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LEGISLATIVE SUMMARY



Bill C-21: An Act to amend the Customs Act

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Any substantive changes in this Legislative Summary that have been made since the preceding issue are indicated in **bold print**.

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(Legislative Summary)

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LEGISLATIVE SUMMARY OF BILL C-21: AN ACT TO AMEND THE CUSTOMS ACT

1 BACKGROUND

On 15 June 2016, the Honourable Ralph Goodale, Minister of Public Safety and Emergency Preparedness, introduced Bill C-21, An Act to amend the Customs Act,¹ in the House of Commons. The bill amends the *Customs Act*² to authorize the Canada Border Services Agency (CBSA) to collect biographic information³ on all travellers – including Canadian citizens – as they leave Canada.

1.1 PARTNERSHIP BETWEEN CANADA AND THE UNITED STATES

1.1.1 JOINT DECLARATION

In February 2011, the Prime Minister of Canada and the President of the United States issued a declaration establishing, among other matters, a long-term partnership respecting their perimeter security:

To preserve and extend the benefits our close relationship has helped bring to Canadians and Americans alike, we intend to pursue a perimeter approach to security, working together within, at, and away from the borders of our two countries to enhance our security and accelerate the legitimate flow of people, goods, and services between our two countries.⁴

The joint declaration set out four key areas of cooperation between the two countries:

- addressing threats early;
- trade facilitation, economic growth and jobs;
- integrated cross-border law enforcement; and
- critical infrastructure and cybersecurity.⁵

More specifically, the declaration announced the establishment of an entry-exit system for the two countries:

In order to promote mobility between our two countries, we expect to work towards an integrated Canada–United States entry-exit system, including work towards the exchange of relevant entry information in the land environment so that documented entry into one country serves to verify exit from the other country.⁶

1.1.2 ACTION PLAN

In December 2011, the two countries published a document entitled the *Beyond the Border Action Plan*.⁷ This document establishes a plan for the partnership between the two countries, but does not give rise to rights or obligations and is not an international treaty.⁸ The Action Plan sets out joint priorities for the two countries and is “built upon a perimeter approach to security and economic competitiveness.”⁹

First, the Action Plan specifies that the two countries plan to “[s]hare Canada–United States entry data at the land border such that the entry information from one country could constitute the exit information from another through an integrated entry and exit system.”¹⁰ It should be noted that, while the Government of Canada currently collects biographic information about travellers entering Canada, it “has no reliable way of knowing when and where travellers leave the country.”¹¹

Furthermore, the Action Plan provides that Canada will develop a system for exit records similar to that of the U.S. for travellers leaving Canada by air. Under the new system, “airlines will be required to submit their passenger manifest information on outbound international flights.”¹² However, this system may be expanded to include other modes of transportation, such as rail and sea.¹³

According to the Action Plan, the schedule for implementing this initiative is divided into several phases:

- Phase I: By 30 September 2012, Canada and the United States would begin implementing a proof of concept to exchange “the data of third-country nationals, permanent residents of Canada and lawful permanent residents in the United States, at two to four automated common land border ports of entry.”¹⁴
- Phase II: By 30 June 2013, Canada and the United States would begin implementing “a program exchanging the data of third-country nationals, permanent residents of Canada and lawful permanent residents in the United States, at all automated common land border ports of entry.”¹⁵
- Phase III: By 30 June 2014, the program would be expanded “to include the exchange of data on all travellers at all automated common land border ports of entry.”¹⁶
- Phase IV: By 30 June 2014, Canada would develop “a system to establish exit, similar to that in the United States, under which airlines will be required to submit their passenger manifest information on outbound international flights.”¹⁷

In 2014, Canada and the United States reaffirmed “their commitment to delivering on the initiatives of the 2011 Beyond the Border Action Plan.”¹⁸ In addition, on 10 March 2016, the Prime Minister of Canada, together with the President of the United States, reiterated that the two countries will implement a system to exchange basic biographic information at the land border.¹⁹

According to a report produced by the Office of the Auditor General of Canada in the fall of 2016, the two countries have been unable to keep to the schedule, and the timeline for implementing the final two phases has been delayed until 2018.²⁰ The report highlighted that

[o]ne of the reasons for the delay was the decision to expand the sharing of travellers’ entry and exit information with other Canadian federal departments and agencies (for example, Employment and Social Development Canada, Canada Revenue Agency, and the RCMP). This decision has raised several privacy concerns that have yet to be addressed.²¹

