



SHARED VISION OR MYOPIA

THE POLITICS OF
PERIMETER SECURITY
AND ECONOMIC
COMPETITIVENESS

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BY GAR PARDY
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Shared Vision or Myopia:

The Politics of Perimeter Security and Economic Competitiveness

By Gar Pardy

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The Rideau Institute is a non-partisan, non-profit, public-interest research, advocacy and consulting group based in Ottawa.

Recommendation highlights

1. Authorize the Privacy Commissioner to review all new agreements with the United States that affect the privacy rights of Canadians, to monitor the implementation of the agreements, and to report annually to Parliament with the results of the reviews and monitoring.
2. Following the Arar Commission's recommendation, create a single authority to oversee all federal police and security organizations involved with the transfer of information between Canada and the United States. Designate this authority to receive, investigate and report publicly on any complaints arising from the provision of information to the American authorities.
3. Negotiate a separate treaty on the protection of personal information being transferred to the United States for national security purposes, which would protect such information if it fell outside the current bilateral treaty framework between Canada and the United States.

Summary

The Canada–United States Shared Vision Declaration of February 4, 2011, has not yet received close attention by Canadians. Its announcement in February was accompanied by a bureaucratic structure that allowed for little understanding of what was underway. Although public comment was requested, the May 2nd national election intervened. The Declaration was not discussed during the election. This, hopefully, will change in the coming weeks as working groups of Canadian and American officials are expected to report to their governments and provide action plans for the implementation of the Declaration. It was leaked to the press on September 10, 2011 that agreement had been found with the Americans on some thirty-six items that would form an Action Plan for the Declaration.

Shorn of its high-sounding rhetoric about advancing prosperity and defending our values and freedoms, the Declaration is an act of desperation by Canada to roll back border restraints and constraints, and improve cross-border economic activity. Many see these restraints and constraints as the main barrier to the full flowering of Canadian exports to the United States. Since the border shutdown in the uncertain days after 9/11, these restraints and constraints have prevented Canadian goods and services from crossing the border in the manner envisaged by the 1988 and 1994 free trade agreements.

The United States has not recovered the confidence it had prior to 9/11, when it provided the international community with leadership, initiative and global standards. Rather, in the aftermath of the September 11, 2001 attack, the United States descended into a paroxysm of rage, jingoism and bravado that forced all policy and relationships through a national security filter. And in the decade since 9/11 national security has become the central element in most powerful aspect of American domestic and foreign policy.

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Canada and the United States since 9/11 have attempted several initiatives to deal with the restraints and constraints on trade while ensuring that co-operation on security measures meets American expectations. Clearly these measures failed. In the statements of American leaders up until the present, Canada has been described as a threat to the security of the United States. Some have stated that Canadian laws and policies represent a greater threat than those of Mexico to the national security of the United States.

The Shared Vision Declaration has emerged to try to deal with the differences in views between the two countries.

The Declaration is a unique document in Canada–United States relations. Previously, agreements between the two countries were issue-specific. The requirements of each country were balanced within the scope of the agreement and neither country looked for additional concessions in unrelated areas. Only once before were American trade concessions – this was prior to the creation of Canada – paid for outside of a trade agreement. This was in the 1854 trade agreement that granted the Americans fishing rights on the Grand Banks.

The Shared Vision Declaration is based on the dual premise of Canadian concessions on security matters and the Americans’ promise to provide concessions on the border. Implicit in the Declaration is the expectation that the Canadian concessions will come first, but there are no guarantees that the American concessions will become manifest.

The concessions the Americans want is the transfer of enormous amounts of information about Canadians and others about whom Canada collects information. It is evident that to meet such expectations Canadian privacy laws will need to be ignored, violated or weakened. While the Declaration speaks of formulating common Canada–United States privacy protection principles, there can be little expectation that these principles will reach upwards towards existing Canadian standards. Rather there will be a willingness by the Government of Canada to lower Canadian standards to match those of the United States, which continue to deteriorate.

The scope of the information to be exchanged is loosely described in the Declaration: the verification of the identities of travellers and screening carried out at the earliest possible opportunity; common technical standards for the collection, transmission and matching of biometrics that enable the sharing of information on travellers in real time; and an integrated Canada–United States entry–exit system.

Even before these proposals came into focus the Privacy Commissioner of Canada, the Auditor General and commissioners of inquiries have all been critical of the inadequate protection of privacy information by Canadian police and security organizations. In the atmosphere envisaged by the Shared Vision Declaration there can be no expectation that any of the recommendations made by these authorities will receive serious attention. The Canadian Privacy Act dates from the mid-1970s and, while there have been regular calls for its updating to deal with a vastly different world of data collection, transmission and storage, there are few signs these calls have been answered.

There are also few indications that the police and security authorities on either side of the border are capable of dealing effectively with vast amounts of new data. The performance of these authorities both before and after 9/11 in dealing with potential threats has bordered on the inept, as indicated by the underwear bomber episode, in their ability to improve the security of our respective populations – this despite the billions of dollars that have been invested. The absence of terrorist attacks in North America since 9/11 is less an indication of the effectiveness of security measures than it is of the ineffectiveness of terrorist organizations to reach beyond their traditional areas of operation. Fort Hood and Oslo are more indicative of what the future may bring.

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For the most part the ability of our national police and security authorities to collect, analyze and act on prospective threat information has been sadly deficient. The Declaration talks of creating “perimeter security” that will surround Canada and the United States. As with many of the ideas that have come to characterize government policy and action since 9/11, perimeter security is “theatre” and like the Maginot Line of history, only creates the illusion of security.

Recommendations

This paper analyses the environment in which the Shared Vision Declaration has emerged and highlights the implications its security components will have for privacy rights of those drawn into the transfer of personal information to the American authorities. The border issues that are background to the Declaration have been well documented by those who have been directly affected. As billions of dollars are involved and some would argue, the future prosperity of Canada, it is understandable that over the past decade there have been several initiatives promoted by the Canadian government to resolve the constraints and restraints that prevent the easier passage of Canadian goods and services into the United States.

