

THE NEW SECURITY PERIMETER WITH THE UNITED STATES

Brian Flemming

SUMMARY

After 9/11, several decades of success in building a more open US-Canadian border came to an end due to rising security concerns. To ameliorate this trend, both countries are now attempting to make their border more permeable. This paper attempts to predict how a new security perimeter agreement will be negotiated and what subjects will be covered by any new agreement or series of agreements. Sensitive issues such as privacy, civil rights and harmonization of national regulations, trade and security practices are examined. The paper also deals with the twin problems of the current lack of trust in politicians and governments and the difficulty of getting an agreement before the American presidential and Congressional elections get under way in earnest.

The paper concludes with an examination of what the consequences will be if no agreement is reached between Canada and the US on a new security and trade perimeter.

Go up, Urshanabi, onto the wall of Uruk and walk around.
Examine its foundation, inspect its brickwork thoroughly —
is not even the core of the brick structure of kiln-fired brick,
and did not the Seven Sages themselves lay out its plan?

– Gilgamesh to Urshanabi, the ferryman,
Tablet XI, the *Epic of Gilgamesh*

Walls and borders have always been emotionally and diplomatically charged places, from those walls surrounding the earliest city-states to those borders that encompass the nation-states of the 21st century. Indeed, the earliest written treaties humankind possesses, some more than 4000 years old, were mostly about settling border disputes among ancient Eastern empires or cities. But establishing boundaries around an individual's real property, or fixing frontiers around a country's territory, has always been a parlous process. From the male lion urinating around his territory to delineate his domain to humans who, throughout recorded history, built walls around their cities and countries, mammals seem to be hardwired to establish secure borders around the territories they claim.

In the oldest written story on Earth, the 5000-year-old *Epic of Gilgamesh*, the titular character, the King of Uruk, after being shorn of his immortality, returns to Uruk and the comfort of knowing the walls of his city are secure. Two millennia after Gilgamesh, Greek city-states built walls that marked the borders between the "civilized" citizens who lived inside the walls and those "pre-political men" who lived beyond the borders of the *polis*. A good border differentiated the polis' limits of civility from the wild tracts of territory beyond its walls.

Like many ancient institutions, 21st century security walls, whether constructed of concrete or computer bits, are capable of stirring the same powerful nationalistic and xenophobic feelings in the psyches of today's leaders and their people — whether they are consciously aware of it or not — as borders did in the minds of Gilgamesh and the citizens of Uruk. The difference between today's world and that of Uruk is that "modern-day walls are [usually] discredited markers of failed sovereignty."¹ The 20th century urban partitions of East and West Berlin, Jerusalem, Belfast and Beirut were (or are) as forbidding as many ancient walls. The walls separating the West Bank from Israel and those being built along the US-Mexican border are avatars of Gilgamesh's walls. Indeed, "the wall and its symbolic proxies are built when a political authority cannot flatter itself as a settled fact, whether granted by god or imprescriptible title. It comes too late or too soon."² In the end, the wall's political value lies in creating an illusion of impenetrability in the face of the reality of permeability. With the coming of globalization and signing of free trade pacts of various kinds, post-World War Two borders steadily became much more porous. Then along came the 9/11 attacks and the resulting rekindling of a desire once again to make borders places where hermetic barriers had to be built. And no country, with the possible exception of Israel, heard this siren song of security more clearly than America did.

¹ G. Newey, "Limits of Civility," review of *Walled States, Waning Sovereignty* by Wendy Brown. *London Review of Books*, 17 March 2011. <http://www.lrb.co.uk/v33/n06/glen-newey/limits-of-civility>.

