
January 2003

The Smart Border: Movement of Goods - Transportation and Customs Aspects - U.S. Speaker

Douglas M. Browning

Follow this and additional works at: <https://scholarlycommons.law.case.edu/cuslj>

Recommended Citation

Douglas M. Browning, *The Smart Border: Movement of Goods - Transportation and Customs Aspects - U.S. Speaker*, 29 Can.-U.S. L.J. 151 (2003)

Available at: <https://scholarlycommons.law.case.edu/cuslj/vol29/iss1/24>

This Speech is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Canada-United States Law Journal by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

THE SMART BORDER: MOVEMENT OF GOODS - TRANSPORTATION AND CUSTOMS ASPECTS

Douglas M. Browning[†]
U.S. Speaker

Thank you, John. Let me also join Allan in expressing my appreciation to Professor King in giving us this opportunity to participate in this forum. I was struck by a comment that was made from the previous panel and as I looked at the list of speakers, it occurred to me that it falls to me to represent those sincere public servants who want to make things work.

Indeed, a good bit of what we have been trying to do over the last 18 months is to get back to a place where we can facilitate legitimate trade and travel between our two countries. I think a good example of this is the Smart Border Accord.¹ It is something that we have been investing a great deal of effort in, and with good reason. The economic relationship between the United States and Canada is one of the most significant in the world, and perhaps most unique, in the way so much of the activity is centered on a single land border.

It has been one of the broadest and deepest relationships between any two countries in history, a fact recognized at the senior-most policy levels of both governments. This recognition will not change with the movement of the former U.S. Customs Service into the Department of Homeland Security. If anything, what we hope is that our capabilities should improve. There are opportunities to tie together what have been separate streams of collaboration.

[†] Douglas M. Browning is the Deputy Commissioner of the U.S. Customs Service. He has served on several national and international committees and task forces. Prior to this recent appointment, he was the acting Assistant Commissioner for the Office of Regulations and Rulings. In 1994, Mr. Browning was appointed Assistant Commissioner for the Office of International Affairs. He began his career with U.S. Customs in 1977 when he joined the Office of Regulations and Rulings as a staff attorney, later transferring to the Office of the Chief Counsel, where he served as Assistant Regional Counsel in New Orleans and in Baltimore. Mr. Browning has also served as Senior Counsel for International Enforcement in Washington, D.C. Mr. Browning received his B.A. from the University of Pittsburgh, his J.D. from Hofstra University, and is also a graduate of the Senior Executive Fellows program at the JFK School of Government at Harvard University.

¹ *The Smart Border Declaration: Building a Smart Border for the 21st Century on the Foundation of a North American Zone of Confidence*, CANADIAN EMBASSY, Dec. 12, 2001, available at www.canadianembassy.org/border/declaration-en.asp

HOMELAND SECURITY

In recent weeks, we created for the first time in the history of the United States, a single agency responsible for all aspects of border management at the ports of entry as well as between the ports of entry.² A key goal in this process is to create one face at the border and the primary purpose for this one face will be to deny the entry of terrorists and their weapons into the United States.³ At the same time, however, the traditional responsibilities of border management, and those that are enshrined in the Smart Border Accord, preserving the flow of legitimate travelers and commerce, are still an important part of our work.⁴ With no margin for error and the scale of economic activity that is the reality of the U.S.-Canada border, our governments clearly have to work together.

The Bureau of Customs and Border Protection now has within its mandate a very broad task. To be successful, we are not only counting on the improvements that we are able to make internally as we look at ways to integrate functions and better coordinate between what were separate border agencies, we are also clearly dependent on good relationships with our neighbors to the north and the south. In this context, the relationship we have forged with the Government of Canada remains a critical one. The work of the Bureau of Customs and Border Protection, the Canadian Customs and Revenue Agency, and Canada's Citizenship and Immigration, as part of the Smart Border Accord process, is a genuine reflection of this understanding. Before I talk about some of the specific issues we have been grappling with together in this context, I have to note that the work we are doing is just the latest evolution in a long-standing cooperative relationship between our two administrations.⁵

Effective management of our shared border has been a priority for a number of years from both governments and the trade community. As Allan mentioned, I have had the pleasure of working with him for a number of years. During that time a fair amount of analysis has been done on the border environment to diagnose its needs. I want to make a comment about something that was said in an earlier presentation that concerned me a bit.

