File No. 38376

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

BETWEEN:

SHELDON WELLS CANFIELD

APPLICANT
(Appellant)

- and -

HER MAJESTY THE QUEEN

RESPONDENT
(Respondent)

- and –

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

RESPONDENT
(Respondent)

AND BETWEEN:

DANIEL EMERSON TOWNSEND

APPLICANT
(Appellant)

- and –

HER MAJESTY THE QUEEN

RESPONDENT
(Respondent)

- and –

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

RESPONDENT
(Respondent)

JOINT APPLICATION FOR LEAVE TO APPEAL

(SHELDON WELLS CANFIELD & DANIEL EMERSON TOWNSEND, APPLICANTS)

(Pursuant to Section 691(1)(b) of the *Criminal Code of Canada*)

Kent Teskey, Q.C.
Pringle Chivers Sparks Teskey
Barristers
#300, 10150 100 Street
Edmonton, AB T5J 0P6

Tel: (780) 424-8866
Fax: (780) 666-7398
Email: kteskey@pringlelaw.ca

Counsel for the Applicant,
Sheldon Wells Canfield

Evan V. McIntyre
Pringle Chivers Sparks Teskey
Barristers
#300, 10150 100 Street
Edmonton, AB T5J 0P6

Tel: (780) 424-8866
Fax: (780) 666-7398
Email: emcintyre@pringlelaw.ca

Counsel for Counsel for the Applicant,
Daniel Emerson Townsend

Jim Robb, Q.C.
Alberta Department of Justice
Appeals Division, Criminal Justice Branch
3rd Floor, 9833 109 Street NW
Edmonton, AB T5K 2E8

Tel: (780) 422-5402
Fax: (780) 422-1106
Email: jim.robb@gov.ab.ca

Counsel for the Respondent,
Her Majesty the Queen

Moira Dillon
Supreme Law Group
900 – 275 Slater Street
Ottawa ON K1P 5H9

Tel: (613) 691-1224
Fax: (613) 691-1338
Email: mdillon@supremelawgroup.ca

Ottawa Agent for the Applicant,
Sheldon Wells Canfield

Moira Dillon
Supreme Law Group
900 – 275 Slater Street
Ottawa ON K1P 5H9

Tel: (613) 691-1224
Fax: (613) 691-1338
Email: mdillon@supremelawgroup.ca

Ottawa Agent for Counsel for the
Applicant, Daniel Emerson Townsend

Shelley L. Tkatch
Public Prosecution Service of Canada – Alberta Division
#900, 700 – 6th Ave. SW
Calgary, AB T2P 0T8

Tel: (403) 299-3978
Fax: (403) 299-3966
Email: shelley.tkatch@ppsc-sppc.gc.ca

Counsel for the Respondent, Her Majesty the Queen in Right of Canada

François Lacasse
Public Prosecution Service of Canada
160 Elgin Street, 12th Floor
Ottawa, ON K1A 0H8

Tel: (613) 957-4770
Fax: (613) 941-7865
Email: flacasse@ppsc-sppc.gc.ca

Agent for the Respondent, Her Majesty the Queen in Right of Canada

TABLE OF CONTENTS

File No. _____

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

BETWEEN:

SHELDON WELLS CANFIELD

APPLICANT
(Appellant)

- and -

HER MAJESTY THE QUEEN

RESPONDENT
(Respondent)

- and –

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

RESPONDENT
(Respondent)

AND BETWEEN:

DANIEL EMERSON TOWNSEND

APPLICANT
(Appellant)

- and –

HER MAJESTY THE QUEEN

RESPONDENT
(Respondent)

- and –

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

RESPONDENT
(Respondent)

<u>AMENDED</u> JOINT NOTICE OF APPLICATION FOR LEAVE TO APPEAL

(SHELDON WELLS CANFIELD & DANIEL EMERSON TOWNSEND, APPLICANTS)

(Pursuant to Rule 25 of the *Rules of the Supreme Court of Canada*)

TAKE NOTICE that Sheldon Wells Canfield and Daniel Emerson Townsend apply for leave to appeal to the Supreme Court of Canada, pursuant to s. 691(1)(b) of the *Criminal Code*, from the judgment of the Court of Appeal of Alberta, dated October 29, 2020, Appeal #1803-0294A & #1803-0293A.

AND FURTHER TAKE NOTICE that this application for leave is made on the grounds that this case raises the following issues of national and public importance:

1. When does the search of a digital device at the border require individualized suspicion?
2. When is a traveller "detained" at the border for *Charter* purposes?
3. If a traveller is compelled to answer questions under the *Customs Act*, how are the traveller's communicative responses – and any derivative evidence – protected by the principle against self-incrimination incorporated into s. 7 of the *Charter*? Should any compelled evidence be excluded from a criminal trial under s. 24(1) of the *Charter*?
4. When applying s. 24(2) of the *Charter* and deciding whether the admission of evidence would bring the administration of justice into disrepute, should a court consider the unique circumstances of the accused who brings a "test case" that ends a practice that caused a systemic breach of many Canadians' *Charter* rights?

DATED AT Edmonton, Alberta, this 16th day of November, 2020.

Kent Teskey, Q.C. and Evan V. McIntyre
Counsel for the Applicant

Kent Teskey, Q.C.
PRINGLE CHIVERS SPARKS TESKEY
Barristers
#300, 10150 100 Street
Edmonton, AB T5J 0P6

Tel: (780)-424-8866
Fax: (780)-666-7398
Email: emcintyre@pringlelaw.ca

Counsel for the Applicant,
Sheldon Wells Canfield

Moira S. Dillon
Supreme Law Group
900 – 275 Slater Street
Ottawa ON K1P 5H9

Tel: (613)-691-1224
Fax: (613)-691-1338
Email: mdillon@supremelawgroup.ca

Ottawa Agent for Counsel for the
Applicant, Sheldon Wells Canfield

Evan V. McIntyre
PRINGLE CHIVERS SPARKS TESKEY
Barristers
#300, 10150 100 Street
Edmonton, AB T5J 0P6

Tel: (780)-424-8866
Fax: (780)-666-7398
Email: emcintyre@pringlelaw.ca

Counsel for the Applicant,
Daniel Emerson Townsend

Moira S. Dillon
Supreme Law Group
900 – 275 Slater Street
Ottawa ON K1P 5H9

Tel: (613)-691-1224
Fax: (613)-691-1338
Email: mdillon@supremelawgroup.ca

Ottawa Agent for Counsel for the
Applicant, Daniel Emerson Townsend

ORIGINAL TO: THE REGISTRAR

COPY TO:

Jim Robb, Q.C.
ALBERTA DEPARTMENT OF JUSTICE
Appeals Division, Criminal Justice Branch
3rd Floor, 9833 109 Street NW
Edmonton, AB T5K 2E8

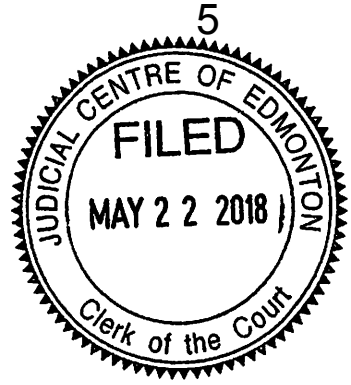
Tel: (780) 422-5402
Fax: (780) 422-1106
Email: jim.robb@gov.ab.ca
Counsel for the Respondent,
Her Majesty the Queen

Shelley L. Tkatch
PUBLIC PROSECUTION SERVICE OF CANADA; ALBERTA REGION
#900, 700 – 6th Ave. SW
Calgary, AB T2P 0T8

Tel: (403) 299-3978
Fax: (403) 299-3966
Email: shelley.tkatch@ppsc-sppc.gc.ca

Counsel for the Respondent,
Her Majesty the Queen in Right of Canada

NOTICE TO THE RESPONDENT OR INTERVENER: A respondent or intervener may serve and file a memorandum in response to this application for leave to appeal within 30 days after the day on which a file is opened by the Court following the filing of this application for leave to appeal or, if a file has already been opened, within 30 days after the service of this application for leave to appeal. If no response is filed within that time, the Registrar will submit this application for leave to appeal to the Court for consideration pursuant to section 43 of the *Supreme Court Act*.



Court of Queen's Bench of Alberta

Citation: R v Canfield, 2018 ABQB 408

Date:
Docket: 150291227Q1, 150156834Q1
Registry: Edmonton

Between:

150291227Q1

Her Majesty the Queen

Respondent

- and -

Sheldon Wells Canfield

Applicant/Accused

And Between:

150156834Q1

Her Majesty the Queen

Respondent

- and -

Daniel Emerson Townsend

Applicant/Accused

And Between:

Sheldon Wells Canfield;
Daniel Emerson Townsend

Applicants/Accused

- and -

Her Majesty the Queen

Respondent

- and -

Public Prosecution Service of Canada

Intervenor

Reasons for Judgment
of the
Honourable Mr. Justice R. Paul Belzil

The Application

[1] The Applicants, Sheldon Canfield and Daniel Townsend, have each been charged with one count of Possession of Child Pornography contrary to s 163.1(4) of the *Criminal Code* and one count of Importing Child Pornography contrary to s 163.1(3) of the *Criminal Code*, as a result of searches conducted on their electronic devices at the Edmonton International Airport, following their arrivals on international flights.

[2] The Applicants have admitted all of the elements of the offences with which they have been charged, subject to their challenge of the constitutionality of s 99(1)(a) of the *Customs Act*, RSC 1985, c 1 (2nd Supp) (*Act*).

[3] Their joint Constitutional challenge seeks the following:

1. A determination that the rights of each Applicant, as guaranteed by sections 7, 8, 10(a) and 10(b) of the *Charter of Rights and Freedoms*, were violated;
2. A declaration made pursuant to section 52(1) of the *Constitution Act*, 1982, that section 99(1)(a) of the *Customs Act*, RSC 1985, c 1 (2nd Supp), violates section 8 of the *Canadian Charter of Rights and Freedoms* and cannot be saved by section 1 of the *Canadian Charter of Rights and Freedoms*, and is therefore inconsistent with the Constitution of Canada and of no force or effect; and
3. An order, made pursuant to sections 24(1) and 24(2) of the *Canadian Charter of Rights and Freedoms*, excluding certain evidence (as particularized below) from the trials of these matters, on the grounds that evidence was obtained in a manner that violated the Applicants' *Charter* rights.

[4] By agreement, the accused were tried before me concurrently.

Factual Background

[5] During the trial, I heard extensive evidence about general Customs procedures at border entries into Canada, in particular, airports.

[6] All passengers arriving at an airport from outside Canada, are directed to a Customs controlled area. Each passenger is requested to complete an E311 Declaration Card, which provides information about the passenger and any goods being brought into Canada.

[7] At the primary inspection line (PIL), each passenger is questioned by a Border Services Officer (BSO) for approximately one to two minutes.

[8] During the discussion in the PIL, the BSO will determine if there are any "indicators", sufficient to refer the passenger for secondary screening.

[9] "Indicators" is not a defined term but may include the person's demeanour, travel itinerary and anything disclosed in the E311 Declaration Card.

[10] Some references for secondary screening are computer generated and some may be entirely random.

[11] At secondary screening, the BSO may search electronic devices.

[12] At the Edmonton International Airport, secondary screening is conducted in an open area immediately adjacent to the initial Customs screening area.

[13] On March 22, 2014, the Applicant, Townsend, arrived on a flight from Seattle.

[14] He was referred for secondary screening by a BSO based on the following indicators:

1. He presented himself at Customs declaring three bags and stated that he had been travelling in the US for five months. The BSO felt that this was an unusual travel pattern for a trip of that length; and
2. During initial questioning his demeanour changed and he stopped making eye contact.

[15] Townsend was found to be in possession of 12 electronic devices, including a laptop computer. A BSO inspected the laptop and found images of child pornography. Townsend was then arrested.

[16] On December 12, 2014, the Applicant, Canfield, arrived on a flight from Cuba. He was referred for secondary screening by a BSO based on the following indicators:

1. he was travelling alone;
2. he travelled regularly to Cuba by himself;
3. he had an overly friendly demeanour; and
4. he made references to "women and Cuba and the beach". Evidence at trial indicated that this was an indicator for sex tourism for women and children.

[17] During a search of his luggage, sex aids were discovered.

[18] The BSO conducting the secondary search formed the belief that Canfield had child pornography on his cell phone. He was asked whether there was child pornography on his cell phone and he responded that there was. After the BSO observed images of child pornography on the cell phone, Canfield was arrested.

The Legislation

[19] Section 99(1)(a) of the *Act* is as follows:

> **Examination of goods**
>
> 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;

[20] The definition of "goods" under the *Act* is as follows:

> goods, for greater certainty, includes conveyances, animals and any document in any form;

Did the search of the Applicants' electronic devices pursuant to s 99(1)(a) of the *Customs Act* violate their rights as guaranteed by s 8 of the *Charter*?

[21] Section 8 of the *Charter* reads as follows:

> Everyone has the right to be secure against unreasonable search or seizure.

[22] The Applicants argue that because their electronic devices contained large amounts of personal information, they should not have been searched by BSO's, absent individualized suspicion that the devices contained prohibited material.

[23] In ***R v Marakah***, 2007 SCC 59, at para 10, it was held that the protections under s 8 of the *Charter* against unreasonable search and seizure, are only engaged where an individual has a reasonable expectation of privacy in the subject matter of the search. The claimant must have a subjective expectation that this subject matter remains private and the expectation must be objectively reasonable.

[24] In ***R v Tessling***, 2004 SCC 6, at para 44, it was held that the place where the search occurs greatly influences the reasonableness of the individual's expectation of privacy.

[25] In the case law, there is a well established distinction in expectations of privacy in a domestic, in land context contrasted to the context of an entry into Canada at the border.

[26] In ***R v Monney***, [1999] 1 SCR 652, the Court cautioned against an overly broad use of s 8 jurisprudence in border crossing cases and in paras 42-43 stated the following:

> **42** The most significant distinction between the circumstances of this appeal and the situation of the respondent in *Stillman* is that border crossings represent a unique factual circumstance for the purposes of a s. 8 analysis....
>
> **43** Accordingly, decisions of this Court relating to the reasonableness of a search for the purposes of s. 8 in general are not necessarily relevant in assessing the constitutionality of a search conducted by customs officers at Canada's border.

[27] In ***R v Simmons***, [1988] 2 SCR 495, at para 27, the Court accepted that there is a lower expectation of privacy at the border which is a function of maintaining national sovereignty:

> **27** It is, I think, of importance that the cases and the literature seem to recognize three distinct 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. No stigma is attached to being one of the thousands of travellers who are daily routinely checked in that manner upon entry to Canada and no constitutional issues are raised. It would be absurd to suggest that a person in such circumstances is detained in a constitutional sense and therefore entitled to be advised of his or her right to counsel. The second type of border search is the strip or skin search of the

> nature of that to which the present appellant was subjected, 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.

[28] There is no reference in the first category of routine questioning, to any requirement of individualized suspicion being formed.

[29] The three categories outlined in ***Simmons*** are discrete. In ***R v Hudson***, (2005) 77 OR (3d) 561 (CA), at para 30, the following passage appears:

> [30] ...The three categories of search identified in Simmons are discrete categories and not a continuum. The cases decided subsequent to Simmons were resolved by first examining the central question of classifying the search within a category identified in Simmons: see Monney, supra. As noted, this approach is necessary because it determines the level of constitutional protection engaged.

[30] In ***R v Jones***, 2006 CanLII 28086 (ON CA) the Ontario Court of Appeal applied ***Simmons*** and stated the following at paras 30-32:

> [30] Like the trial judge, I think the fact that the impugned statements were made at the border in the course of routine questioning by Customs authorities is central to the analysis of the appellant's self-incrimination claim. No one entering Canada reasonably expects to be left alone by the state, or to have the right to choose whether to answer questions routinely asked of persons seeking entry to Canada. As the appellant himself testified, travellers reasonably expect that they will be questioned at the border and will be expected to answer those questions truthfully. Travellers also reasonably expect that Customs authorities will routinely and randomly search their luggage. Put simply, the premise underlying the principle against self-incrimination, that is, that individuals are entitled to be left alone by the state absent cause being shown by the state, does not operate at the border. The opposite is true. The state is expected and required to interfere with the personal autonomy and privacy of persons seeking entry to Canada. Persons seeking entry are expected to submit to and co-operate with that state intrusion in exchange for entry into Canada.
>
> [31] I also have no hesitation in describing Canada's effective control over its borders as a societal interest of sufficient importance to be characterized as a principle of fundamental justice. Nothing is more fundamental to nationhood and national sovereignty than the ability to control national borders. Effective border control serves a myriad of crucial social interests ranging from national self-defence to public health, to the enforcement of Canada's fiscal policies and its penal statutes. The appellant's self-incrimination claim must be balanced against the equally fundamental societal claim to the preservation of the integrity of Canada's borders through the effective enforcement of its laws at those borders. Effective enforcement extends to the successful prosecution of those who are apprehended violating Canada's laws at its borders. Those laws, of course, include the prohibition against the importation of narcotics.

> [32] The significance of the border crossing context to the delineation of individual *Charter* rights is evident from the cases that have considered the operation of s. 10(b) (the right to counsel) and s. 8 (the protection against unreasonable search and seizure) at the border. Persons seeking entry into Canada are subject to state action that can range from routine questioning to highly intrusive searches. The extent to which state action at the border will be said to interfere with individual constitutional rights depends primarily on the intrusiveness of that state action. In cases such as *R. v. Simmons*, [1988] 2 S.C.R. 495, [1988] S.C.J. No. 86, 67 O.R. (2d) 63, 45 C.C.C. (3d) 296, at p. 516 S.C.R., p. 312 C.C.C. and *R. v. Monney*, [1999] 1 S.C.R. 652, [1999] S.C.J. No. 18, 133 C.C.C. (3d) 129, at p. 661 S.C.R., p. 149 C.C.C., the Supreme Court has recognized three levels of state action at the border. The first, or least intrusive level of that action, involves routine questioning of travellers, the search of their luggage, and perhaps a pat-down search of the person. If state action involves only this level of intrusion, the rights protected by s. 10(b) and s. 8 of the *Charter* are not engaged....

[31] The Applicants argue that advances in technology render the ***Simmons*** analysis obsolete and point out that the Supreme Court of Canada in a number of recent decisions has accepted that electronic devices contain large volumes of personal data thus engaging privacy interests:

> ***R v Morelli***, 2010 SCC 8 at para 2; (computer search)
>
> ***R v Vu***, 2013 SCC 60 at para 24; (computer search)
>
> ***R v Fearon***, 2014 SCC 77 at para 51 (cell phone search)
>
> ***R v Jones***, 2017 SCC 60 at para 28 (text messages search)

[32] Notably, none of these decisions involve border issues, rather, they all arise in the context of domestic, in land searches. They are not authority for the proposition that advances in technology have diminished the unique legal context of the border. Indeed none of these decisions make any reference whatsoever to border issues; whereas the context of the border is central to the reasoning in ***Simmons***.

[33] Moreover, these decisions do not support the proposition that because electronic devices contain large amounts of personal information, they are beyond the reach of the law. Rather, they stand for the proposition that individualized search authority may be required.

[34] The Applicants argue that the decision in ***Fearon***, supports the proposition that a search of a cell phone is much closer qualitatively to a strip search and thus falls outside the first category of routine searches described in ***Simmons***.

[35] Leaving aside that ***Fearon*** does not involve border issues and is a post arrest decision, I do not accept that ***Fearon*** supports the position of the Applicants.

[36] At para 51 the majority quoting ***Vu***, readily accepts that searches of cell phones engage privacy interests.

[37] However, at para 55 the majority rejected the argument that a cell phone search is analogous to a strip search:

> **55** In this respect, a cell phone search is completely different from the seizure of bodily samples in *Stillman* and the strip search in *Golden*. Such searches are *invariably* and *inherently* very great invasions of privacy and are, in addition, a significant affront to human dignity. That cannot be said of cell phone searches incident to arrest.

[38] Given that ***Fearon*** does not involve border issues, it is understandable that no reference was made to the three discrete categories of searches outlined in ***Simmons***.

[39] In ***United States of America v Amadi***, 2018 ONSC 727, the court rejected the argument that ***Fearon*** applied to a cell phone search at the border. The following passage appears at para 84:

> ...The *Fearon* restrictions cannot logically be applied when a cell phone is inspected at a border in view of the diminished expectation of privacy when crossing an international border (*R v Simmons*, [1988] 2 SCR 495 at paras 48-50) and the fact that a preclearance inspection of a traveller's good may be entirely random. Constitutionally it need not be based on reasonable grounds to believe that an offence has been committed or that evidence of that offence will be found when goods are inspected (see *R v Jones* (2006), 211 CCC (3d) 4 (CA), at para 30; *R v Singh*, 2014 ONSC 5658, 317 CCC (3d) 446, at para 49.

[40] The facts in ***Fearon*** and the facts before me are not analogous. The contexts are not the same. Bearing in mind the Court's admonition in ***Monney***, accordingly ***Fearon*** is of limited relevance.

[41] Electronic devices have become ubiquitous in modern society. Technological advances in the past few years have been nothing less than astounding. Undoubtedly, this trend will continue in the future and further technological advances will continue to create legal challenges. However, this does not mean that well-established legal frameworks should be abandoned, absent clear direction from the Supreme Court of Canada.

[42] In ***R v Sinclair***, 2016 ONSC 877, the Court applied ***Simmons*** and ***Jones*** (CA) in dismissing the accused's argument that she was detained during routine questioning at the border.

[43] It was held that she was only detained after X-rays identified the presence of drugs in her luggage.

[44] The Ontario Court of Appeal, in a decision cited 2017 ONCA 287, dismissed the appeals from the trial decision and reaffirmed the decision in ***Jones*** (CA). Leave to appeal to the Supreme Court of Canada was refused, 2017 CarswellONT 12864.

[45] In accordance with its usual practice, the Supreme Court of Canada did not give reasons for refusing leave to appeal, however, it surely is significant that leave to appeal in ***Sinclair*** was refused after the release of the Court's decisions in ***Morelli***, ***Vu***, ***Fearon*** and ***Jones***.

[46] There is no authority for the proposition being advanced by the Applicants, that the Supreme Court of Canada is prepared to resile from the principles outlined in ***Simmons*** based on advances in technology. ***Simmons*** remains binding authority. Counsel for the Applicants have

not identified any Supreme Court of Canada decision wherein any judge of the Court has expressed the desirability or necessity of revisiting ***Simmons***.

[47] Moreover, given that overruling ***Simmons*** would have enormous consequences, one would expect that the Supreme Court of Canada, if it wished to overrule this long standing decision, would do so in clear, unequivocal language and not by implication.

[48] It is uncontroverted that the searches of the Applicants did not involve bodily contact, rather they were restricted to searches of their luggage and electronic devices.

