

Submissions to the Canadian Border Services Agency on *Draft Guiding Principles and Commitments on Gender-Based Violence*

November 21, 2023

Introduction

The BC Civil Liberties Association (the “BCCLA”) is the oldest civil liberties and human rights group in Canada, advancing litigation, law reform, community-based legal advocacy, and public engagement and education for the last 60 years. Immigration law reform is one of our key areas of engagement, as we use our platform to give voice to highly vulnerable people who are too often unheard or overlooked.

We appreciate the Canadian Border Services Agency (the “CBSA”)’s invitation to comment on the draft guiding principles and commitments on gender-based violence (the “Draft GBV Principles”). In our submissions below, we address the three key questions proposed by the CBSA:

1. Will the CBSA’s guiding principles and commitments on gender-based violence help victims and survivors to avoid further trauma/exploitation, and create more positive interactions with border officials?
2. Are there any other guiding principles and commitments that the CBSA should be adding?
3. Based on the BCCLA’s experience, what are some concrete examples within the immigration enforcement continuum of where we would want to see the CBSA apply these principles and commitments?

The BCCLA welcomes the CBSA’s goal of improving its service toward victims and survivors of gender-based violence. Many of the guiding principles and commitments described in the Draft GBV Principles are laudable and in alignment with the BCCLA’s positions. We are particularly encouraged that the Draft GBV Principles recognize the reality that the intersectional violence of racial prejudice, social disparity, ethnic origin, and other such factors exacerbate the harms of gender-based violence.

However, we have identified concerns with the specific wording, or lack thereof, in the Draft GBV Principles, which could lead to misunderstandings and misconduct among CBSA employees. We have also identified serious concerns about enforceability and lack of accountability around these guidelines, such that they could become no more than empty promises. It is our hope that the CBSA will find our recommendations helpful in addressing these concerns.

1. Will the CBSA’s guiding principles and commitments on gender-based violence help victims and survivors to avoid further trauma/exploitation, and create more positive interactions with border officials?

The BCCLA has identified two conceptual concerns with the wording in the Draft GBV Principles, as well as two practical concerns regarding the enforceability and application of the Draft GBV Principles. Any of these issues, individually, would impair the utility of the Draft GBV Principles, and all of them together undermine their ability to protect survivors and create positive interactions.

a. Human Trafficking Versus Gender-Based Violence

Human trafficking must not be conflated with gender-based violence, nor with sex work. The Draft GBV Principles defines gender-based violence as including human trafficking; this is the wrong way around, as properly speaking, human trafficking encompasses a wider range of illicit activity and harms. Similarly, family violence and other topics listed in the definition are actually far broader than gender-based violence alone.

The BCCLA suggests, therefore, to reword the second paragraph of the definition of gender-based violence as:

“GBV can occur in, but is not limited to, situations of human trafficking, sexual violence, family violence, intimate partner violence...”

This wording would bring the Draft GBV Principles in closer alignment with the wording used in the National Strategy to End Human Trafficking, as set out by the Ministry of Public Safety.¹

Further, the Draft GBV Principles should explicitly clarify that human trafficking does not include humanitarian efforts to assist people escaping from dangerous conditions with the knowledge and consent of those people. Failure to draw this crucial distinction has led to people in Canada being charged with criminal offences for their humanitarian rescue work.²

¹ Canada, Ministry of Public Safety, *National Strategy to Combat Human Trafficking 2019-2023*, (21 July 2022), online: <<https://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/2019-ntnl-strtgvy-hmnn-trffc/index-en.aspx>>. [*National Strategy*]

² *R. v. Appulonappa*, 2015 SCC 59.

b. Cultural Sensitivity

The BCCLA has concerns with the particular wording of the guiding principle respecting cultural sensitivity:

“While cultural safety and sensitivity must be taken into account when interacting with victims and survivors, GBV is not acceptable in any culture.”

We understand that this particular principle may be simply expressing a general normative stance, with which we are in agreement. However, this wording is inadequate to provide guidance for decision-making by CBSA employees, as it suggests a zero-sum tradeoff between respecting cultural differences and protecting victims of gender-based violence.

