

Digital Policy Hub – Working Paper

Blurred Lines: Civilian Oversight at Canada's Digital Borders

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Key Points

- Since its formation in 2003, the Canada Border Services Agency (CBSA) has been the only major federal law enforcement organization in the country without an arms-length watchdog agency. The recent passage of the Public Complaints and Review Commission Act addresses this gap in accountability by extending the oversight model of the Royal Canadian Mounted Police (RCMP) to the CBSA.
- The new Public Complaints and Review Commission (PCRC) will oversee complaint investigations into the conduct of CBSA and RCMP employees and lead program-level reviews of their operations. Anything related to national security will continue to fall under the jurisdiction of the National Security and Intelligence Review Agency (NSIRA).
- The PCRC is an important step forward for democratic accountability in Canadian law enforcement. However, existing police oversight models that place a strong emphasis on individual officer conduct must adapt to the unique context of the border.
- The complex and highly digitized nature of many decisions at the border alongside the CBSA's dual law enforcement and national security mandate present unique challenges to oversight that must be accounted for in the design of the PCRC.
- Extending meaningful accountability to the border requires developing fit-for-purpose investigative methodologies and a formal framework for collaboration between the PCRC and NSIRA.

Introduction

Since its creation in 2003, the CBSA has been the only major federal law enforcement agency without an external oversight and accountability body. This will soon change following the recent passage of the Public Complaints and Review Commission Act. This act replaces the Civilian Review and Complaints Commission (CRCC),¹ the civilian oversight body for the RCMP. The new PCRC extends the CRCC model to investigate complaints about the conduct of CBSA and RCMP employees and programs. Anything related to national security falls under the jurisdiction of NSIRA. However, this working paper shows that many aspects of decision making at the border are not well suited to the kinds of individual conduct investigations that police oversight bodies such as the CRCC are designed to manage.

The CBSA is Canada's "first line of defence" against drug and weapons smuggling and the primary authority responsible for interdicting travellers suspected as threats to national security or public safety (CBSA 2023). The Canadian border is a highly digitalized environment where exceptional forms of surveillance and automated decision making are normal parts of the traveller experience. These technologies include use of facial recognition for automated identity verification and increasingly sophisticated forms of predictive analytics to assess travellers for risk (NSIRA 2023a). CBSA officers hold

¹ See www.canada.ca/en/public-safety-canada/news/2022/05/bill-c-20--an-act-establishing-the-public-complaints-and-review-commission-and-amending-certain-acts-and-statutory-instruments.html.

broad powers to question, search, detain and remove people arriving in Canada (Pratt 2010). Scrutiny from a CBSA officer may involve invasive questions about personal relationships or finances; searches of vehicles, luggage or digital devices; or being held in immigration detention. Independent oversight is essential for ensuring these powers are exercised responsibly and proportionately (British Columbia Civil Liberties Association 2017).

The PCRC must be designed to account for the unique operational context of the border, including the diffuse nature of responsibility for many border security decisions and the CBSA's dual law enforcement and national security mandates. Border security decisions are frequently influenced by automated and human inputs from multiple individuals, organizations and technical systems, making it difficult to assign individual responsibility. These inputs can simultaneously inform national security and law enforcement decisions, leading to considerable potential overlap in the jurisdictions of the PCRC and NSIRA. These blurred lines of responsibility and jurisdiction must be accounted for in the design of the new oversight body and its accompanying regulations to ensure effective accountability at the border.

Canada's Digital Borders

The CBSA facilitated more than 93 million border crossings by land, air and sea in 2024.² In efforts to manage these flows efficiently, the agency is intensifying its adoption of data-driven technologies intended to streamline international travel and enhance security.³ Air travellers, who account for 40 percent of arrivals, interact with digital interfaces more than human officers in many cases (Raso 2023).⁴ They are encouraged to use the ArriveCAN mobile application to lodge advance customs declarations. Upon arrival, air travellers are greeted by digital kiosks or electronic gates (e-gates) that use facial recognition and fingerprint matching software for identity verification. Automation is intended to promote a more efficient traveller experience while improving capacity to identify and intercept those who may be inadmissible or non-compliant with immigration or customs laws.

