



Ottawa, December 5, 2003

MEMORANDUM D1-16-1

In Brief

EXPLANATION OF SECTION 107 OF THE *CUSTOMS ACT*

1. This Memorandum reproduces section 107 of the *Customs Act* and provides a clause-by-clause description of the legislation.
2. For further information respecting the process to be followed when considering the disclosure of customs information, please refer to Memorandum D1-16-2.



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Ottawa, December 5, 2003

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EXPLANATION OF SECTION 107 OF THE *CUSTOMS ACT*

This Memorandum outlines and explains section 107 of the *Customs Act*. Section 107 provides for protection of customs information (information that is gathered in the administration or enforcement of the *Customs Act* or the *Customs Tariff*, or that is prepared from such information).

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Legislation

Section 107 of the *Customs Act*

Disclosure of Information

107(1) Definitions – The definitions in this subsection apply in this section.

“customs information” means information of any kind and in any form that

(a) relates to one or more persons and is obtained by, or on behalf of the Minister for the purposes of this Act or the *Customs Tariff*, or

(b) is prepared from information described in paragraph (a).

“official” means a person who

(a) is or was employed in the service of Her Majesty in right of Canada or of a province;

(b) occupies or occupied a position of responsibility in the service of Her Majesty in right of Canada or of a province; or

(c) is or was engaged by or on behalf of Her Majesty in right of Canada or of a province.

“specified person” means a person who is employed in the service of, who occupies a position of responsibility in the service of, or who is engaged by or on behalf of, Her Majesty in right of Canada to carry out the provisions of this Act, the *Customs Tariff* or the *Special Import Measures Act*. It includes a person who was formerly so employed or engaged or who formerly occupied such a position.

107(2) Prohibition – provision or use of customs information – Except as authorized under this section, no person shall:

(a) knowingly provide, or allow to be provided, to any person any customs information;

(b) knowingly allow any person to have access to any customs information; or

(c) knowingly use customs information.

107(3) Authorized use of customs information by official – An official may use customs information for the purposes of administering or enforcing this Act, the *Customs Tariff*, the *Special Imports Measures Act* or Part 2 of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* or for any purpose set out in subsection (4), (5) or (7).

107(4) Authorized provision of information – An official may provide, allow to be provided or provide access to customs information if the information:

- (a) will be used solely in or to prepare for criminal proceedings commenced under an Act of Parliament;
- (b) will be used solely in or to prepare for any legal proceedings relating to the administration or enforcement of an international agreement relating to trade, this Act, the *Customs Tariff*, the *Special Import Measures Act*, any other Act of Parliament or law of a province that provides for the imposition or collection of a tax or duty or Part 2 of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, before
 - (i) a court of record, including a court of record in a jurisdiction outside Canada,
 - (ii) an international organization, or
 - (iii) a dispute settlement panel or an appellate body created under an international agreement relating to trade;
- (c) may reasonably be regarded as necessary solely for a purpose relating to the administration or enforcement of this Act, the *Canada Pension Plan*, the *Customs Tariff*, the *Employment Insurance Act*, the *Excise Act*, the *Excise Tax Act*, the *Export and Import Permits Act*, the *Income Tax Act*, the *Special Import Measures Act* or Part 2 of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* by an official of the Agency;
- (d) may reasonably be regarded as necessary solely for a purpose relating to the administration or enforcement of this Act, the *Excise Act* or the *Export and Import Permits Act* by a member of the Royal Canadian Mounted Police;
- (e) may reasonably be regarded as necessary solely for a purpose relating to the life, health or safety of an individual or to the environment in Canada or any other country;
- (f) will be used solely for a purpose relating to the supervision, evaluation or discipline of a specified person by Her Majesty in right of Canada in respect of a period during which the person was employed or engaged by, or occupied a position of responsibility in the service of, Her Majesty in right of Canada to administer or enforce this Act, the *Customs Tariff*, the

Special Import Measures Act, or Part 2 of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* to the extent that the information is relevant for that purpose;

(g) is reasonably regarded by the official to be information that does not directly or indirectly identify any person; or

(h) is reasonably regarded by the official to be information relating to the national security or defence of Canada.

107(5) Provision of information to certain persons – An official may provide, allow to be provided or provide access to customs information to the following persons:

