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# Moving People across the Canada - United States Border: Legislative and Regulatory Developments in Immigration, the Western Hemisphere Travel Initiative, and Enhanced Drivers' License Programs

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MOVING PEOPLE ACROSS THE CANADA-UNITED STATES  
BORDER: LEGISLATIVE AND REGULATORY  
DEVELOPMENTS IN IMMIGRATION, THE WESTERN  
HEMISPHERE TRAVEL INITIATIVE, AND ENHANCED  
DRIVERS' LICENSE PROGRAMS

*Session Chair – Catherine A. Pawluch*  
*United States Speaker – Praveen Goyal*  
*Canadian Speaker – Ken Oplinger*

INTRODUCTION

*Catherine A. Pawluch*

MS. PAWLUCH: Good morning. How are you, ladies and gentlemen? My name is Catherine Pawluch. I am a partner with Gowling Lafleur Henderson,<sup>1</sup> a national law firm in Canada with offices across Canada and in Moscow. It is my distinct privilege this morning to chair this panel which will focus on the movement of people across the Canada-U.S. border. In our knowledge-based economy, it is often said that human capital is the most critical asset in the success of a business.<sup>2</sup> In the context of the U.S-Canada border, yesterday we heard Canada's Ambassador to the U.S. say that more than 400,000 people cross the Canada-U.S. border every day.<sup>3</sup> In this post-9/11 security-related immigration environment, this morning we are going to focus on policies and programs that have been introduced and are about to be introduced which allow our governments to conduct identity and security checks on those seeking to enter and secure legal status. How are these pro-

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<sup>1</sup> See Gowlings Lafleur Henderson, Biography of Catherine A. Pawluch, <http://www.gowlings.com/professionals/professional.asp?profid=230> (last visited Oct. 10, 2008) (“Catherine is a partner . . .” at Gowlings).

<sup>2</sup> See EDWARD E. GORDON, SKILL WARS, WINNING THE BATTLE FOR PRODUCTIVITY AND PROFIT 7 (3d ed. 1999) (“[W]ell educated people are now the defining element for business success”).

<sup>3</sup> See The Honourable Michael Wilson, Can. Ambassador to the U.S., Address to the Seattle Rotary Club (Dec. 12, 2007) (“And more than 400,000 people a day, on average, travel across the [Canada-U.S.] border.”), available at <http://geo.international.gc.ca/can-am/washington/ambassador/071212-en.asp>.

grams effective, and how are they likely to affect corporate movement of employees, the tourism sector and the trade generally between our two countries? As we listen to our presenters this morning, they are going to talk about some new programs that are being rolled out. Let us think about and consider whether these programs further security goals. Will they likely to accomplish their purposes? And are they worth the cost in resources expended and opportunities foregone?

To take us through a description of the new programs and some analysis and thought, I am delighted to welcome two eminently qualified speakers. Praveen Goyal, who is sitting to my right, is the director of U.S. Government Relations for Research in Motion, RIM, a Canadian company with its headquarters in Waterloo, Ontario.<sup>4</sup> RIM is the creator of the BlackBerry, which has been ubiquitous on the North American continent and is indeed coming to be so around the world.<sup>5</sup> RIM is a leading designer and manufacturer of innovative wireless solutions for the worldwide mobile communications market. At RIM, Praveen's responsibilities include developing and implementing policy strategies and representing RIM before federal and state legislators in the United States. Praveen is a graduate of Yale College and Harvard Law School. He has served as counsel within the Federal Communications Commission<sup>6</sup> and the telecommunications industry.

We also welcome this morning, to my left, Ken Oplinger, who is president and CEO of the Bellingham/Whatcom Chamber of Commerce and Industry.<sup>7</sup> Ken currently serves as the co-chair of the BESTT Coalition, the Business for Economic Security Tourism and Trade,<sup>8</sup> which is a bi-national Canada-U.S. coalition of business and industry concerned about the effects on the Canada-U.S. border of implementing the Western Hemisphere Travel Initiative,<sup>9</sup> which we are going to hear about this morning. Ken is a graduate of Willamette University in Salem, Oregon and the Institute for Organiza-

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<sup>4</sup> See Can. - U.S. Law Inst., Biography of Praveen Goyal, <http://cusli.org/conferences/annual/bios/goyal.html> (last visited Oct. 10, 2008) ("Praveen Goyal is Director of U.S. Government Relations for Research In Motion").

<sup>5</sup> See Research In Motion, Products, <http://www.rim.com/products/index.shtml> (last visited Oct. 10, 2008) ("RIM's portfolio of award-winning products . . . include the BlackBerry. . .").

<sup>6</sup> See Can. - U.S. Law Inst., *supra* note 4 ("[H]is career has included various positions serving as counsel within the Federal Communications Commission . . .").

<sup>7</sup> See Bellingham Chamber of Commerce, About Ken Oplinger, [http://www.bellingham.com/content/about/ken\\_oplinger.asp](http://www.bellingham.com/content/about/ken_oplinger.asp) (last visited Oct. 10, 2008) ("Ken Oplinger currently serves as the President/CEO of the Bellingham/Whatcom Chamber of Commerce & Industry . . .").

<sup>8</sup> See *id.* ("Ken currently serves as the co-chair of the BESTT Coalition . . .").

<sup>9</sup> See *id.* ("[A] bi-national coalition of business and industry concerned about the affects of implementing the Western Hemisphere Travel Initiative (WHTI) on the Canada/US Border").

tional Management at UCLA. I am going to ask Praveen to lead off this morning, and Ken will follow.

## UNITED STATES SPEAKER

*Praveen Goyal\**

MR. GOYAL: Well, thank you very much for that introduction, and thank you very much for being here this morning. I know it is quite early on a Saturday morning, and I appreciate the fact that you all made time to come and hear my thoughts on high-tech immigration. Just to give you a little bit background on RIM as was mentioned, we are a Canadian company with operations all over the world. We are in 135 countries right now and are working with about 300 carriers around the world. But North America has always been sort of a home base for us obviously with being a company with Canadian roots and also substantial operations here in the U.S. And I think one of the things that is really interesting about RIM is that the cross-border relationship and the economic value of that relationship is something that is extremely significant for us given the people that we have in Canada, the manufacturing we have in Canada as well as the market that we have in the U.S., and the historic business that we have done with large customers such as the U.S. government and Fortune 500 companies.<sup>10</sup> So to me, RIM is sort of like the shining example of the value of that Canada-U.S. relationship and what is possible if it is a strong and vibrant one.

Today I am here to talk about high-tech immigration. And what is interesting about that issue is that there are some really interesting contrasts between the approach that Canada and the U.S. respectively have taken to high-tech immigration. As a company with significant engineering and R & D operations, the ability to attract skilled workers is something that is incredibly important to our continued success and growth.<sup>11</sup> In Canada one of

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\* Praveen Goyal is Director of U.S. Government Relations for Research In Motion (RIM). Perhaps best known for its BlackBerry wireless handheld devices, RIM is a leading designer and manufacturer of innovative wireless solutions for the worldwide mobile communications market. At RIM, Praveen's responsibilities include developing and implementing policy strategies and representing RIM before federal and state policymakers. Praveen is a graduate of Yale College and Harvard Law School, and his career has included various positions serving as counsel within the Federal Communications Commission, U.S. Congress, and the telecommunications industry.

<sup>10</sup> See e.g., RESEARCH IN MOTION, HISTORY 8 (2006), [http://www.rim.com/company/pdf/RIM\\_History.pdf](http://www.rim.com/company/pdf/RIM_History.pdf) (discussing RIM's history and business it has done with the U.S. government and Fortune 500 companies).

<sup>11</sup> See generally Innovation Performance—British Columbia,

our co-CEOs stated in a speech he gave in America last year that we are just sitting up there with a giant catcher's mitt catching all these great talented engineering R & D candidates from around the world and bringing them to Canada to come work at RIM. At our company we have about 8,000 employees, altogether world-wide 8,300, and of that number, about 2,900 people are involved in R & D.<sup>12</sup> So, there are a very substantial number of employees who are doing very high-skilled, high-tech engineering and development work for the company.

We are also adding jobs significantly in the U.S. I checked this morning, and we have got about 100 jobs open in the U.S. More than half of those hi-tech jobs are engineering positions, and that is about a quarter of our worldwide engineering positions. So we are growing substantially in the U.S. We just announced plans to add about 1,000 jobs from our U.S. headquarters in Texas, and obviously our ability to grow worldwide depends greatly on our ability to attract highly-skilled workers both in Canada and in the U.S.<sup>13</sup>

Obviously, some of you may know there are significant challenges in highly-skilled workers to the U.S. There is a program here called the H-1B Visa Program,<sup>14</sup> and you have probably heard quite a bit about that from companies with U.S. headquarters and U.S. bases. This program is very important to us for our ability to attract workers here. And what happened is in 2003, there was an overall cap of H-1B visa allotments at 195,000, and that went down now to a level of about 65,000.<sup>15</sup> There was a very substantial reduction in the amount of visas available for high-tech workers.<sup>16</sup> Conversely, there is no such cap in Canada.<sup>17</sup> The approach that Canada has

<http://innovation.gc.ca/gol/innovation/site.nsf/en/in02013.html> (last visited Oct. 10, 2008) (discussing innovation and skilled workers as vital to success and growth).

<sup>12</sup> See RESEARCH IN MOTION, ANNUAL INFORMATION FORM 27 (2008), [http://www.rim.com/investors/pdf/AIF\\_2008.pdf](http://www.rim.com/investors/pdf/AIF_2008.pdf) ("As of March 1, 2008, RIM had 8,387 employees: 2,910 in the advanced research . . .").

<sup>13</sup> See generally CANADIAN MANUFACTURERS & EXPORTERS, *THE BUSINESS CASE FOR INNOVATION 6* (2001), <http://www.cme-mec.ca/national/documents/caseforinnovation.pdf> (discussing that the ability to grow and compete worldwide depends on innovation, which is dependent on the ability to attract and retain highly skilled workers).

<sup>14</sup> See U.S. Citizenship and Immigration Serv., Cap Count for H-1B and H-2B Workers for Fiscal Year 2009, <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnexoid=138b6138f898d010VgnVCM10000048f3d6a1RCRD> (last visited Oct. 10, 2008) ("The H-1B visa program is used . . . to employ foreign workers in specialty occupations that require theoretical or technical expertise in a specialized field and a bachelor's degree or its equivalent").

<sup>15</sup> See Nicholas D. Kristof, *Compassion That Hurts*, N.Y. TIMES, Apr. 9, 2006, at 4 ("The H-1B visa program enriches America by bringing in high-tech workers, but the nominal ceiling on these visas has dropped to 65,000, after temporarily rising to 195,000 in the 1990's").

<sup>16</sup> See *id.*

<sup>17</sup> See Colin R. Singer, *Canada's Annual Immigration Levels: Quota System in Disguise*,

taken towards attracting high-tech workers is to implement a point system and basically stand up there with a giant catcher's mitt to try and attract the best and the brightest and bring them over in as many numbers as they can.<sup>18</sup> And so that is a very stark contrast in the approach that has been taken between the two nations.

