

**RISK GOVERNANCE AND BORDER SECURITY POLICY POST 9/11:
BEYOND BORDERS IN THE SECURITY ERA**

by

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Abstract

This paper utilizes a critical (political) discourse analysis to examine security dialogue as revealed through policy; in order to facilitate this task, the following publically available political documents will be analyzed: *Smart Border Declaration*; *Security and Prosperity Partnership (SPP)*, and the pending *Beyond Borders* deal. The objective is to highlight the complexities and realities of the security era as it pertains to North American border security. In other words, I am interested in the administration of border security policy in its practical context. Reviewing the *Beyond Borders* deal and situating it within the overall national security policies that govern the Canadian border facilitates the identification of limitations posed by the security mentality dominant in border governance. This thesis advocates that those studying border security policies in order to formulate alternative options do so in a manner that appreciates the unique polity milieu of the border. The analysis presented here has policy implications and concludes with recommendations and projections for the *Beyond Borders* deal.

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Glossary

ACI	Advanced Commercial Information
API	Advance Passenger Information
ATA	Anti-Terrorism Act
BBWG	Beyond the Border Working Group
BSO	Border Security Officer
CBSA	Canada Border Services Agency
CCLA	Canadian Civil Liberties Association
CDRP	Commercial Driver Registration Program
CIC	Citizenship and Immigration Canada
CJS	Criminal Justice System
CPB	U.S. Customs and Border Protection
CSA	Customs Self Assessment Program
CSC	Correctional Service of Canada
CSIS	Canadian Security Intelligence Service
DHS	Department of Homeland Security
EU	European Union
FAST	Free and Secure Trade
IBET	Integrated Border Enforcement Teams
ICE	U.S. Bureau of Immigration and Customs Enforcement
ICMLEO	Integrated Cross-border Maritime Law Enforcement Operations
IRPA	Immigration and Refugee Protection Act
JFO	Joint Taskforce Operations
MOU	Memorandums of Understanding
NAFTA	North American Free Trade Agreement
OPC	Office of the Privacy Commissioner of Canada
PBC	Parole Board of Canada
PIP	Partners in Protection
PNR	Passenger Name Record
PS	Public Safety Canada

RCMP	Royal Canadian Mounted Police
RRC	Regulatory Cooperation Council
SPP	Security and Prosperity Partnership
TSA	Transportation Security Administration
USCG	U.S. Coast Guard

Chapter 1

Introduction

The problem with academics is that they come up with these wonderful solutions to solve the problems we face but they are rarely applicable in the real world.

~ Regional Director General, CBSA

1.1 Introduction

It is indisputable that notions of risk and security are ubiquitous in contemporary North American society. Expressions such as *world risk society* (Beck 1999), *reflexive modernity* (Giddens 1999), *liquid modernity* (Bauman 2007), *security era* (Hornqvist 2004) and others are used to describe the current political atmosphere. Regardless of which term one chooses to use, each reflects the fact that this era is relatively new and its consequences are still being studied. For clarity and consistency, this paper will adopt Hornqvist's (2004) term and refer to the current epoch as the security era; the emphasis on 'security' encapsulates the mindset governing border security policy post 9/11.

This thesis is concerned with border governance and in particular, with the current application of border security policy. Specifically, I will focus on the pending deal between the Harper and Obama administrations of the U.S. and Canada respectively, entitled "Beyond the Border: A Shared Vision for Perimeter Security and Economic Competitiveness". Canadian Prime Minister, Stephen Harper, and the President of the United States of America, Barack Obama, intend to "streamline border security while creating a shared 'perimeter security' around both countries" (Government of Canada 2011: Beyond the Border). Harper and Obama announced their intention to formulate a perimeter approach to border security on February 4,

2011 in a joint public statement. It quickly received much news coverage and elicited debates about Canadian sovereignty, privacy concerns, and lack of transparency. The border action plan is built upon four key areas of cooperation: (1) addressing threats early; (2) trade facilitation, economic growth and jobs; (3) integrated cross-border law enforcement; and (4) critical infrastructure and cyber-security (Government of Canada 2011: *Beyond the Border*). This border action plan will be referred to as the *Beyond Borders* deal throughout this paper and it will be explained in detail in Chapter 3.

As will become evident, pre-emptive security measures, risk profiling via surveillance mechanisms, intelligence gathering, information sharing, and cyber-security are major concepts in the security era. These essential features are heavily embedded in the *Beyond Borders* deal, rendering the announcement of the intentions of the USA and Canada to engage in a perimeter approach to security an ideal medium by which to examine the mindset of the security era. Undoubtedly, threats to our national security exist but at the same time there is insufficient focus on mitigating the negative consequences of the security era in public discourse. Previous literature on this topic tends to concentrate on the problematical issues arising from a risk-based society, such as breaching privacy, and infringing civil liberties and the rule of law in the name of security (Bell 2006a, 2006b; Paye 2007, Webb 2006, Baker 2003). Yet academics such as Neocleous (2007) and Basaran (2011) have argued that it is the liberal democratic paradigm that permits security to trump liberty. Further, Neocleous (2007) argues that those who believe democratic societies aspire to locate the balance between liberty and security are misguided because the founding principle of the liberal paradigm is security, not liberty (ibid). In this regard, the question, ‘how much liberty are we willing to give up in the name of security?’ is arguably rendered insignificant. Regardless, on the practical level it captures much academic and public

attention, which makes discussion and analysis not only worthy, but also essential. This is discussed in further detail in the second chapter.

While concerns arising from securing the Canadian-U.S. border are frequently problematized they are rarely assessed from a systemic standpoint. I argue that these issues are infrequently contextualized and deliberated in a manner that situates the limitations of border governance within the current political environment. Governance refers to “the actions, processes, traditions and institutions by which authority is exercised and decisions are taken and implemented” (International Risk Governance Council 2007: 3). Hence, to effectively understand the *governance* of border security policy the analysis presented here recognizes that it is essential to grasp the direction taken by the federal Government of Canada to understand current border security policy. While academics often pay lip service to the impact of government direction on the concerns arising from securing the Canadian-U.S. border, this thesis suggests that they do not afford sufficient consideration to context or the inherent complexities of border governance. This will become clear in Chapter two in the section entitled, *Border Governance and its Intrinsic Complexities*.

Although part of my aim is to identify the negative consequences of the security era from a political-socio-legal standpoint, I depart from the literature devoted to exposing the pessimistic side of the security era (Bell 2006a, 2006b; Webb 2006; Baker 2003) as my objective is to highlight the complexities and realities of the security era as it pertains to North American border governance. In other words, I am interested in the administration of border security policy in its practical context. Reviewing the *Beyond Borders* deal and situating it within the overall national security policies that govern the Canadian Border facilitates the identification of limitations posed

by the security mentality dominant in border governance and security policy. The analysis presented here has policy implications.

This paper is essentially a critical (political) discourse analysis of bi-national border security policy devised between Canada and the United States of America. Chapter 2 consists of an extensive Literature Review, which is integral to understanding the complex political atmosphere in which the *Beyond Borders* deal is entrenched. In this chapter, I will first introduce border governance and its intrinsic complexities as a mechanism to clarify what is meant by the pragmatic mind frame. Second, I will contextualize the ‘security era’ by providing a brief historical explanation of the political shift from the welfare state to the security era that is widely argued to have taken place. Third, I will outline the controversial ‘security versus liberty’ debate associated with this topic. Put differently, the question of ‘how much liberty are we willing to give up in the name of security?’ is frequently posed and debated; both sides of the argument will be presented as a mechanism to highlight the complexity of the subject. Subsequently, I will debunk the myth that security trumps liberty and explain why the debate is simply an “ideological trope” (Neocleous 2007: 132). The key concepts of border governance, such as: security, risk, globalization, intelligence, and surveillance will be outlined before providing an overview of the major theoretical frameworks. The information presented in this chapter will facilitate an understanding of the security mentality dominant in the specific border security policies, documents, and legislation set for analysis in this thesis.

In Chapter 3, I will present the key border security policies and legislation analyzed in this study. As a mechanism to examine the security dialogue as revealed through policy, the following publically available political documents will be analyzed: *Smart Border Declaration*; *Security and Prosperity Partnership (SPP)*, and the pending *Beyond Borders* deal. Furthermore,

how the Canadian Border Services Agency (CBSA) came to be situated under the umbrella of Public Safety Canada (PS) and hold such a prominent, powerful role in border security management will be discussed.

Chapter 4 will provide an appraisal of the policies outlined in Chapter 3. I will outline some of the threats facing border governance and discuss barriers to intelligence sharing. Furthermore, this chapter summarizes the opinions of Canadians regarding the *Beyond Borders* deal utilizing reports published by the Beyond Borders Working Group (BBWG). Subsequently I will discuss issues regarding carrying out the *Beyond Borders* deal and focus on how potential negative consequences may be mitigated. The objective here is to provide a pragmatic assessment of the North American partnership, centering on the *Beyond Borders* deal and will heavily focus on its practical application.

Finally, Chapter 5 will conclude with a succinct summary of the key arguments made and discuss the likely prognosis of the *Beyond Borders* deal based on the key findings of the political discourse analysis. This paper will conclude with a candid, realistic discussion of what should be next for border security policy and researchers studying this subject.

1.2 Methodology

Directly engaging with political discourse on risk, security, border policy and legislation provides a means to garner an understanding of the practical and systemic nature of the security mindset. In other words, in order to facilitate the objective outlined above, a critical political discourse analysis will be utilized to examine security dialogue as revealed through policy. The data will primarily derive from publically available policies, legislation, initiatives, and Memoranda of Understanding (MOU) between Canada and the United States of America.

As van Dijk (2001) explains, political discourse is a mechanism by which power and control is ratified, replicated, and legitimized. When engaging with complex social problems or political issues, it is not surprising that many academics use critical discourse analysis as the qualitative methodology in their study (ibid). Van Dijk (2001) indicates key requirements that critical discourse analysis should fulfill in order to effectively grasp the social problem being studied. First, the research should concentrate on “*social problems* or political issues, rather than on current paradigms and fashions” (ibid: 35; emphasis in original). Border security policy and its application can be classified both as a social problem and as a political issue. It is a complex topic that encompasses many different actors, social institutions, and numerous key concepts as will become clear shortly.

Second, “empirically adequate critical analysis of social problems is usually *multidisciplinary*” (ibid). Border security policy is a complicated and controversial topic; concepts such as security, risk, threat, hazard, legitimate person, national security, innocence, the rule of law, crime, border control, surveillance, risk profiling, justice, and democracy (among others) interact in a complex, inter-disciplinary way, validating the multifaceted nature of this topic.

Third, “rather than merely *describe* discourse structures, [critical discourse analysis] tries to *explain* them in terms of properties of social interaction and especially social structure” (ibid). As previously indicated, I am committed to analyzing border security policy from a systemic standpoint. While my study is limited to text documents thus restricting analysis of social interaction, it is clear that the focal point of my study is social structure. In the third chapter, not only will I explain how the power institutions of border security were formulated post 9/11, which involved a major restructuring of the Canadian Government, but I will also deconstruct and

analyze the border security policies and accompanied legislation that herald the *Beyond Borders* deal and situate them within the overall political atmosphere of the security era.

Lastly, the fourth criterion put forth by van Dijk (ibid) is that critical discourse analysis should focus on the methods “discourse structures enact, confirm, legitimate, reproduce, or challenge relations of *power* and *dominance* in society” (ibid). As will become clear in the third and fourth chapters of this paper, structures of power and dominance are embedded into border security policy as the Canadian border is designed to facilitate the free flow of *legitimate* people and goods to and from Canada (Government of Canada 2011: *Beyond the Border*). In other words, mechanisms of surveillance are deployed at the border and act as a social sorting device to allow low risk travelers in while keeping high risk travelers out (Lyon 2007; Webb 2006).

An inductive method of research was implemented whereby border governance was surveyed and the concepts and theories derived from the research. Furthermore, it is important to note that this is a very active and large political area on which to focus. Given the vast array of political documents, agreements and intentions regarding enhancing border security and effectiveness in the security era, this study is limited to bi-national agreements between Canadian and American border security policies¹. While it is understood that such a narrow focus places heavy restrictions on the ability to fully encapsulate the political nature of North American partnerships, it is deemed to be integral to critically assess the various border security partnerships between Canada and the United States. As the Harper and Obama administrations announced in early 2011, “Canada and the United States are staunch allies, vital economic partners, and steadfast friends. We share common values, deep links among our citizens, and

¹ Even though the failed *Security and Prosperity Partnership* (SPP) is a trilateral agreement, it will be included in this study; the SPP was an unprecedented border security policy that clearly has a direct impact on Canadian border governance and is pertinent to this study.

deeply rooted ties” (Government of Canada 2011: *Beyond the Border*). The United States and Canada share a border that is 8,891 kilometers (5,525 miles) in length; it is both logical and necessary to work together to keep the borders closed to criminal activity while maintaining the free flow of *legitimate* people and goods. Therefore, this study’s constricted concentration on Canada-U.S partnerships is regarded both vital and warranted.

The focal political piece of this thesis is the *Beyond Borders* deal that is currently in the preliminary stage of implementation. To fully appreciate the manner with which this bi-national agreement is situated in the security era, it is imperative to understand the political shift that took place prior to 9/11 as well as scrutinize the border security related political developments that surfaced directly after 9/11. Specifically, the *Canada–U.S. Smart Border Declaration* and the failed *Security and Prosperity Partnership (SPP)* will be deconstructed and applied to the assessment of the *Beyond Borders* deal.

Chapter 2

Literature Review

Safety from external danger is the most powerful director of national conduct. Even the ardent love of liberty will, after a time, give way to its dictates.

~ Alexander Hamilton 1787

2.1 Introduction

Canada and the United States of America share a border that is 8,891 kilometers (5,525 miles) in length. They sustain the world's largest bi-national trading relationship (Ek and Fergusson 2010) and Canada holds the top export market for 34 U.S. states (Government of Canada 2011: Beyond the Border). From an economic, geographical, historical, and practical perspective, a cooperative, well established relationship between Canada and the United States is just as much rational as it is essential. It is in each country's best interest to formulate efficient and effective cross-border relations.

Prosperity and security are key motivating factors for Canada and the United States to engage in cooperative and proficient bi-national agreements. It is generally accepted that the motivating factor for Canada to engage in bi-national border governance with the United States is prosperity, while security is the key factor for the United States (Robertson 2011b, Leonard 2011, Friedman 2010). Regarding whether security trumps prosperity or if prosperity trumps security, there is supporting literature on both sides of the argument. The economic argument in brevity states that the pursuit of an economic advantage is incentive for cross-border initiatives (PRI Project North America 2006: 2). Kent (2011) states, "in the case of the United States and Canada, the shared continent is mirrored in an entwined economy" (25). Regardless of the motivating

factor for engaging in bi-national border governance, the reality, and the clear importance, is that approximately 300,000 people cross the Canada-U.S. border on a daily basis and roughly \$1.5 billion of merchandise trade occurs – daily (Nanos 2011). As Prime Minister Harper expressed during an interview on September 8, 2011,

obviously when we share a border with the United States, they have certain security concerns, most of which I think are quite valid. It's incumbent upon us, if we want true interaction with them, to respond to their concerns and to try and work with them on joint systems around the border. I think this just makes common sense (CBC News 2011).

Regarding security, it is argued that as long as the Department of Homeland Security (DHS) maintains power and control over border governance, which it does and will for some time to come, “although lip service is paid to allowing the flow of legitimate goods and people over the border, DHS was established to chant the mantra of security, security, security” (Friedman 2010: 53). Security remains a supreme concern for Americans; “from the fall of the Twin Towers to the present day, security trumps everything, including trade” (ibid: 51).

Corroborating the above with ex-prime minister, Brian Mulroney's, advice to Stephen Harper regarding the relationship that Canadian prime ministers ought to create with American presidents:

This is the most important relationship, the most important responsibility that a prime minister has on his schedule. This is it, the Canada-United States relationship. *If you don't get that right, you're going to have problems...*The relationships [between prime ministers and presidents] are *absolutely indispensable*. If you don't have a friendly and constructive personal relationship with the president of the United States, nothing is going to happen (as cited in Robertson 2011a: 77, emphasis added).

Regardless of which element holds trump - be it security or prosperity - the bottom-line is, “compatible approaches lead to greater prosperity on both sides of the border” (Government of Canada 2011: Beyond the Border).

2.2 Border Governance and its Intrinsic Complexities

Before delving into an analysis of the *Beyond Borders* deal between Canada and the United States, it is pertinent to highlight *some* of the key challenges facing border governance in the security era. As noted, a key challenge for Canada-U.S. cross-border relations is balancing Canada's desire for economic access to the American market with the American desire for security. However, another important challenge that has received much academic attention is locating the balance between the fundamental rights and freedoms guaranteed to Canadian citizens and maintaining the security of Canada.

In February 2007, in the case *Charkaoui v. Canada*, the Supreme Court recognized that one of the essential responsibilities of government is to ensure the security of its citizens (Public Safety Canada 2009: Security Certificates). However, a seemingly simple statement, "ensure security of its citizens", renders itself complex - for what exactly does security entail? One may argue that security means protection from tangible dangers such as criminal activity or terrorism, yet another may argue that security is to be free from power and control mechanisms of the state that potentially infringe fundamental freedoms. In addition to highlighting an inherent conundrum, the focal point is to make the reader aware of the idiosyncratic nature of security. In other words, as demonstrated by the differing academic opinions of what makes one secure, 'security' is internalized differently depending on context, experience, and knowledge. It is certainly understandable that the Supreme Court of Canada recognized the important role the Canadian government holds in ensuring the security of its citizens; however, it is important to note that the manner in which 'security' is interpreted and facilitated by the government is not a straightforward, objective task.

