

Follow-up from SECD meeting

1. REQUEST FOR DRAFT REGULATIONS

Customs Act

- Clause 2 of the Bill proposes to amend *Customs Act* 99.4(a) to authorize the making of Regulations with respect to the examination of personal digital devices.
- The proposed Regulations would enshrine key elements of current policy requirements on the conduct of exams into law, working together with the legislative threshold to establish limits on device examinations. These limits include the requirement to take detailed notes on every PDD examination, regardless of whether it results in an enforcement action or not, as well as disabling network connectivity.
- A Notice of Intent to Regulate was published online (included below), which detailed the specific provisions being considered and included a public comment period.

Preclearance Act, 2016

- The Bill proposes two methods to establish requirements related to PDD examination authorities for US preclearance officers. The first is through Ministerial Directions and the second is through regulation. The Bill stipulates that officers would be legally bound to apply the requirements established by either method.
- Clause 17 authorizes the Minister to give Directions that will take effect on the coming into force of the amendments to the *Preclearance Act, 2016*. These Ministerial Directions will be utilized initially to allow for rapid adaptation as the US adjusts its practices to new Canadian requirements.
- Clause 16 authorizes the creation of regulations made by the Governor in Council in relation to the *Customs Act*. It is expected that the regulations will be substantially similar to those envisaged for CBSA officers (e.g., specific note-taking requirements, and ensuring devices do not have connectivity).
- Ministerial Directions will always be temporary in nature as the Bill proposes they be valid for a maximum of two years. They will also be made public in the Canada Gazette within 60 days of being given.
- Ministerial Directions are a necessary and prudent authority, particularly relevant in situations where Canadian requirements may need to be asserted quickly. Regulations will be the only means to establish requirements on a permanent basis.

Follow-up from SECD meeting

[Customs Notice 22-07: Regulations for the Examination of Documents Stored on Personal Digital Devices Made Pursuant to the Customs Act](#)

Ottawa, April 1, 2022

Notice of Intent to Develop Examination of Documents Stored on Personal Digital Devices Regulations

Notice is hereby given that the Canada Border Services Agency (CBSA) is developing regulations to prescribe legally-binding controls on the examination of documents stored on personal digital devices (PDD). The intent is for the proposed regulations to come into force as soon as possible following Royal Assent of related legislative changes to the *Customs Act* under Bill S-7.

The proposed regulations in this Customs Notice would be made in accordance with proposed paragraph 99.4(a) of the *Customs Act*.

The proposed *Examination of Documents Stored on Personal Digital Devices Regulations* would prescribe requirements for conducting examinations of personal digital devices by designated CBSA officers.

Specifically, the proposed Regulations would set out the requirements for CBSA officers to conduct an examination of a PDD within prescribed legally-binding controls. Requirements would include a provision to ensure that all necessary steps are taken so that only documents stored on the device at the time of border crossing are accessible during the examination.

In addition, these proposed Regulations would set out that notes are to be taken for every PDD examination where the officer has reasonable general concern that a document on the device contravenes CBSA program legislation or the document is evidence that a contravention has occurred or may be occurring at the time of border crossing. Required notes would detail the steps taken by the officer to ensure only documents stored on the device were accessible during the examination. They would also include when the device was examined (i.e., date, time, and duration), the basis for examination (i.e., facts giving rise to officer concerns), a description of the device examined (e.g., make and model), the manner in which it was examined (e.g., manual exam), and what was examined (e.g., documents and applications reviewed accessed).

The proposed regulations would enshrine existing policy elements into law and would result in little additional cost. Policy controls detailing parameters on how a PDD examination should be conducted already exist and include, steps to disable network connectivity, comprehensive notetaking requirements, and handling solicitor-client privilege information. Making some of these policy controls legally-binding would give them the force of law, reinforce privacy protections, and increase transparency and public confidence in the CBSA's actions. These proposed regulations would not only allow the Agency to respond to the Court's declaration of constitutional invalidity but would also demonstrate *Charter* compliance when PDD examinations are subject to judicial or external review.

Follow-up from SECD meeting

There are no anticipated incremental training costs associated with these proposed regulations. Policy updates are conveyed to the field regularly and updates to related training and briefing material are done on an evergreen basis. The CBSA would incur minor costs related to communication and outreach activities needed as a result of the regulations (e.g., updated web content on the CBSA webpage, development of an operational bulletin and briefing materials to stakeholders about the regulations) which would be absorbed within existing operating budgets.

As these changes would largely reflect what is already directed by CBSA policy, officers would experience no additional operational burden. There would be no observable difference for the travelling public as these changes only enshrine existing policy into regulation.

Interested parties who wish to comment on the proposed regulations outlined above are invited to submit their comments by April 15, 2022.