Now obviously we would like to see something that is much more liberal and something that is much more open in terms of the U.S. policies to attract high-skilled workers. And one of the things that surrounded the debate that is taking place right now in the U.S. Congress on increasing that cap and making it permanent is the myth that these are jobs that are taken from U.S. workers and that these jobs reduce the ability to keep the U.S. competitive domestically.<sup>19</sup> And what is interesting about the H-1B program is that when you look at the facts and when you look at some of the numbers underlying the program, I think the evidence is pretty clear that it is a resounding success both in terms of companies like ours who want to come here and grow and expand our operations here, but also for the U.S. economy as a whole.<sup>20</sup> There was an interesting study that showed that for every one H-1B application that is placed, it results in the addition of five jobs in the U.S.<sup>21</sup> Also, if you look at smaller businesses with 5,000 or less employees, the number is even higher: seven jobs are created.<sup>22</sup>

And part of the way that the H-1B program is structured is that you really cannot use it as a way to bring in cheaper labor than you would otherwise have access to from domestic workers.<sup>23</sup> You have to show that you are

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<http://www.immigration.ca/permres-gii-disguise.asp> (last visited Oct. 10, 2008) (stating that there is no cap establishing a specific number of visas available per year, as is done in the U.S.).

<sup>18</sup> See Immigration.ca, *Who Qualifies for Canadian Permanent Residence?*, [http://www.immigration.ca/permres-independent-who\\_qualifies.asp](http://www.immigration.ca/permres-independent-who_qualifies.asp) (last visited Oct. 10, 2008) (explaining the points system for skilled workers).

<sup>19</sup> See NATIONAL FOUNDATION FOR AMERICAN POLICY, *H-1B VISAS AND JOB CREATION*, 1 (2008), <http://www.nfap.com/pdf/080311h1b.pdf> (“New research shows that hiring H-1B visa holders is associated with increases in employment at U.S. technology companies, undermining the assertion of critics that foreign-born professionals harm the job prospects of Americans.”).

<sup>20</sup> See *Help not wanted*, 387 *ECONOMIST* 38, Apr. 12, 2008 (arguing that bright foreigners benefit the American economy).

<sup>21</sup> See NATIONAL FOUNDATION FOR AMERICAN POLICY, *supra* note 19 (“The data show that for every H-1B position requested, U.S. technology companies increase their employment by 5 workers”).

<sup>22</sup> See *id.* (“For technology firms with fewer than 5,000 employees, each H-1B position requested in labor condition applications was associated with an increase of employment of 7.5 workers”).

<sup>23</sup> See NATIONAL FOUNDATION FOR AMERICAN POLICY, *DRIVING JOBS AND INNOVATION OFFSHORE: THE IMPACT OF HIGH-SKILL IMMIGRATION RESTRICTIONS ON AMERICA* 4 (2007), <http://www.nfap.com/pdf/071206study.pdf> (“Under current law, H-1B professionals must be

paying the equivalent wage that you would pay to a U.S. worker in the same job or the prevailing wage for that job.<sup>24</sup> There are a number of fees you have to pay, and I think the overall figure comes out to about \$5,000 or \$6,000, not in addition to the enforcement penalties you subject yourself to if you misuse the program and use it in a way that is inappropriate.<sup>25</sup> So it actually turns out to be that it is more expensive to hire somebody from the H-1B program than if you could find that same worker domestically.<sup>26</sup>

And the reason companies are doing it is because they want to bring in the best and the brightest, they want to bring in people who are top tier candidates that they would not otherwise have access to in the States.<sup>27</sup> And another sort of interesting wrinkle in this is the degree to which - at least in higher education institutions in the U.S. - there are not enough graduates being produced in stem field science, technology, and engineering and math.<sup>28</sup> And I saw some interesting figures showing that if you look at the U.S. as a whole, over 50 percent of the Engineering Master's that are granted are being granted to foreign nationals.<sup>29</sup> And if you look at engineering Ph.D.'s, the number is even higher. It is in excess of 70 percent.<sup>30</sup> Here in Ohio the number is actually closer to 75 percent of the number of Engineering Ph.D.'s that are going to foreign nationals.<sup>31</sup> So what it shows is

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paid the *higher* of the prevailing wage or the actual wage paid to similarly employed Americans. In addition, companies generally pay approximately \$6,000 in legal and government-imposed fees when hiring an H-1B visa holder . . . .”).

<sup>24</sup> See *id.*

<sup>25</sup> See *id.*

<sup>26</sup> See Eilene Zimmerman, *H-1B visa crunch: 'I can't grow my business'*, CNN, Apr. 17, 2008, [http://money.cnn.com/2008/04/16/smbusiness/immigrant\\_visa\\_tech.fsb/index.htm](http://money.cnn.com/2008/04/16/smbusiness/immigrant_visa_tech.fsb/index.htm) (last visited Oct. 10, 2008) (“But federal law requires that H-1B employees be paid the prevailing wage for their positions. And immigration lawyers say it's actually more expensive to hire a foreigner, because of visa filing fees and legal expenses.”).

<sup>27</sup> See *id.* (“Demand for H-1B visas is rising thanks to a shortage of American citizens with training in the hard sciences, mathematics and computer science.”).

<sup>28</sup> See *id.*

<sup>29</sup> See *e.g.*, National Science Foundation, Higher Education in Science and Engineering, <http://www.nsf.gov/statistics/seind08/c2/c2s4.htm#c2s44> (last visited Oct. 10, 2008) (“Within engineering, students on temporary visas earned more than half of master's degrees in chemical engineering (51%) and in electrical engineering (55%).”).

<sup>30</sup> See generally JAQUELINA C. FALKENHEIM, U.S. DOCTORAL AWARDS IN SCIENCE AND ENGINEERING CONTINUE UPWARD TREND IN 2006 2 (2007), <http://www.nsf.gov/statistics/infbrief/nsf08301/nsf08301.pdf> (“The proportion of [doctoral] awards to non-U.S. citizens was largest in engineering (67.7%), particularly in electrical engineering (77.3%), civil engineering (73.5%), and industrial/manufacturing engineering (72.4%) . . . .”).

<sup>31</sup> See *e.g.*, U.S. News and World Report, Graduate Schools: Engineering, <http://premium.usnews.com/grad/eng/items/02222/@@student-body.html> (last visited Oct. 10, 2008) (listing Cleveland State University's School of Engineering student body as 76.3 percent international).

that in the U.S. we are doing a great job of educating Engineering Ph.D.'s and Master's students, but then we are sending them abroad instead of keeping them here to help build the economy over here.<sup>32</sup> And I think that disparity also shows why there is not a sufficient talent pool here for companies that are trying to hire high-skilled workers, and why we have to look overseas to fill those needs.<sup>33</sup>

So what we would like to see happen - and I think there are a large course of companies in the high-tech space that are looking to see this cap increase made permanent - is to have some restoration of the cap back to its prior levels and to reduce the wait time.<sup>34</sup> Right now if you are trying to hire somebody, you have an immediate need, and you want to fill that as quickly as you possibly can. And even under the H-1B program, given that in the last two years, that 65,000 cap has been filled on the first day that the filing window was open and was actually filled before the fiscal year even ended, you are looking at a lead time of about 16 months right now to identify an applicant, get their application filed, cross your fingers, and hope that they win the H-1B lottery and actually get granted a visa before you can actually get them working and contributing to your company and contributing to the development of the economy as a whole.<sup>35</sup>

So those are some of the issues that we are looking at, and some of the kind of harmonization we like to see between immigration policies in the high-tech space. One of the things I will also add to this is sort of the personal story in the sense that I think there are a number of companies that people are aware of that have been founded by immigrants with a strong high-tech background, and the contributions they made to the economy. On an aggregate level, there are figures showing that over that last 15 years, a quarter of the U.S. public companies that are ventured back were actually founded by immigrants and have resulted in a market cap of about \$500 billion in the U.S. economy which is a fairly substantial number.<sup>36</sup> But of

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<sup>32</sup> See Anne Broache, *Bill Gates to Congress: Let us hire more foreigners*, CNET NEWS, Mar. 12, 2008, [http://news.cnet.com/8301-10784\\_3-9892046-7.html](http://news.cnet.com/8301-10784_3-9892046-7.html) (last visited Oct. 10, 2008) (arguing that foreign students educated in the U.S. end up going abroad, which ultimately creates jobs outside of the U.S.).

<sup>33</sup> See *id.* (arguing that there is a shortage of American workers and high-tech companies have to look to top foreign talent to fill these positions).

<sup>34</sup> See *id.* (arguing that we need to increase the cap on H-1B visas and reduce delays).

<sup>35</sup> See *Quota Quickly Filled on Visas For High-Tech Guest Workers*, N.Y. TIMES, Apr. 5, 2007, at C6 (discussing the lottery system and that the 2008 limit for H-1B visa petitions was reached in one day).

<sup>36</sup> See Stuart Anderson and Michaela Platzer, AMERICAN MADE: THE IMPACT OF IMMIGRANT ENTREPRENEURS AND PROFESSIONALS ON U.S. COMPETITIVENESS 6 (2006), [http://www.nvca.org/pdf/AmericanMade\\_study.pdf](http://www.nvca.org/pdf/AmericanMade_study.pdf) (“Over the past 15 years, immigrants have started 25 percent of U.S. public companies that were venture-backed . . .” resulting in market capitalization that “exceeds \$500 billion.”).



particular note to us at RIM is that we share part of that story from the Canadian side. The founder of our company, Mike Lazaridis, and one of our co-CEOs is himself a Canadian immigrant.<sup>37</sup> He was born in Turkey to Greek parents actually, so he is sort of a double-level immigrant. And then came to Canada, grew up in Canada, and founded a remarkable technology company there that has been incredibly successful.

In addition to that commercial success that RIM has enjoyed, Mike has also made it a point to be a strong supporter of basic science research in Canada. And so one of the things that I know has been really important to him is funding basic science research in the University of Waterloo region which is where a lot of RIM employees have graduated from and where Mike himself attended.<sup>38</sup> And he gave \$100 million of his own money to found the Perimeter Institute which is a basic science research institute studying Theoretical Physics.<sup>39</sup> And also \$50 million of his own money to support the Institute for Quantum Computing which is looking at sort of the next generation of computing technologies given the limitations that we are running up against in the silicon world, and the ability to add smaller and smaller transistors on silicon chip, to look at new innovations like optical computing and quantum computing that can really break open the doors of what is possible with silicon-based computing today.<sup>40</sup>

So I like to think that RIM and Mike's personal story in particular are a great example of why we want to keep bringing high-skilled workers over to North America, over to Canada and in increasing numbers to the U.S. to show what is possible. There are plenty of stories here in the U.S. as well of companies like that. I mean, Andy Grove from Intel,<sup>41</sup> Sergey Brin from Google,<sup>42</sup> folks in the government like the Commerce Secretary Carlos Gutierrez,<sup>43</sup> there is Albert Einstein.<sup>44</sup> There is a long list of immigrants who

<sup>37</sup> See Research In Motion, RIM's Executive Team, <http://www.rim.com/newsroom/media/executive/index.shtml> (last visited Oct. 10, 2008) (stating that Mike Lazaridis is a founder and Co-CEO of Research In Motion).