1.2 ENTRY/EXIT INITIATIVE

The Government of Canada established the Entry/Exit Initiative to follow through on the commitments made in the Action Plan. According to the government, implementing this initiative will enable it to do the following:

- respond to the outbound movement of known high-risk travellers and their goods prior to their actual departure from Canada by air (i.e., fugitives of justice, registered sex offenders, human/drug smugglers, exporters of illicit goods, etc.);
- respond more effectively in time sensitive situations such as responding to Amber Alerts and helping find abducted children or runaways;
- help prevent the illegal export of controlled, regulated or prohibited goods from Canada;
- identify individuals who do not leave Canada at the end of their authorized period of stay (i.e., visa overstays) and provide decision-makers with an accurate picture of an individual's travel history;
- focus immigration enforcement activities on persons still in Canada and eliminate wasted time and resources spent on issuing immigration warrants and conducting investigations on individuals who have already left the country;
- verify whether applicants for permanent residency or citizenship have complied with residency requirements; and
- verify travel dates to determine applicable duty and tax exemptions and continued entitlement to social benefit programs.²²

1.2.1 IMPLEMENTATION OF THE INITIATIVE

Phases I and II of the Action Plan were implemented by both countries. From 30 September 2012 to 15 January 2013, Canada and the United States tested

their capacity to exchange and reconcile biographic entry information of third-country nationals (non U.S. or Canadian citizens), permanent residents of Canada who are not U.S. citizens and lawful permanent residents of the U.S. who are not Canadian citizens at four land ports of entry in British Columbia/Washington State and Ontario/New York.²³

As a result, Canada and the United States currently exchange

biographic entry information on third-country nationals (non U.S. or Canadian citizens), permanent residents of Canada who are not U.S. citizens and lawful permanent residents of the U.S. who are not Canadian citizens at land ports of entry.²⁴

The Office of the Auditor General of Canada examined the entry/exit information system in its fall 2016 report. The initiative's total budget is \$121 million. As of 31 March 2016, \$53 million had been spent.²⁵

1.2.2 FUTURE DELIVERABLES

The implementation of Phases III and IV of the Entry/Exit Initiative requires certain regulatory and legislative authorities.²⁶ Bill C-21 is designed to implement these two phases.

The next set of deliverables is as follows:

- Canada and the United States will exchange basic biographic data on travellers at all land ports of entry, including Canadian and U.S. citizens. In brief, the data collected when a traveller enters one country at a land port of entry will serve as a record of the traveller's exit from the other country.
- The CBSA will collect biographic data on all air travellers leaving Canada through electronic passenger manifests received from air carriers.

1.2.3 PRIVACY PROTECTION MEASURES

In May 2012, Canada and the United States released a joint statement of privacy principles. This document set out 12 principles that will guide the information-sharing agreements and initiatives of the two countries under the Action Plan. The key principles in the document are as follows:

- maintaining all reasonable efforts to ensure the accuracy of information, and the continued right to have access and to request corrections of errors;
- proper security safeguards for information;
- relevance and necessity in the collection of personal information;
- redress before existing national authorities where a person believes that his/her privacy has been infringed; and
- effective oversight in the form of a public supervisory authority/ authorities.²⁷

In addition, the Government of Canada stated that “[i]nformation sharing arrangements must be in place between the CBSA and all partners before any information can be shared” and that these arrangements will “include safeguards and protections on information management and privacy protection clauses.”²⁸

In the same vein, the government pointed out that “exit information will only be disclosed in accordance with Canadian law, and would adhere to the disclosure provisions pursuant to both the *Privacy Act* and the *Customs Act*.”²⁹

The *Privacy Act*³⁰ prescribes how the Government of Canada can collect, use and disclose personal information. The Act also grants individuals a right to access any personal information about them that is retained by government institutions and to have that information corrected if necessary.

Under the *Privacy Act*, government institutions may only collect personal information that directly relates to their programs or activities.³¹ In addition, the disclosure of personal information is restricted unless the individual's consent is obtained. Still, the Act authorizes the government to disclose personal information without an individual's consent in a number of circumstances, including:

- disclosure for the purpose for which the information was obtained or compiled by the institution or for a use consistent with that purpose;
- disclosure for any purpose in accordance with any Act of Parliament or any regulation made thereunder that authorizes its disclosure;

- disclosure under an agreement or arrangement between the Government of Canada or an institution thereof and the government of a province or the government of a foreign state for the purpose of administering or enforcing any law or carrying out a lawful investigation; and
- disclosure for any purpose where, in the opinion of the head of the institution:
 - the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure, or
 - disclosure would clearly benefit the individual to whom the information relates.³²

Furthermore, as described in section 2.3 of this Legislative Summary, section 107 of the *Customs Act* sets out the only situations in which customs information may be disclosed by a CBSA official.