This perspective is both incorrect and, in itself, culturally intolerant. It fails to account for the reality that gender-based violence exists and is accepted to some degree in many cultures, including Canadian culture, and that there are on-going efforts in these cultures to combat and overcome gender-based violence in its many forms.

The implied zero-sum tradeoff thus encourages CBSA employees to rely upon their own cultural biases and prejudices regarding gender-based violence, as they make decisions about apprehensions, searches, questioning people, and identifying suspicious activities. The existence of these biases and prejudices, and the fact that CBSA employees already rely upon such reasoning, is well-documented as a widespread systemic issue within the organization.³

Canadian values and Canadian perspectives cannot be the standard by which CBSA employees measure people from all other countries. Canada is as guilty of normalizing gender-based violence as any other country, as evidenced by the National Inquiry into Missing and Murdered Indigenous Women and Girls,⁴ hijab bans and gender-specific racism,⁵ recent statistics on intimate partner violence within the country,⁶ and widespread anti-LGBTQ+ protests across Canada.⁷ Canada’s flaws must be acknowledged so that CBSA employees do not assume other cultures must be measured against an implicit and false image of Canadian perfection. It is

³ Shanifa Nasser, “Canadian files complaint after CBSA agent allegedly tells him ‘You’re Somalian’ as reason for questioning”, *CBC News*, (15 October 2020), online: <<https://www.cbc.ca/news/canada/toronto/cbsa-racism-complaint-1.5762676>>. [Nasser, *CBC News*]

⁴ Canada, National Inquiry into Missing and Murdered Indigenous Women and Girls, *Reclaiming Power and Place: The Final Report on the National Inquiry Into Missing and Murdered Indigenous Women and Girls*, Vol 1b (2015) (Chief Commissioner: Marion Buller), online: <www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Final_Report_Vol_1b.pdf>.

⁵ Laura Marchand, “Quebec students see ‘no future’ for them due to religious symbols law, study suggests”, *CBC News*, (16 March 2022), online: <<https://www.cbc.ca/news/canada/montreal/bill-21-study-1.6385650>>.

⁶ Government of Canada, *Fact sheet: Intimate partner violence*, (7 February 2022), online: <<https://women-gender-equality.canada.ca/en/gender-based-violence/intimate-partner-violence.html>>.

⁷ See: Bryce Hoye, “Protests over LGBTQ rights in schools come to a head in Manitoba”, *CBC News*, (September 20, 2023) <<https://www.cbc.ca/news/canada/manitoba/1millionmarch4children-counterprotest-lgbtq-1.6972517>>; “Arrests, heated exchanges mark rallies over LGBTQ school policies”, online: *CBC News*, (September 20, 2023), <<https://www.cbc.ca/news/canada/rallies-gender-schools-1.6972606>>.

equally vital for CBSA employees to recognize gender-based violence when it occurs among Canadians.

In order to address these issues, the BCCLA submits that the guiding principle above should be rewritten into two separate principles, thereby clarifying that CBSA employees are not to choose between cultural sensitivity and combatting gender-based violence:

“Cultural safety and sensitivity must be taken into account when interacting with victims and survivors of gender-based violence.”

“GBV is not acceptable in any culture and is present in every society, including Canadian society.”

In this manner, CBSA employees will understand that both principles have equal force and importance, and are not at odds with one another.

c. Practical Effects

As the Draft GBV Principles are meant to provide guidance CBSA employees, they must provide some parameters for practical application. Without clarity on these matters, the words themselves are not actionable, and will not produce the desired results of improving relations between border service officers and victims of gender-based violence. Without such practical direction there is a real danger that the Draft GBV Principles will have no effect whatsoever. As a result, even with the best of intentions, it is likely that CBSA officers and employees will neither understand how to recognize their own personal biases, nor recognize when they are in violation of these commitments.

The CBSA should not leave the interpretation of vague principles wholly to the discretion of its employees. To prevent this, the Draft GBV Principles should have accompanying examples, which clarify how the guiding principles and commitments should be applied. This could be similar to the examples set out in the National Strategy to Combat Human Trafficking.⁸ It would also provide a basis for analysis in future disciplinary or court decisions on whether CBSA employees met the required standards.

d. Enforceability and Accountability

There is no accountability mechanism for the Draft GBV Principles, a glaring omission given that the current models of accountability for CBSA employees have proven to be grossly inadequate. The CBSA determined that some 255 founded misconduct complaints occurred in

⁸ *National Strategy*, *supra* note 1.