<sup>38</sup> See *id.* ("Mr. Lazaridis is . . . a passionate advocate for education and scientific research . . . [he has] generated more than \$100 million in additional private and public sector funding for this world centre of excellence, based in Waterloo . . .").

<sup>39</sup> See *id.* ("His most noted gift of \$100 million established the Perimeter Institute for Theoretical Physics.")

<sup>40</sup> See *id.* ("He has donated \$50 million to the University of Waterloo to help establish the Institute for Quantum Computing.")

<sup>41</sup> See Intel Corp., Executive Biography, <http://www.intel.com/pressroom/kits/bios/grove/bio2.htm> (last visited Oct. 10, 2008) (stating that Andrew Grove, a Senior Advisor at Intel, was born in Budapest, Hungary).

<sup>42</sup> See Google, Executive Management, <http://www.google.com/corporate/execs.html#sergey> (last visited Oct. 10, 2008) (stating that Sergey Brin, a Co-Founder and President of Google, is a native of Moscow).

<sup>43</sup> See Department of Commerce, Biography of Carlos Gutierrez,

have come to the U.S. and done incredible scientific work and incredible research that has redounded to significant gains for the country economically and in the high-tech space.<sup>45</sup> So that is my message in support of high-tech immigration and my message in support of some of the reforms that are being looked at in Congress today to increase that cap, make it permanent, and keep the U.S. on a competitive footing.

MS. PAWLUCH: All right. Thank you very much, Mr. Goyal. Very interesting thoughts, and something that I am sure will promote some discussion as we move forward. Let me now turn to our next speaker, and let him walk us through the new initiative that will be implemented in June of 2009.

### CANADIAN SPEAKER

*Ken Oplinger*<sup>†</sup>

MR. OPLINGER: Well good morning. Greetings from the west coast. I want to thank you for inviting me to speak today. When I told my wife that I was coming out to Cleveland for this conference, her first comment was it is yet another reason why I am flying someplace to talk about WHTI.<sup>46</sup> But when I showed her the materials and she looked at them and she saw that one of the organizations that sponsors the Canada-United States Law Institute

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[http://www.commerce.gov/bios/Gutierrez\\_bio.htm](http://www.commerce.gov/bios/Gutierrez_bio.htm) (last visited Oct. 10, 2008) (stating that Carlos Gutierrez, the U.S. Secretary of Commerce, was born in Havana, Cuba).

<sup>44</sup> See Nobelprize.org, Biography of Albert Einstein, [http://nobelprize.org/nobel\\_prizes/physics/laureates/1921/einstein-bio.html](http://nobelprize.org/nobel_prizes/physics/laureates/1921/einstein-bio.html) (last visited Oct. 10, 2008) (stating that Albert Einstein was a native of Germany).

<sup>45</sup> See *Help not wanted*, *supra* note 20 (“Great American companies such as Sun Microsystems, Intel and Google had immigrants among their founders. Immigrants continue to make an outsized contribution to the American economy.”).

<sup>†</sup> Ken Oplinger currently serves as the President/CEO of the Bellingham/Whatcom Chamber of Commerce & Industry, where he has been since October 2003. He has been leading Chambers of Commerce in the Western US for over sixteen years, ten of those years in California. As the President of the Bellingham/Whatcom Chamber of Commerce & Industry, Ken serves as the Chief Executive Officer for a Chamber with a membership of some 1000, representing almost 175,000 people across Whatcom County, Washington. The Bellingham/Whatcom Chamber of Commerce & Industry is the regional leader in creating a strong local economy, promoting the community, representing the interests of business with government, political action for the business community and providing networking opportunities.

<sup>46</sup> See U.S. Department of State, Western Hemisphere Travel Initiative, [http://travel.state.gov/travel/cbpmc/cbpmc\\_2223.html](http://travel.state.gov/travel/cbpmc/cbpmc_2223.html) (last visited Oct. 10, 2008) (discussing the Western Hemisphere Travel Initiative).

was her alma mater of Western Ontario, she actually took some interest in it, so I guess I am doubly thankful.

I am going to be talking a little bit about WHTI and some of the things that our organizations and others have done to try and make it the least impactful possible. But first by way of introduction, I am a border right. For those of you who are not familiar with the west coast, this is the border between Surrey, B.C. and Blaine, Washington.<sup>47</sup> The Peace Arch Crossing is right there on the water, an absolutely beautiful spot to cross on Interstate 5 into Canada if you have not done that before.<sup>48</sup> That is the truck crossing that some have referred to earlier, and the green arrow is my house. So I have the joy on the Friday evening in the summer of generally having my commute time doubled because I cannot get to my freeway exit with the backups on the borders.

You all know a lot about the Canada border, so you probably know some of these statistics. But just by way of refresher, it is the longest common border that is not militarized or actively patrolled.<sup>49</sup> As the Ambassador from Canada tells us, it is better called the longest secured border, and I agree with him.<sup>50</sup> It is 4,000 miles from the contiguous United States,<sup>51</sup> 5,500 when you include Alaska<sup>52</sup>, and that compares to about 2,000 miles on the U.S.-Mexico border.<sup>53</sup> There are 12 states,<sup>54</sup> eight provinces,<sup>55</sup> and one territory that make up the border region.<sup>56</sup> There are 51 million Americans live within 100 miles

<sup>47</sup> See U.S. Can. Peace Anniversary Ass'n., The International Peace Arch, <http://www.peacearchpark.org/peacearch.htm> (last visited Oct. 10, 2008) (discussing the border between Surrey, British Columbia and Blaine, Washington).

<sup>48</sup> See *id.* (discussing the Peace Arch and its location on the Pacific Ocean, off Interstate 5).

<sup>49</sup> See *id.* ("Poised above the international boundary of both countries the Peace Arch represents the longest undefended boundary in the world.").

<sup>50</sup> See The Honourable Michael Wilson, Can. Ambassador to the U.S., *supra* note 3 ("Canadians once spoke of sharing 'the longest undefended border in the world.' That should now be 'the longest secure border in the world.'").

<sup>51</sup> See Blas Nuñez-Neto, BORDER SECURITY: THE ROLE OF THE U.S. BORDER PATROL 2 (2005), <http://www.fas.org/sgp/crs/homesecc/RL32562.pdf> ("The Northern Border with Canada . . . is over 4,000 miles long.").

<sup>52</sup> See Kevin Bohn, *Report: Security on U.S.-Canada Border Fails Terror Test*, CNN, Sept. 28, 2007, <http://www.cnn.com/2007/US/09/27/border.security/index.html> (last visited Oct. 10, 2008) (discussing the over 5,000-mile border between the U.S. and Canada).

<sup>53</sup> See *id.* (discussing the nearly 2,000 mile U.S.-Mexican border).

<sup>54</sup> See Blas Nuñez-Neto, *supra* note 51 ("The Northern Border with Canada touches 12 states . . .").

<sup>55</sup> See Ken Oplinger, WESTERN HEMISPHERE TRAVEL INITIATIVE 2 (2006) [http://www.bestcoalition.com/files/PNWER\\_07-2006.ppt](http://www.bestcoalition.com/files/PNWER_07-2006.ppt) (stating that there are eight provinces on the Canada-U.S. border).

<sup>56</sup> See *id.* (stating that there is one territory on the Canada-U.S. border).

of the border,<sup>57</sup> and 30 million Canadians,<sup>58</sup> and that is 90 percent of Canada's population.<sup>59</sup>

Now when I think about that, I always think about one of my very favorite movies. Have you ever seen “Canadian Bacon?”<sup>60</sup> I generally get a better laugh out of this, especially from a group that knows Canada, I would have . . . One of my favorite scenes is when they are at the CIA building at the Canadian desk. I always thought that was . . . But actually my very, very favorite scene in the movie - and I have been trying to get a copy of this to actually show the video, and I cannot get permission to do it, so I recreated it myself - is when they have the map of Canada and the U.S., and the voiceover from the news broadcast says how 90 percent of Canada's population is amassed at the border ready to strike at any moment.<sup>61</sup> Of course, they have maple syrup going down the screen, and I cannot do that, so I have arrows. But I tell you this because over the last three years as we have been advocating on this issue, it amazes us that there are a lot of members of Congress who to some extent think that that is true. That we have something to worry about from those evil Canadians up north. And so it has been a very interesting couple of years lobbying on this issue.

Let us talk a little bit about the Western Hemisphere Travel Initiative.<sup>62</sup> It came to us through the Intelligence Reform and Prevention Act of December of 2004.<sup>63</sup> It covers all travel into the United States including U.S. citizens originally by January of 2008.<sup>64</sup> The specific wording in the act said that it required a passport or other document or a combination of documents,

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<sup>57</sup> See *id.* (stating that there are 51 million Americans living within 100 miles of the border).

<sup>58</sup> See *id.* (stating that there are 30 million Canadians living within 100 miles of the border).

<sup>59</sup> See *id.* (stating that 90 percent of Canada's population lives within 100 miles of the border).

<sup>60</sup> See Stephen Holden, *Film Review: America's Cold War with Canada. Just Kidding!*, N.Y. TIMES, Sept. 22, 1995, at C20 (reviewing the movie, “Canadian Bacon”).

<sup>61</sup> See KEN OPLINGER, *supra* note 55 (stating that 90 percent of Canada's population lives within 100 miles of the border).

<sup>62</sup> See U.S. Department of State, *supra* note 46 (discussing the Western Hemisphere Travel Initiative).

<sup>63</sup> See Documents Required for Travelers Departing From or Arriving in the United States at Air Ports-of-Entry From Within the Western Hemisphere, 71 Fed. Reg. 68,412, 68,413-14 (Nov. 24, 2006) (discussing the Intelligence Reform and Terrorism Prevention Act of 2004 which provides for the implementation of plans, known as WHTI, that require certain documentation in order to enter the U.S.), available at [http://www.travel.state.gov/pdf/WHTI\\_final\\_rule\\_new.pdf](http://www.travel.state.gov/pdf/WHTI_final_rule_new.pdf).

<sup>64</sup> See Intelligence Reform and Terrorist Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat 3638, 3823 (requiring a passport or other document “for all travel into the United States by United States citizens . . . This plan shall be implemented not later than January 1, 2008 . . .”).

with final rules to come later as to exactly what those documents were going to be.<sup>65</sup> Subsequent action by the Department of Homeland Security<sup>66</sup> divided the implementation into two areas of travel, air travel which was implemented a year earlier on the 23rd of January 2007,<sup>67</sup> and land and sea travel which was supposed to be implemented on that January 2008 time frame.<sup>68</sup> We were successful along with other organizations in lobbying to try and get an extension, and so in the FY 2007 DHS Appropriations Bill, we had language inserted that would have basically put the date out to June of 2009 unless DHS was able to certify that they were ready earlier than that.<sup>69</sup> So we thought that that was going to solve the problem, but DHS made it clear that they were just going to certify themselves prepared.<sup>70</sup> So we had to go back to the 2008 fiscal year DHS Appropriations Bill to put the hard deadline in of June of 2009 which is where we are today.<sup>71</sup>

DHS did end oral declarations on the 23rd of January, 2008, and so that part has been done.<sup>72</sup> What it essentially meant is that many of us who lived

<sup>65</sup> See *id.* (“The Secretary of Homeland Security, in consultation with the Secretary of State, shall develop and implement a plan as expeditiously as possible to require a passport or other document, or combination of documents, deemed by the Secretary of Homeland Security to be sufficient to denote identity and citizenship . . .”).