- (a) a peace officer having jurisdiction to investigate an alleged offence under any Act of Parliament or of the legislature of a province subject to prosecution by indictment, the Attorney General of Canada and the Attorney General of the province in which proceedings in respect of the alleged offence may be taken, if that official believes on reasonable grounds that the information relates to the alleged offence and will be used in the investigation or prosecution of the alleged offence, solely for those purposes;
- (b) a person that is otherwise legally entitled to the information by reason of an Act of Parliament, solely for the purposes for which that person is entitled to the information;
- (c) an official solely for the purposes of developing, administering or enforcing an Act of Parliament or developing or implementing a policy related to an Act of Parliament if the information relates to
 - (i) goods, the importation, exportation or in-transit movement of which is or may be prohibited, controlled or regulated under that Act,
 - (ii) a person who that official has reasonable grounds to believe may have committed an offence under that Act in respect of goods imported or exported by that person, or
 - (iii) goods that may be evidence of an offence under that Act;
- (d) an official, solely for the purpose of administering or enforcing an Act of the legislature of a province, if the information relates to goods that are subject to import, in-transit or export controls, or taxation upon importation into the province under that Act;
- (e) an official of a participating province, as defined in subsection 123(1) of the *Excise Tax Act*, or an official of the province of Quebec, if the information relates to the administration or enforcement of Part IX of that Act in that province, solely for that purpose;

(f) an official solely for the purpose of the formulation or evaluation of fiscal or trade policy or the development of a remission order under an Act of Parliament;

(g) an official solely for the purpose of setting off, against any sum of money that may be due to or payable by Her Majesty in right of Canada, a debt due to

- (i) Her Majesty in right of Canada, or
- (ii) Her Majesty in right of a province on account of taxes payable to the province if an agreement exists between Canada and the province under which Canada is authorized to collect taxes on behalf of the province;

(h) counsel, as defined in subsection 84(4) of the *Special Import Measures Act*, in accordance with subsection 84(3) of that Act and subject to subsection 84(3.1) of that Act, except that the word “information” in those subsections is to be read as a reference to the words “customs information;”

(i) an official of the Department of Human Resources Development solely for the purpose of administering or enforcing the *Employment Insurance Act*, if the information relates to the movement of people into and out of Canada;

(j) an official of the Department of Citizenship and Immigration solely for the purpose of administering or enforcing the *Immigration and Refugee Protection Act*, if the information relates to the movement of people into and out of Canada;

(k) an official of the Financial Transactions and Reports Analysis Centre of Canada solely for the purpose of administering or enforcing the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*;

(l) a person solely for the purpose of determining any entitlement, liability or obligation of the person under this Act or the *Customs Tariff* including the person’s entitlement to any refund, relief, drawback or abatement under those Acts;

(m) any person, if the information is required to comply with a subpoena or warrant issued or an order made by a court of record in Canada;

(n) any person, if the information is required to comply with a subpoena or warrant issued or an order made by a court of record outside of Canada, solely for the purposes of criminal proceedings; and

(o) prescribed persons or classes of persons, in prescribed circumstances for prescribed purposes, solely for those purposes.

107(6) Provision of customs information by

Minister – The Minister may provide, allow to be provided or provide access to customs information to any person if

(a) the information may not otherwise be provided, allowed to be provided or provided access to under this section and, in the Minister’s opinion, the public interest in providing the information clearly outweighs any invasion of privacy, or any material financial loss or prejudice to the competitive position of the person to whom the information relates, that could result from the provision of the information; or

(b) in the Minister’s opinion, providing the information would clearly benefit the individual to whom the information relates.

107(7) Notification of Privacy Commissioner – If customs information provided under subsection (6) is personal information within the meaning of section 3 of the *Privacy Act*, the Minister must notify, in writing, the Privacy Commissioner appointed under section 53 of that Act of any provision of personal information under that subsection before its provision if reasonably practicable or, in any other case, without delay after the provision. The Privacy Commissioner may, if the Privacy Commissioner considers it appropriate, notify the individual to whom the information relates of the provision of the information.

107(8) Providing customs information to other governments – Customs information may be provided by any person to an official or any other person employed by or representing the government of a foreign state, an international organization established by the governments of states, a community of states, or an institution of any such government or organization, in accordance with an international convention, agreement or other written arrangement between the Government of Canada or an institution of the Government of Canada and the government of the foreign state, the organization, the community or the institution, solely for the purposes set out in that arrangement.

107(9) Disclosure of customs information to certain persons – An official may provide, allow to be provided or provide access to customs information relating to a particular person:

(a) to that particular person;

(b) to a person authorized to transact business under this Act or the *Customs Tariff* as that particular person’s agent, at the request of the particular person and on receipt of such fee, if any, as is prescribed; and

(c) with the consent of that particular person, to any other person.

107(10) Evidence – Despite any other Act of Parliament or other law, no official may be required, in connection with any legal proceedings, to give or produce evidence relating to any customs information.

107(11) Measures to protect customs information – The person presiding at a legal proceeding relating to the supervision, evaluation or discipline of a specified person may order any measure that is necessary to ensure that customs information is not used or provided to any person for any purpose not relating to that proceeding, including:

- (a) holding a hearing in camera;
- (b) banning the publication of the information;
- (c) concealing the identity of the person to whom the information relates; and
- (d) sealing the records of the proceeding.

