



BY EMAIL

April 20, 2018

The Honourable Ralph Goodale
Minister of Public Safety
House of Commons
Ottawa, Ontario
Canada
K1A 0A6

Re: Border searches of electronic devices and the preservation of solicitor-client privilege

Dear Minister Goodale,

I am writing to express concern about the Canadian Border Service Agency's policy on electronic devices for travelers returning home to Canada, and in particular, the policy's effect on legal counsel who cross the border with electronic devices. I note that these concerns were raised with your ministry by the Law Society of British Columbia in May 2017, and the Federation of Law Societies of Canada endorses and agrees with the content of that correspondence.

The Federation is the national coordinating body of Canada's 14 law societies, which are mandated by provincial and territorial statutes to regulate the country's 120,000 lawyers, Quebec's 3,800 notaries and Ontario's nearly 9,000 licensed paralegals in the public interest. Communicating the views of the governing bodies of the legal profession, the Federation is a leading voice on national issues critical to safeguarding the public's right to an independent legal profession, the protection of solicitor-client privilege and other issues relating to the administration of justice and the rule of law.

Our concerns revolve around your government's interpretation of "goods" under the *Customs Act*, which seems to encompass electronic devices and the media contained on it, and the CBSA policy guiding its officers' examination of electronic devices. CBSA officers are permitted, under the policy, to request passwords to electronic devices if there is a multiplicity of indicators that *Customs Act* contraventions may be found on the digital device or media. There is no mention of how CBSA officers should conduct themselves in the event a claim of solicitor-client privilege is asserted over the device or media; instead, the policy requires CBSA officers to explain their reasoning in the event of proceeding with a search.

As you can appreciate, this gap in policy presents significant uncertainty for legal counsel travelling back to Canada with electronic devices. In the months since the Law

Society of British Columbia's correspondence to your ministry, others have raised similar concerns about the CBSA policy, with the Standing Committee on Access to Information, Privacy and Ethics recommending in their December 2017 report that both the CBSA policy and the *Customs Act* be amended so that electronic devices are not examined without reasonable grounds. It is the Federation's position that the CBSA policy should also be revised to set out constitutionally compliant steps for CBSA agents to take when a claim of solicitor-client privilege is asserted over an electronic device, or its media.

As unequivocally stated on a number of occasions by the Supreme Court of Canada, solicitor-client privilege must be as close to absolute as possible to ensure that clients communicate openly and confidently with their legal counsel.¹ The sanctity of solicitor-client privilege requires any incursions to minimally impair the privilege, and the Supreme Court has also made it eminently clear that any infringement on solicitor-client privilege must be justified by an absolute necessity. The Supreme Court viewed recourse to the courts as the appropriate resolution to disputes over solicitor-client privilege, and characterized solicitor-client privilege as a fundamental right essential to the rule of law. Given that existing CBSA policy is silent on claims of solicitor-client privilege, it leaves CBSA officers with ambiguous instructions on how to proceed, and creates tremendous risk for clients whose lawyers or notaries travel with these materials in electronic form on their portable electronic devices. We thus urge you to revise the policy so that it reflects the safeguards and constitutionally-compliant procedures that solicitor-client privileged information requires.

We thank you for taking the time to consider these submissions. The Federation would welcome an opportunity to engage with your ministry further regarding these important matters.

Yours sincerely,



Sheila MacPherson
President

¹ *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 (CanLII), *Canada (Privacy Commissioner) v. Blood Tribe Department*, 2008 SCC 44 (CanLII).