Ten years later the government of Canada is still pushing that rock uphill suggesting the government of the United States is either a reluctant partner and/or seeking to extract a very large price for its cooperation. As detailed in the paper the Canadian price has been identified as greater cooperation and even integration on security concerns as defined in Washington. Central to that cooperation/integration would be the transfer of personal information on persons north of the border which could number in the millions. In this the privacy rights of such persons as prescribed by law may be ignored, circumscribed or broken. There are indications that the government is aware of this dimension but there is no indication that the government is prepared to present Canadians with an appropriate accounting of the privacy price Canadians might have to pay in order to buy American cooperation on border issues.

There have been numerous recommendations to the governments of Canada since the coming into law of the Privacy Act in 1983. [References to the *Privacy Act* in this paper also refers to the *Personal Information Protection and Electronic Documents Act* (PIPEDA) which also establishes privacy rights for Canadians.] Unfortunately, none of these recommendations have been implemented. The discussions with the United States on the Shared Vision provides an opportunity for the government to provide Canadians with complete details on the implications of sending personal information south and to elaborate measures that will lead to the protection of the privacy rights of Canadians. Some of these measures could include some or all of the following.

1. Authorize the Privacy Commissioner to review all new agreements with the United States that affect the privacy rights of Canadians, to monitor the implementation of the agreements, and to report annually to Parliament with the results of the reviews and monitoring.

All agreements with the United States that provide for the provision of personal information to the United States should be subject to review by the Privacy Commissioner of Canada. The Privacy Commissioner would in turn seek the views of her provincial and territorial counterparts in order to ensure that the full panoply of Canadian privacy laws is used to measure the legality of the agreements with the United States. Equally, the Privacy Commissioner would provide Parliament with a public report on her conclusions.

The Privacy Commissioner should also be authorized to monitor the implementation of all agreements with the United States which in her view affects the privacy rights of Canadians and to report annually to Parliament on the results.

Each agency of government involved in the transfer of information to the United States would establish an office of privacy affairs that would be mandated to oversee the implementation of the agreements with the United States and ensure that they are in conformity with the laws of Canada. These offices would have a direct reporting relationship with the Office of the Privacy Commissioner.

The Privacy Act of 1983 has not been updated in the past twenty eight years. The world of collection, transmission, exchange and storage of information has changed enormously over these years and there is a pressing need to update the Canadian legislation. The Privacy Commissioner in two papers since

2006 had detailed the needed changes. The first in June of 2006 *Government Accountability for Personal Information: Reforming the Privacy Act* and in April 2008 the Privacy Commissioner provided an *Addendum to Government Accountability for Personal Information: Reforming the Privacy Act* which provides specific recommendations on security and cross border transfer of privacy information. As part of this new mandate, the government should provide a commitment to Canadians that amendments to the Privacy Act will form part of its legislative agenda within the next 24 months.

Canada has both mutual legal and customs assistance treaties with the United States. These treaties should be amended so that they include appropriate provision for the protection of information provided by Canada under Shared Vision agreements.

2. Following the Arar Commission's recommendation, create a single authority to oversee all federal police and security organizations involved with the transfer of information between Canada and the United States. Designate this authority to receive, investigate and report publicly on any complaints arising from the provision of information to the American authorities.

Much of the personal information that would be provided the United States would be transferred through Canadian police and security organizations. These have inadequate oversight and public complaint mechanisms. The possibility of adequately dealing with oversight and public complaints concerning information transferred to the United States is non-existent under present arrangements. The government as part of any commitment to provide the American authorities with personal information from north of the border should make a public commitment that (a) it would create a single oversight body that would have authority over all federal police and security organization and (b) a specific associated body would be created in order to receive, investigate and report publicly on complaints from persons specifically affected by the provision of information to the American authorities.

3. Negotiate a separate treaty on the protection of personal information being transferred to the United States for national security purposes, which would protect such information if it fell outside the current bilateral treaty framework between Canada and the United States.

A separate treaty should be negotiated for the transfer of information relating to personal information under national security. Such a treaty would provide for the protection of information provided by Canada outside of the ambit of the mutual legal and customs assistance treaties.

Introduction

On February 4, 2011, the Prime Minister of Canada and the President of the United States signed a Joint Declaration in Washington called *Beyond the Border: A Shared Vision for Perimeter Security and Economic Competitiveness*. The Declaration stated that Canada and the United States intended to “pursue a perimeter approach to security, working together within, at, and away from the borders of our two countries to enhance our security and accelerate the legitimate flow of people, goods, and services between our two countries.”

The Declaration, as its title boldly states, is a “shared vision” and goes where no agreement has gone before. Accepting the normal meaning of the words used in the preamble suggests that the Declaration is a long-term project meant to guide the daily ebb and flow of the bilateral relationship as well as to provide a road map into the future. Very little has been said by either government since the February signing to elaborate on the Declaration or to provide the justification for this approach as the vehicle for managing the complexities of Canada–United States relations. Now, however, with national elections out of the way and a majority Conservative government in office, the Declaration can be expected to emerge from the shadows and become an issue on the Canadian political agenda. The scope of the Declaration warrants the attention of all Canadians before we conclude that walking this road of a “shared vision” is either necessary or prudent.

Canada–United States Relations

Historically, the relationship between the two countries has been at the centre of Canadian politics, if not American – even before the creation of the two countries and their subsequent emergence onto the world stage. Proximity carries with it the need for mechanisms through which disputes and problems can be resolved and mutual synergies exploited. The histories of both countries contain numerous examples of how our countries have successfully overcome the problems imposed by asymmetrical differences of population, power and political philosophy. Surprisingly, there has been only one occasion when our two countries went to war, and that had more to do with the Napoleonic Wars in Europe than with problems inherent to North America. Compared with American relations with Mexico, which have been the source of numerous wars, armed clashes and territorial conquests and are still a major source of bilateral tension, the Canada–United States border has been a model of decorum and amity that is unique in the world.