Digitalization affects how border security decisions are made. Instead of a traditional visa, many foreign nationals are required to obtain an electronic travel authorization (eTA) online before coming to Canada (Immigration, Refugees and Citizenship Canada [IRCC] 2022; Wallace et al. 2023). ETA applications, which are decided automatically in many cases, are cross-referenced with official databases in the IRCC Global Case Management System (GCMS) to validate identities and flag information such as a past criminal conviction. Regardless of whether an eTA is approved, the final authority to admit someone to Canada rests with individual CBSA officers. While front-line officers have traditionally relied on expert judgment to select travellers or goods for further scrutiny, gut feelings are giving way to standardized risk assessments and varied intelligence inputs (Côté-Boucher 2020; Pratt 2010). Many aspects of decision making about air travellers happen before they arrive in Canada.

2 See www.cbsa-asfc.gc.ca/transparency-transparence/yir-aer-eng.html.

3 See www.cbsa-asfc.gc.ca/services/border-tech-frontiere/modern-eng.html.

4 *Ibid.*

The CBSA's National Targeting Centre screens all inbound air travellers using passenger information provided by airlines as well as open- and closed-source intelligence from domestic and international sources. Canada systematically exchanges a wide variety of customs and immigration information with the United States and several other international partners (NSIRA 2023a). Air passenger targeting is already partially automated using rules-based scenarios where people who meet a set of high-risk criteria are flagged for further investigation. The details remain secret, but work is under way to further “integrate access to CBSA information and data analytics,” thereby enabling more sophisticated traveller screening methods.⁵ But despite expanding automation, human discretion remains essential. “Targeting Officers analyze information and intelligence to develop a personal ‘mental model’ about what constitute ‘high risk’” targets (NSIRA 2023a). Intelligence-driven decision making and increasingly sophisticated pre-clearance risk assessments enable authorities to identify potential threats before they reach Canada.

Land crossings, which accounted for 56 percent of arrivals to Canada in 2024,⁶ lack the capacity to pre-screen travellers. CBSA officers assessing travellers at land borders generally exercise a higher degree of discretion in determining who is suspicious, relying more on observation and questioning (Côté-Boucher 2020). Nonetheless, Canada and the United States systematically exchange information about travellers crossing by land and maintain reciprocal access to criminal databases.⁷ Passport holders with histories of inadmissibility, criminal records or national security concerns may be automatically flagged to officers.

A growing reliance on automated tools for identity verification, information retrieval and risk assessment has reduced the need for interactions between border police and the broader public. Under the Immigration and Refugee Protection Act (IRPA),⁸ individual CBSA officers are responsible for admissibility decisions. In practice, these decisions often involve several human and technical inputs that extend beyond the CBSA to other federal departments, foreign partners and private companies. Jennifer Raso (2024) argues that this kind of digitally mediated governance diffuses responsibility in ways that can shield the CBSA and its employees from some forms of legal scrutiny. Petra Molnar and Lex Gill (2018) add that intensifying automation in migration and border management risks perpetuating algorithmic bias and undermines procedural rights by making it more difficult to contest decisions. In many cases, broad definitions of national security are invoked to avoid disclosing information about how decisions are made.⁹ When decisions are appealed, CBSA officials emphasize qualitative indicators from interactions with travellers as reasons for decisions in isolation from the algorithmic processes and information systems used to cast suspicion in the first place.¹⁰ These factors make it difficult for travellers to understand decisions being made against them and limit their capacity to challenge the underlying processes informing decisions at the border.

5 See www.cbsa-asfc.gc.ca/agency-agence/reports-rapports/fs-ef/2023/it-ti-proj-eng.html.

6 See www.cbsa-asfc.gc.ca/transparence-transparence/yir-aer-eng.html.

7 See www.cbsa-asfc.gc.ca/agency-agence/reports-rapports/pia-efvp/atip-aiprp/ffbi-pfbi-eng.html.

8 *Immigration and Refugee Protection Act*, SC 2001, c 27.

9 *Kiss v Canada (Citizenship and Immigration)*, 2023 FC 1147 (CanLII) [*Kiss v Canada*], online: <<https://canlii.ca/t/jzwtx>>.

10 *Kiss v Canada (Citizenship and Immigration)*, 2022 FC 373 (CanLII), online: <<https://canlii.ca/t/jp1v8>>; *Khaniche v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 559 (CanLII), online: <<https://canlii.ca/t/j8csn>>.