[49] In my view, these searches fall within the first category of routine searches described in ***Simmons*** and thus did not engage s 8 of the *Charter*.

If s 8 *Charter* rights were engaged, were s 8 rights breached?

[50] If I am found to be in error in concluding that the Applicants had no reasonable expectation of privacy respecting searches of their electronic devices during secondary screening, I will go on to consider whether the searches were conducted in compliance with s 8.

[51] It is well-established that for a search or seizure to be "reasonable" within the meaning of s 8, three prerequisites must be satisfied:

1. the search must be authorized by law;
2. the law authorizing the search must be reasonable; and
3. the search must be conducted in a reasonable manner.

(See ***R v Collins*** [1987] 1 SCR 265; ***R v Spencer*** [2014] SCC 43 at para 68; and ***Canada v Federation of Law Societies*** [2015] SCC 7 at para 56.)

1. The search must be authorized by law

[52] The Applicants concede that the searches are authorized by s 99(1)(a) of the *Act*.

2. The law authorizing the search must be reasonable

[53] The Applicants submit that because modern electronic devices contain large volumes of personal information they should be exempted from the term "goods" as defined by the *Act*.

[54] In support of this argument, they rely on Supreme Court of Canada decisions like ***Vu*** which recognized that modern electronic devices may contain large volumes of personal information, thus heightening privacy concerns.

[55] As already noted, expectations of privacy at the border are markedly different from the expectations of privacy an individual may reasonably expect in an in land, domestic context.

[56] There is no linkage between expectations of privacy and in an in land, domestic context and the definition of "goods" in the *Act*.

[57] The definition of "goods" in s 2 of the *Act* is very broad and includes "any document in any form".

[58] It has been held in a number of cases, that this definition includes electronic documents. ***R v Leask***, [2008] OJ No. 329 at para 16; ***R v Saikaley***, [2012] ON No. 6024 at para 70 and ***R v Moroz***, [2012] ONSC 5642 at para 20.

[59] There is no reported court decision in Canada wherein it was decided that electronic devices are not "goods" for the purposes of the *Act* and no authority for the proposition that any item is somehow immune from a border search because it contains personal information.

[60] In the context of the border, the nature of the item being searched does not detract from the need to enforce the *Act* and indeed the converse may be true.

[61] In the specific context of child pornography, it would create an absurd result if electronic devices, which can contain electronic images of child pornography were somehow exempt from searches under the *Act*.

[62] In summary, the definition of "goods" in the *Act* is necessarily broad commensurate with the need to enforce national sovereignty at the border.

[63] The Applicants submit that the electronic devices require individualized suspicion before being searched.

[64] Notably, the applicants cite no authority in support of this broad proposition which is predicated on the assumption that these types of searches do not fall within the first category of searches authorized in ***Simmons***.

[65] I conclude that the law authorizing the search is reasonable.

3. The search must be conducted in a reasonable manner

[66] The Applicants argue that the searches were not conducted in a reasonable manner because the BSO's:

i. took no notes;

ii. risked the integrity of the information on the devices;

iii. the information was not limited to information stored on the devices; and

iv. the BSO's received no training on how to conduct the searches.

[67] I do not accept this argument. The Applicants were not detained at secondary screening, thus the BSO's were not required to keep notes. There is no evidence that the integrity of the data on the electronic devices was in any way imperiled, or that data stored elsewhere was imperiled in any way.

[68] In ***Vu*** at para 57, the Court recognized the difficulty of establishing search protocols for electronic devices:

> **57** Second, requiring search protocols to be imposed as a general rule in advance of the search would likely add significant complexity and practical difficulty at the authorization stage. At that point, an authorizing justice is unlikely to be able to predict, in advance, the kinds of investigative techniques that police can and should employ in a given search or foresee the challenges that will present themselves once police begin their search. In particular, the ease with which individuals can hide documents on a computer will often make it difficult to predict where police will need to look to find the evidence they are searching for. For example, an authorizing justice's decision to limit a search for child pornography to image files may cause police to miss child pornography that is stored as a picture in a Word document. In short, attempts to impose search

> protocols during the authorization process risk creating blind spots in an investigation, undermining the legitimate goals of law enforcement that are recognized in the pre-authorization process. These problems are magnified by rapid and constant technological change.

[69] On the evidence before me, the appropriate procedure for a BSO who finds child pornography on an electronic device is to stop searching and place the passenger under immediate arrest.

[70] The searches in question were conducted in a reasonable manner.

[71] In the result, I conclude that if the s 8 rights of the Applicants were engaged, they were not violated.

If s 99(1)(a) of the *Customs Act* violates s 8 of the *Charter*, can it be saved by s 1 of the *Charter*?

[72] In the event that I am found to be in error in concluding that s 99(1)(a) of the *Act* does not violate s 8 of the *Charter*, I will address whether s 99(1)(a) is justified under s 1 of the *Charter*.

[73] In ***R v KRJ***, 2016 SCC 31, the Court reviewed the process of determining whether an impugned provision can be justified under s 1 of the *Charter*:

1. Does s 99 of the *Act* have a sufficiently important objective?

[74] At para 61 the following passage appears:

> 61 A law that limits a constitutional right must do so in pursuit of a sufficiently important objective that is consistent with the values of a free and democratic society. This examination is a threshold requirement that is undertaken without considering the scope of the right infringement, the means employed, or the relationship between the positive and negative effects of the law.

[75] As noted in ***Simmons***, maintaining a secure border is vital to maintaining national sovereignty.

[76] In ***Little Sisters Book & Art Emporium v Canada***, 2000 SCC 69 at para 148 the following passage appears:

> **148** Canadian sovereignty includes the right to inspect and if considered appropriate to prohibit the entry of goods which Parliament, in the valid exercise of its criminal law power, has prohibited (*Simmons, supra*). Customs procedures are rationally connected to that objective.

[77] Accordingly, s 99(1)(a) does have a sufficiently important objective.

2. Are the means adopted proportional to the law's objective?

[78] At para 67 in ***KRJ*** the follow passage appears:

> **67** In assessing the proportionality of a law, a degree of deference is required. As this Court recently wrote in *Carter*:
>
> > At this stage of the analysis, the courts must accord the legislature a measure of deference. Proportionality does not require perfection:

> *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11, [2013] 1 S.C.R. 467, at para. 78. Section 1 only requires that the limits be "reasonable". [para. 97]

A. Rational Connection

[79] As noted at para 68 in ***KRJ***:

> **68** At this first step of the proportionality inquiry, the government must demonstrate that the means used by the limiting law are rationally connected to the purpose the law was designed to achieve. "To establish a rational connection, the government need only show that there is a causal connection between the infringement and the benefit sought 'on the basis of reason or logic'" (*Carter*, at para. 99, citing *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 153).

[80] In the context of border security, there is clearly a rational, causal connection between border security and the purpose s 99(1)(a) was intended to achieve.

B. Minimal Impairment

[81] At para 70 the following passage appears:

> (b) Minimal Impairment
>
> The question at this second stage is whether the 2012 amendments are minimally impairing, in the sense that "the limit on the right is reasonably tailored to the objective" (*Carter*, at para. 102). It is only when there are alternative, less harmful means of achieving the government's objective "in a real and substantial manner" that a law should fail the minimal impairment test (*Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567, at para. 55).

[82] At the first level of scrutiny identified in ***Simmons***, it is difficult to identify a less harmful means of achieving the government subjective of maintaining border security in the context of efficiently processing millions of entrants into Canada every year.

C. Proportional Effects

[83] The final stage of the proportionality analysis is set out in para 77 and 79 in ***KRJ***:

> (c) Proportionality of Effects
>
> **77** At this final stage of the proportionality analysis, the Court must "weig[h] the impact of the law on protected rights against the beneficial effect of the law in terms of the greater public good" (*Carter*, at para. 122). This final stage is an important one because it performs a fundamentally distinct role. As a majority of this Court observed in *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877:
>
> > The focus of the first and second steps of the proportionality analysis is not the relationship between the measures and the Charter right in question, but rather the relationship between the ends of the legislation and the means employed.... The third stage of the proportionality analysis provides an opportunity to assess, in

> light of the practical and contextual details which are elucidated in the first and second stages, whether the benefits which accrue from the limitation are proportional to its deleterious effects as measured by the values underlying the *Charter*. [para. 125]
>
> ...
>
> **79** I agree. While the minimal impairment test has come to dominate much of the s. 1 discourse in Canada, this final step permits courts to address the essence of the proportionality enquiry at the heart of s. 1.7 It is only at this final stage that courts can transcend the law's purpose and engage in a robust examination of the law's impact on Canada's free and democratic society "in direct and explicit terms" (J. Cameron, "The Past, Present, and Future of Expressive Freedom Under the *Charter*" (1997), 35 Osgoode Hall L.J. 1, at p. 66). In other words, this final step allows courts to stand back to determine on a normative basis whether a rights infringement is justified in a free and democratic society. Although this examination entails difficult value judgments, it is preferable to make these judgments explicit, as doing so enhances the transparency and intelligibility of the ultimate decision. Further, as mentioned, proceeding to this final stage permits appropriate deference to Parliament's choice of means, as well as its full legislative objective.

[84] Maintaining a secure border is a function of protecting the greater public good.

[85] Whether one is concerned with child pornography or other threats to the public good, s 8 infringements are clearly overborne by the greater public good.

[86] In my view, Canada's free and democratic society would be undermined if pernicious material like child pornography could flow evermore freely into Canada.

[87] Given the reality that modern electronic devices are increasingly the mechanism for storing such images and given the reality of the threat posed by child pornography being imported, these searches at the border constitute a minimal impairment of s 8 rights.

[88] In the result, I conclude that even if s 99(1)(a) of the *Act* contravenes s 8 of the *Charter*, it is justified under s 1 of the *Charter*.

During secondary screening were the Applicants detained for purposes of ss 10(a) and (b) of the *Charter*?

[89] In ***Dehghani v Canada***, (M.E.I.) 1993, 1 SCR 1053 at 1074, it was held that routine questioning of a person during secondary screening at the border does not amount to detention within the meaning of s 10(b) of the *Charter*.

[90] The Applicants argue that the definition of detention in ***R v Grant***, 2009 SCC 32, supersedes the reasoning in ***Simmons***. No authority is proffered for this proposition. ***Grant*** does not involve border issues.

[91] The context of the border is relevant to a determination of whether s 10(a) and s 10(b) rights were engaged during routine secondary screening.

[92] The Applicants were not detained during secondary screening, thus ss 10(a) and 10(b) *Charter* rights were not engaged.

During secondary screening, were the Applicants' s 7 *Charter* rights breached?

[93] Section 7 of the *Charter* reads as follows:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[94] The Applicants argue that their s 7 *Charter* rights to be protected from self-incrimination were violated, as a result of routine secondary screening by BSOs.

[95] It is well-established that s 7 includes an overarching principle of self-incrimination.

[96] However, it is also well-established that the protection against self-incrimination in s 7 is not absolute and involves a balancing of interests.

[97] In ***R v White***, [1999] 2 SCR 417, at paras 45, 47 & 48 the following passages are found:

> **45** That the principle against self-incrimination does have the status as an overarching principle does not imply that the principle provides absolute protection for an accused against all uses of information that has been compelled by statute or otherwise. The residual protections provided by the principle against self-incrimination as contained in s. 7 are specific, and contextually-sensitive. This point was made in Jones, supra, at p. 257, per [page439] Lamer C.J., and in S. (R.J.), supra, at paras. 96-100, per Iacobucci J., where it was explained that the parameters of the right to liberty can be affected by the context in which the right is asserted. The principle against self-incrimination demands different things at different times, with the task in every case being to determine exactly what the principle demands, if anything, within the particular context at issue. See also R. v. Lyons, [1987] 2 S.C.R. 309, at p. 361, per La Forest J.
>
> ...
>
> **47** The contextual analysis that is mandated under s. 7 of the Charter is defined and guided by the requirement that a court determine whether a deprivation of life, liberty, or security of the person has occurred in accordance with the principles of fundamental justice. As this Court has stated, the s. 7 analysis involves a balance. Each principle of fundamental justice must be interpreted in light of those other individual and societal interests that are of sufficient importance that they may appropriately be characterized as principles of fundamental justice in Canadian society. This analytical approach was applied, for example, in S. (R.J.), supra, at paras. 107-8, per Iacobucci J., where it was stated:
>
> > ... the principle against self-incrimination may mean different things at different times and in different contexts. . .
>
> **48** It is the balancing of principles that occurs under s. 7 of the Charter that lends significance to a given factual context in determining whether the principle against self-incrimination has been violated. In some contexts, the factors that

> favour the importance of the search for truth will outweigh the factors that favour protecting the individual against undue compulsion by the state. . . .

[98] The context of a border crossing is critical, as noted in ***Simmons***. Routine questioning at the border does not engage *Charter* rights.

[99] At para 37 in ***Jones*** (CA), the consequences of the absence of detention were succinctly summarized:

> **[37]** The conclusion, firmly rooted in the jurisprudence, that routine questioning and inspection of luggage at the border does [page493] not result in a detention, give rise to any right to counsel, or interfere with a traveller's reasonable expectation of privacy compels the conclusion that personal autonomy and privacy -- the values animating the protection against self-incrimination -- were not implicated when the appellant was compelled to answer routine questions about his residence and his marital and employment status. The exclusion from evidence at his subsequent trial of these statements, therefore, could not vindicate or protect those values. Exclusion of the answers, however, could diminish the state's ability to effectively enforce its legitimate border interests while at the same time impairing the search for the truth in the criminal proceeding by excluding relevant evidence. The balancing of competing principles of fundamental justice does not favour extending the principle against self-incrimination to statements made in the circumstances in which the appellant made his statements to the Customs authorities.

[100] On this evidentiary record, the Applicants were never subjected to anything beyond routine questioning and were never detained. Accordingly, their s 7 *Charter* rights were not engaged prior to their arrests.

Section 24(2) of the *Charter*

[101] In the event that I am found to be in error in concluding that the *Charter* rights of the Applicants were not breached, I will consider whether the evidence obtained against them as a result of border searches should nonetheless be admitted pursuant to s 24(2) of the *Charter*.

[102] In ***Grant***, the Court identified three factors to be considered:

1. the seriousness of the *Charter*-infringing state conduct;
2. the impact of the breaches of the *Charter* rights of the accused; and
3. society's interest in the adjudication of the case on its merits.

1. The seriousness of the *Charter*-infringing state conduct

[103] It is significant that the impugned evidence was discovered by BSO's in conducting searches on passengers arriving on international flights. The BSO's on this evidentiary record were genuinely attempting to enforce the *Act* as they understood it. There is no evidence of bad faith or capricious behaviour by them.

[104] This weighs in favour of admission of the impugned evidence.

2. The impact of the breaches of the *Charter* rights of the accused

[105] Even if it is determined that the *Charter* rights of the accused were breached, it remains necessary to consider the breaches occurred at the border. As noted in ***Jones*** (CA), it cannot be reasonably argued that anyone entering Canada expects to do so without scrutiny.

[106] Thus, if the *Charter* rights were breached, the impact on the accused was minimal and this factor weighs in favour of admission of the evidence.

3. Society's interest in the adjudication of the case on its merits

[107] The pernicious nature of child pornography has been repeatedly recognized by courts in this country. Children and society at large are harmed by child pornography. ***R v Sharpe***, [2001] SCC 2 at para 28 and ***R v Hammond***, 2009 ABCA 415 at paras 9 & 11.

[108] The impugned evidence is in the form of electronic images and constitutes real, reliable evidence.

[109] As noted in ***Grant*** at para 83, the Court must consider whether excluding the evidence would essentially gut the Crown's case. That is precisely what would occur if the impugned evidence were excluded.

[110] This factor weighs heavily in favour of inclusion of the evidence.

[111] In the result, I find that if the *Charter* rights of the accused were breached, the impugned evidence would nonetheless be admissible pursuant to s 24(2) of the *Charter*.

Conclusion

[112] In summary, I conclude that s 99(1)(a) of the *Act* does not violate s 8 of the *Charter* and accordingly the application to have this section declared unconstitutional is dismissed.

[113] I further conclude that the ss 7, 8, 10(a) and 10(b) *Charter* rights of the Applicants were not breached but, if they were breached, the impugned evidence would nonetheless, be admissible pursuant to s 24(2) of the *Charter*.

[114] In the result I find each of the Applicants guilty of one count of possession of Child Pornography contrary to s 163.1(4) of the *Criminal Code* and one count of Importing Child Pornography contrary to s 163.1(3) of the *Criminal Code*.

Heard on the dates of April 24-26, 2017, November 27 & 28, 2017 and December 4-7, 2017.
Dated at the City of Edmonton, Alberta this 22nd day of May, 2018.

R. Paul Belzil
J.C.Q.B.A.

Appearances:

Kent J. Teskey, Q.C. and Evan McIntyre
Pringle Chivers Sparks Teskey
for the Applicants/Accused

James Rowan
Alberta Justice - Special Prosecutions Branch
for Her Majesty the Queen (Alberta)

Alexander R. Bernard and Kent C. Brown
Public Prosecution Service of Canada
for Her Majesty the Queen (Canada), Intervenor

In the Court of Appeal of Alberta

Citation: R v Canfield, 2020 ABCA 383

Date: 20201029
Docket: 1803-0294-A
1803-0293-A
Registry: Edmonton

Appeal No. 1803-0294-A
150291227Q1

Between:

Her Majesty the Queen

Respondent

- and -

Her Majesty the Queen in the Right of Canada

Respondent

- and -

Sheldon Wells Canfield

Appellant

Appeal No. 1803-0293-A
150156834Q1

And Between:

Her Majesty the Queen

Respondent

- and -

Her Majesty the Queen in the Right of Canada

Respondent

- and -

Daniel Emerson Townsend

Appellant

The Court:

The Honourable Madam Justice Frederica Schutz
The Honourable Madam Justice Jo'Anne Strekaf
The Honourable Madam Justice Ritu Khullar

Reasons for Judgment Reserved

Appeal from the Decision by
The Honourable Mr. Justice Belzil
Convicted on the 22nd day of May, 2018
(2018 ABQB 408, Docket: 150291227Q1/150156834Q1)

TABLE OF CONTENTS

Reasons for Judgment Reserved

The Court:

I. Overview

[1] The appellants, Mr. Canfield and Mr. Townsend, were each convicted of possession of child pornography. The evidence against them included photographs and videos retrieved when their personal electronic devices (a cell phone and laptop computer, respectively) were searched by Canadian Border Services Agency (CBSA) at the Edmonton International Airport. Both appellants are Canadian citizens, and both were referred for secondary inspection upon re-entering Canada. Their electronic devices were searched pursuant to s 99(1)(a) of the *Customs Act*, RSC 1985, c 1.

[2] The only issues at their trials, which were heard together, were whether the searches of their devices offended the *Charter of Rights and Freedoms*, whether the evidence of child pornography found on the devices was obtained in breach of ss 7, 8, 10(a) and 10(b) of the *Charter,* and, if so, whether the evidence should be excluded pursuant to s 24(2) of the *Charter*.

[3] The leading authority on searches conducted at the border is *R v Simmons*, [1988] 2 SCR 495, 55 DLR (4th) 673. The Court in *Simmons* recognized that the degree of personal privacy reasonably expected by individuals seeking to enter Canada is lower than in most other situations. Three distinct types of border searches, with an increasing degree of privacy expectation, were identified: (1) routine questioning which every traveller undergoes at a port of entry, sometimes accompanied by a search of baggage and perhaps a pat or frisk of outer clothing; (2) a strip or skin search conducted in a private room after a secondary examination; and (3) a body cavity search. The first category was viewed as the least intrusive type of routine search, not raising any constitutional issues or engaging the rights protected by the *Charter*: *Simmons* at para 27.

[4] Section 99(1)(a) of the *Customs Act* permits the routine examination of any "goods". The search of personal electronic devices, such as laptop computers and cell phones, has been treated as coming within the definition of "goods" for the purposes of s 99(1)(a), and as being included in the first *Simmons* category of routine searches that can be undertaken without any individualized grounds.

[5] The trial judge here took the same approach to the search of the appellants' personal electronic devices. He declined the appellants' request to revisit *Simmons* in relation to those searches, and concluded that s 99(1)(a) of the *Customs Act* is valid and constitutional and the evidence of child pornography found on the appellants' devices was admissible as it had not been obtained in breach of their *Charter* rights. He further concluded that, if he was wrong, the evidence should not be excluded under s 24(2) of the *Charter*: *R v Canfield*, 2018 ABQB 408.

[6] A binding precedent, such as *Simmons*, "may be revisited if new legal issues are raised as a consequence of significant developments in the law or if there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate": *Canada (Attorney General) v Bedford*, 2013 SCC 72 at para 42. There have been significant developments, both in the technology of personal electronic devices and in the law relating to searches of such devices, since *Simmons* was decided in 1988. A series of cases from the Supreme Court of Canada over the past decade have recognized that individuals have a reasonable expectation of privacy in the contents of their personal electronic devices, at least in the domestic context. 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.

[7] For the reasons that follow, we are satisfied that the trial judge erred by failing to recognize that *Simmons* should be revisited to consider whether personal electronic devices can be routinely searched at the border, without engaging the *Charter* rights of those being searched. We have also concluded that s 99(1)(a) of the *Customs Act* is unconstitutional to the extent that it imposes no limits on the searches of such devices at the border, and is not saved by s 1 of the *Charter*. We accordingly declare that the definition of "goods" in s 2 of the *Customs Act* is of no force or effect insofar as the definition includes the contents of personal electronic devices for the purpose of s 99(1)(a). We suspend the declaration of invalidity for one year to provide Parliament the opportunity to amend the legislation to determine how to address searches of personal electronic devices at the border.

[8] Following this declaration of invalidity, we find the appellants' rights under s 8 of the *Charter* were infringed in the circumstances of this case. We also find the appellants were detained and their rights under s 10 were violated, and that statements made by them after detention are subject to protection under s 7 of the *Charter*. However, like the trial judge, we conclude the evidence should not be excluded pursuant to s 24(2) of the *Charter*.

II. Background Facts

[9] The trial judge found that passengers arriving at an airport from outside Canada are directed to a Customs controlled area. Each passenger completes a Declaration Card, which provides information about the passenger and any goods being brought into Canada, and is questioned at the primary inspection line by a Border Services Officer (BSO) for approximately one to two minutes. If the BSO determines there are any "indicators" (such as the person's demeanour, travel itinerary, and anything disclosed in the Declaration Card), the passenger may be sent for secondary screening, at which point an additional level of examination or investigation, including a search of personal electronic devices, may be conducted before a decision is made to release the traveller.