As one historian noted in an earlier age, Canada has more geography than history. Nevertheless (and no matter how inaccurate the statement), geography imposes its own impulses, and even before Canada was a country and could be said to have had a “national” will, it was drawn into conflicts both military and economic, occasioned by Great Britain and the United States. The War of 1812, and the 1815 decision by Britain to exclude corn (or more accurately food grains) until its domestically grown corn reached an established price, were in their different ways the starting points for the emergence of unique Canadian perspectives on relations with its southern neighbour. The war confirmed the geographic uniqueness of British North America and some of the associated boundaries, and while there were occasional mutterings south of the border to the contrary, the pre-1812 borders were legitimized by the Treaty of Ghent of 1814. The British Corn Laws, especially their repeal in 1846, ended the limited advantage Canadian wheat enjoyed in Great Britain. The repeal of British Navigation Laws a few years later ended British and colonial protectionism and for the first time the hint of free trade with the United States became part of the Canadian political discourse.

The repeal of the Corn Laws in 1846 led to one of the very first Canada–United States economic agreements, which entered into force in 1854. It provided for the entry of Canadian resource-based exports into the United States and the reciprocal entry of similar American products into Upper and Lower Canada. The sweetener for the Americans was the granting of fishing rights on the Grand Banks and thus the agreement created a precedent for Canadian exports to the United States being “paid for” outside of the narrow exchange of traded products.

Since the 1854 agreement, Canada and the United States have signed hundreds of bilateral treaties, conventions, agreements, memoranda of understanding, and exchanges of notes, protocols and joint letters. The Canada Treaty Information site (treaty-accord.gc.ca) of the Department of Foreign Affairs and International Trade details 698 of these bilateral agreements separate from the various multilateral agreements to which both countries are parties. As well, there are hundreds of state/province-level agreements that promote co-operation in such areas as natural resource management, forest fire suppression and economic co-operation.

A unique and constant aspect of nearly all of these bilateral agreements is that they are issue-specific. There is a problem, and the resulting agreement deals with the balancing of American and Canadian interests within the context of the problem itself. Rarely is an attempt made to find a solution to an issue on one side of the border by using an unrelated matter on the other, as was the case with the 1854 trade agreement. This principle has served Canada well over the sixteen decades during which bilateral agreements have been negotiated, signed and implemented.

The large modern economic agreements with the United States – the Defence Production Sharing Agreement of 1956, the Auto Pact of 1965, the Canada–United States Free Trade Agreement of 1988 and the North American Free State Agreement of 1994 – reflected this principle of issue specificity. These agreements, while extensive in scope, found justification and balance solely within the need to manage specific aspects of the bilateral economic relationship.

At the time, the 1988 free trade agreement, reflecting the asymmetrical nature of the Canada–United States relationship, occasioned a deep and bitter public debate in Canada, leading to a national election in 1988 when the potential effects of the CUSFTA on Canada as a nation were loudly debated. In the United States no such public debate emerged (although many horses were traded during the United States Senate approval process), reflecting a sense that the agreement did not dent American self-preoccupation. The 1994 NAFTA agreement which brought Mexico into the trade equation reflected a change of heart on the part of the Liberal Party of Canada and, while re-igniting some of the 1988 passions in Canada, became part of our national psyche without serious debate. For some in Canada, the inclusion of Mexico in the bilateral trade equation was a mistake, complicating even further what was already a difficult area of public policy.

The United States Trade Representative (USTR) during the CUSFTA negotiations was Clayton Yeutter. Following the successful conclusion of the negotiations, Mr. Yeutter wrote: “[A trade agreement with Canada] truly has historic potential. *We can essentially open the doors between Canada and the United States.* The economic benefits of that are just awesome to contemplate as we move into the next century.” [Emphasis added.]

These words reflect another constant in ordering Canada’s relations with the United States. Agreements reflect the past and the pressures of the present; they do not foretell the future. Within a decade of the CUSFTA and NAFTA, the Americans faced their largest national calamity since the attack on Pearl Harbour in 1941. Four domestic flights were hijacked by nineteen members of al Qaeda. Two crashed into the towers of the World Trade Center in New York and the third into the Pentagon in northern Virginia. The fourth hijacking was courageously resisted by passengers and crashed in central Pennsylvania. Nearly three thousand died, including 26 Canadians.

Post 9/11

Within hours of the disaster, there were allegations that some or all of the hijackers had entered the United States from Canada, a claim with a radioactive half-life that will reflect forever in the bilateral relationship. Most recently, Janet Napolitano, the American Homeland Security Secretary, spoke of the need to treat the Canadian border much the same as that with Mexico. She wanted to “change the culture” surrounding the American treatment of the Canadian border and to make it clear to all that “this is a real border.”

Ms. Napolitano’s words were not exceptional. The following year the American Government Accountability Office (GAO) report complained that the threats on the Canadian border relating to illegal cross-border activity were much higher than the threats on the Mexican one. The report went on to state that the United States was not satisfied with the current situation. In May of this year the American Commissioner for Customs and Border Protection testified before Congress that potential terrorists are exploiting Canadian loopholes to gain entry to the United States. He went on to testify that there are more “cases where people who are suspected of alliances with terrorist organizations, or have had a terrorist suspicion in their background – we see more people crossing over from Canada than we have from Mexico.” It was noted, in an assessment by the Surveillance Studies Centre at Queen’s University, that the GAO report was “published and under discussion within the same time period and in the same context as the Perimeter Security Agreement.”

The words of Ms. Napolitano in 2009 and the 2010 GAO report reflected the views of many other Americans in the aftermath of the 2001 attacks, with the result that the steady roll of Canadian trucks into the United States was stopped for a few days and never returned to pre-2001 levels. From 2001 to the present, efforts have been ongoing to create the potential envisaged by Mr. Yeutter following the 1988 agreement, but the hinges on the Canada–United States “door” do not swing with the freedom that many in the Canadian business community would like to see. The Shared Vision Declaration is

but the latest attempt to restore the entry of Canadian goods through a “thin” United States border – to use the contemporary jargon.

One of the consequences of these American views are efforts to increase the number of American border patrol agents sent to the Canadian border. Two years ago such a patrol agent, Christian Sanchez, was transferred from southern California to Port Angeles in Washington state, which was described to him as “one of the new exciting places to be.” It was understood that the border post was to be increased from a complement of four to twenty-four.

