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Legislative Summary

BILL S-7: AN ACT TO AMEND THE CUSTOMS ACT AND THE PRECLEARANCE ACT, 2016

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For clarity of exposition, the legislative proposals set out in the bill described in this legislative summary are stated as if they had already been adopted or were in force. It is important to note, however, that bills may be amended during their consideration by the Senate and House of Commons and have no force or effect unless and until they are passed by both houses of Parliament, receive Royal Assent and come into force.

Any substantive changes to this Library of Parliament legislative summary that have been made since the preceding issue are indicated in **bold print**.

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(Legislative Summary)

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LEGISLATIVE SUMMARY OF BILL S-7: AN ACT TO AMEND THE CUSTOMS ACT AND THE PRECLEARANCE ACT, 2016

1 BACKGROUND

Bill S-7, An Act to amend the Customs Act and the Preclearance Act, 2016,[1] was introduced in the Senate on 31 March 2022 by the Honourable Marc Gold, Government Representative in the Senate. On 11 May 2022, the Senate completed the second reading of the bill, and the bill was referred to the Standing Senate Committee on National Security, Defence and Veterans Affairs (SECD).

On 15 June 2022, the committee **reported the bill with** amendments. The following day, the Senate adopted SECD's report, and the bill passed third reading on 20 June 2022. SECD's amendments seek to

- subject the examination of digital devices not to the standard of "reasonable general concern" as initially proposed, but to that of "reasonable grounds to suspect";
- specify that the examination of documents stored on a personal digital device can only occur if the device's network connectivity has been disabled; and
- grant regulation-making powers to the Governor in Council with respect to the examination of documents stored on a digital device that are subject to a privilege under the law of evidence, solicitor–client privilege or the professional secrecy of advocates and notaries, or litigation privilege.

The bill was referred to the House of Commons on 20 October 2022, where it was read for the first time the same day.

Bill S-7 amends the *Customs Act*[2] and the *Preclearance Act, 2016*,[3] to set standards for the examination of documents by a Canada Border Services Agency (CBSA) customs officer (hereinafter "officer"), or a preclearance officer in the course of preclearing travellers bound for the United States (U.S.), stored on a personal digital device. Specifically, it sets out the circumstances in which such an examination may be conducted and provides for regulations to be made in this regard.

The bill responds to the 2020 Alberta Court of Appeal decision in *R. v. Canfield* and *R. v. Townsend* **(*Canfield*)**.[4] In these cases, heard concurrently, the Court ruled that section 99(1)(a) of the *Customs Act* – on which CBSA officers rely to search digital devices at the border – is unconstitutional because it does not impose any limits or threshold requirements for conducting such searches. This decision, discussed below, noted that it is up to Parliament to establish a standard that applies to CBSA officers' examination of digital devices. **More recently, in August 2024 in *R. v. Pike*, the**

Ontario Court of Appeal – which also struck down section 99(1)(a) of the *Customs Act* – concluded that this standard for examination should be that of "reasonable suspicion."[5] This court decision is in line with the amendments to Bill S-7 adopted by the Senate in June 2022.

However, echoing the Alberta Court of Appeal, the Ontario Court of Appeal agreed that Parliament could set a less stringent standard to allow officers to examine *certain* electronic documents downloaded to digital devices, such as receipts and travel-related documents.[6]

1.1 THE *CUSTOMS ACT*

1.1.1 Overview of the Canada Border Service Agency's Powers to Search Persons and Examine Goods

The CBSA "is responsible for providing integrated border services that support national security and public safety priorities and facilitate the free flow of persons and goods, including animals and plants, that meet all requirements under the program legislation."[7] In addition, the *Customs Act* authorizes CBSA officers to search persons and examine goods in order to fulfill the CBSA's mandate.[8]

Persons arriving in Canada may be searched in the circumstances set out in section 98 of the *Customs Act*. A certain standard must be met for the CBSA officer to carry out such a search, in other words, the officer must have reasonable grounds to suspect a violation of the *Customs Act*. For example, the officer must have reasonable grounds to suspect that the person has secreted on their person anything that contravenes the *Customs Act* or its regulations, anything that would afford evidence of a such a contravention, or any goods for which the importation or exportation is prohibited by the *Customs Act* or another Act of Parliament.

Section 99(1) of the *Customs Act* grants CBSA officers the power to examine goods in various circumstances. Under section 99(1)(a) of the *Customs Act*, which is used to examine the personal effects (e.g., baggage) of a person without a warrant, an officer may "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."[9] Thus, unlike with other provisions for the search of persons and the examination of goods for which CBSA officers are held to the standard of "reasonable grounds,"[10] section 99(1)(a) of the *Customs Act* does not impose this standard for the examination of imported goods. As explained below, the CBSA interprets section 99(1)(a) of the *Customs Act* as allowing its officers to examine digital devices at the border on a discretionary basis, as long as it is for customs purposes.[11]

In addition, sections 99.2 and 99.3 of the *Customs Act* set out other search and examination powers, including as regards persons entering or leaving a customs controlled area and the goods in their possession.[12]

1.1.2 Standards Applicable to Searches and Seizures

Section 8 of the *Canadian Charter of Rights and Freedoms* (the Charter) protects persons from unjustified state intrusions on their privacy by providing protection from unreasonable search or seizure.[13] The Supreme Court of Canada has ruled that "[a] search will be reasonable if it is authorized by law, if the law itself is reasonable and if the manner in which the search was carried out is reasonable."[14] For a search to be Charter-compliant, it must be reasonable, and therefore, subject to certain limits, depending on the circumstances.

It is worth making a distinction between two main standards that currently apply to searches and seizures: the "reasonable grounds to believe" standard and the "reasonable grounds to suspect" standard.

"Reasonable grounds to believe," also known as "reasonable and probable grounds to believe," is a more stringent standard than "reasonable grounds to suspect," although in both cases, these grounds must be based on objective facts.

The "reasonable grounds to believe" standard does not require "a *prima facie* case for conviction," but rather a reasonable belief or reasonable probability.[15] This standard under several provisions of the *Criminal Code* is required to justify a search or seizure in a criminal investigation.[16]

The "reasonable grounds to suspect" standard, also known as "reasonable suspicion," refers to the reasonable possibility – not probability – of an offence.[17] The Supreme Court of Canada has stated that suspicion should be assessed against the totality of the circumstances of a case:

> The inquiry must consider the constellation of objectively discernible facts that are said to give the investigating officer reasonable cause to suspect that an individual is involved in the type of criminal activity under investigation. This inquiry must be fact-based, flexible, and grounded in common sense and practical, everyday experience.[18]

The adequacy of the "reasonable grounds to believe" or "reasonable grounds to suspect" standard for a search in respect of section 8 of the Charter depends on multiple factors, including the fact that the reasonable expectation of privacy can vary with the context and the degree of invasiveness of the search. In general, as explained below, a lower standard is expected at the border, while a higher standard is often expected in a criminal investigation.