² *ibid.*

The United States' peculiar post-9/11 paranoia, and its continuing fear of attacks by pre-modern, pre-Enlightenment extremists, have led to a decade-long American obsession with creating defences against its self-induced vulnerability. Even though they should know that most barriers are often illusory placebos, Americans continue to plan and build them. If nothing else, new border barriers create an illusion of security and allow petty politicians from Peoria to Paducah to run their victory laps. Borders for Americans have thus been restored to their hoary, ancient status of being fraught and emotional places. With the joint Canadian-American Declaration of a Shared Vision for Perimeter Security and Economic Competitiveness — also known as the Beyond the Border agreement — that was signed and released to the media by US President Barack Obama and Canadian Prime Minister Stephen Harper on February 4, 2011, Canada has now moved deeper into the echo chamber of American security fears, in anticipation of unclogging the once-boasted-about, but no longer real, longest undefended border in the world. The questions for Canada and for Harper now are: how can a satisfactory and effective agreement be reached without inflaming the atavistic loss-of-sovereignty warriors on both sides of the border? Is there any easy way to get the parties to trust one another more as this negotiation proceeds? Will Canada have to pay for most of the new infrastructure and procedures required by any successful agreement? How will any agreement or series of agreements impact on each country's regulatory codes or cherished trade practices?

If Harper's government is known for anything, it is for its secretiveness and tight control of both issues and messaging. If Harper's desire for secrecy continues in 2011, even in the wake of his impressive victory in the federal election of May 2, 2011, how the Beyond the Border agreement is being negotiated may continue to be a Churchillian riddle, wrapped in a mystery inside an enigma for the Canadian public until a deal, or parts of a deal, is rolled out. A clue as to how the agreement will evolve and be unveiled emerged in a column by John Ibbitson in *The Globe and Mail* on July 6, 2011. According to Ibbitson, the negotiation will be diametrically different than the free trade negotiations of the 1980s and 1990s were. Back then, Canadian and American diplomats disclosed, almost daily, where the deal was going. The press, public and Parliament were able to debate each issue openly and incrementally. This time, however, Harper and Obama's strategy appears to be quite different. According to Ibbitson, before winter, "...the two countries will release more than two dozen proposals aimed at easing border congestion and improving security...baby steps will be followed by bigger steps. No Big Bang, no grand schemes. Instead, something that can actually get done."³ None of these many proposals is likely to be as audacious, for example, as the complete removal of land border crossing facilities that has been achieved by 15 European Union countries in the so-called Schengen zone. There will be no grand continental perimeter.

What will be contained in these many packages of proposals? First and foremost, and as the website⁴ set up by both countries says, "in order to promote mobility between our two countries, we expect to work towards an integrated Canada-United States entry-exit system, including work towards the exchange of relevant entry information in the land environment so that documented entry into one country serves to verify exit from another country."

³ John Ibbitson, "Beyond the Canada/U.S. border: open doors, baby steps," *The Globe and Mail*, 6 July 2011. <http://www.theglobeandmail.com/news/politics/john-ibbitson/beyond-the-canadaus-border-open-doors-baby-steps/article2087619/>

⁴ <http://www.borderactionplan-plandactionfrontalier.gc.ca/psec-scep/index.aspx?lang=eng>

This “package” will put in place “...common standards for the collection, transmission and matching of ‘biometrics’ to screen travellers in real time. The key question is whose biometric systems will be used for this purpose. As this paper will later examine, the US already uses more varied systems, like iris or facial recognition technologies, than does Canada. Which technologies will win the day and become binational?

Many of the themes in this area of cooperation will simply require building on protocols that are already in place. Advanced passenger screening already exists in the air sector. To extend this screening process to other sectors will mean identifying new law-enforcement databases to access and share or developing new information-sharing capabilities. A shared and agreed technology will be the key to allowing this information sharing and the resulting enhancement of joint risk assessment. The parties will encounter political and bureaucratic pushback during the process of assessing and in establishing the level of sensitivity needed to make these new databases work effectively. Who will be empowered in Canada to provide input or to perform the risk-assessment of data? Will it be the Canadian Border Services Agency (CBSA), CSIS, the RCMP, Transport Canada or all of the above? Which Canadian agency will be given the lead role? And who will perform the same function in the US? The Department of Homeland Security (DHS) does it now but there could be a permanent joint US-Canada agency to oversee these functions, using NORAD as a model.