In early August, Mr. Sanchez became a whistle-blower when he appeared before a panel of American congressmen. In a news report of his testimony in early August, Mr. Sanchez alleged that “he and his fellow officers in Port Angeles are spinning their wheels and wasting money in the name of national security, in an environment where few, if any, real threats exist.” He went on to testify that “it’s shameful for me to admit that we, as men, have no purpose [in Port Angeles]. I could not stop denying it to myself. There was no work to be done.” It should be noted that 12 years ago, a female border patrol officer intercepted Ahmed Ressam, a refugee claimant in Canada who was entering the United States via the ferry between Victoria and Port Angeles. Mr. Ressam’s car was loaded with explosives which he intended to detonate at the Los Angeles International Airport. It appears that nothing similar has happened at the Port Angeles crossing since.

Understandably, the 2001 attack became one of those events that create large changes in a society and its relations with its neighbours. Nowhere was that more evident than in the United States. The easy-going days of the Clinton administrations and the early days of the know-nothing retrograde first administration of George W. Bush ended abruptly. Subsequent investigations demonstrated that all of the hijackers entered the United States using visas issued by American officials. There were ample signs that a nefarious plot was underway (foreigners at American pilot training schools who appeared interested in flying aircraft but not landing them), but American law enforcement and American security officials failed to connect the dots and the national disaster became inevitable.

The Shared Vision Environment

In the decade since 9/11, American society has been transformed from one of optimism and strength to one in which national security dominates. A *Washington Post* survey by Dana Priest reported that 1,271 government bodies, nearly 2,000 private contractors and more than 850,000 officials (some eleven times larger than the number of active members of the Canadian Armed Forces) were dedicated to counter-terrorism. Two major and inconclusive wars, the erosion of civil protections, the willingness to descend into the depths of torture, and the creation of a Fortress America mentality has transformed and undermined the principles that guided the negotiations for the free trade agreements. Today, the expectation that the Obama administration would have seriously altered the post 9/11 Fortress America mentality is no longer evident. Instead, the national security state and the Fortress America mentality remain central to American policy.

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The increasingly fractured American political system and the associated economic crisis offer little evidence that the United States sees political gain in adhering to the Canadian view that a thinner northern border is of mutual interest. A more realistic interpretation of today’s American policy is that there will be no easing of border restrictions no matter how many technical solutions are offered, bridges built or integrated law enforcement units established.

Instead, the Shared Vision Declaration has created a Faustian dilemma for Canadians – the easing of American restraints and constraints on cross-border economic traffic and personal travel might be bought

by greater co-operation and even integration on security matters. The emphasis here is on the word “might,” as there are no guarantees that greater co-operation on security matters will provide the hoped-for easing of border restrictions. And while eager Canadian officials may see, or hope to see, a connection between greater co-operation on security matters and the easing of the entry of Canadian goods and services, there are few signs that American officials see the relationship through the same rosy glasses.

September 2001 marked a watershed in changing American attitudes towards its northern border. Previously there were occasional efforts to improve border procedures, some even dating back to the 1930s, and some during the Second World War when labour-sharing became a common issue for both countries. The 1988 and 1994 free trade agreements had numerous features that eased cross-border traffic.

There were others in the late 1990s, and these led to the Shared Border Accord or, in a slightly different manifestation, the Smart Border Declaration and Action Plan of late 2001 and 2002. The Accord was rushed into effect even before the smoke at the World Trade Center had cleared.

The Smart Border Plan grew out of a meeting between President George W. Bush and Prime Minister Jean Chrétien on September 24, 2001, in the immediate aftermath of 9/11. They charged Homeland Security Adviser Tom Ridge and Deputy Prime Minister John Manley with the coordination of co-operation along the “longest non-militarized border in the world.” At the time the two leaders recognized the “urgent need to enhance security in a way that strengthened the extraordinary trading relationship between our countries and the prosperity that it provides our citizens.” Mr. Manley and Mr. Ridge announced the associated Action Plan a year later, on September 9, 2002, and it encompassed a broad range of security and economic border facilitation measures, many of which are repeated in the Shared Vision Action Plan of today.

In part, the Shared Border Accord and its extensive Action Plan were supplemented by the Security and Prosperity Partnership (SPP) of North America in 2005. The SPP was a trilateral agreement between Canada and the United States and Mexico, and although it was dismantled in 2009 by President Obama, it “sought to increase North American economic competitiveness and security” using Transborder Data Flows (TBDF). It is indicative that the SPP process at the time saw the private sector as an important element in creating initiatives to “identify and take compatible technological steps to combat fraudulent and deceptive practices” and to bring such matters to the attention of law enforcement agencies. The SPP also saw online commerce as creating privacy concerns and suggested that governments should “encourage the private sector to develop and implement self-regulatory mechanisms, including industry guidelines” in order to deal with these concerns. The Surveillance Studies Centre, Queen’s University, highlighted these concerns in an assessment for the Office of the Privacy Commissioner.

These agreements were accompanied by statements that promised, on the Canadian side, significant improvements to border procedures. However, as the Shared Vision Declaration illustrates, little of significance was achieved. Earlier this year one observer, reflecting years in the trenches on border issues, astutely wrote, “Security trumps prosperity” in all of these efforts. For Canadians and for Mexicans the emphasis was on “prosperity,” while for the Americans the emphasis was on “security.” There are few signs that basic divide will be significantly altered by the balancing of prosperity and security in the Shared Vision Declaration. Canadians and Mexicans see access to the United States as a significant element in their national prosperity; for the Americans there is little willingness to endanger national security, no matter how minor the risk, by enhancing the prosperity of others.

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The United States has been a willing participant in these initiatives, knowing they will always hold the trump hand. A more accurate example of American intentions and policy is to be found, not in these bilateral and trilateral initiatives, but in the Western Hemisphere Travel Initiative (WHTI). Unilaterally announced by the United States in 2005, it was one of the most blatantly misnamed policy initiatives that has emerged in the ebb and flow of cross-border actions. It was not an initiative to travel but rather it placed restrictions on travel. As well, Americans would require a passport in order to enter the United States when traveling from all foreign countries. Historically, Canadians could enter the United States with little more than a Canadian Tire credit card. Americans could do much the same.

