

The Current Law Governing the Search of Electronic Devices at the Canadian Border

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INTRODUCTION

A client calls you. She's taking a trip to the United States on business in a few weeks. She will be travelling with a personal cell phone and a work laptop, both of which contain significant amounts of both personal and business information, including access to social media accounts, emails, photos and working documents. Specifically, she asks you whether Canadian border guards have the right to search her electronic devices¹ and, if so, under what circumstances. What do you tell her?

Under the current state of the law, your advice should be as follows:

- Searches of electronic devices are considered “routine.” Legally, they are treated as the same as a search of a suitcase or handbag. As such, these searches attract no constitutional protection.
- Border guards have the right to search any electronic device on a suspicion-less basis, meaning there is no requirement that they have reasonable grounds to believe a traveller is contravening the *Criminal Code* or any other Act of Parliament.
- Because these searches are considered routine, they do not constitute a detention within the meaning of ss. 9 and 10 of the *Charter*. An individual traveller does not have a right to call a lawyer to get legal advice prior to the search being conducted.
- The *Customs Act* also dictates that any individual seeking entry into Canada is legally compelled to truthfully answer all questions put to them by a border guard. This includes requests for passwords to access electronic devices. Failure to do so is a contravention of the *Customs Act* and may result in charges.
- If contraband is found during a search of an electronic device at the border, it will result in an enforcement ban. If what is found is illegal under the *Criminal Code*, the RCMP will be contacted, their electronic device will be seized pending an application for a search warrant, and criminal charges may result.

So, the advice you give your client should be not to travel with anything they wouldn't want a peace officer to see. The best practice is to travel with a “clean” cell phone or laptop and to leave electronic devices containing or capable of accessing personal information at home. There is

¹ For the purposes of this paper, we will use the term “electronic device” to refer to any personal device capable of storing data and accessing the Internet, including *inter alia* cell phones, laptops, and tablets.

effectively no *Charter* protection for the contents of electronic devices when crossing the border and virtually no possibility of after-the-fact judicial review of an individual border guard's grounds to search them.

At the time of this writing, there is a constitutional challenge to this search power before the Honourable Justice Belzil of the Alberta Court of Queen's Bench. The court's decision is scheduled for 21 May 2018. As such, it is entirely possible the legal regime as described below may be substantially altered by the time these seminars take place. That said, it may remain the same.

What follows is a comprehensive look at the law governing the search of electronic devices at the Canadian border. It will become evident that this remains one area of the law of search and seizure that has not been updated to correspond with the rapid technological advances in personal computing technology over the past 30 years. It would have been unfathomable to the framers of the *Charter* that by 2018 almost every individual would be walking around with a wallet-sized personal computer in their pocket: a computer capable of accessing all of their most sensitive personal and professional information with a few swipes of a finger.

The law often struggles to adapt to rapid social change and this is one area where that struggle is obvious. While change may be forthcoming, it is not inevitable. As it stands, the border is the one place where an individual risks a wide and sweeping search of their most personal information without any prior justification by the state. You must keep this in mind when advising your clients.

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The current law governing the search of electronic devices at the border is relatively straightforward. Section 99(1)(a) of the *Customs Act*, RSC 1985, c 1 (2nd supp), provides the legal authority for border services officers to search a traveller's electronic devices. That provision reads as follows:

99. (1) An officer may

(a) at any time up to the time of release, examine any goods that have been imported and open or cause to be opened any package or container of imported goods and take samples of imported goods in reasonable amounts;

99. (1) L'agent peut :

a) tant qu'il n'y a pas eu dédouanement, examiner toutes marchandises importées et en ouvrir ou faire ouvrir tous colis ou contenants, ainsi qu'en prélever des échantillons en quantités raisonnables;