<sup>66</sup> See Documents Required for Travelers Departing From or Arriving in the United States at Air Ports-of-Entry From Within the Western Hemisphere, 71 Fed. Reg. at 68,414 (“DHS and DOS have decided to defer decisions on the proposed changes to documentation requirements for arrivals by sea. Arrivals by sea and land will be addressed in a separate, future rule-making.”).

<sup>67</sup> See *id.* (“Under this final rule, beginning January 23, 2007, United States citizens and nonimmigrant aliens from Canada, Bermuda, and Mexico entering the United States at air ports-of-entry will generally be required to present a valid passport.”).

<sup>68</sup> See Intelligence Reform and Terrorist Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat 3638, 3823 (The Secretary of Homeland Security . . . shall develop and implement a plan . . . to require a passport or other document . . . for all travel into the United States [including by land and sea]. . . This plan shall be implemented not later than January 1, 2008.”).

<sup>69</sup> See Documents Required for Travelers Departing From or Arriving in the United States at Air Ports-of-Entry From Within the Western Hemisphere, 72 Fed. Reg. 35,088, 35,091 (June 26, 2007) (“Section 546 of the DHS Appropriations Act of 2007 amended section 7209 of IRTPA by stressing the need for DHS and DOS to expeditiously implement the WHTI requirements no later than the earlier of two dates, June 1, 2009, or three months after the Secretaries of Homeland Security and State certify that certain criteria have been met.”).

<sup>70</sup> See *id.* at 35,092 (“DOS and DHS believe that these certifications will be made well in advance of the June 1, 2009 deadline for implementation.”).

<sup>71</sup> See Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, 121 Stat 1844, 2080 (2007) (amending the deadline under the Intelligence Reform and Terrorism Prevention Act of 2004 to state that “[s]uch plan may not be implemented earlier than the date that is the later of 3 months after the Secretary of State and the Secretary of Homeland Security make the certification required in subparagraph (B) or June 1, 2009.”).

<sup>72</sup> See Department of Homeland Security, Homeland Security and State Departments Announce WHTI Land and Sea Final Rule, [http://www.dhs.gov/xnews/releases/pr\\_1206634226418.shtm](http://www.dhs.gov/xnews/releases/pr_1206634226418.shtm) (last visited Oct. 10, 2008)

on the border for a while, we are used to how we could actually just declare ourselves Americans or Canadians as long as we could convince the person, that primarily, we were who we said we were, and we can go on our way. Now we actually have to have documentation like a birth certificate or a passport to be able to cross.<sup>73</sup> Final implementation will now be June of 2009, and so what we have been doing over the past couple of years is that we have been trying to find what some of those other documents are going to be that people can cross the border. The concern that we have in small communities like mine is from the tourism perspective, getting people back and forth to come and spend money in our retail stores and of course with that nice strong Canadian Looney,<sup>74</sup> we have had a very good year in the Bellingham and Blaine area, but we want to make sure that people can continue to do that.<sup>75</sup> So we have been looking at what other documents people can use to get across. And early on we thought that we really ought to try and see if we can continue to have the photo ID, the driver's license that most people already carry with them in their wallet as the primary way to cross the border.

So that is what we were really working on. Let us cover a little bit about some of these other documents, and then I am going to speak specifically about the Enhanced Driver's License. About 26 percent of Americans<sup>76</sup> and 40 percent of Canadians have passports.<sup>77</sup> One of my favorite statistics that we have done on this - we have been working this the last three years - is that on average over the last ten years prior to getting elected into Congress, only 30 percent of the new members of Congress have a passport, which tells you

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("This announcement comes two months after January 31, 2008, when DHS ended acceptance of oral declarations alone of identity and citizenship at the land borders.")

<sup>73</sup> See U.S. Customs and Border Protection, Land Travel, [http://www.cbp.gov/xp/cgov/travel/vacation/ready\\_set\\_go/land\\_travel/](http://www.cbp.gov/xp/cgov/travel/vacation/ready_set_go/land_travel/) (last visited Oct. 10, 2008) ("Beginning January 31, 2008, U.S. and Canadian citizens 19 years and older who enter the U.S. at land and sea ports of entry from within the Western Hemisphere will need to present government-issued photo ID, such as a driver's license as proof of identity, along with proof of citizenship, such as a birth certificate or naturalization certificate, or a passport.")

<sup>74</sup> See *Rising Loonie Creates 'Perfect Storm' for Tourism*, CTV.CA NEWS, Sept. 19, 2007, [http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20070919/tourism\\_loonie\\_070919/20070919/](http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20070919/tourism_loonie_070919/20070919/) (last visited Oct. 10, 2008) ("The rising Canadian dollar has helped to create a "perfect storm" of problems for Canada's tourism industry.")

<sup>75</sup> See City of Bellingham, Washington, Council Minutes April 16, 2007, <http://www.cob.org/web/COUNCIL.nsf/59da8dfbfadd3723882566730073373b/aeb235ce2acb583882572c9006b1408?OpenDocument> (last visited Oct. 20, 2008) (minutes show the council's discussion of regarding the strength of the area's tourism industry).

<sup>76</sup> See Galia Avramov, Myra MacIssac & Michele Polito, *Post-9/11 Challenges for the Immigration Paralegal*, 86 MICH. B.J. 24, 26 (2007) ("Approximately 27 percent of U.S. citizens have passports.")

<sup>77</sup> See *id.* at 26 ("Only 40 percent of all Canadians have passports.")

a lot about who we are sending to Congress.<sup>78</sup> Passports are \$97 per person.<sup>79</sup> I will say six to eight weeks plus.<sup>80</sup> We do have the time down now, but I think we are all familiar with the issues that we had last year with the Euro.

Second, let us discuss preclearance programs.<sup>81</sup> We are very pleased to see in a final rule that preclearance programs are now stand-alone documents, so if you have a NEXUS card, that is all you need.<sup>82</sup> You no longer need to have your passport to enter the U.S.<sup>83</sup> And here is a little tidbit for you: The rules have not actually changed going into Canada, so if you are a NEXUS card holder - I think there was a couple of us in the room, right - if you are a NEXUS company, until the Canadians change the rules - which has not happened yet, be sure to continue to carry your passport with you. Because if you are going into Canada and you are asked for ID and you do not have it that is still grounds for losing the card going into Canada. But going into the U.S. the rule has changed. It is \$50 U.S. for a NEXUS card.<sup>84</sup> Again, it is six to eight weeks or less.<sup>85</sup>

For those who do not know, the NEXUS program was piloted a little over five years ago in the Pacific Northwest, and we had about 20,000 people who just went through the renewal process, so NEXUS cards were a bit delayed, but they have come back now, and it is really still in that six to eight-week

<sup>78</sup> See generally *Discussion Following the Remarks of Mr. Graham*, 29 CAN-U.S. L.J. 95 (2003) (stating that, in total, only 40 percent of Congressmen have passports).

<sup>79</sup> See U.S. Dept. of State, Passport Fees, [http://travel.state.gov/passport/get/fees/fees\\_837.html](http://travel.state.gov/passport/get/fees/fees_837.html) (last visited Oct. 19, 2008) (listing fee table for U.S. passports. See also *Passport Canada, Fees*, <http://www.ppt.gc.ca/cdn/section6.aspx?lang=eng> (last visited Oct. 12, 2008) (listing fee table for Canadian passports).

<sup>80</sup> See generally U.S. Dept. of State, *Passport Application Processing Times*, [http://travel.state.gov/passport/get/processing/processing\\_1740.html](http://travel.state.gov/passport/get/processing/processing_1740.html) (last visited Oct. 19, 2008) (discussing turnaround times for passport applications). See also *Passport Canada, Processing Times*, <http://www.ppt.gc.ca/cdn/service.aspx?lang=eng&region=Canada> (last visited Oct. 12, 2008) (listing processing times for Canadian passports).

<sup>81</sup> See generally U.S. Embassy Canada, *U.S. Canada Passport Requirements*, [http://www.consular.canada.usembassy.gov/passport\\_requirement.asp](http://www.consular.canada.usembassy.gov/passport_requirement.asp) (last visited Oct. 19, 2008) (lists valid methods of traveling between the U.S. and Canada including preclearance programs such as NEXUS).

<sup>82</sup> See Stuart Gilgannon, *Bridging the Gap: Why the Stevens-Leahy Amendment to the Western Hemisphere Travel Initiative May Reveal a Renewed Focus on Civil Liberties in National Security Legislation*, 7 CONN. PUB. INT. L.J. 51, 66 (2007) (explaining that the Final Rule provides for the NEXUS card to be used in lieu of a passport at U.S. airports).

<sup>83</sup> See *id.*

<sup>84</sup> See Dept. of Homeland Security, *NEXUS Eligibility and Fees*, [http://www.cbp.gov/xp/cgov/travel/trusted\\_traveler/nexus\\_prog/nexus\\_eligibility.xml](http://www.cbp.gov/xp/cgov/travel/trusted_traveler/nexus_prog/nexus_eligibility.xml) (last visited Oct. 19, 2008) (listing NEXUS fees).

<sup>85</sup> Canada Border Services Agency, *Join NEXUS*, <http://www.cbsa-asfc.gc.ca/prog/nexus/application-demande-eng.html> (last visited Oct. 12, 2008) (“The process to determine eligibility takes six to eight weeks.”).

time frame.<sup>86</sup> The issue with NEXUS is that there is no guaranteed access to the lanes. Now, out where I live where we do not have to cross a body of water to go over the border, when you have a long line, it is not a problem because we have about a two-and-a-half mile long NEXUS lane. But in Buffalo and Detroit unfortunately where you do cross the body of water, you get the line backed up a little bit onto the bridge or into the tunnel, and you are essentially blocked off from utilizing NEXUS, which surely defeats part of the purpose of it.

The other issue is of course the hours are generally not 24/7, and so for instance when my wife and I go out to dinner in Vancouver, on the way back, oftentimes the NEXUS lane is already closed. And it is fairly low enrollment. For a program that has been in place now for almost six years, I would say that 180,000 people is not a lot of people.<sup>87</sup> After six years we should have a lot more than that with all the folks who are crossing the border.

Third is our new friend, the pass card or what I like to call passport light.<sup>88</sup> It is a card that will only be available to you by using the same procedures that you would use to get your passport. You will submit all the same information, you will go through all the same wait times, all the same procedures. The only difference is that the back end, you get a credit card that can only be used to cross land and sea borders in North America, and that it is about half the cost of a passport. But the key issue here is it is not for Canadians, it is only for Americans. So what we have always argued is why are we spending so much time and resources to come up with another document for Americans to leave and not come up with something to make sure that our friends can come and visit us here in the States?

So this is what we have come up with, the Enhanced Driver's License.<sup>89</sup> This is a program that is completely approved by DHS.<sup>90</sup> There are a number of states and provinces that have already said that they are going to be doing this.