The 2005 initiative changed the world of travel for all in the Western Hemisphere. It established that entry into the United States by air, sea or land would require secure government-issued documentation, which in the case of Canadians meant a passport or secured provincial driver's licence. Previously, the Action Plan for Creating a Secure and Smart Border had a number of joint initiatives for greater security in the "flow of people." While elements of these actions are still underway, the unilateral action by the United States in the WHTI undercut them all, and illustrated the lack of transparency and unevenness on the part of the American national security behemoth when dealing with Canada or the rest of the world.

The Shared Vision Initiative

Today, the Shared Vision Declaration is the central initiative in the effort to free cross-border economic and people traffic of some of the restrictions imposed in the aftermath of 9/11. The participation of the President and the Prime Minister in the effort illustrates how little was accomplished through the earlier efforts. Importantly, the inclusion of security and economic measures within the body of a single initiative reflects a desperate attempt by Canada to keep the Americans fully engaged in the hope that Canadian concessions on security matters will buy significant American movement on border restrictions. This was noted by a senior Canadian official recently during a briefing session for interested Canadian organizations.

The joint Declaration is not an agreement carrying legal or even moral obligations. Unlike the hundreds of treaties detailed in the Canadian Treaty Series which obtain legitimacy under both international and domestic law, the Declaration is a political statement: a statement of intent on the part of both governments to create a grand bargain to overcome American restrictions of the past decade. The Declaration states the intention as follows:

To preserve and extend the benefits our close relationship has helped bring to Canadians and Americans alike, we intend to pursue a perimeter approach to security, working together within, at, and away from the borders of our two countries to enhance our security and accelerate the legitimate flow of people, goods, and services between our two countries. We intend to do so in partnership, and in ways that support economic competitiveness, job creation, and prosperity.

What is unique about this statement of intent is the assumption that closer co-operation on issues of national security will accelerate the "legitimate flow of people, goods, and services between our two countries." This is an enormous assumption and, as mentioned earlier, the history of the past decade strongly supports the conclusion that there is little if any relationship between the two pillars.

In the section of the Declaration's "Key Areas of Cooperation" there are few areas of modern transborder activity and beyond that are not included in the planned activities. In the area of security, these include national security; health security partnership; sharing of information; common understanding of the threat environment; joint threat assessments; verification of the identities of travellers; an integrated Canada-United States entry-exit system; co-operation to identify, prevent and counter violent extremism; privacy protection principles; and the promotion of the principles of human rights, privacy and civil liberties. On trade facilitation, economic growth and jobs, the two countries will pursue creative and

effective solutions to manage the flow of traffic, improve the capacity of border crossings including joint facilities, expand trusted traveller and trader programs, reduce costs of cross-border business, and employ compatible cargo screening methods.

On cross-border law enforcement the two heads of government stated that they will develop the next generation of integrated cross-border law enforcement operations and pursue joint national security and transnational crime investigations and improvements in the sharing of information. In the area of critical infrastructure and cyber-security both governments will work together to prevent, respond to and recover from physical and cyber disruptions, improve cyber-security, and defend and protect our air, land, sea, space and cyberspace.

It is an enormous agenda, and responsibility for implementation was given to a Beyond the Border Working Group (BBWG) with representatives from both governments. Oversight will rest in the offices of the Prime Minister of Canada and the President of the United States. The BBWG will report annually to the heads of government. From briefing and consultations by officials from the Canadian BBWG during the summer it is evident that considerable work is underway to give further definition to the Declaration. It is expected that this aspect of the work will be completed by early fall and, hopefully, further public announcements will be made.

Foreign Minister John Baird released two reports by the BBWG on August 29th which summarized public consultations on the Shared Vision concept. The first covered consultations on Regulatory Cooperation while the second covered Perimeter Security and Economic Competitiveness. The reports broke little new ground. On security matters the public consultations reflected uneasiness by Canadians on closer cooperation or integration. On economic matters the report stated “Improving the movement of goods and people across the border was the number one priority for Canada’s business, industry and trade sectors.” A sign of the government’s background strategy was indicated by the Minister when in his remarks stated that “Canadians recently gave our government a strong mandate to focus on the economy and secure Canada’s recovery.”

At the time of the signing of the Shared Vision Declaration, a second announcement was made, providing for the establishment of a United States–Canada Regulatory Cooperation Council (RCC). The Council, in the words of the announcement, “will reduce red tape by making regulations in a range of sectors more compatible and less burdensome in both countries.” At the time Prime Minister Harper commented, “The review of these rules is an exceptional opportunity to break down regulatory barriers and prevent new ones from being introduced. The main goal of the RCC is to make it easier for Canadian and American firms to do business on both sides of our shared border, leading to more jobs and growth in both Canada and the U.S.” An administrative structure separate from the BBWG was established for this initiative and it is expected that a detailed work agenda will be released in the fall as well.

As detailed earlier, central to the Shared Vision agenda will be increased co-operation on security matters by Canada in exchange for possible lessening of border restrictions by the Americans. In discussions with involved Canadian officials over the summer, the Americans have indicated their expectation that Canada will provide information on a greater number of persons and provide a wider range of information on individuals of possible interest to the United States. This would include citizens of Canada, residents of Canada, temporary visitors to Canada and persons seeking entry into Canada. A separate category could be foreigners about whom Canadian security authorities may have information or could be asked to obtain information through Canadian channels in foreign countries.

In discussions with involved Canadian officials over the summer, the Americans have indicated their expectation that Canada will provide information on a greater number of persons and provide a wider range of information on individuals of possible interest to the United States.

A necessary condition for such exchanges of information on individuals to work successfully would be for Canada to establish exit screening procedures for all persons leaving Canada by land, air or sea. This would involve millions of persons. To be effective in the context of Canada–United States co-operation, such data would need to be made available to the American authorities. As well, such exchanges would create the need for greater coordination and co-operation between Canada and the United States on visa and refugee policies. Changes to Canadian privacy regimes would be necessary in order to meet American requirements.

The Smart Border Action Plan of September 9, 2002, included many of these features and it can be assumed it will form part of the Shared Vision Action Plan that will become public in the fall. At the time there was no concerted examination of the impact these security initiatives would have on Canadian society and the daily lives of Canadians. Nor has there been any detailed examination of the impact those measures defined in the Shared Vision Declaration will have on the lives of Canadians today. Some of the issues were aired in the free trade debates of 1988 and 1994 and found a measure of acceptance by most Canadians. In large part, however, economic co-operation and integration in the aftermath of the signing of these treaties was found by most Canadians to be of marginal concern in their daily lives. Equally, the value of economic co-operation and integration was seen by many Canadians as enhancing the ability of Canadians to maintain its uniqueness both as an economic partner of the United States and as an actor on the international stage.