2018,⁹ with 171 founded complaints occurring in 2019 and 215 in 2020.¹⁰ In addition, hundreds of other complaints, including one which was described as “egregious” by a Carleton University professor,¹¹ failed to bring about any effect during this same period.

In the 2011 criminal law case *R v Greenhalgh*, a CBSA officer was convicted for sexual assault due to his abuse of strip searches. Justice Gordon held:

[T]here must be a clear and unmistakable message from this court to all persons who have been entrusted with state authority, such as border guards, police officers and peace officers generally, that crimes of the nature committed here, involving gross abuse of trust and authority, will attract severe penalties.¹²

Unfortunately, the number of cases involving similar abuses of trust and authority seems to have only increased in the twelve years since this case was decided.¹³

If the CBSA intends for these guiding principles and commitments to have any useful effect, it is absolutely necessary to ensure strong enforcement mechanisms, and to address the existing widespread abuse of power among CBSA employees. Neglect of these crucial problems will result in further trauma to victims of gender-based violence and further negative interactions with border officials. Since these negative outcomes would undermine the goals of the entire project, it is essential to the success of the Draft GBV Guidelines to include clear accountability measures.

2. Are there any other guiding principles and commitments that the CBSA should be adding?

The BCCLA submits two additional principles and commitments to expand the Draft GBV Principles, in order to better address issues of gender-based violence: the CBSA needs to add a policy restricting the use of strip searches and body cavity searches; and the CBSA must draw a clear distinction between sex work, human trafficking, and gender-based violence, such that their officers no longer erroneously conflate these concepts.

a. Strip Searches

There is nothing in the principles or commitments about the use or abuse of strip searches and cavity searches (“Invasive Searches”). This is a significant concern, given the manner in which

⁹ Catharine Tunney, “From soliciting bribes to abuses of authority, CBSA officers hit with hundreds of misconduct complaints”, *CBC News*, (12 May 2020), online: <<https://www.cbc.ca/news/politics/cbsa-misconduct-tunney-1.5560993>>. [Tunney 1, *CBC News*]

¹⁰ Catharine Tunney, “The number of misconduct investigations of border officers rose last year”, *CBC News*, (6 June 2021), online: <<https://www.cbc.ca/news/politics/cbsa-terminations-misconduct-1.6048545>>. [Tunney 2, *CBC News*]

¹¹ Nasser, *CBC News*, *supra* note 3.

¹² *R. v. Greenhalgh*, 2011 BCSC 511 at para 72. [*Greenhalgh*]

¹³ Tunney 1, *CBC News*, *supra* note 9.

strip searches are used by the CBSA. Strip searches are inherently humiliating and traumatizing for all people, described by the Supreme Court of Canada as being akin to “visual rape”.¹⁴ Scholars have noted that police and border services officers have used strip searches to perpetrate gender-based violence:

Apart from the gendered symbolic and psychological harm caused to women by strip-searching, it is also a powerful weapon in the hands of individual officers who may use strip-searching to punish or humiliate women detainees, or as a guise for sexual assault.¹⁵

This is not a hypothetical concern, as Invasive Searches are frequently employed by CBSA officers,¹⁶ and have been abused to perpetuate sexual assault.¹⁷ As such, it is absolutely crucial for the Draft GBV Principles to address the manner in which these searches are used, and to apply hard limits to officers’ behaviour.

