

CANADA - U.S.
CROSS-BORDER IMMIGRATION ISSUES

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I. CONTEXT

Some quick statistics to provide context for our discussion today:

(i) IMMIGRATION

-Canada accepted 260,000 (2005) new permanent residents (approx. 0.8% of the total population of 33 million)

-U.S. accepted 946,142 (2004) new permanent residents (approx. 0.3% of the total population of 298 million)

(ii) TRADE

-2-way trade (Canada and U.S.): C\$680 BILLION (2004), roughly C\$1.9 BILLION worth of goods and services crossing the border each day. The largest trading relationship in the World.

II. EXISTING AGREEMENTS

A. PRE-9/11

(i) NAFTA: NORTH AMERICAN FREE TRADE AGREEMENT (1 JANUARY 1994 REPLACING THE FREE TRADE AGREEMENT OF 1 JANUARY 1989).

PREAMBLES

1. Strengthen the special bonds of friendship and co-operation among nations;
2. Contribute to the harmonious development and expansion of world trade and provide a catalyst to broader international co-operation;
3. Create an expanded and secure market for goods and services produced in their territories;

OBJECTIVES OF NAFTA

1. Eliminate barriers to trade in, and facilitate the cross-border movement of goods and services;
2. Promote conditions of fair competition in the free trade area;
3. Increase substantially investment opportunities in the territories of the parties.

**(ii) GATS: GENERAL AGREEMENT ON TRADE IN SERVICES
(1 JANUARY 1995).**

The GATS is a comprehensive agreement that covers all government measures affecting trade in services. It covers labour mobility, meaning temporary entry of people from one member country to another. 149 countries, all of them members of the World Trade Organization, are signatories. Canada and the United States are signatories. It provides facilitated access to professionals, executives, managers, people having specialized knowledge, and inter-company transfers.

B. POST 9/11

(iii) U.S.-CANADA SMART BORDER ACTION PLAN (12 DECEMBER 2001).

4 pillars:

1. Secure flow of people.

Aimed at identifying security threat before they arrive in North America. Review passenger manifests. Co-ordinate visa policies.

2. Secure flow of goods.

Identify high risk goods. Develop common standards for screening cargo.

3. Secure infrastructure.

Invest reciprocally in border infrastructure. Identify technology that helps speed secure movement across the border. Minimize threats to critical infrastructure that link our countries: airports, ports, bridges, tunnels, pipelines, power lines.

4. Information sharing.

Share information and intelligence.

GOVERNANCE: "Canada and the United States have established 15 integrated border enforcement teams combining U.S. and Canadian law enforcement agencies in a unified effort along the border".

**(iv) SAFE THIRD COUNTRY AGREEMENT: REFUGEE CLAIMS.
29 DECEMBER 2004.**

Canada was once a significant refugee receiving country. The numbers prove this, and recent experience now confirms otherwise.

REFUGEE CLAIMS MADE

2003: 40,000

2005: 24,290

What accounts for such a large and steep decline (ie. 40%)? Several factors conspire in the matrix, but the one that is pertinent to our discussion today is an Agreement entered between Canada and the United States called "**The Safe Third Country Agreement**". This Agreement, implemented on 29 December 2004, states that refugee claimants are required to request asylum in the first safe country they arrive in. The Agreement applies only to Canada-United States land border crossings. Accordingly, anyone seeking entry to Canada via the United States and making a refugee claim will be turned back. They must make their refugee claim in the United States. Exceptions are limited to cases involving family reunification and unaccompanied minor children where it is clear that the best interests of such children is to allow them to have their claim adjudicated in Canada.

What is the effect of this Agreement? Firstly, a sharp decline in the number of refugee claims being made in Canada. This was the desired effect of the Agreement. Up until the implementation of the Agreement, approximately 60% of refugee claimants entered Canada via the United States. Why had most refugee claimants historically entered the United States first, on their way to Canada? Simply because it had been easier to get to the United States first: more flights, more relatives and friends who could invite them in order to get the visas, more U.S. Embassies in more corners of the World issuing visas than we have Canadian Embassies to do the same thing.

By seeking this Agreement with the United States, Canada was intending to benefit from a sharp decline in the number of refugee claimants finding their way to Canada. It has had the desired effect. The website of the Department of Citizenship and Immigration has a press release dated 13 July 2005 which states: "Both Canada and the United States recognize the importance of providing effective protection opportunities for refugees fleeing persecution. Cooperation between our two countries through the Safe Third Country Agreement will enhance the orderly handling of refugee claims, strengthen public confidence in the integrity of our respective refugee systems and help reduce abuse of refugee programs."