Enhancing and Expanding Civilian Review

External review of CBSA activities will make it easier to hold the organization and its employees accountable for their actions. The PCRC will complement existing forms of accountability, including internal investigations, federal watchdogs and the courts. The CBSA presents its internal recourse directorate as a mechanism for the “impartial review” of decisions (CBSA 2023). However, internal forms of accountability are often criticized for their susceptibility to conflicts of interest (Prenzler and den Heyer 2016). The CBSA is also subject to external oversight by NSIRA and other federal watchdogs such as the Canadian Human Rights Commission and the Office of the Privacy Commissioner within the bounds of their respective mandates. Beyond this, people who believe they have been treated unjustly may seek recourse through the courts, but suing or requesting a judicial review is both expensive and time consuming. In the context of judicial review, courts tend to defer to the expertise of border officers, focusing on whether an outcome is reasonable given the law, facts and evidence available and not whether the right choice was made (Daly 2021; Molnar and Gill 2018). Existing forms of external accountability are thus often inaccessible and limited in scope.

Given the limitations of existing avenues of accountability, the PCRC promises to make accountability easier to access. The PCRC Act¹¹ extends the civilian oversight model of the RCMP to the CBSA with relatively minor changes. The CBSA will be responsible for conducting an initial investigation into a complaint made by an individual or third party “concerning the conduct, in the exercise of any power of the Agency or the performance of any of its duties or functions under the Canada Border Services Agency Act, of any person who, at the time that the conduct is alleged to have occurred, was a CBSA employee” under section 33(2). The complainant can request a review by the commission if they are dissatisfied with the outcome, but the chairperson of the PCRC will retain the authority to initiate complaints into the conduct of a CBSA employee and investigations into CBSA policies or programs. The PCRC will be required to forward any national security-related cases to NSIRA. The act accommodates the CBSA through an extended framework for joint investigations with provincial authorities involved in immigration detention and new requirements for the CBSA to report on serious incidents such as injuries or deaths in custody.

Further modifications are necessary to extend meaningful accountability to the full scope of CBSA activities. Examining the CRCC’s 1,071 publicly available complaint summaries shows that investigations focus heavily on the reasonableness of individual officer conduct.¹² Concerns about how external inputs and digital technologies shape officer discretion are less relevant to RCMP activities and have not attracted significant attention in public complaint investigations or in the seven systemic reviews conducted by the CRCC since 2017. Extending the CRCC model to CBSA employees promises to hold individual border officers more accountable for their interactions with the public but does not sufficiently account for the unique operational context of the border.

11 Bill C-20, *An Act establishing the Public Complaints and Review Commission and amending certain Acts and statutory instruments*, 1st Sess, 44th Parl, 2024 (assented to 31 October 2024), online: <www.parl.ca/Content/Bills/441/Government/C-20/C-20_4/C-20_4.PDF>.

12 See www.crcc-ccetp.gc.ca/en/sample-review-findings.

Individual officers will remain responsible for the decisions they make. The PCRC will not have the power to overturn decisions, but CBSA officers who choose to search someone's vehicle without reasonable suspicion or who are abusive toward people held in custody will risk scrutiny from the PCRC. Primarily focusing on the reasonableness of decisions made by front-line officers risks overlooking the influence of automated decision systems and external intelligence sources. This is especially true for passenger screening at airports. Decisions about who is subject to additional scrutiny are heavily influenced by intelligence and analysis from the National Targeting Centre. Investigative methodologies that account for individual actions, underlying processes and external inputs are required to extend meaningful accountability across the full range of border operations.

What Counts as National Security?

An additional challenge is that the boundaries around what counts as national security at the border are not always clear. There is no definition of national security under the current regime or the PCRC Act, which allows flexibility in deciding which complaints or reviews should be handled by NSIRA. However, NSIRA has acknowledged that certain activities exist in a “grey zone” of national security (NSIRA 2023b). Many aspects of border operations exist between the worlds of front-line law enforcement and intelligence, and the tools and methods used by targeting officers are frequently dual use. For example, the same risk indicators may help identify illicit drugs as well as potential terror threats (*ibid.*).