Follow-up from SECD meeting

2. THRESHOLD CRITERIA

Examination Authorities for Personal Digital Devices in the UK

- The United Kingdom (UK) draws its authority to examine goods and people for customs-related purposes from the *Customs and Excise Management Act*.
- Similar to sections 98 – 99.5 of Canada’s *Customs Act*, Part XII of the UK’s *Customs and Excise Management Act* contains various different potential examination authorities.
- Different examination authorities may be available depending on the circumstances, including:
 - whether the examination is with respect to people or goods;
 - whether the examination is with respect to goods being imported (e.g., searches of goods at the border or port of entry itself); or,
 - whether goods which have already been imported but are subject to subsequent verifications or customs-related investigations (e.g., examinations not at the border or port of entry itself).
- The CBSA has confirmed with the UK that personal digital devices are examined under section 78 of the *Customs and Excise Management Act*. This provision authorizes no-threshold examinations of any goods being imported or exported from the UK. This authority is analogous to the no-threshold goods examination authorities in paras. 99(1)(a) and 99(1)(c) of Canada’s *Customs Act*.
- The CBSA understands that section 163A of the UK’s *Customs and Excise Management Act*, which includes a reasonable grounds to suspect threshold, relates to examinations **outside the port of entry**. In addition, the specific “articles” subject to examination under section 163A are expressly limited to “dutiable alcoholic liquor or tobacco products” (see ss. 163(A)(2)).
- The CBSA also understands that section 164 of the UK’s *Customs and Excise Management Act*, which includes a reasonable grounds to suspect threshold, relates to certain searches of persons, namely a strip search, rub-down search or intimate search. This UK authority is analogous to section 98 of Canada’s *Customs Act*.
- For further clarification, the CBSA uses detector dogs as part of routine border processing. These dogs are viewed as a non-intrusive detection tool similar to an x-ray and their interactions with travellers do not require reasonable grounds to suspect.
- The CBSA also conducts no-threshold examinations on mail (x-ray, address searches, organic material scans, etc.), a threshold of reasonable grounds to suspect is only required in the event that the mail needs to be opened.

3. STATISTICS FOR ALBERTA & ONTARIO

- On April 29, 2022, the Courts’ declarations of constitutional invalidity relating to para. 99(1)(a) of the *Customs Act* have taken effect. Officers in Alberta and Ontario are now no

Follow-up from SECD meeting

longer authorized to conduct a no-threshold examination of a personal digital device (PDD) pursuant to para. 99(1)(a) of the *Customs Act*.

- However, officers still have authority to examine goods, including PDDs, pursuant to para. 99(1)(e) of the *Customs Act* if they suspect on reasonable grounds that the *Customs Act* or regulations or any other Act of Parliament administered or enforced by the officer have been or might be contravened in respect of those goods.
- The operational guidance issued to the these two provinces also requires that officers give section 10 *Charter* warnings prior to PDD examinations.
- The combination of a higher examination threshold and the fact that this authority is restricted to suspected prohibited documents (i.e., does not include evidence of border contravention such as undervaluation) has lead to a significant decrease in PDD examinations despite a sharp increase in traveller volumes.

- **Statistics for Alberta and Ontario**

	May 2021	May 2022	% change
Traveller Volume	606,314	2,595,112	328%
Number of PDD Exams	63	18	-71%

- With more travellers crossing and fewer exams being conducted, there is definitely a higher potential for contraventions to be missed and for contraband not to be intercepted.
- The average resultant rate for PDD exams conducted in Alberta and Ontario in May 2022 was **24%** (compared to **27%** May 2021).

Follow-up from SECD meeting

4. CONTENT OF DIVERSITY TRAINING

Canada Border Services Agency (CBSA) officers are required to take the following training as part of Officer Induction Training:

Diversity and Race Relations (2 hours)

This learning product has been developed for the CBSA employees who have face-to-face interactions with internal or external clients of the CBSA with awareness, knowledge, and strategies on managing diversity and race relations.

- This course includes the following themes:
 - Defining diversity related concepts and notions;
 - Understanding diversity and race relations in a border context;
 - Examining the impact of stereotypes, prejudices, discrimination, and biases when interacting with different cultures;
 - Identifying strategies to provide equitable service to our diverse clients; and,
 - Understanding how dealing with diversity and race relations effectively will positively impacts our business.

Preventing Racial Bias at the Frontline (1 hour)

This training is intended to raise awareness and equip CBSA officers with the knowledge and skills required to provide conscientious and equitable service to the public. After completing this training, participants will be able to explain an officer's obligations to demonstrate non-discriminatory behaviour in all aspects of duties.

- This course includes the following themes:
 - Describing racial profiling, its context, scope and impacts;
 - Explaining an officer's obligations to demonstrate non-discriminatory behaviour in all aspects of duties, including the benefits of doing so;
 - Distinguishing between appropriate and discriminatory approaches to serving the public; and,
 - Applying strategies to support conscious, consistent and bias-neutral application of Agency policies and procedures.

