

Canada Alert

The Smart Border Process at Two: Losing Momentum?

Andre Belelieu

OVERVIEW

- It has now been two years since Canada and the United States signed the Smart Border Declaration in the aftermath of 9/11 and began implementing the 30-point Smart Border Action Plan.
- Significant achievements have been registered across all four pillars of the Smart Border Action Plan, which represent a significant upgrade from the pre-9/11 border.
- However, the Smart Border process is losing momentum at a critical juncture, when the Action Plan is largely complete and a more ambitious border strategy and vision is required for the future.
- Several factors are robbing the Smart Border process of the necessary momentum to undertake this task, including uncertainty at the end of the Ridge-Manley era, upcoming election cycles in both countries, new regulations that move away from the traditional smart border approach, and the aftermath of the Maher Arar case.

On December 12, 2001, Canada and the United States signed the Smart Border Declaration, which gave birth to the 30-point Smart Border Action Plan. This bilateral agreement instantly became the de facto framework for ensuring the world's longest undefended border remained secure, while facilitating the flow of people, goods, and services, and was a key component in the larger homeland security goal of creating a zone of confidence against terrorist activity, while causing minimal damage to the world's largest trading relationship. Two years later, the Canadian and U.S. governments can point to progress on all 30 points contained in the Action Plan. Through cooperation and an understanding that a smart border works in the interest of both countries, Canada and the United States can claim to be closer than ever to

ensuring that the Canada-U.S. border remains "open to trade and closed to terrorists."

As the second anniversary of the Smart Border Declaration passes, however, the larger Smart Border process appears to be losing steam. The momentum that has guided border management since 9/11 is now fading as political attention is turning elsewhere, necessary funds are being allocated to different priorities, and political will for further cooperation is slowly fading and can no longer be considered automatic.

Logically, the farther removed Canada and the United States are from the attacks of September 11, 2001, the more inevitable it becomes that the political climate reflects once again a normal balance between security concerns and economic

and domestic political issues. However, it remains that at a time when the Smart Border agenda has by and large been completed, now is the time Canada and the United States should be devoting energy to crafting a new long-term border management strategy that continues to balance Canada's concerns of access to the U.S. market with U.S. concerns for keeping North America free from terrorists.

Due to its success, the Smart Border process, which sets the overall agenda and brings together high-level political actors to monitor progress and keep the agenda moving forward, is the obvious candidate in which to complete this task. It benefits from a specific and well-defined agenda, as contained in the Action Plan, and is guided by principles and political support present in the Smart Border Declaration. However, it appears it has become a victim of its own success, and a series of factors are coming together to rob the process of the necessary momentum to ensure its renewal in the years ahead.

A Two-Year Report Card

Before the Smart Border Action Plan was launched in December 2001, it is worth remembering that Canada and the United States had talked about border management throughout the 1990s. This resulted in many initiatives and programs aiming to improve security at the border, including the 1995 Canada-United States Shared Accord on the Border, which targeted improvements in the areas of customs and immigration procedures, as well as the 1997 Border Vision Initiative, which turned its focus to improving information sharing and interagency coordination. Indeed, one of the primary reasons that the Smart Border process was put into action so swiftly was because much of the groundwork for implementation of its provisions had been laid before 9/11.

The main achievement of the Smart Border process was therefore to combine this work with the necessary political will to offer a new vision for the border, which moved bilateral border management away from the traditional border management paradigm to a more developed approach based on risk management, intelligence-based cooperation,

joint programs with common standards, and a common desire to move enforcement as far away from the physical border as possible. The result has been significant success on all 30 points in the original action plan and progress in all four pillars of the Smart Border Action Plan: the secure flow of people, the secure flow of goods, secure infrastructure, and coordination and information sharing in the enforcement of these objectives.

The result is a "smarter" border that distinguishes between high-risk and low-risk people and cargo, allowing Canadian and U.S. officials to concentrate their efforts where and when they are most needed; a border with significantly upgraded infrastructure allowing for greater speed and facility in all cross-border movements; and a border made safer and more intelligent by unprecedented levels of information and intelligence sharing between a growing number of agencies across the 49th parallel. In comparison with the Smart Border accord between the United States and Mexico, Canada and the United States have made significant progress.