Greater co-operation and integration on security matters is not of the same order as co-operation and integration in the economic sphere. Security cooperation has never been subject to the same attention as the provisions found in the free trade agreements. However, Canada and United States co-operation on security matters has been a significant factor in the relationship stretching back nearly a hundred years. The creation of the FBI was in part modelled on the then-RCMP, which at the national level combined both national security and national criminal responsibilities. The Second World War and the Cold War intensified security co-operation and there were few international security issues that did not involve close Canada–United States co-operation. At the time, co-operation on security matters affected relatively few Canadians and information was exchanged on a limited range of issues.

Again the events of September 11, 2001, dramatically affected the equation. In the preceding years Canadian immigration and visa policies had been expanded, and millions of new Canadians came from countries that subsequently became part of the American ill-defined war on terror. Unfortunately, the leaders of the United States began their own war of terror on American residents, citizens and political standards. Early on, Canadians were drawn into this war and the work of two commissions of inquiry were required to identify the resulting serious errors and to provide corrective advice.

Privacy

Siva Vaidhyanathan is a cultural historian at the University of Virginia who earlier this year published *The Googlization of Everything (and Why We Should Worry)*. In the book Mr. Vaidhyanathan writes of the commercialization of information and, as his title suggests, provides reasons why we should be concerned about it. Personal information is an integral element in this commercialization. To some extent this commercialization, as demonstrated by Google, has led to the easing of our concerns about this unending road into our personal lives. The Shared Vision Declaration takes advantage of this and treats personal information and privacy itself as just another commodity that can be traded. Privacy, of course, is much more than personal information. Mr. Vaidhyanathan offers the following description:

Privacy is not something that can be counted, divided, or “traded.” It is not a substance or collection of data points. It’s just a word that we clumsily use to stand in for a wide array of values and practices that influence how we manage our reputations in various contexts. There is no formula for assessing it: I can’t give Google three of my privacy points in exchange for 10 percent better service.

One of the central issues in the O'Connor (*Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar*) and Iacobucci (*Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-ElMaati and Muayyed Nureddin*) Inquiry Commissions was the security relationship with the United States and the exchange of information. As became evident in Justice Dennis O'Connor's report, the exchange of information with the Americans (and to a lesser extent with other countries as well) resembled more a plate of spaghetti than a carefully developed area of sensitive public policy. The willingness of members of the RCMP to transfer unverified and non-assessed information and inaccurate descriptions of Canadian citizens to American law enforcement authorities demonstrated a frightening attitude on the part of those who exist to protect Canadians and their rights under law. The evidence adduced by Justice O'Connor was even more frightening in that those transferring the information were not even willing to use existing procedural restrictions on the future use of the information by the Americans. It has been five years since Justice O'Connor's recommendations were presented to the government and little has been done since. Yet today we have suggestions by the government that the exchange of information with the Americans can be increased dramatically. Maher Arar's eleven months in a Syrian "coffin" should be a warning to all.

The exchange of sensitive personal information between governments is long-standing. It is one of the basic necessities for the operation of the international system, and all countries are prepared to provide others with information on their citizens and residents. Many governments have formal agreements for such exchanges and some exchanges are sanctioned by mutual legal assistance treaties or a variation, Customs Mutual Assistance Agreements. Formal treaties provide safeguards for the information that is exchanged and, generally, limit the use of exchanged information to the purpose for which it was requested. Beyond such treaties and other formal agreements, there are thousands of requests for information from foreign authorities, and in the give and take of law enforcement and security requirements, most authorities respond positively without serious hesitation or subsequent audit.

There is little public awareness of these exchanges and successive governments have ensured that this state of affairs continues. In 2006, the Office of the Privacy Commissioner for Canada sought to audit the privacy practices of the Canada Border Services Agency (CBSA) – a recently created agency combining functions formerly managed by Immigration and Citizenship Canada, Revenue Canada, and the Food Inspection Agency. The OPC concluded that

Written requests for assistance from foreign governments are processed in accordance with requirements. However, many of the information exchanges between the CBSA and the United States at the regional level are verbal, and are not based on written requests. These exchanges are not recorded consistently and do not follow the approval process as established under CBSA policy... The Agency cannot, with a reasonable degree of certainty, report either on the extent to which it shares personal information with the United States, or how much and how often it shares this information. By extension, it cannot be certain that all information sharing activities are appropriately managed and comply with section 107 of the *Customs Act* and section 8 of the *Privacy Act*.

Another report in May 2009 by the Privacy Commissioner of Canada reviewed the recommendations of the O'Connor and Iacobucci inquiries as they related to oversight of national security programs. The Privacy Commissioner concluded that there is an underlying theme of

poor information handling practices, patchwork accountability mechanisms and limited oversight [leading] to tragic, costly mistakes in the realm of national security operations. Owing to a lack of privacy protections and poor information handling, as recent Inquiries have established, individual Canadians and their families have suffered. To date, the government's response to calls for expanded oversight has been non-committal.

The Privacy Commissioner has not been alone in recognizing the lack of oversight of security bodies and the lack of information provided to the public on their operations. In 2003 the Auditor General wrote that review powers over security organizations need to be “proportionate to the intrusiveness of the powers” used by national security organizations. In a more recent report in March 2009 the Auditor General concluded Canadians “need to know that government agencies and departments maintain a balance between protecting the privacy of citizens and ensuring national security. Canadians also need to have confidence that the decisions and activities of intelligence agencies are legal, consistent, and appropriate, and that they are subject to examination by independent review.”

The Privacy Commissioner in her May 2009 report reiterated these concerns:

At the same time, the complexity and secrecy of these organizations can make meaningful redress for the public challenging, and in some cases next to impossible. We believe the current Canadian system of intelligence oversight is fundamentally compartmentalized and fragmented. This seriously undercuts accountability. An integrated, high-level approach to oversight of intelligence and security at the national level would be far more effective.