1.1.3 Application of the *Canadian Charter of Rights and Freedoms* at the Border

As early as 1988, in *R. v. Simmons*, the Supreme Court of Canada recognized that governments play a very important role in protecting their border by controlling the persons and goods that enter their territory. Persons crossing an international border expect to be subject to checks, and in particular, searches and examinations of their baggage. As a result, the Court held that "the degree of personal privacy reasonably expected at customs is lower than in most other situations."[19] Consequently, the Charter provides some basic protections at the border, but these protections are not as strong as in other circumstances, such as during a criminal investigation. In that same decision, the Supreme Court of Canada indicated that there appear to be three types of border search:

> First is the routine of questioning which every traveller undergoes at a port of entry, accompanied in some cases by a search of baggage and perhaps a pat or frisk of outer clothing.[20]

The Court held that this type of search does not raise any constitutional issues, because a person in these circumstances is not detained.[21]

The other two types of searches established by the Court are

> the strip or skin search … conducted in a private room, after a secondary examination and with the permission of a customs officer in authority. The third and most highly intrusive type of search is that sometimes referred to as the body cavity search, in which customs officers have recourse to medical doctors, to X-rays, to emetics, and to other highly invasive means.[22]

These two types of searches, which more significantly impinge on personal privacy, raise constitutional issues involving the rights and freedoms recognized by the Charter. The Court therefore found that the justification for such searches and the degree of constitutional protection afforded when they take place must be more substantial.

1.1.4 Interpretation by the Courts of Canada Border Services Agency Officers' Powers to Examine Digital Devices

A number of courts have held that digital devices are "goods"[23] within the meaning of the *Customs Act* and that examining them falls within the first category of searches established in *Simmons*, namely searches that raise no Charter-related constitutional issues.[24] Thus, it was determined that examining them did not require a warrant or specific grounds.

However, on 29 October 2020 in ***Canfield***, the Alberta Court of Appeal (ABCA) found the lack of a threshold requirement for examining digital devices at the border

unconstitutional. In its decision, the ABCA held that the Supreme Court precedent established in *Simmons* needed to be re-examined:

> While reasonable expectations of privacy may be lower at the border, the evolving matrix of legislative and social facts and developments in the law regarding privacy in personal electronic devices have not yet been thoroughly considered in the border context.[25]

In this case, the ABCA had to consider the reasonableness of the examinations of digital devices, pursuant to section 99(1)(a) of the *Customs Act*, that CBSA officers found in the possession of two persons at customs. The ABCA held that the definition of "goods" in the *Customs Act* indeed includes the contents of digital devices,[26] but it noted that the key issue was instead whether the contents of digital devices should be treated differently from other receptacles at the border.[27] In addition, the ABCA pointed out that, in *Simmons*, the Supreme Court of Canada held that "the greater the intrusion [of a search], the greater must be the justification and the greater the degree of constitutional protection."[28]

The ABCA remarked that, while the examination of a digital device is not equivalent to taking bodily samples or conducting a strip search,[29] it can nonetheless be a significant intrusion upon their privacy.[30] Accordingly, the Court held that some limits on this examination are necessary for it to be reasonable and thus compliant with section 8 of the Charter.[31] The ABCA ruled that section 99(1)(a) of the *Customs Act* is thus a violation of section 8 of the Charter and that this violation is not justified within the meaning of section 1, as it imposes no limits on searches of digital devices at the border. Consequently, it declared the definition of "goods" in section 2 of the *Customs Act* to be of no force or effect because it includes the contents of digital devices for the purpose of section 99(1)(a).[32]

However, the ABCA suspended this declaration of invalidity for a one-year period so that Parliament could address the matter.[33] The Court decided that it was up to Parliament to determine "[w]hether the appropriate threshold [for CBSA officers to examine digital devices] is reasonable suspicion, or something less than that having regard to the unique nature of the border."[34] The ABCA implied that this threshold "may be something less than the reasonable grounds to suspect required for a strip search under the *Customs Act*."[35]

An application for leave to appeal the ABCA decision was made to the Supreme Court of Canada, but the Court dismissed it on 11 March 2021, confirming the finality of that decision.[36]

In 2024, in *R. v. Pike*, the Ontario **Court of Appeal** also found section 99(1)(a) of the *Customs Act* to be unconstitutional where it applies to the examination of digital devices, holding that it violates section 8 of the Charter.[37] **The Court suspended the declaration of unconstitutionality from coming into effect for six months, until February 2025.**

1.1.5 Canada Border Services Agency's Current Approach to the Examination of Digital Devices

The CBSA has a specific policy for the examination of digital devices its officers,[38] and it has published information on its website about the way the examination is conducted at the border.[39]

The CBSA states that when a person crosses the border, its officers can examine digital devices in that person's possession for customs purposes, just as they can all other goods pursuant to section 99(1)(a) of the *Customs Act*.[40] As for the grounds for examination, a CBSA Operational Bulletin issued in 2015, *Examination of Digital Devices and Media at the Port of Entry – Guidelines*, states the following:

> Although there is no defined threshold for grounds to examine such devices, CBSA's current policy is that such examinations should not be conducted as a matter of routine; they may only be conducted if there is a multiplicity of indicators that evidence of contraventions may be found on the digital device or media.
>
> …
>
> Examination of digital devices and media must always be performed with a clear nexus to administering or enforcing CBSA-mandated program legislation that governs the cross-border movement of people and goods, plants and animals. CBSA officers shall not examine digital devices and media with the sole or primary purpose of looking for evidence of a criminal offence under any Act of Parliament. Officers must be able to explain their reasoning for examining the device, and how each type of information, computer/device program and/or application they examine may reasonably be expected to confirm or refute those concerns. The officer's notes shall clearly articulate the types of data they examined, and their reason for doing so.[41]

This operational bulletin further provides that "[i]nitial examinations of digital devices and media should be cursory in nature and increase in intensity based on emerging indicators."[42]

According to CBSA data, 276,631,519 travellers were processed at the border between 20 November 2017 and 30 June 2022, and the digital devices of 34,066 of them (0.012% of travellers) were examined. In addition, 12,731 of these examinations produced results, in other words, "[o]f these examinations, 37.3% resulted in the detection of a customs or immigration-related contravention."[43] However, the actual number of digital devices examined by CBSA officers may be underestimated. In fact, it is possible that many officers who examine digital devices may fail to complete the documentation necessary for these statistics to be compiled.[44]

The CBSA also notes on its website that, when one of its officers decides to examine a digital device, the person in possession of the device must give the officer the password,[45] which is written on a piece of paper. The CBSA states that its officers should also switch the device to be examined to "airplane mode to disable its ability to send and receive information."[46] As a result, the officer "can only examine information stored on the device,"[47] not social media, banking websites or emails that are not stored on the device. If an officer finds evidence of a contravention of the law on the device, the officer can seize the device.