This success in making the border "smarter" is due in large part to increased information sharing and cross-agency cooperation, as many old inefficiencies have been eliminated and many traditional cross-agency rivalries have been laid to rest. However, much of the progress can be linked to the largely successful implementation of a series of new border management initiatives that together represent a significant upgrade from the September 10, 2001 border. These include

- **NEXUS:** NEXUS is a border-wide fast lane program for prescreened, low-risk travelers, allowing border agents to concentrate their efforts on unknown and high-risk travelers and goods. Since 2001, NEXUS-only lanes have been implemented at 13 major crossings, with expansion planned for 2 more crossings. In 2004, enrollment for NEXUS-air will begin for the program launch at Ottawa's MacDonal-Cartier Airport and Montreal's Dorval Airport.
- **Free and Secure Trade (FAST):** FAST is a program aiming to harmonize the commercial process between Canada and the United States to securely and efficiently move preapproved,

low-risk commercial shipments across the world's busiest trading border. Since the Smart Border Action Plan was put into effect, FAST has become operational at the six main Canada-U.S. crossings. It is slated for expansion to 6 additional crossings by the end of 2003 and to all 22 major commercial crossings by the end of 2004.

- **Integrated Border Enforcement Team (IBET):** IBETs are binational, multiagency border patrol and enforcement teams combining Canadian and U.S. law enforcement, immigration, and customs officials. In the first two years of the Smart Border process, IBET have been expanded to cover all strategic locations across the 5,525 mile Canada-U.S. border.
- **Container Security Initiative (CSI):** The CSI has established joint targeting teams to ensure that all high-risk containers are examined when they arrive in North America through the collection of advance manifest data for incoming ships and their containers. Currently, Canadian and U.S. marine officials work side by side in Newark-New York, Seattle, Halifax, Montreal, and Vancouver.
- **Advance Passenger Information and Passenger Name Records (API/PNR):** API/PNR aims to provide Canada and the United States with information that will arm border agencies with data on passengers bound for and departing from the United States, through increased information sharing and the harmonization of multiple criminal databases. Since the signing of the Smart Border Declaration, Canada and the United States have developed a risk scoring mechanism to oversee information sharing and determine high-risk travelers, and plans are in place to develop an automated data-sharing program by spring 2004.

These initiatives have come simultaneously with several advances in the management of the secure flow of people through increased information sharing and cooperation on various visa, refugee, and immigration policies. These include

- The introduction of permanent resident cards in June 2002 to all new immigrants arriving in Canada;
- The signing of a Statement of Mutual Understanding (SMU) for information exchange on immigration-related issues;
- The adoption of the Safe Third Country Agreement in December 2002, aiming at more efficient information sharing on respective refugee/asylum systems;
- The increasing harmonization of visa policies, with Canada and the United States now sharing common visa policies for 144 countries; and
- The launch in the United States of the United States Visitor and Immigrant Status Technology (US VISIT), an entry-exit system that, as of the end of this year, will track all individuals entering the United States on visas using biometric technology (early negotiations between Canada and the United States have explored an exemption for Canadians from the system in return for the assistance of Canadian officials in the implementation of the program).

As a result of this progress, the 30-point Smart Border Action Plan has largely been completed and has recently been expanded from 30 to 32 points, with the addition of provisions on biosecurity and science and technology cooperation. However, it is important to distinguish between the Action Plan and the Smart Border process in general. While the Action Plan has been a success and is nearing completion, the overall process of making the border "smarter" continues, and here there is room for pessimism as to what the immediate future holds.

The Momentum Problem

It is clear that significant progress in modernizing the Canada-U.S. border has been one of the best examples of Canada-U.S. cooperation since the attacks of 9/11. It is also clear that Canada-U.S. cooperation at all levels of government has been better within the Smart Border framework than elsewhere during the recent deterioration of relations between George Bush and Jean Chretien. However, the framework conceived in 2001 is now

largely complete, and the momentum and sense of urgency that underpinned these efforts has recently dissipated. This is worrying at a time when the process needs to be renewed, in order to start adapting the framework to a more long-term focused strategy. Moreover, it is especially worrying for the national interests of both countries, as it is through incremental cross-border initiatives such as the Smart Border process and not through the negotiation of a “big idea” or “strategic bargain” that Canadian and U.S. interests are currently best served.