A. Mr. Canfield

[10] Mr. Canfield arrived at the Edmonton International Airport on a flight from Cuba on December 12, 2014. He was referred by a BSO for secondary screening because he was travelling alone, he travelled regularly to Cuba by himself, he had an overly friendly demeanour, and he referred to "women and Cuba and the beach", which the BSO viewed as an indicator for sex tourism for women and children. Sex aids were found in his luggage. The BSO conducting the secondary search formed the belief that Mr. Canfield had child pornography on his phone. The BSO asked Mr. Canfield if there was child pornography on his cell phone, and Mr. Canfield responded that there was. The BSO asked Mr. Canfield to show him an image of child pornography, which he did. The BSO then conducted a more detailed search of the phone, and found more images of child pornography. Mr. Canfield was then arrested.

B. Mr. Townsend

[11] Mr. Townsend arrived at the Edmonton International Airport on a flight from Seattle on March 22, 2014. At the primary inspection line, he was referred for secondary screening because the BSO considered his three bags, five-month travel pattern and lack of employment to be unusual, and found his demeanour changed and he stopped making eye contact during initial questioning. At the secondary examination area, it was discovered that Mr. Townsend was in possession of 12 electronic devices, including a laptop computer. A BSO demanded the password for the laptop, which Mr. Townsend provided. The laptop was searched and images of child pornography were found on it. At that point, Mr. Townsend was arrested.

III. Grounds of Appeal and Standards of Review

[12] The appellants submit that the trial judge committed the following errors:

1. Declining to reconsider *Simmons* in light of the significant societal change with regard to the reasonable expectations of privacy of Canadians in the contents of their personal electronic devices;
2. Failing to make necessary or sufficient findings of fact to permit meaningful appellate review;
3. Concluding that s 99(1)(a) of the *Customs Act* is constitutional in permitting unlimited searches of electronic devices;
4. Concluding that the appellants' constitutional rights under sections 7, 8 and 10 of the *Charter* had not been breached; and
5. Declining to exclude the evidence from the searches of the appellants' electronic devices pursuant to s 24(2) of the *Charter*.

[13] Questions of law, including the constitutional validity of legislation, whether the scope of a *Charter* right was correctly interpreted, and the sufficiency of reasons, are reviewed for correctness: *Housen v Nikolaisen*, 2002 SCC 33 at para 8; *R v Malmo-Levine*, 2003 SCC 74 at para 23; *R v Mohamed*, 2013 ABCA 406 at para 12.

[14] For findings of fact, whether adjudicative, social, or legislative, the standard of review is palpable and overriding error: *Canada (Attorney General) v Bedford*, 2013 SCC 72 at para 56, [2013] 3 SCR 1101.

IV. Analysis

A. Should Simmons be reconsidered in relation to searches of personal electronic devices at the border?

[15] This appeal engages the constitutionality of s 99(1)(a) of the *Customs Act*. That section provides:

> (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.

[16] The word "goods" is defined in s 2(1) of the *Customs Act* as including "conveyances, animals and any document in any form".

[17] Section 98 permits an officer to search a *person* entering Canada "if the officer suspects *on reasonable grounds* that the person has secreted on or about his person" anything which would contravene the *Customs Act* (emphasis added).

[18] At issue in *Simmons* was the constitutionality of ss 143 and 144 of the *Customs Act*, RSC 1970, c-40, which required that an officer have "reasonable cause" to conduct a body search (since repealed and replaced by s 98 of the *Customs Act*). The majority in *Simmons* drew a distinction between the degree of personal privacy expected at a border crossing as opposed to domestically, saying at para 49:

> … 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.

[19] As has been noted, three distinct types of border searches were identified, at para 27:

> It is, I think, of importance that the cases and the literature seem to recognize three distinct 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**.** No stigma is attached to being one of the thousands of travellers who are daily routinely checked in that manner upon entry to Canada and no constitutional issues are raised. It would be absurd to suggest that a person in such circumstances is detained in a constitutional sense and therefore entitled to be advised of his or her right to counsel. The second type of border search is the strip or skin search of the nature of that to which the present appellant was subjected, 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.

[20] The Court went on to note "that each of the different types of search raises different issues….it is obvious that the greater the intrusion, the greater must be the justification and the greater the degree of constitutional protection": para 28.

[21] Later decisions of the Supreme Court confirmed that "border crossings represent a unique factual circumstance for the purposes of a s 8 analysis" and that "decisions of this Court relating to the reasonableness of a search for the purposes of s 8 in general are not necessarily relevant in assessing the constitutionality of a search conducted by customs officers at Canada's border": *R v Monney*, [1999] 1 SCR 652 at paras 42–43, 171 DLR (4th) 1. See also *R v Jacques*, [1996] 3 SCR 312 at para 18, 139 DLR (4th) 223.

[22] The three categories of search identified in *Simmons* have been characterized as "discrete categories and not a continuum". Cases have been resolved by "classifying the search within a category identified in *Simmons*" to determine "the level of constitutional protection engaged": *R v Hudson* (2005), 77 OR (3d) 561 at para 30, [2005] OJ No 5464 (CA).

[23] The first *Simmons* category – that of routine searches that do not engage constitutional issues – applies to "goods" searched pursuant to s 99(1)(a); goods, as noted above, is defined to include "conveyances, animals and any document in any form": s 2(1). In the border context, "goods" has been interpreted to include documents in electronic form on personal electronic devices, such as cell phones and personal computers: *R v Bialski*, 2018 SKCA 71 at para 111; *R v Moroz*, 2012 ONSC 5642 at para 20. Applying this law, the trial judge in this case concluded that

the searches of the appellants' electronic devices fell "within the first category of routine searches described in *Simmons* and thus did not engage s 8 of the *Charter*": *Canfield* at para 49.

[24] Section 8 of the *Charter* provides that everyone has "the right to be secure against unreasonable search and seizure". The appellants submit that s 99(1)(a) of the *Customs Act* is unconstitutional and offends s 8 because it imposes no restrictions on the ability to search personal electronic devices. They argue that individuals, even those at the border, have a reasonable expectation of privacy with respect to their personal electronic devices and that *Simmons* should be revisited to the extent that it does not distinguish between the search of such devices and the search of other goods. The trial judge, however, concluded that *Simmons* "remains binding authority" (para 49) and he declined to reconsider the matter.

[25] The first issue before us is whether the conclusion of the Court in *Simmons* should be revisited, insofar as it applies to searches of personal electronic devices.

[26] The doctrine of legal precedent is "'fundamental to our legal system. It provides certainty while permitting the orderly development of the law in incremental steps. However, *stare decisis* is not a straitjacket that condemns the law to stasis. Trial courts may reconsider settled rulings of higher courts in two situations: (1) where a new legal issue is raised; and (2) where there is a change in the circumstances or evidence that 'fundamentally shifts the parameters of the debate' (*Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at para 42)": *Carter v Canada (Attorney General)*, 2015 SCC 5 at para 44.

[27] In *Carter*, the Supreme Court upheld a trial judge's decision to revisit *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519, 107 DLR (4th) 342 with respect to the blanket prohibition on physician assisted dying. The Supreme Court gave several reasons for revisiting the earlier precedent, which had been decided 22 years prior. The Court noted, at paras 46 and 47:

> (1) The argument before the trial judge involved a different legal conception of s. 7 than that prevailing when *Rodriguez* was decided. In particular, the law relating to the principles of overbreadth and gross disproportionality had materially advanced since *Rodriguez*… and
>
> (2) The matrix of legislative and social facts … differed from the evidence before the Court in *Rodriguez*. The majority in *Rodriguez* relied on evidence of (1) the widespread acceptance of a moral or ethical distinction between passive and active euthanasia (pp. 605-7); (2) the lack of any "halfway measure" that could protect the vulnerable (pp. 613-14); and (3) the "substantial consensus" in Western countries that a blanket prohibition is necessary to protect against the slippery slope (pp. 601-6 and 613). The record before the trial judge in this case contained evidence that, if accepted, was capable of undermining each of these conclusions ….

[28] Similar considerations come into play here. There is no doubt that there have been significant developments in the technology of personal electronic devices and the way they are used by Canadians since *Simmons* was decided in 1988. In 1997, almost a decade after *Simmons* was released, only 22% of Canadian households had a cell phone for personal use; by 2004 that number had increased to 59%[1]. This was prior to the release of the iPhone in 2007, and the advent of smartphones. In January 2019, there were approximately 28 million mobile internet users in Canada.[2] In January 2020, 96% of Canada's population had a mobile connection and 94% used the internet. Of those who use the internet, 89% own a smartphone, 85% own a laptop or desktop computer, and 55% own a tablet device. [3]

[29] The law with respect to searches of personal electronic devices in the domestic setting has, likewise, changed significantly in the same period. A series of decisions from the Supreme Court of Canada over the past decade has recognized the evolving law governing search and seizure of such devices.

[30] In *R v Morelli*, 2010 SCC 8, a computer technician was installing a high-speed internet connection ordered by the accused when he noticed links to adult and child pornographic sites in the task bar's favourites list. A search warrant was obtained, which was challenged by the accused at his trial. The majority found that the search and seizure of the appellant's computer infringed his constitutional rights under s 8 of the *Charter* and excluded the evidence pursuant to s 24(2) of the *Charter* under the test in *R v Grant*, 2009 SCC 32. The Court made the following comments about the significance of the breach at paras 105 and 106:

> As I mentioned at the outset, it is difficult to imagine a more intrusive invasion of privacy than the search of one's home and personal computer. Computers often contain our most intimate correspondence. They contain the details of our financial, medical, and personal situations. They even reveal our specific interests, likes, and propensities, recording in the browsing history and cache files the information we seek out and read, watch, or listen to on the Internet.
>
> It is therefore difficult to conceive a s. 8 breach with a greater impact on the *Charter*-protected privacy interests of the accused than occurred in this case.

[31] In *R v Vu*, 2013 SCC 60, the appellant was charged with various drug offences and theft of electricity. The police had obtained a warrant authorizing the search of a residence for evidence of theft of electricity, however the warrant did not specifically refer to computers or authorize the search of computers. The Supreme Court of Canada found that there was a breach of the appellant's s 8 *Charter* rights. While an authorization to search a "place" included the authorization to search

---

[1] https://www.ic.gc.ca/eic/site/Oca-bc.nsf/eng/ca02267.html

2 https://www.statista.com/topics/3529/mobile-usage-in-canada/

3 https://datareportal.com/reports/digital-2020-canada

receptacles found within that place, the general authorization did not apply to personal computers and cell phones. Such searches require specific prior authorization. No distinction was drawn between computers and cell phones because "present day phones have capacities that are … equivalent to those of a computer" (para 38). However, the Court did distinguish computers and cell phones from other receptacles, at paras 39 and 40:

> As noted earlier, the general principle is that authorization to search a place includes authorization to search places and receptacles within that place….This general rule is based on the assumption that, if the search of a place for certain things is justified, so is the search for those things in receptacles found within that place. However, this assumption is *not* justified in relation to computers because computers are not like other receptacles that may be found in a place of search. The particular nature of computers calls for a specific assessment of whether the intrusion of a computer search is justified, which in turn requires prior authorization.
>
> It is difficult to imagine a more intrusive invasion of privacy than the search of a personal or home computer: Morelli, at para. 105; R. v. Cole, 2012 SCC 53, [2012] 3 S.C.R. 34, at para. 3. Computers are "a multi-faceted instrumentality without precedent in our society": A. D. Gold, "Applying Section 8 in the Digital World: Seizures and Searches", prepared for the 7th Annual Six-Minute Criminal Defence Lawyer (June 9, 2007), at para. 3.
>
> [emphasis added]

[32] Similar considerations were at issue in *R v Fearon*, 2014 SCC 77, which involved the search of a cell phone incident to arrest. In discussing the nature of the search of a cell phone, the majority of the Supreme Court of Canada said (at para 51):

> It is well settled that the search of cell phones, like the search of computers, implicates important privacy interests which are different in both nature and extent from the search of other "places": *R. v. Vu*, 2013 SCC 60, [2013] 3 S.C.R. 657, at paras. 38 and 40-45. *It is unrealistic to equate a cell phone with a briefcase or document found in someone's possession at the time of arrest. As outlined in Vu, computers — and I would add cell phones — may have immense storage capacity, may generate information about intimate details of the user's interests, habits and identity without the knowledge or intent of the user, may retain information even after the user thinks that it has been destroyed*, and may provide access to information that is in no meaningful sense "at" the location of the search: paras. 41-44.
>
> [emphasis added]

[33] In the result in *Fearon*, the Court concluded that, given the nature of the privacy interest in the contents of a cell phone, police officers will not be justified in searching a cell phone incidental to every arrest. However, such searches may comply with s 8 where certain conditions are met: para 83.

[34] In comments that are instructive to the case before us, the Court in *Fearon* recognized that not all cell phone searches will involve the same level of intrusion on privacy: paras 54-58. Whereas seizures of bodily samples are "*invariably and inherently* very great invasions of privacy" and "a significant affront to human dignity", the same cannot be said of every search of a cell phone: para 55. In the case of *Fearon* itself, a search limited to an unsent text message to a co-offender and a photo of a handgun would constitute only a minimal invasion of privacy. The real issue "is the potentially broad invasion of privacy that may, *but not inevitably will*, result from law enforcement searches of cell phones": para 54. The risk of such a serious invasion of privacy led the majority to conclude that the approach for searches incident to arrest must be altered to account for the risk (at para 58):

> … the search of a cell phone has the potential to be a much more significant invasion of privacy than the typical search incident to arrest. As a result, my view is that the general common law framework for searches incident to arrest needs to be modified in the case of cell phone searches incident to arrest. In particular, the law needs to provide the suspect with further protection against the risk of wholesale invasion of privacy which may occur if the search of a cell phone is constrained only by the requirements that the arrest be lawful and that the search be truly incidental to arrest and reasonably conducted. The case law suggests that there are three main approaches to making this sort of modification: a categorical prohibition, the introduction of a reasonable and probable grounds requirement, or a limitation of searches to exigent circumstances. I will explain why, in my view, none of these approaches is appropriate here and then outline the approach I would adopt.

[35] The trial judge below distinguished *Morelli*, *Vu*, and *Fearon* because "none of these decisions involve[d] border issues" and were "not authority for the proposition that advances in technology have diminished the unique legal context of the border": para 32. He held that the decisions "do not support the proposition that because electronic devices contain large amounts of personal information, they are beyond the reach of the law. Rather, they stand for the proposition that individualized search authority may be required": para 33. Further, the trial judge found it significant that the Supreme Court of Canada refused to grant leave to appeal from the decision in *R v Sinclair*, 2017 ONCA 287, in which the Ontario Court of Appeal upheld a trial judge's application of *Simmons* to the search of a traveller's luggage. The trial judge concluded there was "no authority for the proposition … that the Supreme Court of Canada is prepared to resile from the principles outlined in *Simmons* based on advances in technology": paras 45-46.

[36] The trial judge's analysis misses the point. The court is asked to revisit the approach in *Simmons* not because the Supreme Court of Canada has changed the law, but on the basis that it is appropriate to consider whether the law should be changed. Moreover, refusal of leave is not to be taken to indicate any view by the Supreme Court on the merits of a decision: *Des Champs v Conseil des écoles séparées catholiques de langue française de Prescott-Russell*, [1999] 3 SCR 281 at para 31; *R v Bachman* (1987), 78 AR 282 at para 10, 52 Alta LR (2d) 411 (Alta CA); *R v Meston* (1975), 43 CRNS 323 at para 22, 28 CCC (2d) 497 (Ont CA), citing *Gilbert-Ash (Northern) Ltd. v Modern Engineering (Bristol) Ltd.*, [1973] 3 WLR 421, [1973] 3 AII ER 195 at 442.

[37] Personal computers and cell phone searches were not mentioned or distinguished from other goods when *Simmons* was decided in 1988. That is hardly surprising given the nature of the technology that existed at that time. Individuals were not travelling and crossing borders with personal computers or cell phones that contained massive amounts of highly personal information. The technological advancements in computing technology over the past 32 years have fundamentally changed how individuals use personal electronic devices. There have been significant developments in the jurisprudence governing an individual's reasonable expectations of privacy in their personal electronic devices and searches of such devices in the domestic context.

[38] We are satisfied that these changes satisfy the threshold test for revisiting the earlier law, and that the trial judge erred in failing to revisit *Simmons* and consider whether searches of personal electronic devices at the border should continue to be treated as falling into the first *Simmons* category of a routine search, or whether other approaches should be considered, such as a categorical prohibition, the introduction of a reasonable suspicion or reasonable and probable grounds requirement, a limitation of searches to exigent circumstances, or the adoption of an altogether different or new approach as was done in *Fearon*.

B. Evidentiary findings and the factual record

[39] One of the grounds of appeal advanced by the appellants is that the trial judge failed to make sufficient findings of fact on a number of issues to permit meaningful appellate review.

[40] In the course of oral argument, counsel acknowledged that while there was a lack of factual findings by the trial judge on some relevant matters, there is a comprehensive record that was essentially unchallenged and not subject to issues of credibility. The record comprises: an Agreed Statement of Facts; the testimony of BSOs Arul, Atherton, Aboagye and Rai; the affidavit evidence and testimony of Denis Vinette (Director General, International Region, Operations Branch of CBSA, who was qualified as an expert in the operations, policies, and procedures relating to the CBSA's administration and enforcement of legislation governing the movement, management, and processing of people and goods crossing the Canadian border); the report and testimony of Dr. Peter Collins (qualified as an expert in forensic psychiatry, particularly with respect to sexual deviance, pedophilia, and the use, consumption, collection, and effects of sexually explicit material, including child pornography); the report and testimony of Neil Malamuth (qualified as an expert in psychology and the effects of exposure to sexually explicit material, including child

pornography and obscenity, and the effects of sexually violent material in particular); and the report and testimony of Darren Murray (Manager of the Informatics Mobile Support Unit with the RCMP, who was qualified as an expert in the forensic examination of various types of digital devices).

[41] The appellants called no evidence.

[42] Having regard to the nature of the record, counsel agreed that the panel could assess the record and make the necessary factual findings to address the constitutionality of s 99(1)(a) of the *Customs Act* and the appellants' *Charter* applications. The briefs filed in the court below were provided to the panel. As a result, rather than refer the matter back to be heard by a new judge, we have reviewed the record at trial, some of the important elements of which are set out below.

i. CBSA operations at the border

[43] 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": *Canada Border Services Agency Act*, SC 2005, c 38, s 5(1).

[44] The CBSA has approximately 14,000 employees, including over 6,500 uniformed officers who provide services at 1200 points across Canada and abroad. During the period April 1, 2015 to March 31, 2016, the CBSA processed over 92 million travellers who arrived in Canada, over 16 million releases of commercial goods, and over 39 million shipments sent by courier. During that period, the CBSA made 11,163 drug seizures (valued at $329 million), 1,966 currency seizures (valued at $33.2 million), 829 firearms seizures, 8,922 prohibited weapon seizures, 1,610 tobacco seizures, 142 child pornography seizures and 661 seizures of other prohibited goods.

[45] CBSA relies upon the regulatory inspection provisions in the *Customs Act*. Goods brought into Canada are classified under the *Customs Tariff*. Prohibited items include child pornography, hate propaganda, obscene material, treasonous or seditious material, and reprints of Canadian copyrighted works. The vast majority of imported goods which are inspected at the border, including personal electronic devices, are examined pursuant to s 99(1)(a).

[46] Travellers who arrive at a port of entry to Canada are initially subject to primary processing at a primary inspection line. They are typically asked a series of questions by a BSO to determine their immigration status, the nature of any goods they are importing, and their duty-free allowance and personal exemption entitlements. The BSO may release the person directly, refer them for additional processing (e.g. payment of duties and taxes), or refer them for secondary examination. Referrals to secondary examination can be done for mandatory reasons (based upon a specific lookout or target or a computer generated "hit"), on a random basis, or as a selective referral. Selective referrals are made when the BSO has "reasonable grounds to suspect that additional

examination or investigation is necessary to make a decision on release": CBSA Enforcement Manual, Part 3, Chapter 3 – Reporting, Questioning and Referral and the Glossary, Part 11.

[47] The policies and procedures developed by the CBSA are set out in the CBSA Enforcement Manual and the People Processing Manual. CBSA policies require officers to be "able to articulate the reason for making a selective referral or proceeding with an examination" (Vinette Affidavit at para 47). CBSA's People Processing Manual provides that selective referral is to be based on "indicators", defined as "a single piece of information, trend, abnormality, or inconsistency that when added to other information or data raises a concern to a targeting officer about the threat presented by a traveller or shipment" (CBSA Enforcement Manual, Part 11, chapter 1). The Glossary to the CBSA refers to "reasonable grounds to suspect that additional examination or investigation is necessary", and the CBSA Enforcement Manual, Part 3, Chapter 3 instructs selective referral to be "made when reasonable suspicions exist about the truth of a person's declaration". The purpose of these policies is "to ensure that officers are making decisions about selective referrals and examinations in a reasonable manner…that the powers exercised by CBSA officers are applied in a fair and defensible manner…that officers not base their actions upon personal bias, including impermissible human rights considerations…and prevent claims that CBSA officers exercised their authority in an unreasonable manner" (Vinette Affidavit at para 48).

[48] Operational Bulletins, first published in 2012 and updated in 2015, contain specific guidelines regarding the authority of CBSA officers to examine portable computers and mobile communications devices.[4] They include the following.

From the 2012 Bulletin:

> The courts uphold that there is a reduced expectation of privacy when crossing the border, including the examination of digital devices. There is no greater expectation of privacy for the search of a digital device than for that of a pocket, purse, or wallet search. These searches will not be conducted as a matter of routine unless indicators are present that evidence may be found.
>
> …
>
> It is expected that officers will put each device through a progressive examination based on indicators, evidence, and reasonable grounds. When criminality is suspected based on evidence, a client is subject to Charter protections no different from normal practice.

[4] Regional Operations Bulletin #2012-008 Examination of Portable Computers and Mobile Communication Devices (2012 Bulletin) and Operational Bulletin PRG-2015-31, Examination of Digital Devices and Media at the Port of Entry – Interim Guidelines, June 2015 (2015 Guideline).

> … officers must ensure the wireless capacity of the device is turned off, preferably by the owner, prior to examining it. Officers may only examine what is stored in the device.
>
> Officers may ask for a password to log in to the device only. Officers cannot ask for passwords and log into a person's personal accounts without the formal legal authority provided by a warrant.
>
> Officers must document details of these examination in their notebooks and, if required, in ICES, FOSS, or ORS.
>
> Officers should be in a position to clearly articulate the reasons for progressing from a cursory exam to a progressive exam, and at what point such indicators became apparent. This will ensure enforcement actions are undertaken within the realm of policy and the *Charter*.

From the 2015 Guideline:

> Paragraph 99(1)(a) of the *Customs Act* provides CBSA officers with the legislative authority to examine goods, including digital devices and media, for customs purposes only. 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.