107(12) Appeal from order to disclose customs information – An order or direction that is made in the course of or in connection with any legal proceeding and that requires an official to give or produce evidence relating to customs information may, by notice served on all interested parties, be immediately appealed by the Minister or by the person against whom the order or direction is made:

- (a) to the court of appeal of the province in which the order or direction is made, in the case of an order or direction made by a court or other tribunal established under the laws of the province, whether or not that court or tribunal is exercising a jurisdiction conferred by the laws of Canada; or
- (b) to the Federal Court of Appeal, in the case of an order or direction made by a court or other tribunal established under the laws of Canada.

107(13) Disposition of appeal – The court to which the appeal is taken may allow the appeal and quash the order or direction appealed from or may dismiss the appeal. The rules of practice and procedure from time to time governing appeals to the courts apply, with any modifications that the circumstances require, in respect of the appeal.

107(14) Stay – An appeal stays the operation of the order or direction appealed from until judgment in the appeal is pronounced.

107(15) Regulations – The Governor in Council may make regulations prescribing the circumstances in which fees may be charged for providing or providing access to customs information or making or certifying copies of information and the amount of any such fees.

Section 160(1) of the *Customs Act*

Enforcement

160(1) Every person who contravenes section 11, 12, 13, 15 or 16, subsection 20(1), section 31 or 40, subsection 43(2), 95(1) or (3), 103(3) or 107(2) or section 153, 155, 156 or 159.1 or commits an offence under section 159 or knowingly contravenes an order referred to in subsection 107(11):

- (a) is guilty of an offence punishable on summary conviction and liable to a fine of not more than fifty thousand dollars or to imprisonment for a term not exceeding six months or to both that fine and that imprisonment; or
- (b) is guilty of an indictable offence and liable to a fine of not more than five hundred thousand dollars or to imprisonment for a term not exceeding five years or to both that fine and that imprisonment.

GUIDELINES AND GENERAL INFORMATION

PURPOSE AND SCOPE

1. The purpose of this document is to outline and explain the provisions of the *Customs Act* that relate to the provision to others, allowing access to others, and the use of customs information (information that is gathered in the administration or enforcement of the *Customs Act* or the *Customs Tariff* or is prepared from such information).

INTRODUCTION

2. Amended section 107 of the *Customs Act* became effective on November 29, 2001. It replaced former sections 107 and 108. Section 107 provides strict prohibitions on the provision to others, allowing access to others, and the use of customs information.

3. The new legislation brings the customs confidentiality regime more in line with similar provisions in the *Income Tax Act* and the *Excise Tax Act*. It makes customs confidentiality law more transparent, while continuing to strictly preserve the confidentiality of client information.

4. The former legislative framework relied heavily on Ministerial Authorizations that were made under the authority of the former paragraph 108(1)(b). Those Ministerial Authorizations are no longer in effect.

5. There are also other federal statutes that impact on the disclosure of customs information. The *Access to Information Act* extends the present laws of Canada to provide a right of access to information in records under the control of a government institution. The *Privacy Act* extends the present laws of Canada that protect the privacy of individuals with respect to personal information about themselves held by a government institution. The *Privacy Act* governs the collection, use, retention, and disposal of personal information. Finally, the *Canadian Charter of Rights and Freedoms* (the *Charter*) applies to disclosures of information authorized by federal law. This is particularly important given that the courts have ruled that the provision of certain types of information qualifies as a search or seizure for the purposes of the *Charter*. The exercise of the legislative authority to disclose customs information must be consistent with the *Charter*; the risk of a conflict with the *Charter* is increased when the information disclosed is biographical core personal information about an identifiable individual (see paragraph 11 of Memorandum D1-16-2). The authority to disclose information in such instances must be guided by the *Charter*. Generally, when investigative agencies are seeking biographical core customs information to further a criminal investigation (not a regulatory investigation), even when there is authority to release the information within section 107 of the *Customs Act*, the police force or other investigative agency should obtain a judicial warrant or court order. This will enable the information required to be considered for release under the authority of paragraph 107(5)(m) of the *Customs Act*. When a customs official is uncertain whether a judicial warrant or court order should be sought by another agency, the official may consult with the Director, Strategic Program Analysis, Direction and Coordination, Program Strategy Directorate, Customs Branch.

CLAUSE BY CLAUSE INTERPRETIVE NOTES FOR SECTION 107 OF THE *CUSTOMS ACT*

6. The remainder of this memorandum provides further explanations of key provisions of section 107 of the *Customs Act*.

DEFINITIONS

7. “**Customs information**” is information of any kind and in any form that: (a) relates to one or more persons and is obtained by or on behalf of the Minister for the purposes of the *Customs Act* or the *Customs Tariff*; or (b) is prepared from information described in paragraph (a). (“Person” is defined in Section 2 of the *Customs Act* as, unless the context otherwise requires, including a corporation, a partnership, and an association). A person, therefore, includes, in the context of this memorandum, an individual, a union, or any business. The definition of customs information includes any aggregate of pieces of customs information about different identifiable customs clients,

whether or not the aggregate is capable of identifying a particular person, and in this regard the definition of “customs information” is different from the definitions of “taxpayer information” and “confidential information” in the *Income Tax Act* and Part IX of the *Excise Tax Act* respectively.