² *The National Strategy for Homeland Security*, OFFICE OF HOMELAND SECURITY, July 2002, available at www.whitehouse.gov/homeland/book/nat_strat_hls.pdf

³ *Smart borders: US/Canada joint anti-terrorism actions*, U.S. CUSTOMS TODAY, Feb. 2002, available at www.cbp.gov/xp/CustomsToday/2002/February/custoday_borders.xml

⁴ Remarks of Robert C. Bonner, *Safeguarding America*, June 3, 2002, available at www.cbp.gov/xp/cgov/newsroom/commissioner/speeches_statements/jun032002.xml

⁵ See, Debra A. Valentine, *Cross-Border Canada/U.S. Cooperation in Investigations and Enforcement Actions*, 26 CAN.-U.S. L.J. 271 (2000); Konrad Von Finckenstein, *Cross-Border Canada/U.S. Cooperation in Investigations and Enforcement Actions Vis-a-vis Private Parties*, 26 CAN.-U.S. L.J. 285 (2000).

That is the notion that the Smart Border Accord is good housekeeping. It actually is a little bit more than that. In fact, an awful lot more than that.

In eight years as serving as the Assistant Commissioner for the Office of International Affairs, when we started the Shared Border Accord, we had an awful lot of successes early in that process. We were plucking the low hanging fruit on a regular basis, but what we found is that we hit a wall. The wall was the wall of political resistance. It was said earlier that sovereignty is the hobgoblin of rational negotiations. I would also say the hobgoblin of successful Border Accords. What has happened in the intervening period is that we have been able in the name of security to push that envelope further and go beyond what we thought was possible.

Many of the ideas that I am going to talk about were ideas that Allan and I discussed early in the process, but there simply was not the political will to move it forward. More recently with the tragic events of September 11th and the resulting shift in our focus to enhance security in the trade environment, not only did the need for our collaboration increase, but the scope of the initiatives we needed to undertake necessarily started to mirror those larger security concerns.⁶ The difficulties in commercial and passenger traffic that we experienced in the immediate aftermath of the tragedy and the need to undertake remedial measures quickly punctuated the need for long-term solutions given the overriding international threat and the acknowledgement that it would not diminish in the foreseeable future.⁷ Such is the genesis of the 30-point Smart Border Action Plan endorsed by Secretary Ridge and Deputy Prime Minister Manley.⁸ Their involvement brought greater attention to the U.S.-Canada relationship and re-energized efforts to quickly improve management of our shared border. The action plan also represents an opportunity for putting into practice a number of programs reflecting the layered strategy developed by Customs and Border Protection in the post 9-11 context.

This approach involves a conscious effort to balance trade and security interests and look at ways to extend the border, improve interdiction at the border, and enhance risk management processes to guide our interventions in the trade process. One of the core objectives of the Smart Border Plan is to contribute to the secure and efficient flow of goods across the Canada-U.S.

⁶ *A more secure U.S.-Canada border*: Commissioner outlines joint security improvements at WCO, U.S. CUSTOMS TODAY, June 2002, available at www.cbp.gov/xp/CustomsToday/2002/June/border.xml

⁷ James Granelli and Scott Reckard, *Response to Terror: Heightened Security Measures and Lengthy Delays Are Prompting Customers to Move their Freight by Other Methods*, L.A. TIMES, Sept. 28, 2001, at C1, available at 2001 WL 2521432.

⁸ *Specifics of Secure and Smart Border Action Plan: Action Plan for Creating a Secure and Smart Border*, OFFICE OF HOMELAND SECURITY, Jan. 7, 2002, available at www.whitehouse.gov/news/releases/2002/01/20020107.html

border.⁹ Fortunately, established relationships between the Canada Customs and Revenue Agency (CCRA) and us. Bonner and Commissioner Wright made moving in this direction relatively easy. The personal engagement of the agency heads has been invaluable. Their continuing commitment to implementing our portions of the action plan are a critical part of what is pushing our work forward. In addition to the involvement of senior management in this process, there is throughout our two organizations a clear focus and recognition that this is work we have to do in order to be successful. Because of this, we have been able to put aside some of the parochialism that crept into the relationship in years past and really focus on developing solutions for long-term benefit of both sides.