[49] In his evidence, Mr. Vinette expressed concern about the ability of CBSA officers to fulfill their legislative mandate if a "legal threshold" of individualized reasonable suspicion were imposed. He described CBSA's policy of requiring "articulable reasons" for examining electronic goods as falling "well below" the legal threshold of individual reasonable suspicion. Mr. Vinette expressed concern that "a legal threshold of individualized reasonable suspicion for examination of digital devices would significantly undermine the CBSA's capacity to perform its statutory mandate" and would create distinctions "whereby goods brought into Canada within electronic devices are subject to a higher inspection threshold than goods stored in a more traditional manner". As technology advances, this distinction would "expand to exempt more and more goods from the ambit of the CBSA's long-standing powers on no-threshold inspection … impeding the CBSA in its legislated mandate, including its role in enabling Canada to meet its international obligations." Mr. Vinette also stated that examination of documents such as receipts, invoices and airline tickets "are essential to border controls". As more of such documents are stored electronically, it would "undermine the CBSA's basic functions if an officer could examine a printed receipt as a matter of routine but one stored as a PDF file on an electronic device only after meeting a legal threshold". CBSA anticipates that a legal threshold for inspection of digital devices "would be exploited by smugglers" (Vinette Affidavit at paras 89-93, 99).

[50] Evidence was also led at trial of the pernicious nature of child pornography and the efforts made by CBSA to curb it. There was significant expert evidence at trial regarding pedophilia and the use, consumption, collection and effects of sexually explicit material, including child pornography, and the escalation of the problem since the advent of the internet. As many as a third of child pornography offenders have committed sexual offences against children; those who travel abroad to abuse children may be carrying documented records of their activities and seek to transport them across international borders. Between 2011 and 2015, CBSA made an average of 123 seizures of child pornography at the Canadian border annually, of which the majority (between 73% and 80%) were on electronic devices.

ii. Search of Mr. Canfield

[51] At the primary inspection line, Mr. Canfield was referred for secondary inspection by BSO Arul on the basis that he was travelling alone, had travelled regularly to Cuba by himself, had an overly friendly demeanor, and referred to "women and Cuba and the beach", which BSO Arul considered to be an indicator for sex tourism for women and children.

[52] Mr. Canfield was examined in the secondary examination area by BSO Rai, who asked him questions about his luggage and travel while searching his luggage. At that point, BSO Rai knew there was a concern with Mr. Canfield at the primary inspection line, but did not know the nature of the concern. He noted that Mr. Canfield was breathing heavily, sweating profusely, had a cotton dry mouth and his hands were shivering and shaking. Based on his discovery of condoms, lubricants and a penis ring in Mr. Canfield's luggage, his observations of Mr. Canfield's demeanour, and his belief that Cuba was known for sex tourism, BSO Rai formed the belief that Mr. Canfield had child pornography on his cell phone. BSO Rai asked Mr. Canfield if there was a possibility he had child pornography on his cell phone. Mr. Canfield first said, "I'm not sure", but later said, "yes".

[53] BSO Rai testified as follows:

> I instructed him to pull up the images that he thought would be the most obscene or rather clear-cut image of child pornography. I had him turn around kind of positioned the phone to me so I could see what he is doing or to ensure he is not going to – excuse me – delete any images. While he was pulling up through his – you know, going – opening his phone gallery, going through the images, I noticed other images that are – through my view, were obviously children and there was several images of this. Mr. Canfield opened an image, and an image immediately, in my opinion, contained child pornography.

[54] BSO Rai seized the cell phone and searched for additional images in the gallery application. BSO Rai considered that Mr. Canfield was under "examination" and not arrest at the time, although he later testified he had decided that he would be arresting Mr. Canfield after seeing the first image. BSO Rai arrested Mr. Canfield after consulting with his Superintendent. He advised Mr. Canfield

of his rights and provided the caution. BSO Rai's interaction with Mr. Canfield took approximately 23 minutes. BSO Rai did not take notes while he was interacting with Mr. Canfield. He examined the cell phone a second time when writing his report.

[55] The matter was referred to the Northern Alberta Internet Child Exploitation Unit for investigation. A search warrant for the cell phone was obtained based upon the observations of the BSOs, which identified 130 photographs and 17 videos that were admitted to constitute child pornography.

iii. Search of Mr. Townsend

[56] On March 22, 2014, the date that Mr. Townsend arrived at the Edmonton International Airport from Seattle, CBSA was engaged in Project Safe Haven, a two-day special project where four personnel were tasked with examining laptops of arriving travellers directed at detecting and preventing the importation of child pornography into Canada. BSO Arul, who questioned Mr. Townsend at the primary inspection line, testified on his reasons for referring Mr. Townsend for secondary inspection:

> Mr. Townsend – usually, in my opinion, most – in my experience, most people in their 20s are not leaving for – can't afford to travel for five months with no job. So I think his income was a – his needs to finance his trip was an indicator; the three bags was an indicator. And I feel his physical indicators was an indicator as well where he wasn't making eye contact, he wasn't – and the questions became more longer and more in depth. He came quieter and not as confident as he was initially answering those questions…

[57] At secondary inspection, BSO Atherton examined Mr. Townsend's luggage and noted that he appeared agitated and was in possession of 12 electronic devices. BSO Atherton also found Mr. Townsend's position during the examination suspicious, which suggested that he was trying to hide something. He also testified that he believed the United States to be "renowned as a source country for child pornography". BSO Atherton searched one of Mr. Townsend's cell phones and discovered legal pornographic images. Another BSO, BSO Aboagye, began to search Mr. Townsend's laptop computer, which was password protected. Mr. Townsend was reluctant to provide the password, but did so when BSO Aboagye insisted. At some point, Mr. Townsend asked if he needed a lawyer. Approximately 10 minutes after the search of the laptop began, BSO Aboagye located an item of child pornography. She ended the examination and attempted to arrest Mr. Townsend under the *Customs Act*; he fainted and was taken to hospital.

[58] The matter was referred to the Northern Alberta Internet Child Exploitation Unit, and a search warrant was obtained for a forensic examination of Mr. Townsend's various devices. A total of 4422 pictures and 53 videos of child pornography were found on the devices, all of which appeared to have been downloaded from the internet.

C. Does s 99(1)(a) of the Customs Act *offend s 8 of the* Charter *insofar as it does not impose limits on when and how searches of personal electronic devices can be conducted at the border?*

[59] Section 8 of the *Charter* provides that everyone has the right to be free from unreasonable search and seizure. "To claim s. 8 protection, a claimant must first establish a reasonable expectation of privacy in the subject matter of the search, i.e., that the person subjectively expected it would be private and that this expectation was objectively reasonable": *R v Marakah*, 2017 SCC 59 at para 10, citing *R v Edwards*, [1996] 1 SCR 128 at para 45, 132 DLR (4th) 31; *Hunter et al v Southam Inc*., [1984] 2 SCR 145 at pp 159-60, 11 DLR (4th) 641. Whether the claimant had a reasonable expectation of privacy must be assessed in "the totality of the circumstances": *Edwards* at paras 31 and 45; see also *R v Spencer*, 2014 SCC 43 at paras 16-18; *R v Cole*, 2012 SCC 53 at para 39; *R v Patrick*, 2009 SCC 17 at para 26; *R v Tessling*, 2004 SCC 67 at para 19; *R v Marakah* at para 10.

[60] Four lines of inquiry guide the determination of whether a claimant has a reasonable expectation of privacy "in the totality of the circumstances" (*Marakah* at para 11):

1. What was the subject matter of the alleged search?

2. Did the claimant have a direct interest in the subject matter?

3. Did the claimant have a subjective expectation of privacy in the subject matter?

4. If so, was the claimant's subjective expectation of privacy objectively reasonable?

[61] The appellants had a direct interest in the subject matter of the search, which was the "data, or informational content" of their personal electronic devices. The "concern is thus with informational privacy: '[T]he claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others'": *Tessling* at para 23, quoting A. F. Westin, *Privacy and Freedom* (1970), at p 7; *Cole* at paras 41-42.

[62] Neither of the appellants testified regarding their subjective expectation of privacy in the contents of their electronic devices. Courts have "presumed unless the contrary is shown in a particular case that information about what happens *inside* the home is regarded by the occupants as private": *Tessling* at para 38. Similar presumptions have been made that an individual's "direct interest and subjective expectation of privacy in the informational content of his computer can be readily inferred from his use of the laptop to browse the Internet and to store personal information on the hard drive": *Cole* at para 43. The same inference can be drawn with respect to an individual's cell phone, which will often contain comparable levels of personal information: *Fearon* at para 51. It also appears that Mr. Townsend had an expectation of privacy with respect to his computer to the extent that he was reluctant to provide the password to his "work" computer and asked if he

needed a lawyer before doing so. We accept that both appellants had a subjective expectation of privacy in their personal electronic devices.

[63] A number of factors have been considered in assessing whether privacy expectations are objectively reasonable:

1. Possession, ownership or control of the property searched (*Marakah* at para 24; *Edwards* at para 45);

2. The private nature of the subject matter searched (*Cole* at paras 45-46);

3. The place where the search occurred (*Tessling*; *Marakah* at para 24).

[64] The personal electronic devices were owned by the appellants and were in their possession and control when the searches were conducted. Such devices often contain highly personal information. The inherent privacy of an individual's "biographical core of personal information" is well recognized. As noted in *R v Plant*, [1993] 3 SCR 281 at 293, 145 AR 104:

> In fostering the underlying values of dignity, integrity and autonomy, it is fitting that s. 8 of the *Charter* should seek to protect a biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state. This would include information which tends to reveal intimate details of the lifestyle and personal choices of the individual.

[65] This was also recognized in *Cole*, at paras 46-48:

> The closer the subject matter of the alleged search lies to the biographical core of personal information, the more this factor will favour a reasonable expectation of privacy. Put another way, *the more personal and confidential the information, the more willing reasonable and informed Canadians will be to recognize the existence of a constitutionally protected privacy interest.*
>
> Computers that are used for personal purposes, regardless of where they are found or to whom they belong, "*contain the details of our financial, medical, and personal situations"* (*Morelli*, at para. 105). This is particularly the case where, as here, the computer is used to browse the Web. Internet-connected devices "reveal our specific interests, likes, and propensities, recording in the browsing history and cache files the information we seek out and read, watch, or listen to on the Internet" (ibid.).
>
> This sort of private information falls at the very heart of the "biographical core" protected by s. 8 of the *Charter*.

[emphasis added]

[66] The key question is to what extent an expectation of privacy is reasonable in the context of an international border crossing. In the domestic context it is well-recognized that individuals have a reasonable expectation of privacy in the contents of their personal electronic devices: see *Morelli*, *Vu*, *Fearon*. However, reasonable privacy expectations at an international border differ from reasonable expectations of privacy elsewhere. As was recognized at para 49 of *Simmons*:

> … 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.

[67] The high expectation of privacy that individuals have in their personal electronic devices generally must be balanced with the low expectation of privacy that individuals have when crossing international borders. Since border crossings represent unique factual circumstances for the reasonableness of a s 8 search and seizure (*Monney* at paras 42-43), the reasonable expectations of privacy international travellers hold in their electronic devices must be considered anew and in context.

[68] The law recognizes that individuals have some objectively reasonable expectations of privacy at the border. Both *Simmons* and the *Customs Act*, s 98 recognize that reasonable grounds are necessary before a strip search can be conducted**.** Moreover, body cavity searches "may raise entirely different constitutional issues for it is obvious that the greater the intrusion, the greater must be the justification and the greater the degree of constitutional protection": *Simmons* at para 28.

[69] The searches at issue in this case were purportedly conducted under the authority of s 99(1)(a) of the *Customs Act.* That provision permits a customs officer to "examine any goods that have been imported and open or cause to be opened any package or container of imported goods". The legislation provides no limits on the examination of any imported goods conducted under this section, beyond presumably that the search be conducted for a valid customs purpose. Computers and cell phones, including the electronic documents which they contain, have been treated in the jurisprudence as "goods" that can be searched at the border pursuant to s 99(1)(a) as part of a routine search without raising any *Charter* implications, on the basis that they fall within the first category of routine search outlined in *Simmons*: *R v Leask*, 2008 ONCJ 25 at para 18; *R v Bares*, 2008 CanLII 9367 (ON SC); *R v Mozo*, [2010] NJ No 445 at para 34 (NL PC); *R v Whittaker*, 2010 NBPC 32; *R v Moroz*, 2012 ONSC 5642 at para 20; *R v Saikaley*, 2012 ONSC 6794 at para 82; *R v Buss*, 2014 BCPC 16 at paras 25–32; *R v Gibson*, 2017 BCPC 237 at para 201; *R v Singh*, 2019 OCJ 453 at paras 64-65; and *Bialski* at para 111. It is also worth noting that, unlike the nature of the complaints in *Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, 2000 SCC 69 at para 77, [2000] 2 SCR 1120, the issue here is not merely the implementation of the statutory

scheme by customs officials, but the scheme itself, which purports to authorize unlimited searches of "goods" at the border (s 99(1)(a)) and sets out a broad definition of "goods" that arguably captures personal electronic devices and the information stored thereon (s 2(1)).

[70] The appellants have submitted that the contents of a laptop computer or cell phone do not qualify as "goods". We are satisfied that the electronic documents, photos or videos on an electronic device fall within the broad definition of "goods' in s 2 of the *Customs Act*, which includes "any document in any form". However, that does not end the inquiry. The question is whether the contents of electronic devices should be treated differently from other receptacles at the border.

[71] A distinction has been drawn in the domestic context between searches of personal computers and other receptacles "because computers are not like other receptacles that may be found in a place of search. The particular nature of computers calls for a specific assessment of whether the intrusion of a computer search is justified, which in turn requires prior authorization": *Vu* at para 39. In *Vu*, several distinctions between computers and other receptacles were identified:

- "… computers store immense amounts of information, some of which, in the case of personal computers, will touch the 'biographical core of personal information' referred to by this Court in *R. v. Plant*, [1993] 3 S.C.R. 281, at p. 293. The scale and variety of this material makes comparison with traditional storage receptacles unrealistic" (para 41).
- "computers contain information that is automatically generated, often unbeknownst to the user" (para 42).
- "a computer retains files and data even after users think that they have destroyed them" (para 43).
- "a search of a computer connected to the Internet or network gives access to information and documents that are not in any meaningful sense at the location for which the search is authorized" (para 44).

[72] The Court in *Vu* concluded that "(t)hese numerous and striking differences between computers and traditional 'receptacles' call for distinctive treatment under s. 8 of the *Charter*. The animating assumption of the traditional rule — that if the search of a place is justified, so is the search of receptacles found within it — simply cannot apply with respect to computer searches": para 45.

[73] The categories of search recognized by *Simmons* relate primarily to physical or bodily privacy; they do not address informational privacy, which is also an aspect of the right to be protected against unreasonable search and seizure under s 8. The appellants point out that s 99(1)(b) provides greater protection for mail than is provided for electronic documents under s 99(1)(a). Section 99(1)(b) provides that an officer may "examine any mail that has been imported

and … open or cause to be opened any such mail that the officer suspects *on reasonable grounds* contains any goods" that are prohibited, controlled or regulated. No such requirement is contained in s 99(1)(a). In "Privacy of Canadians at Airports and Borders" (Ottawa: Canadian Bar Association, September 2017), the authors put the distinction in privacy between electronic devices and mail this way:

> Crossing the border with an electronic device is akin to crossing the border with every piece of mail a traveller has ever sent or received. It would not be unreasonable to expect the information stored in an electronic device to attract even greater protection than a physical envelope containing a single written letter (at p 9).

[74] Reasonable grounds to suspect are also required prior to the carrying out of a strip search under the *Customs Act*. Section 98 provides that an officer can search any person if the officer "suspects on reasonable grounds that the person has secreted on or about his person" anything that might afford evidence with respect to a contravention, or any prohibited, controlled or regulated goods. In *Simmons*, the majority noted that such searches of the person are "not routine", but as they required reasonable grounds and were subject to review at the request of the person being searched, they were not unreasonable under s 8 of the *Charter*: para 51.

[75] We agree with the conclusion in *Fearon* at paras 54 and 55 that, while the search of a computer or cell phone is not akin to the seizure of bodily samples or a strip search, it may nevertheless be a significant intrusion on personal privacy. To be reasonable, such a search must have a threshold requirement. As was noted in *Simmons* at para 28, "the greater the intrusion, the greater must be the justification and the greater the degree of constitutional protection". Given that, in our view the threshold for the search of electronic devices may be something less than the reasonable grounds to suspect required for a strip search under the *Customs Act*. The appellants suggest a requirement for individualized suspicion that the search will reveal contraband. Recognizing that complex issues must be weighed in altering the law in this area, we decline to set a threshold requirement for the search of electronic devices at this time. Whether the appropriate threshold is reasonable suspicion, or something less than that having regard to the unique nature of the border, will have to be decided by Parliament and fleshed out in other cases. However, to the extent that s 99(1)(a) permits the unlimited search of personal electronic devices without any threshold requirement at all, it violates the protection against unreasonable search in s 8 of the *Charter*.

[76] We hasten to add that not all searches of personal electronic devices are equal. As was noted in *Vu* at para 63, it is neither possible nor desirable "to create a regime that applies to all computers or cellular telephones that police come across in their investigations, regardless of context".

[77] In *Fearon,* when considering restrictions that would be appropriate on searches of cell phone incident to arrest, the Supreme Court noted that the common law imposes meaningful requirements on such searches, saying at para 57:

> … the common law requirement that the search be truly incidental to a lawful arrest imposes some meaningful limits on the scope of a cell phone search. The search must be linked to a valid law enforcement objective relating to the offence for which the suspect has been arrested. This requirement prevents routine browsing through a cell phone in an unfocussed way.

[78] Nevertheless, because of the potential for a cell phone search to be a much more significant invasion of privacy than the typical search incident to arrest, the court in *Fearon* concluded that the suspect should be provided "further protection against the risk of wholesale invasion of privacy": para 58. The court's focus was not "on steps that effectively gut the usefulness of searches incident to arrest", but rather "on measures to limit the potential invasion of privacy that may, but does not inevitably result from a cell phone search": para 74. Some of the measures implemented by *Fearon* included tailoring the scope of the search to the purpose for which it may lawfully be conducted; restricting searches for the purpose of discovering evidence only when the investigation will be stymied or hampered absent the ability to promptly search the cell phone incident to arrest; and requiring officers to take detailed notes of what has been examined.

[79] We do not say that the limitations enunciated in *Fearon* should all be adopted in border searches; the unique context of the border and the purpose of border searches must inform the approach taken. However, there are similarities between the two cases. Although an unlimited and suspicion-less search of the contents of a personal electronic device would breach the *Charter,* we recognize that some of the information commonly stored on cell phones and other devices must be made available to border agents as part of the routine screening of passengers. For example, and without setting out an exhaustive list, we note that receipts and other information relating to the value of imported goods, as well as travel related documents, are an essential part of routine screening. The review of such items on a personal electronic device during a routine screening would not constitute an unreasonable search under s 8.

[80] Having concluded that s 99(1)(a), as drafted and insofar as it purports to authorize unrestricted searches of personal electronic devices, violates the s 8 protection against unreasonable searches, we turn to consider whether the violation is nevertheless justified under s 1 of the *Charter*.

D. Is the authorization of searches of personal electronic devices in s 99(1)(a) of the Customs Act *a reasonable limit under s 1 of the* Charter*?*

[81] Section 1 of the *Charter* "guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".

[82] We have concluded that s 99(1)(a) of the *Customs Act* offends the right to be secure from unreasonable search and seizure pursuant to s 8 of the *Charter* to the extent that it authorizes suspicion-less and unlimited searches of personal electronic devices. As these searches are prescribed by law, the burden shifts to the Crown to demonstrate on a balance of probabilities that such searches are reasonable and justified in a free and democratic society: *R v Oakes*, [1986] 1 SCR 103 at pp 136-37, 26 DLR (4th) 200. The justification criteria were recently reiterated in *Frank v Canada (Attorney General)*, 2019 SCC 1 at para 38:

> Two central criteria must be met for a limit on a *Charter* right to be justified under s. 1. First, the objective of the measure must be pressing and substantial in order to justify a limit on a *Charter* right. This is a threshold requirement, which is analyzed without considering the scope of the infringement, the means employed or the effects of the measure (*R. v. K.R.J.*, 2016 SCC 31, [2016] 1 S.C.R. 906, at para. 61). Second, the means by which the objective is furthered must be proportionate. The proportionality inquiry comprises three components: (i) rational connection to the objective, (ii) minimal impairment of the right, and (iii) proportionality between the effects of the measure (including a balancing of its salutary and deleterious effects) and the stated legislative objective (*Oakes*, at pp. 138-39; *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, [2015] 1 S.C.R. 3, at para. 139; *K.R.J.*, at para. 58). The proportionality inquiry is both normative and contextual, and requires that courts balance the interests of society with those of individuals and groups (*K.R.J.*, at para. 58; *Oakes*, at p. 139).

i. Pressing and Substantial Objective

[83] "A law that limits a constitutional right must do so in pursuit of a sufficiently important objective that is consistent with the values of a free and democratic society. This examination is a threshold requirement that is undertaken without considering the scope of the right infringement, the means employed, or the relationship between the positive and negative effects of the law": *R v KRJ*, 2016 SCC 31 at para 61.

[84] The trial judge concluded that, "(a)s noted in *Simmons*, maintaining a secure border is vital to maintaining national sovereignty": para 75. The majority in *Simmons* accepted the rationale from American authorities "that border searches lacking prior authorization and based on a standard lower than probable cause are justified by the national interest of sovereign states in preventing the entry of undesirable persons and prohibited goods, and in protecting tariff revenue": para 49. In our view, this continues to be the objective of the provisions of the *Customs Act* that regulate the entry of goods and people into Canada.

[85] We find that the objective of s 99(1)(a) is to maintain a secure border and protect the national interest by preventing the entry of undesirable persons and prohibited goods, and in protecting tariff revenue. We are satisfied that this qualifies as a pressing and substantial objective.

ii. Rational Connection

[86] The first step of the proportionality inquiry is "whether the measure that has been adopted is rationally connected to the objective it was designed to achieve. The rational connection step requires that the measure not be 'arbitrary, unfair, or based on irrational considerations'": *Frank* at para 59, citing *Oakes* at p 139. Essentially, the government must show that there is a causal connection between the limit and the intended purpose: *RJR-MacDonald Inc. v Canada (Attorney General)*, [1995] 3 SCR 199 at para 153, 127 DLR (4th) 1. In cases where a causal connection is not scientifically measurable, one can be made out on the basis of reason or logic, as opposed to concrete proof: *RJR-MacDonald* at para 154; *Toronto Star Newspapers Ltd. v Canada*, [2010] 1 SCR 721 at para 25, 320 DLR (4th) 64; *Frank* at para 59.

