



**Submission of the  
Federation of Law Societies of Canada  
to the  
Senate of Canada  
Standing Committee on  
National Security and Defence**

***Bill S-7  
An Act to amend the Customs Act and the  
Preclearance Act, 2016***

**Ottawa, May 27, 2022**

## **Introduction**

1. The Federation of Law Societies of Canada (the “Federation”), on behalf of its member law societies, appreciates the opportunity to provide comments to the Senate of Canada’s Standing Committee on National Security and Defence on Bill S-7, *An Act to amend the Customs Act and the Preclearance Act, 2016* (“Bill S-7” or the “bill”), introduced by the Hon. Marc Gold, Government Representative in the Senate, on March 31<sup>st</sup>, 2022.
2. The Federation is the coordinating body of the 14 regulators of the legal profession in Canada. Our member law societies are charged by legislation in each province and territory with the responsibility for regulating more than 136,000 lawyers, 4,200 notaries in Quebec and Ontario’s nearly 10,600 licensed paralegals in the public interest. An important role of the Federation is to express the views of the law societies on national and international issues relating to the administration of justice and the rule of law. This includes an established practice of advocating for robust protection of solicitor-client privilege.
3. It is the Federation’s position that sections of Bill S-7 are unconstitutional to the extent that they fail to provide adequate protection for solicitor-client privileged information in searches of personal digital devices (“PDDs”) of legal professionals<sup>1</sup> by the Canada Border Services Agency’s (“CBSA”) Border Service Officers (“BSOs”). Further, the proposed legal test of “general reasonable concern” has no precedent in Canadian legislation and establishes a lower threshold than for other searches under the *Customs Act* and the *Preclearance Act, 2016*. The lack of clarity in the legislation, including the new untested legal standard, combined with greater latitude for BSOs to search digital devices relative to other items creates confusion and enhances the likelihood of breaches of information protected by solicitor-client privilege. While the Federation understands the need for measures to regulate the importing and exporting of goods at the Canadian border, they must not come at the expense of fundamental rights and freedoms.
4. The Federation submits that amendments to Bill S-7 are necessary to ensure that the protection of solicitor-client privilege is as close to absolute as possible in accordance with Supreme Court of Canada jurisprudence. measures

## **Background**

5. The government introduced Bill S-7 in response to the Alberta Court of Appeal’s decision in the companion cases of *R. v. Canfield* and *R. v. Townsend*.<sup>2</sup> The court held that the search provisions under paragraph 99(1)(a) of the *Customs Act*, which do not impose limits on when and how BSOs may search PDDs, violate the Charter’s protections against unreasonable search. This decision followed longstanding criticism that the search regime in the legislation as it applies to digital devices is inappropriate and outdated.<sup>3</sup>

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<sup>1</sup> Lawyers, Quebec notaries and licensed paralegals.

<sup>2</sup> Cited as *R. v. Canfield*, 2020 ABCA 383 (CanLII).

<sup>3</sup> For example, see Canadian Privacy Commissioner, *Crossing the line? The CBSA’s examination of digital devices at the border* (October 19, 2019):

[https://priv.gc.ca/en/opc-actions-and-decisions/investigations/investigations-into-federal-institutions/2018-19/pa\\_20191021\\_cbsa?wbdisable=true](https://priv.gc.ca/en/opc-actions-and-decisions/investigations/investigations-into-federal-institutions/2018-19/pa_20191021_cbsa?wbdisable=true).

6. The Federation has closely monitored and made submissions to the government on the issue of searches of PDDs by BSOs and the potential for breaches of solicitor-client privilege. In letters to the Minister of Public Safety dated April 20, 2018 and May 21, 2019, the Federation expressed concerns that CBSA policy failed to provide adequate protection for solicitor-client privilege particularly in relation to the devices of legal professionals.
7. On April 14, 2022, the Federation made submissions to the CBSA on its proposal to create regulations under the *Customs Act* that would “prescribe requirements for conducting examinations of personal digital devices by designated CBSA officers”.<sup>4</sup> According to the CBSA, the regulations would not propose any policy changes but “only enshrine existing policy into regulation” including the “handling of solicitor client privilege information”. CBSA’s stated intention is for these regulations to come into force at the same time as Bill S-7. The CBSA policy— proposed to be enshrined in the regulations – only limits searches of information explicitly “marked” as privileged. This policy violates the *Charter of Rights and Freedoms*<sup>5</sup> by providing inadequate protections for solicitor-client privileged information contained on PDDs.