The causes behind the loss of momentum are numerous, and many of them are to be expected as the aftermath of 9/11 fades farther into history. However, this loss of momentum need not be inevitable, as Canada and the United States have the money and personnel to fund and operate the myriad Smart Border programs, and different ideas exist as to how best move this process forward. As the second anniversary passes, a series of factors appear to be combining that will impede further progress on the border, which make one wonder whether the smart border process will receive any attention at all.

The End of the Ridge-Manley Era

One of the main problems conspiring to rob border management of badly needed momentum is the end to the relationship that guided Smart Border discussions for the past two years and which represented the political will and leadership needed to deliver the ambitious Smart Border agenda. This is the John Manley–Tom Ridge relationship. Deputy Prime Minister Manley and Secretary of Homeland Security Ridge cultivated a strong working relationship since they were handed this high-level portfolio by Chretien and Bush respectively. This enabled the two “border czars” to solve tough problems, obtain the necessary funds to implement the agenda, and to exert a common leadership that was instrumental in moving the process forward. Throughout the first two years, the relationship became the bedrock of continuity in the fluid and ever-changing homeland security environment.

This period is coming to an end with Manley’s departure from Canadian politics, which was announced on November 27. Manley will be replaced as deputy prime minister and finance minister on December 12, the day Chretien officially steps down after a decade in power. Since Manley was an early opponent of Paul Martin in the race to replace Chretien, it was apparent he would not have a place in the Martin government, even if Martin has offered him the role of ambassador in Washington, D.C. (Early indications suggest Manley may decline.) As of yet, it is unclear who will replace Manley, or even if the current structure for dealing with border issues in the Canadian government will survive. (Martin has suggested creating a cabinet-level committee on Canada-U.S. affairs, and it is likely border negotiations will fall under this umbrella.) What is certain is that it will be extremely difficult for Martin to find a politician as respected in the United States for his security-related work post 9/11.

On the other hand, although Ridge remains the head of the Department of Homeland Security, it remains that he oversees a department experiencing many growing pains, as it takes shape after the largest reorganization of U.S. government in 50 years. It seems logical that he would spend increasing amounts of time fixing these problems, instead of launching new initiatives in a process that is working relatively well. Two other problems can also be cited on Ridge’s end. First, it is debatable whether Ridge remains the best person to press the U.S. government on border issues. As head of a department, he has become an implementer, instead of his old position in the White House as director of the Office of Homeland Security, where he had the president’s ear on a regular basis. Second, Ridge is well respected in the Bush administration and may be offered a different position should Bush win reelection. As with Manley, should Ridge leave this position it will be hard to find a replacement after the work Ridge has accomplished with Manley in the past two years and the relationships he has built with Canadian officials.

But why, in the end, was this relationship so important? It is because leadership at the top of the Smart Border process is a critical element in moving a process forward that benefits from a lack

of institutionalization. Since 9/11, border negotiations proceeded without the benefits of a regular institution. The process was successful because Ridge and Manley had sufficient respect and clout to ensure regular monitoring and implementation of the Action Plan and because enough money was available to ensure the success of Smart Border initiatives. With no institutionalization of the process in sight for the near future, leadership will therefore continue to play a key role in ensuring the agenda moves forward.

The Importance of Electoral Cycles

Of course, the end of the Ridge-Manley era need not signal the end of the Smart Border process. It is conceivable that the Ridge-Manley relationship will be replaced by an equally strong relationship between their replacements. However, even if this is the case, these new border “gurus” will have to contend with electoral cycles in both Canada and the United States, which at a minimum will limit in the next year any significant progress or new initiatives on the Smart Border agenda.

For the second time in four years, Canada and the United States will be going to the polls in the same year. While Bush is obliged to run for reelection in November, it is almost a certainty that Paul Martin will choose to call a federal election in Canada, maybe even as early as the spring. Accordingly, 2004 will be a year of intense campaign preparations, especially if these elections are as close as some pollsters predict. Neither Martin, who could face a reinvigorated and united conservative party, nor Bush, who has become one of the most polarizing figures in American politics in recent memory, can afford to ignore a host of economic and social issues that are dividing regions and electorates in both countries.