Political will and a framework for having the necessary discussions are only part of the equation. Identifying the issues and the priorities is the other part. That is what the action plan has served to do and to do well. A number of points in the plan pertain to, as Allan had mentioned, Customs Administration. These are primarily those associated with the secure flow of goods. They include issues such as harmonized commercial processing, information exchange, clearance away from the border, joint facilities and container targeting. In each of these areas in which we have been given a mandate, we and Canada Customs have been working to implement measures that improve security in the movement of goods, but in a way that does not contribute to undue congestion or delays for legitimate trade and travelers.

SMART BORDER SUCCESSES

I would like to give you a brief status report; think of it as a report card. I have a 12-year-old daughter who is on occasion reluctant to show me her report card unless the A's outweigh the B's. In this context, I am very happy to share our report card with you, because some of the areas we are considering and have undertaken in the Smart Border Accord framework clearly indicate that we are moving in the right direction.

First, I would like to talk about our success in the area of harmonizing commercial process. And, in particular, and this has been mentioned earlier by some of the other speakers, the Free and Secure Trade Program or FAST.¹⁰ This program is the latest successful incarnation of rapid release

⁹ *Action Plan for Creating a Secure and Smart Border: An Efficient, Secure and Smart Border*, OFFICE OF HOMELAND SECURITY, DEC. 12, 2001, available at www.whitehouse.gov/news/releases/2001/12/20011212-6.html (describing one of the key objectives as creating and implement technologies and harmonized commercial processes at the border to identify dangerous cargo while expediting the flow of low-risk goods).

¹⁰ *United States - Canada Free and Secure Trade Program the FAST Program*, THE WHITE HOUSE, OFFICE OF THE PRESS SECRETARY, available at www.whitehouse.gov/news/

programs for the U.S.-Canada border. The action plan requires us to look at how to establish complimentary systems for commercial processing incorporating audit based procedures and industry partnerships. Based on this guidance and through our intensive consultation process, we have been able to make significant progress in implementing FAST as a rapid release system for low risk shipments.

What this program does is to build upon relationships established with companies participating in the Customs Trade Partnership Against Terrorism known as C-TPAT.¹¹ Let me pause for a moment. One of the things that we have clearly recognized is the need to collaborate with the private sector. So much of the supply chain is controlled by parties outside of our jurisdiction as a regulatory authority. We recognize that in order to have an effective supply chain security system we would have to engage the private sector. That was done through the Customs Trade Partnership Against Terrorism. In less than 18 months we have been able to engage over 2,200 importers, exporters, freight forayers, brokers, carriers, shippers, in the process of assisting us to secure the supply chain. It has been a phenomenal success.

Working with the C-TPAT program, driver registration and advanced technology, FAST provides a combination of low risk designation and information that will permit us to almost nearly instantaneously release the shipment when it arrives at the port of entry.¹² Essentially, the program allows rapid entry of shipments sent by certified industry partners, importers and carriers that have entered into agreements with us to undertake security measures, using cleared drivers. The advance transmission of information via transponder to the Customs clearance booth permits us to perform screening in advance of arrival, so that under normal circumstances when the truck does reach the port of entry, there is no time required for clearance formalities. The time savings and the predictability made possible by this system are a great benefit to commercial interests on both sides. A critically important element of the program is that it works in both directions. In an era of just-in-time inventory mottoes, the value of such a system is absolutely apparent.

FAST is operating at six major border crossings: Blaine/Douglas, Port Huron/Sarnia, Detroit/Windsor, Buffalo at Fort Erie, Lewiston and Queenston, and Champlain/Lacolle. Each location has dedicated FAST booths and technology. I believe its benefits have already been felt along the

releases/2002/09/20020909-3.html

¹¹ *C-TPAT Fact Sheet and Frequently Asked Questions*, U.S. CUSTOMS AND BORDER PROTECTION, available at www.customs.ustras.gov/xp/cgov/import/commercial_enforcement/ctpat/fact_sheet.xml

¹² *U.S./Canada FAST Program*, U.S. CUSTOMS AND BORDER PROTECTION, available at www.customs.ustras.gov/ImageCache/cgov/content/import/commercial_5fenforcement/ctpat/fast/us_5fcanada_5finformation_2edoc/v2/us_5fcanada_5finformation.doc

border.¹³ The goal at this point is to include expanding and participation into the program, which we think will be helped with the opening of some additional enrollment centers in Canada. We are looking at how we might introduce a dedicated FAST lane in at least one or two of the existing crossings.