To bridge the gap between abstract concepts of security and what border officials think of as a straightforward “practical problem” it is worth reviewing some key points of the Canadian Justice System (CJS). Governed by the rule of law, the CJS indicates that *first* a crime is committed and *then* the justice system is implemented. However, in the security era the first task has come to be seen as identifying a crime and then second, to manage it. Section 11(d) of the *Canadian Charter of Rights and Freedoms* holds, “any person charged with an offence has the right to be presumed innocent until proven guilty according to law...”. Given that the security era is entrenched in notions of risk governance, is the focus on preemptive security policy and crime control measures in conflict with the *Canadian Charter*?

Proactively preventing crime from occurring can be argued as a vital crime control strategy; yet deploying force prior to the commission of a crime arguably contravenes section 11 (d) of the *Canadian Charter*. From that perspective, it could be argued (and is by many) that crime control policy under the mindset of the security era is wrong and infringes *Charter* protected rights and freedoms (Bell 2006a; Paye 2007; Baker 2003). However, if the crime in question is a premeditated murder or perhaps a planned terrorist attack, then supporters of the pre-crime approach hesitate to argue that it is wrong.

The state has tools of exception, such as section 33 of the *Canadian Charter*, commonly referred to as the ‘notwithstanding clause’ (Johansen and Rosen 2008). Section 33 indicates, “Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter”. Essentially this means that the state can supersede rights guaranteed under the *Charter* if it is deemed necessary. The aim here is not to facilitate a legal discussion about what the state can or cannot

do. The more modest intent here is to illustrate the notion that the mindset of the security era is founded in risk governance.

Not surprisingly, inherent to risk governance is the concept of risk, which is frequently “applied to characterize future consequences of activities, decision options, or interventions” (van Asselt and Renn 2011:437). To reiterate, the practical element of this argument is the altered manner in which the CJS tends to be employed in the security era; the theoretical constituent of this example is the embedded nature of the concept of risk in the mindset of the security era.

In summation, the complexities involved in fostering and maintaining indispensable cross-border relations with the United States, interpreting the constitutional viability of security laws by the Supreme Court, and the preemptive mindset of the security era, which raises concern over infractions of Canadians rights and freedoms, provides clear evidence of the very real conundrums inherent in governing Canada in the security era. These examples were provided to evoke the reader into a pragmatic frame of mind deemed essential to realistically appraise active border governance. Nevertheless, it is important to understand the background of this current political atmosphere to fully appreciate the complexities of border governance in the security era.

2.3 Contextualizing the Political Atmosphere: Welfare to Security

It has been widely argued that the dismantling of the welfare state in the late 1970s resulted in a shift to a fundamentally different era of crime control policy (Rose 2000; Garland 2001; Hornqvist 2004; Kemshall 2003). Expressions such as “liquid modernity” (Bauman 2007), the “safety state” (Raab 2005, as cited in Lyon 2007), “an electronic panopticon, risk society, actuarial justice, or society of control” (Rose 2000: 321) are among many terms being used to depict the current state of crime control, which is the broad category that border security policy falls under.

Essentially, by the 1970s, “a hybrid, ‘penal-welfare’ structure, combining liberal legalism of due process and proportionate punishment with a correctionalist commitment to rehabilitation, welfare and criminological expertise” had become the theoretical underpinning of crime control policy (Garland 2001:27). This era was characterized by an extensive expert consensus regarding how crime control fundamentals should operate as well as the goals and values that should formulate criminal justice (ibid). Arguably, the goal of the welfare state was to *correct* the problems that challenged the moral fibre of society. Further, in the welfare state, “the rehabilitative ideal was not just one element among others. Rather it was the hegemonic, organizing principle, the intellectual framework and value system that bound together the whole structure and made sense of it for practitioners” (ibid: 35).

Throughout the last thirty years, major changes have occurred in the field of crime control and Garland (2001) argues that two major social facts are responsible for this change. The first is “the normality of high crime rates” and the second is “the acknowledged limitations of the criminal justice state” (ibid: 106). Garland argues that crime has become a “routine part of modern consciousness” (106); crime is now “regarded as an everyday risk that must be routinely assessed and managed” (ibid). At the same time high crime rates became understood as a normal social fact, “the criminal justice system came to be viewed primarily in terms of its limitations and propensity for failure rather than its prospects for future success” (ibid: 107). It was now accepted that governmental agencies could not control crime on their own (ibid). This is a key distinction between the welfare era and the security era as the expected role of the State has changed dramatically.

Garland (2001) argues that late modernity

transformed some of the social and political conditions upon which the modern crime control field relied. It also posed new problems of crime and insecurity, challenged the

legitimacy and effectiveness of welfare institutions, and placed new limits on the powers of the nation-state (75).

But what he does not make explicit is the impact of globalization, which is a key contextual element to understanding the mindset of the security era. Globalization is “the intensification of worldwide social relations which link distant localities in such a way that local happenings are shaped by events occurring many miles away and vice versa” (Giddens 1990: 64).

Bauman (2007), however, provides a clear argument regarding the role of globalization in the shift from the welfare state to the security era. For Bauman (ibid), the security era is depicted as ‘liquid modernity’ or the ‘personal security state’. He argues that the problems facing society today operate on a global level and therefore cannot be solved on a local level; further, he contends that fear and uncertainty are inherent characteristics of the security era (ibid). More specifically, Bauman (ibid) argues that anxieties related to insecurity of the present and uncertainty about the future produce an unstoppable fear in liquid modernity. This arguably leads to the consumption of various personal security mechanisms in an attempt to appease this sense of anxiety (ibid). In other words, in an effort to engage in personal protection, fear leads to decisive action and the need to act is born out of negative globalization (ibid).

As Bauman (ibid) states, “on a negatively globalized planet, all the most fundamental problems are global, and being global they admit of no local solutions; there are not, and cannot be, local solutions to globally originated and globally invigorated problems” (25). Border security must operate on a globalized level - it is logically impractical for the Canadian government to solely employ its own border security policy without any consultation with the American state. Bauman’s (2007) argument is congruent with Garland’s (2001) argument that the state is no longer deemed capable to solely protect its citizens. Pragmatically, this means that the nation state is rendered inadequate to provide security to its citizens and therefore, in a negatively globalized

society, fear and uncertainty are permanent fixtures. Further, this is also in harmonization with the theoretical framework of risk society and risk governance, which will be discussed in detail towards the end of this chapter.

By directly relating Bauman's (2007) liquid modernity thesis to the issues highlighted in this paper regarding the security era, two themes become evident that are both an extension of fear and negative globalization: (1) security versus liberty, and (2) the retreat of the state. More specifically, on a negatively globalized planet various battles between security and liberty occur that ultimately constrain personal freedoms. In the security era there is a fixation with security whereby governments are constantly trying to find new ways of attaining security. However, Bauman and numerous other academics express concern over placing such an emphasis on security (Bell 2006a; Basaran 2011; Lyon 2007; Paye 2007; Webb 2006); aside from the reality that security can never be attained, by favoring security over liberty in an attempt to nourish uncertainty, the original problem (the source of uncertainty and fear) is neither solved nor cured but only perpetuated.

Applied directly to the delegation of security policy, "the desire to control immigration, to eliminate terrorism, and to combat international organized crime has consequences that appear to cross-cut older social and regional divisions and raise questions about citizenship, human rights, and civil liberties" (Lyon 2007: 162). Bauman (2007) explicitly states that security is unattainable in a negatively globalized planet yet we live in a culture that is fanatical over attaining security. Regarding the formulation of a bi-national cross-border agreement, this essentially implies that the American obsession and insistence that security trump all is problematic.

Through the retreat of the state, the state is dismantled and a newfound importance is placed on individualism where citizenship is no longer guaranteed (Bauman 2007). Simply put, the security era in itself challenges the conception of the nation state as a sovereign and autonomous entity. The transformation from the mindset of the welfare state into that of the security era places emphasis on an individualistic schematic by which individuals must seek out personal security measures as they can no longer depend on the state to provide for their security (Bauman 2007; Rose 2000). In other words, with the dismantling of the state, the individual is left to seek, find and practice individual solutions to socially produced problems (Bauman 2007). This is congruent with Rose's (2000) argument of the significance of prudentialism in the security era.

In explaining contemporary political discourse, Rose (2000) depicts the state as “partner and animator rather than provider and manager” (327). He specifically states,

individuals, families, firms, organizations, communities are urged to *take upon themselves* the responsibility for the security of their property and their persons, and for that of their own families. Protection against risk of crime through an investment in measures of security becomes part of the responsibilities of each active individual, each responsible employer, if they are not to feel guilt at failing to protect themselves, their loved ones, and their employees against future misfortunes. And, in exercising prudence, individuals cannot look solely to the public police and the formal mechanisms of the legal system: they must educate themselves with the assistance of experts and must actively engage in partnerships with expertise to maintain order and combat threats to individual and collective security (ibid, emphasis in original).

Recall Garland's (2001) argument that the ontological framework of the welfare state was to rehabilitate (include) the criminal agent, which is different than that of the security era that seeks to manage (exclude) the criminal agent. Rose (2000) argues that a “society of security [works to] exacerbate, rather than reduce, the division between the included and excluded” (328).

Furthermore, Bauman (2007) argues that modern capitalism prevails through the market and creates a predicament of ‘human waste’ removal (28). One would undoubtedly have great

difficulty referring to human beings as human waste without pausing to contemplate the immoral nature of such a statement. Yet this is precisely what makes Bauman's articulation of the security era so vital; many, if not most, academic writers do not state the issues facing society in such a candid manner. Bauman (2007) is saying that the people who do not fit into the schematic of modern capitalism become a problem. This is clearly applicable to and evident at the site of the border where risk profiling occurs and various surveillance technologies are utilized to essentially sort the people passing through (Lyon 2007; Basaran 2011) and place them on a continuum from 'low risk' to 'high risk' (CBSA 2010: Programs and Services).

Understanding the current political atmosphere makes it easier to appreciate why we have shifted into a security era. It makes sense why we are no longer concerned with the *function* of criminological problems and are instead focused on the *management* of such problems. Applying this theoretical framework to the disposition of the Criminal Justice System (CJS) in the security era helps to explain why we want to identify the crime before it is committed and *then* manage it; quite simply, the security era is concerned with, if not obsessed with, prevention. In other words, the security era "is concerned with techniques to identify, classify, and manage groupings sorted by dangerousness. The task is managerial not transformative... it seeks to *regulate* levels of deviance, not intervene or respond to individual deviants or social malformations" (Feely and Simon 1992: 452 as cited in Rose 2000: 331, emphasis in original). Since the mindset of the security era holds that the state is no longer in a position to be the lone provider of security to its citizens, we become prudent citizens and take measures to ensure our own personal security.

In the security era, the quest for security has essentially become a juggernaut. As Lyon (2007) states, "perennial and universal desires for security, orderliness, risk management and the taming of change have been magnified and reinforced since the 1980s, so that regulation of every

area of life has become a watchword” (12). As such, in an effort to attain security, surveillance mechanisms have been ushered in to collect, sort, analyze, and share massive amounts of data, which has created an extensive reliance on surveillance data (Lyon 2007). Basically, attempting to increase border security has led to a heavy reliance on technology to create the ‘smart border’ (Lyon 2007; Basaran 2011). What this has led to in practice is the alteration of the spatial dimension of the border to “extend the function of border controls inside the state” (Basaran 2011: 37). In the security era, surveillance mechanisms deployed at the border act as social sorting devices (Lyon 2007). As Basaran (2011) argues,

several techniques for the government of populations are employed to filter unwanted populations, to securitize them and place them under illiberal rule. The exclusion of specific populations could not take place without identification, documentation and control of the general population as a whole (36).

The legal elements of border security policy in the security era are important to review and explain. It is another pertinent layer to conceptualizing border governance in the security era. With that, the following section is intended to highlight the rule of law and how it is deemed to function in border governance.

2.4 Security Versus Liberty

The rule of law is “the foundation of the Canadian legal system” (Griffiths 2007: 24); the central concept is that no person, regardless of power or status, is above the law (ibid). The rule of law is undoubtedly a valued, vital and binding facet of Canadian society. Canada’s obligation to the rule of law is clearly demonstrated in the *Constitution Act* as it initially states “Canada is founded upon principles that recognize the supremacy of God and the rule of law”. As Hornqvist (2004) outlines, “we do not become the focus of police attention or find ourselves in prison for no

reason. There has to be a crime involved. The justice system is only activated once a crime has been committed” (31).

As discussed earlier, the security era does not maintain the same mindset as that of the rule of law. Specifically, the security era seeks to identify a crime *and then* manage it (Hornqvist 2004). Recall that this is an important distinction as it brings in the notion of preemptive action. It is argued that our typical way of dealing with crime through the rule of law is not sufficient in the security era (*ibid*). To exemplify this argument, let us take murder and terrorism into consideration. A murder is a horrific crime that is dealt with according to the rule of law; however, murder is accepted as a normal social fact (Giddens 1990; Garland 2001). Terrorism on the other hand, is not accepted as a normal social fact. Rather, it is deemed to be “a particular form of political violence: the intentional random murder of defenseless noncombatants...with the intent of spreading fear of mortal danger amidst a civilian population as a strategy designed to advance political ends” (Meisels 2004: 20). Although murder is an element of terrorism, albeit a key one, the political element inherent to terrorism separates it from murder; furthermore, the political element is what arguably prevents the rule of law from effectively dealing with the crime. The terrorist is communicated and understood to be a callous enemy different from the *ordinary* criminal. As such, terrorism is deemed to be an existential threat (Hornqvist 2004) and arguably requires existential measures to deal with it. Accordingly, when it comes to politically motivated crimes, “security, not the law, is now the primary principle from which the use of physical force and other coercive measures proceeds” (Hornqvist 2004:37).

2.4.1 The Impact of the Shift into the Security Era

Now that the underlying argument has been pragmatically framed, the debate between security and liberty can be articulated by discussing the impact of the transition into the security

era. As a result of the security mentality, Hornqvist (2004) argues that the rule of law has been ruptured both upwards and downwards. In the most basic terms, Hornqvist (2004) implies that the rule of law has been fractured upwards by collapsing the continuum between acts of war and crime and downwards by the erasure of the line between crime and minor public order disturbances. Since border security is more closely associated with the formal mechanisms of crime control policy, this discussion will focus on fracturing the rule of law upwards. As Basaran (2011) notes, “the politics of borders has become an important security practice of liberal states” (1).

In the last section, I stated that the difference between murder and terrorism was the political element inherent in acts of terrorism; Hornqvist (2004) exemplifies this by pointing out that had President Bush deemed the terrorist attacks of 9/11 as a crime as opposed to an act of war, the burden of investigation would have been designated to the police and the inquisition of guilt would have occurred in a criminal court (ibid). Furthermore, he argues, “in the context of the new security mentality, the difference between the two [crime and acts of war] becomes less tangible. The line distinguishing crimes from acts of war is beginning to vanish in the pursuit of terrorism” (ibid: 32). Dealing with terrorism “has become a matter for both police and military” (ibid), making the line between crime and acts of war transparent. The distinguishing feature between crime and war is politically determined and it becomes a question of *intent* (ibid). The problem, Hornqvist argues, is that it is difficult to distinguish “which motivations are *not* of a terrorist nature” (ibid: 32). “The sluice gates are opened for the exercise of power unimpeded by considerations of the law” (ibid: 34).

2.4.2 Security Certificates & Myth Debunking

Thus far it has been the approach of this thesis to frame key concepts in practical terms; therefore, it is felt that the best method to explain the debate between security and liberty is via pragmatic examples that challenge crime control policy. This section will also demonstrate how mandates of liberty and security conflict in the security era as well as highlight key academic arguments pertaining to this epic debate. Additionally, I will exemplify the way the Canadian state has arguably fractured the rule of law in order to protect Canada from terrorism by examining the security certificate process.

The security certificate process is an immigration proceeding as it is contained in the Immigration and Refugee Protection Act (IRPA). A security certificate can be issued to non-Canadians who are deemed to pose a serious threat to Canada and Canadians (Public Safety Canada 2009: Security Certificates). It is held that this provision is only carried out in “exceptional circumstances where the information to determine the case cannot be disclosed without endangering the safety of any person or national security” (ibid). Recall earlier when it was suggested that existential crime (terrorism) requires existential methods (security certificates). The security certificate process is one of heated debate as it is argued that it infringes rights guaranteed under the *Canadian Charter* and thus, evades the rule of law (Bell 2006).

The security certificate process is a security mechanism by which Canada employs formal, proactive social control. Essentially, the liberal democratic paradigm deems that non-citizens are “outside their borders and therefore outside the remit of their legal rights procedures” (Basaran 2011: 1). Consequently, as the security certificate process is contained in the IRPA polity dictates it to be an immigration proceeding and is therefore not subject to criminal proceedings. Hornqvist (2004) states, “through loopholes of this kind, the use of coercive

measures is liberated from the constraints of the law” (36). In other words, by deeming the security certificate process as a matter of the IRPA, persons finding themselves accused of posing a terrorism risk to Canada can be detained for an undetermined amount of time, which essentially voids them of basic legal rights.