As regards solicitor–client privilege, the CBSA states the following:

> If an officer comes across content marked as solicitor-client privilege during their examination, the officer must stop inspecting that document. If there are concerns about the legitimacy of solicitor-client privilege, the device can be set aside for a court to make a determination of its contents.[48]

In 2017, the Canadian Bar Association and the Barreau du Québec recommended, among other ideas, establishing a working group to develop a policy on solicitor–client privilege at the border.[49]

1.2 THE *PRECLEARANCE ACT, 2016*

1.2.1 Preclearance: Concept, Background and Application

As defined by Public Safety Canada, "preclearance"

> refers to an arrangement between two countries that allows customs and immigration officials from the country of destination to be located in the country of origin in order to clear or deny the admission of travellers or goods to the destination country.[50]

The purpose of this type of agreement is to improve the efficiency of traveller identity validation and the management of travel and trade flows, and to protect and enhance security at the border between the two countries.[51]

Historically, Canada and the U.S. have had several agreements of this type. One of the first allowed the U.S. to conduct preclearance at certain Canadian airports as early as 1952.[52] From 2002 to 2019, U.S. preclearance in Canada was based on the *Agreement on Air Transport Preclearance Between the Government of Canada and the Government of the United States of America*[53] and the *Preclearance Act* of 1999.[54]

In 2015, as part of the joint action plan *Beyond the Border: A Shared Vision for Perimeter Security and Economic Competitiveness*,[55] Canada and the U.S. signed the Agreement on Land, Rail, Marine, and Air Transport Preclearance Between the Government of Canada and the Government of the United States of America[56]

(LRMA). The LRMA led Canada to enact the *Preclearance Act, 2016*[57] and to make the necessary regulations to implement the Act.[58] The *Preclearance Act, 2016* and the LRMA came into effect at the same time on 15 August 2019.[59]

In practice, this allows travellers bound for the U.S. to complete all U.S. customs and immigration inspections before leaving Canada.

At this time, the U.S. conducts preclearance operations at eight airports in Canada: Vancouver, Edmonton, Calgary, Winnipeg, Toronto, Ottawa, Montréal and Halifax.[60] While the in-transit preclearance (ITP) service for international passengers connecting to U.S. destinations could be available at any airport with preclearance facilities, only the Vancouver International Airport and Toronto Pearson International Airport offer ITP.[61]

Canada does not currently conduct preclearance operations in the U.S., but "discussions to support the implementation of a pilot proof of concept in the land mode are underway."[62] In addition, in budget 2021, the federal government planned to fund the implementation of "three Canadian preclearance pilots in the United States that would enable customs and immigration inspections to be completed before goods and travellers enter Canada."[63]

1.2.2 Preclearance Areas, Preclearance Perimeters and the Powers of Preclearance Officers in These Areas

The *Preclearance Act, 2016* allows for preclearance operations in air, land, rail and marine transport and sets out the powers of preclearance officers. These are officers authorized by the U.S. government to conduct preclearance in Canada in preclearance areas or preclearance perimeters.

With respect to preclearance areas, section 6 of the *Preclearance Act, 2016* states that these areas are designated by the minister and are set out in the schedule to the Act.[64] The locations in which preclearance areas may be designated are the following:

- aerodromes[65] and associated places such as terminals, bonded warehouses and areas where cargo is screened;
- areas in Canada that are associated with marine navigation or infrastructure and adjacent areas;
- railway stations and terminals under federal jurisdiction and associated areas; and
- highways, roads, bridges, tunnels and paths that connect a part of Canada with a part of the U.S., and adjacent areas, including areas from which goods are regularly shipped for export to the U.S.

Consequently, preclearance areas are not limited to areas where travellers and goods are examined. They may include waiting areas where travellers wait to board a conveyance, the conveyance itself when stationed in preparation for departure to the U.S. and baggage-handling areas.

With respect to preclearance perimeters, section 7 of the *Preclearance Act, 2016* states that such perimeters may be designated by the minister. This perimeter is an area in close proximity to where a conveyance is stationed in preparation for its departure to the U.S. This means that preclearance officers may, in the preclearance perimeter, examine the exterior of the conveyance, examine the goods that are to be loaded onto the conveyance, and direct persons in the perimeter to identify themselves and state their reason for being there.[66] This designation is also set out in the schedule to the *Preclearance Act, 2016*.

Section 20 of this Act provides general powers for preclearance officers only in a preclearance area. These include the power to "examine, search, and detain goods bound for the U.S., including by taking samples of the goods in reasonable quantities."[67] A similar power applicable in a preclearance perimeter is set out in section 28 of the *Preclearance Act, 2016*. These powers do not include any threshold requirements that preclearance officers must observe when conducting such a search. At this time, preclearance officers may use this authority to search the digital devices in the possession of persons bound for the U.S.

1.2.3 Application of Canada's Preclearance Legislation

From the outset, the LRMA establishes reciprocity between Canada and the U.S. The preclearance authorizations granted under this agreement apply equally to Canadian preclearance officers working in the U.S. and to U.S. preclearance officers working in Canada.[68] These authorizations apply to all conveyances. The LRMA also states that preclearance officers must enforce the laws of the country in which they work.

For example, the *Preclearance Act, 2016* establishes how preclearance conducted by U.S. preclearance officers, who enforce U.S. laws relating to the importation of goods, immigration, agriculture, or public health and safety in a preclearance area or perimeter, is conducted in accordance with Canadian law. Section 9 explicitly states that "Canadian law applies, and may be administered and enforced, in preclearance areas and preclearance perimeters." Section 10(2) specifies that "[a] preclearance officer is not permitted to exercise any powers of questioning or interrogation, examination, search, seizure, forfeiture, detention or arrest that are conferred under the laws of the United States."

Lastly, section 11 of the *Preclearance Act, 2016* ensures compliance with Canadian law by providing that U.S. preclearance officers must abide by Canadian law, including the Charter, the *Canadian Bill of Rights* and the *Canadian Human Rights Act*.[69] This

requires U.S. preclearance officers to be trained in Canadian law in order to perform their duties under the Act in Canada.

Any person in a preclearance area or perimeter is subject to Canadian criminal law and Canadian legislation, including:

- the Charter;
- the *Canadian Bill of Rights*;
- the *Canadian Human Rights Act*; and
- the *Preclearance Act, 2016*.

As a result, Canadian search and examination standards (described above) also apply to searches and examinations conducted by U.S. preclearance officers. However, searches and examinations conducted by U.S. preclearance officers continue to raise privacy concerns, as do searches and examinations conducted by CBSA officers, particularly with respect to digital devices. In addition, because the preclearance officers are U.S. officers, the exercise of preclearance powers raises concerns about on-the-ground enforcement of Canadian laws, particularly the Charter, and how Canadians can actually have their rights upheld when violations occur.[70]

2 DESCRIPTION AND ANALYSIS

2.1 AMENDMENTS TO THE *CUSTOMS ACT*

2.1.1 Authority of Officers to Examine Personal Digital Devices (Clause 1)

Clause 1 of the bill adds new section 99.01 to the *Customs Act* to set out the circumstances in which a CBSA officer may examine documents stored on a personal digital device, including emails, text messages, receipts, photographs and videos. In other words, this new section creates a specific examination authority for CBSA officers with respect to personal digital devices in order to differentiate them from the general category of "goods."

