



May 1, 2017

Sent via email and post

The Honourable Jody Wilson-Raybould
Minister of Justice and Attorney General of Canada
House of Commons
Ottawa, ON K1A 0A6

The Honourable Ralph Goodale
Minister of Public Safety
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Herman Van Ommen, QC
President

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Dear Sir/Madam:

Re: Search of Lawyers' Electronic Devices by Border Agents

We write in connection with reports that Canada Border Service Agents have been seeking the production of passwords to electronic devices for people crossing the border into Canada.

We are concerned about the application of this course of action insofar as it may relate to lawyers who cross the border with electronic devices and in particular as to whether it could have a detrimental effect on solicitor-client privilege.

We understand that the authority on which this action is based is s. 99 of the *Customs Act*. That section does not specifically authorize access to privileged goods or documents. As the Supreme Court of Canada has made clear, solicitor-client privilege is a principle of fundamental justice and is a civil right of supreme importance in Canadian law. Its protection must be as close to absolute as possible. A general authorization power in a statute does not, absent specific statutory language to the contrary, authorize access to privileged information. Even with specific language, the authorization to access privileged information must be absolutely necessary and must no more than minimally impair the privilege.

We therefore believe that any demand by border service agents for the production of a password to a lawyer's electronic device, which would be expected to contain privileged or confidential information, is not authorized by s. 99 of the *Customs Act*. There is no statutory authorization for access to privileged information in that section. Moreover, a lawyer's electronic device would, in our opinion, constitute a "law office" as that term was defined by the Court of Appeal for British Columbia in *Canada (Attorney General) v. Festing* 2003 BCCA 112. Consequently, the principles addressed in cases such as *Lavallee, Rackel & Heinz v. Canada (Attorney General)* [2002] 3 S.C.R. 209 must be brought into consideration.

We therefore seek your assurance that border service agents will not seek to obtain passwords from lawyers to their electronic devices when crossing the border into Canada. If such a request is made and a lawyer refuses it, we seek your assurance that border agents will not confiscate the electronic device or otherwise detain the lawyer. By refusing access to the password, the lawyer is only discharging his or her professional obligations as required by the various codes of professional conduct across the country (for example, in British Columbia these are found in Rule 3.3-2.1 of the *Code of Professional Conduct for British Columbia*).

For your reference, we also note that the US Customs and Border Protection Inspection of Electronic Devices policy states that:

In conducting border searches, CBP officers strictly adhere to all constitutional and statutory requirements, including those that are applicable to **privileged**, personal, or business confidential information.

[Emphasis added]

Conversely, Canada Border Service Agency Operational Bulletin PRG-2015-31 provides no such assurance respecting searches by Canadian border agents. We urge you to amend that document accordingly. Moreover, given the vast number of bi-directional border crossings, we urge you to consult with US Customs and Border Protection to coordinate a uniform, bilateral approach to safeguarding privileged electronic communications at border crossings between Canada and the United States.

Yours truly,



Herman Van Ommen, QC
President