

Canada – US Security Perimeter

Canada and the US have announced plans to create a North American Security Perimeter.

Since the 9/11 terrorist attacks, thickening of the Canada-US border has resulted in travel impediments, and significant costs to manufacturers seeking to export goods across the border. The Security Perimeter is meant to ease border traffic by closing borders to criminals and “terrorist elements”, and opening borders to “legitimate travelers and trade”.

At this nascent stage, not much is known about how the Security Perimeter will actually work. However a Working Group has been constituted to issue an Action Plan by fall 2011.

The Working Group confirms some broad objectives. The Security Perimeter is to build on existing trusted traveler programs such as Nexus, in assessing threats early. There will be increased ‘information sharing and pooling’, integrated cross-border law enforcement, joint plans on critical infrastructure and cyber-security, and joint privacy principles relating to personal information.

From a civil liberties perspective, the actual details will be crucial.

How will travellers be identified as being trusted or risky? What information will be relied upon? Will travellers have the opportunity to access this information, seek rectification in case of error, and seek effective appeal and redress if they dispute the categorization of ‘risky’? Indeed, what are the ramifications of creating profiles of “trusted” , “risky”, or even “normal”? Will these profiles permeate to eligibility determination in other fields, such as employment?

What about Canadians who end up on US watch lists, or No Fly Lists? Presently there are individuals who are not on Canadian watch lists, but who are on US lists. In a Security Perimeter context, will US lists predominate? What about mobility rights guaranteed in the Canadian Charter of Rights and Freedoms, and in international law?

Listing also raises many due process concerns, including knowing and challenging the information relied upon, and the presumption of innocence. How can an innocent person prove they were wrongly listed?

And how will Canada ensure that information procured from torture is not relied upon in Security Perimeter listing, threat assessments or other “information sharing and pooling”? To rely on information procured from torture contravenes Canadian and international law prohibitions against torture, and also results in a corrupted network of information exchange that erodes legal standards.

“Greater information sharing and pooling” raises concerns of accountability, transparency, and necessity. We believe that legal safeguards surrounding necessity, proportionality and reasonableness of collection, use, dissemination, retention, and deletion must be enforced. Further, these legal safeguards should “attach” to any information shared with Third States/agencies.

The plans for “integrated cross-border law enforcement” also raise questions of oversight, accountability, and due process. Integrated law enforcement or security initiatives, must be accompanied by integrated oversight and accountability mechanisms.

With respect to cyber-security, Canada and the US have different approaches to electronic surveillance, warrants, and the use of third-party intermediaries. The internet inherently raises inter-jurisdictional issues. Will Canada simply amend its laws to comply with US standards? How will differences be addressed? What about future US policy changes and the impact upon Canada?

Finally, there is also concern about refugees and asylum-seekers. In cases where the US refuses to allow an asylum-seeker into its territories or airspace, will that individual be obstructed from reaching Canadian borders? What are the possible repercussions for refugees and asylum-seekers currently living inside Canada? Will Canada be able to maintain its legal and humanitarian commitments to refugees and asylum-seekers?

Differences on many issues are inevitable and the issue of neutral, enforceable dispute resolution mechanisms is also raised. Will new mechanisms be created, how will they operate, and will their decisions be enforced?

At the end of the day, it is vital from a civil liberties perspective that all of the legal safeguards contained in the Canadian Charter of Rights and Freedoms are upheld. Our freedoms and liberties must be protected. Proper attention must be paid to the civil liberties implications of Security Perimeter proposals, so that legal safeguards including due process, accountability, transparency, privacy protection, and redress mechanisms are built in to the process.