THE BARREAU DU QUÉBEC: COMMENTS AND OBSERVATIONS

Privacy and Personal Information Protection at Border Crossings and Airports

Submitted to the House of Commons Standing Committee on Access to Information, Privacy and Ethics

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To ensure the protection of the public, the Barreau du Québec oversees professional legal practice, promotes the rule of law, enhances the image of the profession and supports members in their practice.

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INTRODUCTION

The House of Commons Standing Committee on Access to Information, Privacy and Ethics has recently undertaken a study on the privacy of Canadians at airports, borders and travelling in the United States. The Barreau du Québec is pleased to provide its comments.

Since the principal mission of the Barreau de Québec is the protection of the public,[1] it requires us to take on a leading social role in promoting the primacy of the law, particularly through protecting and valuing human rights and freedoms. In that spirit, the Barreau du Québec is sharing with you its comments on the legal aspects inherent in the study.

1. GENERAL COMMENTS

Protecting personal information as an issue is taking on ever greater significance today, particularly with regard to electronic devices. The considerable amount of information they contain raises various questions, including with regard to human rights and freedoms. The *Canadian Charter of Right and Freedoms*[2] guarantees everyone the right to be secure against unreasonable search or seizure. It therefore protects the right to have a reasonable expectation of privacy.[3] The Supreme Court has defined the right to privacy as the right of the individual to determine when, how, and to what extent he or she will release personal information.[4]

In *R. v. Fearon,*[5] the Supreme Court emphasized the importance of digital devices, the information they contain and their impact on people's private lives:

> [101] The devices which give us this freedom also generate immense stores of data about our movements and our lives. Ever-improving GPS technology even allows these devices to track the locations of their owners. Private digital devices record not only our core biographical information but our conversations, photos, browsing interests, purchase records, and leisure pursuits. Our digital footprint is often enough to reconstruct the events of our lives, our relationships with others, our likes and dislikes, our fears, hopes, opinions, beliefs and ideas. Our digital devices are windows to our inner private lives.

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1 *Professional Code*, CQLR, ch. C-26, s. 23.
2 *Constitution Act, 1982,* Part 1 (Schedule B of the *Canada Act, 1982,* 1982, ch, 11 (U.K.), s. 8 (hereafter the Canadian Charter).
3 *R. v. Edwards* [1996] 1 SCR 128.
4 *R. v. Duarte* [1990] 1 SCR 30.
5 2014 SCC 77.

> [102] Therefore, as technology changes, our law must also evolve so that modern mobile devices do not become the telescreens of George Orwell's *1984*.

The Court has therefore found that a search of a cell phone has the potential to be a much more significant invasion of privacy than the typical search incident to arrest; it must be analyzed differently in order to determine if it is valid.[6]

However, there are places in which our expectation of privacy is less, such as at border crossings and airports. Most people, in fact, willingly submit to strict security checks when they are travelling to another country. The Supreme Court confirms this in *R. v. Simmons*:[7]

> 49 I accept the proposition advanced by the Crown that the degree of personal privacy reasonably expected at customs is lower than in most other situations. People do not expect to be able to cross international borders free from scrutiny. It is commonly accepted that sovereign states have the right to control both who and what enters their boundaries. For the general welfare of the nation the state is expected to perform this role. Without the ability to establish that all persons who seek to cross its borders and their goods are legally entitled to enter the country, the state would be precluded from performing this crucially important function. Consequently, travellers seeking to cross national boundaries fully expect to be subject to a screening process. (Our underlining)

However, this does not mean that travellers must give up all protection of their rights. The issue is to find a proper balance between providing effective security at airports and borders, and protecting privacy.

2. BILL C-23

Bill C-23[8] is currently being studied by the Senate after passage in the House of Commons. Its objective is to enact the Agreement on Land, Rail, Marine, and Air Transport Preclearance between the Government of Canada and the Government of the United States of America, to provide for the preclearance in each country of travellers and goods bound for the other country.

Currently, the *Preclearance Act*[9] (hereafter the "current Act") regulates the process of preclearance for air travel between the United States and Canada. This act will be rescinded and replaced by Bill C-23.