Finally, all of the CBSA's federal partners must submit Privacy Impact Assessments to the Office of the Privacy Commissioner to ensure that potential privacy risks are identified and effectively mitigated before personal information is disclosed by the CBSA.³³

Privacy impact assessments are used to identify the potential privacy risks of new or redesigned federal government programs or services. They also help eliminate or reduce those risks to an acceptable level.³⁴ The CBSA completed these assessments for Phases I and II of the Entry/Exit Initiative.³⁵

In March 2017, the Privacy Commissioner of Canada called “for greater protection of privacy rights of Canadians in the U.S.”³⁶ In a letter to the ministers of Justice, Public Safety and Defence, he highlighted a “significant gap in the protection of Canadians’ personal information south of the border.”³⁷

2 DESCRIPTION AND ANALYSIS

2.1 COLLECTION OF INFORMATION ABOUT PERSONS AND GOODS

2.1.1 PERSONS WHO ARE LEAVING OR WHO HAVE LEFT CANADA (CLAUSE 2)

Clause 2 sets out the legislative framework authorizing the CBSA to collect biographic information on any person who is leaving or who has left Canada. Under new section 92(1) of the *Customs Act*, the biographic information in question is as follows:

- the person’s surname, first and middle names, date of birth, citizenship or nationality and sex;
- the type of travel document that identifies the person, the name of the country or organization that issued the travel document and travel document number; and
- the date, time and place of the person’s departure from Canada and, if the person arrives in the United States, the date, time and place of arrival.

It should be noted that the powers granted by section 92(1) are not mandatory. The CBSA has a discretionary authority; that is, it “may” collect this information if it wishes to do so, but it is not required to do so.

Moreover, new section 92(2) enables the Governor in Council to make regulations prescribing the “sources from which the information may be collected,” as well as the circumstances in which the information may be collected and the time within which and the manner in which the information may be collected.

The list in section 92(2) is not exhaustive. Therefore, it is difficult to envision the scope of the powers granted. The manner of collection prescribed by regulation could, for example, resemble that set out by the *Passenger Information (Customs) Regulations*.³⁸

With respect to regulations that may be proposed, the CBSA has indicated that “[a]ll interested parties will be provided the opportunity to participate in the regulatory development process” through consultations following the pre-publication of the regulations in Part 1 of the *Canada Gazette*.³⁹

The agency responsible for land ports of entry and security in the United States, U.S. Customs and Border Protection, will likely obtain information for the CBSA.

2.1.2 INFORMATION GIVEN TO THE CANADA BORDER SERVICES AGENCY (CLAUSE 2)

Pursuant to new section 93(1) of the *Customs Act*, with respect to a prescribed conveyance that departs or is expected to depart a place inside Canada for a final destination outside of Canada, the persons prescribed by regulation must give the CBSA, in the circumstances and manner prescribed by regulation:

- information about the conveyance or its travel route; and
- Information about any person on board or expected to be on board that conveyance.

Thus, pursuant to new section 93(1)(a) of the Act, the persons prescribed by regulation must give the CBSA the following information related to the conveyance or its travel route:

- any prescribed information;
- the last place inside Canada from which the conveyance departed, regardless of whether persons boarded the conveyance at that place; and
- the date and time of the conveyance’s departure.

In addition, in accordance with new section 93(1)(b) of the Act, the persons prescribed by regulation must give the CBSA the following information regarding any person on board or expected to be on board that conveyance:

- the person's surname, first name and middle names, date of birth, citizenship or nationality and sex;
- the type of travel document that identifies the person, the name of the country or organization that issued the travel document and travel document number; and
- any unique passenger reference assigned to the person by the prescribed person.

According to the Action Plan, the persons prescribed by regulation will probably include airlines offering international flights departing from Canada.⁴⁰ Nevertheless, as has already been noted, the regulations may prescribe other conveyances, which are defined by section 2(1) of the *Customs Act* as "any vehicle, aircraft or water-borne craft or any other contrivance that is used to move persons or goods."