CONTAINER SECURITY

Another issue on which we have had significant success pertains to container targeting.¹⁴ As you most likely know, Customs and Border Protection lost a program over a year ago called the Container Security Initiative,¹⁵ which is designed to extend the border for Customs purposes beyond the traditional port of entry. Our first partner in prototyping this concept was Canada. Each of us has personnel located in ports on the other side of the border since this time approximately a year ago. U.S. Officers have been posted in Vancouver, Montreal and Halifax, and Canadian Officers are stationed in Seattle and Newark. Working through this pilot, we have been able to start targeting containers destined for the respective countries at a point in their movement that would otherwise be impossible.

I want to pause from my prepared remarks here because after being in this business for about 25 years it is clear that this is another example of a paradigm shift that is occurring in the business of global trade. At a point in Customs, our job was to bus boxes when they arrived at the point of entry, at the ports of entry. Now, what we are doing through advanced information is to make decisions on what risk factors we will attach to containers and cargo even before they are laden on vessels destined for this country. I think that is a point that Allan made reference to.

A year ago we undertook to identify 20 mega ports and to engage the foreign countries in those mega ports to allow us to do prescreening, pre-inspection of containers bound for the United States before they were laden at those ports of entry.¹⁶ Today, we have succeeded in getting 18 of those countries engaged and the others have at least agreed in principle to do

¹³ See, Asa Hutchinson's Testimony Before the House Select Committee on Homeland Security, June 25, 2003, available at http://hsc.house.gov/files/Testimony_Hon_Hutchinson.pdf

¹⁴ *Container Security Initiative Expands Beyond the Megaports, Strengthening Anti-Terror Coalition*, Press Release, U.S. CUSTOMS AND BORDER PROTECTION, Feb. 21, 2003, available at www.cbp.gov/xp/cgov/newsroom/press_releases/022003/02212003.xml

¹⁵ *U.S. Customs Service's Container Security Initiative*, Fact Sheet, U.S. DEPT. OF STATE, Feb. 22, 2002, available at <http://usinfo.state.gov/topical/pol/terror/02022505.htm>

¹⁶ See, *U.S. Customs Container Security Initiative Forging Ahead*, U.S. CUSTOMS AND BORDER PROTECTION, Aug. 8, 2002, available at www.usconsulate.org.hk/pas/pr/2002/081201.htm

the same. The notion that you would be able to have sovereign countries waive their sovereignty in favor of enhanced security, while at the same time provide us with the potential to get back to a level of facilitation that existed pre 9-11, if you had asked me if that was possible a year ago, I would probably have said impossible, but that is the environment in which we are working in today.

What it means for traders is that there is the potential for import data to become export data, for export data to become import data, for one stream of information to be information used by all of the border authorities for the movements of goods and people. The cost savings and cost implications for a process of that type are significant. As with other locations in which we have engaged the Container Security Initiative, this capacity has dramatically improved our ability to target for risk, and ultimately to protect our people. Even with the duration of this prototype and the honing of our target practices, we have been working to advance the effectiveness of this initiative.

Through the Smart Border process, we have created an arrangement by which we can now obtain electronic advanced manifest information on containers from Canadian Customs, something we could not do a year ago because the process was at that time paper-based. In addition, CCRA will begin a process within the Canadian government to promote adoption of a rule similar to the U.S. regulation requiring vessel manifest information be submitted 24 hours before lading. If this effort is successful, the additional information that will be made available to CCRA would vastly improve its risk analysis capabilities and enhance the targeting that our joint teams can perform as part of the in transit container screening program. This is a prospect that we are certainly looking forward to.

While there are a few areas like those I have mentioned which we have had appreciable success already, there are others in which our efforts continue. For example, one of the more complex deliverables in the action plan calls for us to develop methodologies for clearance away from the border including inland pre-clearance and pre-processing centers at the border. The objective is to reach an agreed upon approach to move inspection activities away from the border in a way that improves security and lessens congestion at the ports of entry.

