

CAUT Briefing Note

Supplement to 2005 CAUT Travel Advisory

The June 2005 CAUT Travel Advisory on Travel to the United States considers traveler rights at land border entry points to the US as well as in preclearance to the US at applicable Canadian airports. The preclearance review was based on the 1999 *Preclearance Act*.

In March 2015, Canada and the United States signed the *Agreement on Land, Rail, Marine, and Air Transport Preclearance*, which required new legislation to be implemented in both countries. The Canadian legislation is the *Preclearance Act*, Bill C-23, introduced in the House of Commons in June 2016. As of October 2017, the bill is at second reading in the Senate. The United States legislation implementing the *Agreement* was passed by Congress in December 2016.

To date, discussion of Bill C-23 has largely focused on the enhanced powers under Part 1 accorded to United States Custom and Border Protection (CBP) officers in preclearance zones located in Canada. Other concerns have arisen over the new Part 2 provisions that refer to Canada Border Services Agency (CBSA) officers operating in any preclearance zones set up by Canada at US locations in the future.

Recent controversies at points of entry to both Canada and the United States have triggered concerns over the exercise of powers by officers of the respective border agencies. For CAUT members, reports that border agents are demanding access to electronic devices such

as laptops, notepads and cell phones raise particular concerns over the protection of research confidentiality and exercise of academic freedom.

While the powers now being exercised by border officials in both Canada and the United States may not be new, they are being newly exercised. This document supplements the 2005 Travel Advisory in light of preclearance procedures now being applied, and those that may be applied following passage of Bill C-23.

Travelling to Canada

The Office of the Privacy Commissioner of Canada provides the following statement in respect to the inspections and searches of electronic devices at Canadian points of entry:

At border controls, Canada Border Services Agency (CBSA) officers have widespread powers to stop and search people, and examine their baggage and other possessions including devices such as laptops and smartphones. Under Canada's "Customs Act," these activities may be conducted without a warrant.

Canadian courts have generally recognized that people have reduced expectations of privacy at border points. In this context, privacy and other Charter rights continue to apply but are limited by state imperatives of national sovereignty, immigration control, taxation and public safety and security. To our knowledge, the Canadian courts have not yet ruled on whether a border officer can compel a person to turn over their password so that their electronic device may be searched at a border crossing.

While the law is unsettled, CBSA policy states that examinations of personal devices should not be conducted as a matter of routine; such searches may be conducted only if there are grounds or indications that “evidence of contraventions may be found on the digital device or media.”

If your laptop or mobile device is searched, it should be searched in line with this policy and you will likely be asked to provide your password. According to the policy, officers may only examine what is stored within a device, which includes, for example, photos, files, downloaded e-mails and other media. Officers are advised to disable wireless and internet connectivity, limiting access to any data stored external to the device, for instance, on social media or in a cloud. If you refuse to provide your password, your device may be held for further inspection.¹

The above statement reflects the relevant CBSA directives and policies, except to note that the powers of CBSA officers flow not just from the *Customs Act* but also from the *Immigration and Refugee Act*. Thus, in respect to searches of electronic devices, CBSA officers may rely on the *Customs Act* if the concerns relate to potential customs violations, or the *Immigration and Refugee Act* if the concerns relate to identify and/or threats to security.²

A refusal to provide a password to access an electronic device may result in the device being held by CBSA, but not the arrest of the person failing to cooperate. That said, in August 2016, a Quebec resident was convicted and fined \$500 for obstructing border officials in refusing to give up his smartphone password on re-entry to Canada at the Halifax airport. The charges were brought under the *Customs Act* and CBSA concerns were evidently related to goods that the individual may have seeking to bring into Canada.³ Nonetheless, as the defendant pled guilty, there was no trial, nor any ruling on the issue as to whether CBSA officers do indeed have

the authority to require travelers to provide passwords to electronic devices such as cell phones.⁴

It should be noted that the CBSA *Operational Directive* emphasizes that a request to search an electronic device and/or demand a password should be performed “with as much respect for the traveler’s privacy as possible, considering that these examinations are usually more personal in nature than baggage examinations.”⁵ Further, the power to examine an electronic device does not extend to accessing links to information not actually downloaded on the device. Indeed, CBSA officers are instructed to immediately put the device into “airplane” mode on initial access.

For academics, however, the claimed powers to examine the contents of a laptop, notebook or cell phone suggests that keeping research information on electronic devices may create a risk that such information will be reviewed at a Canadian port of entry. This is without considering what access an American border official may have already had to the data if the owner of the device is returning to Canada from travel to the United States (or indeed other countries).

Travel to the United States

Issues with respect to travel to the US extend beyond inspection and search of electronic devices, given the recent Executive Orders of the President of the United States and the apparent application of a heightened ethnic and religious screening process by CBP officers despite the injunctions against the implementation of those Orders.

The recommendation to avoid having confidential information on an electronic device when seeking entry to the US is bolstered by the apparently more liberal application of purported search powers by US Custom and Border Protection officers.⁶

1. “Your privacy at airports and borders: Custom Searches,” *Public safety and law enforcement*, Office of the Privacy Commissioner of Canada, 2016, Web.
 2. “Operational Bulletin: PRG-2015-31: Examination of Digital Devices and Media at the Port of Entry – Interim Guidelines,” British Columbia Civil Liberties Association, 2015, Web. See page 3-6 of the PDF.
 3. Ruskin, Brett. “Alain Philippon pleads guilty over smartphone password border dispute,” *CBC News: Nova Scotia*, 2016, Web.

4. Bailey, Sue. “Border phone search raises privacy, charter issues, say lawyers.” *CBCNews: Nova Scotia*. 2016. Web.
 5. See “Actions required by CBSA officers” on page 2 of “Operational Bulletin: PRG-2015-31.”
 6. Greenberg, Andy. “A Guide to Getting Past Customs with your Digital Privacy Intact,” *Wired*, 2017, Web.

Further, unlike the Canadian practice, CBP officers may ask for passwords not just to access the electronic device but also to access external sites linked to the device such as social media or websites. The scope for privacy intrusion is thus even more extensive.⁷

There is really no effective legal way for a Canadian resident to challenge the exercise of CBP officer powers at a US point of entry. The outcome for a failure to cooperate is likely to be turned away at the border — perhaps without the electronic device in question.

7. Waddell, Kaveh. "Give Us Your Passwords," *The Atlantic*, 2017, Web.