BORDER PACT - BEYOND THE BORDER ACTION PLAN

Trade between Canada and the United States currently equates to the movement of approximately $1.6 billion in goods and services per day in addition to which some 300,000 people cross the Canada-U.S. border every day. This international trade between our two countries represents tremendous mutual economic benefit and has grown substantially since the enactment of the North American Free Trade Agreement. The new Beyond the Border Agreement endorsed by Canadian Prime Minister Harper and U.S. President Obama makes provision for action plans that are intended to reduce trade barriers through harmonization of the regulatory process, increase mobility and reduce delay while increasing efficiency under enhanced security measures.

Trusted-traveller and business programs such as NEXUS and the Free and Secure Trade (FAST) programs are slated for expansion. Harmonization of the regulatory process is intended to improve and streamline the flow of traffic and trade. Trade facilitation, economic growth and jobs are key areas of cooperation outlined in this new border pact. Both parties to the Action Plan recognize the need to reduce the cost of conducting legitimate business across the border, and to implement "coordinated, cooperative, and timely border management decision making".

There are some flaws within the prevailing border programs relating to the cross-border mobility of people that are deserving of attention within the forthcoming harmonization process – some of which are addressed within the following observations:

NEXUS

NEXUS is an enrollment-based system in which applicants are pre-screened to determine what risk, if any, they pose as travelers. Upon approval, low-risk applicants are issued a NEXUS card and receive the privilege of using the NEXUS lane at border checkpoints. By separating NEXUS card-holders from the rest of the traveling public, NEXUS enables Canadian and U.S. border authorities to concentrate their efforts on potentially high-risk travelers and goods, thereby enhancing border security. It also allows card-holders to enjoy predictable and timely border-crossings.

NEXUS attempts to strike a balance between national security and economic security. However, both the "zero-tolerance" enrollment policy and absence of an appeal mechanism for those denied enrollment shows little regard for personal security. To date, NEXUS procedures have left individual rights subject to the whim of institutional expediency.

Pages 12 and 13 of the Plan recognize the need for NEXUS enhancement. By 2013, the parties aim to enhance enrollment, compliance enforcement redress, and other benefits. We urge that the Plan's NEXUS enhancements include the following:

1. Retreat from NEXUS' Zero Tolerance enrollment policy that denies NEXUS benefits to persons with criminal convictions for minor violations of the law, no matter how old. A waiver of ineligibility for FAST enrollment is available to qualifying truck drivers with minor convictions. A NEXUS waiver of ineligibility might be modeled on the FAST waiver process.
2. Establish an appeals process for NEXUS denials and revocations. (Canada already has such a process insofar as revocations are concerned). NEXUS has matured since it began in 2001 as part of the Smart Border Accord, and due process protections need to be built into its application and revocation procedures. A "Smart Border" is incomplete without such safeguards.1

The Plan also indicates that the U.S. and Canada will implement a joint marketing plan for NEXUS. We suggest that building transparency and accountability into the program, as suggested above, is the simple way to ensure increased enrollment. Many potential users have opted out of NEXUS because of perceptions that both program enrollment and revocation processes are subject to arbitrary and capricious administration. Meanwhile, we suggest that NEXUS card-holders be able to opt-in for periodic e-mail updates which would provide information regarding additions and deletions of prohibited food items, changes in NEXUS hours, addition of NEXUS lanes at various Ports of Entry, and periodic reminders of NEXUS rules. The e-mail list should also request periodic feedback from NEXUS participants – the system as it currently exists has no formal feedback mechanism. Confusion exists within the NEXUS lanes as to whether card holders can make verbal declarations (as exists within regular lanes) or must research and prepare formal written declarations. We suggest that this inequity needs to be addressed in order that entry requirements are clearly understood and travelers are not inadvertently directing to non NEXUS lanes (so as to make verbal declarations) and thus adding to traffic congestion.

NEXUS has proven itself at land-border crossings and airports. We suggest NEXUS documented passengers

1 NEXUS card-holders are not allowed to use the NEXUS lane for transport of commercial goods upon threat of revocation of NEXUS benefits. Persons enrolling at the Blaine enrollment center are frequently advised that they cannot take more than six of their business cards with them when using the NEXUS lane, as transportation of seven or more business cards constitutes transportation of commercial goods for NEXUS purposes. We knows of no commercial or security justification for such statement; it suggests that the lack of an appeals process is a factor that allows such statements to be made.

receive priority treatment when boarding U.S. destined cruise ships or AMTRAK in Vancouver, BC.

