

# Protecting Client Confidential Information Across Borders

## BACKGROUND

- Under the *Customs Act*, Customs officers may examine any imported mail over 30 grams and may open it if they suspect, on reasonable grounds, that it contains any goods the importation of which is prohibited, controlled or regulated.
- In March 2001, the Minister of National Revenue acknowledged that Customs inspectors randomly open mail entering Canada, including correspondence between clients and their solicitors, and pass information on to other government departments. The practice came to light with mail to Canadian immigration lawyers being passed by Customs officers to Immigration officers. In turn, Citizenship and Immigration Canada (CIC) maintains a databank of the information.
- Then CBA President Daphne Dumont, Q.C. wrote to the Ministers of Revenue, Immigration, and Justice, to say that random searches by government inspectors, including correspondence covered by the solicitor-client privilege, are illegal and must cease immediately.
- An investigation by the Privacy Commissioner concluded that such searches were legal, but unethical. The Immigration Minister undertook to review CIC practices, but ultimately decided they were sound. The Privacy Commissioner begged to differ.
- Federation of Law Societies also wrote to Minister of Revenue, opposing random mail searches.
- Bill S-23, amending the *Customs Act* extends the mail opening powers to mail **leaving** Canada. It received Royal Assent in October 2001 (S.C. 2001, c. 25).
- Then CBA President Daphne Dumont, Q.C. and Ben Trister, then Vice-Chair of the Citizenship and Immigration Law Section, appeared before the Senate Finance Committee in May 2001. They opposed extending powers to outbound mail. CBA also wrote to the House of Commons Finance Committee in October 2001.
- In August 2001, the Canada Customs and Revenue Agency told the Privacy Commissioner that it would update its practices to exclude the weight of external packaging such as express packs and bubble packs to arrive at the 30-gram limit. CCRA also undertook to “review all our policies, directives and training materials to ensure that all respects of our postal mandate are carried out with the greatest possible restraint and sensitivity to personal privacy.”
- In July 2008, U.S. Customs and Border Protection issued a policy regarding border searches and confiscation of information on computers, phones, personal digital assistants, cameras, and other data-storing devices. The policy advises customs officers that, “although legal materials are not necessarily exempt from a border search, they may be subject to special handling procedures.” Nonetheless, client confidential information may be at risk.

## **CURRENT STATUS**

- In September 2008, the CBA Ethics and Professional Issues Committee issued Guidelines for Practicing Ethically with [New Information Technologies](#), and CBA PracticeLink published an [article](#) on securing your laptop before crossing the border.
- In August 2009, the U.S. Department of Homeland Security issued revised guidelines on border searches of “electronic devices.” When encountering material that may be subject to solicitor-client privilege, officers are to confer with their legal counsel before conducting a search.

## **NEXT STEPS**

- International Practice Issues Team and Legislation and Law Reform staff will monitor impact of Customs officials’ practices, and experience with U.S. border officials.