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<sup>86</sup> See *id.*

<sup>87</sup> See generally U.S. Dept. of Homeland Security, NEXUS Fact Sheet, [http://www.cbp.gov/linkhandler/cgov/newsroom/fact\\_sheets/travel/nexus\\_fact.ctt/nexus\\_fact.pdf](http://www.cbp.gov/linkhandler/cgov/newsroom/fact_sheets/travel/nexus_fact.ctt/nexus_fact.pdf) (last visited Oct. 19, 2008) (In Sept., 2007, NEXUS had 128,265 members.).

<sup>88</sup> See Marc Philip Hedrich, *Section 7209 of the Intelligence Reform and Terrorism Prevention Act of 2004: Balancing the Western Hemisphere Travel Initiative with International Tourism and Homeland Security*, 28 Nw. J. Int'l L. & Bus. 341, 366 (2008) (explaining the goals and advantages of the PASS Card).

<sup>89</sup> See U.S. Dept. of Homeland Security, Enhanced Driver's Licenses: What Are They?, [http://www.dhs.gov/xtrvlsec/crossingborders/gc\\_1197575704846.shtm](http://www.dhs.gov/xtrvlsec/crossingborders/gc_1197575704846.shtm) (last visited Oct. 12, 2008) (describing the progress and features of enhanced driver's licenses).

<sup>90</sup> See Katherine Liebner, *Driving Too Fast: Spitzer's Failed Experiment at Immigration Reformation*, 26 BUFF. PUB. INT. L.J. 73, 81 (2007-2008) (describing enhanced driver's licenses as federal compliant).



There are three specific things that have been changed on the Enhanced Driver's License to make it a legal document to cross the border. The first is that on the back where there is a machine-readable zone. If you have a passport, the little series of odd numbers, letters, and characters, the exact same thing is on the back of the Enhanced Driver's License. So when you go back to the primary booth, they do not have to keystroke it in. They can simply swipe the card, all your information appears on screen. The second is that once DHS gets the money to roll out the readers on all the lanes, there is also an RFID chip inside the driver's license which will speed that up even quicker. So just like with NEXUS, if you are in what I like to call the on-deck circle, hold your card out of the window, and when you get up to the booth, your information will already be on the screen. They do not even have to take it. And the third, you will see the little American flag on there, the nationality component to it, and this was always the catch on the card that was how we were going to do nationality.

The way this has been resolved between DHS and Washington state is that the folks at our Department of Licensing who are looking at your documents and deciding whether you get an Enhanced Driver's License are not, and we are going to use the legal terms that they give me - they are not going to be adjudicating for citizenship, they are simply going to denote your citizenship on your driver's license because what the State Department says is it is our sovereign right to determine citizenship, and we cannot give that right to anyone else, so this is how we have gotten around that.

The driver's license can only be used for crossing land and sea borders. It cannot be used for any other purpose. So I could not use it for instance to prove in Washington state I am eligible for benefits or anything like that. And so by sort of putting all of these limits on it and only using it for that purpose, the State Department signed off on it. And we are very pleased because the uptake on this is amazing.

And I know there is bits of information that maybe it is not so good, but let me share the exact numbers with you. As of April the 11th - so this is roughly 11 weeks into the program, we just started at the end of January - there are over 9,000 EDLs already in circulation,<sup>91</sup> there are close to 22,000 people who have their interviews set up to receive their EDLs in Washington state.<sup>92</sup> Also, 98 percent of all of the interview slots in the month of April have been filled.<sup>93</sup> And 80 percent of all the slots in the month of May were

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<sup>91</sup> See generally Cara Matthews & Matthew Daneman, *More States Plan Licenses to Ease Border Traffic*, USA TODAY, July 17, 2008, at 02a (stating that as of July 2008, 21,000 Washington state citizens have received enhanced driver's licenses).

<sup>92</sup> See generally *id.* (stating that Washington state has over 4,000 appointments scheduled in coming a week, and has stopped advertising enhanced driver's license).

<sup>93</sup> See *id.*

filled.<sup>94</sup> And our State legislature is so pleased with the uptake that they just appropriated an additional \$3.5 million for the program so that more people can be trained so we can get more people through the program.<sup>95</sup> So the uptake is absolutely amazing. Now by contrast to that, in the province of British Columbia where they are only going to be doing a pilot project, within 24 hours of announcing that that pilot was in place and the 500 slots remained available, all 500 of those EDLs were gone as well.<sup>96</sup>

So what we are seeing is that as our polling showed early on, and as the uptake has been going, this is clearly the way that people who live within the border regions want to go back and forth over the border. In Vermont, Arizona, New York, Michigan, and Washington, the legislatures have already approved the EDL.<sup>97</sup> In four of those cases, all but Michigan, the memorandums of understanding have been signed.<sup>98</sup> California and Texas have actually expressed strong interest in this. In both states they are going to have to go into the legislature to make a small change because as with many states, they were a little concerned about the Real ID Act,<sup>99</sup> and so they passed rules within the legislature that made it difficult to put the EDL into place, but they committed to going back and making those changes, and so we should hopefully be seeing stuff there as well.<sup>100</sup> In Canada, in addition to British Columbia, we know that Ontario, Manitoba, and Quebec have all expressed strong interest in doing this.<sup>101</sup> New Brunswick and Nova Scotia are also looking to move forward, so we are seeing states and provinces actually move towards this as well.<sup>102</sup>

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<sup>94</sup> See *id.*

<sup>95</sup> See generally Governor Gregoire's Accomplishments 2008 Legislatvie Session, [http://www.capaa.wa.gov/documents/2008-04-01\\_LegAccomplishments.pdf](http://www.capaa.wa.gov/documents/2008-04-01_LegAccomplishments.pdf) at 17 (last visited Oct. 20, 2008) (one accomplishment is the continued expansion of EDL in Washington).

<sup>96</sup> See generally Governor Chris Gregoire & Premier Gordon Campbell, *The British Columbia/Washington State Partnership on Enhanced Driver's Licences*, CAN. PARLIAMENTARY R., Spring 2008, at 4-5 (explaining that when British Columbia's pilot program was launched, it was oversubscribed in 48 hours).

<sup>97</sup> See Matthews, *supra* note 91 (listing New York, Vermont, Michigan and Arizona as states that are moving towards following Washington state's lead on enhanced driver's licenses).

<sup>98</sup> See *id.*

<sup>99</sup> See Real ID Act of 2005, Pub. L. No. 109-13, § 202(c)(2)(B) (codified as amended at 49 U.S.C. § 30301 (2005)).

<sup>100</sup> See Dept. of Homeland Security, *supra* note 89 (listing California and Texas as states working with the DHS to implement enhanced driver's licenses).

<sup>101</sup> See, e.g., Ontario Ministry of Tourism, U.S. Administration Accepts Passport Proposal Changes Advocated By McQuinty Government, [http://ogov.newswire.ca/ontario/GPOE/2007/08/26/c2206.html?lmatch=&lang=\\_e.html](http://ogov.newswire.ca/ontario/GPOE/2007/08/26/c2206.html?lmatch=&lang=_e.html) (last visited Oct. 12, 2008) (explaining that Ontario is discussing the option of adding enhanced driver's licenses with New York).

<sup>102</sup> See, e.g., Nova Scotia Canada, Nova Scotia Pursuing Enhanced Driver's License,

So a little bit about the program then and sort of the steps that we took in a little case study if you will: In July 2005, the BESTT Coalition supported the Real ID solutions of WHTI.<sup>103</sup> Real ID for those of you who do not know is a law that was passed roughly the same time by our Congress that put some basic standards into IDs basically for federal ID purposes.<sup>104</sup> So for instance, to board a domestic flight, the driver's license has to meet certain requirements, or you could not use the driver's license for that purpose. In 2005, 2006 we began pushing for use of existing driver's licenses and upgraded the Real ID standards.<sup>105</sup> We thought at that point that the EDL was a much better way to go because it would be easier to get than the pass card.<sup>106</sup> It was actually going to be a more secure document than the security features that are being put in the pass card. And it is more discretionary because people are already carrying it with them rather than having the room to take it.

Chertoff gave his support for the Real ID solution in July of 2006 at a meeting in Edmonton and Governor Gregoire from the State of Washington and Premiere Campbell from British Columbia followed at their summits in August.<sup>107</sup> Then it was announced that they all were supportive of moving forward with the program.<sup>108</sup> Washington then became the first state to sign the MOU with DHS, and as you know, they are already in place.

A little bit about our coalition. We are jointly run by my chamber as well as the chambers in the Detroit Regional Chamber and Buffalo-Niagara partnership.<sup>109</sup> The way this all started was that when WHTI was announced, I reached out to the other two large border crossing areas to ask if we might find some way to work together and the BESTT Coalition is certainly a result of that. We have about 125 members in the United States and the five provinces.<sup>110</sup> And we are really a grass roots focus group. And sort of the difference between the BESTT Coalition and a lot of the other trade groups

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<http://www.gov.ns.ca/news/details.asp?id=20080828004> (last visited Oct. 12, 2008) ("Nova Scotia is working with the other Atlantic provinces toward an enhanced driver's licence.").

<sup>103</sup> See BESTT, Official Position on WHTI, <http://www.besttcoalition.com/Position.html> (last visited Oct. 12, 2008) (outlining BESTT's position on the WHTI and REAL ID Act).

<sup>104</sup> See Real ID Act of 2005, *supra* note 99.

<sup>105</sup> See *id.*

<sup>106</sup> See Hedrich, *supra* note 88 at 368 (calling the development of the PASS Card an "investment in redundancy.").

<sup>107</sup> Governor Gregoire, *supra* note 96 at 4 ("The Edmonton PNWER summit in July 2006 included Homeland Security Secretary Michael Chertoff and Canada's Minister of Public Safety Stockwell Day.").

<sup>108</sup> See *id.*

<sup>109</sup> See BESTT, About Us, <http://www.besttcoalition.com/aboutus.html> (last visited Oct. 12, 2008) (listing the Detroit Regional Chamber and Buffalo-Niagara Partnership as members of BESTT).

<sup>110</sup> See *id.*

out there is that our entire purpose is advocacy. We do not do conferences, we do not try and make nice people. Our whole purpose is to address the concerns that are causing problems with the businesses that we represent, period.

The three organizations agreed to work together then in July of 2005. We attended our first hearings in D.C. on this in October of that year, and have held a number of fly-in meetings since then. The largest of which was our first in February 2006 when we had over 200 lawmakers contacted by the 50 people who came in for the fly-in.<sup>111</sup> And we have had an ongoing presence in D.C. ever since, and we have been all over the country. It is not just me, it is my colleague, Sarah Hubbard, from the Detroit Regional Chamber speaking about her issue and raising awareness on what we think is probably the best way to go to try and solve this.<sup>112</sup> Our website is BESTTcoalition.com, and I have been asked to ensure that the slides are available. So at the end of today, I will post them. And that is it for me. Thanks.

MS. PAWLUCH: Thanks very much, Ken. At this point we will open it up to questions from the floor.