The bill does not define the term "personal digital device." **The CBSA does use the term "personal digital device,"** which it defines as "any device that is capable of storing digital data."[71] This includes devices such as cell phones and smartphones, tablets, computers, drives and smartwatches.[72]

New section 99.01(2) of the *Customs Act* provides that the president of the CBSA may designate officers for the purpose of examining documents stored on a digital device pursuant to new section 99.01(1) of the *Customs Act*.

Documents on a personal digital device may be examined as long as there has been no release or export.[73]

New section 99.01(1) of the *Customs Act* provides that examined documents must be "stored" on the personal digital device. As previously stated, current CBSA policy provides that when an officer is examining documents stored on a digital device, they should put the digital device in airplane mode so as to "disable its ability to send and receive information"and to be able to "only access information stored on the device."[74] Thus, for the purposes of this new provision, the term "stored" in the CBSA policy appears to refer to documents that are accessible in airplane mode and exclude documents stored on a cloud, since they are not accessible in airplane mode. Furthermore, when he appeared before SECD, the Honourable Marco Mendicino, Minister of Public Safety, said that section 99.01(1) of the *Customs Act* addressed only documents "physically stored on that phone," and that, as part of the "protocol of the search, officers will be trained and instructed to deactivate the antenna and any wireless signal that would allow access to the cloud."[75]

In 2024, the Ontario Court of Appeal confirmed that the *Customs Act* does not authorize CBSA officers to examine cloud data, that is, data that is accessible by the device but that comes from remote servers and has not been downloaded and stored on the digital device.[76]

SECD amended the first clause of the bill to specify in new section 99.01(1) of the Act that a CBSA officer may examine documents that are stored on a personal digital device that "has had its network connectivity disabled."[77]

New section 99.01(1) of the *Customs Act* sets a standard to be met in order for officers to examine documents stored on a personal digital device and outlines the specific reasons for which officers may conduct such an examination. In particular, the first reading version of the bill provided that the officer must have a reasonable general concern that

> (a) [the *Customs Act*] or a regulation made under it has been or might be contravened in respect of one or more of the documents;
>
> (b) any other Act of Parliament that prohibits, controls or regulates the importation or exportation of goods and is administered or enforced by the officer or any regulation made under that Act has been or might be contravened in respect of one or more of the documents; or
>
> (c) one or more of the documents may afford evidence in respect of a contravention under
>
> (i) [the *Customs Act*] or a regulation made under it, or
>
> (ii) any other Act of Parliament that prohibits, controls or regulates the importation or exportation of goods and is

> administered or enforced by the officer or any regulation made under that Act.[78]

Clause 9 of Bill S-7 (in its first reading version) also added the standard of "reasonable general concern" to the *Preclearance Act, 2016*, but the term does not appear elsewhere in the *Customs Act* or in any other federal legislation, and it is not defined in the bill. This legal standard seems lower than "reasonable grounds to suspect" and "reasonable grounds to believe."[79] When he appeared before SECD, the Honourable Marco Mendicino, Minister of Public Safety, said that the standard of "'reasonable general concern' is meant to be higher than a mere suspicion or hunch, but less restrictive than 'reasonable grounds to suspect.'"[80] He said that the term "reasonable" means "that the noted factual indications of non-compliance need to be objective and verifiable" and that the term "general" is intended to "distinguish it from higher [standards] that may require officers to identify specific contraventions before beginning the exam."[81] Lastly, he said that the term "concern" was used to differentiate between the proposed standard and the term "reasonable suspicion":

> This is designed to be a new [standard] that is more flexible than "reasonable suspicion." At the same time, it does not authorize officers to examine devices without individualized concerns as the courts have suggested a "generalized suspicion" [standard] might. "Reasonable general concern" requires that the concern be individualized and is attributable to a specific person or their device.[82]

Furthermore, the Minister of Public Safety said that the government had looked into using the standard of "reasonable grounds to suspect," but that this standard was too restrictive for the examination of personal digital devices at the border. He provided the following explanation:

> In addition, "reasonable grounds to suspect" is used at the border for strip searches, which have been identified in jurisprudence as being more intrusive – more invasive – than the examination of personal digital devices.
>
> I would like to underscore that we now have statistics to prove how challenging it is to meet the higher [standard] in this context. We have already begun to see a sharp decline in the number of personal digital device examinations that we carry out in Alberta and Ontario since the courts' rulings came into force.
>
> Unfortunately, prohibited materials are imported every single day. National implementation of a higher [standard] would compromise border integrity and drastically reduce the agency's ability to intercept illegal contraband. Since April 29, officers have had to rely on Customs Act 99(1)(e), which requires "reasonable grounds to suspect" to initiate an exam. Prolonging the requirement to use this higher

> [standard] will unquestionably compromise public safety and border integrity related to the decrease in the interception of prohibited materials on PDDs [personal digital devices].[83]

According to observers, the use of the word "general" means that the standard is not clear as to whether the officer will have to rely on objective facts.[84] Therefore, SECD amended the first clause of the bill to replace the phrase "reasonable general concern" in new section 99.01(1) of the *Customs Act* with the phrase "reasonable grounds to suspect."

Lastly, new section 99.01(3) of the *Customs Act* specifies that section 99.01 does not apply to personal digital devices that are imported or exported solely for sale; for an industrial, occupational, commercial, institutional or other similar use; or for any other prescribed use.

2.1.2 Authority to Make Regulations Concerning the Examination of Documents Stored on a Personal Digital Device (Clause 2)

Clause 2 of the bill amends section 99.4 of the *Customs Act* by adding a paragraph authorizing the Governor in Council to make regulations respecting the examination of documents stored on personal digital devices carried out under new section 99.01(1) of the *Customs Act*.

SECD amended clause 2 to authorize the Governor in Council to make regulations "respecting measures to be taken by an officer if a person asserts that a document to be examined under subsection 99.01(1) is subject to a privilege under the law of evidence, solicitor–client privilege or the professional secrecy of advocates and notaries, or litigation privilege."

2.1.3 Authority to Make Digital Copies of Documents Stored on Personal Digital Devices (Clause 3)

Section 110 of the *Customs Act* gives CBSA officers various seizure authorities. Among others, under section 110(3) of the *Customs Act*, a CBSA officer may, where they believe on reasonable grounds that the *Customs Act* or its regulations have been contravened, "seize anything that he believes on reasonable grounds will afford evidence in respect of the contravention."

Clause 3 of the bill amends section 110 of the *Customs Act* to add new section 110(3.1) to authorize an officer who exercises the power under section 110(3) of the *Customs Act* to make an electronic copy of a record or document in the following cases:

- if it is impossible or impractical to seize anything on which the record or document is stored; or

- if seizing the thing is likely to degrade the record or document or make it unusable as evidence.

Accordingly, a CBSA officer could, for example, make copies of photos, videos, text messages or emails stored on a personal digital device.