The widening scope of intelligence information-sharing has an enormous impact on the privacy of Canadians. Privacy is not just a legal provision under federal statute. The Supreme Court of Canada has stated on numerous occasions that the fundamental right to privacy deserves constitutional protection and goes to the very heart of our democratic state.

In the past decade the erosion of privacy and other civil and political rights has been justified by democratic governments on the basis that they need to be traded away so that national security can be enhanced. Professor Jennifer Chandler of the Faculty of Law at the University of Ottawa has noted the paradox of this argument. She wrote in a chapter in a 2009 book (*Privacy versus National Security: Clarifying the Trade-offs*), “security measures intended to protect a liberal democracy can end up eroding the civil liberties at the heart of that liberal democracy.” The Shared Vision Declaration audaciously takes this paradox to a new level. The erosion of our civil liberties is now to be justified not on the basis of national security, but on the basis that we need to have Canadian goods and services enter the United States with greater ease and certainty. If it was difficult to justify the earlier assertion of national security needs then Canadians should be outraged at the idea that economic necessity provides justification for the Shared Vision assault on our civil liberties.

Inherent in the Shared Vision document is the belief that there is a shared understanding of the world surrounding Canada and the United States. We are still close to the “march of folly” aspects of recent American foreign policy, but it is not too soon to debate the assumption that what is good for the United States is good for Canada. The idea that the surrounding world represents a significant threat to Canada has become a standard aspect of public policy. As with other current aspects of public policy formation, Canadians have willingly accepted significant public policy changes based on little more than ideologically-based and fact-deprived beliefs. Evidence and facts are ignored and it will only be years and billions of badly-spent dollars later that corrective action can be taken. On September 7, 2011, the Rideau Institute published a report on “The Cost of 911” by economist David MacDonald.¹

1. A copy of the report can be found at <http://www.rideauinstitute.ca/the-cost-of-911/>

Conclusions

The world is replete with examples of countries with shared borders where wars, enmity and closed frontiers are normal. For most of their history Canada and the United States have avoided this “normal” state of affairs and instead have co-existed with a high degree of civility and amity. They have mutually exploited their synergies and from within their uniqueness provided the world with an example worthy of study and emulation. The commonalities of geography, original peoples, language, openness to the dispossessed of the world, and economics have contributed to this civility and amity. At the same time sufficient differences have emerged to provide for distinct national characteristics which, in Canada, fuel a strong wariness against inroads by the United States.

This civility and amity stands in sharp contrast to American relations with Mexico, the countries of Central America and some islands of the Caribbean. There American Exceptionalism was pursued with missionary zeal and led to invasions, territorial conquest, indirect suzerainty and economic domination, creating conditions characterized by the presence of nasty despots, revolution and economic backwardness. A recent indication of these tendencies was an August 6, 2011 story in the *New York Times*. The lead paragraph in the story read:

The United States is expanding its role in Mexico’s bloody fight against drug trafficking organizations, sending new C.I.A. operatives and retired military personnel to the country and considering plans to deploy private security contractors in hopes of turning around a multibillion-dollar effort that so far has shown few results.

As the story indicates, the dark legacy of these high-handed policies continues to plague the region. They stand in sharp contrast to Canada’s continuing ability to exercise some measure of control over the relationship, to its political and economic advantage.

Growing up in Newfoundland and being old enough to remember the Confederation debate of the late 1940s can provide some insight into and understanding of the continuing struggle for many Canadians when public policy issues are associated with relations with the United States. For many the conflict between the ideal of idiosyncratic Canadianism and the practical needs of geography and economics is an ongoing struggle needing constant vigilance. It is also a reminder for successive Canadian governments of the need to stay within certain boundaries when planning large projects leading to closer integration with the United States.

The free trade debates of the late 1980s and early 1990s dramatically illustrated this Canadian tension. Then, President Reagan and Prime Minister Mulroney – two pseudo-Irishmen – were able to make common cause for closer economic integration. Those debates are now sufficiently retrospective to provide a benchmark for all large initiatives. The economic success of these free trade agreements has been sufficient to more than justify the limited erosions of sovereignty they required.

Unfortunately, the limitations of these earlier agreements also provide justification for the greater political and security integrations that the Shared Vision Declaration promotes. The earlier free trade agreements were economic in scope, with balancing and trade-offs inherent in them, and did not look for additional concessions beyond their facilitation of Canada–United States trade. The Shared Vision approach essentially promotes the idea that in order to restore the *status quo ante* implicit in the free trade agreements there have to be large political concessions by Canada that will satisfy American security concerns. While not lessening the demands, many experts today characterize these security concerns as overblown and having little to do with cross-border and entry traffic from Canada.

The Shared Vision approach is the latest in a series of bilateral initiatives since 2001 attempting to deal with American security paranoia. The earlier initiatives which confidentially promoted answers for easing border controls and constraints have had little impact. The Shared Vision initiative is a response to these

failures. Today the matter has become one where both governments have agreed that lesser constraints and controls on border traffic might be paid for by the Canadian government providing information on millions of persons, citizens and others, to the United States.

Little of substance is said in the February 4 joint Declaration on privacy except for the open-ended statement:

We intend to formulate jointly Canada–United States privacy protection principles that should inform and guide our work in relation to facilities, operations, programs, and other initiatives contemplated by this Declaration.

Sometimes it can be assumed that the less said about an issue in a bilateral document, the more important it is.

Public Safety Minister Vic Toews and Homeland Security Secretary Janet Napolitano met in Winnipeg on August 15, 2011, and in their public comments gave some indications that privacy remains at least of some concern to Canada. Mr. Toews commented, “How do we share information in an appropriate fashion in order to ensure that security interests are met and yet that it doesn’t thicken the border?” Ms. Napolitano for her part downplayed the privacy matter: “I think that one of the key facets of today’s meeting as with some other meetings we’ve had is the fact that the privacy issues between the United States and Canada are not nearly as great as is suggested.” While there was a leak to the media on September 10 that the negotiations were successful, Canadians might consider that a more indicative signal of the state of the negotiations was Mr. Toews’ comment that President Obama and Prime Minister Harper would meet in the fall since negotiators needed “further directions.”