#### DISCUSSION FOLLOWING THE REMARKS OF PRAVEEN GOYAL AND KEN OPLINGER

MS. RUDE: Good morning. Marianne Rude, and I represent the province of Manitoba in Washington, and I have spent many a day with Ken in D.C. on fly-ins. It is a pleasure to hear all of this. I am still trying to work with some of the States in particular, even though I represent Manitoba in dealing with a lot of Manitoba's border states that are struggling to figure out how to handle both Real ID and WHTI and the EDL solution. So I have been in several meetings recently with Iowa, Minnesota, North Dakota, and they are trying to figure out how they straddle that issue. And I am wondering if for the group you can share some of the Washington experience, how you dealt with the Real ID challenge and then used EDL to actually meet Real ID because it is a complex issue, and I think there are some very good lessons learned from Washington State.

MR. OPLINGER: Sure. Well to start, I should say for those who were not familiar with Real ID, there has been a bit of a pushback from a number of

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<sup>111</sup> See BESTT, DC Fly-in: September 12-14, 2006, <http://www.besttcoalition.com/DCFlyin.html> (last visited Oct. 20, 2008) (describing the 2006 DC Fly-in).

<sup>112</sup> See generally BESTT, Homepage, <http://www.besttcoalition.com/index.html> (last visited Oct. 20, 2008).

states in the U.S.<sup>113</sup> The driver's licenses are the purview of the states, it is not something that the federal government has control over,<sup>114</sup> so they are using the power of the purse, if you will, to try and push states into meeting the obligations.<sup>115</sup> And so because of the pushback there are a lot of states including Washington that very early on said there is absolutely no way we are using Real ID, and you cannot make us use it.<sup>116</sup> And Governor Gregoire at one point actually looked like he was going to push our legislature to being the first state to approve legislation precluding us from ever implementing Real ID.<sup>117</sup> That is how opposed to that she was.

As we began talking to her about the Enhanced Driver's License program, I think the way that we were able to successfully make the sell to her and cause her to change her mind on that aspect of it was that this was a means of being able to keep the State in control of the general ID that people were using. We were going to provide a service to not just border communities, but to folks all over the state of Washington who generally like to go up and recreate British Columbia. But to also ensure that we have that strong tie between British Columbia and Washington, which generally have worked very, very well together. The interesting issue about it though is that the discussion has not just happened there.

Jennifer Granholm was also certainly a very strong opponent to Real ID.<sup>118</sup> And we were able to convince her that this was not Real ID, this was more of a service to the constituents of her state, and something that would be a benefit to them now. The reason we got DHS to sign off on this bill was because to some extent it is, it is Real ID. The difference though is that the

<sup>113</sup> See Ragini Shah, *Sharing the American Dream: Towards Formalizing the Status of Long-Term Resident Undocumented Children in the United States*, 39 COL. HUM. RTS. L. REV. 637, 685 (2008) (listing states that have passed laws at odds with the Real ID Act since its passage).

<sup>114</sup> See Patrick R. Thiessen, *The Real ID Act and Biometric Technology: A Nightmare for Citizens and the States that Have to Implement It*, 6 J. ON TELECOMM. & HIGH TECH L. 483, 490 (2008) (explaining the opposition to the Real ID Act on the basis that it infringes on the state right to issue driver's licenses).

<sup>115</sup> See *id.*

<sup>116</sup> See generally Governor Chris Gregoire, Gov. Gregoire Statement on Real ID Extension, (Jan. 24, 2008) <http://www.governor.wa.gov/news/news-view.asp?pressRelease=770&newsType=1> (asking for an extension for Real ID implementation and outlining concerns with Real ID Act).

<sup>117</sup> See Real ID Act-Compliance, Washington Chapter 85, Laws of 2007 (2007), available at <http://www.leg.wa.gov/pub/billinfo/2007-08/Pdf/Bills/Session%20Law%202007/5087-S.SL.pdf> (stating Washington State's intention to not comply with the Real ID Act by ordering state agencies to not expend any funds for its implementation).

<sup>118</sup> See Dept. of State, Granholm, Land Offer Michigan Perspective on Federal Driver License, ID Card Requirements, (May 8, 2007) [http://www.mi.gov/sos/0,1607,7-127-1640\\_9150-168108-,00.html](http://www.mi.gov/sos/0,1607,7-127-1640_9150-168108-,00.html) (outlining the issues that Governor Granholm relayed to the Department of Homeland Security regarding the Real ID Act).

Enhanced Driver's License is not something that is as mandatory as Real ID would be. You have to opt yourself in. You do not have to do it if you do not want to. That is really the way that we have been able to sort of differentiate it in all of the states and in the provinces.<sup>119</sup> And so as we go forward, DHS likes it because they are seeing some aspect of Real ID in place. The states like it because they are maintaining control, and it is not fully implemented, and so we are sort of walking that tight rope, but so far successfully.

MS. PAWLUCH: Let me pose a question if I may to Praveen. You mentioned Canada's more favorable immigration environment, and indeed we have heard that the more favorable immigration environment was cited as one of the reasons, too, why Microsoft announced that it was going to open a software development center in Vancouver, British Columbia, Canada. Is there a way that U.S. employers with Canadian operations perhaps may be able to use Canada's more facilitative work permit system to address some of the challenges that the high-tech industry in particular is experiencing in the U.S.?

MR. GOYAL: Absolutely. And I think the Microsoft example is one that got a lot of attention just a few weeks ago when Bill Gates came and testified in Congress and talked about that

very fact that in order to address its inability to add enough high-tech workers in the U.S., that Microsoft was basically moving a substantial chunk of their operations to Vancouver in order to facilitate their ability to continue adding employees.<sup>120</sup> I think a lot of folks notice that, a lot of the folks were unnerved by that. And I think that - absolutely, it is both an opportunity and a risk. I mean, I think certainly it is a great thing for Canada and for Canada's development economically to have this much more favorable environment for high-skilled immigration, in comparison to the U.S. Also, there absolutely are opportunities for U.S. companies to go over and build operations in Canada. You know, from RIM's perspective, what we think would be the best would be to have a flexibility to do both right, and clearly we are a company with substantial Canadian operations, the vast bulk of our operations are in Canada, and that is where we have most of our employees. But it is important I think particularly in a global economic environment where you have got large multinational companies doing business in jurisdictions around the world to have the maximum flexibility to attract employees where you want to do business. Now, absolutely, I think the

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<sup>119</sup> See DMV.org, REAL ID, <http://www.dmv.org/news-alerts/real-id.php> (last visited Oct. 20, 2008) (discusses Real ID, criticism by states, and how Real ID and EDL overlap.).

<sup>120</sup> See Patrick Thibodeau, *Microsoft Crosses Border on Coding*, COMPUTERWORLD, July 16, 2007, at 12 ("On July 5, Microsoft announced plans to open a software development center in Vancouver, partly to help it 'recruit and retain highly skilled people affected by immigration issues in the U.S.'").

current state of affairs is a great opportunity for Canada, and I think Canadian companies are up there with a catcher's mitt, U.S. companies are learning how to play baseball up there. But I think the best approach would be to have flexibility on both sides.

MR. CRANE: David Crane. Canada is attracting scientists and engineers from those other parts of the world, one of the things I am concerned about - which we read of periodically - is this issue of racial profiling, and even people who possess a Canadian passport, that they come from a different ethnic or racial background, that they are still subject or can be subject to significant harassment at the border. And the proof of Canadian citizenship does not seem to carry that much weight with the U.S. officials who are faced with individuals that have got the wrong color or the wrong kind of name. And I wondered to what extent that issue can be addressed.

MR. GOYAL: I agree.

MS. PAWLUGH: Very good question to our speakers, but also if there is anyone from in the audience that can speak to that.

MS. PAWLUGH: Do you have any thoughts on that, Ken?

MR. OPLINGER: Well, it is certainly an issue for us, that Vancouver - I do not think anyone would be surprised to hear - has a very large immigrant population. We get horror stories on a fairly regular basis of people who are mistreated by the U.S. officials at the border oftentimes for the issue that you just described. And unfortunately, what those stories sort of end with to us is, and we are just not ever going to cross the border again. I think that is yet another reason why we are seeing drop-offs in people crossing the border even though the lines are longer and the wait times are longer because people just do not want to put up with it.

MS. IRISH: I am Maureen Irish, University of Windsor with a related question. With the two countries having different views on security, and a very different immigration and visa policies overall, when we look at responsibilities of the employer, it is both a question of getting the employee there working, but also there is a question of employees who have to travel for their work. And there are difficulties about temporary admission, et cetera. Do employers have problems with employees afraid to travel for their work? And in particular here, I will mention the case of Maher Arar, who was not traveling for work at the time but had been in the past traveling across the Canada-U.S. border as part of his employment.

MR. GOYAL: I will be happy to take a stab at it. You know, just from the perspective of RIM, I think some of the border crossing issues are less of a daily issue for us because of where our operations are located, so most of our employees in Canada would be Canadian citizens or Canadian residents. Most of our employees in the U.S. would be U.S. residents. I think that absolutely there are issues that Canadian employers and U.S. employers on the border would face. With the increased difficulty of being able to cross the

border, racial profiling like the last questioner mentioned, there is obviously a risk that you deter. Employees would otherwise be very successful, very capable in contributing to your company from being willing to put up with that hassle and being willing to put up with that burden in order to get to work every day. It is a very serious problem. I think it is one that has been a substantial change in the environment as a result of heightened tensions around security post-9/11, and it is something we need to do a better job of addressing. I think as Ken's presentation shows, there are good and efficient ways to do that, and then there are ways to do that that create an even greater obstacle and a greater hassle frankly that workers do not even have access to in terms of getting these Enhanced Driver's Licenses. So I think that absolutely we want to make the border crossing as fluid and as dynamic as possible because there are so many people like Ken himself in fact who work close to the border and need access. I will turn it over to Ken for any additional thoughts.

MR. OPLINGER: Well, the interesting thing about this is that it expands off of just getting employees back and forth and whether they are even willing to make some of those trips. In our area we have an interesting phenomenon where we have a lot of folks from the Vancouver area who have their cabins in the states in places like Birch Bay. And we are finding more and more of those folks selling because when they get to the border - and it is not a racial profiling issue, it is that they get to the border and they pull up information and see they have crossed quite a bit because they are going to their cabin. Well, the first thing that the people on the U.S. side think is, well, they must be working down here. And then they start getting hassled about that, they just do not want to put up with it anymore. So, I mean, it goes across lots of different areas, but it is certainly something that needs to be addressed. And we have - and I saw earlier you had the sheet out - we have some categories of jobs here in the states where we can get Canadians to come over and they can get their visas to do that. Nurses is one. You know, in the Detroit-Windsor area you have got 5,000 nurses that are crossing from Windsor into Detroit to work in Detroit hospitals which is why hospitals there generally have a far less problem than the rest of the U.S. does in getting fully-staffed with their nurses, and Bellingham is the same way.<sup>121</sup>

I have got 500 welding jobs in the marine industry in Whatcom County alone that have gone unfilled at this point, and I have people in Vancouver that I could bring in to do those jobs today, all 500 of them, but we cannot

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<sup>121</sup> See The Honorable Marlene Jennings, *Session 12: The Future the Evolving, Special Canada-U.S. Relationship: New Dimensions and Possible Future Progress and Concerns. Differing Approaches to our Common Values and Experiences*, 31 CAN-U.S. L.J. 385, 388 (2005) ("We have a lot of nurses, for instance, Canadian nurses who cross that border every day and work in hospitals in Detroit, Michigan.").



bring any of them down because it is not an approved category.<sup>122</sup> So finding some way to try and address these really arcane labor issues is certainly important even for smaller areas like ours.