Colleen Bell (2006a) argues “the security certificate functions as a moment of legal exception for the assertion of sovereign power and legitimation; this compromises the rule of law by denying basic legal protection and judicial impartiality to non-citizen detainees” (65). Before delving further, it is pertinent to briefly outline the politics of borders as it pertains to non-citizens. Basaran (2011) argues that “borders and the distinction between inside and outside are strategically used to change the ordinary balance between security and liberties in liberal states: to increase policing powers and to limit access to legal rights and procedures” (1). She argues that border governance can employ liberal rule to deny fundamental justice and enact unlimited detention (ibid). Contrary to the popular argument that this type of state intervention, such as the security certificate process, discredits the rule of law, Basaran (ibid) argues,

these violations of human rights and civil liberties are committed by liberal democracies that continue to operate under the rule of law and value liberal rights, but at the same time restrict or even suspend fundamental rights for a specific category of people at specific places. The politics of borders highlight that illiberal practices are embedded in ordinary politics of liberal democracies and, moreover, how illiberal practices can be legally authorized (Basaran 2011:1).

To be clear, Basaran argues that it is within the rule of law to limit liberties to certain categories of people - namely non-citizens.

As demonstrated by Bell’s (2006a) argument that the security certificate process functions as a moment of legal exception, “the infringement of liberties is portrayed as an exception to liberal rule, with the assumption that liberal and illiberal rule are distinct ways of governing, and that safeguarding liberties is possible through return to liberal rule and the rule of

law” (Basaran 2011: 5). Yet Basaran (2011) demonstrates that inherent to the rule of law is a paradigm that allows for the breach of liberties; she indicates that it is the legal system itself that hinders access to liberties. Put differently, “the limitation of liberties is hence not an extraordinary state of liberal rule, but both liberal and illiberal effects are produced through the same, regular democratic and legal processes of liberal democracies (ibid: 6).

The problem is, how is it possible for liberties to be restricted under liberal rule? This is the main question that Basaran (2011) answers in her book, *Security, Law and Borders: At the limits of liberties*. In its most basic tenet, she argues that the legal architecture of border zones creates lawless space (ibid). “The legal design of the border zone creates a space that justifies excessive policing powers and concurrently restricts the outreach of rights for a specific category of people” (ibid: 6). In keeping with the conception of borders in risk governance theory and the theoretical conception of the security era, Basaran (2011) argues that the border is not a static, physical fixture. Rather, in a globalized society, “a state’s borders are multiple, shifting and fluid” (ibid: 7). She further argues,

border zones – whether on the territory, on the seas or in third countries – are depicted as outside the liberal state, outside its rule of law and outside its responsibility, implying that the laws of the liberal state do not apply here (ibid: 31).

Conceptualizing the border not as a geographic entity but as a political entity is vital to understanding Basaran’s argument.

A widely argued limitation of current border security policy is the manner with which people are profiled based on race. Moreover, as the Canadian government engages in a perimeter security partnership with the United States, the physical border becomes increasingly fluid and creates ever-increasing areas of lawless space (Basaran 2011). In these lawless spaces, the notion of citizen, permanent resident, or foreign national become potentially life-altering distinctions.

Returning to the discussion of security certificates, it is undeniable that security certificate procedures potentially compromise the basic legal rights of detainees. Canada's legal system was inherited from the British system of common law; accordingly, our law is found both in statutes and in judicial precedents, which is better known as case law (Griffiths 2007). As a result, "through their decisions in cases, judges can interpret, modify, extend, restrict, or strike down statutory laws" (Griffiths 2007: 186). Furthermore, under the notion of *stare decisis*, once the Supreme Court of Canada has ruled on a specific legal issue, "all courts below it are bound to apply that ruling in subsequent cases" (Griffiths 2007: 186). As noted in Chapter 1, in the case of *Charkaoui v. Canada*, the Supreme Court recognized that the security certificate process required amendment to better protect the rights of persons subject to a certificate (Public Safety Canada 2009: Security Certificates). At the same time, the Supreme Court recognized that the government held the security of its citizens as its primary responsibility.

Essentially the contention of the security certificate process is founded in its evidentiary process (Bell 2006; Public Safety Canada 2009: Security Certificates). Under a security certificate, persons being accused of posing a serious threat to Canada are not permitted access to the evidence held against them as it may compromise the ability of the Canadian government to protect its nation and citizens (Public Safety Canada 2009: Security Certificates). This is a vastly different process than that of criminal law in which the defendant has full access to the evidence held against him or her. However, security certificates are only used in exceptional circumstances whereby "the information cannot be disclosed without endangering the safety of any person or national security". In fact, the security certificate process has only been implemented 27 times in the 33 years it has been in effect (*ibid*). Five of those were issued

between September 2011 and November 2005 (Department of Justice 2005: Joint Statement by the Hon. Anne McLellan).

The security certificate basically acts as the ‘ace in the pocket’ of the security enforcement community at the national level – it is the exceptional tool utilized in desperate cases whereby the security of Canada and Canadians are deemed to be at risk. Arguably, as a mechanism to avoid undue harm to the Canadian state, the security certificate can be justified. On the other hand, as a mechanism that provides undue harm to the specific individual it is applied against, it is not justified. This essentially reinforces the tautological argument that seems to be embedded in the security era – how much liberty will we forgo in the name of security?

Much academic attention has been paid to the ‘security versus liberty’ topic. Referring to the abundance of literature on this topic, Neocleous (2007) indicates, “either explicitly or implicitly, the assumption is that we must accept that we have to forego a certain amount of liberty in our desire for security” (132). However, Neocleous (ibid) argues that speaking of a *balance* is an ‘ideological trope’ because historical analysis demonstrates that the core tenet of liberalism is security, not liberty (ibid). Layering Neocleous’ position with Basaran’s (2011) argument that “the infringement of liberties is a routine liberal practice” (12) elicits an enlightening perspective. Given the vast amount of academic research indicates that the manner with which crime control policy is implemented in the security era is done so in a way that fractures the rule of law, the notion that it is the very rule of law that allows these policies and procedures to be implemented in such a way is provocative.

One cannot dismiss the arguments presented by Basaran (2011) and Neocleous (2007); but regardless of whether or not the security versus liberty debate is rendered insignificant, it still captures much academic attention and, more importantly, it still carries weight in border security

policy. For example, the summary report on the *Beyond Borders* deal indicates that the identified concerns such as privacy and sovereignty (which are part of the security versus liberty debate) among others will be given serious consideration by the Canadian government. It will be interesting to see how this promise is fulfilled. Further, the report suggests that these concerns are expected to impact the negotiations with Canada and the United States on the upcoming joint action plan of the *Beyond Borders* partnership. However, regardless of the optimistic attitude the report conveys, whether or not the claims are true will be evident once the *Beyond Borders Action Plan* is published. This argument will be revisited in the final chapters.

2.5 The Epic Systemic Failure of 9/11

In the security era the concern is not why Bin Laden organized an attack on the United States of America; rather, the concern is over the systemic breakdown that was attributed to important intelligence information not being shared between various agencies. Arguably, had such a prolific systemic failure not occurred the twin towers might still be standing (Hulnick 2004). As such, intelligence gathering and information sharing is an integral component of calculating and managing risks.

The events that took place on September 11, 2001 require no introduction as images of the destruction of the World Trade Centers have been lacerated into our memories. Hindsight tends to be revealing and it is very easy to look back and make predictable statements after-the-fact. Naturally, the inner workings of the U.S. intelligence community were extensively reviewed to determine what went wrong and what could have been prevented. It was never stated that the terrorist attack could have been prevented; however, “as evidence piled up, it became clear that the failure was caused by a variety of factors, some of which might have been overcome by better teamwork, more effective information-sharing, and a more rigorous system for ‘connecting the

dots' ” (Hulnick 2004: 3). The intelligence system was designed to fight the Cold War and did not contain the flexibility needed to combat different threats (ibid). Notions of competition impeded the effectiveness of intelligence sharing (ibid) and “animosity between agencies, bureaucratic rivalries, clashing cultures, risk-avoidance behaviours, reduced resources, as well as a lack of critical data, all contributed to the intelligence communities’ inability to find, track and stop the terrorists” (ibid: 3). The central feature here is not whether 9/11 could have been prevented or not; instead, the event demonstrated what the 9/11 Commission saw as the frightening state of the intelligence community and propelled the facilitation of numerous changes to fix the lack of integral information sharing and to break down the barriers leading up to the systemic failure. The fact of the matter is that 9/11 is a statistically rare event yet it has motivated changes in polity, which is congruent with the notion that the security era is concerned with risk management and the actual occurrence of events are less important than the calculation and prevention of risks.

2.6 Key Concepts Defined

This section is a preamble to the theoretical overview section to provide an understanding of the major concepts that emerge from studying border governance in the security era. Without explicitly defining what is and is not meant by words such as security, risk and border zones, the main arguments of this thesis risk being lost in translation.

2.6.1 Border Zones

The theoretical conceptualization of border zones is best exemplified utilizing the work of Basaran (2011). Her conception of the manner with which liberal rule permits the infringement of liberties for a particular categories of people, namely non-citizens, has already been discussed earlier in this chapter. Recall her assertion that border zones are “depicted as outside the liberal state, outside its rule of law and outside its responsibility, implying that the

laws of the liberal state do not apply” (ibid: 31) in the border zone. For Basaran (2011), the border is a mechanism of the state to assert its sovereign power and create a lawless space whereby liberties are restricted. She argues,

legal borders are a widely accepted practice for restricting liberties under liberal rule. The distinction between inside and outside is strategically used to change the balance between security and liberties, to increase sovereign policing powers and limit access to liberal rights and procedures. Legal borders define who is inside or outside the state – especially for refugees, migrants and other foreigners, this distinction is crucial as it either provides access to the liberal society and rights, or places them outside it (ibid: 31).

Borders were originally conceived of as defining the property of the state (Basaran 2011).

However, in the security era borders are neither instinctive nor impartial – they are political. As Basaran explains “they are social and political products, historically and spatially contingent, reflecting relationships of power” (ibid: 34). “Borders are not innocent images, but reflect a specific social, political and global order, a particular way of seeing and thinking about the state and its space” (ibid). In the security era, borders are multiplied, mobile, and selective (ibid). This is consistent with the broader understanding of borders in contemporary times. Bauman (2007) refers to the fluidity of borders; Bigo (2007) emphasizes the role of the border as a mechanism of selective surveillance of high-risk individuals; Salter (2004) indicates that the border security policies are designed to make the border function in a more discerning (selective) fashion; and Lyon (2007) would argue that through mechanisms of surveillance, the border acts as a social sorting device. Specifically Lyon (2007) indicates, “the ‘surveillance’ dimensions of (inter)national security arrangements have everything to do with ‘social sorting’ ” (162).

Effectively, this consolidates to surmise that border zones are not fixed and are in a continuous state of renovation, negotiation, and contestation (Basaran 2011). The technology deployed in border zones “allows the state to govern selective populations through a security regime, whilst the rest of the state can be governed by liberal rule” (ibid: 47). Essentially, border zones are

Governed by the state practices for regulating the conduct of people by means of responsabilization and governmentality allow[ing] for a distinction between fundamental human rights norms, applicable in principle to all, and the denial of human rights for a specific category of people (ibid: 85).

Therefore, through the dialogue of the security regime the border is rendered a zone that validates increased surveillance and control mechanisms while restricting rights for people deemed to threaten the security of legitimate citizens. As such, it is not surprising that the mandate of Canada Border Services Agency (CBSA) is, “the Agency is responsible for providing integrated border services that support national security and public safety priorities and facilitate the free flow of persons and goods, including animals and plants, *that meet all requirements under the program legislation*” (CBSA 2011: About the CBSA, emphasis added). The CBSA is charged with the duty to assess individuals entering Canada and only permit those who “meet all requirements under the program legislation”; in other words, the CBSA must act as a social sorting mechanism and only let in people who are deemed to pose a low risk (legitimate) to Canada and Canadians alike.

Bigo (1999) argues that border policing has transformed “from the control of and hunt for individual criminals...to the surveillance of so-called risk groups, defined by using criminology and statistics (as cited in Salter 2004: 74). Or as O’Connor and de Lint (2009) state, the border zone “function[s] as technologies of governance that involved territorializing formations and knowledge functions in the sovereign aim of securing the exception” (40). These arguments are all valid and warranted and highlight the ambiguous nature of the security era; but at the end of the day the CBSA must enforce its mandate and carry out the responsibilities mandated by the Government of Canada. Therefore, to try to understand ‘the border’ with any other perspective than a systemic one is naive and renders the analysis insignificant. It is not feasible to remove the

pragmatics of the border from the theory of the border and come out with a holistic understanding of border zones.

2.6.2 *Security*

Security is a vague term with differing meanings. As such, it is important to provide a quick overview of security as a concept. Zedner (2003) provides a breakdown of security as an objective condition, which is a “form of avoidance or non-exposure to danger” (155). Zedner (2003) indicates that “predicating security on the pretense of that which threatens it” (155) is the most common use of the term. However, security also contains a subjective definition, which “suggests both the positive condition of feeling safe, and freedom from anxiety and apprehension defined negatively by reference to insecurity” (ibid). Both the subjective and objective conceptions of security are important within this paper and neither is mutually exclusive. In fact, Zedner (2003) argues that the subjective form of security could be correlated with the objective form of security because as feelings of insecurity (subjective security) rise, the need for security measure (objective security) arguably rises.

The subjective definition of security is related to the feeling of fear. Zedner (2011) highlights an axiom of criminology whereby the little old lady, who is statistically the least likely to be victimized by crime, reports the highest feeling of fear of crime yet the young adult male who is most likely to be victimized by crime, reports the lowest fear of crime rating. Bauman discusses the impact of fear on the collective majority and discusses the behaviours that we tend to engage in to ensure our personal security (gated communities, car alarm systems, avoiding dark alleys, etc). However, the paradox remains that fear of crime literature demonstrates a relatively low fear of crime in the collective majority yet security policy enacts numerous measures to ensure the security of citizens to reduce the anxieties that apparently are not being felt. Regardless

of whether or not citizens report a high degree of subjective insecurity, people act differently in the security era. More specifically, people have changed their packing strategies when boarding an airplane; they have subscribed to the various security mechanisms of the state by purchasing the required identification for travel (passports, NEXUS cards, enhanced drivers license); they might be more apprehensive around populations identified to pose a security risk; and more and more they are living in gated communities that are deemed to be safer (Bauman 2007).

All of these changes in behaviour that are common in the security era are not necessarily due to feelings of fear and insecurity, it could simply be an adaptation to a changing environment that is deemed to be vulnerable. Regardless of the reason for the change in behaviour, the reality is that even if we do not report being ‘fearful’ of a terrorist attack or insecure about flying, our behaviour at the airports, on the plane, and proceeding through border checkpoints has altered. Perhaps the reason that the fear of crime literature does not support the alleged insecurities of society is because the new level of anxiety, insecurity, or fear has been normalized in the security era. Could it be that a certain level of fear is deemed to be normal in the security era? Just as Garland (2001) argues that crime is deemed to be a normal social fact, we may have embarked upon a time where a general level of fear is also considered a normal social fact.

Returning to security as a concept, providing a definition for the purpose of this paper proves to be somewhat difficult because at this point it should be obvious that “the concept of security defies simple definition. Its meanings are various, conflicting and politically contested” (Zedner 2003: 158). Further, “security is thus not only an analytical category, but also a category of practice, a way of framing and responding to social problems” (ibid). This captures the essence of this study: to realistically appraise the impact of the mindset of the security era on border security policy. In other words, to conceive of security purely as an analytical tool and to

only employ a discourse analysis of border security policy would not provide justice to the social problem at hand. Although it may be easier to “grapple with the raw facts of the social situation” (Zedner 2003: 166) it must be understood that “discourse cannot be conceived in isolation from practice but is an inextricable component of social action” (Melossi 2001 as cited in Zedner 2003: 166). Put differently,

the language of security is embedded in the place, institutions and practices of which it is the product. It follows, therefore, that in order to understand this language it is not enough to simply observe the superficially different meanings given to security in different languages; one must study the institutions and practices of security in their own right (ibid: 166).

Therefore, this study will not provide a definition of security for the purposes of this paper; rather, a definition of security will arise from studying the institutions involved in creating and maintaining security.

2.6.3 Risk

Risk is also a vague term with differing meanings. Risk thinking is prevalent in the security era – we are preoccupied with assessing risk and minimizing harm has become an obsession in Canada and elsewhere. Risk thinking is essentially concerned with “bringing possible future undesired events into calculations in the present, making their avoidance the central object of decision-making processes, and administering individuals, institutions, expertise and resources in the service of that ambition” (Rose 2000: 332). The running theme that is fairly consistent within the literature review on risk discourse is the attempt to calculate an event deemed to *potentially* occur in the *future*. Just as with security, risk must also be pragmatically understood. “Risk definitions are practical outcomes of actual engagements with the world, and concern agency and planning, intentionality and action, decision-making, and any other matter that constitutes the social” (Boholm and Corvellec 2010: 186).

Parallel to the understanding of security, this thesis is interested with the way risk manifests itself within border security policy. Inherent to risk is a preventive logic that brings out a pre-emptive approach to security (Ericson 2007: 962). As noted earlier, border security is associated with systemic risks (van Asselt and Renn 2011). It is argued that

systemic risks cannot be fully understood, but in order to understand them as well as possible, it is needed to transcend disciplinary boundaries and to involve knowledge and experience not certified as academic. It is recommended to include experiential and often tacit (indigenous) knowledge into the analysis, and it is prudent to reflect variability in social and cultural values, preferences, and worldviews (ibid: 442).