When each discrete “package” is rolled out, it will be fascinating to learn how the parties intend to meet the inevitable challenges that will be thrown up from a legal, policy, technological and procurement perspective. Will, for example, there be a requirement that Canada’s official language laws be obeyed? Will potential contracts conform to the NAFTA rules for bilateral bidding procedures? Who will set the criteria for including in or deleting people from the main database of individuals? Who will have access to this database? And, most important, how much harmonization of enforcement powers will there be along the border? That will be a possible deal-breaker because, at present, American border officials have a draconian power to refuse entry at their border, a capability that is not open to appeal. Will CBSA officers be given similar powers? Or will American border officials’ powers be curbed? Or will the existing powers of American officials remain the same so that Canadians potentially may be treated differently than Americans at the border under a new agreement? This will be a delicate issue because Americans who live near the Canadian border, sail on the Great Lakes and otherwise transit the border constantly, have made many complaints recently against their officials.

According to recent press reports, zealous empowered American officials are stopping and searching citizens more and more, and for risible reasons. In June 2011, *The New York Times* reported that more and more security checks were being made of boaters on the Hudson River in upper New York state by “officers wearing flack jackets and holstered pistols — many of them on the lookout for terrorists.”⁵ Some boaters said they had been stopped as many as four times in a single day. In Vermont, Senator Patrick Leahy recently complained he’d been stopped about an hour’s drive from the Canadian border and asked to prove he was a US citizen. Leahy asked the American agent, who was simultaneously forcing a carload of

⁵ Peter Appelbome, “Security Checks on Boaters Disrupt Idyllic Life on the Hudson,” *New York Times*, June 10, 2011. <http://www.nytimes.com/2011/06/11/nyregion/stepped-up-security-checks-on-hudson-river-anger-boaters.html>.

Canadians to open their luggage, what legal authority he had to do all this so far from the border. The agent patted his gun and said his weapon was his authority.⁶ There are scores of stories like this in the media, along with occasional reports that some highly placed American politicians and bureaucrats believe the Canadian border is more menacing to America than the Mexican border.⁷ What process will be put in place to ensure that Canadians and Americans will be treated equally at or near the border?

Perhaps the most sensitive part of any package will be the biometrics and identification component of any proposal. Currently, the US and Canada use a mixture of unique and common technologies to identify people at the border. On the one hand, joint US-Canada pre-clearance programs such as NEXUS or FAST (Free and Secure Trade) use the same technologies for identifying people. Other American programs use technologies like facial recognition, iris scans, fingerprints or hand geometry. A new program will have to put in place an agreed biometric that will set new standards and will determine which company or companies in the private sector will be allowed to be given contracts to implement the program. If an Enhanced Driver's Licence is agreed to be a secure document for border transit, provinces and states will have to become involved. At present in Canada, only Ontario, Quebec, Manitoba and British Columbia offer enhanced licences to their citizens. Many American states offer similar licences. How will federal authorities harmonize all this on either side of the border?

In the case of commercial trans-border traffic, accelerating border clearance is a fairly straightforward task once the security risk assessment has been made, preferably long before the goods being carried ever get to the border crossings. There will probably not be many changes made in the numerous Canadian-American programs that currently offer simplified declaration or accounting procedures at the border. There could be systems upgrades requiring more technologies, like better GPS systems or electronic tracking systems, to be used at the border. In the end, though, both sides must face the fact that facilitation of land border crossings has been mostly hampered by infrastructure choke points such as the long lineups on bridges like the Ambassador Bridge between Windsor and Detroit. The border bureaucrats on both sides have not been the problem there. The big question for the parties will be: how quickly can new and better infrastructure projects be built and who will pay for them? The best solution will be one like that of Canada's air transport security system where the users/passengers of the equipment might pay entirely for the new facility, not the broad base of taxpayers.