This poses a double challenge for renewing the Smart Border process. On the one hand, work on the current border agenda will continue in the background. However, it is unlikely Bush or Martin will campaign on border issues, and this will result in a lack of high-level attention in moving the agenda forward or listening to new ideas or proposals. On the other hand, new programs such as

US VISIT will be launched during this time, and should the launch fail, or the programs prove to be a headache, it is unlikely leaders will want to focus their energy and the debate on these issues, which will not win votes at the ballot box. Accordingly, should progress stall, or should new problems emerge, it is unlikely the Smart Border process will see adequate high-level attention necessary to address those issues. Instead, it looks set to become a victim of electoral timetables.

New Approaches?

A third hurdle that the Smart Border process may have to face concerns a series of new directives that are moving border policy away from the risk management strategy that enabled the border to remain secure with minimal damage to cross-border trade and commerce. Specifically, as the Smart Border agenda expands to include a host of new agencies, a trend is emerging where specific mandates in these agencies are calling for different approaches to dealing with the border, and these directives are responding in some cases to almost contradictory concerns.

An example of this trend is the new bioterrorism regulations being implemented by the Food and Drug Administration (FDA) in the United States. The Bioterrorism Act, which was passed in 2002, includes new regulations that will require exporters sending agricultural products to the United States to provide a two-hour advance notification period detailing the content of their shipments. (It is worth noting that when the original plan called for advance notification, the FDA insisted on a 24-hour notice period, which would have crippled many exporters of fresh produce and seafood.) This causes two main problems for the future of the Smart Border process. On the one hand, this approach makes no distinction between high-risk and low-risk shipments, moving away from the successful risk management approach that has defined border policy in the past two years. Secondly, the new directives are sure to confuse the private sector and exporters, who in some cases will now be obliged to provide this information to the FDA in addition to the advance notice already required by the U.S. Bureau of Customs and Border Protection (BCBP), which operates with different

reporting requirements. Moreover, these new regulations apply to all exporters, making no distinctions for exporters already certified under the FAST program as low risk.

To be sure, the Bioterrorism Act is a necessary piece of legislation to enable the FDA, which has no staff at the border, to fulfill its mandate and better identify high-risk shipments that could contain harmful pathogens or contaminated produce. At the same time, however, this approach represents a step back from the risk management approach that is vital if high levels of cross-border trade are to continue. Moreover, these new directives send mixed messages to the private sector, which is an integral partner in making the border “smarter,” and add a layer of bureaucracy and paperwork to an already time-sensitive process. With risk management, exporters had an incentive to improve their internal security practices in order to qualify as low risk under the risk management approach. If new directives such as the Bioterrorism Act, or the April 2003 Declaration of Principles for rail cargo, represent a new desire to move away from such a strategy, it will make little sense for companies to make similar investments in the future. This may cause many organizations to question the necessity of participating in many Smart Border programs.

The End of Intelligence Sharing?

A final issue that will affect the Smart Border process, and that may have the most serious long-term consequences, is the aftermath of the Maher Arar case. Quickly, Arar’s story has become a scandal in Canada and threatens to jeopardize the increasing levels of intelligence gathering and information sharing that are a vital plank of the Smart Border agenda and a prerequisite for moving future border cooperation forward. However, the case is also revealing as a measuring stick in determining the level of trust between the Canadian and U.S. governments.

The case began on September 26, 2002, when U.S. Immigration and Naturalization officials at New York’s Kennedy Airport detained Arar. Arar was returning from a family vacation to Tunisia and stopping over in New York on his way to Montreal.

Arar, however, never made it. The United States suspected him of having ties to Al Qaeda and decided to deport him to his birthplace, Syria, even though he was traveling on a Canadian passport, is a Canadian citizen, and had not been to Syria in 15 years. They claimed they were acting on information sent from multiple intelligence sources, hinting at assistance from Canadian agencies such as the Royal Canadian Mounted Police (RCMP) and Canadian Security Intelligence Service (CSIS). He was sent first to Jordan and then to Syria, where he was jailed and tortured for over a year. During this time, Arar claims to have been forced to sign a false confession that he spent time in Afghanistan. It was only on October 5, 2003, or one year later, that Arar was released by Syria. Since his return to Canada, calls have been made for a public inquiry and for those responsible for Arar’s deportation to step forward.