### **The Law of Solicitor-Client Privilege**

8. The Supreme Court of Canada has confirmed that solicitor-client privilege is a substantive right, afforded “quasi-constitutional” protection.<sup>6</sup> The Supreme Court has recognized solicitor-client privilege as a principle of fundamental justice, of supreme importance in Canadian law, and essential to the rule of law.<sup>7</sup> Solicitor-client privilege must be as close to absolute as possible in recognition of the high public interest in maintaining the confidentiality of the solicitor-client relationship.<sup>8</sup> Unlike other privacy interests, solicitor-client privilege does not involve a balancing of interests on a case-by-case basis.<sup>9</sup> The Supreme Court has also made it clear that any infringement on solicitor-client privilege must be justified by an absolute necessity<sup>10</sup> and must minimally impair the privilege.<sup>11</sup>

<sup>4</sup> CBSA, *Customs Notice 22-07: Regulations for the Examination of Documents Stored on Personal Digital Devices Made Pursuant to the Customs Act*.

<sup>5</sup> Section 8 of the Charter guarantees that: Everyone has the right to be secure against unreasonable search and seizure.

<sup>6</sup> *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 (CanLII) (“*University of Calgary*”), *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7 (CanLII), *Canada (Privacy Commissioner) v. Blood Tribe Department*, 2008 SCC 44 (CanLII) (“*Blood Tribe*”), *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, *R v. Fink*, 2002 SCC 61 (CanLII) (“*Lavallee*”).

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ontario (Public Safety and Security) v. Criminal Lawyers’ Association*, 2010 SCC 23 (CanLII) at para. 53.

<sup>9</sup> *Blood Tribe* at para. 9.

<sup>10</sup> For instance, solicitor-client privilege does not exist where a court determines the existence of a “criminal purpose” including, for example, importing illegal written material such as child pornography. There is also caselaw that the privilege may be waived in rare circumstances where there is an imminent threat to public safety or the innocence of a client is at stake. It is important to underscore that it is Court that must make this determination.

<sup>11</sup> *University of Calgary* at para. 68.

9. Where an individual faces the power of the state and their liberty may be at stake, such as under the *Customs Act*,<sup>12</sup> preserving solicitor-client privilege takes on additional importance. The Supreme Court has held that solicitor-client privileged information is out of reach for the state and that investigative necessity, criminal or otherwise, does not move the information within its reach.<sup>13</sup> There has been no case law to suggest there is a reduced expectation of privacy for solicitor-client privileged information at the border.
10. Solicitor-client privilege applies to confidential communications pertaining to legal advice within the solicitor-client relationship. The privilege belongs to the client; the legal professional is the trustee of that privilege. Legal professionals are duty-bound to protect their client's privileged information in accordance with their professional ethical obligations and are not permitted to disclose solicitor-client privileged information without their client's informed consent or as ordered by a court.<sup>14</sup> Further, the privilege exists whether the client asserts a claim of privilege and regardless of whether the materials in the legal professional's possession are marked as "privileged".

### **The Law on Searching Legal Professionals' Personal Digital Devices**

11. In *Lavallee v. Canada (Attorney General)*, the Supreme Court outlined guiding principles<sup>15</sup> that apply to searches of law offices to ensure constitutional protection of solicitor-client privileged information, which the courts have held to apply to "any place where privileged documents may reasonably be expected to be located."<sup>16</sup> In other words, the guiding principles apply to any context where solicitor-client privilege is a live issue and is possibly vulnerable to breach.<sup>17</sup> The Courts have recognized that this includes a legal professional's personal electronic devices, including mobile devices.<sup>18</sup> In *Festing v. Canada*, the British Columbia Court of Appeal stated that the definition of "law office" in the guiding principles:

...would include, for example, a lawyer's home, a lawyer's office in multidisciplinary business premises; the office of in-house counsel for a business, and storage facilities where lawyers store their files. The Court offers these examples as just that — examples of places where the *Lavallee* guidelines would apply. Counsel agree that there is little utility in attempting to define all such places since the practice of law, and the manner in which lawyers' store client information (for example, on computer hard drives and disks), continue to expand and diversify.<sup>19</sup>

<sup>12</sup> *Customs Act*, s. 160(1). Persons guilty of a summary offence may be imprisoned for up to six months, or for up to five years for if guilty of an indictable offence.

<sup>13</sup> *Lavallee* at paras. 24 and 36.

<sup>14</sup> See also note 10 above.

<sup>15</sup> See Appendix A. The guidelines establish restrictions that govern both the search authorization process and the general manner in which the search must be carried out.

<sup>16</sup> *Festing v. Canada (Attorney General)*, 2003 BCCA 112 (CanLII) at para. 24 ("*Festing*").

<sup>17</sup> *R. v. Rudolph*, 2017 NSSC 334 (CanLII) at para. 10. See also *R. v. A.B.*, 2014 NLCA 8 (CanLII).