2.1.4 Other Amendments to the *Customs Act* (Clauses 4 to 7)

Existing section 111 of the *Customs Act* provides that a justice of the peace, who upon receiving information on oath that complies with certain formalities, is satisfied that there are reasonable grounds to believe that there will be found in a building, receptacle or place

> (a) any goods or conveyance in respect of which this Act or the regulations have been contravened or are suspected of having been contravened,
>
> (b) any conveyance that has been made use of in respect of such goods, whether at or after the time of the contravention, or
>
> (c) anything that there are reasonable grounds to believe will afford evidence in respect of a contravention of [the *Customs Act*] or the regulations,
>
> may at any time issue a warrant under his hand authorizing an officer to search the building, receptacle or place for any such thing and to seize it.

Clause 4 amends section 111 of the *Customs Act* by adding new section 111(8) of the *Customs Act*, authorizing officers to lay an information to obtain a warrant by various means of telecommunication. The clause also amends section 111(2) of the *Customs Act* to specify that a warrant issued by a justice of the peace under section 111(1) may be executed anywhere in Canada, thereby expanding the territorial jurisdiction of the justice of the peace. In addition, this clause creates new section 111(3.1) of the *Customs Act*, which authorizes an officer executing a warrant issued under section 111(1) of the *Customs Act* to make an electronic copy of a record or document make an electronic copy of a record or document in the following cases:

- if it is impossible or impractical to seize anything on which the record or document is stored; or
- if seizing the thing is likely to degrade the record or document or make it unusable as evidence.

Furthermore, clause 4 makes a number of amendments to the English version of section 111 of the *Customs Act* to make it more consistent with the French version and

to clarify that searches and seizures apply to any records or documents regardless of their medium, including documents on digital media.

Existing section 115(1) of the *Customs Act* provides that, in the case of an examination or seizure of records under that Act, the CBSA officer examining or seizing the records "may make or cause to be made" copies of them. Clause 5 amends section 115(1) of the *Customs Act* to specify that a CBSA officer may make or cause to be made copies of the records regardless of the medium.

Pursuant to section 153.1:

> No person shall, physically or otherwise, do or attempt to do any of the following:
>
> (a) interfere with or molest an officer doing anything that the officer is authorized to do under [the *Customs Act*]; or
>
> (b) hinder or prevent an officer from doing anything that the officer is authorized to do under [the *Customs Act*].[85]

Existing section 160.1 of the *Customs Act* states that every person who contravenes section 153.1 of the *Customs Act* is guilty of an offence punishable on summary conviction and is liable to

> (a) a fine of not less than $1,000 and not more than $25,000; or
>
> (b) both a fine described in paragraph (a) and imprisonment for a term not exceeding twelve months.

Clause 6 amends section 160.1 of the *Customs Act* to make the offence under section 153.1 a hybrid offence, to be prosecuted by way of summary conviction or indictment. The penalties associated with the offence are also amended as follows:

> Every person who contravenes section 153.1
>
> (a) is guilty of an offence punishable on summary conviction and liable to a fine of not more than $10,000 or imprisonment for a term of not more than six months, or both; or
>
> (b) is guilty of an indictable offence and liable to a fine of not more than $50,000 or imprisonment for a term of not more than five years, or both.

Lastly, clause 7 amends section 163 of the *Customs Act* to increase the limitation period for summary conviction proceedings for offences under the *Customs Act* from three years to eight years after the time when the subject matter of the proceedings arose.

2.2 AMENDMENTS TO THE *PRECLEARANCE ACT, 2016*

2.2.1 Officers' Powers to Examine Personal Digital Devices (Clauses 9, 12 and 15)

Clause 9 creates new section 20.1 of the *Preclearance Act, 2016*, which sets out the general powers of U.S. preclearance officers in Canada[86] as regards documents stored on personal digital devices. Under this new provision, preclearance officers may, for the purposes of preclearance, examine, search and detain documents, including emails, text messages, receipts, photographs or videos, that are stored on a personal digital device of a traveller bound for the U.S. Pursuant to the first reading version of the bill, U.S. preclearance officers may exercise these powers when they have "a reasonable general concern" that a law of the U.S. on importation of goods, immigration, agriculture or public health and safety has been or might be contravened in respect of one or more documents. Under new section 20.1 of the *Preclearance Act, 2016*, a U.S. preclearance officer may also exercise these powers when they have a reasonable general concern that one or more documents may afford evidence of such a contravention.

This "reasonable general concern" standard that the bill proposed adding to the *Preclearance Act, 2016* is the same standard that it proposed including in the *Customs Act*. According to commentators, this standard appears to be less stringent than the standard of "reasonable grounds to suspect" and of "reasonable grounds to believe," as it "does not require legal grounds."[87]

SECD amended clause 9 to replace the standard of "reasonable general concern" in new section 20.1(1) of the *Preclearance Act, 2016* with the standard of "reasonable grounds to suspect." It also amended clause 9 to specify that, under new section 20.1(1) of the *Preclearance Act, 2016*, a U.S. preclearance officer may examine documents on a personal digital device "that has its network connectivity disabled."

Clause 9 also provides that preclearance officers have the power to detain the personal digital device on which the documents are stored (new section 20.1(2) of the *Preclearance Act, 2016*).

Clause 9 adds new section 20.1(3) of the *Preclearance Act, 2016* to specify that the powers of preclearance officers must comply with Canadian regulations or ministerial directions given under new section 45.1(1) of that Act, as discussed in greater detail in section 2.2.2 of this Legislative Summary.

Clause 9 further clarifies that these powers do not apply to personal digital devices bound for the U.S. and intended for sale; an industrial, professional, commercial, institutional or other similar use; or any use prescribed by regulation (new section 20.1(4) of the *Preclearance Act, 2016*).

The new powers of officers in preclearance areas to search, examine and detain personal digital devices set out in new section 20.1 of the *Preclearance Act, 2016* are almost identical to those of officers in a preclearance perimeter outlined in clause 12, which adds new section 28.1 of that Act. The wording of these two new sections was essentially the same in the first reading version of the bill and provided for the same legal standards, that is, reasonable general concern. However, regarding the powers of officers in preclearance areas, new section 28.1 of the *Preclearance Act, 2016* provides that the powers may be used not only for preclearance purposes, but also for the purpose of "maintaining the security of or control over the border between Canada and the United States." It also states that, for preclearance officers to examine, search or detain the personal digital device, it must not only be in the possession or control of a traveller bound for the U.S., but it must also be on board an air, land, rail or marine conveyance referred to in section 6(2)(a) of the *Preclearance Act, 2016*.

SECD amended clause 12 in a manner similar to clause 9, replacing the standard of "reasonable general concern," outlined in new section 28.1(1) of the *Preclearance Act, 2016*, with "reasonable grounds to suspect." It also amended clause 12 to specify, in new section 28.1(1) of the *Preclearance Act, 2016*, that a U.S. preclearance officer may examine documents stored on a personal digital device "that has its network connectivity disabled."