For goods coming from countries other than Canada or the US, the Border Action Plan says, "We intend to work towards developing an integrated security strategy that ensures compatible screening methods for goods and cargo before they depart foreign ports bound for Canada and the United States, so that once they enter the territory of either we can, together accelerate subsequent crossings at land ports of entry."⁸ There is already limited pre-screening of container cargoes taking place abroad, and Americans already work side-by-side with Canadian

⁶ Brian Lee Crowley, "America has right to expect we be vigilant, but U.S. can go too far the other way," *The Hill Times*, 30 May 2011. <http://hilltimes.com/page/view/crowley-05-30-2011>.

⁷ Colin Freeze, "U.S. border chief says terror threat greater from Canada than Mexico," *The Globe and Mail*, May 18, 2011. <http://www.theglobeandmail.com/news/politics/us-border-chief-says-terror-threat-greater-from-canada-than-mexico/article2027713/>.

⁸ *op. cit.*, Fn. 4.

inspectors at various Canadian ports, but this provision will mean better cargo flows, for example, at Canada's Pacific Gateway entry points. Currently, cargo going from China to Canada and landing, for example, in Long Beach, California, has to go through two full screenings before reaching its destination. Agreement that one customs clearance is sufficient for transit of these goods to Canada will improve the system and cut expenses.

In the case of establishing joint border facilities that are to be located outside of North America, this initiative will be new to Canada but not to the US, particularly if Canadian customs and immigration officials are to be stationed at foreign airports, as Americans now are at many Canadian airports for pre-clearance to the US. Choosing which foreign airports will have sufficient passenger volumes to ensure value for money, and working with airport authorities and foreign governments on the facilities for the Canadian officials, will be an important task. Because US Customs Border Patrol employees and their managers have already had extensive experience in establishing these kinds of facilities and paying for them, Canada could profit from this experience when implementing similar practices. Sharing the costs of combined Canadian-American pre-screening facilities might be very attractive for both sides in these times of government restraint. The American experience will also help Canada by allowing us to tap into existing infrastructure, including accommodation and IT procedures that Americans have built and maintained. For ports of entry along the Canada-US border, joint facilities for border security already exist in places like Coutts, Alberta. Any new package agreed to in this area will probably mean choosing additional ports of entry to be candidates for the building of new sites for joint facilities and agreeing on their design and management. They will be one of the least controversial projects for the Beyond the Border negotiators.

In the cases of either people or goods transiting the borders, it will be important in any new package to make risk-assessment methodologies and systems interoperable and therefore understandable to both parties. A considerable component of harmonization will simply consist in understanding how each other operates in the areas of policy, procedures and systems. Joint training, opening new ways of communicating and monitoring the results of the new methodologies will be needed to ensure an effective working relationship is being forged, and that it works for both parties. And, of course, as changes are needed in the existing methodologies, joint consultation and communication forums will be essential.

For the last decade, Canadian and American armed forces have been developing interoperable capacities so that, for example, when a Canadian frigate is leading a joint Canadian-American naval task force off Somalia, its systems and methodologies must be able to mesh completely with those of American ships in the neighbourhood and vice versa. Those Canadian and American bureaucrats and military officers who helped develop military interoperability will be invaluable in applying what they have learned to the new border arrangements. Already, in May 2011, Canada quietly agreed to provide information to the US from 22 Canadian radar stations along the border, thereby enhancing America's ability to better patrol its northern border by being able to detect low flying aircraft.