In the United States, however, their system to determine the outcome of refugee claims differs markedly from that of Canada. Refugee claimants are routinely detained in secure facilities, and if released, they are not entitled to work. The United States has historically had a lower acceptance rate (ie. positive determination). In Canada it currently stands at 42%, while in the United States, it is only about 29%. In Canada, we rarely detain a refugee claimant (the only justifications are suspicious identity, threat to national security or danger to the public, or a flight risk), and we promptly grant them a work permit and a study permit allowing them to work, study, or both.

III. SECURE TRAVEL DOCUMENT: What does America want?

(i) INTRODUCTION

The biggest issue these days for the United States of America is security. Senior members of the U.S. Administration have repeatedly stated that security trumps trade. This of course means that trade has a second priority. Making America's borders secure is the number one priority. But not all of the American borders are the same, physically, geographically, even politically. Accordingly, each border has its own unique characteristics. You can fly to the States, drive, or take a boat. Large international airports within the U.S. are very different entry points compared to a land border on a remote part of the New Brunswick-Maine border, different again from the crossing between California at Dan Diego and Tijuana, Mexico.

(ii) BORDER PATROL

Conceding that his government does not have full control of its border, the President of the United States announced on 15 May 2006 that 6,000 National Guard troops would be sent to strengthen 2,000 miles of the U.S-Mexico border, all to beef up the defence of that border so as to bolster security and crack down on the number of illegal aliens coming into the United States from Mexico.

The U.S.-Mexican border is the most frequently crossed international border in the world, with some 350 million people crossing legally every year. It has the highest number of both legal and illegal crossings of any land border in the world. An estimated 1 million people cross that border illegally each year, most of whom are of Mexican origin entering the United States. The differences in living standards on the two sides of the border is the primary driving force behind the migratory flows. The United States wants to stop it, but it is not going to be easy. Mexico does not want to stop it: it receives tens of billions of dollars each year in expatriate remittances. Estimates of 45% of all agricultural workers in the United States are illegal aliens.

Mr. Bush has asked Congress for US\$1.9 BILLION for this operation that will assist the Border Patrol by increasing surveillance, analyzing intelligence, installing more fences and vehicle barriers, building patrol roads, and providing training. While Mr. Bush stated that this move "will not militarize the southern border", the perception, if not the reality is unavoidable. The President also called for the hiring of 6,000 additional Border Patrol agents by the end of 2008, increasing the force by 50% from its current 12,000. More troops, more fences, more motion sensors, more infrared cameras, more aerial surveillance, even unmanned aerial vehicles (ie. drones) to detect and prevent illegal crossings. The end to the policy of "catch and release". Illegal aliens will now be detained until they are deported. More detention facilities to be built.

When President Bush recently made this announcement, the Canadian government rushed to lobby the U.S. to restrain them from taking any such similar measure with their

Northern Border. Imagine the political reality of National Guardsmen patrolling our border with the United States? The U.S. responded by stating that the plan to beef up security has only to do with the southern border, not the border with Canada.

(iii) MINUTEMEN

There is a group of self-proclaimed law-enforcement civilians in the United States. They are para-military types, taking law-enforcement into their own hands. They patrol the border, both the southern and the northern borders of the United States. They demand maximum border security, they are opposed to illegal immigration, and they seek to protect the border from terrorists, criminals, drugs, and illegal aliens. They say it is their constitutional right to do so. They are a group of part-time volunteers, who share a common goal of "taking back their cities, counties, states, and nation from those who believe in open borders between sovereign nations and the free flow of unchecked foreign nationals into the United States. They call themselves the "Minutemen", named after a U.S. inter-continental ballistic nuclear missile, and before that a group of armed civilians during the American Revolution (1774) who agreed to turn out for service at a minute's notice.

(iv) TRAVEL DOCUMENTS

The United States has passed a piece of new legislation called **The Intelligence Reform and Terrorism Prevention Act of 2004**, pursuant to which the Western Hemisphere Travel Initiative has been proposed, which requires all travelers within the Western Hemisphere to have a passport or other accepted document that establishes the bearer's identity and nationality to enter or re-enter the United States. The planned date of implementation was 31 December 2005. It has been extended to 31 December 2006 for all air and sea travel, and 31 December 2007 for all land border crossings. Canada has lobbied strongly against this legislation.

IV. UNDOCUMENTED ALIENS WITHOUT STATUS

(i) INTRODUCTION

Defined as foreigners having no legal status, every country has a component of its population which is illegal.