After-sales service

Page 15 of the Plan outlines several cross-border business areas in which improvement is anticipated. One of these areas is after-sales service to industrial and other critical operations systems (e.g. software) acquired from abroad. The Chamber notes that Customs and Border Protection (CBP) often construes rules allowing foreign nationals to enter the U.S. for this purpose as narrowly as possible. However, narrow construction is not inherent in applicable law.

For example, the Department of State's (DOS) Foreign Affairs Manual (FAM) does not require business visitors travelling to the U.S. to perform after-sales-service to have the same country of origin as the product to be serviced:

> **9 FAM 41.31 N10 OTHER BUSINESS ACTIVITIES CLASSIFIABLE B-1**
>
> While the categories listed below generally may be classified under the proper applicable nonimmigrant class, i.e., A, E, H, F, L, or M visas, you may issue B-1 visas to otherwise eligible aliens under the criteria provided below.
>
> **9 FAM 41.31 N10.1 Commercial or Industrial Workers**
>
> 3. An alien coming to the United States to install, service, or repair commercial or industrial equipment or machinery purchased from a company outside the United States or to train U.S. workers to perform such services. However, in such cases, the contract of sale must specifically require the seller to provide such services or training and the visa applicant must possess specialized knowledge essential to the seller's contractual obligation to perform the services or training and must receive no remuneration from a U.S. source...

NAFTA contains a similar provision:

> **After-Sales Service**
>
> Installers, repair and maintenance personnel, and supervisors, possessing specialized knowledge essential to a seller's contractual obligation, performing services or training workers to perform services, pursuant to a warranty or other service contract incidental to the sale of commercial or industrial equipment or machinery, including computer software, purchased from an enterprise located outside the territory of the Party into which temporary entry is sought, during the life of the warranty or service agreement.

The NAFTA provision mirrors the After-Sales Service clause of the U.S. - Canada Free Trade Agreement (CAFTA) which read as follows:

> **After-Sales Service**
>
> Installers, repair and maintenance personnel, and supervisors, possessing specialized knowledge essential to a seller's contractual obligation, performing services or training workers to perform services, pursuant to a warranty or other service contract incidental to the sale of commercial or industrial equipment or machinery, including computer software, purchased from an enterprise located outside the United States/Canada, during the life of the warranty or service agreement.

The after-sales service provisions of the CAFTA and the NAFTA are virtually identical with the exception that the NAFTA provision refers to the Parties to cover the United States, Canada and Mexico, while the CAFTA provision refers to United States/Canada.

None of the three after-sales service clauses cited above requires the person providing service to be a national of the country in which the equipment was manufactured. ***However, CBP frequently (always?) requires the sale to involve Canadian made product sold from a Canadian company for a Canadian to supply the after-sales service.***

In 1991, the U.S. Department of Commerce published a pamphlet entitled "U.S. - CANADA Free Trade Agreement After-sales Service and Repair Questions and Answers". The publication is aimed at U.S. persons seeking to perform after-sales service in Canada under the CAFTA.
Page 5 of the pamphlet is most instructive. Paragraph 3 of page 5 indicates that for an American to perform after-sales service in Canada the product to be serviced be purchased from a seller "located outside of Canada and must not be of Canadian origin." Accordingly, applying this rule to the converse situation (i.e., a Canadian to perform after-sales service in the U.S.) the product to be serviced must be purchased from a seller located outside of the U.S. and must not be of U.S. origin.

In addition, the last paragraph of page 5 of the pamphlet indicates that for an American to perform after-sales service in Canada, it is not even necessary for an American company to have made the sale of the product to the Canadian user; it sets out provisions for a third country national company to make the sale and to contract the after-sales servicing to a U.S. company. Accordingly, applying this rule to the converse situation (i.e., to Canadian after-sales service providers) a Canadian company need not have made the sale to the U.S. user provided the after-sales servicing has been contracted to it, for one of its Canadian employees to provide the after-sales servicing.

Thus, it appears that after-sales service is frequently construed by CBP more narrowly than intended. In Beyond the Border discussions regarding after-sales service, We suggest that the criteria contained in referenced publication be used as the baseline for expansion of after-sales service rules instead of the endpoint. Lastly, we suggest that a bilateral pamphlet similar to referenced publication reflecting the Beyond the Border after-sales and after-lease service agreements be published.