The jurisdiction of the PCRC is likely to overlap with NSIRA on matters related to border security. Despite attempts to bracket off law enforcement from the CBSA's national security activities, a 2019 review by the National Security and Intelligence Committee of Parliamentarians ([NSICOP] 2020) recognizes “the important role that intelligence plays across the full spectrum of CBSA's activities.” NSIRA's subsequent “Study of the Government of Canada's use of Biometrics in the Border Continuum” found that “biometrics contribute to overall organizational goals, not just national security objectives” (NSIRA 2022). Thus, the insistence on sharp boundaries around national security under the PCRC Act is out of step with the operational realities of the border. This disconnect leads to ambiguity surrounding the mandates of the PCRC and NSIRA.

The act explicitly extends the existing framework for joint investigations between the PCRC, provincial authorities and foreign counterparts. NSIRA, however, is conspicuously absent from this framework. Instead, section 85 requires the two bodies to “cooperate with each other to avoid any unnecessary duplication of work,” deferring the prospect of joint proceedings to the regulations under section 87(o.1). Joint investigations are potentially permissible, although this may conflict with the PCRC's statutory requirement not to pursue any complaint or review related to national security under section 8. There is a mechanism for forwarding a case to NSIRA but not for bilateral collaboration between the two agencies. This presents an issue because the CBSA may seek to restrict access to information it deems related to national security under section 17(6), effectively forcing the PCRC to forward an investigation to NSIRA. As a result, NSIRA may be asked to use its resources to investigate matters better suited for the PCRC because of a partial relationship to national security. Alternately, the PCRC may choose to limit the scope of an investigation to avoid this. A formal framework for

collaboration would help clarify these jurisdictional ambiguities and ensure the conduct of efficient and comprehensive investigations.

The case study that follows illustrates how ambiguities regarding responsibility for decisions and what counts as national security present problems for effective oversight of Canadian border operations.

Case Study: Alleged Discrimination in Passenger Targeting

In 2019, eTAs issued to the Kiss and Szép-Szögi families respectively were cancelled as they attempted to board flights bound for Canada. All of the family members involved are Hungarian nationals, and the Kiss family is of Roma ethnicity. They were questioned at the gate by private security officers working for a company called BudSec at the Budapest International Airport. This company was hired by Air Canada to meet its legal obligations under the IRPA to deny boarding to travellers likely inadmissible to Canada. After their interactions with the families, the BudSec officers called a CBSA liaison officer in Vienna who chose to cancel their travel authorizations in consultation with indicators in GCMS. One of these indicators was that both families had “associations with refugees” in Canada.¹³

The two families sought judicial reviews of the decisions made against them, which were heard together due to the similarity of their complaints. They alleged that using their associations with refugees as a risk indicator was discriminatory and that the CBSA officer engaged in a form of “extraterritorial enforcement against prospective refugees and people who are ‘associated with refugees,’” which should be considered an “unauthorized overseas examination.”¹⁴ They asserted that these practices have “adversely affected a large number of Hungarian nationals and Roma travellers.”¹⁵ In its defence, the Canadian government argued that associations with refugees is but one indicator among many that factored into the decisions to cancel their travel authorizations.

Initially, the government attempted to withhold details about the indicators that informed these decisions. They argued that disclosure would adversely impact Canadian national security because this information could be used to evade detection in the future. However, the court decided that refusing to disclose all except for one of the indicators was unreasonable because they were either common sense or already in the public domain.

Ultimately, the judge ruled that the decisions to revoke the eTAs was procedurally unfair and restored the families’ permission to travel, but the ruling was limited in scope. The court found the individual CBSA officer’s decisions were unlawful while upholding their authority to cancel the eTAs from abroad. It affirmed that associations with refugees could be relevant to decision making about traveller admissibility. The officer’s reliance on insights from the private security agents and digital indicators in GCMS meant that the decision to cancel the eTAs “did not constitute the examination of foreign

¹³ *Kiss v Canada*, *supra* note 9.

¹⁴ *Ibid* at paras 44, 90.

¹⁵ *Ibid* at para 13.

nationals”¹⁶ affirming the diffuse nature of responsibility for decisions at the border. Furthermore, the evidence failed to “establish the existence of a coordinated program by the CBSA” to discriminate against Roma travellers.¹⁷

Meaningful Accountability, Diffuse Responsibility

Kiss v Canada illustrates how civilian oversight must adapt to the diffusion of responsibility in modern border operations. While the PCRC lacks the authority held by the courts to overturn decisions, it does have more leeway to consider broader context than judicial review. In-depth examination of whether the security agents or the indicators used to target the families were discriminatory fell outside the scope of the judicial review. Acknowledging the lack of a “smoking gun” in *Kiss*, Simon Wallace and his colleagues (2023, 4) argue that there is a “strong circumstantial case that Canada has winked and nodded its way into a program of extraterritorial racial profiling of travellers” aided by delegation to private external actors and automated indicators. While it is limited to investigating CBSA and RCMP employees and operations, the PCRC will be empowered to investigate matters like this in greater detail and issue recommendations for disciplinary action or corrective policy measures through both complaint investigations and program-level reviews.