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[6] Ibid. para. 58.
[7] [1988] 2 SCR 495.
[8] *Bill C-23, An Act respecting the preclearance of persons and goods in Canada and the United States*. Debate on Second Reading – 20-09-2017, 42nd Parliament, 1st Session. (Can.).
[9] S.C. 1999, ch. 20.

In the bill, preclearance is defined as the exercise, by an American officer or a Canadian border services officer, of powers and the performance of duties and functions conferred on them under the laws of the United States or Canada in order to determine whether travellers or goods bound for the United States or Canada are admissible and, if applicable, to permit them to enter.[10] Preclearance therefore allows representatives of the country to which travellers are going to determine, before they arrive, whether they are allowed to enter.

The Barreau du Quebec considers that a number of aspects of Bill C-23 are likely to be of interest to the Standing Committee on Access to Information, Privacy and Ethics. As an example, the Bill makes it impossible for travellers to simply withdraw from the preclearance process,[11] whereas the current Act allows those who refuse to answer questions from preclearance officers to leave the preclearance area with no other formalities.[12] Moreover, the current Act specifically states that a refusal to answer any question asked by a preclearance officer does not constitute reasonable grounds for a search, or give rise to suspicion that a false or deceptive declaration has been made or that officers have been obstructed in the performance of their duties.[13]

These provisions do not appear in Bill C-23. This is a major change in the legislation, because it will no longer be possible for travellers simply to withdraw their applications to enter Canada or the United States. In fact, travellers will have to answer questions from officers about their reasons for desiring to leave the preclearance process.[14] This power is very much like a "fishing expedition" in order to discover the travellers' motivations.

The Barreau de Québec considers that these aspects are particularly troubling in terms of protecting personal information and privacy. Additionally, the Barreau du Québec recommends the inclusion of a provision to require an independent review of the legislation and of the way it has operated five years after it comes into force.[15]

3. LAWYER-CLIENT PRIVILEGE

Currently, the issue of professional secrecy is not addressed in the *Customs Act*[16] or in the current *Preclearance Act*. The Barreau du Québec is of the opinion that it is essential to ensure that the powers granted by the *Customs Act* and by Bill C-23 are exercised with due regard to professional secrecy, a principle of fundamental justice protected by section 7 of the Canadian Charter:

> The Court has held in the past that professional secrecy is a principle of fundamental justice within the meaning of s. 7 (*Lavallee, Rackel & Heintz v. Canada (Attorney General)*, 2002 SCC 61, [2002] 3 S.C.R. 209, at para. 49). It is

[10] Bill C-23, clauses 5, 10 and 46.
[11] Bill C-23, clause 55.
[12] Current Act, s. 16.
[13] Ibid. s. 16(3).
[14] Bill C-23, clauses 30 and 55.
[15] For the Barreau du Québec's full position, see the online brief on Bill C-23: https://www.barreau.qc.ca/pdf/medias/positions/20170505-memoire-pl-**c23**.pdf
[16] R.S.C., 1985, c. 1 (2nd Supp.) (Hereafter, the *Customs Act*).

> also a civil right of supreme importance in the Canadian justice system. Professional secrecy must thus remain as close to absolute as possible, and the courts must adopt stringent standards to protect it.[17]

In Quebec, professional secrecy is also protected in section 9 of the *Charter of Human Rights and Freedoms*[18] as well as in the *Professional Code*.[19] The professionals governed by the *Professional Code*, including lawyers, are required to respect professional secrecy. In addition the *Act Respecting the Barreau du Québec*[20] also addresses the issue and requires a lawyer to "keep absolutely secret the confidences made to him by reason of his profession,"[21] with the exception of those cases that are expressly provided for, such as when a lawyer is relieved therefrom by the person who made such confidences to him or where so ordered or expressly authorized by law. Professional secrecy belongs to the client, not to the lawyer, and only the client may waive it:

> The situation is very different when information protected by professional secrecy is involved. The nature of such information means that it cannot be disclosed by a notary or a lawyer in any regulatory context. Even if the information may be obtained from a third party or may be a type of information that taxpayers must regularly provide to the tax authorities, it is presumed to be protected by professional secrecy while in the hands of a notary or a lawyer and is therefore exempt from seizure (*Maranda*, at paras. 33-34). … We are therefore of the opinion that, with certain rare exceptions, the general rule is that information protected by professional secrecy that is in the possession of a legal adviser is immune from disclosure (*Foster Wheeler Power Co. v. Société intermunicipale de gestion et d'élimination des déchets (SIGED) inc.*, 2004 SCC 18, [2004] 1 S.C.R. 456, at para. 37; *Smith*, at para. 51; *McClure*, at paras. 34-35.
>
> …
>
> Professional secrecy belongs to the client, not to the notary or lawyer; only the client may waive it (*Blood Tribe*, at para. 9; *McClure*, at para. 37; *FLS*, at para. 48). Where it is in jeopardy, the client must therefore have an opportunity to ensure that it is protected.[22]

The Supreme Court has recently restated the importance of preserving trust in the lawyer-client relationship:

> Thus, where professional secrecy is in issue, what matters is not the context in which a privileged document or privileged information could be disclosed to

[17] *Canada (Attorney General) v. Chambre des notaires du Québec*, 2016 SCC 20, para 5.
[18] CQLR, c. C-12.
[19] CQLR, c. C-26.
[20] CQLR, c. B-1.
[21] Ibid. s. 131.
[22] *Canada (Attorney General) v. Chambre des notaires du Québec*, 2016 SCC 20, paras 32 and 45.

> the state, but rather the fact that the document or information in question is privileged. It is important that a client consulting a legal adviser feel confident that there is little danger that information or documents shared by the client will be disclosed in the future regardless of whether the consultation takes place in the context of an administrative, penal or criminal investigation: "The lawyer's obligation of confidentiality is necessary to preserve the fundamental relationship of trust between lawyers and clients" (*Foster Wheeler*, at para. 34).[23]

Professional secrecy is the highest privilege recognized by the courts[24] and the Supreme Court of Canada has long regarded it as fundamentally important to our justice system.[25]

Moreover, the disclosure of documents protected by a claim of lawyer-client privilege can be ordered only in cases of absolute necessity. The Supreme Court of Canada has defined the test for absolute necessity as follows:

> Absolute necessity is as restrictive a test as may be formulated short of an absolute prohibition in every case. [26]

Clearly customs agencies in other countries where travel has taken place are under no obligation to ensure that confidential information carried by Canadian lawyers is protected. However, the issue of the professional secrecy of lawyers going through Canadian customs remains open, as it has never been the subject of a judicial decision.

The powers of the Canada Border Services Agency under the *Customs Act* are relatively broad and imprecise. That is why courts have interpreted the term "a good" to include electronic devices and the data they contain. In fact, the Provincial Court of British Columbia has recently found that:

> [93] There is a body of case law that I have reviewed that has consistently found, explicity or implicitly, that data stored on a cellular device is a good within the meaning of s. 99(1)(a) of the *Customs Act*. I am unaware of any cases that have found otherwise.
>
> …
>
> [95] … Accordingly. I find that s. 99(1)(a) authorizes a CBSA officer to examine the data stored on any electronic device in the actual possession of, or in the accompanying baggage of the traveller… [27] (our underlining)

So customs officers have the power to examine and open any electronic device that travellers may try to bring into Canada, without a warrant. Likewise, travellers are obliged to answer any questions asked by customs officers when they go through customs.[28]

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[23] *Canada (Attorney General) v. Chambre des notaires du Québec*, 2016 SCC 20, para 39.
[24] *Smith v. Jones*, [1999] 1 SCR 455, para. 44.
[25] Ibid, para 45.
[26] *Goodis v. Ontario (Ministry of Correctional Services)*, 2 SCR 32, 2006 SCC 31, para. 20.
[27] *R. v. Gibson,* 2017 BCPC 237.
[28] *Customs Act*, (cited in footnote 16). S.11.

These factors raise problems with respect to lawyer-client privilege. A lawyer who has to cross a border with electronic devices containing privileged information currently has no protection and must answer an officer's questions about his files or his clients.

Given the fundamental importance of lawyer-client privilege and the difficulties encountered about this issue at borders, the Barreau de Quebec recommends the establishment of a working group in order to develop a policy to protect lawyer-client privilege at borders and in preclearance areas.