[87] The trial judge concluded that "there is clearly a rational, causal connection between border security and the purpose s 99(1)(a) was intended to achieve": para 80.

[88] The appellants submit that the overwhelming majority of child pornography is shared over the internet. In such circumstances, permitting unrestricted searches of personal electronic devices for child pornography, obscene material and hate propaganda is not rationally connected to the objective of preventing such materials from entering Canada.

[89] The Crown submits that the ability to examine the contents of electronic devices without grounds to suspect an offence permits the effective policing of Canada's borders because it increases the likelihood that contraventions will be discovered and deters non-compliance. Many documents that are relevant to the customs inspection process, such as travel documents, electronic receipts, pictures, and electronic communications confirming that imported goods were not reported, are now in electronic form. Similarly, seizures related to the evasion of duties and taxes, and prohibited items such as child pornography are often in electronic format. As was noted earlier, from 2011 to 2015 between 73 and 80% of all seizures of child pornography at the border were on electronic devices.

[90] We are satisfied that s 99(1)(a) is rationally connected to the objective of border security. Whether the provision exceeds what is necessary to achieve that objective is a matter to be assessed at the next stage of the inquiry.

iii. Minimal Impairment

[91] The second step of the proportionality inquiry "requires the government to show that the measure at issue impairs the right as little as reasonably possible in furthering the legislative objective. In other words, the measure must be 'carefully tailored' to ensure that rights are impaired no more than is reasonably necessary. However, some deference must be accorded to the legislature by giving it a certain latitude: 'If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement'": *Frank* at para 66 [citations omitted].

[92] The trial judge found that "it is difficult to identify a less harmful means of achieving the government subjective [sic] of maintaining border security in the context of efficiently processing millions of entrants into Canada every year": para 82.

[93] Between April 1, 2015 and March 31, 2016, CBSA processed more than 92 million individual travellers, 33 million conveyances, 16 million releases of commercial goods and 39 million courier shipments. Mr. Vinette was unable to estimate how many cell phones or laptop computers were searched at the border on an annual basis. The evidence was that it was "quite common" and "standard procedure" to search electronic devices, and that such searches may take up to 45 minutes.

[94] The appellants submit that s 99(1)(a) authorizes indiscriminate searches of any traveller's electronic devices, without the need for any grounds to conduct a search and without limits on the scope of the search. BSOs have unlimited legislative discretion on when, where and how to conduct a search of a device, and how thoroughly the device is searched.

[95] The Crown notes that searches of electronic devices must be conducted in accordance with the purpose of the *Customs Act*. They are performed as part of secondary screening when concerns arise about whether a traveller is in breach, or as part of random selection. CBSA policies prohibit the examination of data stored on remote servers and information gathered as a result of such searches is subject to the confidentiality provisions in s 107 of the *Customs Act*. The Crown submits that any additional limits would reduce the scope of routine customs examinations and the effectiveness of border control. The Crown opposes the appellants' suggestion that a reasonable suspicion standard should be applied to ensure that the law is minimally impactful, pointing out that reasonable suspicion is different from a generalized suspicion. It is a rigorous standard that must "be based on objectively discernable facts, which can then be subjected to independent judicial scrutiny…(it) is an expectation that the targeted individual is possibly engaged in some criminal activity. A 'reasonable' suspicion means something more than a mere suspicion and something less than a belief based upon reasonable and probable grounds": *R v Chehil*, 2013 SCC 49 at para 26 (citing *R v Kang-Brown*, [2008] 1 SCR 456 at para 75, 293 DLR (4th) 99). The Crown argues that such a standard would negatively impact CBSA officers' ability to conduct a search if they had only generalized information about a particular flight, or observed anomalous behaviour that would not meet the criteria of reasonable suspicion.

[96] Section 99(1)(a) imposes no legislative limits at all on searches of "goods" at the border. CBSA has developed policies that provide guidance on when and how electronic devices may be searched at the border. The 2015 Guideline provides in part:

- While there is "no defined threshold for grounds to examine such devices", 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".

- The examination must always be performed with a clear nexus to administering or enforcing CBSA-mandated program legislation and not for the primary purpose of looking for evidence of a criminal offence under another 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 shall keep notes that clearly articulate the types of data examined and the reason for doing so.
- The examination of digital devices and media shall be conducted "with as much respect for the traveler's privacy as possible, considering that these examinations are usually more personal in nature than baggage examinations."
- Wireless and internet connectivity shall be disabled prior to examination.
- Initial examinations of digital devices "should be cursory in nature and increase in intensity bases on emerging indicators".
- Only material within the device shall be examined.
- Officers shall note "the indicators that led to the progressive search of the digital device or media; what areas of the device or media were accessed during the search; and why."
- Passwords to access the device can be requested but not passwords to access information stored remotely or online.
- If a traveler refused to provide a password, the device may be detained under s 101 of the *Customs Act*.

[97] The above limitations are not contained in the legislation; they are CBSA policies only. In his evidence, Mr. Vinette characterized these policies as not intending to impose a legal threshold of individualized suspicion because that "would significantly undermine the CBSA's capacity to perform its statutory mandate" (Vinette Affidavit at para 89). He stated that "CBSA anticipates that a legal threshold for inspection of digital devices would be exploited by smugglers" (para 99). It is not apparent why appropriately drafted legislated limits on searches of personal electronic devices would significantly undermine CBSA's ability to perform its mandate beyond what would be the case if CBSA officers were complying with the above policies. The existence of these CBSA policies suggests that some form of limitation on an unrestricted search ability of personal electronic devices is both possible and would not frustrate the objective of ensuring effective border security.

[98] It is relevant that other provisions in the *Customs Act* require a prescribed threshold to be met before goods entering Canada can be searched:

- Paragraph 99(l)(b) provides that imported mail may be opened and examined if **the officer suspects on reasonable grounds** that it contains any goods referred to in the *Customs Tariff*, or any goods the importation of which is prohibited, controlled, or regulated under any other Act of Parliament;
- Paragraph 99(1)(c.1) provides that any mail to be exported can be opened and examined if **the officer suspects on reasonable grounds** that it contains any goods the exportation of which is prohibited, controlled, or regulated under any Act of Parliament;
- Paragraph 99(l)(d) authorizes goods to be examined and reasonable samples taken if **an officer suspects on reasonable grounds** that an error has been made in the tariff classification, value for duty or quantity of any goods accounted for under section 32, or where a refund or drawback is requested in respect of any goods under the *Customs Act* or pursuant to the *Customs Tariff*;
- Paragraph 99(l)(d.l) authorizes goods to be examined and reasonable samples taken if **the officer suspects on reasonable grounds** that an error has been made with respect to the origin claimed or determined for any goods accounted for under section 32 (which deals with the payment of duties);
- Paragraph 99(l)(e) authorizes goods to be examined and any package or container opened **where the officer suspects on reasonable grounds** that the *Customs Act* or the regulations or any other Act of Parliament administered or enforced by the officer or any regulations thereunder have been or might be contravened;
- Paragraph 99(l)(f) authorizes an officer to stop, board and search any conveyance, examine any goods thereon and open or cause to be opened any package or container thereof and direct that the conveyance be moved to a customs office or other suitable place for any such search, examination or opening **where the officer suspects on reasonable grounds** that the *Customs Act* or the regulations or any other Act of Parliament administered or enforced by the officer or any regulations thereunder have been or might be contravened.

[emphasis added]

[99] The rationale for the distinction between the unrestricted search of goods permitted under paragraph 99(1)(a), and the threshold requirement for "suspicion on reasonable grounds" for the search of goods under paragraphs 99(1)(b), (c.1), (d), (d.1), (e) and (f) is not apparent. As was noted in the discussion of the constitutionality of s 99(1)(a), the privacy interest in the contents of laptop computers or cell phones greatly exceeds that in a single piece of mail, yet mail can only be searched where an officer suspects on reasonable grounds that the *Customs Act* has been violated.

[100] As well, s 139(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 provides that persons seeking to enter Canada, their luggage, personal effects and the means of transportation that conveyed them to Canada may be searched *if the officer believes on reasonable grounds* that the person has not revealed their identity, has hidden on or about their person

documents that are relevant to their admissibility, or has committed or possesses documents that may be used in the commission of people smuggling, human trafficking, or document fraud (emphasis added). The CBSA's 2015 Operational Bulletin: Examination of Digital Devices and Media at the Port of Entry – Interim Guidelines describe this provision as allowing "for the search of digital devices and media at the ports of entry where there are reasonable grounds" to believe that the criteria in the statute have been met, provided that the purpose of the search must be confined to identifying the person, finding documents relevant to admissibility or that may be used in the specified offences, or finding evidence of the specified offences.

[101] It is difficult to reconcile the requirement for "reasonable grounds" to search the computer or cell phone of an individual who is seeking to enter Canada pursuant to the *Immigration and Refugee Protection Act* with the lack of any requirement, not even at a lower threshold such as "reasonable suspicion", to search the computer or cell phone of an individual entering Canada (who, like the appellants, may be a Canadian citizen) pursuant to the *Customs Act.*

[102] Having regard to the other provisions of the *Customs Act* and the *Immigration and Refugee Protection Act,* which impose some limits on the searches of goods, and the policies adopted by CBSA with respect to searches of personal electronic devices, we find that the unrestricted ability to search such devices pursuant to s 99(1)(a) does not satisfy the minimal impairment aspect of the proportionality inquiry.

iv. Balancing the Salutary and Deleterious Effects

[103] The final step of the proportionality inquiry involves asking "whether there is proportionality between the overall effects of the *Charter*-infringing measure and the legislative objective. Whereas the preceding steps of the *Oakes* test are focused on the measure's purpose, at this stage the assessment is rooted in a consideration of its effects. This allows a court to determine on a normative basis whether the infringement of the right in question can be justified in a free and democratic society": *Frank* at para 76 [citations omitted]. In other words, are "the benefits of the impugned law …worth the cost of the rights limitation": *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 SCR 567 at para 77.

[104] An average of 94 million travellers passed through the Canadian border in 2014 and 2015; during the same period there were 229 seizures of digital child pornography. CBSA was unable to indicate what percentage of travellers had their personal electronic devices searched, but the BSOs who testified indicated that doing so was "quite common" and "standard procedure". The BSOs indicated that in the course of their searches of electronic devices they regularly viewed intimate photos and videos, internet browser histories, work-related documents, personal emails and financial information. It is reasonable to conclude that thousands of individuals had their personal electronic devices searched pursuant to s 99(1)(a).

[105] Unfettered and unrestricted access by BSOs to search personal electronic devices has serious implications for the privacy interests of these thousands of individuals who have had their

devices searched at the border, and indeed for any individual seeking to cross the Canadian border with a personal electronic device in their possession. As has been noted in cases like *Vu* and *Fearon*, giving access to such devices is akin to giving access to one's biographical core and to a myriad of potentially sensitive documents and communications. The protection of these important privacy interests must be balanced against the need for secure borders and the need to combat child pornography.

[106] Turning to the salutary effects, technological advancements continue to create new and unforeseen ways to undermine border security. For searches of electronic devices, BSOs may not know where evidence will be, in what form, or how it can be accessed. The lag between these advancements and CBSA's ability to respond presents real challenges for border safety, security, and crime suppression. Courts must be careful not to short-circuit the state's capacity to secure the border even before these criminal practices are identified. Broad search powers can provide flexibility to adapt to unforeseen and increasingly complex criminal strategies.

[107] Child pornography, in particular, is a serious issue of great public importance, as was confirmed by the evidence of Dr. Collins. He testified that some paedophilic sex-travellers, who travel to countries where it is easier to meet children and abuse them sexually, save the images of their sexual encounters with children as "trophies" and use them for their own masturbatory purpose or post and/or trade the images on-line with other like-minded individuals. Such images may well be on the personal electronic devices of paedophilic sex travellers when they are returning to Canada. Their online nature can amplify the impact and permanence of harm done to victims. Mr. Vinette's evidence noted the examination of a tablet in the possession of a Wisconsin resident in 2015 containing images of child sexual abuse. As a result of cooperation between Canadian and US officials, the search led to the identification of the 6-year-old female victim.

[108] But the deleterious effects to personal and digital privacy enabled by s 99(1)(a) are substantial, and provide compelling reasons to curtail unfettered search powers of electronic devices at the border. Under a broad and plenary power to search personal electronic devices, advances in technology may make mass surveillance at the border entirely possible in the near future: see Gerald Chan and Nader R Hasan, *Digital Privacy: Criminal, Civil and Regulatory Litigation* (Toronto: LexisNexis Canada, 2018) at 42. This prospect is disconcerting in light of the intimate biographical information stored on these devices and the personal data they generate. Devices now contain vast amounts of data touching on financial and medical details, the personal likes and propensities of users, and their geographic movements over time. They may create and retain this data automatically, unbeknownst to the user, and they can also provide access to data stored on remote networks or other devices which the police may have no lawful authority to search.

[109] There is no doubt that child pornography is a pernicious problem, and that the search of personal electronic devices at the border can go some way toward addressing that problem. We also have no difficulty in concluding that the national security interests of Canada in policing its border and enforcing its customs and other laws at the border are important objectives. However,

it is not at all clear that these objectives cannot be met if additional safeguards are put in place to protect individuals from unnecessarily intrusive searches of their personal electronic devices. The policies put in place by the CBSA go some way to recognizing the need for such safeguards, however policies are not "prescribed by law" as required by s 1. Ultimately, we have determined that, as currently drafted, s 99(1)(a) is not saved by s 1.

v. Remedy

[110] Section 52(1) of the *Constitution Act, 1982* provides:

> The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force and effect.

[111] We are satisfied that s 99(1)(a) of the *Customs Act* violates s 8 of the *Charter* to the extent that it authorizes unlimited searches of the contents of personal electronic devices (such as cell phones or lap top computers). The provision is not saved by s 1 as a reasonable and demonstrably justified limit. Accordingly, we declare 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).

[112] We are mindful that protecting the privacy interest in an individual's personal electronic devices while recognizing the need for effective border security will involve a complex and delicate balancing process. It will be up to Parliament, should it choose to do so, to devise a new approach that imposes reasonable limits on the ability to conduct such searches at the border. This raises the question of whether the declaration of invalidity should be suspended and if so for how long: *Bedford* at paras 166-167.

[113] Suspension of the declaration could mean that some travellers may continue to have their s 8 privacy rights violated during the intervening period. Immediate invalidity would preclude personal electronic devices from being searched at the border, which may pose a danger to the public: *Schachter v Canada*, [1992] 2 SCR 679, 93 DLR (4th) 1.

[114] We recognize that there are a number of matters that need to be considered in devising an appropriate law that balances the competing interests at play in this context. For example, what items can be examined without constituting a search; what should be the trigger or threshold for any search to be conducted; how should requests for passwords or requests to show photographs to a BSO be handled; what is the scope of the search; should there be a requirement to document what is searched and how it was searched. As was noted previously, the Supreme Court in *Fearon* preferred an approach that would see a restriction on the scope of searches that could be conducted incident to arrest; the CBSA guidelines already address some of the relevant issues.

[115] Given the serious problems posed by child pornography and other border protection goals, we have concluded it is appropriate to give Parliament an opportunity to craft a solution that addresses and balances the various competing interests. Accordingly, the declaration of invalidity will be suspended for one year.

E. Were the appellants' rights under s 8 of the Charter *breached?*

[116] As we have concluded that s 99(1)(a) of the *Customs Act* is unconstitutional to the extent that it applies to searches of information contained on personal electronic devices, the searches of the appellants' cell phones and personal computers were unreasonable searches, not authorized by a valid law, that violated their rights under s 8 of the *Charter*.

F. Were the appellants' rights under s 10 of the Charter *breached?*

[117] Section 10 of the *Charter* provides that everyone has the right on arrest or detention "to be informed promptly of the reasons therefor" (s 10(a)) and "to retain and instruct counsel without delay and to be informed of that right" (s 10(b)).

[118] The trial judge concluded that the appellants "were not detained during secondary screening, thus ss 10(a) and 10(b) *Charter* rights were not engaged": para 92. He relied on *Dehghani v Canada (Minister of Employment and Immigration)*, [1993] 1 SCR 1053, 101 DLR (4th) 654, which held that routine questioning of a person during secondary screening at the border does not amount to detention within the meaning of s 10(b) of the *Charter*.

[119] The appellants suggest that the analysis in *Grant*, that detention occurs when an individual has been deprived of the right "to choose to walk away or decline to answer questions" (paras 41–44), supersedes earlier rulings of the Supreme Court of Canada on detention, and that the *Grant* analysis should be applied at the border. We reject this approach, as it would mean that every traveller who elected to cross the border would be "detained" and would have a right to counsel, which is neither reasonable nor realistic. It is inherent in electing to seek to enter Canada at a border crossing that individuals voluntarily put themselves in the position where they are required to answer questions asked by border agents: see ss 11, 153 and 160 of the *Customs Act*. As a result, and in recognition of border security concerns, the courts have adopted different criteria for what constitutes detention at the border.

[120] *Simmons* recognizes that some interactions between a traveller and a customs officer at the border constitute detention, while others do not. There is "little doubt that routine questioning by customs officials at the border or routine luggage searches conducted on a random basis do not constitute detention for the purposes of s 10. There is no doubt, however, that when a person is taken out of the normal course and forced to submit to a strip search that person is detained within the meaning of s 10": para 36.

[121] In *R v Jacoy*, [1988] 2 SCR 548, 89 NR 61, released the same day as *Simmons*, the accused was suspected of intending to import narcotics into Canada. He was under surveillance by the RCMP in Washington state, who contacted CBSA and suggested they perform a secondary inspection. When the appellant was frisked as part of the secondary inspection, a bag containing cocaine was located. He was handcuffed and advised of his right to retain and instruct counsel without delay. He immediately asked to telephone his lawyer but was not allowed to do so until he arrived at the police station two hours later. In the meantime, he was further searched and additional cocaine was found on his person. He was not advised about ss 143 and 144 of the *Customs Act* (since replaced), which at the time provided the accused with the right to appear before a justice of the peace, police magistrate or the chief customs officer to justify the search. At trial, the narcotics were excluded from evidence on the grounds that the appellant's s 10(b) rights were infringed. In the result, the acquittal was set aside, but on the issue of detention the majority of the Supreme Court of Canada had this to say at para 14:

> For the reasons given in *R. v. Simmons*, there is no doubt that the appellant was detained when he was ushered into the interview room … At this point, the customs inspectors had assumed control over the movement of the appellant by a demand that had significant legal consequences for him. The evidence indicates that the customs officials intended to search the appellant regardless of his responses to their questions. …[T]his indicates that the decision to search the appellant, and to strip search him if necessary, had been made by the time the appellant entered the interview room. The appellant was clearly subject to restraint. He could not have refused to be searched and could not have continued on his way. I am therefore satisfied that the appellant was detained, at least from this point onward, and should have been informed of his right to retain and instruct counsel.

[122] In both *Simmons* and *Jacoy*, detention was found to have occurred once a decision was made to search (and potentially strip search) an individual pursuant to ss 143 and 144 of the *Customs Act*.

[123] On the other hand, no detention occurs where a search is characterized as part of "routine questioning". In another case, a search of someone's pockets was found to be "no more invasive than a search of baggage, or a purse, or a pat down or frisk of outer clothing…the border search in this case had only proceeded to a secondary inspection, which remains a routine part of the general screening process": *R v Hudson* (2005), 77 OR (3d) 561 at para 38, 203 CCC (3d) 305 (Ont CA).

[124] The search of a purse was also viewed as part of routine questioning in *R v Nagle*, 2012 BCCA 373. The court went on to note at para 81, however:

> Border crossings are not *Charter*-free zones. Border officials must be alive to the rights of travellers under Canadian law. While border officials have a right to make routine inquiries as part of the screening process, *once border officials have 'assumed control over the movement of [a traveller] by a demand that had*

> *significant legal consequences' the person is detained and must be apprised of his or her rights and afforded an opportunity to contact counsel.* See *R. v. Jacoy*, [1988] 2 S.C.R. 548; 45 C.C.C. (3d) 46 at 53. At that point, constitutional rights are fully engaged.
>
> [emphasis added]

[125] In applying this analysis to the search of personal electronic devices, we do not suggest that every search of an electronic device would go beyond "routine questioning" and amount to a detention. Such a conclusion would ignore the border context. As was noted in *R v Jones* (2006), 81 OR (3d) 481 at para 32, 211 CCC (3d) 4 (ONCA), "[p]ersons seeking entry into Canada are subject to state action that can range from routine questioning to highly intrusive searches. The extent to which state action at the border will be said to interfere with individual constitutional rights depends primarily on the intrusiveness of that state action".

[126] The decision of the Ontario Court of Appeal in *Jones* provides helpful guidance on identifying the "intrusive state action" that may engage a traveller's constitutional rights. Jones had argued that he became the target of a criminal investigation, and was therefore detained, as soon as the suspicions of the Customs authorities were raised. In rejecting that argument, the court noted that, "in a general sense, everyone who is questioned at the border and whose luggage is examined is the target of an investigation". The mere fact that a person "has attracted the suspicion of a Customs official, thereby causing that official to ask routine questions and conduct a routine search, should not give that individual any enhanced constitutional protection": *Jones* at para 40. The court drew the following line, at paras 41-42:

> *I think the proper distinction is between persons, like the appellant, who are not detained or subject to any violation of their reasonable expectation of privacy when the impugned statements are made and persons who are subject to detention, or interference with legitimate privacy expectations when statements are made.* Persons who are subject to detention have the constitutional right to counsel and the constitutional right to remain silent. Persons who have a reasonable expectation of privacy can expect that the state will respect that expectation and not interfere with that reasonable expectation. The existence of these rights and the legitimate expectation of privacy reflect the values of autonomy and personal privacy that underlie the protection against self- incrimination. If a person is compelled to answer questions at the border while under detention, or while his or her reasonable expectation of privacy is otherwise interfered with, a strong argument can be made that an attempt to use those answers in a subsequent criminal proceeding will run afoul of the principle against self-incrimination. That argument does not have to be resolved on the facts of this case.
>
> While I would not make the appellant's s. 7 self- incrimination claim turn on whether he could be said to have been a target of a criminal investigation at the

> border, *the extent to which the border authorities suspect an individual of having committed a particular offence will impact on whether that individual is or is not detained when subject to routine questioning. For example, if the border authorities have decided, because of some sufficiently strong particularized suspicion, to go beyond routine questioning of a person and to engage in a more intrusive form of inquiry, it may well be that the individual is detained when subject to that routine questioning*: see *R. v. Jacoy*, [1988] 2 S.C.R. 548, [1988] S.C.J. No. 83, 45 C.C.C. (3d) 46. As indicated above, if the person is detained, the assessment of the s. 7 self-incrimination claim as it applies to statements made under statutory compulsion during routine questioning may well yield a different result.
>
> [emphasis added]

[127] The reasoning in *Jones* was followed in *R v Sinclair*, 2017 ONCA 287. In the latter case, the appeal court concluded that Sinclair was not detained until after her luggage was x-rayed as part of routine screening. The court accepted the trial judge's conclusion that it was *after* the x-ray that the border officer "had a sufficiently strong particularized suspicion to warrant a more intrusive form of inquiry": para 9.