Existing section 34(1) of the *Preclearance Act, 2016* sets out the powers of U.S. preclearance officers in a preclearance area or perimeter to make a seizure to the extent and in a manner permitted by the laws of the U.S. Clause 15 amends this section to allow the seizure of digital devices detained in the preclearance area or preclearance perimeter in accordance with the new powers created by clauses 9 and 12.

2.2.2 Making of Regulations and Ministerial Directives (Clauses 16 and 17)

Clause 16, in the first reading version of the bill, amended section 43 of the *Preclearance Act, 2016* to authorize the making of regulations respecting the examination, search and detention of a personal digital device under new sections 20.1 and 28.1 of that Act.

SECD amended clause 16 to also authorize the making of regulations

> respecting measures to be taken by a preclearance officer if a person asserts that a document to be examined, searched or detained under section 20.1 or 28.1 is subject to a privilege under the law of evidence, solicitor–client privilege or the professional secrecy of advocates and notaries, or litigation privilege.

Clause 17 creates new section 45.1 of the *Preclearance Act, 2016*, which allows the minister to give directions respecting the examination, search and detention of documents that are stored on a personal digital device in a preclearance area or preclearance perimeter by preclearance officers under new sections 20.1 and 28.1 of the *Preclearance Act, 2016*.

Clause 17 of the bill also adds new sections 45.1(2) and 45.1(3) to the *Preclearance Act, 2016*, which set out various terms and conditions relating to when ministerial directions have effect and when they cease to have effect.

Furthermore, under new section 45.1(4), the *Statutory Instruments Act* does not apply to ministerial directions; however, the minister must publish them in the *Canada Gazette* within 60 days after the day on which they are given.

New section 45.1(5) of the *Preclearance Act, 2016* specifies that, if there is a conflict between the directions and the regulations, the regulations prevail.

2.2.3 Amendments to the French Version (Clauses 8, 10, 13 and 14)

Clauses 8, 10, 13 and 14 amend sections 20(1)(d), 27(2)(a), 31(2)(a) and 32(1)(a) of the *Preclearance Act, 2016* by changing the existing verb "s'identifier" to "donner son identité" to update the French version of that Act as regards a traveller's obligation to identify themselves. These amendments ensure consistency in the verbs used in section 18(1)(a) of the *Preclearance Act, 2016* and in section 4(a) of the *Preclearance in Canada Regulations*.[88]

NOTES

1. Bill S-7, An Act to amend the Customs Act and the Preclearance Act, 2016, 44th Parliament, 1st Session. **The Charter Statement was tabled by the Minister of Justice on 10 May 2022. See Government of Canada, *Bill S-7: An Act to amend the Customs Act and Preclearance Act, 2016 – Charter Statement*, 10 May 2022.**
2. *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.).
3. *Preclearance Act, 2016*, S.C. 2017, c. 27.
4. *R. v. Canfield*, 2020 ABCA 383 (CanLII).
5. ***R. v. Pike*, 2024 ONCA 608.**
6. **Ibid., para. 84.**
7. *Canada Border Services Agency Act*, S.C. 2005, c. 38, s. 5(1).
8. The search powers of CBSA officers are found primarily in section 98 and subsequent sections of the *Customs Act*. See *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.).
9. Ibid., s. 99(1)(a).
10. Ibid. See, for example, ss. 99(1)(b), 99(1)(c.1), 99(1)(d), 99(1)(d.1) and 99(1)(f).

11. This interpretation is set out in the CBSA's Operational Bulletin PRG-2015-31: *Examination of Digital Devices and Media at the Port of Entry – Guidelines*. See House of Commons, Standing Committee on Access to Information, Privacy and Ethics (ETHI), "Appendix A: Examination of Digital Devices and Media at the Port of Entry – Guidelines," *Protecting Canadians' Privacy at the U.S. Border*, Tenth report, December 2017, p. 23.

12. A customs controlled area

> is a designated area where there is a likelihood that domestic workers and/or departing domestic origin travellers come into contact with international travellers and goods that have not yet been processed or released by the CBSA. …
>
> The CBSA currently operates within assigned areas at ports of entry as legislated in the *Customs Act* (including customs offices and other facilities used for the purposes of processing internationally arriving goods or persons); these would be considered 'customs areas.'
>
> Customs Controlled Areas are designated spaces within these areas where there is a likelihood that domestic workers and/or departing domestic origin travellers come into contact with international travellers and goods not yet cleared by the CBSA.

CBSA, *Customs Controlled Areas: Questions and Answers*.

13. *Canadian Charter of Rights and Freedoms* (the Charter), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 8.

14. *R. v. Collins*, [1987] 1 S.C.R. 265, para. 23. See also *R. v. Shepherd*, 2009 SCC 35, para. 15; and *Hunter et al. v. Southam Inc.*, [1984] 2 S.C.R. 145.

15. For instance, in the context of an arrest by a police officer, the Supreme Court of Canada interpreted the "reasonable and probable grounds to believe" standard to include an objective element and a subjective one:

> In summary then, the *Criminal Code* requires that an arresting officer must subjectively have reasonable and probable grounds on which to base the arrest. Those grounds must, in addition, be justifiable from an objective point of view. That is to say, a reasonable person placed in the position of the officer must be able to conclude that there were indeed reasonable and probable grounds for the arrest. On the other hand, the police need not demonstrate anything more than reasonable and probable grounds. Specifically they are not required to establish a *prima facie* case for conviction before making the arrest.

See *R. v. Storrey*, [1990] 1 S.C.R. 241.

16. *Criminal Code* (the Code), R.S.C. 1985, c. C-46. A number of provisions in the Code require prior judicial approval (a warrant) that is subject to the "reasonable grounds to believe" standard for a search or seizure to take place. Examples include the provisions on search warrants (section 487 of the Code), the general warrant that covers electronic surveillance (section 487.01 of the Code), general production orders for documents (section 487.014 of the Code), production orders for tracking data (section 487.017 of the Code), production orders for financial data (section 487.018 of the Code) and warrants for forensic DNA analysis (section 487.05 of the Code).

17. *R. v. Chehil*, 2013 SCC 49, paras. 27–29.

18. Ibid., para. 29.

19. *R. v. Simmons*, [1988] 2 S.C.R. 495, para. 49. See also *R. v. Monney*, [1999] 1 S.C.R. 652, paras. 34–36; and *R. v. Jacques*, [1996] 3 S.C.R. 312, para. 18.

20. *R. v. Simmons*, [1988] 2 S.C.R. 495, para. 27.

21. Ibid.

22. Ibid.

23. Note that section 2 of the *Customs Act* defines "goods" as follows: "for greater certainty, includes conveyances, animals and any document in any form." This same provision defines "record" as "any material on which data are recorded or marked and which is capable of being read or understood by a person or a computer system or other device." See *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.), s. 2.