<sup>18</sup> *R. v. A.B.* at para. 39. The Newfoundland and Labrador Court of Appeal speaking in the context of a criminal case held that mobile telephones "are now an essential tool to criminal lawyers permitting remote service to clients with this virtual office. ...[T]here is no substantive difference between a lawyer's office phone and residential phone, especially when mobile devices dominate business and domestic communications regardless of location."

<sup>19</sup> *Festing* at para. 24. Since the court's decision in 2003, the practice of law has continued to evolve. Digital tools and devices, including mobile devices such as laptops, tablets and smartphones, have

12. The broad scope of the *Lavallee* guiding principles is necessary to ensure that the protection of solicitor-client privilege is as close to absolute as possible as required by the Supreme Court. The Federation states that the guiding principles would apply to a legal professional's PDD during a search by a BSO where a claim of solicitor-client privilege has been made. The claim may be communicated verbally or in writing.
13. The Supreme Court has also held that in disputes over whether information or documents are indeed protected by solicitor-client privilege, the proper recourse is to the courts.<sup>20</sup>

### **Statutory Amendments are Required to Clarify Solicitor-Client Privilege Protections**

14. The imperative of protecting solicitor-client privilege requires absolute clarity in the law. Bill S-7 fails to achieve that clarity, which creates greater confusion and the potential for violations of the privilege when combined with the existing CBSA policy that the government is proposing to enshrine into regulation. Amendments to the bill are necessary to bring clarity to the legislation and its implementation at the Canadian border.
15. The bill is silent on how solicitor-client privileged information is to be dealt with in the search of PDDs under the *Customs Act* and the *Preclearance Act, 2016*. The need for clear and consistent direction at all levels of legal authority, including in the statute, must be emphasized. It is not sufficient to deal with solicitor-client privilege protections in the regulations and policies as those are subject to change by the government. The importance of this is underscored by the fact that the current CBSA policy, which the government is proposing to enshrine into regulation, constitutes a clear violation of the *Lavallee* guiding principles. The policy purports to limit searches of information on PDDs only if the information is explicitly marked as solicitor-client privileged. According to the CBSA, its policy states:

*Solicitor-client privileged information*

*The CBSA is committed to respecting privacy rights while protecting the safety and security of the Canadian border. If a BSO encounters content **marked as solicitor-client privilege**, the officer must cease inspecting that document. If there are concerns about the legitimacy of solicitor-client privilege, the device can be set aside for a court to make a determination of the contents.*<sup>21</sup> (emphasis added)

16. As noted above, the law requires that the protection of solicitor-client privileged information be as near to absolute as possible. Limiting the protection to such information and

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become an integral part of contemporary legal practice. For example, see Amy Salyzyn, et al. *Legal Ethics in a Digital Context*, Canadian Bar Association (June 23, 2021).

<https://www.cba.org/getattachment/Sections/Ethics-and-Professional-Responsibility-Committee/Resources/Resources/Legal-Ethics-in-a-Digital-Context/LegalEthicsInaDigitalContext.pdf>.

<sup>20</sup> *Attorney General v. Law Society*, 2010 ONSC 2150 per Hennessy J. of the Superior Court of Justice at para. 27, "...the court retains control over the entire process of the unsealing of material seized from a law office or subject to solicitor-client privilege". "[A]t the stage where the material must be reviewed to determine whether it contains solicitor-client privilege, the court controls this process."

<sup>21</sup> CBSA, *Examining Digital Devices at the Canadian border*, <https://www.cbsa-asfc.gc.ca/travel-voyage/edd-ean-eng.html>.

documents as are explicitly labelled “privileged” falls well short of this requirement. At a minimum, searches of a legal professional’s PDD ought to be halted immediately when there is a claim, verbal or in writing, that such a device or its contents are protected by solicitor-client privilege.

17. Bill S-7 should be amended to codify the law outlined in the *Lavallee* guiding principles to be applied to searches of legal professionals’ PDDs at the border as locations “where privileged documents may reasonably be expected to be located”. For instance, following the *Lavallee* guiding principles, the legislation should require that materials subject to a claim of solicitor-client privilege must be sealed and reviewed independently by the court<sup>22</sup> to verify the legitimacy of the claim. In fact, the CBSA’s current policy contemplates the need for review by the court when there are “concerns” about the privilege claim (except that the policy improperly applies only to content marked as solicitor-client privilege). The Federation notes that there are precedents in federal legislation for codifying the process for handling information that is the subject of a claim of solicitor-client privilege.<sup>23</sup>