One of the concepts that has arisen out of the dialogue on how to accomplish this goal is that of the Integrated Border Inspection Area or IBIA,¹⁷ which Allan mentioned a little earlier. U.S. and Canadian officials have been grappling with this issue for some time. Together we have

¹⁷ H.J. RES. 2, § 127 (2003). Authority for the Creation of Integrated Border Inspection Areas and Designation of Foreign Law Enforcement Officers, *available at* www.fedsources.gov/pdf/fedsfranchiseauth.pdf

completed an analysis of the benefits that could be accrued from establishing joint facilities on either our side or the Canadian side of the border.¹⁸ There are some clear quantifiable advantages to this type of processing, particularly when one considers how concentrated the major commercial flows are at the border and the fact that in the case of some crossings, delays at the port of entry have a direct impact on traffic at urban centers.

Nonetheless, there are also a number of questions raised by the possibility of implementing such an operation, including questions about the legality of allowing Customs Officers to perform inbound inspections on behalf of the U.S. and vice versa, co-location of officers at an international plaza, where both sides can exercise their national authorities, and general questions about how to apply either country's laws outside the traditional border context. U.S. Customs and Canadian Customs staff have been working for some time to develop options and we continue to do so. To resolve these outstanding issues, we are engaging more senior levels within our respective governments to see what we can do to make this an operational reality. It will take some time, but eventually I think we will put in place something that takes us closer to this goal.

Finally, another area within the issue of clearance away from the border on which work is continuing relates to the processing of rail cars. CBP and CCRA have been working closely with Canadian railroad companies to develop approaches to augment security in this critical sector of our valuable national trade.¹⁹ As in other areas, the priority is to improve enforcement activities while facilitating the flow of legitimate traffic. Logistics and other factors have introduced some challenges. However, we have redoubled our efforts to find a practical and effective set of solutions. Recently, we and CCRA reached an agreement with Canadian National and Canadian Pacific Railroads to place security screening equipment at a number of the busiest crossings on our shared border. In addition to the deployment of nonintrusive technology, the agreement provides for rail companies to transmit electronic manifest information eight hours in advance of arrival so that we can perform the necessary risk assessment and targeting. A bit of work remains to implement this agreement. There will be significant investments made on both sides to insure the process works well.

¹⁸ *CSI: U.S. and Canadian customs inspectors working side-by-side*, U.S. CUSTOMS TODAY, June 2002, available at www.cbp.gov/xp/CustomsToday/2002/June/csi.xml

¹⁹ *U.S. and Canadian Customs Agencies, and Canada's Two Largest Railways Reach Agreement to Strengthen Security Measures for Transborder Rail Shipments*, U.S. CUSTOMS AND BORDER PROTECTION, April 3, 2003, available at www.cbp.gov/xp/cgov/newsroom/press_releases/042003/04032003.xml

CONCLUSION

Having cited some of the successes we can already identify and a few areas we are continuing the dialogue on, I hope that you have a sense of Customs and Border Protection's commitment to the goals of the Smart Border Accord. Much has changed since 9-11, as it should. We and CCRA are collaborating on ways to realize levels of facilitation similar to what we had before those tragic events. In doing this, we have to make sure the processes we put in place accomplish this in a way that provides the security we all know as necessary.

Assessing the results, it is clear that there have been substantial gains. Assessing the future, it is clear there will be many more. The border environments of the two customs administrations are working together to build a secure and efficient system, but the success of this effort depends on continuing dialogue and innovation. The operations we are discussing are complex, raising logistical and legal questions, some of which are new, some of which depend on technologies that are still in the process of being developed. The answers might not be immediate in every instance, but those that do come are well thought out and should yield benefits for those operating in the border trade context.

I believe we are off to a good start and that the benefits we have long promised to the communities living and working in the border region are now being realized. Speaking for Customs and Border Protection, I know that what we have done thus far is only the beginning. I am sure that our partners in the Canadian Customs and Revenue Agency will be working alongside us to realize a truly smarter and more secure U.S.-Canada border.

Thank you.