8. “**Official**” is any person currently or formerly employed in, or occupying a position of responsibility in the service of, or engaged by, or on behalf of, Her Majesty in right of Canada or a province. An official includes an employee of any federal or provincial government department or agency, as well as a contractor hired by any federal government or provincial department or agency.

9. “**Specified person**” is a person who is employed in the service of, who occupies a position of responsibility in the service of, or who is engaged by, or on behalf of, Her Majesty in right of Canada (but not in right of a province) to carry out the provisions of the *Customs Act*, the *Customs Tariff*, or the *Special Import Measures Act* (SIMA). It includes a person who was formerly so employed or engaged, or who formerly occupied such a position. This would include a contractor hired by the CCRA to perform services related to customs administration. However, an employee or a contractor hired for income tax or GST administration purposes, or to provide services unrelated to customs or SIMA administration is not included. The definition of “specified person” is included solely for the purposes of paragraph 107(4)(f) and subsection 107(11), which relate to the use of customs information for the supervision, evaluation, or discipline of specified persons.

AUTHORIZED USE OF CUSTOMS INFORMATION BY AN OFFICIAL

10. Subsection 107(3) provides that customs information may be used by an official for administering or enforcing the *Customs Act*, the *Customs Tariff*, the *Special Import Measures Act* (SIMA), or Part 2 of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, or for any of the purposes set out in subsections 107(4), (5), and (7), which outline when customs information may be shared, and with whom. These listed statutes are administered by the CCRA, either wholly or in part. Use of customs information for the administration or enforcement of the *Custom Act* includes using such information to prepare for, allow for, or carry out the provision of customs information to others provided that provision to others is authorized by section 107.

AUTHORIZED PROVISION OF CUSTOMS INFORMATION

11. Subsections 107(4), (5), (8), and (9) describe the circumstances in which an official may provide, allow to be provided, or provide access to customs information, if specific tests relating to the information are met. The

exercise of the official's authority must take into account memorandum D1-16-2, *Interim Administrative Guidelines for the Provision to Others, Allowing Access to Others and Use of Customs Information*. No official may disclose customs information unless authorized in those guidelines to do so.

LEGAL PROCEEDINGS

12. Paragraph 107(4)(a) gives an official the authority to provide, allow to be provided, or provide access to customs information solely for use in, or to prepare for, criminal proceedings. The criminal proceedings must arise under a federal law.

13. Paragraph 107(4)(b) gives an official the authority to provide, allow to be provided, or provide access to customs information solely for use in, or to prepare for, any legal proceedings (civil or criminal) relating to the administration or enforcement of:

- (a) international trade agreements relating to trade;
- (b) *The Customs Act, Customs Tariff, SIMA, or Part 2 of the Proceeds of Crime (Money Laundering) and Terrorist Financing Act*; or
- (c) any federal or provincial legislation that provides for the imposition or collection of a tax or duty (which includes most revenue statutes administered by the CCRA or by the provinces).

14. Paragraph 107(4)(b) enables disclosure of customs information before a court of record in Canada or in a jurisdiction outside Canada, an international organization, or a dispute settlement panel or an appellate body created under an international agreement relating to trade. For example, paragraph 107(4)(b) would allow a customs officer to provide relevant customs information to a Crown counsel or to give testimony during court proceedings under the *Customs Act*. Legal proceedings pursuant to a province's sales tax legislation would also qualify. Similarly, customs information, such as importer accounting documents, could be provided to an official in the Department of Finance or the Department of Foreign Affairs and International Trade for the purposes of preparing Canada's case before a NAFTA or World Trade Organization (WTO) dispute settlement panel or appellate body in respect of actions taken under SIMA.

SHARING CUSTOMS INFORMATION TO ADMINISTER CCRA PROGRAM LEGISLATION

15. Paragraph 107(4)(c) allows for the sharing of customs information within or outside the CCRA by an official of the CCRA, but only if the information may reasonably be regarded as necessary for a purpose relating to the administration or enforcement (by a CCRA official) of the *Customs Act*, the *Customs Tariff*, the *Excise Tax Act*, the

Income Tax Act, and the *Excise Act* (all legislation for which the CCRA has sole responsibility), as well as specific legislation for which the CCRA has partial administrative responsibility (namely the *Canada Pension Plan*, the *Employment Insurance Act*, the *Special Import Measures Act*, the *Export and Import Permits Act* and Part 2 of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*). When customs information is requested for the purposes of a criminal investigation, pursuant to one of the statutes listed in paragraph 107(4)(c), the official, as a general rule, should obtain a judicial warrant or a court order before customs can release the information that they are seeking for use in criminal proceedings. As previously noted (in paragraph 5 of this Memorandum), customs officials can consult with Headquarters to clarify whether a judicial warrant or court order should be sought.