[128] We would draw the same line when defining detention at the border for purposes of s 10 in this case. Detention occurs when the inquiry moves from "routine questioning" to a more intrusive form of inquiry, initiated on the basis of a sufficiently strong particularized suspicion and with significant legal consequences. We have already determined that the search of a traveller's personal electronic device, beyond what is required for routine screening, constitutes a shift to a more intrusive form of inquiry. Wilson J, in her concurring reasons in *Jacoy*, noted that "in situations involving searches and seizures during periods of arrest or detention the citizen's right to retain and instruct counsel without delay under s. 10(*b*) of the *Charter* and his or her right to be secure against unreasonable search and seizure are mutually re-inforcing. The right to counsel is surely the main safeguard to the citizen that his or her other rights will be respected": para 30.

[129] Not every search of a personal electronic device will amount to a detention. As was noted in *Fearon*, the search of a cell phone is not an equivalent intrusion to the strip search of a person. Some searches of personal electronic devices may fall under the rubric of "routine questioning" and not a more intrusive invasion of privacy. An obvious example would be receipts for imported goods and travel-related documents, stored in electronic format. A search for such items at the border would be considered routine. A wholesale search of a traveller's correspondence or photos would not.

[130] In our view, the line from routine questioning to more intrusive search is crossed when the BSO develops "some sufficiently strong particularized suspicion", sufficient to permit a broader search of the traveller's electronic device, beyond what is required for routine screening.

[131] In *R v Sekhon*, 2009 BCCA 187, 67 CR (6th) 257, for example, the appellant was subject to a search of his vehicle, which the court described as part of "the normal screening process": para 10. He was not free to go, but was not detained for purposes of the *Charter*. He was detained when the process moved into something more serious, beyond routine screening. This point occurred when "it became apparent that cocaine was contained in a hidden compartment" (para 75); at that point the officers decided that the appellant should be detained and advised of his right to counsel. An analogous line can be drawn with respect to the searches of the appellants here.

i. Mr Canfield

[132] Mr. Canfield was subject to the normal screening process when he was referred to secondary screening, when his luggage was searched, and when he was asked whether he might have any child pornography on his phone. To that point there was no detention. The screening moved beyond routine after Mr. Canfield answered "yes" to the question about his possession of child pornography and showed the BSO an image that constituted child pornography; certainly it moved beyond routine when the BSO decided to conduct a more thorough search of the images on the phone. At that point, Mr. Canfield became the subject of a particularized suspicion and was subjected to a more intrusive search of his personal electronic device, in an interaction with significant legal consequences. He was detained, and should have been advised of his right to counsel pursuant to s 10.

ii. Mr Townsend

[133] The analysis with respect to Mr. Townsend's detention is similar. His referral to secondary screening was a part of routine questioning, as was the search of his luggage. He was referred because he had an unusually high number of bags given his travel pattern as a backpacker, and because of his mannerisms, including ceasing to make eye contact and giving quieter and less confident responses to questions. One of the officials who examined Mr. Townsend at secondary screening, BSO Atherton, testified that he would not examine every electronic device in a secondary examination, but would do so if indicators warranted its examination. Indicators included a traveller's mannerisms, coming from source countries for child pornography, including the United States, being in possession of electronic devices and being employed in the technology field. Several electronic devices, including laptops, external hard drives and smart phones, were found in Mr. Townsend's luggage. Mr. Townsend became more agitated during the inspection. BSO Atherton then accessed the photographs on one of the cell phones and found legal pornographic images.

[134] Some 10 minutes after the inspection of Mr. Townsend's luggage began, BSO Aboagye began examining his laptop. It was password protected, so she requested the password. Mr. Townsend was reluctant to give the password, but eventually did so. In less than ten minutes BSO Aboagye found an item of child pornography on the laptop; at that point she attempted to arrest Mr. Townsend under the *Customs Act*.

[135] At some point in this interaction, the questioning of Mr. Townsend and the inspection of his belongings moved from routine screening to a more intrusive level of search and a greater invasion of privacy. That point may have occurred when BSO Atherton scanned Mr. Townsend's cell phone to look for contraband items. In our view, the line to intrusive search, and the point at which Mr. Townsend was certainly the subject of "particularized suspicion", was crossed when BSO Aboagye asked for the password to his laptop so she could conduct a more thorough search. At that point, Mr. Townsend was detained and should have been advised of his s 10 rights.

G. Were the appellants' rights under s 7 of the Charter *violated?*

[136] Section 7 of the *Charter* provides that everyone has "the right to life, liberty and security of the person and the right not be deprived thereof except in accordance with the principles of fundamental justice."

[137] The principle against self-incrimination is a principle of fundamental justice under s 7 of the *Charter*: *R v Porter*, 2015 ABCA 279 at para 16. It has been described as a "general organizing principle of criminal law", from which a number of rules can be derived: *R v Singh*, 2007 SCC 48, citing *R v Jones*, [1994] 2 SCR 229 at p 249 per Lamer J. At para 21 of *Singh*, the court reiterated the following description of the principle of self-incrimination (from *R v White*, [1999] 2 SCR 417 at para 44 per Iacobucci J):

> The jurisprudence of this Court is clear that the principle against self-incrimination is an overarching principle within our criminal justice system, from which a number of specific common law and *Charter* rules emanate, such as the confessions rule, and the right to silence, among many others. The principle can also be the source of new rules in appropriate circumstances. Within the *Charter*, the principle against self-incrimination is embodied in several of the more specific procedural protections such as, for example, the right to counsel in s. 10(*b*), the right to non-compellability in s. 11(*c*), and the right to use immunity set out in s. 13. The *Charter* also provides residual protection to the principle through s. 7.

[138] The appellants submit that their right to be protected from self-incrimination was violated by the use at their criminal trial of certain information they provided to the BSOs in the course of the secondary screening process. In Mr. Canfield's case, it is said to include his response to the question of whether he had child pornography on his cell phone, and his manipulation of the cell phone to show BSO Rai the suspected image. In Mr. Townsend's case, it is said to include his provision of the password to unlock his notebook computer.

[139] Both appellants say they were compelled to provide the incriminating information by s 11 of the *Customs Act*, which requires persons entering Canada to "answer truthfully any questions asked by the [customs] officer in the performance of his or her duties". Providing false or deceptive statements can result in prosecution, and liability for fines or imprisonment: *Customs Act*, ss 153 and 160.

[140] The Crown denies that the appellants' s 7 rights were infringed. It says s 7 rights are not engaged at the border because no one is compelled to present themselves at the border and they do so of their own volition. In the alternative, the appellants' s 7 rights were not breached because the principle against self-incrimination is not absolute. The appellants were not detained at the time the statements were made, and no relevant statements were made by them following the discovery of child pornography.

[141] The principle against self-incrimination does not provide "absolute protection for an accused person against all uses of information that has been compelled by statute or otherwise": *White* at para 45. "The contextual analysis that is mandated under s 7 of the *Charter* is defined and guided by the requirement that a court determine whether a deprivation of life, liberty, or security of the person has occurred in accordance with the *principles* of fundamental justice": *White* at para 47, emphasis in original. "It is the balancing of principles that occurs under s 7 of the *Charter* that lends significance to a given factual context in determining whether the principle against self-incrimination has been violated. In some contexts, the factors that favour the importance of the search for truth will outweigh the factors that favour protecting the individual against undue compulsion by the state": *White* at para 48.

[142] *White* identifies three stages to be analyzed when determining whether s 7 has been infringed (at para 38):

> The first question to be resolved is whether there exists a real or imminent deprivation of life, liberty, security of the person, or a combination of these interests. The second stage involves identifying and defining the relevant principle or principles of fundamental justice. Finally, it must be determined whether the deprivation has occurred in accordance with the relevant principle or principles: see *R. v. S. (R.J.)*, 1995 CanLII 121 (SCC), [1995] 1 S.C.R. 451, at p. 479, per Iacobucci J. Where a deprivation of life, liberty, or security of the person has occurred or will imminently occur in a manner which does not accord with the principles of fundamental justice, a s. 7 infringement is made out.

[143] The decision of the Ontario Court of Appeal in *Jones* again provides a useful analytical construct. Jones had made false statements under statutory compulsion in response to routine questioning by border officials. Subsequently, his luggage was searched and cocaine was found. The statements were used as evidence in his criminal trial, and he argued their use breached his s 7 rights against self-incrimination. The court had no difficulty in finding that the first two stages in *White* were met: Jones' "liberty interest was clearly at stake in the criminal proceedings in which the statements were tendered against him"; and the operative principle of fundamental justice said to be infringed by the admission of the statements was the principle against self-incrimination: para 26. At the third stage, the court noted that "context becomes crucial" and "the court must consider the extent to which the rationale underlying the principle against self-incrimination is engaged in the specific circumstances, and the extent to which countervailing principles of fundamental justice operate in the specific circumstances": para 27.

[144] The key context in *Jones*, as in this case, was that the impugned statements were made at the border in the course of questioning by Customs authorities. As the court noted, at para 30, "[n]o one entering Canada reasonably expects to be left alone by the state, or to have the right to choose whether to answer questions routinely asked of persons seeking entry to Canada". The court went on to state:

> … the premise underlying the principle against self-incrimination, that is, that individuals are entitled to be left alone by the state absent cause being shown by the state, does not operate at the border. The opposite is true. The state is expected and required to interfere with the personal autonomy and privacy of persons seeking entry to Canada. Persons seeking entry are expected to submit to and co-operate with that state intrusion in exchange for entry into Canada.

[145] We agree. We also agree with the Ontario court's observation that effective border control is vitally important, and claims of self-incrimination of the kind made here "must be balanced against the equally fundamental societal claim to the preservation of the integrity of Canada's borders through the effective enforcement of its laws at those borders": para 31. This includes the enforcement of Canada's laws against the importation of child pornography.

[146] It is well established that routine questioning at the border is not a sufficiently intrusive state action to amount to a detention, even when there is a statutory duty to answer those questions: see *Simmons* at p 517; *Dehghani* at p 1074; *Jones* at para 35. Absent detention, there is no constitutional right to counsel and no constitutional right to remain silent at the border: *Jones* at para 36; *R v Hebert*, [1990] 2 SCR 151 at p 201. As was noted previously in our analysis of the appellants' claims under s 10, "the extent to which state action at the border will be said to interfere with individual constitutional rights depends primarily on the intrusiveness of that state action": *Jones* at para 32. We agree with the views expressed at para 37 of *Jones*, that routine questioning and routine searches at the border do not engage a traveller's s 7 rights:

> The conclusion, firmly rooted in the jurisprudence, that routine questioning and inspection of luggage at the border does not result in a detention, give rise to any right to counsel, or interfere with a traveller's reasonable expectation of privacy compels the conclusion that personal autonomy and privacy -- the values animating the protection against self-incrimination -- were not implicated when the appellant was compelled to answer routine questions about his residence and his marital and employment status. The exclusion from evidence at his subsequent trial of these statements, therefore, could not vindicate or protect those values. Exclusion of the answers, however, could diminish the state's ability to effectively enforce its legitimate border interests while at the same time impairing the search for the truth in the criminal proceeding by excluding relevant evidence. The balancing of competing principles of fundamental justice does not favour extending the principle against self-incrimination to statements made in the circumstances in which the appellant made his statements to the Customs authorities.

[147] We agree with the balancing exercise undertaken in *Jones*. "The mere fact that a person has attracted the suspicion of a Customs official, thereby causing that official to ask routine questions and conduct a routine search, should not give the individual any enhanced constitutional protection against self-incrimination": *Jones* at para 40. However, we reject the proposition that s 7 rights can never be engaged at the border simply because individuals voluntarily present themselves in order to enter the country. Such an analysis is inconsistent with the recognition in *Simmons*, *Jacoy*, *Jones* and *Sinclair* that *Charter* rights may be triggered at the border when a traveller is subjected to a higher level of state intrusiveness.

[148] The description at paras 41 and 42 of *Jones* of the circumstances in which the principle against self-incrimination might be engaged at the border is worth repeating here:

> … If a person is compelled to answer questions at the border while under detention, or while his or her reasonable expectation of privacy is otherwise interfered with, a strong argument can be made that an attempt to use those answers in a subsequent criminal proceeding will run afoul of the principle against self-incrimination. …
>
> … if the person is detained, the assessment of the s. 7 self-incrimination claim as it applies to statements made under statutory compulsion during routine questioning may well yield a different result.

[149] We agree with the analysis undertaken by the Ontario Court of Appeal in *Jones*, and also in *Sinclair*: there can be a point where, what began as routine questioning and a routine search of belongings, becomes sufficiently intrusive that it qualifies as a detention that engages *Charter* rights. Absent detention, there is no right to counsel and no right to remain silent. Neither the existence of a statutory duty to answer the questions posed, nor the criminal penalties attendant on failing to do so honestly, gives rise to constitutional rights as long as the interaction remains part of routine questioning by Customs officials: *Dehghani* at para 41. The values animating the protection against self-incrimination are not implicated when a traveller is compelled to answer routine questions: *Jones* at para 37. The answers to such questions can, accordingly, be received in subsequent proceedings without violating the principle against self-incrimination.

[150] If and when a traveller is detained, however, his rights to counsel and to remain silent are engaged. If he is compelled by statute to answer questions at that point, the admission of those compelled statements may well violate the principle against self-incrimination.

i. Mr. Canfield

[151] Mr. Canfield submits that *any* statements made by him to the BSOs were compelled under s 11 of the *Customs Act* and, therefore, engage the principle against self-incrimination enshrined in s 7 of the *Charter*. He argues that this would include his admission in response to the question posed by BSO Rai about whether he had child pornography on his electronic device and his actions in pulling up an image in response to the request to pull up the most clear-cut image of child

pornography. At the time that Mr. Canfield made this statement, he was subject to routine questioning. Individuals who choose to import goods when they enter Canada can reasonably expect to be asked questions about the goods which they are bringing with them, as part of routine questioning, such as:

- What is the value of the goods you are importing?
- Do you have any illegal drugs, prohibited weapons or child pornography?
- What is in this container?

[152] We are satisfied that Mr. Canfield's admission that he had child pornography was made in the course of routine questioning prior to his detention and that the use of this admission in his criminal trial does not offend his s 7 rights.

[153] For the reasons set out in our analysis of Mr. Canfield's s 10 rights, we are satisfied that he was detained when he was asked to pull up an image of child pornography on his cell phone. That was the start of a more intrusive inquiry, beyond routine questioning, and Mr. Canfield's *Charter* right to counsel and right to silence were engaged. Any statements made by Mr. Canfield past that point would be protected by the principle against self-incrimination and their admission in criminal proceedings would breach his rights under s 7.

ii. Mr. Townsend

[154] The same analysis applies to Mr. Townsend. Again, for the reasons set out in our s 10 analysis, we are satisfied that he was detained at the point when the BSO demanded his password so that she could conduct a more thorough search of his laptop computer, and his s 7 rights were engaged. Any statements made by Mr. Townsend past this point would be subject to the right against self-incrimination.

H. Should the evidence obtained in breach of the Charter be excluded pursuant to s 24(2) of the Charter?

[155] Section 24(2) of the *Charter* provides:

> Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

[156] While a reviewing court generally defers to the trial judge's s 24(2) analysis, a fresh s 24(2) analysis on appeal may be necessary where the trial judge has made errors. As was noted in *R v GTD*, 2017 ABCA 274 at paras 7-8, rev'd on other grounds 2018 SCC 7, at paras 7 and 8:

> Whether evidence should be excluded as a remedy under s. 24(2) of the *Charter* because of a breach of *Charter* rights involves an element of discretion, and some deference is due to the decision of the trial judge: *R. v Grant*, 2009 SCC 32 at para. 86, [2009] 2 SCR 353. A decision to exclude evidence under s. 24(2) will only be reversed where the trial judge's decision is based on a wrong principle or exercised in an unreasonable manner: *R. v A.M.*, 2008 SCC 19 at para. 96, [2008] 1 SCR 569.
>
> Less deference is owed to a s. 24(2) analysis performed "in the alternative", after the trial judge has found there was no *Charter* breach. One component of the *Grant* analysis is the seriousness of the breach, and a trial judge who has found there was no breach may under-weigh this factor: *Grant* at para. 129; *R. v Paterson*, 2017 SCC 15 at para. 42, 347 CCC (3d) 280. If the reviewing court concludes that the *Charter* breach, while established, was indeed of a minor nature, some deference is still called for.

[157] As we have concluded that the searches of the appellants' electronic devices offended their rights under s 8 of the *Charter* and that their rights under ss 10(a), 10(b) and 7 were infringed, we must now consider whether the evidence obtained should be excluded under s 24(2).

[158] In *Grant*, the Court identified three factors to be considered in assessing the effect of admitting the evidence on society's confidence in the justice system (at para 71):

i. the seriousness of the *Charter*-infringing state conduct;

ii. the impact of the breach on the *Charter*-protected interests of the accused; and

iii. society's interest in the adjudication of the case on its merits.

[159] The first stage focuses on the culpability of the authorities who conducted the search while the second stage focuses on the harm caused by the search. The final stage considers the effect of admission or exclusion on the truth-seeking function of the trial. These three avenues of inquiry are to be viewed from a "long-term, forward-looking and societal perspective": *Grant* at para 71.

i. Seriousness of the *Charter*-infringing state conduct

[160] The Court must assess the state conduct to determine if it is so severe and deliberate that the Court must disassociate itself to preserve public confidence in the justice system: *Grant* at para 72. If the authorities are acting in good faith, pursuant to what they thought were legitimate policies, the state conduct will be less serious. Good faith reduces the culpability of the authorities and the seriousness of the state conduct; however, ignorance of, or negligence or wilful blindness to, *Charter* standards is not good faith, and a pattern of abuse will support exclusion: *Grant* at para 75.

[161] The appellants say there is a pattern of negligence and abuse in the actions of the border officials. They say the BSOs were not following the CBSA's own policies and ignored recent Supreme Court jurisprudence on the important privacy interests in electronic devices. The Crown says the BSOs reasonably relied on their powers under the *Customs Act*. There was no institutional negligence, as the CBSA reasonably relied on *Simmons* and other jurisprudence as providing almost unlimited search powers at the border.

[162] The BSOs here faced a similar situation to the police in *Fearon*. The Supreme Court in that case found that, while there may have been some gray area in this area of the law, "it was a very light shade of gray, and [the police] had good reason to believe, as they did, that what they were doing was perfectly legal": para 94.

[163] In this case, with respect to s 8, the dominant view based on historical jurisprudence was that customs officials could search electronic devices at the border. The trial judge found that the BSOs "were genuinely attempting to enforce the Act as they understood it" and that there was "no evidence of bad faith or capricious behaviour": para 103.

[164] We do not see how evidence of non-compliance with a 2015 internal policy is relevant to the seriousness of the state conduct in 2014. The BSOs acted in accordance with the existing statutory requirements. Moreover, "there were ample 'objective, articulable facts' … to support the customs officer's suspicion" (*Simmons* at 534), and the searches were carried out in a reasonable manner.

[165] This analysis extends to the breach of the appellants' rights under s 10 and s 7 as well. In the case of Mr. Canfield, although the BSO should have informed Mr. Canfield of his right to retain and instruct counsel before he finished searching his cell phone, the BSO was operating under a good faith understanding of the powers afforded under the *Customs Act*. Additionally, given the absence of bad faith or capricious behavior related to failure to provide access to a lawyer or compel answers to the questions being asked, the seriousness of the *Charter*-infringing state conduct is on the low end of the spectrum.

[166] With respect to Mr. Townsend, the BSOs were operating under a similar good faith understanding and instructed Mr. Townsend of his right to counsel after the discovery of an image that appeared to be child pornography. While not as prompt as they should have been, especially when confronted with Mr. Townsend's inquiries about whether he needed a lawyer, the BSOs did not demonstrate an egregious level of *Charter*-infringing conduct on the ss 10 and 7 breaches.

[167] We conclude that the BSOs acted reasonably in the good faith belief that their actions were authorized by law. This factor favours admission.

ii. Impact on the appellants' *Charter*-protected interests

[168] In this line of inquiry, the Court focuses on the accused and the extent of the infringement on his or her *Charter* right*: Grant* at para 76. This involves identifying the interests engaged by the infringed right and the extent to which the breach violated those interests.

[169] "[A]n unreasonable search contrary to s. 8 of the *Charter* may impact on the protected interests of privacy, and more broadly, human dignity. An unreasonable search that intrudes on an area in which the individual reasonably enjoys a high expectation of privacy, or that demeans his or her dignity, is more serious than one that does not": *Grant* at para 78.

[170] The BSO's original search of Mr. Canfield's electronic device was minimal in scope. After Mr. Canfield selected and showed the BSO an image of child pornography on the device, the BSO seized the phone and confirmed the existence of other child pornography images. The BSO remained within the same image folder and did not access any other applications on the device. The search lasted at most three minutes.

[171] The original search of Mr. Townsend's devices was more thorough. The search occurred over approximately 10 minutes and involved two BSOs. The BSOs cannot speak with certainty to the applications opened; however, based on their individual general practices, the BSOs believe they searched images and other document files but did not access the email or text messaging applications. This evidence was not contradicted at trial. After an image of child pornography was found, the search was immediately halted.

[172] While the original searches of both Mr. Canfield and Mr. Townsend's electronic devices were reasonably limited in scope, the devices were seized and later forensically searched under warrant. The warrants were based on evidence discovered during the earlier *Charter*-infringing searches. The evidence obtained under the warranted search also falls under the s 24(2) analysis.

[173] The forensic searches involved "a detailed technical examination and analysis" of the devices. The searches were "methodical and thorough", even viewing files that had previously been deleted.

[174] While we do not have specific evidence on what was contained in these particular devices, electronic devices generally contain intimate correspondence; details of our financial, medical and personal situations; and reveal information about our specific interests, likes, and propensities: *Morelli* at para 105. The search of these devices presumably revealed "personal and core biographical information" about Mr. Townsend and Mr. Canfield and therefore constituted a significant breach of their privacy interests: *Marakah* at para 33.

[175] A breach of s 10 denies an individual who has been arrested or detained an opportunity to understand the reasons for their arrest and obtain legal advice relevant to their legal situation: ***R v Evans***, [1991] 1 SCR 869 at para 31, 63 CCC (3d) 289; *Sinclair*. The purpose of the right to counsel

is "to allow the detainee not only to be informed of his rights and obligations under the law but, equally if not more important, to obtain advice as to how to exercise those rights": *R v Manninen*, [1987] 1 SCR 1233 at 1242-43, 41 DLR (4th) 301, affirmed in *Sinclair* at para 26.