Additional Training

CBSA officers also take mandatory courses specifically designed to improve their interactions with the public including:

- **Processing Indigenous Traveller and their Sacred Goods (1.5 hours)**
 - This training, designed for frontline officers, provides knowledge on policy and procedures for respectfully processing Indigenous travellers, and protocol associated with handling sacred goods. The training includes: Processing Indigenous Travellers, Processing Indigenous Travellers' Sacred Goods and Cultural Practices.

Follow-up from SECD meeting

- **Introduction to Gender-Based Analysis Plus (GBA +) (2 hours)**
 - This course provides an introduction to GBA Plus and how identity factors such as, gender, race and disability can help to shape social, health and economic opportunities and outcomes. Participants will turn their GBA Plus insights into action by reflecting on the recurring barriers to accessing government services and how to mitigate them.
 - The training includes:
 - defining the key concepts of GBA Plus;
 - applying foundational GBA Plus concepts and processes;
 - identifying how GBA Plus can enhance responsiveness, effectiveness and outcomes; and,
 - recognizing how various identity factors can influence federal government initiatives.

NEW Training (launching in Spring 2022)

- **Incorporating the Practice of Anti-Racism and Allyship at the CBSA Training**
 - The purpose of this training is to bring awareness to the reality of racism and how it affects the CBSA, its employees and clientele. It will help employees recognize patterns of biases, allow them to reflect on past interactions related to racism and the impact of them, and encourage them to be committed to changing behaviours. The knowledge and awareness acquired will assist them to be more comfortable talking and asking questions about racism and provide strategies to help eliminate racism in the workplace and workforce. The ultimate goal is for all CBSA employees to feel a sense of belonging and safety in the workplace, free of harassment and discrimination, and for all employees and clientele to be treated with dignity and respect.
- **Reflecting on Cultural Bias: Indigenous Perspectives**
 - With a focus on understanding Indigenous Peoples, this course demystifies the idea of unconscious cultural bias and explores issues of prejudice and discrimination. Through a series of self-reflection exercises, participants will discover the cultural competencies they need to build respectful relationships with First Nations, Métis and Inuit. Topics include:
 - exploring cultures, worldviews, race and ethnicity;
 - strengthening awareness of cultural differences;
 - understanding personal biases, prejudices and discrimination; and,
 - building culturally safe relationships with Indigenous Peoples.

Frequency

These training models are evergreen, meaning that any significant updates will require that the course be retaken.

Follow-up from SECD meeting

5. ADDITIONAL EFFORTS BY THE CBSA TO ADDRESS SYSTEMIC RACISM AND BIAS

The Agency is focused on the need to attract, develop, and retain employees with diverse identities and backgrounds resulting in a workforce that is reflective of Canada and those the CBSA serves. This is supported by the Agency's Equity Diversity and Inclusion Action Plan which focuses on three priorities: (1) collection of equity and diversity data; (2) increasing workforce diversity; and (3) building an inclusive workplace.

In addition to increasing representation rates for visible minorities and Indigenous Peoples in our workforce, the Agency is focused on developing and retaining employees with diverse identities and backgrounds and aims to hire an additional 750 persons with disabilities (brand new to public service, indeterminate employees) by 2025.

Anti-Racism Unit

- The Anti-Racism Unit (ARU) was created as part of the CBSA's Anti-Racism Strategy and leads multiple initiatives intended to bring awareness to issues of antiracism, equity, diversity and inclusion.
- The guiding principles include:
 - holding leaders at all levels to account to increase representation and inclusion of Black, Indigenous, and racialized employees;
 - tackling the issue of racism by building awareness of the root cause of racism and discrimination; and,
 - developing tools and resources to ensure a bias-free and racism-free workplace.

Indigenous Affairs Secretariat

- The Indigenous Affairs Secretariat (IAS) was created to develop a culture where Indigenous affairs are at the forefront of CBSA considerations, both in the workplace and as a public-facing agency. This is reflective of the CBSA's commitment to the Government of Canada's Reconciliation efforts.
- The IAS supports the CBSA's journey to become a leading organization that engages, respects, cooperates and partners with Indigenous Peoples in providing integrated border services.
- The IAS is accountable for supporting the Agency's Nation-to-Nation activities, including such initiatives as the Border Collaboration Initiative with the Mohawks of Akwesasne First Nation.
- In September 2020, the CBSA Policy on the Agency's Relationship with Indigenous Peoples was approved and in March 2021 it came into force, which was developed with input and feedback from Indigenous employees across the Agency.

Follow-up from SECD meeting

- This policy is the first of its kind for the CBSA and is being supported by the development of an Indigenous Affairs policy suite that provides guidance on:
 - the application of an Indigenous-lens to policy and program development;
 - engagement of Indigenous Peoples;
 - the creation and use of land acknowledgements; and,
 - payment for Indigenous services.