MS. PAWLUCH: On that note, let me just add we do have in Canada a low-skill worker program which is fairly new, and it is intended to facilitate lower-skilled workers coming in for a maximum of two years for some specific job training.<sup>123</sup> So we have tried to address some concerns as identified here. MR. BINETTE: Hi. My name is Felix Binette, I am from Consulate General in New York.

I have a question regarding technology. One of the solutions that have been used to fill that perceived heightened security needs at the borders has been technology.<sup>124</sup> And another aspect was practicality when you look at EDLs, something that everyone carries. One of the things that most people carry now are mobile devices, and I know that airlines are looking at using mobile devices as boarding passes and things like that. Is there a future for use of mobile devices to ease crossing the border or in that area?

MR. GOYAL: Well, I can definitely talk about technology that we have that is used for user authentication. You know, we have certainly never positioned it as something that would work for the purposes of a border crossing technology, and I think that that is really something that is up to regulatory agencies in the U.S. and Canada to determine. But certainly we have a number of customers using this product in very highly-sensitive situations including Defense and National Security. And what it is basically the same - it is called a CAT card that U.S. government agencies issue to their employees at Department of Defense, at NSA, you name it.<sup>125</sup> And then the card is used for identifying and authenticating a user to access electronic terminals, whether it is a BlackBerry or whether it is a PC. So it is very highly secure. It is something that we are selling every day and is used exactly for that purpose of authenticating users of making sure they are who they are supposed to be and only giving them access to resources that they

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<sup>122</sup> See The United States Embassy Consular Services Canada, Visa Categories and Requirements, [http://www.consular.canada.usembassy.gov/usa\\_visa.asp](http://www.consular.canada.usembassy.gov/usa_visa.asp) (last visited Oct. 12, 2008) (listing acceptable categories of U.S. visas).

<sup>123</sup> See Citizen and Immigration Canada, Changes to the Temporary Foreign Worker Program — Low Skill Pilot Project, <http://www.cic.gc.ca/EnGLIsh/work/low-skill.asp> (last visited October 12, 2008) (explaining the Low Skill Pilot Project and recent changes made to the program).

<sup>124</sup> See generally The Honorable Asa Hutchinson, *Holes in the Fence: Immigration Reform and Border Security in the United States*, 59 ADMIN. L. REV. 533, 540 (2007) (stating that technology is critical to comprehensive border security).

<sup>125</sup> See Research in Motion, BlackBerry Smart Card Reader, <http://na.blackberry.com/eng/ata glance/security/products/smartcardreader/> (last visited Oct. 20, 2008).

are supposed to get access to, and it works quite well. And so certainly the technology is there to do what you are suggesting. But in terms of whether or not that would satisfy the needs of the agencies and countries involved, I think that is something that is really up to them to decide.

MS. PAWLUCH: An interesting concept though. Yes, Dan.

MR. UJCZO: To continue the trend of uncomfortable questions. Praveen, on the issue of the H-1Bs and highly skilled workers coming across the borders, of course these issues get caught up with the general immigration debate in the United States. But I am going to ask you to put on your prognosticator hat on up a bit. And just in terms of the tent around the hill as well as in our Presidential campaigns, we know Senator McCain was certainly differentiated from his party on some of the immigration issues<sup>126</sup> as well as two candidates in the Democratic party that seemed to be in favor of at least expanding highly-skilled issues and dealing with immigration in a sensible way. What are the prospects for the future? Ellen Yost<sup>127</sup> was just in town from Fragomen,<sup>128</sup> a great friend of our institute, saying they just ca not handle the volume of work that they are getting on H-1Bs. Now in our experience anytime we have ever had to advocate, we do not use the "L" word, lobby, but anytime you have ever had to advocate, we just use the jobs message. You know, Senator X, Representative X, this is how many jobs this is going to cost in your district, but we have jobs that are unfilled here in Cleveland. Ken was just mentioning the jobs in the marine industry. How are you differentiating between the immigration issue in terms of illegal migrants or undocumented migrants and highly-skilled workers, and what are your prospects for the future in terms of the campaign? We all know nothing is going to happen this year because it is '08, but what are the prospects for the future?

MR. GOYAL: Well, I think one thing that I take a certain amount of solace in and optimism from is the fact as you mentioned that I think we are looking at a situation where the three leading candidates for the U.S. Presidential election are supporters of comprehensive immigration reform. Senator McCain from his work on the Comprehensive Immigration Bill in the Senate,<sup>129</sup> and both Senator Obama<sup>130</sup> and Senator Clinton<sup>131</sup> have said

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<sup>126</sup> See Lauren Gilbert, *National Identity and Immigration Policy in the U.S. and the European Union*, 14 COLUM. J. EUR. L. 99, 108 (2007/2008) (discussing Senator McCain's support of an immigration bill that drew criticism from Republicans).

<sup>127</sup> See Ellen G. Yost, [http://pubweb.fdbl.com/peoplebriefs.nsf/\(\\$pub2004-people-briefs\)/F692F5E8C88F1EF6882569FA00651867?OpenDocument](http://pubweb.fdbl.com/peoplebriefs.nsf/($pub2004-people-briefs)/F692F5E8C88F1EF6882569FA00651867?OpenDocument) (last visited Oct. 12, 2008).

<sup>128</sup> See Fragomen, About Us, <http://www.fragomen.com/about/about.shtml> (last visited Oct. 12, 2008).

<sup>129</sup> Gilbert, *supra* note 126 at 108.

<sup>130</sup> Katherine L. Vaughns, *Restoring the Rule of Law: Reflections on Fixing the Immigration System and Exploring Failed Policy Choices*, 5 U. MD. L.J. RACE, RELIGION, GENDER &

that they support comprehensive immigration reform. So I think that is encouraging that is a source of tremendous encouragement that the long-term prospects of getting a solution to this problem and the amount of visibility that it is received. In terms of the highly-skilled piece of it alone, I think that as the Congress continues to move forward and frankly runs out of time, there is a greater sense of urgency of doing something about the high-skilled piece of it because in an election year, particularly in a Presidential election year, the prospects of something as big as comprehensive immigration reform moving looks less likely. I mean, I do not think anyone at this point expects that a comprehensive immigration reform bill is going to move. And so the question is what to do about H-1B visas? What do you do about the high-skilled piece of it? I know there are folks that are working on trying to get a bill to address the increase to the cap and making it permanent possibly to move forward in this Congress. You know, I cannot tell you that I think the chances of that are particularly great. I mean, it has not happened in the past. And I think the good news is that immigration reform as an issue is receiving a tremendous amount of attention in the United States, and I think we have got a potential for all the stars to align to actually move a comprehensive bill forward and high-tech immigration would be a part of that.

MS. PAWLUGH: Thank you. There was a question here from Mr. Crane.

MR. CRANE: I just wanted your perspective. How effective are programs like the Lou Dobbs program and some of the stuff that appears on the Fox network in creating a more xenophobic kind of mentality on the part of voters here? Do you think that these people have much significance in U.S. debate? How do you assess that?

MR. GOYAL: You know, I do not have any statistics or figure to back this up, but I would say anecdotally my experience is, yes, that obviously there is a number of substantial media outlets like Mr. Dobbs who raise an alarm about undocumented workers and undocumented immigrants.<sup>132</sup> I think that the trade issue, the issue of free trade agreements is another one that I think is sort of closely tied to a lot of those economic anxieties, and I think it

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CLASS 151, fn 162 (2005) (“[O]n December 15, 2005, Senators Barack Obama (D-IL) and Mel Martinez (R-FL) held a press conference indicating their support for a comprehensive approach to immigration policy reform.”).

<sup>131</sup> See Bill Ong Hing, *The Case for Amnesty*, 3 STAN. J. CIV. RTS. & CIV. LIBERTIES 233, 284 (2007) (discussing comprehensive immigration reform proposal sponsored by Senator Hillary Clinton).

<sup>132</sup> Brietta R. Clark, *The Immigrant Health Care Narrative and What it Tells Us About the U.S. Health Care System*, 17 ANNALS HEALTH L. 229, 265-266 (2008) (“Popular media commentators like Lou Dobbs, who hosts the nightly newscast “Lou Dobbs Tonight” on the cable television station CNN, fuel a fear of immigrants that in turn generates support for harsher immigration initiatives.”).

definitely has an effect.<sup>133</sup> I think that one thing that is going to be critical for this debate to move forward and reach resolution is for the concerns on both sides to be addressed in a way that both sides feel are satisfactory. And one of the things that is clearly coloring the political environment in the U.S. today is that there is a tremendous amount of economic anxiety, there are concerns about manufacturing jobs moving overseas.<sup>134</sup> And the way I look at that is that is just an economic fact, and it is an inevitable economic fact, and we need to deal with it, we need to address it, and it is going to require national policy to do so. I think the answer is not to take a xenophobic approach. I think the answer is to take an approach that engages with the rest of the world, in terms of attracting highly-skilled immigrants, attracting low-skilled immigrants, furthering trade policies and more. And I think there is a great deal of room probably to be done in the debate on what that "more" is to address the concerns of economic anxiety. But there is absolutely no question that programs like the Lou Dobbs show have a significant effect in shaping the debate and in raising the level of alarm that folks opposed to expanding immigration programs feel.<sup>135</sup>

MR. OPLINGER: Praveen is much, much more judicial than I would be. Blowhards like Lou Dobbs are really those that are causing a lot of this problem, but I think that the other half of it is that we are not doing enough to try and counter that. You know, Jason Conley was here yesterday talking about all the work that the U.S. Chamber has done to push the Free Trade programs. And I like Jason, and the U.S. Chamber, most of the things they do I appreciate. I have not seen the results of any of this work.

Someone had asked a question about why we cannot put a face on the positive things that NAFTA's doing. And that is exactly what we have to do, not just on NAFTA but on the ability of the low-skills and the high-skills to get people to be able to have that intermobility, and we have done a very poor job of doing that. And until we can counter some of that xenophobia with some actual news of some people who have benefitted from this, have them on TV telling their story, we are just not going to win this debate.

MR. CRANE: It is very interesting when Hillary and to a lesser extent Obama came out against NAFTA.<sup>136</sup> There was not much response from the business communities saying we disagree.

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<sup>133</sup> See *id.*

<sup>134</sup> See Aaron Bernstein, *Backlash: Behind the Anxiety Over Globalization*, BUSINESS WEEK ONLINE, Apr. 24, 2000, [http://www.businessweek.com/2000/00\\_17/b3678001.htm](http://www.businessweek.com/2000/00_17/b3678001.htm).

<sup>135</sup> Clark, *supra* note 133 at 266 ("Lou Dobbs has used his CNN program to help make immigration one of the most discussed issues of the 2008 campaign, resulting in others labeling him as 'the most influential spokesperson for the anti-immigration movement,' and accusing him of being 'a farmonger who vilifies immigrants and promotes xenophobia.'").

<sup>136</sup> See Ruth Conniff, *Pushing the Dems on Trade*, PROGRESSIVE, May 2008, at 20 ("Both Clinton and Obama have promised to renegotiate NAFTA.").

