



Password protection does not limit search of electronic devices at the border

A recent Ontario Court of Appeal decision on police searches of cell phones serves as a reminder that care must be taken when carrying electronic devices across the border. In *R v Fearon*, the appellant argued that the police violated his constitutional right to freedom from unreasonable search and seizure when they conducted a warrantless search of a cellphone found on his person. The Court held that the search of the unlocked cellphone was incidental to Fearon's arrest, but noted that a warrant would have been required had the phone been password protected or locked.

This "password protected" rule has received a great deal of media attention; however, persons entering and exiting Canada should be aware that it does not apply to searches at the border.

The *Customs Act* provides that Canadian Border Service Agency ("CBSA") officers may examine and inspect any **goods** that enter or leave[†] Canada. A personal or work-related cell phone, smart phone or laptop computer falls within the definition of goods as do electronic documents such as computer files, digital photographic images and text messages.

A non-destructive search of a computer, smart phone or cellphone at an international border for the purpose of determining compliance with the *Customs Act* is considered a routine inspection. As such, there is a reduced expectation of privacy and CBSA officers do not require reasonable grounds

or a warrant to search these devices. Moreover, the Ontario Court of Appeal's "password protected" rule does not apply. A password is analogous to a key and refusing to provide a password is analogous to a refusal to open a car trunk or a locked suitcase.

Travellers concerned about safeguarding sensitive or privileged information can take steps to protect such information. Travellers can use clean electronic devices and access sensitive files abroad by connecting remotely to a company server; however, electronic communications in foreign countries will be subject to that country's laws. Travellers with privileged documents should declare to any CBSA officer searching those documents that the documents are privileged. While this will not necessarily limit the search, it will help ensure that privileged information is not improperly disclosed to other parties.

[†] Many goods destined for export are exempted from reporting requirements, and therefore are not subject to examination by CBSA. The right to examine goods for export is limited to those goods that are not exempt from reporting.



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