

THE COMITY OF NATIONS IN A TECHNOLOGICAL WORLD: BEYOND THE BORDER ACTION PLAN

Smarter Way to Cross Blog Archives
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Canada and the United States share the world's longest international border – more than 5,500 miles coast to coast and more than 7,000 miles when Alaska is included. In 2013, Canada and the United States engaged in more than \$600 billion in trade, and that was just in goods, not including trade in services. There are approximately 120 staffed ports of entry (POEs) along each side of the border, handling close to 400,000 people daily.

John F. Kennedy endeared himself to the Canadian people early in his presidency. In a speech before the Canadian Parliament in Ottawa in May 1961 he remarked:

But we share more than a common border. We share a common heritage, traced back to those early settlers who traveled from the beachheads of the Maritime Provinces and New England to the far reaches of the Pacific Coast...We share common values from the past, a common defense line at present, and common aspirations for the future - our future, and indeed the future of all mankind. Geography has made us neighbors. History has made us friends. Economics has made us partners, and necessity has made us allies."

That friendship had its advantages, and most of us recall the days when Canadians and Americans enjoyed the privilege of document-free travel as visitors for business or pleasure. We were passport-exempt and visa-exempt.

Many people, like me, who grew up in border communities, never really appreciated the challenges associated with controlling and regulating the flow of people between the two countries in pursuit of commerce, trade, tourism, recreation, and family relationships. But border personnel were certainly aware of the consequences and the risks associated with a system that tolerated undocumented entries. People were admitted for no particular time frame and with no formal record of entry. And even when there was a record of entry, there was no record of departure. Aggregate annual time and per-trip time was generally not detected or calculated, and there was no recordkeeping system that even provided the data to do so. The system was essentially self-regulated and entrusted to the mutual good will and good behavior of the respective citizenry.

Ah, how times have changed. Advances in technology and an era of terrorism have combined to eradicate many of those privileges for the sake of national security.

In an earlier blog entry, I commented on the nuances of the so-called "180-day rule," which may trigger real or imagined consequences under the U.S. immigration and tax laws. On July 1, 2014, things will become even more interesting as the Department of Homeland Security (DHS) and the Canada Border Services Agency (CBSA) combined to implement phase II of their [Beyond the Border Action Plan for Perimeter Security and Economic Competitiveness](#).

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In phase I, conducted at the end of 2012, the CBSA and DHS implemented a three-month pilot program at four POEs along the Washington/B.C and New York/Ontario borders in which they exchanged routine biographic entry information from “third-country nationals” (citizens of neither Canada nor the U.S., including landed permanent residents). The primary purposes of phase I were to test and develop an entry/exit system for both countries such that a single data point could serve as a shared record of entry into one country and a record of exit from the other. An analysis of this data allowed the respective agencies to determine the extent of overstays and other noncompliance with the terms and conditions of admission.

Phase II, which begins on July 1, 2014, will expand that initiative to all “automated” land border ports of entry (land, ferry, and pedestrian POEs, but not cruise ship sea ports). The biographic entry data elements being shared for phase II are: full name, date of birth, nationality, gender, document type, document number, and document country of issuance.

Both agencies state that there will be no information shared on Canadian or U.S. citizens for phase II. But that does not mean that data is not being collected. We have already seen that U.S. Customs and Border Protection creates an accessible electronic travel history that is not confined to third-party nationals.

The concerns that have flowed from all these immigration-related initiatives are not solely immigration law concerns. Canadians are fearful that the exit/entry system might not only remove the historic mystery about one’s exact number of days of presence in the United States, but might also serve up incriminating evidence to the welcoming hands of the Internal Revenue Service.

But can that happen? Canadians have already voiced concerns about the cost of compliance and privacy rights of its citizens in connection with the implementation of the U.S. Foreign Account Tax Compliance Act (FATCA). But FATCA was clearly a tax-related initiative, while the Beyond the Border (BTB) plan is not. The two countries entered into a formal Statement of Privacy Principles for the BTB plan, which states that the data could only be used for the stated purposes of the program or “in furtherance of the fulfillment of those purposes or such other lawful purposes as are not incompatible with those purposes,” so long as such use is stated in the “initiative or in a notice to the public.”

Tax compliance and enforcement are not specified as stated purposes of the BTB program. It is too early to speculate on the possible future use and sharing of the BTB data for tax-related purposes, but it is certainly relevant. For every person who might be incriminated by involuntary use of the data, there may be another who might be absolved from U.S. tax liability through voluntary access to the data.

We will continue to monitor and report on any developments, hoping that the joint efforts of the two governments remain faithful to John Kennedy’s words of comity and amity.