This approach is consistent with that of this study. The focus here is on the manner with which risk and security are expressed, understood, analyzed and managed within the practical arena of border security policy. Zedner (2003) provides a brilliant summary for the conception of risk and security as it pertains to border governance - “whereas risk threatens, security promises” (176).

2.7 Theoretical Overview

There are three key theoretical frameworks that will help to examine and assess post 9/11 border governance. In this section, I will first outline Beck’s and Giddens conception of the risk society. Subsequently I will summarize Risk Governance theory using the work of van Asselt and colleagues as well as de Vries and colleagues. Lastly, I will briefly summarize Securitization theory; here I will focus on the work of Bryan Mabee and also use the Copenhagen school of thought.

2.7.1 The Risk Society

The theoretical framework of risk society, which is also termed reflexive modernity, is typically associated with the work of Ulrich Beck and Anthony Giddens. In its most basic form, the concept of risk “emerged in a future-oriented society in which hazards are assessed in relation

to future possibilities” (Giddens 1999: 1). It is argued that wealth attainment typified the mindset of industrial modernity and has since been replaced by a mindset of risk avoidance (Ekberg 2007). Further, industrial modernity is associated with *external risk* that is rooted in nature; in other words, the risks that impacted society resulted from the force of nature (plagues, hurricanes). Conversely, manufactured risks result from human impact on the world (Giddens 1999). As Giddens (1999) explains, “the problem is that we cannot predict the level of manufactured risk because we have no experience of it” (1). Essentially, “in the politics of risk, risk is a function of power and a catalyst for social transformation” (ibid: 345).

Stemming from the work of Beck and Giddens, Ekberg (2007) provides a fresh angle on the disposition of risk in the security era. She provides six parameters of the risk society: (1) the ubiquitous nature of risk and the materialization of a “collective risk consciousness” (ibid: 344); (2) the manifestation of a new understanding of risk; (3) the large amount of conflicting viewpoints on the understanding of risk as a concept; (4) “the emergence of reflexivity as an individual and institutional response to risk issues and risk events” (ibid); (5) the ironic manner in which technology and science were thought to alleviate risk in the modern era but have resulted in a loss of public trust in technology and science; and finally, (6) the “politics of risk, which links risk with power and knowledge and with the political values of liberty, equality, justice, rights and democracy” (ibid).

As Ekberg (ibid) argues, “at the very core, reflexive modernity is characterized by an awareness of living in a society of increasing vulnerability to the unpredictable, unfamiliar and unprecedented risks manufactured by modern science and technology” (345). Fundamentally, the risk society is interchangeable with the security era as they are one in the same. However, the last parameter discussed by Ekberg (2007), the politics of risk, provides an essential elaboration of the

role of politics in the security era, which is deemed integral to analyzing contemporary border security policy. Contemporary society is obsessed with improving quality of life and the method we tend to employ to achieve this goal is through mechanisms that decrease anxieties, uncertainties and fear. Before getting into the politics of risk, it is important to contextualize its importance.

Individuals in technological advanced societies are saturated with conceptions of security and insecurity on a daily basis. One could say that this is nothing new, as historically there have always been folk devils to fear, but the extent to which security *features* are embedded in our daily lives has inarguably increased over the past few decades. Not only do media outlets continuously feed us images and headlines of various (in)security issues to be mindful of, but also we are rather tolerant to what some see as an increasingly invasive state gaze. For example, in Canadian society today, public surveillance cameras are commonplace; the collection and use of biometric data is ubiquitous; personal information is being collected and disseminated between state agencies and the private sector at an ever growing rate; and citizens frequently take personal security precautions to ensure their own safety – and these are just a few examples of the many ways in which security features are omnipresent in modern Canadian society. The focal point here is that these *routine* features result, for many, in new experiences of fear, uncertainty and insecurity.

“The sociology of risk is inseparable from the politics of risk, which includes the risk to our fundamental political ideals of liberty, equality, justice, rights and democracy” (Ekberg 2007: 357). It is the politics of risk that is most closely associated with this thesis as it is argued, “the fundamental sociopolitical values of liberty, equality, justice, rights and democracy are also at risk” (ibid: 360). Clearly, border governance and the many inherent complexities highlighted

throughout this paper fall under this category, which exemplifies the pragmatic nature of the risk society/security era. Regarding politics, Giddens (1999) argues that in the contemporary society (security era/risk society/reflexive modernity), “politicians hesitate between scaremongering and cover-ups” (1). Arguably, however, politicians are somewhat at a loss in the security era regarding the management of risk.

To exemplify this point, let us look at terrorism (although any activity that elicits uncertainty and poses a risk to society would suffice). If a terrorist attack were to occur tomorrow in Union Station in Toronto involving suicide bombers and the death of hundreds of innocent citizens, there would be an uproar – and the essential question would be “how did this happen?” Subsequently, the practice (pre-event) of surveillance, intelligence-gathering and analysis, policing and security policy would likely be deemed insufficient. The vast majority would likely hold the belief that if we had *more* surveillance, *more* intelligence gathering and analysis, *more* policing and *more* extensive security policies in place, the terrorist act *might have* been thwarted. Politicians would then be accused (post-event) of not doing enough to prevent hundreds of innocent citizens from being killed.

However, during times of relative peace, the opposite tends to occur and politicians are accused of scaremongering or having too many restrictions in place which infringe civil rights and liberties. Since 9/11, the Advanced Passenger Information (API)/Passenger Name Record (PNR)² and the sharing of this information with the United States have been seen as major privacy concerns; the long line ups at airport security are deemed too invasive; the risk profiling of Arabs and Muslims are considered to be discriminatory; the border officer that looks in the

² The API/PNR program enables the CBSA to conduct a risk assessment of travelers prior to their arrival in Canada (CBSA 2011: Advanced Commercial Information). Furthermore, the objective of this program is to identify high-risk travelers “who may be subject to closer questioning or examination on arrival in Canada” (ibid).

trunk of your car is deemed to be ‘high on power’ or ‘wasting your time’...and the list of typical complaints in the security era continue. In the aftermath of a crisis, the public is likely to be more tolerant to invasive measures of security policies; however, during times of relative peace, the public is likely to be less tolerant to such invasive measures. This suggests that tolerance for and expectations of security policy are on a continuum that varies depending on external forces.

Clearly the above argument is exceptionally limited and arguably subject to bias. It is not academic in nature as there are no data to support this – it is merely a hypothesis devised from a combination of extensive literature review, a non-academic review of public opinions on various issues related to crime control policy practices, personal experiences and personal conversations had with a variety of people about contemporary security practices. It is simply an untested hypothesis at this point; regardless of its significance from an academic standpoint, it is warranted for discussion because it represents a very real concern – security actors essentially face a conundrum in which they are *‘damned if they do, and damned if they don’t’*. As Giddens (1999) stated in a public lecture,

in these circumstances, there is a new moral climate of politics, marked by a push-and-pull between accusations of scaremongering on the one hand, and of cover-ups on the other. If anyone – government official, scientific expert or researcher – takes a given risk seriously, he or she must proclaim it. It must be widely publicized because people must be persuaded that the risk is real – a fuss must be made about it. Yet if a fuss is indeed created and the risk turns out to be minimal, those involved will be accused of scaremongering (6).

This is the political conundrum of the security era and I would argue should be considered a seventh element of risk society. It is accepted that risk itself, along with its, assessment and management is embedded into the security era and evidenced in our daily lives. In other words, “on pure logical grounds, responsibility to be alert, that is to take uncertainty seriously, cannot be based on the knowledge that actions may inflict adverse outcome, that is

risk” (de Vries, Verhoeven, and Boeckhout 2011: 492). Liability must take environment into consideration and realistically be aware of and accept the vulnerabilities inherent in the environment (ibid). Therefore, “allocating responsibilities for ‘taming uncertainty’ thus calls for a shift in the direction of the actors’ attention from (probable) *damaging outcomes* to the *vulnerability* of the context of their operations” (ibid: 492-93, emphasis in original). At this point, a discussion on risk governance must be had in order to examine the actor-networks and dynamics of security policy in the security era.

2.7.2 Risk Governance

The notion of *governance* encapsulates the idea that the *government* is not the sole actor in the administration of society (van Asselt and Renn 2011). Given that one of the fundamental distinctions between the welfare era and the security era is that the changing role of the state whereby the state was no longer perceived to be capable of solely providing security to its citizens, it is not surprising that the notion of governance is prevalent in the security era. Risk governance is a conceptual framework regarding the management of uncertain, intricate and ambiguous risks (ibid). More specifically, risk governance “refers to the totality of actors, rules, conventions, processes, and mechanisms concerned with how relevant risk information is collected, analyzed, and communicated, and how regulatory decisions are taken” (ibid: 432). The governance of border security is inherently complex and ambiguous and thus it is necessary to examine the theoretical framework of risk governance before assessing border governance.

Taking decisive action in the face of risk is a key role of governance; “risk decisions can be understood only as the upshot of complex interplays between multiple actors” (ibid: 453). It is argued that the “governance perspective is needed to sensibly examine and explain the societal dynamics around issues framed as risk issues” (ibid), such as border security policy. However,

van Asselt and Renn (2011) point out that the manner in which simple risks are dealt with cannot be generalized to that of complex risks. Specifically, “many risks cannot be calculated as a linear function of probabilities and effects” (ibid: 436). A vast amount of risks that require assessment and management are systemic in nature (ibid).

the term ‘systemic’ describes the extent to which a risk is embedded in the larger contexts of societal processes. Systemic risks require a more holistic approach to hazard identification, risk assessment, and risk management because investigating systemic risks goes beyond the usual agent-consequence analysis. Instead the analysis must focus between interdependencies and ripple and spillover effects that initiate impact cascades between otherwise unrelated risk clusters (Hellstroem 2001 as cited in van Asselt and Renn 2011: 436).

In the beginning of this chapter, I outlined a few examples to convey the inherent complexities and ambiguities associated with border security policy in the security era; border security can be conceived as a systemic risk. Moreover “systemic risks are not confined to national borders or a single sector and do not fit the linear, mono-causal model of risk. They are complex (multi-causal) and surrounded by uncertainty and/or ambiguity” (van Asselt and Renn 2011: 436).

The ambiguous nature of systemic risks speaks to the many differing, yet legitimate, perspectives associated with the best method to manage the risk. As with border security policy, there are many differing, conflicting but legitimate viewpoints as to how to deal with the problems of border governance. For example, viewpoints challenging the current mechanisms of security policy may use specific examples, such as the case of Maher Arar³, to demonstrate the ways in which fundamental liberties could be jeopardized. At the same time, examples may be found to underscore the mandate of the Government of Canada to hold the security of its citizens

³ Maher Arar came to public attention after American authorities rendered him to Syria, his native country. While imprisoned there he was subjected to torture and other degrading and inhumane treatment. He was eventually released and a public inquiry was called in Canada, which cleared his name.

as its fundamental responsibility. The point is not to argue how to have one without losing the other, as they are both essential mechanisms of crime control policy - the point is to demonstrate the ambiguous nature of risk governance. What van Asselt and Renn (2011) are trying to make clear is the notion that systemic risks are different than simple risks and therefore must be managed differently. They argue,

risk governance highlights the importance of uncertain, complex, and/or ambiguous risks. However, it is a consistent finding that in most of these cases, the risks are treated, assessed, and managed as if they were simple. The assessment and management routines in place do not do justice to the nature of such risks. The consequences of this maltreatment range from social amplification or irresponsible attenuation of the risk, sustained controversy, deadlocks, legitimacy problems, unintelligible decision-making, trade conflicts, border conflicts, expensive re-bound measures, and lock ins (438).

From here, van Asselt and Renn provide three principles that synthesize what needs to be considered in the management of systemic risk, namely: (1) communication and inclusion; (2) integration; (3) reflection (2011).

At this juncture, it is important to return to the pragmatic nature of risk governance and discuss the practical problems that policy makers encounter. Policy makers face many practical problems while formulating solutions to various risk problems and de Vries and colleagues argue that they can be broken down into three main themes: (1) practical problems; (2) changing social circumstances; and (3) new challenges (de Vries et al. 2011: 487).

First, practical problems arise from repeatedly applying the same techniques to both simple and complex risk management. Additionally, solutions that are devised in laboratory settings cannot always be generalized into policy measures directed at actual social problems (ibid). As Latour explains, “achieving effective prevention requires introducing labels of control that may be feasible in laboratories but not in society at large” (as cited in de Vries et al. 2011:487). Second, as exhaustively noted at the onset of this chapter, social circumstances

change; globalization and a new level of risk tolerance within North American society will undoubtedly have an effect on the policymaking.

The increasingly border-transgressing nature of many threats is a case in point. Not only may the bounds of national jurisdiction stand in the way of effective risk management, but risk assessment, too, may be hindered by the limited scope of nation-based authority, even to the point where 'simple' risk problems may turn into 'uncertain' or 'ambiguous' ones' (ibid: 487).

Third, new challenges constantly appear. For example, every time a new terrorist attack is attempted or successfully carried out, security agencies *react* with new measures to circumvent a similar attack from occurring. This can be exemplified through the ever-revolving airport security regime; it is not by chance that shoes are now checked for bomb-making devices nor is it just by chance that liquids are severely restricted. Right or wrong, these are direct reactions to specific incidents that have been deemed to be at risk of compromising the security of air travel. To be clear, I am not arguing that the formulation of ad hoc security measures is warranted or effective. Rather, I am demonstrating the reactionary approach dominant post 9/11 in border security policy. Policy makers are required to be vigilant and reflexive to the changing social circumstances.

2.7.3 *Securitization*

Securitization theory offers an integral component of analysis that is deemed essential to conceptualizing border security policy in the security era. The securitization theory was put forth by the Copenhagen school of thought and is essentially concerned with how threats are identified and responded to (Mabee 2007).

The key to the approach is how discursive moves by 'securitizing actors' bring a perceived threat out of the area of normal politics and into the area of security, where it is seen as a kind of 'emergency measure': 'the invocation of security has been the key to legitimizing the use of force, but more generally it has opened the way for the state to

mobilize, or to take special powers, to handle existential threats' (Buzan et al. 1998: 21 as cited in Mabee 2007: 387).

In other words, the security mindset elicited in various dialogues can legitimize exceptional political measures or procedures (Buzan et al. 1998 as cited in Mabee 2007). Securitization theory accepts that “a belief in a particular discourse of threat can lead to the implementation of measures to deal with the threat, regardless of whether the threat is real or not” (ibid). However, as Mabee (2007) notes, securitization theory is limited in its “inability to distinguish between different types of threats and their possible impacts” (ibid: 388).

Pragmatically, the security mindset prevalent in the security era and identified through many different speech acts and texts⁴ has a direct impact on border security policies. This is the mindset behind specific border security policies such as: the *Smart Border Declaration*, the *Security and Prosperity Partnership*, and the *Beyond Borders* deal, which will all be discussed in Chapter 3.

2.8 Conclusion

One of the most pressing challenges in Canada-U.S. cross-border relations is balancing Canada's desire for economic access to the American market with the American desire for security. The *Beyond Borders* deal, its preceding bi-national agreement, *the Security and Prosperity Partnership of North America*, and its governing framework, the *Smart Border Declaration* can be depicted as practices of “security-surveillance harmonization” (Lyon 2007: 165). However, the desire to achieve a smart and secure border has social consequences that risk infringing fundamental liberties and human rights for a specific category of persons deemed to

⁴ While there are numerous examples of speech and text discourse that identify the security mindset, speeches from the Bush administration during the months after 9/11 such as “*axis of evil*” or “*you're either with us or against us*” are perfect examples.

pose a risk to the nation state. Security and liberty either become presented as dichotomous entities that cannot co-exist, or twisted into concepts that cannot exist without each other. Whichever position one takes, the end result is rendered confirmation of the security era and all its inherent complexities, ambiguities, and uncertainties.

Furthermore, border security may be viewed as a systemic risk that should be managed with a synthesis of communication and inclusion; integration; and reflection (van Asselt and Renn 2011: 438). The theoretical framework of the security era, risk society, risk governance and securitization all pertain to border security and these concepts will be applied to the analysis of border security policy in the next chapter.

Three key concepts are: border zones, risk and security. The concepts will be analyzed as they manifest throughout the practice of creating, facilitating and administering border security policy in the real world. The role of academia here, as I see it, is to research the effectiveness of the tools being employed at the border in an effort to secure the nation state against unwanted goods and persons.

Chapter 3

Beyond Smart Borders

“There is no more fundamental role for government than the protection of its citizens”

~ Public Safety Canada

3.1 Introduction

Canadian and American governments intend to “streamline border security while creating a shared perimeter security around both countries” (Savage 2011). The *Beyond Border’s* action plan is built upon four key areas of cooperation: (1) addressing threats early; (2) trade facilitation, economic growth and jobs; (3) integrated cross-border law enforcement; and (4) critical infrastructure and cyber-security (Perimeter Security & Economic Competitiveness 2011).

The *Beyond Borders* action plan is not new; rather it can be viewed as a post 9/11 border security political initiative. Since the demise of the *Security and Prosperity Partnership (SPP)* in 2009 there have not been any new public commitments to follow-through with the objectives laid out in the *Smart Border Declaration* that was devised between Canada and the United States months after the collapse of the twin towers on 9/11. This section employs a critical discourse analysis to examine the security dialogues of post 9/11 border security policy. It is important to note that 9/11 was a catalyst, not the reason, to the security era and its associated risk-based border governance. Risk governance was already embedding itself into national security initiatives and 9/11 served to deepen the senses in which the present may be described as the security era (Lyon 2003).