At the very least, the February 4, 2011 statement suggests that privacy concerns and principles will be subject to the demands of security and economics. It is generally accepted that American privacy principles have never been onerous and have lessened considerably in the decade since 9/11. At the same time, the reports by the Privacy Commissioner of Canada, the Auditor General and commissioners of inquiries have all provided ample evidence that Canadian privacy principles are not equal to the demands of today’s world. An atomized world of point-to-point communications, the pervasive collection of personal information by governments and commercial enterprises, the demands of politicians for supersonic response times during crises, and the willingness of police and security authorities to cut corners and ignore controls contribute to erosions of privacy principles that have entered into law in earlier eras.

In conversations with members of the Canadian working group for the Shared Vision Declaration they acknowledged that some of the actions contemplated could conflict with Canadian privacy laws. It was suggested that the Government of Canada had certain “red lines” that it was not prepared to cross in dealing with American demands for personal information. There is some comfort in that there was an early recognition that protecting privacy was of some concern.

However, the record of the Canadian government on such issues is not encouraging. At one level, the government is theological in its defence of information that it declares to be of national security interest which[might be used by citizens to judge the value of security measures. At the other end of the scale, the government is prepared to use information that is protected by the privacy laws to advance its “tough on crime” agenda and to rid the country of alleged “war criminals.” In this equation, where economic benefits may be at stake, it is not extreme to suggest that when “Canada–United States privacy protection principles” are under bilateral discussion, privacy protection will not be increased. A more likely result is that existing Canadian privacy laws, as flawed as they are, will erode to meet the demands of the United States.

American society and its political system are under more stress today than at any time since the ending of the Second World War. Today the great society is more a greedy society where plutocrats dominate.

The first Black president has unhinged many and there is no sign a sunny benevolent actor will ride into town and calm the turbulence. It is in this atmosphere that specific agreements under Shared Vision are being discussed, agreed to and implemented.

It is hardly an auspicious time to enter negotiations with the Americans on issues that will lead to the erosion of the privacy rights of Canadians. Economic hard times do not ennoble, and in an insecure and troubled international environment there can be little expectation that Canadian needs for less controls and constraints on trans-border traffic will be met. A more likely scenario would be Canadian concessions on security and privacy matters and only American promises for an easier border regime.

An even more troublesome aspect of the Shared Border Declaration is the assumption that police and security officials on both sides of the border will be able to use the additional information that will be generated. Both countries have engaged in large “theatre” security measures since 2001 and there are few signs that doing so has improved national security. Various inquiries since 2001 have demonstrated that security officials, both American and Canadian, have not been able to effectively use available information. To assume that a flood of more information will add to our collective security is naïve; it is more likely that more innocent persons will be harmed rather than that intercepting those planning harm will be identified.

There are many examples of these failures:

- the “underwear bomber” failed because of his inexperience, yet prior to his boarding a flight for the United States his Nigerian father alerted American intelligence officials of the extremist views of his son;

- the arrest of a 66-year-old American grandmother by Canadian border officials who confused used motor oil with liquid heroin is yet another example of the abilities of persons who are entrusted with exchanged information;

- the testing of bombs by persons involved in the bombing of Air India 182 days before its fateful flight was observed by CSIS agents but they did not recognize the noise as explosions;

- and most egregious of all was the inability of the FBI to use information available prior to 9/11 suggesting that a nefarious plot was underway. The bombing, eight years earlier, of one tower of the World Trade Center should have been an ongoing warning of trouble yet to come.

Another example and possibly a sign of things to come was the saga of Aeromexico Flight 33 which was en route from Mexico to Italy on July 20, 2011. The flight passed through American-controlled air space. Among the passengers was Mexican professor Raquel Gutierrez Aguilar, on her way to Italy for an academic conference. Professor Gutierrez was a social activist who had been involved in several Latin American social and economic justice causes and clearly had come to the attention of American authorities, and her presence on the flight probably became known to the American authorities through the pre-notification of passengers to the American authorities. They denied permission for the flight to travel through its air space control zone and the flight had to return to Mexico. Professor Gutierrez was removed from the plane and it was allowed to resume its flight through American air space. If Professor Gutierrez is the standard the Americans are using to prevent over-flight clearance, then air travel out of Canada will never be the same. Tommy Douglas would not meet this standard.

It is understandable that the business community of Canada has assiduously promoted the Shared Vision approach. A decade of frustrating effort to obtain high-level attention in Washington has produced little. The easy-going days of cross-border co-operation have gone forever in the environment of harsh and ill-informed rhetoric of American leaders. There is, however, a fundamental flaw in the manner in which concessions are balanced in the Shared Vision approach. If Canadian concessions on security and privacy rules do result in the lessening of American border restrictions and controls then such results would always be hostage to future events over which Canada has no control. Such

events could require more concessions by Canada in order to meet American demands.

Many members of the Canadian business community and their supporters regarded the inclusion of Mexico in the free trade arrangements as an unnecessary complication. Many in the American political system have differing views. Very few Canadians participate in the American political process; on the other hand, there are close to 50 million Hispanics in the United States, two-thirds of whom have Mexican ancestry. Although many of the Canadians involved in the American relationship debate have some degree of antipathy towards the inclusion of Mexico in these discussions, the American political system is increasingly assimilating the Hispanic factor as a fundamental element in its political system. Janet Napolitano, coming from a border state with Mexico, reflected this in her recent characterizations of the Canadian border. She is not alone in seeing the Canadian border through darkened glasses.

On the security side, the Declaration speaks of providing “a shared vision for perimeter security.” It is a concept that is meant to beguile, and feeds into the paranoia promoted by many that the threats we are facing come from abroad. The perimeter security concept is a modern Maginot Line created out of the expectation that immense flows of information about citizens will increase security. Like the Maginot Line of history, it creates the illusion of security but it is the security that only “theatre” can provide since it does not reflect the complex environments in which our lives are lived. Perimeter security for the citizens of Oklahoma City, Fort Hood and Oslo is a cruel delusion and one that suggests more myopia than vision.

If Canadian concessions on security and privacy rules do result in the lessening of American border restrictions and controls then such results would always be hostage to future events over which Canada has no control.

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