[176] Although the search of Mr. Canfield's cellphone was minimal in scope, he was nevertheless denied an opportunity to consult a lawyer until the search was complete. This impacted his ability to appreciate the consequences facing him after he answered "yes" to the question about his possession of child pornography. Similarly, Mr. Townsend ought to have been provided an opportunity to understand his jeopardy and seek legal advice when BSO Aboagye requested password-access to his laptop. Although these interactions were brief, a brief rights-infringement is not necessarily trivial: *R v Le*, 2019 SCC 34 at para 155. Mr. Canfield and Mr. Townsend's s 10 rights were both undermined in a non-trivial manner in the course of these interactions.

[177] The protection against self-incrimination under s 7 prevents the state from compelling individuals to provide evidence to promote a self-defeating purpose: *R v Jarvis*, 2002 SCC 73 at para 67. It guards against state coercion and abuse of power in the context of the unequal power relationship between individual and state: *White* at para 51.

[178] Mr. Canfield was lawfully required to answer questions during the part of his questioning that was routine, but the situation took on a coercive context with criminal consequences once he was detained and denied an opportunity to speak to a lawyer. Mr. Townsend experienced the same shift from lawful to unlawful coercion. The risk of abuse of state power is heightened when travellers expect to be compelled to answer questions but are unaware of when routine questioning turns to a more personalized search based on reasonable suspicion. Mr. Canfield and Mr. Townsend's interests protected under s 7 were significantly undermined by the *Charter* breaches.

[179] These factors weigh against admission.

iii. Society's interest in the adjudication of the case on its merits

[180] This final line of inquiry considers whether the truth-seeking function of the courts would be served better by the admission or exclusion of the evidence. The factors considered are the reliability of the evidence, the importance of the evidence to the Crown's case, and the seriousness of the offence: *Vu* at para 73, citing *Grant* at paras 81, 83-84.

[181] The electronic files containing child pornography are real, highly reliable evidence: *Spencer* at para 80; *Canfield* at para 108. There is no suggestion that this evidence was in any way altered during the search. Excluding this evidence would gut the Crown's case: *Canfield* at para 109.

[182] The seriousness of the offence can cut both ways. The public interest in having the case heard on its merits is heightened when the offence is serious; however, where the penal stakes for the accused are high, there is a vital interest in having the justice system be above reproach: *Grant*

at para 84. Both cases before us deal with child pornography. Society "undoubtedly has an interest in seeing a full and fair trial based on reliable evidence … for a crime which implicates the safety of children": *Spencer* at para 80.

[183] Society has a strong interest in the adjudication of these cases on their merits. This weighs heavily in favour of admitting the evidence obtained contrary to ss 8, 10 and 7.

iv. Conclusion on s 24(2)

[184] On balance, society's confidence in the justice system is best maintained through the admission of the evidence. While the impact on the appellants' *Charter*-protected interests under ss 8, 10 and 7 was serious, this is just one factor in the analysis and, in this case, it is outweighed by the other *Grant* factors.

[185] While predating *Grant*, in both *Simmons* and *Jacoy* the Supreme Court concluded that the customs officer had acted in good faith and that the evidence from a search in breach of *Charter* rights should not be excluded pursuant to s 24(2). In *Bialski* (para 119), the Court found that "even if there had been a breach of the appellants' s. 8 Charter rights, the emails and texts viewed at the time the appellants crossed the border would not have been excluded pursuant to s. 24(2) using the analysis set out by the Supreme Court of Canada in *R v Grant* … because the customs officers reasonably believed that such searches were authorized by s. 99 of the Act and that belief was supported by the jurisprudence cited herein. The Supreme Court of Canada in similar circumstances, where the law was uncertain or changing, has not excluded evidence: *Vu* and *Fearon*."

[186] This is an evolving area of the law; there was nothing unreasonable in the reliance by the CBSA on the authority of *Simmons* and the jurisprudence following it. Quite the opposite; it would have been unreasonable not to rely on those authorities. The border officials acted in good faith in deciding to search the devices and in carrying out the searches. They uncovered real and reliable evidence of a serious offence that is crucial to the Crown's case.

[187] The evidence is admitted.

V. Conclusion

[188] We are satisfied:

(a) the trial judge erred in failing to recognize that Simmons should be revisited to consider whether personal electronic devices can be routinely searched at the border; and

(b) s 99(1)(a) of the Customs Act is unconstitutional to the extent that it imposes no limits on the searches of such devices at the border, and is not saved by s 1 of the Charter.

[189] We declare that the definition of "goods" in s 2 of the *Customs Act* is of no force and effect insofar as it includes the contents of personal electronic devices for the purpose of s 99(1)(a) of the *Customs Act*.

[190] We suspend the declaration of invalidity for one year to provide Parliament the opportunity to amend the legislation, should it wish to do so.

[191] We conclude that:

(a) the appellants' rights under s 8 of the *Charter* were infringed;

(b) the appellants were detained and their rights under s 10 of the *Charter* were violated;

(c) statements made after the appellants were detained are subject to the protection of s 7 of the *Charter*; and

(d) the evidence from the searches of the appellants' electronic devices should not be excluded pursuant to s 24(2) of the *Charter*;

[192] The appellants' convictions are upheld and their requests for new trials are dismissed.

Appeal heard on January 8, 2020

Memorandum filed at Edmonton, Alberta
this 29th day of October, 2020

Authorized to sign for: Schutz J.A.

Strekaf J.A.

Authorized to sign for: Khullar J.A.

Appearances:

D.J. Alford
for the Respondent, Her Majesty the Queen

S.L. Tkatch
for the Respondent, Her Majesty the Queen in the Right of Canada

K.J. Teskey, Q.C.
for the Appellant, Sheldon Wells Canfield

E.V. McIntyre
for the Appellant, Daniel Emerson Townsend

COURT OF APPEAL OF ALBERTA

COURT OF APPEAL FILE NUMBER:	1803-0294A
TRIAL COURT FILE NUMBER:	150291227Q1
REGISTRY OFFICE:	Edmonton
RESPONDENT:	Her Majesty the Queen
STATUS ON APPEAL:	Respondent
APPLICANT:	Sheldon Wells Canfield
STATUS ON APPEAL:	Appellant
DOCUMENT:	**JUDGMENT**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT:	Kent Teskey, Q.C. Pringle Chivers Sparks Teskey Barrister #300, 10150 100 Street NW Edmonton, AB T5J 0P6 Phone: (780) 424-8866 Fax: (780) 666-7398

Registrar Stamp
REGISTRAR
FILED
13 Nov 2020
RZ
Court of Appeal of Alberta

DATE ON WHICH JUDGMENT WAS PRONOUNCED:	October 29, 2020
LOCATION OF HEARING:	Edmonton, Alberta
NAMES OF JUDGES WHO GRANTED THIS JUDGMENT: *(list each judge in order of seniority)*	Madam Justice F. Schutz Madam Justice J. Strekaf Madam Justice R. Khullar

---

UPON THE HEARING OF THIS APPEAL ON January 8, 2020, of an appeal from the finding of constitutional invalidity of section 99(1)(a) of the *Customs Act* and from the convictions entered by the Honourable Mr. Justice R.P. Belzil on May 22, 2018;

AND UPON HEARING representations from counsel for the Appellant and counsel for the Respondent;

IT IS ORDERED THAT:

A unanimous Court, ordered that:

1) The definition of “goods” found in section 2 of the Customs Act, R.S.C., 1985, c. 1 (2nd Supp.), is declared to be of no force or effect as that definition applies to the search of any information contained on electronic devices that may be searched under the authority of section 99(1)(a) of the Customs Act. This declaration of invalidity is suspended until October 29, 2021, subject to further order of this Court.

2) The appeals against conviction of the appellant Mr. Canfield and the appellant Mr. Townsend are both dismissed.

Registrar, Court of Appeal

APPROVED AS BEING THE ORDER GRANTED:

Deborah Alford, counsel for the Respondent
Attorney General of Alberta

Signed on behalf of Shelley Tkatch,
counsel for the Respondent Attorney
General of Canada

COURT OF APPEAL OF ALBERTA

COURT OF APPEAL FILE NUMBER:	1803-0293A
TRIAL COURT FILE NUMBER:	150156834Q1
REGISTRY OFFICE:	Edmonton
RESPONDENT:	Her Majesty the Queen
STATUS ON APPEAL:	Respondent
APPLICANT:	Daniel Emerson Townsend
STATUS ON APPEAL:	Appellant
DOCUMENT:	**JUDGMENT**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT:	Evan V. McIntyre Pringle Chivers Sparks Teskey Barrister #300, 10150 100 Street NW Edmonton, AB T5J 0P6 Phone: (780) 424-8866 Fax: (780) 666-7398

Registrar's Stamp

DATE ON WHICH JUDGMENT WAS PRONOUNCED:	October 29, 2020
LOCATION OF HEARING:	Edmonton, Alberta
NAMES OF JUDGES WHO GRANTED THIS JUDGMENT: *(list each judge in order of seniority)*	Madam Justice F. Schutz Madam Justice J. Strekaf Madam Justice R. Khullar

---

UPON THE HEARING OF THIS APPEAL ON January 8, 2020, of an appeal from the finding of constitutional invalidity of section 99(1)(a) of the *Customs Act* and from the convictions entered by the Honourable Mr. Justice R.P. Belzil on May 22, 2018;

AND UPON HEARING representations from counsel for the Appellant and counsel for the Respondent;

IT IS ORDERED THAT:

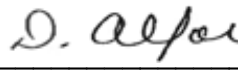
A unanimous Court, ordered that:

1) The definition of “goods” found in section 2 of the Customs Act, R.S.C., 1985, c. 1 (2nd Supp.), is declared to be of no force or effect as that definition applies to the search of any information contained on electronic devices that may be searched under the authority of section 99(1)(a) of the Customs Act. This declaration of invalidity is suspended until October 29, 2021, subject to further order of this Court.

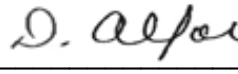
2) The appeals against conviction of the appellant Mr. Canfield and the appellant Mr. Townsend are both dismissed.

Registrar, Court of Appeal

APPROVED AS BEING THE ORDER GRANTED:



Deborah Alford, counsel for the Respondent
Attorney General of Alberta



Signed on behalf of Shelley Tkatch,
counsel for the Respondent Attorney
General of Canada

PART I: OVERVIEW OF APPLICATION AND STATEMENT OF FACTS

1. Overview of Issues of Public Importance

[1] These cases present an opportunity for the Court to bring investigative procedure at Canada's borders into the 21st century, clarifying issues of importance to the millions of Canadians who travel abroad. The applicants, who are both Canadian citizens, returned to Canada after visiting other countries. Customs officers compelled them to answer incriminating questions and ordered them to manipulate electronic devices so the officers could search the contents of these devices. The applicants argued that Canada Border Services Agency (CBSA) officers had violated their s. 8 and s. 10 of *Charter* rights, and they asked the courts to limit the state's power to search electronic devices at the border without individualized suspicion. They also argued that admitting any evidence gleaned directly or indirectly through the statutory compulsion of the *Customs Act* would violate their s. 7 *Charter* protection against self-incrimination.

[2] Although the Alberta Court of Appeal accepted the key principles the applicants had advanced, this case still raises important questions about search, detention, and self-incrimination at the Canadian border. Some of these debates have been brewing for years – at least since 2013, when this Court explained why electronics are not ordinary receptacles. And, over the better part of the last decade, these border issues have attracted public debate,[1] calls for change from legal academics,[2] a Parliamentary committee report,[3] and concerns both from the Privacy Commissioner and from within the legal profession.[4] It is time to put these debates to rest.

---

[1] CBC Radio, *Spark*, "Do you have to give up your passwords at the border?" (12 Nov. 2015); Marni Soupcoff, "Get the state out of my smartphone", *National Post* (online) (5 Mar. 2015).

[2] R. Currie, "Electronic Devices at the Border: The Next Frontier of Canadian Search and Seizure Law?" (2016), 14:2 *Can. J. Law & Tech.* 289; S. Penney, "'Mere Evidence'?: Why Customs Searches of Digital Devices Violate Section 8 of the *Charter*" (2016), 49:2 *UBC Law Rev.* 485; R. Diab, "Protecting the Right to Privacy in Digital Devices: Reasonable Search on Arrest and at the Border" (2018), 98 *UNB Law J.* 96.

[3] House of Commons, Standing Committee on Access to Information, Privacy, and Ethics, *Protecting Canadians' Privacy at the U.S. Border* (Dec. 2017).

[4] Canadian Bar Association, "Privacy of Canadians at Airports and Borders" (Sept. 2017); Federation of Law Societies of Canada, "Crossing the Border with Electronic Devices: What Canadian Legal Professionals Should Know" (Dec. 2018); Privacy Commissioner of Canada, "Crossing the line? The CBSA's examination of digital devices at the border" (Oct. 2019).

[3] This case's importance also extends past the border: it raises practical concerns about how Canadian courts develop new rules of criminal procedure. Everyone recognized this *Charter* application was a test case. After years of litigation, the applicants succeeded in convincing the Court of Appeal to change the law. The Court of Appeal relied on the principles in *Bedford* and declined to apply this Court's outdated precedent. It also recognized that these *Charter* breaches were systemic and affected thousands of other Canadians, most of whom were innocent of any crime. Yet the applicants received no remedy – largely *because* they had succeeded in changing the law. When the Court of Appeal refused to exclude any evidence, it treated the customs officers' good-faith reliance on the prior state of the law as essentially determinative.

[4] This Court should reconsider whether a change in the law should be treated as a *de facto* s. 24(2) trump card whenever the accused in a criminal case makes a successful *Charter* argument with systemic effects. In practice, constitutional cases brought by accused persons are the mechanism by which all Canadians' *Charter* rights are defined and protected. Few people other than those accused of crimes have any incentive to litigate complex procedural issues. But without any prospect of a remedy, the accused has virtually no reason start down this lengthy and expensive road. Refusing to provide a s. 24(2) remedy is an enormous disincentive to raising novel *Charter* arguments. Although investigators' good-faith reliance on the previous state of the law is a relevant factor to consider under s. 24(2), this Court should also recognize the negative long-term impact on the administration of justice that will result when an accused is deprived of a s. 24(2) remedy in a test case that has the indirect benefit of protecting the *Charter* rights of millions of Canadians.

[5] There are four questions of public importance that justify granting leave in these two cases:

1. When does the search of a digital device at the border require individualized suspicion?
2. When is a traveller "detained" at the border for *Charter* purposes?
3. When a traveller is compelled to answer questions under the *Customs Act*, how are the traveller's communicative responses – and any derivative evidence – protected by the principle against self-incrimination incorporated into s. 7 of the *Charter*? Should any compelled evidence be excluded from a criminal trial under s. 24(1) of the *Charter*?
4. When applying s. 24(2) of the *Charter* and deciding whether the admission of evidence would bring the administration of justice into disrepute, should a court consider the unique circumstances of the accused who brings a "test case" that ends a practice that caused a systemic breach of many Canadians' *Charter* rights?

2. Summary of Facts and Proceedings Below

[6] The applicant Mr. Townsend returned to Edmonton from Seattle in March 2014. He spoke with a CBSA officer at the primary customs examination station in the Edmonton airport. The officer thought Mr. Townsend was travelling with too much luggage for a sightseer, he thought Mr. Townsend had been in the United States for an unusually long time, and he found it suspicious that Mr. Townsend was speaking softly and avoiding eye contact. The officer referred Mr. Townsend to secondary screening. As it happened, CBSA officers at Edmonton International Airport were engaged in an investigative exercise dubbed "Project Safe Haven." The CBSA hoped to detect child pornography by searching the devices of travellers referred to secondary screening.[5]

[7] Once Mr. Townsend arrived at secondary screening border guards soon began searching his digital devices. They saw sensitive and potentially embarrassing information: while searching Mr. Townsend's cell phone one officer uncovered legal pornography. Although the officer could not remember exactly what he searched on the phone, he suggested it was his common practice to perform what he called a "cursory" review of photos, videos, and web browsing history. As the CBSA officers proceeded with their search, another officer encountered a password-protected laptop. She asked Mr. Townsend for the password. The officer described what happened next:

> [H]e asked me something to the effect of, did he need a lawyer, and I said to him, Well, why do you think that you need one? And he said something about his employer, that being his employer's laptop. And then my colleague Mr. Atherton said something to the effect of, Well, you said that you were self-employed, so I don't understand how this is your employer's laptop. And at that point, he made some comment to the effect of, well, he wasn't actually working for them, but he still had some kind of legal contract with them. So I said, well, if you're concerned about giving me the password, you don't need to give it to me, you can just unlock it.[6]

[8] Mr. Townsend typed in the password for the computer, and the border guard began to search its contents. She could not remember exactly how long she searched it, but she estimated it was about ten minutes before she identified an image of child pornography. The officer explained that when she searched a digital device, she would continue searching until she was "satisfied" there was "nothing of concern," with these searches sometimes taking upwards of a half hour to

---

[5] Transcript at 11/12-20, 53/24-28, 89/6-14; Agreed Statement of Facts at paras 17-20; *R v Canfield*, 2018 ABQB 408 at paras 13-14; *R v Canfield*, 2020 ABCA 383 at para 56.

[6] Transcript at 56/3-4, 57/21 to 58/14, 78/27 to 79/21, 89/41 to 90/2-11; *Canfield* (QB) at para 15; *Canfield* (CA) at para 57.

45 minutes. She also emphasized that, in her experience, it was common for CBSA officers to search a traveller's digital devices after they were referred to secondary screening:

> Q: How often as a [border services officer] at least sometimes stationed in secondary [screening] would you being doing an examination on a laptop or another digital device?
>
> A: It's quite common. I mean, that's part of the travellers' goods. So if they're coming to secondary for an exam, it's standard procedure. It happens all the time.[7]

[9] Despite Mr. Townsend's concerns about whether he needed a lawyer, the officers took no steps to facilitate access to counsel. It was only after an officer identified the obscene image on the laptop that Mr. Townsend was placed under arrest and provided with his s. 10(b) rights.[8]

[10] The second applicant, Mr. Canfield, returned to Edmonton from Cuba in November 2014. He also went through customs at the Edmonton airport. He was referred to secondary screening because he was travelling alone, because he had a history of travelling to Cuba, because he made innuendos about sex and "women on the beach," and because seemed "overly friendly".[9]

[11] At secondary screening, the officer was suspicious that Mr. Canfield might be involved in sex tourism because Mr. Canfield was a single male travelling from Cuba, because he appeared nervous, and because the officer found condoms, a penis ring, and lubricants in his luggage. The officer decided he was going to search Mr. Canfield's phone. But first, he asked Mr. Canfield whether he had any child pornography on his phone. Mr. Canfield responded: "I'm not sure." The officer explained how Mr. Canfield's response "obviously heightened my suspicion," and he thought Mr. Canfield appeared more nervous. The officer repeated his question: "I asked him once again very clearly if he had any images or any videos of child pornography on his cellphone". Mr. Canfield sighed, and then finally replied "yes". The officer told Mr. Canfield "to pull up the images that [Mr. Canfield] thought would be the most … clear-cut image of child pornography". Mr. Canfield manipulated his phone and showed the officer an image. The officer arrested Mr. Canfield and informed him of his s. 10(b) *Charter* rights.[10]

---

[7] Transcript at 90/11-12, 100/15-18, 110/11-22, 114/31-41.

[8] Transcript at 59/21-23.

[9] Transcript at 14/2-8; *Canfield* (QB) at para 16; *Canfield* (CA) at para 51.

[10] Transcript at 122/8 to 124/32; *Canfield* (QB) at paras 17-18; *Canfield* (CA) at paras 52-54.

[12] Although one officer had testified that digital searches "happen all the time," CBSA policy directed that searches of digital devices must not be "conducted as a matter of routine" and the CBSA required its officers to look for so-called "indicators" before they search a digital device. Yet the CBSA executive who testified on the *voir dire* acknowledged that – despite CBSA policy requiring these "indicators" – an officer could examine a digital device so long the officer had articulable "doubts." He admitted that an officer could search a digital device under CBSA policy even if the officer's suspicions came "nowhere near" the legal threshold of reasonable suspicion.[11]

[13] The applicants argued the CBSA had violated their s. 8 *Charter* rights by searching their electronic evidence. They asked the Court to strike down s. 99(1)(a) of the *Customs Act*. They argued that if the definition of "goods" in s. 2 of the *Customs Act* included the electronic contents of digital devices, then s. 99(1)(a) gave border guards the power to search devices without any individualized suspicion. They also argued they had been "detained" in the meaning of s. 10(b) even before they were placed under arrest, yet they had not been given a chance to consult with a lawyer. As a remedy, they sought exclusion of their statements and digital evidence under s. 24(2) of the *Charter*. Finally, they argued that any statements and communicative acts compelled under the authority of the *Customs Act* were protected by the principle against self-incrimination under s. 7 of the *Charter*, and argued they were entitled to both use immunity and derivative use immunity under s. 24(1) of the *Charter*, making much of the Crown's evidence inadmissible.

[14] For their part, the Alberta Crown and the Public Prosecution Service of Canada (PPSC) both argued that – despite the CBSA policy – searches of digital device were indeed "routine," and as such, they did not require individualized suspicion. For similar reasons, they argued the applicants were not detained and were not owed any s. 10 *Charter* rights before the officers placed them under arrest. They also suggested the applicants' compelled responses to the officers' questions could be used against the applicants at their criminal trials.

---

[11] Transcript at 231/36-37; "Bulletin 2012-008 - Examination of Portable Computers and Mobile Communication Devices" (1 October 2012), found at p. 115 of Exhibit F to the Affidavit of Denis R. Vinette (sworn 1 March 2017), being Exhibit 6 at trial; "Operational Bulletin PRG-2015-31: Examination of Digital Devices and Media at the Port of Entry – Interim Guidelines" (30 June 2015), found at p. 108 of Exhibit E of the Vinette Affidavit.

[15] The trial judge dismissed the applicants' *Charter* arguments,[12] but the Court of Appeal accepted that the searches were unlawful and that the applicants had been detained.[13] Most importantly, the Court concluded that s. 99(1)(a) of the *Customs Act* violated s. 8 of the *Charter* because the "goods" it allows an officer to search – a term defined in s. 2(1) of the *Customs Act* – encompasses the digital contents of electronic devices. The Court of Appeal also agreed that the applicants and been detained without being afforded their s. 10(b) *Charter* rights, because the CBSA officers had crossed from making "routine" inquiries into an investigation with enough "particularized suspicion" to result in detention. For similar reasons, the Court also concluded that the principle against self-incrimination was engaged when the officer demanded Mr. Townsend's password and when Mr. Canfield was asked to pull up an image of child pornography. The Court of Appeal declined to grant an exclusionary remedy under s. 24(2), however. Although the Court of Appeal mentioned the serious impact of the breaches on the applicants' *Charter*-protected interests, the Court concluded the officers' conduct was not especially serious – largely because the officers were acting in good faith and operating within an evolving area of the law.