The post 9/11 security environment can be identified as a reactionary approach (Wark 2006). As Wark (ibid) states, “in the immediate wake of the attacks, and for some time

thereafter, the government response was reactive” (5). This is demonstrated by the development of the *Anti-Terrorism Act* (ATA) in Canada that was enacted in December 2001⁵ (Department of Justice 2009a: Background: Anti-Terrorism Act). Shortly thereafter the *Canada-U.S. Smart Border Declaration* came into effect on December 12, 2001 (DFAIT 2003: The Canada-U.S. Smart Border Declaration). The *Smart Border Declaration* was founded on the rationale that

the terrorist actions of September 11 were an attack on our common commitment to democracy, the rule of law and a free and open economy. They highlighted a threat to our public and economic security. They require our governments to develop new approaches to meet these challenges. This declaration commits our governments to work together to address these threats to our people, our institutions and our prosperity (ibid).

The intention was to “develop a zone of confidence against terrorist activity” (ibid), which is similar to the goal of the *Beyond Borders* deal of “pursu[ing] a perimeter approach to security” (Beyond the Border: 2011). Additionally, the failed *Security and Prosperity Partnership* (SPP), implemented in March 2005, had similar goals albeit was much more expansive in its overall objectives.

The SPP is based on the principle that our security and prosperity are mutually dependent and complementary. Cooperation in intelligence, border management, law enforcement and transportation security is intended to reduce criminal activity and terrorist risks, thereby making our communities safer, facilitating legitimate trade and travel, and protecting our quality of life. Collaborative planning and prevention strategies will help ensure reduced impact, coordinated response and faster recovery from disaster situations, whether public health, cyber, natural, human error or terrorist in nature (About the SPP 2009).

Essentially, since 2001 Canada and the United States (and from 2005-2009 Mexico) have been working towards the goal of securing a smart border to facilitate national security interests while ensuring that the economic interests of both countries also remain a priority.

⁵ While it is understood that the ATA continued to be amended after it was enacted in December 2001, the point here is to demonstrate the reactive approach taken in the aftermath of 9/11.

My analysis will begin with the *Smart Border Declaration*, as it was the first bi-national declaration dedicated to securing the border between Canada and America post 9/11. To effectively analyze, ascertain the complexities and make future projections of the *Beyond Borders* deal, it is important to understand the *Smart Border Declaration* as it is the founding bi-national political accord on Canada-U.S. border governance.

3.2 Smart Border Declaration

There was much speculation after 9/11 that some of the terrorists responsible for carrying out the attacks in the United States had gained access through Canada. Regardless of the fact that this rumour was falsified, the alleged weaknesses of the Canadian-U.S. border were scrutinized. Combined with the impact in the days after 9/11 from temporary border closures, it was deemed integral that Canada and the United States “engage in more fundamental harmonization and integration...to keep the border open to trade” (Council of Canadians 2006: 1). Three months after 9/11, the *Smart Border Declaration* was implemented as a mechanism to stabilize the manic state of the Canada-U.S. border (d’Aquino 2011). The *Declaration* included a 30-point action plan that has since been increased to 32. The mandate and objective of the *Declaration* is outlined by its four pillars: (1) the secure flow of people; (2) the secure flow of goods; (3) investing in secure infrastructure; and (4) coordination and information sharing in the enforcement of these objectives (Public Safety Canada 2008: Smart Border Declaration and Action Plan).

The first pillar, securing the free flow of people, embodies a risk management approach as its main goal is to maintain access to *legitimate* or ‘low risk’ travelers. From this pillar, programs such as NEXUS were born. NEXUS is an example of a joint program offered by the Canada Border Services Agency (CBSA) in conjunction with the U.S. Customs and Border Protection (CBP); the purpose of NEXUS is to “expedite the border clearance process for low-

risk, pre-approved travelers into Canada and the United States” via air, rail, and car (CBSA 2011: NEXUS). In order to qualify for NEXUS, an applicant must be deemed admissible (or low-risk) by the United States and Canada independently. NEXUS is a zero-tolerance program; therefore, if the applicant fails the risk assessment by either country their application is denied (ibid). Recall that surveillance mechanisms are omnipresent in border security mandates in the security era. The NEXUS program is a prime example of how biometric data collection is used as a surveillance mechanism⁶. This rigorous procedure, rooted in biometric identifiers, permits access to expedited border crossing for individuals deemed low-risk (legitimate) by both the CBSA and CBP. This exemplifies a common mode of 'social sorting' (Lyon 2007) in the security era.

The second pillar, securing the flow of goods, is equivalent to the first pillar but focused on tangible items instead of travelers. This objective is carried out through a risk management approach whereby advanced information is used to “identify and expedite low-risk shipments across the border” (Public Safety Canada 2008: Smart Border Declaration and Action Plan). Under this pillar the aim is to move the inspection stations away from the physical border to expedite the flow of low-risk goods. Similar to the NEXUS program, the Free and Secure Trade (FAST) program “facilitates the cross-border movement of low-risk, pre-approved commercial goods and truck drivers” (ibid).

Investing in secure infrastructure is the third pillar of the *Declaration* and is carried out by the enhancement of border infrastructure from new lanes at land crossing to iris scanners in airports, as well as various other surveillance technologies deemed necessary to “better support programs like NEXUS and FAST” (ibid). The goal of this pillar is to alleviate congestion at

⁶ Once a NEXUS application is approved by both countries, the applicant’s fingerprints are taken as a final authentication of identity. In the final step, a digital iris scan and a digital facial photograph are obtained and subsequently input into a database (ibid).

major border crossings by “investing reciprocally in border infrastructure and identifying technological solutions that will help to speed movements across the border” (Canada U.S. Smart Border Declaration 2003).

The final pillar is centered on integrating enforcement and information sharing. The *Declaration* expressed intention to devise necessary tools to facilitate information sharing and a legislative framework as a mechanism to “ensure that information and intelligence is shared in a timely and coherent way” (ibid). This objective has since been carried out by Integrated Border Enforcement Teams (IBETs), joint enforcement coordination, integrated intelligence, biometric data collection, information and intelligence retention and dissemination, counter-terrorism legislation, freezing of terrorist assets, and joint training and exercises (Washington Canadian Embassy 2005).

Five themes emerge from the *Declaration* that are consistent with the mindset of the security era. First, border governance is carried out through a risk-based approach; this creates a selective border conducive to social sorting (Basaran 2011; Lyon 2007). Second, the ‘border’ is not a fixed, physical entity but a mobile and fluid concept (ibid). This is demonstrated by the increased use and dependence on pre-clearance programs such as NEXUS and FAST. The *Declaration* clearly emphasizes “identifying security threats before they arrive in North America” (Canada-U.S. Smart Border Declaration 2003). The third, and virtually obvious, theme is integration. Fundamentally, the *Declaration* is a commitment by the United States and Canada to work together in an integrated fashion to increase border security. In support of this argument, on December 12, 2001 the Chrétien government and the Bush administration stated, “this declaration commits our governments to work together to address these threats to our people, our institutions

and our prosperity” (ibid). Further, integration is purported to be central to keeping the border open to trade and close to crime.

The fourth theme is a demand for increased intelligence sharing. This is evidenced by the goal to integrate mechanisms of enforcement and information sharing and demonstrated through Joint Force Operations (JFOs) such as the IBETs. Finally, increased social sorting via mechanisms of surveillance is the final theme. The underlying principle of the first pillar, securing the free flow of people, is to differentiate between low-risk and high-risk individuals. Mechanisms of social sorting and risk profiling must be employed to ascertain who and what is *legitimate*.

3.3 SPP to Beyond Borders

The *Security and Prosperity Partnership (SPP)* was the second political development post 9/11 in which Canada engaged with the United States. The *SPP* was a North American partnership between Canada, the United States, and Mexico in March 2005 (Government of Canada 2009). Border security was not the goal of the *SPP*; rather, it was one element among many. As d’Aquino (2011) indicates, the goal of the *SPP* was to “clothe continental security and economic imperatives with a grander political design” (1). The intention of the *SPP* was to build on “other existing positive and productive bilateral and trilateral relationships established with Canada’s North American partners, through such mechanisms as the North American Free Trade Agreement (NAFTA); the Canada-U.S. Smart Border Declaration; and the Canada-Mexico Partnership” (Government of Canada 2009: About SPP). Whereas the *Smart Border Declaration* was accompanied by a 32-point action plan, the *SPP* was a non-binding partnership with “flexible means of dialogue, priority setting, collaboration and action on issues affecting the security, prosperity and quality of life of Canadians, Americans, and Mexicans” (ibid).

The *SPP* was a convoluted and complex trilateral partnership. For example, in 2007 five priorities⁷ were announced for the following year and each priority had sub-priorities creating almost next-to-impossible goals and objectives to attain. Furthermore, the *SPP* was divided into two categories, the “Security pillar” and the “Prosperity Pillar,” run by the Minister of Public Safety and the Minister of Industry respectively. Regarding the smart and secure border objective of the *SPP*, it was professed that

effective border strategies minimize security risks, while facilitating the efficient and safe movement of goods, services and people, as trade and cross-border travel increase in North America. These strategies will draw on risk-based border management, innovative use of new technologies, coordinated border infrastructure development, and by moving, where possible, inspection and screening away from the land border (Joint Statement Prime Minister Harper, President Bush and President Calderon North American Leaders’ Summit).

Risk dialogue is embedded into the *SPP* just as with the *Smart Border Declaration*. This is demonstrated by the following: “the *SPP* Security Agenda is oriented toward finding more effective ways to enhance the safety and security of Canadians, while supporting our need to efficiently move *legitimate* goods and people across our border, as well as through ports and airports” (Government of Canada 2009: Security Agenda, emphasis added). Legitimate is akin to low-risk and reinforces the notion of social sorting by employing mechanisms of risk assessment and pre-approval. This is demonstrated within the security agenda of the *SPP*, which states, “a risk management approach is helping to identify threats before they reach North America⁸” (ibid).

⁷ The five priorities were (1) Enhancing the global competitiveness of North America; (2) Safe Food and Products; (3) Sustainable Energy and the Environment; (4) Smart and Secure Borders; and (5) Emergency Management and Preparedness.

⁸ This quote suggests that threats to North America come from outside our borders; it is important to note that the Government of Canada explicitly indicates that a major threat to Canada is homegrown terrorism (CSIS 2007: Backgrounder No.8-Counter-Terrorism)

Further, an integration objective is validated as the *SPP* expressed “close collaboration with our neighbours is critical in such an approach” (ibid).

The objective of the *SPP* regarding border security was similar to that of the *Smart Border Declaration*. The *SPP* failed in 2009 and d’Aquino (2011) provides an explanation for its failure.

SPP lost its way, a victim of excessive complexity, bureaucratic overload and political inertia. Its demise was accelerated by changes in government in Canada, the United States, and Mexico. In all three countries, the *SPP* had failed to ignite the imagination and attracted growing opposition from the critics of continental integration. The *SPP* was genuinely big idea orphaned by the neglect of its political sponsors (1-2).

Essentially, the *SPP* failed due to unattainable goals and ineffective, uncommitted organization on part of its political leaders (d’Aquino 2011; Burney 2011). Thomas d’Aquino (2011) argues that the failure of the *SPP* exposed a reality of post 9/11 crime control policy, namely the “vulnerability and limitations of trilateralism” (2). Regardless of the failure of the *SPP*, it reinforces the notion that post 9/11 border governance is rooted in a risk-based approach. Additionally, the physical entity of the border is transformed into a fluid and mobile concept and security and integration are deemed inseparable. As will be demonstrated next, the five themes evident in the *Smart Border Declaration* and the *SPP* are also manifested in the *Beyond Borders* deal.

3.4 Beyond the Border

The *Beyond Borders* deal is officially referred to as the 'Perimeter Security and Economic Competitiveness' and is currently in the preliminary phase of policy development. In the first phase, “Canada and the U.S. will develop an initial Joint Action Plan that will identify issues in priority sectors for action” (Regulatory Cooperation 2011:3). To date there has been a public statement by the Prime Minister of Canada and the President of the United States to declare the

intention to formulate a perimeter approach to the shared border. The Beyond the Border Working Group (BBWG) and the Regulatory Cooperation Council (RCC) has been formulated and both conducted public consultations whereby the public was encouraged to submit input to inform the development of a Joint Action Plan. In June 2011 the Public Safety Minister Vic Toews, and the U.S. Secretary of Homeland Security, Janet Napolitano, met to discuss working more closely with international partners to “enhance the security of the global supply chain” (Public Safety Canada 2011: Public Safety Minister Toews). They met again in August 2011 to further discuss the cooperation between Canada and the United States on border security and cross-border trade. Additionally, Canada’s Foreign Affairs Minister, John Baird, met with U.S. Secretary of State, Hillary Clinton in a formal bilateral meeting to demonstrate the importance of the Canada-U.S. relationship. Finally in late August 2011, Foreign Affairs Minister Baird announced the release of two summation reports of the public consultations on the *Beyond Borders* deal.

The *Beyond Border* deal is a bi-national agreement formulated to enhance the security and prosperity of both the United States and Canada. The intention is “to address security threats at the earliest point possible in a manner that respects privacy, civil liberties, and human rights” (Government of Canada 2011: Beyond the Border), which reinforces the border as a fluid and mobile concept rather than a physical entity. This agreement acknowledges globalization and commits both countries to enhance security and prosperity by cooperating together on border governance. The Prime Minister and President indicated that through cooperation and partnership they would strengthen resilience by ensuring “readiness” at all levels of government. Further, they explicitly indicate that a risk management approach will be utilized “where compatible,

interoperable, and –where possible – joint measures and technology should proportionately and effectively address the threats we share” (ibid).

In congruence with the mentality of the security era and the themes prevalent in both the *Smart Border Declaration* and the *SPP*, Prime Minister Harper and President Obama indicated, “effective risk management should enable us to accelerate *legitimate* flows of people and goods into Canada and the United States and across our common border, while enhancing physical security and economic competitiveness of our countries” (Government of Canada 2011: Beyond the Border, emphasis added). The leaders intend to accomplish their goals by increasing information sharing requirements and capabilities while recognizing and respecting the “separate constitutional and legal frameworks that protect privacy, civil liberties, and human rights and provide for the appropriate recourse and redress” (ibid).

3.4.1 Key Areas of Cooperation

As previously stated, the four key areas of cooperation are: (1) addressing threats early; (2) trade facilitation, economic growth and jobs; (3) integrated cross-border law enforcement; and (4) critical infrastructure and cyber-security (Government of Canada 2011: Beyond the Border). It is likely that these areas will be outlined in detailed objectives in the pending Joint Action Plan expected to be released later in 2011.

The premise of the first pillar, addressing threats early, is to identify and disrupt threats that risk the security of Canada and the United States prior to arriving at the border. This will be facilitated by screening travelers and goods “at the earliest possible opportunity” and coordinating “technical standards for the collection, transmission, and matching of biometrics that enable the sharing of information on travelers in real time” (ibid). Further,

in order to promote mobility between our two countries, we expect to work towards an integrated Canada-United States entry-exit systems, 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 the other country” (ibid).

Since the announcement of the *Beyond Borders* deal there have been concerns raised in Canada regarding sharing personal information with the United States and the effect on the privacy rights of Canadians (Robertson 2011a, 2011b; Friedman 2011; Gabriel 2011; Perimeter Security and Economic Competitiveness 2011). To address these expected concerns, Mr. Harper and Mr. Obama announced the intention to “cooperatively devise Canada-United States privacy protection principles” (Government of Canada 2011: Beyond the Border). Further, both countries “intend to work together to promote the principles of human rights, privacy, and civil liberties as essential to the rule of law and effective management of our perimeter” (ibid).

The second key area of cooperation, trade facilitation, economic growth and jobs, is primarily targeted at the ‘competitiveness’ or prosperity aim of the *Beyond Borders* deal.

Essentially,

to enhance our risk management practices, we intend to continue planning together, organizing bi-national port of entry committees to coordinate planning and funding, building, expanding or modernizing shared border management facilities and border infrastructure where appropriate, and using information technology solutions (ibid).

It is likely that the members of the RCC and the BBWG will employ lessons learned from the failure of the *SPP* and reduce the convoluted and complicated rules and regulations that companies must follow to facilitate their trade across the border. Additionally, Canada and the United States intend to harmonize regulations and requirements to smoothen the flow of legitimate goods. The specific intention is to develop

an integrated cargo security strategy that ensure compatible screening methods for goods and cargo before they depart foreign ports bound for Canada or the United States, so that once they enter the territory of either we can, together, accelerate subsequent crossings and land ports of entry between our two countries (ibid).

Regarding Integrated Cross-Border Law Enforcement, which is the third key area of cooperation, the goal is to integrate cross-border law enforcement programs to capitalize on information sharing capabilities to “better identify serious offenders and violent criminals on both sides of the border” (ibid). The objective is to

build on existing bilateral law enforcement programs to develop the next generation of integrated cross-border law enforcement operations that leverage cross-designated officers and resources to jointly identify, assess, and interdict persons and organizations involved in transnational crime (ibid).

Integrated Cross-border Law Enforcement is typically carried out in Joint Taskforce Operations (JFO), which are designed and outlined through Memorandums of Understanding (MOU). According to a Regional Director General of CBSA⁹, MOUs are formed at a senior-level and designate each agencies roles and responsibilities in the JFO based on the goals and objectives of the operation (Sebben 2009). For an agency to participate there must be a gain for that agency as per their agency mandate; if the operation does not fit with their mandate then they will not enter into partnership as they “have no business investing tax payers dollars into that operation” (ibid). The MOU essentially provides the parameters of the partnership for each participating agency, identifies the objectives, roles and responsibilities of each agency; outlines where each agencies accountability begins and ends, and where legal requirements begin and end (ibid). The parameters established through the MOU allow each agency to know where their role starts and ends, therefore assisting each agency to effectively work together (ibid).