RCMP

16. Paragraph 107(4)(d) authorizes an official to provide customs information to a member of the RCMP if the information may reasonably be regarded as necessary for a purpose relating to the administration or enforcement (by a member of the RCMP) of the *Customs Act*, the *Excise Act*, or the *Export and Import Permits Act*. Ordinarily, the customs information would be provided to a member of the RCMP pursuant to RCMP administrative responsibilities under one of the listed statutes. The official considering providing the information must assess whether the "reasonably regarded as necessary test" is met. They may do so either on their own, or in consultation with the RCMP. If customs information is provided to an RCMP member under authority of paragraph 107(4)(d), it may only be used for a purpose relating to the administration or enforcement of the Acts listed above.

HEALTH AND SAFETY

17. Paragraph 107(4)(e) allows an official to provide customs information, if it may reasonably be regarded as necessary, solely for a purpose relating to the life, health, or safety of an individual, or to the environment in Canada or any other country (see paragraph 28 and 29 of D1-16-2). For example, to provide customs information to the government of a foreign country when the information concerned a shipment of food or water identified in Canada as having been imported from that country and the product was found to be contaminated. Similarly, customs information about a hazardous product previously imported into Canada could be provided to Health Canada to permit them to attempt to contact Canadians in possession of the product. This provision may also be used by a management representative designated by an Assistant Commissioner to table customs information related to a workplace incident or accident before the National Health and Safety Policy Committee (NHSPC).

SUPERVISION, EVALUATION, OR DISCIPLINE OF AN EMPLOYEE

18. Paragraph 107(4)(f) allows a customs official to use or provide to any person, customs information solely for a purpose relating to the supervision, evaluation, or discipline of a “specified person.” A “specified person” is, generally speaking, any person doing work or having done work, related to the administration or enforcement of the *Customs Act*, *Customs Tariff*, SIMA, or Part 2 of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*. Not included in the definition of “specified person” would be a CCRA employee or contractor working in income tax or GST administration, or an RCMP officer not assigned to a role under one of the Acts listed in 107(4)(f) and referred to above.

STATISTICAL DATA

19. Paragraph 107(4)(g) allows officials to disclose statistical information generated from raw customs information, provided the statistical information may reasonably be regarded by the official to be customs information that does not directly or indirectly reveal the person to whom it relates. For example, subject to paragraph 20 of this Memorandum, this would allow for customs information to be provided to an enforcement body on the number of seizures made in a given year and for what commodities, or for the exchange of vehicle statistics between customs officials and bridge authorities.

20. Care must be taken in disclosing statistics involving a small sample when the information could be used with other information to identify the person to whom it relates. For more details, see paragraph 9 of D1-16-2.

NATIONAL SECURITY/DEFENCE OF CANADA

21. Paragraph 107(4)(h) allows for customs information to be disclosed when it is reasonably regarded by the official to be information relating to the national security or defence of Canada. In every case, when customs information is proposed for disclosure under this provision, a senior CCRA official (see paragraph 28 and 29 of D1-16-2) must be satisfied that the information is necessary for the protection of the national security or defence of Canada. For example, this provision would allow information found by a customs inspector during a routine examination of a mail parcel, which when combined with additional information obtained from systems checks on the addressee, leads the inspector to believe that the goods are related to terrorist activities, to be disclosed by the customs inspector to the appropriate law enforcement agencies. The information found might include, for example, flight manuals in a language not commonly used by Canadian industry, training manuals for the handling of explosive materials, or books on biological agents. The system checks might reveal that the addressee name may be related to a lookout record for proceeds of

crime, or the destination address returns a record related to an individual or organization suspected of being involved in terrorist-related activities.

PROVISION OF CUSTOMS INFORMATION TO CERTAIN PERSONS

To police officers and others, in cases of alleged serious offences

22. Subject to what is said in paragraph 23 of this Memorandum, paragraph 107(5)(a) provides authority for an official to give customs information to (see paragraph 30 of D1-16-2):

- (a) a peace officer having jurisdiction to investigate an alleged offence under any federal or provincial law, provided the offence is subject to prosecution by indictment;
- (b) the Attorney General of Canada (in other words, a federal prosecutor); and
- (c) the Attorney General of the province in which proceedings in respect of the alleged offence may be taken (in other words, a provincial prosecutor).

23. This provision may only be used when the official is satisfied or believes on reasonable grounds that the customs information relates to the alleged offence and will be used in the investigation or prosecution of the offence. Once the customs information is provided, it may only be used in the investigation or prosecution of the alleged offence (see paragraph 30 of D1-16-2). For example, this provision would allow a customs official to inform the police that a person has been arrested at customs for a criminal offence subject to prosecution by indictment. It could also allow a customs official to communicate with a peace officer when counterfeit money is discovered. However, when a police force wishes to acquire biographical core customs information (see paragraph 11 of Memorandum D1-16-2) to facilitate an investigation of an indictable offence and the subsequent laying of criminal charges, the police force should be directed to first obtain a judicial warrant or court order. The requirement to obtain a judicial warrant or court order is to protect individual *Charter* rights related to unreasonable search and seizure.