In the United States, these are estimated to be approximately 12 million illegal aliens. In Canada, estimates of 200,000 are frequently made. What should our political leaders do about this? For many of these people, they are integrated into communities, speak one or more of the official languages, own real estate, own businesses, have Canadian-born children, have jobs, and are self-supporting. We don't live in a police-state, so there is no constant witch-hunt to find and remove these people. However, when undocumented foreigners come to the attention of authorities, they are usually harshly dealt with. Arrest, detention, deportation is often the result.

(ii) **THE UNITED STATES**

President Bush has refused to grant an automatic and sweeping amnesty, however, he has stated that "there is a rational middle ground between granting an automatic path to citizenship for every illegal immigrant, and a program of mass deportation. That middle ground recognizes that there are differences between an illegal immigrant who crossed the border recently, and someone who has worked here for many years, and has a home, a family, and an otherwise clean record." Quite simply, it is unrealistic to try to both identify and deport millions of illegal immigrants already in the country. Critics of a blanket and automatic amnesty argue that it would be unfair to those already in our countries lawfully, others patiently waiting in the long immigration line-ups and backlogs, and it might invite further waves of illegal immigration. But, a balance must be struck between law enforcement and compassion.

President Bush proposes that a more robust and viable guest-worker program be implemented to relieve the enormous pressures on their borders that walls and patrols alone will not stop. The United States plans to issue to every legal foreign worker a tamper-proof biometric identity card. Moreover, the U.S. Senate is currently debating new immigration legislation (called the "Comprehensive Immigration Reform Act of 2006") that would create a mechanism by which illegal immigrants could proceed toward legal status, and eventual citizenship, by working a minimum number of 5 years, paying fines, paying back-taxes, undergoing a background check, and learning English. The "catch and release" program has also now ended.

(iii) **CANADA**

What is the newly-elected Conservative government's position on the issue of illegal immigrants amongst us, currently estimated at about 200,000? The Minister of Citizenship and Immigration, The Honourable Monte Solberg, has publicly stated that there is no consideration being made by the government to regularize the status of such persons. More detection, more arrests, more detentions, and more removals will be done. The government has hinted at continuing the current volume of intake for new immigrants, cleaning up the horrible backlog, but appears to have no political appetite for any form of amnesty.

V. THE DEATH PENALTY

On 14 July 1976, following a free vote, the House of Commons passed a law that abolished capital punishment, replacing it with a mandatory life sentence without the possibility of parole for 25 years for all first-degree murders. Several states in the United States still have the death penalty. The Supreme Court of Canada ruled in the case of **Burns and Rafay (2001)** that it is unconstitutional to deport or extradite anyone from Canada who would likely face the death penalty in their home country if convicted.

VI. HOW DID 9-11 ALTER GOVERNANCE OF IMMIGRATION IN OUR TWO COUNTRIES?

In the United States, the Immigration and Naturalization Service (INS), a federal agency, was once part of the Department of Justice. It seemed to make sense for many years. Immigration eligibility has always been a matter of applying law and policy, laws which have been properly enacted by the elected law-makers, policy which is quite properly developed by their bureaucratic civil servants, and laws applied by authorities and interpreted by the courts. The rule of law applies to everyone in the land, and those overseas seeking entry. 9-11 changed all of this.

It was discovered that the INS in fact issued study permits to the persons who piloted the planes into the World Trade Center Twin Towers in New York City. The pilots came to the United States to train on aircraft, to learn how to fly (but not take off or land) the planes. After the attacks, even after the terrorists who flew those planes had been unequivocally identified, it was furthered discovered that the INS in fact issued and mailed renewal study permits to the terrorists to their last-known addresses. This was too much for the American public to handle. The worst attack against America committed on American soil was committed by foreigners on valid student status and could have been averted. Immigration was no longer a legal issue, as it had been for decades, it was now a matter of national security. Accordingly, a new Department of Homeland Security was established, and the INS was stripped from the Department of Justice and placed with Homeland Security.

What happened in Canada? The response of our then Liberal government was similar. Immigration border patrol, at land and sea borders and at airports, and the enforcement duties of the Department of Citizenship and Immigration, were taken from Immigration and a new agency was created. The Canada Border Services Agency was created, which reports to the Minister of Public Security. Moreover, the union representing the officers of this Agency have been begging their political masters for years to have handguns, much like their U.S. counterparts. The newly-elected Conservative government has promised to provide them with the handguns. It has not happened yet, but it will.