### **The Proposed New Standard for Searching Devices is an Additional Threat to Privilege**

18. As noted above, Bill S-7 proposes a new legal test of “reasonable general concern” for authorizing a search of a PDD, including the device of a legal professional. The Federation has serious concerns about this standard. The standard will result in confusion and potential additional threats to information protected by solicitor-client privilege. We note that the standard is a departure from the “reasonable grounds to suspect” standard used elsewhere in the *Customs Act*.<sup>24</sup> Indeed it appears to be without precedent in Canadian federal legislation. Without established case law, it is unclear what would constitute a “reasonable general concern” or whether it establishes a meaningful standard at all.<sup>25</sup> Coupled with the failure to expressly articulate appropriate protections for solicitor-client privileged information, the uncertainty created by this new standard increases the risks to the privilege.
19. The standard also appears to set a lower threshold for searching PDDs than for other goods making it relatively easier for BSOs to search these devices. For instance, to lawfully open imported mail under the *Customs Act*, a BSO must “suspect on reasonable grounds” that the mail contains prohibited, controlled or regulated goods.<sup>26</sup> Applying the lower standard of “reasonable general concern” would grant BSOs significant authority to search PDDs and may also signal to BSOs that a lower privacy interest exists in these devices compared to other forms of searches permitted by the *Customs Act* and *Preclearance Act, 2016*.
20. The uncertainty of the proposed novel legal standard, and the lower threshold it would establish, creates greater potential for violations of solicitor-client privilege as there may be no meaningful impediment to the search of legal professionals’ PDDs (including the

<sup>22</sup> Or a lawyer appointed by a law society. See Appendix A.

<sup>23</sup> See, for example, section 19 of the *Competition Act* (R.S.C., 1985, c. C-34).

<sup>24</sup> See *Customs Act*, s.99(1)(b).

<sup>25</sup> See Ian Burns, “No satisfactory explanation why law on cellphone searches at border has not been introduced: court”, *Lawyer’s Daily* (May 2, 2022), <https://www.thelawyersdaily.ca/articles/35583/no-satisfactory-explanation-why-law-on-cellphone-searches-at-border-has-not-been-introduced-court>.

<sup>26</sup> *Customs Act*, s.99(1)(b).

inadequate protections under the proposed regulations that would only limit searches on content explicitly marked “privileged”).

## **Conclusion**

21. The protection of solicitor-client privilege must be as close to absolute as possible. This requires that BSOs and other agents of the state be prohibited from accessing solicitor-client privileged information on a legal professional's PDD except with the express consent of the holder of that privilege, the client, or as ordered by a court.<sup>27</sup>
22. The bill must be amended to set out constitutionally compliant measures in line with the *Lavallee* guiding principles when a claim of solicitor-client privilege is asserted over a legal professional's PDD or its content during a border search under the *Customs Act* or the *Preclearance Act, 2016*.
23. While it will be for Parliament to determine the appropriate language for any amendments, the Federation would welcome the opportunity to provide input and expand on the issues raised in this submission to assist in ensuring that the legislation provides adequate protection for solicitor client privilege.

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<sup>27</sup> The rare exceptions are outlined above at note 10.



## Appendix A

### Lavallee guiding principles

1. *No search warrant can be issued with regards to documents that are known to be protected by solicitor-client privilege.*
2. *Before searching a law office, the investigative authorities must satisfy the issuing justice that there exists no other reasonable alternative to the search.*
3. *When allowing a law office to be searched, the issuing justice must be rigorously demanding so to afford maximum protection of solicitor-client confidentiality.*
4. *Except when the warrant specifically authorizes the immediate examination, copying and seizure of an identified document, all documents in possession of a lawyer must be sealed before being examined or removed from the lawyer's possession.*
5. *Every effort must be made to contact the lawyer and the client at the time of the execution of the search warrant. Where the lawyer or the client cannot be contacted, a representative of the Bar should be allowed to oversee the sealing and seizure of documents.*
6. *The investigative officer executing the warrant should report to the justice of the peace the efforts made to contact all potential privilege holders, who should then be given a reasonable opportunity to assert a claim of privilege and, if that claim is contested, to have the issue judicially decided.*
7. *If notification of potential privilege holders is not possible, the lawyer who had custody of the documents seized, or another lawyer appointed either by the Law Society or by the court, should examine the documents to determine whether a claim of privilege should be asserted, and should be given a reasonable opportunity to do so.*
8. *The Attorney General may make submissions on the issue of privilege, but should not be permitted to inspect the documents beforehand. The prosecuting authority can only inspect the documents if and when it is determined by a judge that the documents are not privileged.*
9. *Where sealed documents are found not to be privileged, they may be used in the normal course of the investigation.*
10. *Where documents are found to be privileged, they are to be returned immediately to the holder of the privilege, or to a person designated by the court.*