To a person otherwise legally entitled to customs information

24. Paragraph 107(5)(b) provides that an official may provide, allow to be provided, or provide access to customs information to a person that is legally entitled to the information by reason of an Act of Parliament. This provision allows customs information to be given to an official in another federal department or agency that is legally entitled under its legislation to receive customs information. For example, the *Statistics Act* authorizes

Statistics Canada to receive customs information for the purposes of compiling national statistics. Also, by operation of subsection 16(1) of the *Department of Industry Act*, the Minister of Industry is legally entitled to be given copies of invoices and other information collected under the *Customs Act* on goods imported into Canada and exported from Canada for the purpose of carrying out duties and functions of the Minister of Industry under paragraph 6(b) of that Act. By further example, the sharing of customs information with the Office of the Information Commissioner of Canada and the Office of the Privacy Commissioner of Canada when they are undertaking an investigation is authorized under paragraph 107(5)(b). The customs information may only be provided for the purposes for which the legal entitlement exists.

To an official, for specified purposes relating to specified federal legislation

25. Paragraph 107(5)(c) allows for the provision of customs information to an official (who ordinarily would be an official in another federal department or agency) solely for the purposes of developing, administering, or enforcing a federal Act, or developing or implementing a policy related to a federal Act, provided the information relates to:

- (a) goods, the importation, exportation, or in-transit movement of which are or may be prohibited, regulated, or controlled under that legislation;
- (b) a person who that official has reasonable grounds to believe may have committed an offence under that legislation in respect of goods, which the person has imported or exported; or
- (c) goods that may be evidence of an offence under that legislation.

This provision may be used by a management representative designated by an Assistant Commissioner, to report certain incidents under Part II of the *Canada Labour Code* to the National Health and Safety Policy Committee (NHSPC), or to Human Resources Development Canada.

26. For example, subparagraph 107(5)(c)(i) would allow customs information from the B3 accounting document, which relates to the importation of a controlled substance that requires permits or authorizations under the *Food and Drugs Act* and regulations, to be given to Health Canada, solely for the purposes described in paragraph 25 of this Memorandum.

27. Subparagraph 107(5)(c)(ii), would enable the official of the CCRA to provide access to customs information to a official in another federal institution, subject to legislative authority to receive the information when it is required to prosecute offences under that Act concerning imported or exported goods. The customs information must relate to a

person whom the official providing the information must have reasonable grounds to believe may have committed such an offence under that other Act.

To officials for the purposes of specified provincial legislation

28. Subparagraph 107(5)(d) would allow an official to provide customs information solely for the purpose of administering or enforcing an Act of the legislature of a province that relate to goods subject to import, in-transit or export controls, or taxation upon importation. For example, information from customs documents such as the B15 *Casual Goods Accounting Document*, to be given to a provincial official for purposes of collecting provincial sales tax on goods imported into the province. Another example would be the provision of customs information to provincial conservation authorities regarding the exportation of wildlife from that province where provincial game export permits are required by provincial law. The provision of customs information under authority of this paragraph will ordinarily be made pursuant to a memorandum of understanding or a written agreement between the province and the CCRA.

To officials of certain provinces, for GST purposes in that province

29. Under the authority of paragraph 107(5)(e), customs information may be provided to officials of a province participating in the Harmonized Sales Tax (HST) scheme or to the province of Quebec, provided the information relates to the administration or enforcement of Part IX of the *Excise Tax Act* in that province, but solely for that purpose.

To an official for fiscal or trade policy purposes, or for a remission order

30. Paragraph 107(5)(f) allows an official to provide customs information to an official solely for the purpose of the formulation or evaluation of fiscal or trade policy or the development of a remission order under an Act of Parliament. For example, this provision would allow for reports and customs documents containing import data and importer information to be provided to the Department of Finance for use in developing a new statute related to country of origin marking.

To an official to carry out set-off to collect a Crown debt

31. Under paragraph 107(5)(g), an official may provide customs information to an official (who typically will be either a federal or provincial government official) solely for the purpose of setting off, against any sum of money that may be due to or payable by Her Majesty in right of Canada, a debt due to Her Majesty in right of Canada or of a province. In the case of a province, this provision may only apply to collect a tax debt due to the province (such as PST)

if there is a tax collection agreement with the province under which Canada is authorized to collect taxes on behalf of the province.

To counsel in SIMA proceedings

32. An official may provide customs information to counsel for parties to a proceeding under SIMA (as defined in subsection 84(4) of the SIMA) under the authority of paragraph 107(5)(h). This would be in accordance with the conditions set out in subsection 84(3) of the SIMA, but subject to the limitation set forth in subsection 84(3.1) of SIMA, except that the word “information” in those last two SIMA provisions is to be read as a reference to the words “customs information.”