MR. OPLINGER: Absolutely. You are absolutely right.

MS. PAWLUCH: There was a question up there, and then...

MR. VANDEVERT: Paul Vandevent, "The Guy from Ford" I am told. How much of this could be attributed to or is in fact caused by an incomplete use of technology? I was struck by your statement about the Canadians who are coming to their summer homes and cottages across the border. And what it struck me was there is partial use of technology, the Customs officer or immigration officer calls up, oh, you have been crossing in a lot. But we always say what we are doing when we cross. And so why do not they know that this is the 37th time this month that Mrs. Jones from Vancouver has gone to her cabin with the kids screaming in the car, and she is not a worker? So is there incomplete use of technology?

MR. OPLINGER: I think to some extent that is true. I mean, they are not putting in there that this person owns a cabin in Birch Bay and they cross a lot, so that they have that information when it comes up. But I think the flip side of that is also the way that the two Customs entities deal with it. On the Canadian side, the person at primary is an employee, and they have a supervisor, and if the person at primary does something that you think is inappropriate or starts to hassle you about something, you can ask to see a supervisor and have that addressed. It does not work the same way going into the States. The person at primary that I first meet is God when I cross, and there is no one that can make a change in the decision that they make for a 24-hour period.<sup>137</sup> And so to some extent that is also part of the problem because giving that sort of ability to someone without any sort of an oversight at all means that there is not any ability to correct these issues once someone with a clear head sees them. That person makes the decision. And if for some reason you have ticked them off, you are done for the day, and there has to be some way to try and address that.

MS. ROSS: I am Sue Ross with the law firm of Mitchell, Silberbert & Knupp.<sup>138</sup> I am about to do something I very seldom do because for anybody that knows me, I am one of the first people to stand up and really give U.S. Customs a hard time. But I think we are going to have this dialog. We also have to incorporate the real fact that Customs is geared more towards the southern border than they are towards the northern border. And we also have to acknowledge the fact that there is a very real sense within the Customs service and within the rest of the federal government that I think was best illustrated by something that was said by someone who works for the Los

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<sup>137</sup> See generally Murthy Law Firm, An Inside View of the Port of Entry Inspection Process, <http://www.murthy.com/news/UDpoeip.html> (last visited Oct. 20, 2008) (general about filing a complaint).

<sup>138</sup> See Mitchell Silberberg & Knupp, <http://www.msk.com/home.asp> (last visited Oct. 12, 2008).

Angeles Airport where I live. And the comment was: If there is an alarm that goes off at one of the terminals, I will get a certain degree of criticism if I evacuate the terminal and nothing happens. But if I do not evacuate the terminal and something happens, I can never live with myself. And so there is a certain degree of that going on. Now you obviously have to overlay that with things that we know about B.C. Gold,<sup>139</sup> we know about all the other irregular things that occur in the transits back and forth. But I think the last point I want to make is I want to take exception to your comment that there is not something that you can do. There actually is. I mean, you have to be willing to put up with all the garbage that goes along with ticking off the guy who is the primary inspector. But you can and you should collect the badge number and write to the port director. If there are enough complaints about what somebody is doing, they will do something. You are right, it does not do you any good to do it on the spot and demand the supervisor because when we do that, the cargo area which is where I deal, you very often get, well, this was the inspector's discretion, and he had good reason, and all this other silliness. But enough complaints about rude behavior and other irregularities, and we will get the desired result.

MR. OPLINGER: One of the things that we have been arguing for the last three years is that we actually believe that - maybe not more discretion in this sense because I really do believe there should be a supervisor on spot that can do some of these things. But empowering these people to do things is something that we are very supportive of. The example is that the one person we have caught coming into the U.S. trying to do us harm was caught in my neck of the woods on a ferry from Victoria to Port Angeles.<sup>140</sup> And DHS loves to use that story as a means of saying why we have to have WHTI, but if you look at that story, it is a great example of why documentation means absolutely nothing. This is a person who had two valid passports from two countries that were both visa-waiver countries, so he had every right to enter the U.S.<sup>141</sup> The reason we caught him had nothing to do with documentation, it was because the person at primary who interviewed him said he was sweating a lot, he seemed very nervous, maybe we should have a look in his

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<sup>139</sup> See *Quebec Gold: the other Canadian marijuana*, CUSTOMS AND BORDER PROTECTION TODAY, May 2003, <http://www.cbp.gov/xp/CustomsToday/2003/May/other/quebecgold.xml> (discussing Quebec and BC Gold smuggling).

<sup>140</sup> See Donald Kerwin & Margaret D. Stock, *The Role of Immigration in a Coordinated National Security Policy*, 21 GEO. IMMIGR. L.J. 383, 392 (2007) ("In December 1999, an astute inspector on the Canadian border stopped Ahmed Ressam, a member of the Armed Islamic Group, who planned to use explosives in his car to bomb Los Angeles International Airport on New Year's Day in 2000.").

<sup>141</sup> See U.S. Dept. of State, Visas, [http://travel.state.gov/visa/visa\\_1750.html](http://travel.state.gov/visa/visa_1750.html) (last visited Oct. 12, 2008) (explaining requirements for entering U.S. on a visa).

car.<sup>142</sup> They pulled him over and found over 100 pounds of explosives in the back of his car.<sup>143</sup> So, having good, well-trained people staffed at the border is really the way to go. And so in that sense, please, empower them. I think it is probably the best way to try and ensure our security.

MR. CHERRIN: My name is Dan Cherrin, and I am with Northcoast Strategies<sup>144</sup>. I also represent the University of Windsor and the Detroit-Windsor Tunnel. My question to you, Ken specifically, is what is your coalition doing for when a new administration does take effect? It will be the first time that the Department of Homeland Security will likely be in transition. And they are already going through a lot of difficult transition periods.

MR. OPLINGER: Well, we believe at this point that any of the three new folks coming in to form the new administration will be supportive of this and will continue to sign the MOUs. Now that being said, we have certainly reached out to all three campaigns to try and share with them the process that we have gone through, where we are, and why we think this ought to continue. We have not got any feedback from any of the three campaigns that they think otherwise, and in fact there is some thought that they may be even a little bit looser on some of this. And if we get towards June, 2009, and we do not have what I think we all feel is enough appropriate documents in circulation, we might even be able to bump it back a little bit more. But at this point we are really concentrating more on making sure that we can continue this process of getting the MOUs signed. And at this point we think we can.

MS. RUDE: This is just more of a comment following on that because I am sometimes a little bit afraid that ever since the June 2009 delay was announced, that everyone sort of breathed this collective sigh of relief that okay, now everything is okay. And I think there were several things that are still not okay. And to the extent that people are able to continue to work on things in this room, I think it is really important that people are aware of some of those things. In particular, on the technology front, the final rule that would have just recently come out is that there is an intention to have RFID readers at 39 ports of entry across the Canada-U.S. border.<sup>145</sup> This is not even half of the ports of entry. Now they justified that by saying that those ports are where the majority of crossings occur, but that is not a sufficient

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<sup>142</sup> See *United States v. Ressam*, 474 F.3d 597, 600 (9th Cir. 2008) (“Dean asked Ressam about his travel plans. His answers indicated that he was nervous and agitated.”).

<sup>143</sup> See Kerwin & Stock, *supra* note 141 at 392.

<sup>144</sup> See North Coast Strategies, <http://www.northcoaststrategies.com/> (last visited October 12, 2008).

<sup>145</sup> See generally Laura M. Ulatowski, *Recent Developments in RFID Technology: Weighing Utility Against Potential Privacy Concerns*, 3 I/S: J.L. & POL’Y FOR INFO. SOC’Y 623, 642 (2007-2008) (Discussing importance of RFID readers at all U.S. ports).

justification if you are dealing with huge slots of the border where an entire state or an entire province may not have a crossing with an RFID reader. If you are trying to get to those jurisdictions on the side of producing an EDL, it is hard to promote an EDL with an RFID capacity when the person knows that they are crossing over than half that capacity. There needs to be a continued push for that technology. And I was looking around the room and hoping that the presenter from CBSA was still here - I do not believe she is - because I was hoping that she could also expand on the 17 million pledge for NEXUS because I am completely in Ken's court, that the level of enrollment is ridiculously small for how long the program has been in effect.<sup>146</sup> And I am curious how that 17 million is going to be spent, if it is in promotions, if it is in incentives, if it is in as well expanding NEXUS lanes, NEXUS readers. Because exactly like the RFID, we still have huge slots of the border without NEXUS reading capacity. If there is going to be a genuine option for people other than the passport, all of that technology and application needs to be pushed and promoted. I was recently at an event in Washington where the person from the State Department that gives the regular updates on passport enrollment portrayed this very rosy picture of how well-prepared State Department was for an influx of passport applications. Meanwhile we all know that the vast majority of border crossings between Canada and the U.S. occur at the land border. The uptake in passports in the U.S. in particular increased pretty small. I would say the increase was quite small from when it was pre-air implementation to post-air implementation. And the vast majority of those travelers already had passports because they used them for travel elsewhere. So I am not quite convinced that there will not be another crush of passport applications as the land gate looms. But I think as Ken said, watching to see if there is a critical mass of documents pushing for alternatives to be promoted and offered is crucial. And the onus is really on everyone in this room to continue to push those buttons and make sure that we are vigilant as we are coming up to 2009.

MR. OPLINGER: And I did not even pay her to say all that, so that is great. The only other thing I would add to that is also marketing, and I really want to lend my congratulations to CBSA who spent a considerable amount of money leading up to the end of oral declarations, paying for radio advertising across Canada, and mailers into homes across Canada to let people know that the end of oral declarations was coming. Do you know how much CBP spent? (Indicating zero).<sup>147</sup> We put the rule into place, and we did

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<sup>146</sup> See U.S. Dept. Homeland Security, *supra* note 87.

<sup>147</sup> See generally Government Accounting Office, Observations on Implementing the Western Hemisphere Travel Initiative, <http://www.gao.gov/htext/d08274r.html> (last visited Oct. 20, 2008) (“According to CBP officials at the ports of entry we visited, they do not expect the end of oral declaration to represent a significant operational change for them, because the majority



absolutely nothing to market, with the exception of printing cards that we handed out to people when they crossed the border to let them know that the rule is going into place. So the fact that we were passing this rule without consulting the Canadians, and yet they did a great job of making sure that their citizens knew about the rule change I thought was outstanding.

**MR. ROBINSON:** Michael Robinson from Toronto. Just a very short comment, not a question. I tell all my clients and lawyer colleagues that there is one thing you must never say at the border, NAFTA. If you ever mention the word like, I am a business visitor under NAFTA, I am a foreign legal consultant under NAFTA, the experience that I have enjoyed is as follows: They take your ticket and your passport, they put you in a little room. They check your flight time, they tell you of course you can go back to Canada if you want, but otherwise you have to sit here until we decide to question you. Five minutes after your flight has left, they give you back your ticket and passport with a big smile.

**MS. PAWLUCH:** Well, on that cheery note, I am seeing no other questions in the room. Please join me in thanking our speakers this morning, Praveen Goyal and Ken Oplinger, for a very, very interesting presentation.

(Session concluded.)

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of people crossing at their ports already present documents rather than attempt entry by oral declaration alone.”).