There are two major JFO programs currently in place that promote integrated law enforcement on cross-border initiatives, the Canada-U.S. Shiprider program and the Integrated

⁹ This data derives from an unpublished project whereby interviews were conducted with various law enforcement officers. The University of Calgary granted ethics approval in 2008 and it was stipulated that data could be retained for further use for up to five years.

Border Enforcement Teams (IBETS). The Shiprider program is officially labeled the Integrated Cross-border Maritime Law Enforcement Operations (ICMLEO) (RCMP 2010 Canada-U.S. Shiprider). The Shiprider program essentially

removes the international maritime boundary as a barrier to law enforcement by enabling seamless continuity of enforcement and security operations across the border, facilitating cross-border surveillance and interdiction, and serving as both a force multiplier and, potentially, as a model for other U.S./Canadian cross-border (integrated) enforcement and security initiatives (ibid).

Operationally, this program deploys vessels that are jointly crewed by “specially trained and designated Canadian and U.S. law enforcement officers who are authorized to enforce the law on both sides of the international boundary line” (ibid). This facilitates an efficient mechanism of “securing both sides of the border without violating the sovereignty of either nation” (ibid). The Shiprider program is an integrated, risk-based approach where the border is conceived as a fluid and mobile concept rather than a physical entity. Additionally, it is consistent with Basaran’s (2011) argument expanding border zones outlined in Chapter two.

Another integrated program is the Integrated Border Enforcement Teams (IBETs), which is a joint initiative between Canada and the U.S. founded in the *Smart Border Declaration* (CBSA 2006 Canada-United States Integrated Border Enforcement Teams). The IBETs “combine the intelligence and law enforcement expertise of various agencies and use a coordinated approach to *identify* and stop the *high-risk* movement of people and goods between the ports of entry on the Canada-United States border (ibid, emphasis added). The IBET initiative is founded in risk management, intelligence sharing, and partnership to “ensure that the border is open for business, but close to crime” (ibid).

IBETs are a Joint Force Operation (JFO) between five major partners: the Royal Canadian Mounted Police (RCMP), Canada Border Services Agency (CBSA), U.S. Customs and

Border Protection (CBP), U.S. Bureau of Immigration and Customs Enforcement (ICE), and the U.S. Coast Guard (USCG). The JFO creates a cooperative relationship conducive to efficient and effective information and intelligence sharing, which arguably should strengthen the security of the Canada-US border. “These multi-agency intelligence-led enforcement teams augment the integrity and security of the border by identifying, investigating and interdicting individuals and organization that pose a threat to the security of both nations” (RCMP 2010: Canada-United States IBET Threat Assessment: 1).

According to the Canada-United States IBET Threat Assessment 2007 (RCMP 2008 Canada-United States IBET Threat Assessment 2007), “the coordination and continued sharing of criminal information and intelligence by IBET partners has led to the ongoing success of IBET and the dismantlement of cross-border crime between the ports of entry on the Canada/U.S border”. However, the report suggested that sharing national security information is a difficult issue. It is expected that the *Beyond Borders* deal will have mechanisms laid out to circumvent some of these difficulties.

Returning to the key areas of cooperation set out in the *Beyond Borders* deal, the fourth pillar is concerned with Critical Infrastructure and Cyber-security (Government of Canada 2011: Beyond the Border). The objective here is to “implement a comprehensive cross-border approach to strengthen the resilience of our critical and cyber infrastructure” (ibid). Under this pillar, it is expected that the *Beyond Borders Joint Action* plan will include objectives to integrate transportation and communication networks as well as enhance key ports of entry, such as the Detroit-Windsor crossing.

At this point, it should be clear that the *Beyond Borders* deal is not only focused on cooperation between the United States Customs and Border Protection (CBP) and the Canada

Border Services Agency (CBSA); rather, the goal is for the national security paradigm of both countries to join forces through integration and cooperation to enhance the security of both nations. As such, it is important to look at Public Safety Canada (PS), which is similar to the American Department of Homeland Security (DHS).

3.5 Public Safety Canada

In order to understand the power dynamics of border security policy, it is important to examine the governing bodies responsible for creating and mandating these policies and its accompanying legislative framework. In order to maintain the trade relationship with the United States and to provide for the security of Canada and Canadians, the Canadian government was forced to revamp its national security paradigm. As a result, the *Anti-Terrorism Act (ATA)* was enacted in December 2001 as part of extensive anti-terrorism measures. The fundamental objective of the ATA is to provide measures that allow the Government of Canada to protect “the safety, security and fundamental rights of Canadians” (Department of Justice Canada 2009b: The Anti-Terrorism Act). Another key piece of legislation is the *Public Safety Act*, which was proposed in 2002 and received royal assent in May of 2004 after a series of amendments (Department of Justice 2011: Public Safety Act). Public Safety Canada (PS) was devised to “ensure coordination across all federal departments and agencies responsible for national security and the safety of Canadians” (Public Safety Canada 2011: About Us). The fundamental mandate of PS is to keep Canadians safe (ibid). *Figure 1* was obtained from the Public Safety Canada website and depicts the organizational structure; this provides a visual of all the agencies operating under the umbrella of Public Safety Canada. As depicted in *Figure 1* (Public Safety Canada 2010: Public Safety of Canada Portfolio), the five key agencies responsible for the public safety of Canada are: Canada Border Services Agency (CBSA), Royal Canadian Mounted Police

(RCMP), Canadian Security Intelligence Service (CSIS), Correctional Service of Canada (CSC), and the Parole Board of Canada (PBC).

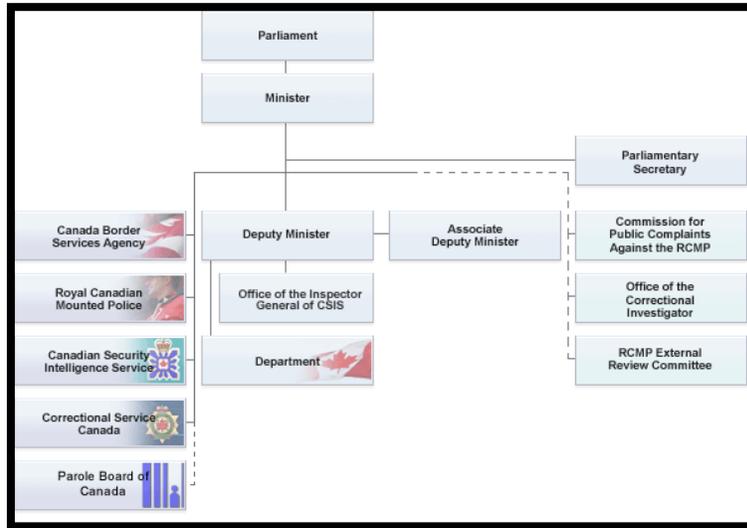


Figure 1: The Public Safety of Canada Portfolio

Essentially, Public Safety Canada “coordinates and supports the efforts of federal organizations ensuring national security and the safety of Canadians” (Public Safety Canada 2010). The core program areas are (1) Emergency Management; (2) National Security; (3) Law Enforcement; (4) Corrections; and (5) Crime Prevention (ibid).

3.6 Canada Border Services Agency (CBSA)

The CBSA was formulated in 2003 “as a response to the need for increased border services in a post-9/11 society and brought together functions from Citizenship and Immigration Canada, the former Canada Customs and Revenue Agency and the Canadian Food Inspection Agency” (CBSA 2010 About the CBSA). The Agency’s mission is to “ensure the security and prosperity of Canada by managing the access of people and goods to and from Canada” (ibid). The CBSA is responsible for administering approximately 90 pieces of legislation centered on

managing the flow of people and goods to and from Canada (ibid). The Agency has many legislative, regulatory and partnership responsibilities, which are depicted in *Figure 2* (ibid).

- **Administering** legislation that governs the admissibility of people and goods, plants and animals into and out of Canada;
- **Detaining** those people who may pose a threat to Canada;
- **Removing** people who are inadmissible to Canada, including those involved in terrorism, organized crime, war crimes or crimes against humanity;
- **Interdicting** illegal goods entering or leaving the country;
- **Protecting** food safety, plant and animal health, and Canada's resource base
- **Promoting** Canadian business and economic benefits by administering trade legislation and trade agreements to meet Canada's international obligations
- **Enforcing** trade remedies that help protect Canadian industry from the injurious effects of dumped and subsidized imported goods;
- **Administering** a fair and impartial redress mechanism
- **Promoting** Canadian interests in various international forums and with international organizations; and
- **Collecting** applicable duties and taxes on imported goods

Figure 2 Responsibilities of the CBSA

The CBSA functions within the mindset of the security era as it has adopted risk-based programs. Targeting high-risk persons and goods *before* they reach the border is a pivotal priority of the CBSA. The fundamental role of the Agency is to ensure the free flow of legitimate (low-risk) people and goods while keeping the border closed to criminal activity and terrorism (CBSA 2011: About the CBSA). To accomplish this goal, the Agency implements many programs and services that are rooted in risk thinking. For example, the CBSA runs a national risk assessment center that operates on a 24/7 schedule. The operative goal of the national risk assessment center is to process information and intelligence; subsequently, intelligence is disseminated throughout the Agency and with other law enforcement partners in both Canada and then United States as per various Memoranda of Understanding (MOU).

Another main goal of the CBSA is to target high-risk persons and goods *before* they reach the border. This goal is accomplished primarily through pre-clearance programs such as, Advanced Commercial Information (ACI), Advance Passenger Information (API), Passenger Name Record (PNR), NEXUS, FAST, and eManifest. Additionally, information that has been released thus far on the *Beyond Borders* deal suggests that one of the mechanisms to target high-risk goods will be via the relocation of inspections away from the site of the border (Government of Canada 2011: Beyond the Border; Robertson 2011a; Robertson 2011b). This will serve a dual function. First, expediting the flow of people and goods at the site of the border will minimize congestion to ensure business is not affected (Robertson 2011a); second, to increase North American safety and security by obtaining information and intelligence prior to the person(s) or good(s) arriving at the border. In this regard, high-risk individuals and items would be flagged for secondary screening upon arrival at the port of entry (CBSA 2011: Programs and Services).

The CBSA also employs various modes of technology to “target and prevent high-risk cargo from entering Canada, whether by sea, air or on land” (CBSA 2011: About the CBSA). The CBSA has a heavy reliance on technology to carry out their mandate of creating and maintaining a smarter, more secure border. As such, various technology equipment is deployed and utilized to detect contraband and act as mechanisms of surveillance.

The CBSA is vigilant in its enforcement of the legislation that it administers. To ensure the free flow of legitimate people and goods, the CBSA monitors, investigates, detains and removes those people or goods in violation of the relevant laws (CBSA 2011 Safety and Security).

There are eight main mechanisms of surveillance technology deployed at various border ports. The first example is radiation detection equipment at marine ports to facilitate mass screening of cargo containers (ibid). Second, biometric data is collected via digital fingerprint machines and iris-scan identification systems are located at selected land border and airports to carry out the

mandate of certain border policy programs. For example, the iris-scan identification system is located at select airport locations to identify NEXUS participants.

Third, the CBSA utilizes flexible videoprobes, fibre scopes, submersible cameras and mirror kits to detect contraband in hard-to-reach areas of vehicles, ships, containers, undercarriage of vehicles or tractor-trailers. Fourth, the CBSA agents have trace detection technology systems to identify trace amounts of narcotics and explosives residue. Fifth, gamma-ray and x-ray technologies are also utilized to detect contraband. Sixth, density gauge and measuring devices are used at major border and marine ports to determine the density of a surface or object; additionally, laser range finders are used to measure the inside of commercial containers. Seventh, detector dogs teams are stationed Canada-wide to detect illegal narcotics, firearms and currency. The detector dogs also help to “identify harmful pests and diseases by detecting illegal plants, fruits, meats, and animals” (CBSA 2011: Safety and Security). Eighth, the CBSA also utilizes specimen isolation toilets to recover banned substances at airports, cruise ship terminals and at some major border crossings. Finally, the CBSA also has remote operated vehicles that are used for under-vessel inspections in marine operations.

Additionally, the CBSA has implemented various programs that require advance information and information-sharing programs. The goals of these programs are twofold: first, information is obtained and shared with joint partners such as the American Customs and Border Protection (CBP) or the RCMP for intelligence purposes. Second, receiving advanced information on goods and persons crossing the borders allows the border to flow smoother. These technologies and programs are congruent with Basaran (2011) argument that the border no longer acts as a fixed entity but is multiplied, mobile, and selective.

CBSA also has a variety of programs and services that function within the mindset of the

security era whereby the goal is to expedite the flow of *legitimate* persons and goods through the border. The NEXUS program has already been discussed in relation to the *Smart Border Declaration* to demonstrate the risk mentality dominant in the mandate of securing the free flow of people. CANPASS is a similar program but only covers entry into Canada from the United States. As such, the difference between the NEXUS and CANPASS programs is that the latter is solely enforced by the CBSA and only directed at entry to Canada from the United States, whereas NEXUS is a joint program between the US and Canada (CBSA 2010: Programs and Services).

The final initiative devised by the CBSA to expedite flow of *eligible* travelers is Automated Border Clearance. This is a two-year pilot program only offered at the Vancouver International Airport. This pilot program is designed to “provide a safe, secure and faster option for eligible travelers returning to Canada”. The kiosk allows the user to declare goods for up to four people of the same address and then have their documents verified by a designated Border Services Officer (BSO) (CBSA 2010: Programs and Services).

The three programs discussed are targeted at making travel smoother for Canadians and Americans crossing the border via land, air, water, or rail. The CBSA also has programs in place for smoother border clearance of goods. All of the programs are based on the notion of pre-approval to sort low-risk goods from high-risk goods. There are six programs aimed at facilitating trade: Commercial Driver Registration Program (CDRP), Customs Self Assessment Program (CSA), Free and Secure Trade (FAST), Partners in Protection (PIP), Advance Commercial Information, and eManifest (CBSA 2010 Programs and Services). Although each program is targeted at different areas of trade facilitation, the common goal is to move “*pre-approved eligible* goods across the border and verifying trade compliance *away* from the border”

(ibid). These are pragmatic programs that reinforce the arguments made by Basaran (2011) and Lyon (2007) discussed in the previous chapter.

3.7 Conclusion

By examining the *Smart Border Declaration*, the *Security and Prosperity Partnership (SPP)*, the pending *Beyond Borders* deal, Public Safety Canada (PS), Canada Border Services Agency (CBSA) and the various programs and services implemented to attain a smart border, it confirms five main themes of border governance in the security era that were suggested after examining the *Smart Border Declaration*. Evidently, security is a priority of border governance. However, a risk dialogue was also evident as there was continuous reference to categorizing travelers and trade into categories of risk. Targeting high-risk persons and goods is a pivotal priority of the CBSA and risk ideology is rooted in organizational mandate of Public Safety Canada.

In summary, five main themes of border governance were evident in the policies and documents analyzed: (1) border security is attained through a risk-based approach; (2) the border is no longer a fixed entity but a fluid and mobile concept; (3) integration is central to keeping the border open to trade and close to crime; (4) intelligence sharing and the creation of joint databases to ensure the sharing of information in real time is paramount; and (5) surveillance mechanisms are utilized as a social sorting device to ensure that only low-risk (or legitimate) persons and goods are admissible to the host country.

Chapter 4

Getting it Done Beyond the Border

*The reason the enlightened prince and the wise general conquer the enemy wherever they move
and their achievements surpass those of ordinary men is foreknowledge*

~ Sun Tzu

4.1 Introduction

The objective of this chapter is to appraise the *Beyond Borders* deal focusing on its practical application. The previous chapter identified five main themes founded in the various policies and documents analyzed. Furthermore, these themes are congruent with the theoretical framework laid out in the second chapter. Despite this, there is still a clash between the reality and the theory of border governance in the security era. The complexities outlined in the first chapter regarding fracturing the rule of law, the preemptive activation of the legal system, the infringement of rights and freedoms, and privacy breaches resulting from information sharing are real events occurring in the security era. Further, these concerns are related to border governance, especially on a bi-national level.

4.2 Threats to National Security

In order to put forth an effective argument that bi-national dissemination of intelligence is necessary in the security era, a real threat must be established. Therefore, this section will briefly summarize the threats facing the Canada-U.S. border. According to the Canada-U.S. IBET threat assessment, organized crime groups continue to “smuggle people, illicit drugs, currency, firearms, and contraband tobacco across the Canada-U.S. border” (RCMP 2010 Canada-United States IBET Threat Assessment: 3-4). According to the RCMP Assistant Commissioner, Pierre-Yves

Bourduas, “like a cancer, organized crime attacks the very foundation of our Canadian society, by overtaxing the health care system as a direct result of drug abuse and gratuitous violence, by undermining the credibility of our financial institutions through major commercial crime and money laundering and finally, by targeting the most vulnerable” (CISC 2005:5). Organized crime is a major enterprise in Canadian society that infringes upon our fundamental rights to “peace, order and good government” (Public Safety Canada 2006:1).

Another persistent threat facing the Canadian-U.S. border is human smuggling and illegal migration. Numerous people around the world are living in economic hardship and harsh conditions, which cause them to seek out the services of various organized crime groups to aide them in relocating to a country in which they can lead a better life (Organized Crime Impact Study 1998; RCMP 2010 Canada-United States IBET Threat Assessment). There is a major demand for this type of relocation, which has created a black market of human trafficking (Organized Crime Impact Study 1998).