To an official of HRDC for employment insurance purposes in some cases

33. An official may provide customs information to an official of HRDC under the authority of paragraph 107(5)(i) solely for the purpose of administering or enforcing the *Employment Insurance Act*, provided the customs information relates to the movement of people in to or out of Canada. For example, paragraph 107(5)(i) would allow for the provision of customs information (typically of limited scope and not sensitive in nature) related to travelers coming in to or leaving Canada, to HRDC for verification of employment insurance entitlements. The provision of customs information under the authority of this paragraph will ordinarily be made pursuant to an MOU between HRDC and the CCRA.

To an official of CIC for *Immigration Act* purposes in some cases

34. Paragraph 107(5)(j) allows an official to provide customs information relating to the movement of people in to and out of Canada to the Department of Citizenship and Immigration (CIC) solely for the purpose of the administration or enforcement of the *Immigration and Refugee Protection Act*. For example, this provision will provide authority for customs data relating to the movement of people in to and out of Canada to be given to CIC, i.e., to communicate from customs primary to immigration secondary, in order to perform background checks on travelers to determine their eligibility under the *Immigration and Refugee Protection Act* and for the NEXUS – Air program.

To an official to administer the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*

35. Paragraph 107(5)(k) allows an official to provide customs information to an official in the Financial Transactions and Reports Analysis Centre of Canada solely for the purpose of administering or enforcing the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*. Under Part 2 of this Act, which is expected to come into

effect in 2003, every person is required to report to customs cross-border movements of currency or monetary instruments, which exceed a prescribed threshold.

To a person to determine a customs entitlement, liability, or obligation

36. Paragraph 107(5)(l) allows an official to provide customs information to a person (this includes an individual, a corporation, a partnership, and an association) solely for the purpose of determining any entitlement, liability, or obligation of the person under the *Customs Act* or the *Customs Tariff*. Included expressly in the customs information that may be provided is the person’s entitlement to any refund, relief, drawback, or abatement under those two Acts. Typically, the customs information to be disclosed will relate only to that person. For example, an importer or his agent may request transaction data to confirm that the appropriate amounts of duty and tax were paid on imported goods.

To any person, to comply with a Canadian subpoena, warrant, or court order

37. Paragraph 107(5)(m) allows an official to provide customs information to any person if the information is required to comply with a subpoena or warrant issued, or an order made by a court of record in Canada. Such courts include, for example: the Supreme Court, the Federal Court of Canada (Trial Division and Court of Appeal), a Superior Court of a Province, including the Court of Queen’s Bench of a Province, a provincial Court of Appeal, Bankruptcy Court, provincial criminal courts, small claims courts or the Canadian International Trade Tribunal (CITT). While subsection 107(10) protects officials from being forced to disclose customs information, officials are instructed to act carefully and quickly when a court order to produce or disclose customs information is served on the CCRA.

38. In most cases, customs will be prepared to provide customs information under the authority of 107(5)(m) when presented with an order of a Canadian court of record to disclose customs information. In cases raising particular concerns, refer to Memorandum D1-16-2 for the procedure to follow.

To any person, to comply with a foreign subpoena, warrant, or court order

39. Paragraph 107(5)(n) allows an official to provide customs information to any person if the information is required to comply with a subpoena or warrant or order from a court of record outside Canada, but solely for the purposes of criminal proceedings. The latter provision is intended to allow customs to assist with criminal matters, such as a situation involving smuggling of narcotics between Canada and the U.S., where available Canadian evidence may help establish when the person left or arrived

in Canada. But it does not give authority to disclose customs information for civil litigation in foreign jurisdictions. Paragraph 107(5)(n) will not enable customs officials to provide customs information before foreign courts of records not dealing with criminal cases. For example, customs officials are not authorized by paragraph 107(5)(n) to provide customs information in evidence before U.S. Senate trade-related hearings or as part of foreign civil suits or foreign family law or divorce litigation.

To other persons in prescribed circumstances, and for prescribed purposes if regulations made

40. Paragraph 107(5)(o) provides for the development of regulations, through the Order-in-Council process, to authorize the use or disclosure of customs information in circumstances not contemplated when the revisions to section 107 were promulgated. No such regulation has been created.

DISCLOSURE OF CUSTOMS INFORMATION IN THE PUBLIC INTEREST OR WHERE THE PERSON ABOUT WHOM IT RELATES WILL CLEARLY BENEFIT

41. Paragraph 107(6)(a) gives the Minister of National Revenue the authority to provide, allow to be provided, or provide access to customs information to anyone if the information may not otherwise be provided under section 107, and the Minister is of the opinion that the public interest in providing the information clearly outweighs any invasion of privacy or any material financial loss or prejudice to the competitive position of the person to whom the information relates that could result if the information were provided. Paragraph 107(6)(b) gives the Minister the authority to disclose customs information if the Minister is of the opinion that providing the information would clearly benefit the individual to whom the information relates.