Some of the most difficult packages to negotiate will be those that include any harmonization of regulation of Canadian and American product standards or the products of internal trade institutions such as marketing boards. The current American ambassador to Canada highlighted the most famous recent conflict in standards of regulation. David Jacobson discovered that the Cheerios breakfast cereal he bought and consumed in Canada was different from what he'd

been eating in Chicago. How will silly cereal regulations be resolved? Then, there is the ridiculous issue of deodorants. There is apparently some regulatory incompatibility between Canadian deodorants and those manufactured abroad. Finally, there is the always-thorny issue of whether the products of Canadian marketing boards in wheat, eggs, beef, chickens or milk will be allowed to cross the border unimpeded. Protectionists in Canada — yes, Virginia, we have these folks in Canada too — will continue to apply pressure for border measures that will halt the importation of products that do not meet Canadian standards in favour of those products that have had their standards harmonized. Some export declaration requirements have already been aligned by using import declarations from the other country, but how and what common product standards and which harmonized customs rules will eventually be negotiated will make fascinating reading when the package containing this material emerges into the sunlight.

For both Americans who have seen many of their privacy rights taken away during the so-called Global War on Terror, and for Canadians who have a Charter of Rights and Freedoms to help protect their privacy rights, how the privacy card is played in any one of the packages will be a significant issue.

Jointly formulating privacy protection principles will be a difficult task on both sides. What privacy safeguards will be put in place to protect citizens of both Canada and the US from being treated unfairly by security systems on either side of the border? The famous American no-fly list that inadvertently caught non-terrorists like the late Senator Ted Kennedy in its net is almost impossible to get off of. Will there be a process by which people who have been inadvertently or wrongly placed on this list can get off? Will it be a binational one? The casual way in which Canada was recently included in a new American law which would treat Canada as a wicked tax haven like the Cayman Islands does not give one confidence that this issue can be easily resolved by any Beyond the Border agreement. Nor do reports like a recent one from the American Government Accountability Office — the watchdog arm of Congress — that claimed the border between Canada and the US was scarcely better than the one between Mexico and America. The report found that only a few kilometres of our long border was “secure.”⁹ Some American legislators have made similar claims in the last year or two.

One of the difficulties negotiators will face as they secretly negotiate will be that of the paradoxical attitudes both Canadians and Americans have with respect to the border. In one poll conducted this year for the Association for Canadian Studies, only 22 percent of Canadians and 16 percent of Americans said the US-Canada border should be erased. Another poll, this one by Harris-Decima, claimed Canadians overwhelmingly favoured cooperating with America in reaching an agreement that would enhance border security while loosening barriers to cross-border trade. Interestingly, 75 percent of Canadians said they would support more intelligence sharing with the US in order to achieve those objectives. And 84 percent favoured harmonization of food safety regulations while 70 percent approved of the creation of a bilateral agency to oversee the building of a new border infrastructure. Harper and his negotiators will look at these poll results as ones that could put wind in their sails in this negotiation.

⁹ Lee-Anne Goodman, “U.S. report raps border security: Northern boundary ‘under-protected,’” *The Chronicle-Herald*, February 2, 2011. B1.

Overarching all issues and all packages in the Beyond the Border negotiation will be the twin hydras of trust and timing. Trust in the abilities of politicians to solve problems of any kind is at an all-time low in both Canada and the United States. This lack of trust has been exacerbated by the recent imbroglios in Washington over raising the national debt ceiling and bringing the massive American public debt problem under control. In one poll conducted in August 2011, 82 percent of Americans said they no longer trusted Congress. Canadians do not revere their ministers and parliamentarians but they probably would not give them the same kind of low marks as Americans gave their political masters. Nevertheless, the Harper government's obsession with secrecy and non-transparency on so many issues does not encourage Canadians to give their trust freely. That lack of trust consequently looms ahead like an iceberg that is partly above water but is mostly underwater, waiting to wreak political havoc.