There are social-political impacts on Canada resulting from human trafficking. One of the facets of immigration programs and policies in Canada is public support; migrant trafficking “abuses the openness of Canadian society, as reflected in its refugee program, and threatens to seriously undermine public support for the process” (Organized Crime Impact Study 1998). Furthermore, it can lead to xenophobic reactions from the community at large and create an ‘*us versus them*’ mindset.

Other threats to the Canada-U.S. border involve the smuggling of illicit drugs, currency, firearms and contraband cigarettes (RCMP 2010 Canada-United States IBET Threat Assessment). Furthermore, to facilitate smuggling activities, smugglers use “scanners, GPS devices, satellite and pre-paid cellular phones, smart phones, text messaging, camouflage clothing, night vision

goggles, decoy vehicles and counter surveillance tactics to evade law enforcement” (ibid: 5).

Accordingly,

protecting the border does not start or stop at the physical border. It requires a multifaceted approach. Fostering partnerships with agencies that investigate crime with a cross-border nexus is crucial to IBET investigations and interdictions of cross-border criminal activity (ibid: 13).

Furthermore, “as criminals continue to exploit the border using increasingly sophisticated concealment methods, technological aids, counter surveillance...the coordination and continued sharing of criminal information and intelligence by IBET partners is essential, as well as joint operations” (ibid).

4.3 Intelligence Sharing and Its Barriers

There are real threats facing our borders that require policies and legislation to circumvent without creating a negative impact on Canadians. Throughout this thesis, it has been indirectly argued that gathering and sharing intelligence in a multifaceted, integrated team approach is the best way to tackle the threats facing our borders. Intelligence “is more than just a theoretical construct – it is also a practical activity with very real consequences” (Richards 2010:4). In this fashion, “intelligence is both a piece of information, and an overarching process that governs how that information is generated, managed, and disseminated” (ibid). Functionally, the intelligence process is a cyclical process that starts and ends at the operational level under the direction of the Government. Law enforcement officers, including BSO’s, collect the information during their daily operations and provide it to the intelligence department who subsequently analyze, research and verify the data (Sebben 2009).

Information must meet certain criteria; once that is met, the information is theoretically disseminated on a ‘right to know basis’ (ibid). However, on the practical level discretion plays a

vital role in this process. It is commonly understood that the notion of ‘right to know’ governs information sharing (ibid). In other words, when an officer is utilizing discretion around information sharing, the decision should be based on whether or not that person or agency requesting the information has a ‘right to know’ (ibid). Further, mechanisms of informal information sharing are liable to take place; according to a CTV news article, “law enforcement agencies on both sides of the border already share information informally” (CTV 2011: Harper, Obama Agree to Forge New Border Plan). In this case, it is likely that officers in need of information are dependent upon having a previously established contact.

In Chapter two, I discussed the systemic breakdown attributed to important intelligence information not being shared between various agencies in the 9/11 terrorist attacks. Subsequently I put forth the argument that had such a prolific systemic failure not occurred in the case of 9/11 the twin towers might still be standing (Hulnick 2004). In this regard, it is clear that intelligence gathering and information sharing is an integral component of calculating and managing risks - it is central to border governance in the security era. This can be further supported by the *Smart Border Declaration*, the *Security and Prosperity Partnership*, and the preliminary information on the *Beyond Borders* deal call for an increase in intelligence sharing capabilities between the U.S. and Canadian border agencies as well as with other key law enforcement partnerships.

One of the mechanisms of intelligence and information sharing capabilities suggested in the *Beyond Borders* deal is a security-surveillance harmonization (Lyon 2007). This is “the quest for harmonization of security and surveillance arrangements” (ibid: 165). This is demonstrated by the intention to coordinate “technical standards for the collection, transmission, and matching of biometrics that enable the sharing of information on travelers in real time” (Government of Canada 2011: Beyond the Border). As previously stated, the goal is to “work towards the

exchange of relevant entry information in the land environment so that documented entry into one country serves to verify exit from the other country” (ibid). The goal becomes a sort of global surveillance (Lyon 2007) whereby the objective is not only to increase the surveillance of people and goods crossing the border but also to increase the space under surveillance away from the border to accommodate pre-screening at the earliest point possible. Effectively, people in transit through the border “are reconfigured as information (van der Ploeg 2003, 2006 as cited in Lyon 2007: 124) and shared with other key agencies. “Not only does the ‘informating’ of bodies make the data sharable, it also facilitates the sorting, categorizing and profiling” (ibid).

From a security standpoint, collecting information is essential regardless of whether or not it transforms a person into a ‘security identity’ (Lyon 2007) via mechanisms of surveillance and information gathering, analyzing, sorting and dissemination. However, it is important to note the difference between information and intelligence. “Information or just data alone, and the collection thereof, is not necessarily intelligence if it does not take the reader of it any further forward in their thinking” (Richards 2010: 11). As applied to the border, information is collected during daily operations and provided to the intelligence department who subsequently analyze, research and verify the data – only then does the information transform into intelligence (Sebben 2009).

However, there are negative aspects to the relentless collection of information. First, surveillance technology allows for the collection of an astonishing amount of information/ data. Yet this information can only be useful intelligence after it has been analyzed, researched and verified; this takes both labour-power and time – both of which are expensive resources. It is unfeasible that all information collected could be analyzed equally. Second, “there is sometimes a pitfall in the belief that relentless gathering of information is an end in itself, and will eventually

lead to evidence of suspicious activity or crime” (Richards 2010: 11). As Richards (ibid) explains, “aside from this process being inefficient, there are difficult political and ethical questions arising over the gathering of information, and the boundary between this information and ‘intelligence’” (11).

More intelligence sharing capabilities would increase the avoidance of another systemic failure whereby essential intelligence is not shared. It only makes sense that connected databases and integrated teams will be more effective at preventing crime and terrorist activity than agencies operating alone. Furthermore, increased intelligence sharing capabilities would also promote target deconfliction (Sebben 2009). According to the Regional Director General of CBSA, target deconfliction prevents two organizations from investigating the same target (ibid). Therefore, a nation-wide target deconfliction system, which is arguably what the *Beyond Borders* deal is trying to achieve on some level, could reduce wasted resources by preventing agencies from working on the same operation. Sharing resources allows the agencies to force multiply. Combining target deconfliction with force multiplying could potentially have a major positive effect on the overall effectiveness and power of border governance (ibid).

However, there are many potentially negative consequences of sharing information with the U.S. and creating integrated databases. Quite obviously, issues of privacy protection - or lack thereof – factor in at this point. Here I discuss the results of the public input during the public consultation period of the *Beyond Borders* deal as it expresses the concerns Canadians have regarding information sharing in a perimeter security model.

4.4 Perimeter Security and Economic Competitiveness: What Canadians Told Us

In declaring the *Beyond Borders* intentions, PM Harper expressed a commitment to engage with “all levels of government and with communities, non-governmental organizations,

the private sector and citizens on innovative approaches to security and competitiveness” (ibid: 3). To accomplish this, the provinces and territories were directed to “name a senior representative as a principle point of contact with the Government of Canada” (ibid). Furthermore, a vast amount of stakeholders from the business community, border communities, Aboriginal organizations, academic experts and think tanks were consulted in one-on-one meetings (ibid). Additionally, a website was established to provide information on the *Beyond Borders* deal and between March 13, 2011 and June 3, 2011 the Beyond the Border Working Group (BBWG) “conducted a public consultation to inform the development of a Joint Action Plan for Perimeter Security and Economic Competitiveness” (ibid). It is reported that the website received more than 16,000 individual visits and received over 1000 submissions (ibid).

On August 29 2011, Foreign Affairs Minister Baird announced the release of two summation reports of the public consultations on the *Beyond Borders* deal. The first report is entitled “What Canadians told us: A summary on Consultations on Perimeter Security and Economic Competitiveness” and the second is entitled “Summary Report on Consultations with Canadians on Regulatory Cooperation Between Canada and the United States. “Over the course of the consultation period, the RCC received feedback from across Canada, including input from private citizens, think tanks, corporations, and a wide range of industry and business associations representing several sectors of the Canadians economy¹⁰” (Regulatory Cooperation 2010:5). The key areas of this report are summarized here.

¹⁰ For an exhaustive list of the specific organizations consulted, the reader is encouraged to view the Regulatory Cooperation (2010) document, which can be located at http://www.borderactionplan-plandactionfrontalier.gc.ca/psec-scep/RCC_Consultations_Report-Rapport_sur_les_consultations_du_CCR.aspx?lang=eng

The first key area of cooperation outlined in the *Beyond Borders* deal is *Addressing Threats Early*. According to the report, provincial and territorial input indicated concern for “potential privacy issues to arise and the challenges associated with information sharing between governments” (Perimeter Security and Economic Competitiveness 2011:4). Business groups supported the notion that cooperation with the U.S. in this regard was imperative and they also provided support for the alignment of traveler pre-screening programs (ibid). Individual Canadians indicated increased information sharing through government partnerships raised concern about privacy and threats to Canadian sovereignty (ibid). Further, the Office of the Privacy Commissioner of Canada (OPC) provided specific input on information sharing with the United States (ibid). Finally, the Canadian Civil Liberties Association (CCLA) submitted a comprehensive overview “on the legal and constitutional impact of information sharing measures” (ibid: 4). Overall, the key concern noted here regards information sharing between governments and the United States in particular.

The second key area of cooperation is *Trade Facilitation, Economic Growth and Jobs*. Under this pillar it makes sense that Canada’s business, industry and trade sector would declare this section a priority. Not surprisingly, “there was overwhelming support from this sector for increasing trade through harmonization and streamlining of border processes and for expanding the range of benefits from trusted trader and trusted traveler programs for businesses of all sizes” (ibid: 4). Further, input from the business sector supported inspections of goods being conducted away from the physical border; this sector also recommended the pre-screening of travelers prior to crossing the border to minimize congestion at all ports (ibid). This sector also requested infrastructure development at major border crossings, such as the Ambassador Bridge and the Detroit and Windsor Tunnel; additionally, new technology to expedite the flow of traffic was also

requested. Regarding input from individual Canadians for this key area of cooperation, the main suggestion was to have measures in place to expedite the “movement of people for tourism or personal travel” (Perimeter Security and Economic Competitiveness 2011: 4).

The third key area of cooperation, *Integrated Cross-Border Law Enforcement*, elicited feedback primarily from individual Canadians who expressed concern regarding JFO’s between Canada and the United States. Additionally, the OPC and the CCLA “called for measures to ensure that cross-border law enforcement activities and programs respect the legal and privacy rights of Canadians” (ibid: 5).

Finally, the fourth key area of cooperation is *Critical Infrastructure and Cyber-Security*. Although some industry groups “saw the benefits of strengthening the resilience of critical and cyber infrastructure through cross-border cooperation” (ibid: 5), individual Canadians requested assurances that the Canadian law would be adhered.

Not surprisingly, trade facilitation was the chief concern for the business sector. After all, with roughly \$1.6 billion of merchandise trade occurring daily at the Canada-U.S. border (ibid), it is commonsense for this to be a major concern for the business and trade sector. Exporters spend billions of dollars per year to meet the requirements of the U.S. and Canada respectively; therefore, they want to see the Canadian government work with the U.S. to “simply, expand and harmonize existing trade facilitation programs” (ibid: 5). Furthermore, another common concern regards the impact of increased collaboration with the United States in particular. More specifically, concerns over the loss of Canadian sovereignty via the Canadian law giving way to U.S. demands were conveyed (ibid). Further, Canadians expressed concern over privacy and demanded protection of personal information. Canadians also called for measures to expedite the movement of people through the border for tourism and personal travel (ibid). The input outlined

above is expected to inform the BBWG's Joint Action Plan that should be released in the upcoming months. Finally, the CCLA expressed the vital need for redress mechanisms to be established to assist "persons unjustly or negatively affect by cross-border law enforcement activities, including early screenings and risk assessments" (ibid: 33).

4.5 Getting It Done

Prior to the announcement by Prime Minister Harper and President Obama, Colin Robertson, a senior strategic advisor for McKenna, Long and Aldridge LLP located in Ottawa, published a report entitled "Now for the Hard Part: A User's Guide to Renewing the Canadian-American Partnership". This report was released prior to the public announcement of the *Beyond Borders* deal and the content of the report provides evidence that Robertson (2011b) clearly was privy to the *Beyond Borders* deal prior to the public. This report essentially is focused on making specific suggestions regarding the *Beyond Borders* deal in relation to what Canada and the U.S. should establish and how they should go about streamlining the borders. The objective here is to provide a succinct summary of Robertson's (2011b) recommendations.

Robertson (2011b) argues that the ultimate goal of the *Beyond Borders* deal should be to make the flow of people, goods, and service "as easy as that enjoyed within the European Union" (1). He further argues that this should be achieved through principles of risk-management. He predicted the "Canadian debate will be noisy" (ibid) and that "concerns over privacy standards and sovereignty need to be assuaged and the case made for how the initiative serves the national interest" (ibid). Robertson (2011b) believes that the partnership outlined in the *Beyond Borders* deal between Canada and the United States is not only practical but to leave the current cross-border relations as they are "means continuing incremental decline" (1).

Robertson (2011b) provides a series of recommendations regarding how this policy initiative should navigate through Canadian concerns to ensure it reaches the stage of implementation. First, he makes it clear that it will take approximately eighteen months for negotiations between Canada and the United States and approximately six months past that for required legislative and regulatory implementation (ibid). If Robertson's calculations are correct, we can expect the negotiations to continue until the August 2012 and the *Beyond Borders* deal to be enacted in February 2012. He further asserts that the Prime Minister and his delegates must work to "capture the imagination of Canadians" (ibid:8) while bringing "big ideas that visibly advance the integrity of the country" (ibid) to the table with the United States. Robertson (ibid) argues that the foundation of a successful deal must be (1) security; (2) jobs and growth; and (3) resource management (ibid:8).

Robertson (ibid) indicates that for the *Beyond Borders* deal to be successful, the Canadian government will have to persuade the Americans to believe that Canada is equally serious about security as they are. Additionally, practical collaboration, such as the Shiprider and IBET programs, is essential as it has been a major characteristic of Canada-U.S. law enforcement since World War II (ibid). Robertson (ibid) candidly questions whether there is a need for separate custom checks when the BSO's of the CBSA and of the CBP are searching for the same thing. He also indicates that allocating too much emphasis on tariff collection is a diversion from "looking out for threats to our health and safety" (ibid: 10).

It is probable that agreeing upon migration issues will be a major challenge for the *Beyond Borders* action plan (ibid). Balancing security and rights demands with sovereignty and privacy issues are likely to be a source of lengthy negotiations (ibid). Prime Minister Harper has promised his citizens that he will not bend Canadian privacy laws nor jeopardize our sovereignty

through the *Beyond Borders* deal (Government of Canada 2011: Beyond the Border).

Furthermore, Mr. Harper's statements in various news articles over the past several months suggest almost an unprecedented confidence in Canada given the current state of the American economy. For example, on September 25th, 2011 Prime Minister stated in a U.S. broadcast, "in terms of Canada's role, we have continued and continue in forecasts to be outperforming the average, or the pack, in the industrial world" (CBC News 2001: Harper Touts Canada's Economy on U.S. TV). Further, Mr. Harper professed that Canada is "the only country in the world that is a growing supplier of energy, that is a secure and democratic country and whose energy sector is based on market principles rather than strategic objectives" (ibid).

Leonard (2011) indicates that because Canada has an abundance of natural resources that are in demand, it places "Canada in a strong bargaining position with the United States vis-à-vis privileged access, particularly to crude oil" (46). In this regard, "this provides Canada with a unique opportunity to engage the Americans from a position of strength with regard to developing the coordination of North American fossil fuel supplies to ensure that the benefits are fairly balanced between the US desire for security of supply and the Canadian desire for a premium price for privileged access" (ibid: 46). Mr. Harper would be wise to utilize the Canadian economic advantage and the American need for Canadian resources in negotiations with the United States while appeasing their concerns over Canadian border security infrastructure and overall mindset. The reality is that "the thickening border affects goods moving in both directions, and Americans are beginning to realize that economic costs of border security are not negligible" (ibid: 49).

Nevertheless, the fact remains that sharing immigration information is going to be a tricky negotiation as both countries have strong ideologies, rooted in history, regarding migration

issues (Robertson 20011b). Robertson indicates that the U.S. will demand information sharing regarding immigration and it is unlikely that Canada will modify its current immigration system.

Therefore, Robertson (2011a) predicts that Canada and the United States will maintain

separate migration regimes, including different visa practices. But the Americans will insist on biometrics. This is the recommendation of the 9/11 Commission and they are adamant. We've already recognized its utility in the Smart Border Accord, and to avoid Charter challenges we should stick to the voluntary approach in return for "fast pass" through the border. Those who don't want to provide a retinal scan and fingerprints will have to accept the greater likelihood of delays and interrogation. As Ambassador Gary Doer reminds us, the Canadian Charter of Rights does not apply to those crossing into the United States (78).