New section 93(2) of the *Customs Act* authorizes the Minister to issue a notification to any person who provides information to the CBSA under section 93(1) to require the person to take any specified measure with respect to the information. Pursuant to section 93(3), the person to whom the notification is issued must comply with it. The wording does not specify the type of measure to be taken.

New section 93(4) provides that a person who is required to give information under section 93(1) is not subject to the restrictions on the disclosure of information set out in the *Aeronautics Act*. This legislation protects certain information, such as the substance of security measures in the case of an emergency direction and on-board recordings in respect of an aircraft, and imposes restrictions on their disclosure.⁴¹

Finally, new section 93(5) of the *Customs Act* authorizes the Governor in Council to make regulations implementing section 93 and provides a non-exhaustive list of subjects that the regulations may concern:

- the information that must be given under section 93(1)(a);⁴²
- the conveyances in relation to which information must be given under section 93(1);
- the persons or classes of persons who must give the information under that section;
- the circumstances in which the information must be given under section 93(1); and
- the time within which and the manner in which the information must be given under section 93(1).

2.1.2.1 OBLIGATION TO ANSWER QUESTIONS

New section 94 stipulates that every person who is leaving Canada must, if requested to do so by an officer, present themselves to an officer and answer truthfully any questions the officer asks.

It must be noted that section 7.1 of the *Customs Act* already provides an obligation to provide “true, accurate and complete” information to an officer responsible for enforcing the Act. In addition, a similar obligation already exists on arrival in Canada, where every person must present themselves before an officer and truthfully answer the officer’s questions. For example, section 11 of the Act provides that every person must present themselves to an officer without delay.⁴³ A similar obligation can be found in section 13 of the Act, which provides that every person who reports goods must truthfully answer any question asked with respect to the goods and present the goods. In cases where an officer has reasonable grounds to suspect that a person has entered Canada without presenting themselves to an officer, the officer may stop that person pursuant to section 99.1 of the Act.

New section 94 therefore grants CBSA officers powers respecting persons leaving Canada. Failure to comply with the obligation set out in new section 94 is made an offence under section 160 of the *Customs Act* (clause 8 of the bill). The punishment for this offence on summary conviction is a maximum fine of \$50,000 or imprisonment for up to six months, or both. In the case of an indictable offence, an individual is liable to a fine of up to \$500,000 or imprisonment for no more than five years, or both.

2.2 EXPORTATION OF GOODS (CLAUSES 3 TO 5)

The second part of Bill C-21 concerns the exportation of goods. Clause 3 of the bill amends section 95 of the *Customs Act* to add two exceptions concerning goods that do not have to be declared:

- Goods on board a conveyance that proceeds directly from one place outside Canada to another place outside Canada and passes through Canadian waters (including inland waters) or Canadian airspace do not have to be reported (new section 95(1.1)).
- Goods on board a conveyance that proceeds directly from one place in Canada to another place inside Canada and temporarily leaves Canadian waters (including inland waters) or Canadian airspace do not need to be declared (new section 95(1.2)).

Clauses 4 and 5 make other amendments in order to include the words “to be exported” and “exportation” in the powers granted by sections 97.25 and 99 of the Act.

2.3 AUTHORIZATION TO SHARE CUSTOMS INFORMATION
(CLAUSE 6)

The Minister of Public Safety is responsible for administering the *Customs Act* (except for Part V.1). The Minister may delegate his or her powers to employees of the Canada Revenue Agency, who in turn may delegate their powers to CBSA officers. In the same vein, section 107 of the *Customs Act*⁴⁴ and section 241 of the *Income Tax Act*⁴⁵ contain provisions authorizing the disclosure of information in certain cases.

Clause 6 replaces section 107(5) of the *Customs Act* in order to authorize the disclosure of customs information to an official of the Department of Employment and Social Development not only pursuant to the *Employment Insurance Act*, but also for the purposes of the *Old Age Security Act*.

2.4 SMUGGLING
(CLAUSE 7)

Clause 7 of the bill amends section 159 of the *Customs Act* to make it an offence to smuggle or attempt to smuggle out of Canada, whether clandestinely or not, any goods that are subject to duties, or any goods the exportation of which is prohibited, controlled or regulated.