The BCCLA has significant concerns with CBSA officers’ use of Invasive Searches. At a bare minimum, the Draft GBV Principles must require the use of the PACE guidelines adopted by the Supreme Court of Canada.¹⁸ This can be achieved by including the following list of requirements for strip searches:

- 1. The strip search is conducted in a private space set aside by the CBSA, equivalent to conducting the search in a private room at the police station.**
- 2. The strip search is conducted in a manner that ensures the health and safety of all involved.**
- 3. The strip search is authorized by an officer acting in a supervisory capacity.**
- 4. The officer(s) carrying out the strip search are of the same gender as the individual being searched. In the case of LGBTQ+ individuals, this means the individual chooses the gender of the officer conducting the search.**
- 5. The number of officers involved in the search are no more than is reasonably necessary in the circumstances.**
- 6. The minimum force necessary is used to conduct the strip search.**
- 7. The strip search is carried out in a private area such that no one other than the individuals engaged in the search can observe the search.**
- 8. The strip search is conducted as quickly as possible and in a way that ensures that the person is not completely undressed at any one time.**
- 9. The strip search involves only a visual inspection of the arrestee’s genital and anal areas without any physical contact.**

¹⁴ *R. v. Golden*, 2001 SCC 83, at para 90. [*Golden*]

¹⁵ Michelle Psutka & Elizabeth A Sheehy, “Strip-Searching of Women in Canada: Wrongs and Rights”, (2016) 94-2 *Canadian Bar Review* 241 at pages 247-248.

¹⁶ Erica Johnson, “Sunday school teacher says she was strip-searched at Vancouver airport after angry guard failed to find drugs”, *CBC News*, (9 June 2019), online: <<https://www.cbc.ca/news/canada/british-columbia/sunday-school-teach-strip-searched-at-vancouver-airport-1.5161802>>.

¹⁷ *Greenhalgh*, *supra* note 12.

¹⁸ *Golden*, *supra* note 14 at para 101.

10. If the visual inspection reveals the presence of a weapon or evidence in a body cavity, the detainee has the option of removing the object themselves or of having the object removed by a trained medical professional.

11. A proper record is kept of the reasons for and the manner in which the strip search was conducted.

In addition to the process safeguards outlined above, the Supreme Court of Canada has offered this guidance about when Invasive Searches can be lawfully conducted by police:

[S]trip searches will only be reasonable when they are conducted in a reasonable manner “as an incident to a lawful arrest for the purpose of discovering weapons in the detainee’s possession or evidence related to the reason for the arrest” and the police “have reasonable and probable grounds for concluding that a strip search is necessary in the particular circumstances of the arrest”: *Golden*, at paras. 98-99.¹⁹

We recommend that the CBSA apply these same limits, as there is no principled reason for border enforcement to meet lower standards than other law-enforcement contexts. Other protections that belong to people in police custody, such as access to legal counsel before the strip search, should also be strictly applied.

b. Sex Work Versus Human Trafficking

Sex work is not inherently gender-based violence, nor is it a form of human trafficking. These three concepts should not be conflated. To the contrary, they should be explicitly defined apart from one another. Sex work is a form of employment which Canadian courts have recognized as legitimate.²⁰ While sex workers may become victims of gender-based violence, conflating the two concepts would effectively re-criminalize sex work, which is extremely hazardous and counter-productive for reducing gender-based violence against sex workers.

The CBSA has played a key role in pursuing, arresting, and deporting sex workers in Canada. In doing so, the CBSA has increased and perpetuated gender-based violence, as this behaviour endangers predominantly female or LGBTQ+ workers.²¹ Interviews with CBSA-targeted sex workers indicate that this is a significant issue:

“Being handcuffed is super traumatizing,” Wendy said. “Sex workers are not violent, so when there are investigations, we try to collaborate, we don’t run or fight back, so when they use chains it’s really scary.”

¹⁹ *R. v. Fearon*, 2014 SCC 77 at para 24.

²⁰ *Canada (Attorney General) v. Bedford*, 2013 SCC 72; see also: Moira Donovan, “Former sex worker’s victory in small claims court sets precedent, lawyer says”, *CBC News*, (4 July 2023), online: <<https://www.cbc.ca/news/canada/nova-scotia/former-sex-worker-small-claims-court-national-precedent-1.6896597>>.

²¹ “Sex workers further victimized by deportations, groups say”, *CBC News*, (11 May 2015), online: <<https://www.cbc.ca/news/canada/ottawa/sex-workers-further-victimized-by-deportations-groups-say-1.3069626>>.