42. Paragraph 107(6)(a) is intended to be used only in unique, exceptional circumstances, which are not specifically reflected elsewhere in the legislation but are important enough in terms of the public interest that a disclosure should be made. Decisions to disclose customs information under this provision will be made by the Minister of National Revenue.

43. Subsection 107(7) sets out the requirement that, if the customs information provided under subsection 107(6) is “personal information” as defined in section 3 of the *Privacy Act* (generally speaking this is customs information about an identifiable individual that is recorded in any form), then the CCRA must notify the Privacy Commissioner in writing before the disclosure, if practicable, or immediately after, if not. The Privacy Commissioner may notify the individual concerned or initiate a complaint or an investigation.

PROVISION OF CUSTOMS INFORMATION TO FOREIGN GOVERNMENTS

44. Subject to what is said in Paragraphs 45 and 46 of this Memorandum, subsection 107(8) allows any person in specified circumstances to provide customs information to an official, or any other person employed by or representing:

- (a) the government of a foreign state;
- (b) an international organization established by the government of states;
- (c) a community of states; or
- (d) an institution of any such government or organization.

45. Subsection 107(8) requires that the disclosure be in accordance with an international convention, agreement, or other written arrangement between the Government of Canada or an institution of the Government of Canada and the government of the foreign state, the organization, community, or the institution, solely for the purposes set out in the arrangement. In circumstances when, for example, health and safety or national security is at issue, officials should not restrict their judgment to disclose customs information to subsection 107(8) but consider all of section 107 of the *Customs Act* (see paragraphs 17 and 21 of this Memorandum).

46. The international understanding does not have to deal exclusively with the exchange of customs information, but it must allow for the disclosure or exchange of customs information.

CONSENT PROVISION

47. Subsection 107(9) allows an official to provide, allow to be provided, or provide access to customs information relating to a particular person:

- (a) to that person;
- (b) to a person or a person’s agent who is authorized to transact business under the *Customs Act* or *Customs Tariff*, if the particular person requests it and on receipt of any prescribed fee; or
- (c) with the consent of the particular person, to anyone.

48. Subsection 107(9) does not require that a request or consent be in writing, but normally the individual’s request under (b) or consent under (c) should be provided to the CCRA in writing. For more details, see Memorandum D1-16-2.

COMPELLABILITY OF AN OFFICIAL TO PROVIDE EVIDENCE

49. While several subsections and paragraphs of section 107 allow for the provision of customs information for, or relating to, certain legal proceedings (107(4)(a), 4(b), 4(f), 5(h), 5(m), 5(n), and 11), and also to the police for some investigative purposes (see 107(5)(a)), subsection 107(10) provides that, despite any other Act of Parliament or other law, no official may be required to give or produce evidence relating to customs information in connection with any legal proceeding. This clarifies that section 107 of the *Customs Act* will have priority over other legislation when considering or processing requests for customs information. But Court Orders cannot be ignored on the basis of subsection 107(10). Please refer to Memorandum D1-16-2.

MEASURES TO PROTECT CUSTOMS INFORMATION IN CERTAIN LEGAL PROCEEDINGS

50. Subsection 107(11) provides that the person presiding at a legal proceeding relating to the supervision, evaluation, or discipline of a specified person may order any measure that is necessary to ensure that customs information is not used or provided for any purpose not relating to that proceeding including:

- (a) holding a hearing in camera;

- (b) banning the publication of the customs information;

- (c) concealing the identity of the person to whom the customs information relates; and

- (d) sealing the records of the proceeding.

51. These protective measures may be appropriate, for example, when customs information about persons other than the specified person is considered for disclosure in legal proceedings.

APPEALS FROM A COURT ORDER TO DISCLOSE CUSTOMS INFORMATION

52. At times a court may order the disclosure of customs information that, in the view of the CCRA, is either inappropriate or not something that the law permits. Subsections 107(12), (13), and (14) provide an appeal process to be followed in such cases that could stay or amend the order. Reasons for which the CCRA might choose to appeal an order could include the possibility of harming an ongoing investigation; the potential of harming trade interests; or an inability to practically produce the requested customs information.

REFERENCES

<p>ISSUING OFFICE –</p> <p>Strategic Program Analysis, Direction and Coordination Division Program Strategy Directorate</p>	<p>HEADQUARTERS FILE –</p> <p>74400-7-2</p>
<p>LEGISLATIVE REFERENCES –</p> <p><i>Customs Act</i>, Section 107</p>	<p>OTHER REFERENCES –</p> <p>D1-16-2</p>
<p>SUPERSEDED MEMORANDA “D” –</p> <p>D1-16-1, June 16, 1989</p>	

Services provided by the Canada Customs and Revenue Agency are available in both official languages.

This Memorandum is issued under the authority of the Commissioner of Customs and Revenue.