The trust issue will most obviously rear its ugly head in any part of the Beyond the Border negotiation that deals with disputed settlements or the structure of any joint Canadian-American body that is created to manage the provisions of any agreement or agreements. The perceived failure of the dispute settlement mechanisms contained in the free trade deals of the 80s and 90s is still stuck in Canadians' reptilian brains — but is far from the consciousness of Americans or their political masters. That divergence in sentiment will not help this process. A worrying and largely unnoticed movement gathering steam in the US involves xenophobic moves by some states to force their Superior Courts to ignore non-American law (which probably includes ignoring international and treaty law). Oklahoma recently passed just such an amendment to their state constitution¹⁰ and other states may be getting ready to promote similar moves. How will these strange, and probably unconstitutional, moves affect all of America's agreements with other countries, including Canada? The jury is still out on American legal chauvinism.

For an increasingly embattled President Obama, striking multiple trade and security deals with a boring, and nearly invisible, Great Insecure North will hardly be at the top of his to-do list as the 2012 election season begins in earnest. Unlike former US presidents Ronald Reagan and Bill Clinton, Obama does not appear at present to have the political capital at his disposal to go to the wall for Canada as his predecessors did. So, despite being in the catbird seat in terms of his complete control over the Government of Canada and federal elections that are far off, Harper may wind up being trapped by an American political timetable that does not mesh with his own. And any agreement or set of agreements will probably have to be structured so as to be executive agreements of the US presidency, not full international treaties that might require the advice and consent of Congress. Obama may not be able to coax a recalcitrant Congress to ratify *anything* agreed with Canada. In the end, the best Harper may be able to hope for will be the president's re-election and a consequent, renewed ability by Obama to strike a deal with Canada that will stick and be able to pass political muster in Washington.

¹⁰ Part of the text of Question 755 as contained in a ballot initiative that was adopted by more than 70 percent of voters in Oklahoma said: “[State and municipal courts] when exercising their judicial authority, shall uphold and adhere to the law as provided in the United States Constitution, the Oklahoma Constitution, the United States Code, federal regulations promulgated pursuant thereto, established common law, the Oklahoma Statutes and rules promulgated pursuant thereto, and if necessary the law of another state of the United States provided the law of another state does not include Sharia Law [*sic*], in making judicial decisions. The courts shall not look to the legal precepts of other nations or cultures. Specifically, the courts shall not consider international or Sharia Law...”

It is even conceivable that a re-elected Obama, in 2013, could face a Congress under the influence of the Tea Party. Incumbents of all stripes — Democratic as well as Republican — will probably face difficult primary challenges that, if successful, could lead to the election of more extreme, and probably more nationalistic, members of both the House of Representatives and the Senate. That will not help Canada because many Americans believe Canada is nothing less than the “People’s Republic of Canuckistan,” and both a socialist state and a “haven for terrorism.” The urban myth that most, if not all, of the 9/11 bombers came through Canada to the US is still believed in Washington despite all Canadian efforts to expunge it. If too many members of Congress with erroneous opinions get elected, no agreements of any kind may be possible. On top of all that, any new terrorist incident, especially one that had Canadian connections, would seriously impair any deal Harper and Obama made.

What will be the consequences of failure, in all or in part, of the Beyond the Border negotiations? One will be *schadenfreude* on the part of Mexico, which has been barred from these new initiatives, as it was not in the failed Security and Prosperity negotiations of several years ago. Another will be that Canada may simply have to accept the consequences of living along a thickened trade border with America, one that will deduct at least one percent per year from Canada’s GDP. That will be difficult to accept but not devastating because the truth is that Canadian-American trade has been in decline for several years and is likely to continue to diminish more in future. Other countries will want to fill the gap left by an increasingly dysfunctional, debt-ridden and strangely old-fashioned United States. The time for a third way in international trade that failed under prime ministers like John Diefenbaker, Pierre Trudeau and Jean Chretien may finally have come. And Canadians may simply have to accept the consequences of having a permanently less porous border with their American cousins. It will be a sad outcome, but the border will not be impenetrable like the walls Gilgamesh built around Uruk.

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<http://policyschool.ucalgary.ca/files/publicpolicy/ontario%20sales%20tax%20reform4.pdf>

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