24. See, for example, *R. v. Moroz*, 2012 ONSC 5642 (CanLII), para. 20; *R. v. Saikaley*, 2012 ONSC 6794 (CanLII), paras. 79–82; *R. v. Buss*, 2014 BCPC 16 (CanLII), paras. 25–33; *R. v. Gibson*, 2017 BCPC 237 (CanLII), paras. 64 et seq.; and *R. v. Bialski*, 2018 SKCA 71 (CanLII), para. 111. See also Sergio R. Karas and Zachary Gee, "Privacy Compromised: Searches of Electronic Devices at Ports of Entry," *International Law News*, American Bar Association, Vol. 48, No. 3, Spring 2021.

25. *R. v. Canfield*, 2020 ABCA 383 (CanLII), para. 6.

26. The Ontario Court of Appeal came to the same conclusion. See *R. v. Pike*, 2024 ONCA 608, paras. 36–40.

27. ***R. v. Canfield*, 2020 ABCA 383 (CanLII), para. 70.**

28. *R. v. Simmons*, [1988] 2 S.C.R. 495, para. 28; and *R. v. Canfield*, 2020 ABCA 383 (CanLII), para. 75.

29. In 2024, the Ontario Court of Appeal held that the same threshold (i.e., reasonable suspicion) applies to digital devices and to strip searches. See *R. v. Pike*, 2024 ONCA 608, paras. 53, 80 and 122.

30. The Court of Appeal of Alberta referred to more recent Supreme Court decisions in *Vu* and *Fearon*, which recognize the intrusive nature of a search of a personal computer or cellular telephone in a residential setting and acknowledge that these searches are different from searches of other places. See *R. v. Canfield*, 2020 ABCA 383 (CanLII), paras. 31–38 and 75 et seq.; *R. v. Fearon*, 2014 SCC 77; and *R. v. Vu*, 2013 SCC 60.

31. *R. v. Canfield*, 2020 ABCA 383 (CanLII), para. 75.

32. Ibid., paras. 7, 188 and 189.

33. Ibid., paras. 7, 113, 114 and 190. Initially, the declaration of invalidity was suspended for one year, until 28 October 2021. However, the Alberta Court of Appeal issued a decision extending the suspension of invalidity for six months, until 28 April 2022. See *R. v. Canfield*, 2021 ABCA 352 (CanLII). A further application for an extension was made, but was dismissed by the Alberta Court of Appeal. See *Her Majesty the Queen (Canada) v. Canfield*, 2022 ABCA 145 (CanLII).

34. *R. v. Canfield*, 2020 ABCA 383 (CanLII), para. 75.

35. Ibid.

36. *Sheldon Wells Canfield, et al. v. Her Majesty the Queen, et al.*, Applications for Leave, Case no. 39676, 11 March 2021.

37. **The Court also declared unconstitutional the mandatory minimum sentence of one year's imprisonment for the offence of importing child pornography set out in section 163.1(3) of the *Criminal Code*. See *R. v. Pike*, 2024 ONCA 608, para. 183.**

38. This internal policy does not appear to be published on the CBSA website. However, the CBSA's Operational Bulletin PRG-2015-31: *Examination of Digital Devices and Media at the Port of Entry – Guidelines* was obtained by ETHI. Although it is unclear whether this bulletin was up to date or in force at the time of writing this legislative summary, it remains a reference document. See ETHI, "Appendix A: Examination of Digital Devices and Media at the Port of Entry – Guidelines," *Protecting Canadians' Privacy at the U.S. Border*, Tenth report, December 2017, p. 23.

39. Government of Canada, *Examining personal digital devices at the Canadian border*.

40. Ibid. See also Operational Bulletin PRG-2015-31: *Examination of Digital Devices and Media at the Port of Entry – Guidelines*. ETHI, "Appendix A: Examination of Digital Devices and Media at the Port of Entry – Guidelines," *Protecting Canadians' Privacy at the U.S. Border*, Tenth report, December 2017, p. 23.

41. Operational Bulletin PRG-2015-31: *Examination of Digital Devices and Media at the Port of Entry – Guidelines*. See also ETHI, "Appendix A: Examination of Digital Devices and Media at the Port of Entry – Guidelines," *Protecting Canadians' Privacy at the U.S. Border*, Tenth report, December 2017, p. 23.

42. ETHI, "Appendix A: Examination of Digital Devices and Media at the Port of Entry – Guidelines," *Protecting Canadians' Privacy at the U.S. Border*, Tenth report, December 2017, p. 25.

43. Government of Canada, "Statistics," *Examining personal digital devices at the Canadian border*.

44. Terry Davidson, "Canada's border guards not documenting device searches, says lawyer," *The Lawyer's Daily*, 9 March 2020.

45. In *R. v. Pike*, the Ontario Court of Appeal did not address whether the password demand violates the right against self-incrimination guaranteed by section 7 of the Charter. See *R. v. Pike*, 2024 ONCA 608, para. 112. However, the Court held that password demands amount to detention within the meaning of section 9 of the Charter, therefore requiring that the person detained be promptly informed of the reasons for their detention (s. 10(a) of the Charter) and of their right to counsel (s. 10(b) of the Charter). See *R. v. Pike*, 2024 ONCA 608, paras. 116–123.

46. Government of Canada, "What to expect if we examine your personal digital device," *Examining personal digital devices at the Canadian border*.

47. Ibid.

48. Government of Canada, "Solicitor-client privileged information," *Examining personal digital devices at the Canadian border*. Note that CBSA Operational Bulletin PRG-2015-31 does not address solicitor–client privilege.

49. Canadian Bar Association (CBA), *Privacy of Canadians at Airports and Borders*, Submission to ETHI, September 2017; and Barreau du Québec, *The Barreau du Québec: Comments and Observations – Privacy and Personal Information Protection at Border Crossings and Airports*, Submission to ETHI, 18 October 2017.

50. Public Safety Canada (PSC), "What is Preclearance?," *Preclearance in Canada and the United States*.

51. Ibid.; and PSC, *Beyond the Border Action Plan*.

52. PSC, "History of Preclearance in Canada," *Preclearance in Canada and the United States*.

53. Government of Canada, *Agreement on Air Transport Preclearance Between the Government of Canada and the Government of the United States of America*.

54. *Preclearance Act*, S.C. 1999, c. 20. While Bill S-22, An Act authorizing the United States to preclear travellers and goods in Canada for entry into the United States for the purposes of customs, immigration, public health, food inspection and plant and animal health (short title: Preclearance Act), received Royal Assent in 1999, it did not come into force until the corresponding agreement, the *Agreement on Air Transport Preclearance*, was ratified in 2003. The 1999 *Preclearance Act* was repealed on 15 August 2019.

55. PSC, *Beyond the Border Action Plan*.

56. Government of Canada, *Agreement on Land, Rail, Marine, and Air Transport Preclearance Between the Government of Canada and the Government of the United States of America*.

57. *Preclearance Act, 2016*, S.C. 2017, c. 27. Bill C-23, An Act respecting the preclearance of persons and goods in Canada and the United States, received Royal Assent on 12 December 2017.

