NORTON ROSE FULBRIGHT

Legal update

Privacy at the border: routine searches of electronic devices breach the *Charter*

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White-collar crime
Data protection, privacy and cybersecurity

The Supreme Court of Canada recently dismissed an application for leave to appeal the Court of Appeal of Alberta's decision in *R v Canfield*[1], which effectively means that Canadian border officials do not have unlimited search powers to review the contents of personal devices at international borders under the *Customs Act*.

The Customs Act and *R* v *Simmons*

Sheldon Canfield and Daniel Townsend were each convicted of possession and importation of child pornography on their personal electronic devices by the Alberta Court of Queen's Bench. Both had been arrested at the Edmonton International Airport after border security officers had searched their personal electronic devices. Contesting the legality of the searches that led to their arrests, they appealed their convictions before the Court of Appeal of Alberta.

At issue on appeal was the constitutionality of s 99(1)a) of the *Customs Act*, a provision governing searches of goods by border security officers at a port of entry. Unlike s 98 of the *Act*, which provides that border security officers can only search individuals if they suspect "on reasonable grounds" that they are carrying illegal material, when it comes to searches of goods, s 99(1)a) grants virtually unfettered discretion to officers:

> **99 (1)** An officer may
>
> **(a)** at any time up to the time of release, examine any goods that have been imported and open or cause to be opened any package or container of imported goods and take samples of imported goods in reasonable amounts;

Because of the *Customs Act*'s broad definition of "goods" at section 2, the significant powers granted to officers under s 99(1)a) extended to searches of electronic devices, including searches of the content they hold.

The interaction between the *Canadian Charter of Rights and Freedoms* (*Charter*) rights and searches at the border is not a novel problem in Canadian constitutional law. The Supreme Court of Canada considered the matter at length in the 1988 judgment *R v Simmons*, where it established a distinction between the degree of privacy Canadians can reasonably expect in a domestic context as opposed to when they arrive at an international port of entry. According to the court, "it is commonly accepted that sovereign states have the right to control both who and what enters their boundaries," and "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."[2]

With this important state prerogative in view, the court set out three categories of searches according to the degree of privacy a traveller could reasonably expect: first, searches of baggage and outer clothing that occasionally accompany the "routine questioning" every traveller undergoes; second, strip or skin searches "conducted in a private room, after a secondary examination and with the permission of a customs officer in authority"; and finally, body cavity searches, involving medical professionals, X-rays, and "other highly invasive means."[3] According to the court, only the latter two raise any constitutional issues regarding *Charter* protection against arbitrary search, seizure, and detention, as they entail considerable encroachments on bodily privacy.

In *Canfield*, the trial judge had relied on Supreme Court precedent in finding that the searches conducted on Canfield and Townsend's electronic devices under s 99(1)a) of the *Customs Act* were not unreasonable. Seeing as the challenged searches only involved "goods," they fell within the first category outlined in *Simmons* and did not raise any constitutional issues.[4]

Simmons reconsidered

On appeal, the Court of Appeal of Alberta took the rather unusual step of revising the Supreme Court of Canada's conclusions in *Simmons*. According to the Court of Appeal, considerable changes in Canadian society's relationship with personal electronic devices, as well as developments in case law, justified adopting a different approach. The digital revolution of the last few decades, resulting in the near-ubiquitous use of personal electronic devices, raised novel concerns about privacy given the "massive amounts of highly personal information" stored on the laptops, tablets, and cellphones that thousands of travellers carry across the border every day.[5]

Weighing the privacy interests of travellers against the state's interest in policing the movement of people and goods at the border, the Court of Appeal concluded that the unlimited discretion afforded to border security officers under sections 2 and 99(1)a) of the *Customs Act* violated the *Charter*. The court placed particular emphasis on the *Charter* values of privacy and human dignity served by protecting the "biographical core of personal information" stored on personal computers and cellphones, a well-established principle in the case law governing domestic searches.[6]

Despite their being in transit at the border, travellers have a legitimate and objectively reasonable expectation of privacy for the contents of their personal electronic devices. According to the court, a balance needs to be struck between "the high expectation of privacy that individuals have in their personal electronic devices generally" and "the low expectation of privacy that individuals have when crossing international borders."[7] The *Customs Act* had failed to achieve this balance: sweeping searches of personal electronic devices at the border simply could not be justified as a matter of "routine" inspection.

Having concluded that the unlimited search powers in the *Customs Act* violated the *Charter* and were not saved by the application of s 1 of the *Charter*, the court held that "the definition of 'goods' in s 2 of *Customs Act* is of no force or effect insofar as the definition includes the contents of personal electronic devices for the purposes of s 99(1)(a)."[8]

However, the court recognized the difficulty in setting an appropriate "threshold" under which such a search might be deemed reasonable. While the appellants pressed for an "individualized suspicion that the search will reveal contraband," the court suggested that it might be "something less than that" in light of the "unique nature of the border."[9] Conscious of the sensitivity of its task, the court suspended its declaration of invalidity regarding s 2 of the *Customs Act* for a year, concluding that Parliament was in the best position to strike a balance between the competing interests at play and it should be given the time to develop an appropriate solution.[10]

A need for clearer guidance

Although the court concluded that Canfield and Townsend's *Charter* rights had been violated, it nevertheless ruled in favour of admitting the evidence gathered by the border security officers. According to the court, the appellants had failed to acquit the burden imposed upon them by s 24(2) of the Charter, namely demonstrating that, "having regard to all the circumstances," the admission of the impugned evidence "would bring the administration of justice into disrepute."

With the Supreme Court's dismissal of the application for leave to appeal in *Canfield*, the task of defining the appropriate "threshold" for searches of personal electronic devices has been left to Parliament.

Though the Court of Appeal's decision may represent a significant victory for travellers' rights at the border, Parliament will likely take the court's cue in ruling out a standard of "individualized" suspicion comparable to the standard required to conduct a search in a domestic context. Whatever the solution may be, it will need to execute the delicate balancing act prescribed by the Court of Appeal in *Canfield* while providing clear guidelines to the officers tasked with policing Canada's borders.

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Footnotes

1 2020 ABCA 383 [*Canfield*]

2 *R v Simmons*, [1988] 2 SCR 495, par. 49.

3 *Id.*, par. 27.

4 *R v Canfield*, 2018 ABQB 408; Canadian courts had reached identical conclusions in *R v Bialski*, 2018 SKCA 71, at par. 111, and *R v Moroz*, 2012 ONSC 5642, at par. 20.

5 *Canfield*, par. 37.

6 *Id.*, par. 64

7 *Id.*, par. 67.

8 *Id.*, par. 111.

9 *Id.*, par. 75

10 *Id.*, par. 114-115.

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