Regarding enhancing prosperity through "coordination of infrastructure investments and regulatory compatibility" (ibid), Robertson suggests five steps: (1) a joint commission for border infrastructure must be formulated; (2) "open our skies and roads" (ibid:12) to encourage tourism and facilitate smoother trade; (3) streamline regulations by destroying "outdated and downright silly regulatory differences that do little for productivity, health or safety in Canada" (Burney and Hampson as cited in Robertson 2011b: 12); (4) "simplify, or eliminate, the rules-of-origins regulations that govern whether goods partially produced outside North America qualify for the duty-free trade" (Robertson 2011b:13); and (5) "collaborate in managing our human capital, including the adoption of common standards" (ibid). Essentially, Robertson argues that if the European Union (EU) can manage to harmonize their standards, there is no reason that Canada and the United States cannot come to an agreement whereby basic standards and regulations are agreed upon (ibid).

4.6 Mitigating Negative Consequences

The concerns identified by the Canadians who participated in the public consultation are congruent with the concerns identified by academics in Chapter two. Essentially, there are three

main areas of concern stemming from the intention of Canada and the U.S. to facilitate a perimeter approach to border security: (1) sharing intelligence and personal information with the United States increases the risk of breaching the privacy of Canadians; (2) rights and freedoms being infringed upon; and (3) Canadian sovereignty being undermined by giving way to American demands. Overall, the main negative consequences of bi-national border governance stems from the goal of sharing intelligence with the United States. Intelligence sharing with the U.S. raises the concern of privacy breaches and infringing rights and freedoms. What happens to our personal information once it is in the United States system is a major and valid question (Surveillance Studies Centre 2011).

In order to mitigate the aforementioned negative consequences that are likely to arise from the *Beyond Borders* deal, the onus will be on the Canadian Government to ensure that the Canadian legal system is not compromised by partnership with the U.S. Specifically, the officials comprising the BBWG and the RRC must ensure that when negotiating with the U.S. that specific attention is paid to Canadian privacy laws to ensure that the personal information that will be shared with the United States is protected the same as it would be if the information were to remain in Canada.

However, this will not circumvent the informal sharing of information between agencies, which operates within and across organizations; as such, it is an issue that will have to be dealt with at the agency level. I refer to informal sharing of information between agencies such as the RCMP and the DHS, for example, which has been known to occur and is evidenced by cases such as Maher Arar. Here, this case can be utilized to exemplify the ways in which rights and freedoms can be infringed upon regarding informal information sharing. The Arar inquiry resulted in a

report outlining 23 recommendations from Judge Dennis O'Connor (CBC News 2007: In Depth Maher Arar). Of note, the 11th recommendation states:

Canadian agencies other than the RCMP that share information relating to national security should review these recommendations to ensure their information-sharing policies conform, to the appropriate extent, with the approaches being recommended for the RCMP (ibid).

Regarding Canadian sovereignty concerns, it can be argued that “agreements that enhance mutual interests are actually assertions of sovereignty, and consistent with a long tradition of constructive agreements between Canada and the United States that serve and improve vital security, economic and environmental interests” (Burney 2011: 51). Prime Minister Stephen Harper has explicitly professed that the sovereignty of Canada is not in question as the intention of the *Beyond Borders* deal “is to make sure Canadians are safer and more secure” (CBC News 2011: Border talks ‘not about sovereignty.’ Harper). Further, Mr. Harper indicated “we are not talking about eliminating the border but rather simplifying wherever possible the management of the border as well as the free flow of people and goods across the border” (ibid). Although input from individual Canadians suggests that some Canadians fear that the *Beyond Borders* deal will undermine Canadian sovereignty, there is no evidence to support these fears at this time.

4.7 Remaining Realistic

One of the commitments of this thesis, in policy terms, is to be realistic, in a prudent sense of the word, about intervention options. In other words, when contemplating methods to circumvent the aforementioned limitations evident in the security era, the context of border governance should have bearing. As Philp (2010) argues, “we have to take into account the context in which the agent proposes to act since this will inevitably have an impact on what the

agent can realistically expect to bring about and at what cost.” (468). For example, not sharing information with the United States would mitigate privacy concerns. Nevertheless, integrated law enforcement initiatives and increased information sharing capabilities are deemed necessary by those in power as demonstrated in political initiatives reviewed in Chapter 3. To be clear, I am arguing that the context and dominant ideologies of border governance in the security era should be taken into consideration when formulating methods to mitigate the negative consequences of the security era. Numerous factors must be considered when “evaluating the decisions and actions that are actually taken by politicians” (Philp 2010: 467).

Organizations such as the OPC and the CCLA exemplify how pragmatic intervention options can be formulated within the parameters of border governance post 9/11. The OPC and CCLA recognize the potential grave impact of sharing information with the United States. The OPC specifically recommended, “Canadian legal safeguards governing the use and protection of personal information apply to information shared between Canadian, U.S. and international agencies and officials” (Perimeter Security and Economic Competitiveness 2011: 19). The OPC further demanded, “the proposed measures must be implemented in accordance with Canadian privacy rights and protections” (ibid). Furthermore, the CCLA expressed the need for “effective and clear appeal and redress procedures for persons placed on watch lists, such as 'no-fly' lists” (ibid). Both the OPC and the CCLA seem to understand the pragmatics of border governance by submitting recommendations that are conducive to the mindset of border governance post-9/11. Given the concern Canadians have expressed regarding information gathering and dissemination (Perimeter Security and Economic Competitiveness 2011), mitigating the negative consequences of information sharing practices should be a key source of Government focus.

Richards (2010) suggests that the likelihood of incorrect intelligence being formulated and shared can be mitigated if analysts are aware of their cognitive limitations (38). Cognitive limitations are thinking patterns that affect our perception of the environment and subsequently impact decision made based on available information. When assessing possible interventions, one must consider, “what is to be done here and now must be a subset of what can be done, and what can be done depends on economic, political, social, cultural, and dispositional preconditions that have to be recognized, managed or negotiated by the agent” (Philp 2010: 467). In the case of intelligence analysis, “the task is to raise awareness of these natural limitations of the human brain and to mitigate and challenge them wherever possible” (Richards 2010: 38-39). Ensuring proper training and implementing extensive mechanisms of checks and balances should lessen the frequency of faulty intelligence being shared. However, it would be naive to conceive of a perfect system in which mistakes never occur. As demonstrated in the second chapter, there are many complexities associated with border governance. It is argued here that the complex, convoluted nature of security policy in the security era combined with dominant ideologies evident in border governance impact decision-making on a systemic level. The argument is not whether or not this reality is right or wrong; in a more modest approach, I am arguing that context should not be undervalued. This thesis advocates that those studying border security policies to derive alternative options do so in a manner that appreciates the unique nature of polity and the milieu it functions within.

Chapter 5

Conclusion

In theory, there is no difference between theory and practice. But, in practice, there is.

~ Jan L.A. van de Snepscheut

5.1 Summary

Pre-emptive security measures, risk profiling via surveillance mechanisms, intelligence gathering, information sharing, and cyber-security are major features of the security era. This thesis outlines the complexities involved in fostering and maintaining indispensable cross-border relations with the United States, interpreting the meaning of securing Canadians as recognized by the Supreme Court, and the preemptive mindset of the security era, which raises concern over infractions of Canadians rights and freedoms, provided evidence of the very real conundrums inherent in governing Canada in the security era. These examples were provided to evoke the reader into a pragmatic frame of mind deemed essential to realistically appraise active border governance.

The concept of the security era was explained and placed in historical context to demonstrate why the CJS is no longer concerned with the *function* of criminological problems and are instead focused on the *management* of such problems. It has been established throughout this paper that the security era “is concerned with techniques to identify, classify, and manage groupings sorted by dangerousness” (Perimeter Security and Economic Competitiveness 2011). Applied directly to border security policy, border governance is concerned with managing the free flow of legitimate people and goods to and from Canada.

The importance of the Canadian-U.S. relationship is stressed and the argument is made that it is in each country’s best interest to formulate efficient and effective cross-border relations.

From an economical, geographical, historical, and practical perspective, a cooperative, well established relationship between Canada and the United States is as rational as it is essential. One of the most pressing challenges in Canada-U.S. cross-border relations is balancing Canada's desire for economic access to the American market with the American desire for security. Border governance is "founded on the principle that national security and economic security are not competing objectives" (Public Safety Canada 2008: Smart Border Declaration and Action Plan). However, it was argued that despite the profession that economic security and national security interests are equally important, 9/11 reset the policy agendas favouring security (Smith 2007).

The desire to achieve a smart and secure border has social consequences that risk infringing fundamental liberties and human rights for specific categories of people deemed to pose a risk to the nation state. Security and liberty either become presented as dichotomous entities that cannot co-exist, or as concepts that cannot exist without each other.

A (political) critical discourse analysis was implemented to examine the security dialogue as revealed through policy. By examining the *Smart Border Declaration*, the *Security and Prosperity Partnership (SPP)*, the pending *Beyond Borders* deal, Public Safety Canada (PS), Canada Border Services Agency (CBSA) and the various programs and services implemented to attain a smart border, main themes (or ideologies) of border governance in the security era emerged: (1) border security is attained through a risk-based approach; (2) the border is no longer a fixed entity but a fluid and mobile concept; (3) integration is central to keeping the border open to trade and close to crime; (4) intelligence sharing and the creation of joint databases to ensure the sharing of information in real time is paramount; and (5) surveillance mechanisms are utilized as a social sorting device to ensure that only low-risk (or legitimate) persons and goods are admissible to the host country.

This thesis examines the *Beyond Borders* deal, which is currently being developed, as a mechanism to garner an understanding of the limitations posed by the security mentality dominant in risk governance and border security policy. The objective of identifying such limitations is to focus on finding applicable methods to circumvent or mitigate the negative consequences dominant in the security era. Subsequently, three main areas of concern stemming from the intention of Canada and the U.S. to facilitate a perimeter approach to border security are established: (1) sharing intelligence and personal information with the United States increases the risk of breaching the privacy of Canadians; (2) rights and freedoms being infringed upon; and (3) Canadian sovereignty being undermined by giving way to American demands.

5.2 Beyond Border Projections: What's Next?

Currently, it is ten years post-9/11 and the American economy is in significant peril; some argue that the Americans are finally reorganizing their priorities from a 'security trumps all' viewpoint to recognize that their economic security desperately requires a political action plan to re-establish the economic stability that Americans expect (Leonard 2011). In September 2011, Prime Minister Stephen Harper was questioned by Peter Mansbridge of CBC news regarding the United States being more focused on security than Canada. Mr. Harper replied,

I think it is true. I would say that probably eight, nine years ago that was probably extreme. United States security was all they were focused on, and that was not so much the case in [Canada]. I think we've stepped up our game in terms of security. I think the Toronto 18 plot that you mentioned is, quite frankly, an example of the heightened sense of security, and action on the security front in [Canada]. At the same time, I do think things have started to come a bit back into balance in the United States.

When projecting the likely future of the *Beyond Borders* deal, it is important to appreciate that it is in each country's best interest to formulate efficient and effective cross-border relations. Furthermore, given that prosperity and security are key motivating factors for Canada

and the United States to engage in cooperative and proficient bi-national agreements, it is likely that the *Beyond Borders Action Plan* will be released within the next month as indicated by Mr. Harper. This *Action Plan* is prone to be framed in fashion whereby there are specific objectives outlined for each of the four key areas of cooperation. Given the strong feedback from individual Canadians, the OPC, and the CCLA demanding privacy considerations be taken into consideration, it is hopeful that an agreement will be reached whereby a bi-national legislation is formulated on personal information that affords the same legal protection of personal data that is currently had by Canadians.

Furthermore, it is anticipated that Mr. Harper will utilize the Canadian economic advantage and the American need for Canadian resources in negotiations with the United States. The Canadian government is apt to put effort into convincing the United States that Canadians are just as serious about security as the Americans - this will be an essential requirement for the Americans. However, it is expected that a difficult feat will be fostering an agreement upon sharing immigration information. Robertson's (2011b) projection that the U.S. and Canada will maintain separate migration regimes is almost certainly correct. As Robertson (ibid) indicated, the U.S. will demand information sharing regarding immigration and it is unlikely that Canada will modify its current immigration system. Given that Canada has a majority conservative government for the next four years and Prime Minister Harper and President Obama generally have a good working relationship, it is probable that Canada and the U.S. will succeed in carrying out a perimeter approach to security whereby regulations are harmonized and joint resources are utilized.

Consequently, despite, the negative limitations addressed within this thesis, the themes arising from post 9/11 border security policy suggest that the Canada-U.S. border will

increasingly be founded in risk-based principles where prevention via pre-screening mechanisms is deemed vital. As a result, we will continue to see increasing pre-screening programs and infrastructure and the border will remain a fluid and mobile concept. Given that integration is believed to be central to keeping the border open to trade and travel yet closed to crime, JFO's such as Shiprider and IBETs will likely be expanded and built upon. Despite the concerns from privacy advocates, joint databases at the border are likely to be put into place. Although, I expect that a broad legislative framework will be put into place to appease Canadians' concerns about their personal information.

Finally, surveillance mechanisms will more than likely be used at an increasing rate and the data will almost certainly be integrated with the United States. It has become apparent that social sorting is deemed necessary in a risk-based mindset and will be carried out to ensure that only legitimate people and goods are permitted access to the host country. This thesis provides evidence that the trends just mentioned are already occurring and the *Beyond Borders* deal will almost certainly continue to push these trends further. While only time will tell what the exact outcomes of the *Beyond Borders* deal will be, it clearly is a function of the security era and is predicated upon risk governance.

5.3 Concluding Thoughts: Bridging the Gap

Based on my research, the abovementioned projections of the *Beyond Borders* deal are believed to be the likely outcome of the joint action plan that should be released in the upcoming months. The projections are candidly presented based on the themes demonstrated in the specific border security policies that were analyzed in this thesis. Furthermore, it is recognized that they are rooted in the security operative – that is, from the perspective of those actively working within the border security domain. Yet, a major underlying premise of this thesis has been

identifying two competing paradigms active within the study of border governance: academic issues and pragmatic issues. Subsequently, to conclude without a discussion of how to reconcile the mandates of the pragmatic actor with that of the academic actor in terms of border governance would be disconcerting.

It cannot be overstated that the desire to achieve a smart and secure border has social consequences that risk infringing fundamental liberties and human rights for specific categories of persons deemed to pose a risk to the nation state. Nor can it be disregarded that there is an extreme potential for life altering ramifications to occur as a result of sharing information with the United States. As stated in the onset of this thesis, the objective of identifying such limitations was to focus on finding applicable methods to circumvent or mitigate the negative consequences dominant in the security era. In order to facilitate this task, it is necessary to keep in tension the pragmatic and academic paradigms.

Regarding academia, I stated earlier that a major role of academics studying border security should be to research the effectiveness of the tools being employed at the border in an effort to secure the nation state against unwanted goods and persons. While public policy functions within a political atmosphere that deems surveillance mechanisms to be a vital asset of risk management, this is no reason to use technologies or processes that have been shown to be ineffective or inappropriate. Therefore, it is imperative that research be conducted to help ensure that the most effective tools are implemented to ensure that undue harm is mitigated.

Additionally, I explicitly advocated that those studying border security policies and initiatives do so in a manner that appreciates the unique nature of that polity and milieu - this will not be an easy feat. Recall Zedner's (2003) argument that "the language of security is embedded in the place, institutions and practices of which it is the product" (166). She explicitly states, "one

must study the institutions and practices of security in their own right” (ibid). For an academic to meet this challenge, they must directly engage with the border security environment. However, in many cases the academic is unable to gain access required, as I discovered in my own research, to obtain the caliber of understanding required to effectively and holistically assess the problem and devise solutions to mitigate the consequences. The inability to gain the access required is not due to lack of motivation on the part of the academic; conversely, the denial of access typically results from the direction of senior management within the institutions being studied.

For example, the original goal of my thesis was to ascertain how decisions are made at the border via interviewing agents of all levels of the CBSA. Despite the fact that I received funding to carry out my original mandate and received ethical consent to carry out my project, the CBSA refused to partner with me on this project and denied access to the required information to facilitate my goal. This essentially rendered me incapable of answering the question: How do the CBSA Border Service Officers (BSO) uphold their duty to restrict access to unwanted persons and goods on a daily basis? Issues of access to and transparency of government agencies directly impact the quality of research conducted and this rests on the shoulders of the pragmatic actors.

Interestingly, a senior level manager of CBSA conveyed to me, “the problem with academics is that they come up with these wonderful solutions to solve the problems we face but they are rarely applicable in the real world” (Sebben 2009). However, I would like to refute his perception and argue that government agencies do not provide adequate opportunities for academics to problem solve (or devise ‘wonderful solutions’) as they are not permitted necessary access to essential information. This is an issue that needs to be rectified at the practical level.

In essence, this is a tautological argument because in order to effectively solve the problems that practical institutions face (such as the CBSA), academics require access to the

essential information; yet typically only senior-level agents of the institution or government are privy to this information for *security* reasoning. Recall that border security is a systemic risk and “in order to understand [systemic risks] as well as possible, it is needed to transcend disciplinary boundaries and to involve knowledge and experience not certified as academic” (van Asselt and Renn 2011: 442).

In my opinion, the most ideal method to bridge the gap between the pragmatic paradigm and the academic paradigm is via participant observation whereby the academic is immersed within the environment being studied. However, it has been established that this is not always possible. My suggestion here is grounded in my experience both as an academic actor and a pragmatic actor. I am well versed in the inherent frustrations of trying to balance the core beliefs of both paradigms. With that being said, I believe it is possible to wear the hat of the academic and advocate alternative options to circumvent and mitigate the consequences of the security era while still maintaining an appreciation of the unique nature of border polity and milieu. The OPC and the CCLA are prime examples here as they have both demonstrated the ability to reconcile the academic and pragmatic issues by submitting recommendations that address both critically and practically the mindset of border governance post 9/11.

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