58. *Order Fixing the Date on which the Preclearance Act, 2016 Comes into Force as the Day on which the Agreement on Land, Rail, Marine and Air Transport Preclearance between the Government of Canada and the Government of the United States of America Enters into Force*, SI/2019-34, 12 June 2019, in *Canada Gazette*, Part II, 12 June 2019, p. 3076. According to the explanatory note for the Order, Canada put in place regulations regarding how detained or seized goods are disposed of, determining who is permitted to enter a preclearance area, determining what instructions airport employees and other non-travellers must comply with within a preclearance area, establishing a mechanism for travellers to submit comments on their interactions with preclearance officers and mandating a continuous police presence in a preclearance area. Canada was also required to complete an exemption order to the *Firearms Act* permitting U.S. preclearance officers to carry firearms within Canada.

59. Ibid., p. 3076; and PSC, *New Canada–U.S. Preclearance Agreement comes into force, opening door to enhanced travel and trade*, News release, 15 August 2019.

60. PSC, "Preclearance Locations in Canada," *Preclearance in Canada and the United States*. In addition, to facilitate transborder traveller transportation, U.S. "pre-inspection facilities" also exist at marine terminals in Vancouver, Victoria and Prince Rupert, and at the passenger rail terminal in Vancouver.

61. In-transit preclearance allows international passengers to avoid the customs clearance process upon their arrival on Canadian soil.

62. The Government of Canada plans to implement this preclearance pilot project in the United States in the first quarter of the 2023–2024 fiscal year. Government of Canada, "Travellers Preclearance," *Ministerial transition 2021: Transition binder – Key programs*.

63. Department of Finance Canada, "4.5 Building Infrastructure to Boost Trade," *A Recovery Plan for Jobs, Growth, and Resilience*, Budget 2021.

64. *Preclearance Act, 2016*, S.C. 2017, c. 27, Schedule. The Minister of Transport is responsible for designating preclearance areas and perimeters at air, marine and rail sites, while the Minister of Public Safety is responsible for land sites. See *Order Designating Certain Members of the Queen's Privy Council for Canada to be Minister for the Purposes of this Act and Certain Sections of that Act in Certain Circumstances: (1) the Minister of Public Safety and Emergency Preparedness; (2) the Minister of Transport; and (3) the Minister of Foreign Affairs*, SI/2019-33.

65. For the complete list of aerodromes, see *Canadian Aviation Security Regulations, 2012*, SOR/2011-318, Schedules 1–3.

66. *Preclearance Act, 2016*, S.C. 2017, c. 27, s. 28. Under section 13(1), "[a] preclearance officer may, in a preclearance area or preclearance perimeter, also conduct a frisk search of a person if the officer has reasonable grounds to suspect that the person has on their person anything that would present a danger to human life or safety."

67. *Preclearance Act, 2016*, S.C. 2017, c. 27, s. 20(1)(c). Under section 2, the term "goods" "includes (a) currency and monetary instruments; and (b) for greater certainty, animals and plants and their products, conveyances and any document in any form."

68. Government of Canada, *Agreement on Land, Rail, Marine, and Air Transport Preclearance Between the Government of Canada and the Government of the United States of America*. Under Article II of the Agreement:

> 2. The Inspecting Party shall ensure that the preclearance officers comply with the law of the Host Party while in the territory of that Host Party. The law of the Host Party applies in the preclearance area and the preclearance perimeter. Preclearance officers shall only exercise powers and authorities permitted and provided by the Host Party pursuant to this Agreement. Given that preclearance officers must also administer the Inspecting Party's laws in the territory of the Host Party, preclearance shall be conducted in a manner consistent with the law and constitutions of both Parties and with this Agreement, recognizing that the Parties shall apply the applicable standards set out in Article VI. The Parties acknowledge that the Inspecting Party shall not enforce the Inspecting Party's criminal law in the territory of the Host Party through activities such as arrest or prosecution.

69. PSC, *Preclearance: Helping keep the Canada–United States Border secure and efficient, while protecting Canadians' Charter Rights*.

70. Office of the Privacy Commissioner of Canada (OPC), "Travelling to the U.S. or other countries," *Your privacy at airports and borders*, December 2018; OPC, *Letter to the Standing Committee on Public Safety and National Security regarding the review of Bill C-23, An Act respecting the preclearance of persons and goods in Canada and the United States*, 24 May 2017; British Columbia Civil Liberties Association and Canadian Internet Policy and Public Interest Clinic, "U.S. Preclearance Areas in Canada," *Electronic Devices Privacy Handbook: A Short Guide to Your Rights at the Border*, 2018, p. 7; and International Civil Liberties Monitoring Group and National Council of Canadian Muslims, *Brief on Bill C-23: Preclearance Act, 2016*, Submission to the House Standing Committee on Public Safety and National Security, 12 May 2017, p. 11.

71. Government of Canada, "Personal Digital Devices," *Examining personal digital devices at the Canadian border*.

72. Ibid.

73. Section 2 of the *Customs Act* defines the term "release" as including "in respect of goods, to authorize the removal of the goods from a customs office, sufferance warehouse, bonded warehouse or duty-free shop for use in Canada" and the term "export" as "export from Canada." See *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.), s. 2.

74. Government of Canada, "What to expect if we examine your personal digital device," *Examining personal digital devices at the Canadian border*.

75. Senate, Standing Committee on National Security, Defence and Veterans Affairs (SECD), *Evidence*, 30 May 2022 (Hon. Marco E. L. Mendicino, PC, MP, Minister of Public Safety, Public Safety Canada).

76. *R. v. Pike*, 2024 ONCA 608, para. 41.

77. SECD, *Third report*, 15 June 2022.

78. Bill S-7, An Act to amend the Customs Act and the Preclearance Act, 2016, 44th Parliament, 1st Session, cl. 1 (first reading version, 31 March 2022).

79. CBA/ABC National, *Making up a new search standard*, CBA, 14 April 2022. See also Ian Burns, "No satisfactory explanation why law on cellphone searches at border has not been introduced: court," *LAW360* Canada, 2 May 2022.

80. SECD, *Evidence*, 30 May 2022 (Hon. Marco E. L. Mendicino, PC, MP, Minister of Public Safety, Public Safety Canada).

81. Ibid.

82. Ibid.

83. Ibid.

84. CBA/ABC National, *Making up a new search standard*, CBA, 14 April 2022. It should be noted that ETHI and the OPC have recommended, among other things, that the "reasonable grounds to suspect" standard be applied to examinations of digital devices by CBSA officers. See ETHI, *Protecting Canadians' Privacy at the U.S. Border*, Tenth report, December 2017; and OPC, *Crossing the line? The CBSA's examination of digital devices at the border*, 21 October 2019.

85. *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.), s. 153.1.

86. See section 1.2.2 of this legislative summary for more information about the terms "preclearance area" and "preclearance perimeter."

87. It should be noted that the Privacy Commissioner has also recommended that the examination of digital devices by preclearance officers be subject to the "reasonable grounds to suspect" standard. OPC, *Follow-up to the Senate Standing Committee on National Security and Defence (SECD) on Bill C-23, an Act to Amend the* Customs Act (Preclearance), 5 December 2017.

88. *Preclearance in Canada Regulations*, SOR/2019-183.