Beyond the public relations setback this case represents for the Canadian and U.S. governments, and beyond the warning it provides concerning the threats to civil liberties by new antiterrorist legislation, the Arar saga may be the catalyst for the first step back in Canada-U.S. border cooperation since 9/11. Already, many Canadians are calling for a review of intelligence-sharing agreements and cooperation between Canada and the United States. The United States has shown that it will use its new array of police, investigative, and immigration powers to deport naturalized Canadian citizens back to their birthplace, without consulting the Canadian government until it is a *fait accompli*. (Foreign Affairs Minister Bill Graham was informed only three days after Arar’s arrest that he had been deported to Syria.) Moreover, by choosing Syria instead of Canada as a destination for the deportation, the United States has also shown that it is willing to send Canadian citizens to be interrogated in countries well known for torturing their prisoners.

On another level, however, by choosing Syria over Canada, the United States is showing that despite some of the rhetoric, it still has issues with Canadian policies vis-à-vis the war on terror. Even though it seems the U.S. government may have made a huge mistake, the United States would not have detained Arar if it had not been convinced it

had a serious terrorist suspect on its hands. By refusing to send him to Canada, the U.S. government appears to have believed Canada would let Arar walk free, or at a minimum fail to gain any information from him.

Moreover, it is highly unlikely that the United States was acting without information from Canadian agencies such as the RCMP and the CSIS (even if Chretien's refusal to launch a public inquiry means the extent of Canadian involvement may never be known). In April, the U.S. ambassador to Canada, Paul Cellucci, confirmed that Arar was well known to Canadian agencies and that they were "glad not to see him back." If that is the case, along with the apparent mistrust of Canada's handling of potential terrorists, the veracity and reliability of Canadian information for the United States may now also be in question.

To be sure, both countries are to blame for how this situation has evolved. The United States sent a Canadian citizen to a country known for using torture as a method of interrogation, and elements within Canadian government agencies seem to have provided the information that got Arar into the situation in the first place. However, as Canadians and Americans share more information than ever, and the Canadian government fights for guarantees and exemptions for its citizens in the new homeland security environment, it appears that this case is not only the worst public relations setback of the last two years, but also a real threat to future cooperation on the fourth pillar of the Smart Border accord.

Renewing the Smart Border Process

Momentum becomes important because while the original Action Plan has been largely completed, the overall Smart Border process must continue and become even more ambitious, as much work remains to be done in transforming the border to cope with the future. There are many reasons for this. First, it is worth remembering that the Smart Border Action Plan was implemented during an economic downturn, with trade levels dropping from levels seen in the 1990s. With the economy in the United States picking up and trade levels likely to increase, future border management will need to

continue to find ways to upgrade an infrastructure that in many places is already at a saturation point.

Second, the implementation of new programs such as US VISIT could potentially cause future headaches that will need to be worked out between Canadian and U.S. officials. In fact, Canadians will only be exempt from the system if such an idea passes in Congress, and there are no guarantees this will occur (even if for budgetary and practical reasons it is likely). Third, momentum is important because the ultimate truth with border policy is that there is no such thing as perfect policy. No border will ever be a perfect shield. Transforming the Canada-U.S. border in a fashion that will weigh economic benefits vs. security concerns and reflect the interests of both nations will always require vigilance and high-level leadership as long as Canada and the United States face organizations that seek to disrupt their way of life.

Therefore despite its past success, the Smart Border process is entering a critical year and can ill afford to rest on its laurels. The best way to continue is by immediately moving to renew the agenda, which may include exploring options for institutionalizing the process. This could include many options, including a reorganization of border policy in Canada (though not necessarily the creation of a Canadian DHS), the adoption of a Northern Border Coordinator within DHS (as proposed in Congress last February), as well as a new declaration that sets fixed bilateral meetings, new objectives, and a new vision for the future.

One hopes it will not take another 9/11-style attack or the successful disruption of such an attack to find the necessary momentum to start this process of renewing the agenda and seriously considering various options for moving the process forward, such as institutionalization or the adoption of a common security perimeter. Having accomplished so much in its first two years, it would be a shame if the Smart Border process stalled when it has earned the opportunity to set its ambitions much higher.

About the Author

Andre Belelieu is a research associate in the CSIS Americas Program. Prior to joining CSIS, Belelieu worked as a research assistant at a private-sector research and consulting firm in Arlington, Virginia, and as a policy analyst at the G-8 Research Group in Toronto, Canada. Belelieu holds an M.Sc. in government from the London School of Economics and Political Science and a B.A. in international relations and German language and literature from the University of Toronto.

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