Border operations call for a different sort of investigation than what is available through existing avenues of accountability, including the types of bad conduct investigations managed by the CRCC. Focusing primarily on officer conduct toward the *Kiss* and Szép-Szőgi families led to an incomplete analysis. Considering how automated inputs, varied intelligence products and the delegation of responsibilities to external actors factored into the officer’s decision making is essential for a comprehensive understanding of what happened and of how to prevent it from reoccurring. While the CBSA officer in *Kiss v Canada* was ultimately responsible for their own procedurally unfair use of indicators from GCMS and BudSec, the court’s ruling affirmed the agency’s ability to defer a certain degree of liability for conducting examinations to automated systems and private companies. Given the highly digitalized and diffuse nature of border operations, individual complaints will bleed into broader systemic concerns on a regular basis, requiring investigative methods to be updated.

The *Kiss v Canada* case also demonstrates how drawing boundaries around what counts as national security is problematic in the context of border management. While complaints about discrimination based on associations with refugees are certainly serious, they are not closely related to national security. Yet the government invoked national security to avoid disclosing how the families were targeted. Ultimately, one indicator was still deemed sensitive enough to reasonably withhold, which made it difficult for the impacted parties to access reasons for the decisions against them. Given the ultimate restoration of the families’ travel authorizations, it is unlikely that they were high-risk national security targets, but their case was still impacted by national security concerns.

The PCRC may face similar challenges in future cases involving air passenger targeting. The PCRC Act’s lack of clarity around what counts as national security, paired with the clear prohibition on investigating these matters, will pose challenges to meaningful

¹⁶ *Ibid* at para 46.

¹⁷ *Ibid* at para 69.

accountability. The CBSA may reasonably argue that details surrounding passenger targeting decisions are relevant to national security and therefore refuse to disclose them to the PCRC. But the complaints arising from these cases could be efficiently and effectively investigated by the PCRC with input from NSIRA experts. NSIRA could weigh in on the nature of sensitive information and the extent to which it is relevant to allegations of discrimination or other forms of misconduct without taking on the entire investigation. However, a framework for such collaboration is required.

The PCRC has strong potential to extend much-needed accountability to the Canadian border. But the new oversight body must account for the diffuse nature of responsibility at the border and the potential jurisdictional overlaps created by the CBSA's unique mandate. These factors should be addressed in the regulations and the design of the organization itself.

Recommendations

- **Design and implement process-oriented investigative methodologies:**
 - Commission a systematic review of investigative methods used in police, border and national security oversight to identify opportunities for innovation and to inform the design of a process-oriented approach to investigating complaints.
 - In consultation with interdisciplinary experts, devise investigative methodologies that enhance the prevailing legal focus on the reasonableness of officer conduct with methods from fields such as organizational behaviour, technical auditing and human computer interaction.
- **Establish a formal framework for collaboration between the PCRC and NSIRA:**
 - Require a formal framework for collaboration between NSIRA and the PCRC in the regulations.
 - Establish a Memorandum of Agreement between NSIRA and the PCRC including provisions for: reciprocal information sharing on an as-needed basis; delegating specific aspects of investigations or reviews that are partially related to national security (such as sensitive details about passenger targeting); and conducting joint investigations and reviews when expertise related to both law enforcement and national security is relevant.

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Acronyms and Abbreviations

CBSA	Canada Border Services Agency
CRCC	Civilian Review and Complaints Commission
eTA	electronic travel authorization
GCMS	Global Case Management System
IRCC	Immigration, Refugees and Citizenship Canada
IRPA	Immigration and Refugee Protection Act
NSICOP	National Security and Intelligence Committee of Parliamentarians
NSIRA	National Security and Intelligence Review Agency
PCRC	Public Complaints and Review Commission
RCMP	Royal Canadian Mounted Police

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