Redress and expedited removal
The Plan calls for a review of the effectiveness of existing redress and recourse mechanisms for business travelers whose applications are denied, and for implementing administrative and operational improvements by the end of 2012. PACE suggests that CBP's use of expedited removal against Canadians be part of this review. Expedited removal is a procedure authorized by U.S. law in 1986 by which non-resident aliens may be excluded from the U.S. without the opportunity of a hearing and barred from re-entry for a period of five years. There is no judicial review of an Order of Expedited Removal. Nothing can be as devastating for a cross-border business as the expedited removal of a key employee.

However, the Attorney General has been authorized to exempt certain aliens from the expedited removal process, and has done so by promulgating 8 C.F.R. § 235.3:

> "An alien who is arriving in the United States, ... who is determined to be inadmissible under section 212(a)(6)(C) or 212(a)(7) of the Act (***except an alien for whom documentary requirements are waived under §211.1(b)(3) or §212.1 of this chapter***), shall be ordered removed from the United States..."

Documentary requirements have been waived for most Canadian non-immigrants. Specifically, 8 C.F.R. § 212.1 provides that "a visa is generally not required for Canadian citizens." Thus, reference to 8 C.F.R. § 212.1 by 8 C.F.R. § 235.3 means that Canadian citizens are not to be subjected to expedited removal. Unfortunately, CBP subjects Canadians to expedited removal on a daily basis.

- Expedited removal does not have effective redress and recourse mechanisms, as anticipated by the Beyond the Border Action Plan, because (1) persons on whom it is used have been exempted from redress and recourse, and (2) it bars these persons from entering the U.S. for a period of five years with no opportunity for judicial review. Under the expedited removal scheme, CBP acts as the judge, jury, and executioner.
Meanwhile, Canada has no equivalent to the expedited removal process.

We suggest that the Beyond the Border process provides an excellent opportunity to clarify that expedited removal is not to be used on Canadians requesting admission to the U.S. at Ports of Entry for business or pleasure purposes.

Facilitating the conduct of cross-border business

Among other things, this topic calls for:

A. Providing enhanced administrative guidance and training to CBP and CBSA officers and enhanced operational manuals to achieve optimal operational consistency at all ports of entry on business traveler issues. Improvements for consideration to :

- Ensure that all guidance and training materials and enhanced operational manuals are made available to stakeholders prior to finalization so as to allow stakeholder feedback.

- Share all current guidance and training materials and current operational manuals as soon as possible.

B. Reviewing current administrative processes under which all categories of business travelers may request adjudication of employment and related petitions by the destination country's immigration authorities to identify and resolve potential issues prior to the actual date of travel.

Improvements for consideration to :

- Expand border processes that work for Canadian and U.S. Citizens by extending them to permanent residents of the two countries wherever possible.
- Expand border processes to include expanded NAFTA work permit processing options:
    - The U.S. could provide a new Perimeter Security Partner Processing option to Canadians encouraging them to submit work permit applications to USCIS Regional Processing Centers where the applications would be adjudicated within 10 days at no additional charge other than the standard processing fee. As it presently stands, applications sent to Regional Processing Centers take approximately 90 days to process unless an additional Premium Processing fee of $1,225 is provided, in which case the matter is adjudicated in 15 business days.

    - The U.S. could allow initial processing for TN (NAFTA professional) matters to take place at both Ports of Entry and at USCIS Regional Processing Centers. Currently the initial TN application must be made at a Port of Entry.

    - The U.S. could reestablish NAFTA Free Trade Officer positions at major ports of entry. The U.S. abolished such posts many years ago.

    - USCIS could expand its operations to include adjudication of NAFTA work permit matters at major Ports of Entry, thus taking over CBP's duties in this regard.

These and other examples have been the subject of negative publicity and are the cause for concern, doubt and confusion which has led to significant loss of public confidence. The foregoing corrective undertakings are expected to provide beneficial changes within border programs that will serve to create an increased level of public confidence and acceptability with the view that enhanced greater participation will lead to improved mobility, reduced congestion while advancing the cause of international trade and travel.

THE CHAMBER RECOMMENDS

That the Provincial Government work with the Federal Government in conjunction with their United States counterparts to:

1. address the current existing inequities between regulatory and interpretative aspects of Canada – U.S. border impediments, as demonstrated in the combination of options for consideration and the urging of action with specific suggestions outlined in the Preamble, which negatively impact the legitimate flow of people, goods and services across the Canada/ U.S. border and undertake these in conjunction with implementing improvements under the new "Beyond the Border Action Plan

2. implement improvements in cross-border transactions to support the principle that people, goods and services are deserving of equitable treatment irrespective of whether the transaction is southbound or northbound across our mutual international borders.