Sex workers interviewed for this story say raids offer a guise for officers to target and overpolice migrants and undocumented sex workers, most of whom are racialized. Sex workers like Wendy say they are not being trafficked; they perform sex work by choice, so when police and CBSA officers raid their environments, it feels like a trap to corral migrants and undocumented workers.²²

If the CBSA intends to reduce gender-based violence, their employees must understand the difference between sex work, human trafficking, and gender-based violence, so as not to traumatize sex workers under misguided claims of assisting them. As such, it is crucial to draw this distinction explicitly in the Draft GBV Principles.

The BCCLA proposes that the CBSA add the following principle:

“Sex work is a form of lawful employment in Canada, and while sex workers may be the victims of gender-based violence, this work is not inherently a form of gender-based violence nor human trafficking.”

This wording will provide CBSA employees with a clearer understanding of how to support sex workers and help them to avoid creating traumatic experiences for them.

3. Based on the BCCLA’s experience, what are some concrete examples within the immigration enforcement continuum of where we would want to see the CBSA apply these principles and commitments?

It is our understanding that the Draft GBV Principles will guide the behaviour of CBSA employees across all levels, and that employees can be held accountable for behaviour that violates the guiding principles and commitments. If this is not the case, we would strongly encourage the CBSA to ensure that all employees, from front-line officers to disciplinary reviewers, are trained with and guided by the Draft GBV Principles. This is particularly important due to the well-documented, widespread culture of sexism and racism among CBSA employees.²³

The BCCLA has identified the following three specific situations in which it is particularly important to ensure that CBSA employees follow trauma-informed practices and ensure that victims and survivors of gender-based violence are treated appropriately.

²² Anya Zoledziowski, “Sex Workers Say ‘Anti-Trafficking Raids’ Are Often a Guise to Target Them”, *Vice News*, (4 August 2020), online: <<https://www.vice.com/en/article/5dzj3q/sex-workers-say-anti-trafficking-raids-are-often-a-guise-to-target-them>>.

²³ See: Nasser, *CBC News*, *supra* note 3; “Canada locks up Black immigrants, asylum seekers longer than other detainees: report”, *CBC News* (17 June 2021), online: <<https://www.cbc.ca/news/canada/asylum-seekers-detention-canada-1.6069327>>.

a. Immigration Detention

Given the particular vulnerability of immigration detainees, it is vitally important that the CBSA ensures that the Draft GBV Principles are applied and enforced in this context. Many people in immigration detention face language barriers, and many have already experienced violence or traumatic events. On top of these existing barriers and traumas, Canada's treatment of its detainees has proven to cause significant physical and psychological trauma.²⁴

Detainees are uniquely dependent on CBSA employees, and uniquely under their power. As such, the BCCLA submits that CBSA employees have a special responsibility to protect and support immigration detainees, which includes ensuring that they are not retraumatized by the employee's own actions and behaviour.

For example, CBSA employees could ensure that families and extended families are allowed to stay together. They could also ensure that non-binary and transgender detainees are not forced against their will into detention centres that do not conform with gender identities.

The BCCLA has also advocated extensively for the CBSA to end its practice of using prisons for immigration detention, and for immigration detention centres to meet human rights standards.²⁵ We once again urge the CBSA to take these necessary steps, as the failure to do so will by its nature contribute to re-traumatization and harms toward victims of gender-based violence.

b. Physical Searches of Persons and Belongings

As discussed above, strip searches and cavity searches are inherently humiliating and traumatizing. Given the gravity of these situations and the high risk of severe harm, CBSA officers should be especially careful to follow PACE guidelines for all passengers, and to minimize the impacts of gender-based violence. For instance, CBSA officers could accommodate passengers' requests for an accompanying family member or trusted friend. CBSA employees should also track and overcome their internal biases regarding who they are most likely to detain and search.

In addition, the BCCLA submits that all CBSA employees who engage in physical searches – including pat-downs over clothing, checking pockets, removing shoes and jackets, etc. – must be particularly careful about following the Draft GBV Principles. For example, the CBSA should

²⁴ International Human Rights Program, "We Have No Rights: Arbitrary imprisonment and cruel treatment of migrants with mental health issues in Canada", *University of Toronto*, (May 2015), online: <https://ihrp.law.utoronto.ca/We_Have_No_Rights>; Brian Stauffer, "I Didn't Feel Like a Human in There", *Human Rights Watch* (2021) at 67-68, online <https://www.hrw.org/report/2021/06/17/i-didnt-feel-human-there/immigration-detention-canada-and-its-impact-mental#_ftn11>.