NOTES

1. [Bill C-21: An Act to amend the Customs Act](#), 1st Session, 42nd Parliament.
2. [Customs Act](#), R.S.C. 1985, c. 1 (2nd Supp.).
3. The biographic information covered by Bill C-21 is set out in ss. 92(1) and 93(1).
4. Public Safety Canada, "[Annex – Declaration on a Shared Vision for Perimeter Security and Economic Competitiveness](#)," *Beyond the Border Action Plan*, 4 February 2011.
5. Ibid.
6. Ibid.
7. Public Safety Canada, [Beyond the Border Action Plan](#).
8. Ibid.
9. Ibid.
10. Ibid.
11. Government of Canada, "[Minister Goodale introduces An Act to amend the Customs Act–Exit information](#)," News release, 15 June 2016.
12. Public Safety Canada, *Beyond the Border Action Plan*.
13. Ibid.
14. Public Safety Canada, *Beyond the Border Action Plan*; Canada Border Services Agency [CBSA], [Privacy Impact Assessment Executive Summary – Phase I Entry/Exit](#).
15. Ibid.

16. Ibid.
17. Public Safety Canada, *Beyond the Border Action Plan*.
18. Public Safety Canada, [2014 Beyond the Border Implementation Report](#), 19 May 2015. See also Public Safety Canada, [2015 Beyond the Border Implementation Report](#).
19. Prime Minister of Canada, [Fact sheet: Canada – United States: Neighbours, Partners, Allies](#), 10 March 2016.
20. Office of the Auditor General of Canada [OAG], [The Beyond the Border Action Plan](#), Report 1 in *Reports of the Auditor General of Canada – Fall 2016*, 2016.
21. Ibid.
22. Government of Canada, “[Entry/Exit initiative](#),” Backgrounder.
23. CBSA, [Entry/Exit Initiative](#).
24. Ibid.
25. OAG (2016).
26. Public Safety Canada, *2014 Beyond the Border Implementation Report*. See also OAG (2016).
27. Public Safety Canada, [Beyond the Border Action Plan – Joint Statement of Privacy Principles](#).
28. Government of Canada, “Entry/Exit initiative.”
29. Ibid.
30. [Privacy Act](#), R.S.C. 1985, c. P-21.
31. Ibid., s. 4.
32. Ibid., s. 8(2).
33. Government of Canada, “Entry/Exit Initiative.”
34. Office of the Privacy Commissioner of Canada, [Privacy Impact Assessments](#).
35. CBSA, [Entry Exit Initiative – Phase II Privacy Impact Assessment \(PIA\) Executive Summary](#); CBSA, *Privacy Impact Assessment Executive Summary – Phase I Entry/Exit*.
36. Office of the Privacy Commissioner of Canada, [Privacy Commissioner calls for greater protection of privacy rights of Canadians in U.S.](#), Announcement, 10 March 2017.
37. Ibid.
38. [Passenger Information \(Customs\) Regulations](#), SOR/2003-219.
39. CBSA, [Forward Regulatory Plan: 2017–2019 – Entry/Exit Initiative](#).
40. Public Safety Canada, *Beyond the Border Action Plan*.
41. [Aeronautics Act](#), R.S.C. 1985, c. A-2, ss. 4.79 and 22.
42. As noted above, s. 93(1)(a) provides that the persons prescribed by regulation must give any prescribed information.
43. See also s. 11.4 of the *Customs Act*.

44. Section 107 of the *Customs Act* sets out a number of circumstances in which the Canada Border Services Agency may disclose customs information. Section 107(4)(h) authorizes the disclosure of customs information where the information is reasonably regarded as relating to the national security or defence of Canada. The [Anti-terrorism Act, 2015](#) (S.C. 2015, c. 20) amended the *Customs Act* to add s. 107(4)(i), which authorizes the disclosure of information in accordance with the [Security of Canada Information Sharing Act](#) (S.C. 2015, c. 20, s. 2).
45. Section 241 of the [Income Tax Act](#) (R.S.C. 1985, c. 1 (5th Supp.)) governs the disclosure of information collected by the Canada Revenue Agency [CRA] and sets out a number of cases in which confidential information may be disclosed. For example, pursuant to s. 241(4)(d)(viii), a CRA official may disclose confidential information to an official of the Department of Veterans Affairs for the purposes of the administration of the [War Veterans Allowance Act](#) (R.S.C. 1985, c. W-3). Section 241(9) also authorizes the disclosure of certain information in accordance with the *Security of Canada Information Sharing Act*.