²⁵ BC Civil Liberties Association & Canadian Civil Liberties Association, "Joint Letter from the BCCLA and CCLA Calling on Federal Government to end all CBSA Immigration Detention Agreements", (21 November 2022), online: <<https://bccla.org/policy-submission/joint-letter-from-the-bccla-and-ccla-calling-on-federal-government-to-end-all-cbsa-immigration-detention-agreements/>>.

ensure that its officers respect people's preferences regarding same-gender searchers, religious clothing such as hijabs and turbans, and gender-affirming items like wigs and packers.

These concerns regarding personal searches will also apply to searches of personal belongings, such as purses, wallets, and carry-on bags. Such items generally contain highly intimate belongings, such as personal identification, medications, cherished mementos, bank and credit cards, menstrual products, and condoms. Searching these personal belongings without a trauma-informed approach is likely to create traumatic and negative interactions between CBSA employees and passengers.

c. Electronic Devices

As the law currently stands, CBSA employees have broad powers to seize and search people's electronic devices, including laptops, cellphones, and tablets. The CBSA already has guidelines that encourage officers to use only a cursory surface-level search of electronic devices when they have no reason for suspicion. However, CBSA officers can still look at email accounts, texts, photos, and videos, and have the authority to conduct deeper searches at their discretion.²⁶ CBSA officers have also arrested people for refusing to disclose their passwords, which is both traumatizing and legally questionable.²⁷

The Supreme Court of Canada has repeatedly affirmed that our personal electronic devices carry special protections, given the highly private, intimate, and invasive nature of the data collected on these devices. As the Supreme Court of Canada explained in *Fearon*:

It is unrealistic to equate a cell phone with a briefcase or document found in someone's possession at the time of arrest. As outlined in *Vu*, computers — and I would add cell phones — may have immense storage capacity, may generate information about intimate details of the user's interests, habits and identity without the knowledge or intent of the user, may retain information even after the user thinks that it has been destroyed, and may provide access to information that is in no meaningful sense "at" the location of the search: paras. 41-44.²⁸

An individual's decision not to password protect his or her cell phone does not indicate any sort of abandonment of the significant privacy interests one generally will have in the contents of the phone [...] Cell phones — locked or unlocked — engage significant privacy interests.²⁹

Given the significance of these privacy interests, it is essential that the CBSA restrict its searches of electronic devices and ensure that these searches are not done by routine. It is also essential

²⁶ BCCLA, CIPPIC, & Greg McMullen, *Electronic Devices Privacy Handbook* (2018): British Columbia Civil Liberties Association, online: <https://bccla.org/wp-content/uploads/2018/07/Electronic-Devices-Privacy-Handbook-BCCLA_2018.pdf> at p. 18.

²⁷ Brett Ruskin, "Alain Philippon pleads guilty over smartphone password border dispute" *CBC News* (15 August 2016), online: <<http://www.cbc.ca/news/canada/nova-scotia/alain-philippon-to-plead-guilty-cellphone-1.3721110>>.

²⁸ *Fearon*, *supra* note 19 at para 51.

²⁹ *Ibid* at para 53.

that CBSA employees pay attention to the Draft GBV Principles and act in a trauma-informed manner when searches of electronic devices prove to be necessary.

It may not be immediately intuitive for CBSA employees to consider the Draft GBV Principles when searching or confiscating electronic devices, and yet these devices carry highly personal and intimate information. Cellphones and electronic devices can record deeply personal conversations, such as between family members, or between a person and their therapist. They may hold medical information and psychiatric records, intimate photographs or videos. People may also use these devices for consensual sexual activity. As such, there is a high potential for traumatic or gendered experiences when CBSA officers search these devices. For this reason, we draw the CBSA's attention to the importance of applying the Draft GBV Principles in these circumstances.

Thank you again for inviting the BCCLA's comment on the CBSA's laudable efforts to address gender-based violence. We would welcome the opportunity to provide further comment on future revisions of the Draft GBV Principles.