PART II: QUESTIONS IN ISSUE

[16] This case raises the following issues of national and public importance:

1. When does the search of a digital device at the border require individualized suspicion?
2. When is a traveller "detained" at the border for *Charter* purposes?
3. When a traveller is compelled to answer questions under the *Customs Act*, how are the traveller's communicative responses – and any derivative evidence – protected by the principle against self-incrimination under s. 7 of the *Charter*? Should any compelled evidence be excluded from a criminal trial under s. 24(1) of the *Charter*?
4. When applying s. 24(2) of the *Charter* and deciding whether the admission of evidence would bring the administration of justice into disrepute, should a court consider the unique circumstances of the accused who brings a "test case" that stops a practice that caused a systemic breach of many Canadians' *Charter* rights?

---

[12] *R v Canfield*, 2018 ABQB 408. See also *R v Canfield*, 2017 ABQB 350 (*O'Connor* ruling).
[13] *R v Canfield*, 2020 ABCA 383.

PART III: ARGUMENT

1. When does the search of a digital device at the border require individualized suspicion?

[17] Section 99(1)(a) of the *Customs Act* gives CBSA officers the power to search imported "goods" – including "any document in any form" – without individualized suspicion.[14] This falls short of the minimum requirements presumed by *Hunter v Southam*: specifically, that an intrusion into someone's reasonable expectation of privacy must be supported by judicial authorization and must be grounded in credibly based probability that the search will reveal evidence of an offence.[15] As this Court has recognized, the border calls for some flexibility.[16] No one suggests that the full *Hunter* requirements apply to every customs search. In the courts below, however, both Alberta Justice and the PPSC have taken an even more extreme position: they argue that an international traveller does not have any reasonable expectation of privacy with respect to digital devices at the border. If Alberta and Canada are correct, then law enforcement have licence to search every traveller's devices at will, in whatever manner they please, without any constitutional limits.

[18] The Alberta Court of Appeal disagreed. It concluded that travellers do have a reasonable expectation of privacy over digital devices, and it held that s. 99(1)(a) of the *Customs Act* violates s. 8 of the *Charter* when used to search those devices. Naturally, the applicants do not dispute the Court's declaration that the search power was unconstitutional – and so far, neither respondent has advised whether they plan to challenge that finding in this Court. If the respondents disagree with the Court of Appeal's conclusion, the applicants concede this point raises a question worthy of this Court's consideration. But even if the respondents now agree that these searches violate s. 8 of the *Charter*, more guidance would be useful. In border cases, courts hear a common refrain from the Crown: the border is different, and travellers have a greatly reduced expectation of privacy at the border. This is undeniably true – to a point. But as in so many areas of the law, the proliferation of digital devices forces us to take a step back and reconsider the rationale for traditional rules.

---

[14] Section 99.3(1) also authorizes suspicionless, "non-intrusive" searches of certain goods within customs-controlled areas, but not searches of digital devices: see *Customs Controlled Areas Regulation*, s. 6. The Crown did not rely on this provision to justify the searches in this case.

[15] *Hunter v Southam Inc*, [1984] 2 SCR 145 at 159-168.

[16] *R v Jacques*, [1996] 3 SCR 312 at paras 18-21; *R v Monney*, [1999] 1 SCR 652 at paras 29-43.

[19] International travellers have a lower expectation of privacy because Canada has a heightened interest in controlling the flow of goods and people into the country. Canadians accept that our luggage may be searched when we re-enter the country – even without individualized suspicion – because of strong state interests in matters such as protecting Canadian agriculture and the environment, enforcing duties and collecting taxes, excluding physical contraband and dangerous goods, and ensuring noncitizens enter Canada only when they are allowed to do so.

[20] But the state interest takes on a different character when a search is conducted only to identify *informational* contraband.[17] No one seriously doubts that nearly all child pornography, pirated intellectual property, hate propaganda, and other "digital contraband" will enter Canada via the internet – that is, by fibre optic cable, not on travellers' laptops and cell phones. If the desire to prevent this unlawful data from entering Canada were enough to justify suspicionless digital searches, then the state interest would also justify installing software to automatically screen every file that flows across the border on the internet. The *means* by which the data is transferred – whether a phone in someone's pocket or an undersea communications cable – seems irrelevant to the state interest. Yet no one would defend such a sweeping digital dragnet at the border.

[21] The state interest in controlling the flow of contraband information, although real, does not justify the same suspicionless search powers that apply to physical contraband. The Court of Appeal tried to work within the existing framework for border searches, but this case presents an opportunity to re-evaluate the present categories. The existing framework, set out in this Court's 1988 decision of *Simmons*, divides border searches into three levels: "routine" frisk searches and baggage searches (no individualized suspicion required), strip searches (reasonable suspicion), and still more invasive searches such as body cavity searches (reasonable and probable grounds).[18]

[22] As Prof. Currie notes, *Simmons*, "a 1988 case, well pre-dates the section 8 methodology that we now use." While the three *Simmons* categories largely focus the effects on travellers' bodily integrity, we now recognize the distinct and significant *informational* interests at play when

---

[17] Penney, "Mere Evidence" at 509-514; Currie, "Electronic Devices at the Border" at 307-312; Diab, "Protecting the Right to Privacy" at 120-124.

[18] *R v Simmons*, [1988] 2 SCR 495 at para 27; see also *R v Hudson* (2005), 77 OR (3d) 561 (CA).

a digital device is searched.[19] And courts have read *Simmons* in different ways, reaching different conclusions about whether there is no reasonable expectation of privacy for *Simmons*' "first level" searches, or whether there is a reasonable expectation of privacy, but that expectation is diminished because of state interests.[20] This case presents an opportunity to refresh the framework in *Simmons*.

[23] This case also provides the Court with a chance to provide more nuanced guidance if Parliament redrafts the *Customs Act*'s search powers. The Court of Appeal hinted that *some* suspicionless electronic searches might be permissible, including searches for "receipts for imported goods and travel-related documents, stored in electronic format" (para 129). But in the applicants' view, this is a difficult standard to apply, and may overshoot the mark: as a practical matter, it is hard for officers to search for receipts and travel documents without also encountering unrelated-but-sensitive correspondence or photos. Still, there may be other ways to constrain the scope of a warrantless search power. For example, rather than limiting a search power based on the category of *document*, a search could be justified by based on the category of *traveller*: a different standard might apply to searches of noncitizens' devices. After all, citizens have the constitutional right to enter Canada, protected by s. 6(1) of the *Charter*; others do not, and they could be asked to give up some privacy rights when they seek permission to enter Canada. Even if the Court of Appeal was essentially correct, there is still important nuance left to be worked out.

[24] The Court of Appeal also took the unusual step of addressing – in some detail – whether the s. 8 breach could be justified under s. 1 of the *Charter*. This Court has been reluctant to turn to s. 1 in search-and-seizure cases,[21] largely because s. 8 of the *Charter* contains its own internal limit of "reasonableness". The respondents' s. 1 arguments were rooted in the Crown's expert evidence about how pedophiles use and distribute child pornography. But the focus on child pornography was a red herring. No one doubts that child pornography is pernicious and that its distribution across international borders is harmful. But s. 99(1)(a) is not narrowly tailored to detect only child pornography. And nearly every intrusion on Canadians' privacy could be defended on the basis it

---

[19] *R v Tessling*, 2004 SCC 67 at paras 20, 23; *R v Spencer*, 2014 SCC 43 at paras 34-44.

[20] Currie, "Electronic Devices at the Border" at 301-303; Penney, "Mere Evidence" at 501.

[21] *Lavallee, Rackel & Heintz v Canada (Attorney General)*, 2002 SCC 61 at para 46; *Canada (Attorney General) v Chambre des notaires du Québec*, 2016 SCC 20 at para 89.

would help detect serious wrongdoers. This Court's commentary about the utility – or the lack thereof – of this kind of expert evidence would be welcome.

[25] Finally, the Court of Appeal relied on the principles in *Bedford* when it concluded that *Simmons* had to be "revisited".[22] The Court of Appeal believed there was binding law that would have settled the s. 8 *Charter* issue. But it declined to apply that law because of the many advances in digital technology since 1988. When a lower court relies on *Bedford*, the case will nearly always raise an issue of national importance worthy of this Court's attention. The rest of the country needs to know whether changing circumstances have indeed undermined this Court's precedent.

2. When is someone "detained" at the border for *Charter* purposes?

[26] The constitutional concept of "detention" is important in border cases. Not only does detention potentially trigger someone's rights under s. 10 of the *Charter* – including the right to counsel – but some courts have also suggested that the protections against self-incrimination under s. 7 of the *Charter* may hinge on whether someone was detained. Unfortunately, the test for when a traveller is detained is less than clear. This subject also deserves the Court's renewed attention.

[27] For the purposes of s. 10(b) of the *Charter*, early decisions of this Court defined "detention" as circumstances involving "compulsory constraint" – either physical restraint, or circumstances where someone reasonably believed they had to acquiesce in the deprivation of their liberty.[23] But while customs screening generally involves some level of compulsory constraint, another early case, *Simmons*, concluded that travellers are *not* detained when they present themselves at the border for preliminary customs screening.[24] Indeed, the Court suggested it would be "absurd" to suggest that the thousands of travellers who are "routinely" questioned or searched are "detained in a constitutional sense" (para 27). The Court concluded there was "little doubt that routine questioning by customs officials at the border or routine luggage searches conducted on a random basis do not constitute detention for the purposes of s. 10" (para 36). Similarly, in *Dehghani*, this

---

[22] *Canfield* (CA) at paras 6-7, 25-38; *Canada (Attorney General) v Bedford*, 2013 SCC 72.

[23] *R v Therens*, [1985] 1 SCR 613 at paras 54-57 (Le Dain J., dissenting, but not on this point); *R v Thomsen*, [1988] 1 SCR 640 at para 12.

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

Court confirmed that the statutory duty to answer an officer's questions does not itself trigger a *Charter* detention.[25]

[28] Still, *Simmons* recognized that a traveller can be detained at the border in at least in some circumstances. When someone is "taken out of the normal course and forced to submit to a strip search," for example, the Court recognized the person is "detained" both within "the meaning given to detention in common parlance" and the *Charter* definition of detention (paras 35-36). As a result, a traveller has the right to speak with a lawyer before being strip-searched. When explaining why those travellers have the right to counsel, the Court noted that a traveller who is about to be strip searched must submit to the search, cannot leave, and cannot offer any resistance. Of course, the same is true of everyone who is subject to less-intrusive searches. The difference is the degree of intrusiveness, not whether the travellers are subject to compulsory constraint.

[29] In *Jacoy*,[26] a companion case to *Simmons*, the Court suggested that less-invasive searches and questioning might also trigger a detention. Mr. Jacoy was ordered into an interview room, where officers interrogated him because of their suspicions about his involvement in the drug trade. Although this Court noted there was "nothing to suggest that this was anything but a routine inspection" (para 6), the Court still concluded that "there is no doubt that the appellant was detained when he was ushered into the interview room" (para 14). The Court emphasized that the officers who had assumed control of Mr. Jacoy's movements had already decided to search him.

[30] In general, however, "courts have been reluctant to find a *Charter* detention"[27]. For example, courts have concluded that some travellers were not detained even if their goods were searched for over half an hour, calling these searches part of the normal screening process.[28]

[31] More recently, in *Grant*,[29] the Court restated the general definition of "detention" for the purposes of ss. 9 and 10. Detention includes both an actual, physical restraint on someone's liberty as well as psychological detentions. Someone is psychologically detained when they have a "legal

---

[25] *Dehghani v Canada (Minister of Employment and Immigration)*, [1993] 1 SCR 1053.
[26] *R v Jacoy*, [1988] 2 SCR 548.
[27] Penney, "Mere Evidence" at 502.
[28] See e.g. *R v Sekhon*, 2009 BCCA 187; *R v Buss*, 2014 BCPC 16.
[29] *R v Grant*, 2009 SCC 32 at paras 24-44.

obligation to comply with [a] restrictive request or demand" or when "a reasonable person would conclude by reason of the state conduct that he or she had no choice but to comply" (para 44). *Grant* never mentioned the border, of course – which was unsurprising, given its facts.

[32] There are two main problems with the earlier border cases defining detention.

[33] First, *Simmons* implies that whether someone has been detained depends on whether the border guards' actions were "routine." But "routine" is not a clear threshold, and it fails to provide meaningful guidance when courts and border guards confront a new technique or situation. Is "routine" a descriptive standard? (That is, *does* the practice happen often?) Surely not, because if it were descriptive, the CBSA could erode travellers' s. 10(b) rights by adopting a new investigative practice as long as they applied that practice to every traveller and made it "routine." Or is it a normative test? (That is, *should* this be allowed to happen often?) If so, the term "routine" can be misleading. It camouflages the deeper policy questions about which kinds of questioning or other investigative techniques should be allowed before someone can speak with a lawyer.

[34] This case demonstrates the challenges of trying to shoehorn the *Charter* question into an ill-fitting analysis of whether something was "routine." The Court of Appeal struggled to determine precisely when Mr. Townsend was detained, suggesting it happened "at some point in [the] interaction" and "may have occurred" at one point, but had "certainly" occurred by another point (para 135). Respectfully, when even the Court of Appeal cannot clearly articulate when the detention began, this is a worrisome signal that the legal test is unclear. The Court of Appeal also concluded that the officer's decision to search Mr. Canfield's phone for evidence of a crime, and the officer's repeated questions about the presence of child pornography, were simply part of the "normal screening process" and a "routine" practice. This conclusion would probably surprise the many thousands of travellers who cross the border every day without being ushered into a special screening area and singled out for questioning about whether they are carrying child pornography. This conclusion also conflicts with the CBSA's own policy, which specifically cautions that these searches are *not* routine. At a minimum, both the CBSA and travellers need clearer guidance.

[35] Second, the Court should recognize that *Simmons* strained the concept of a detention to reach a workable outcome. It is unclear why, as an interpretive matter, the word "detained" in s.

10 of the *Charter* should be given a narrower definition in a particular legal context, such as customs. The applicants suggest that, rather than crafting a border-specific definition, the Court should shift the heavy lifting to the *Oakes* test, where it belongs.

[36] Based on the general definition in *Grant*, it seems clear that anyone who is corralled through an airport's customs screening hall is, in some sense, detained. Travellers have a legal obligation to stay put and answer questions, backed by the threat of arrest and prosecution. As Prof. Penney explains, "in light of both common sense and the Court's own definition of *Charter* 'detention' (which includes any legal compulsion to cooperate with authorities), it makes little sense to say that people facing punishment for failing to cooperate or answer questions [at the border] are not detained."[30] After all, if a returning traveller completely ignored the customs process and tried to walk through the nearest exit, everybody knows what would happen: the CBSA would try to stop them, and if they could not, they would ask the police to arrest the traveller.

[37] Of course, requiring border guards to give a s. 10(b) caution to every returning traveller would be enormously time-consuming and usually quite pointless. But recognizing that travellers are detained in a constitutional sense does not mean everyone will need a *Brydges*-and-*Prosper*-style caution before they grab their luggage off the carousel. Nuanced circumstances call for nuanced rules – and the right to counsel can be limited, within reason. Just as a driver's s. 10(b) rights are suspended while she blows into a roadside screening device,[31] for example, the state could suspend a traveller's s. 10(b) rights during an initial screening conversation at the border.

[38] The question is whether the Court should reach a reasonable result by carving out a bespoke, border-specific definition of "detention," or whether rights should be limited through the normal procedure for limiting constitutional rights: reasonable limits prescribed by law that can be demonstrably justified in a free and democratic society. That is, s. 1 and the *Oakes* test.

[39] Respectfully, *Simmons* made a wrong turn in pursuit of a workable standard. Instead of narrowing the definition of a "detention" to fit the exigencies of border screening, the Court should recognize that re-entering Canada will nearly always involve a detention, however brief. The onus

---

[30] S. Penney, "Standards of Suspicion" (2017), 65 *Crim. L.Q.* 23 at 58.
[31] *R v Orbanski & Elias*, 2005 SCC 37.

should then fall on the state to define and justify a limited suspension of s. 10(b) rights, and the *Customs Act* (or its regulations) can then spell out when someone is permitted to consult with counsel. Section 1 would obviously afford the state some leeway, given the high-volume nature of customs screening and the limited need for most travellers to speak with a lawyer. But it should not fall to the courts to do Parliament's work by anticipating and explaining all the various nuances of investigations at the border. Parliament should make the first move, and the courts should review Parliament's decision to determine whether it passes constitutional muster.

[40] The approach in *Simmons* also provides an example of an important doctrinal concern that arises from some of this Court's criminal procedure decisions. Some s. 10(b) decisions have balanced the accused's right to counsel against broader societal concerns when defining the breadth of the right.[32] As Prof. MacDonnell explains, this is unusual: when a constitutional provision does not contain an "internal" limit, courts typically balance state and individual interests under s. 1 of the *Charter*. This appeal presents an opportunity to clarify whether a broad constitutional concept – in this case, "detention" – should be interpreted narrowly in some contexts to address the state's investigative interests, or whether the balancing should happen under s. 1.

3. How and when is the principle against self-incrimination engaged at the border?

[41] There is a related problem with border jurisprudence this Court should address: how should courts reconcile the *Customs Act*'s broad powers to compel answers from travellers with the principle against self-incrimination enshrined in s. 7 of the *Charter*? In general, the *Customs Act* requires everyone who enters Canada to promptly "present himself or herself to an officer and answer truthfully any questions asked by the officer in the performance of his or her duties under this or any other Act of Parliament".[33] Lying is an indictable offence. So is refusing to answer. Both are punishable by up to five years in jail.[34] And "officers" include not only CBSA employees,

---

[32] V.A. MacDonnell, "*R v Sinclair*: Balancing Individual Rights and Societal Interests Outside of Section 1 of the *Charter*" (2012), 38:1 *Queen's Law J.* 137.

[33] *Customs Act*, s. 11(1). See also s. 11.4(1.1), which applies to people who are within a "customs controlled area" (such as the Edmonton airport), but which does not apply to travellers who have an obligation to report under s. 11. The two provisions are functionally identical.

[34] *Customs Act*, ss. 153, 160(1).

but also RCMP officers. As a result, everyone entering Canada must honestly answer questions posed by such peace officers, even if the answers incriminate them. And because RCMP officers can use the *Customs Act* powers when the officers are enforcing any federal law, compelled answers could touch on matters beyond the *Act* and its regulations. This is not a narrow provision.

[42] Of course, the principle against self-incrimination varies depending on the legal context.[35] But this Court has never specifically addressed how the principle applies at customs.

[43] In some contexts, the principle against self-incrimination allows the state to compel someone to provide incriminating information but prevents that information from being used in later penal proceedings. For example, motorists must provide collision statements when required under provincial traffic law. In *White*, however, this Court explained why these compelled statements are inadmissible in criminal proceedings against the motorist. The law compelling the statement is constitutional. But the statement cannot be used to jail the driver.[36]

[44] In other contexts, the principle against self-incrimination allows courts to use compelled statements in some penal proceedings, but the *Charter* limits *when* investigators can use that statutory power to compel an answer. In *Jarvis*, for example, this Court considered provisions of the *Income Tax Act* that allowed investigators demand information from taxpayers. The Court held that when the "predominant purpose of a question or inquiry is the determination of penal liability," a taxpayer is owed the "full panoply" of *Charter* protections against self-incrimination. Under this approach, once investigators cross the "predominant purpose" boundary, they can no longer rely on their statutory power to compel answers from a taxpayer.[37]

[45] Here, the applicants did not challenge the constitutionality of the *Customs Act* provisions that required them to answer questions. Instead, they echoed the approach in *White*: the *Customs Act* can lawfully require travellers to answer questions, and these answers can be used for non-penal, regulatory purposes, such as seizing contraband goods or deciding whether a traveller is admissible to Canada. But s. 7 of the *Charter* prevents those answers from being used in penal

---

[35] *R v Fitzpatrick*, [1995] 4 SCR 154 at paras 27-28.
[36] *R v White*, [1999] 2 SCR 417.
[37] *R v Jarvis*, 2002 SCC 73.

proceedings against the traveller. The applicants pointed to the factors discussed in *Fitzpatrick* and *White* – the existence of coercion, whether there is an adversarial relationship, the risk of unreliable statements, and the potential for abuse of power – and argued these factors weighed against admitting *Customs Act* statements at a criminal trial.[38]

[46] The choice of approach may affect the remedy in a criminal trial. When *Charter*-compliant legislation compels someone to make a statement, that information is not "obtained in a manner" that violates s. 7 of the *Charter*. And because the evidence is not obtained unconstitutionally, s. 24(2) is not engaged. Instead, the *use* of the information at a criminal trial may violate the *Charter*. As the Court explained in *White*, when the accused "is entitled under s. 7 to use immunity in relation to certain compelled statements in subsequent criminal proceedings" then the "exclusion of the evidence is required" under s. 24(1) of the *Charter*, not 24(2).[39] The accused should also receive derivative use immunity for information flowing from compelled information.[40]

[47] Instead of considering the factors in *White*, the Alberta Court of Appeal followed *Jones*, a 2006 Ontario Court of Appeal decision.[41] *Jones* rejected both the four-factor analysis in *White* and the "penal purpose" approach in *Jarvis*. Instead, *Jones* suggested that self-incrimination rights are not engaged at the border until officers form a "sufficiently strong particularized suspicion" and decide to "go beyond routine questioning of a person and to engage in a more intrusive form of inquiry" (para 42). Rather than considering whether there was a penal purpose for an investigation, *Jones* suggested that, "[i]n a general sense, everyone who is questioned at the border … is the target of an investigation" and reasoned that travellers should therefore expect *fewer* self-incrimination protections (para 40). This turns the usual principles on their head: normally, the presence of an adversarial relationship weighs in favour of granting use immunity, not against. And by linking self-incrimination protections to whether a traveller is detained (para 41), *Jones* raises the same host of definitional problems that apply to the right to counsel.

---

[38] *Fitzpatrick* at paras 33-48; *White* at paras 53-66.

[39] *White* at para 89. See also *R v Powers*, 2006 BCCA 454; *R v Soules*, 2011 ONCA 429; *R v Porter*, 2015 ABCA 279.

[40] *R v S(RJ)*, [1995] 1 SCR 451 at 561-566; *Re Application under s. 83.28 of the Criminal Code*, 2004 SCC 42 at paras 70-71.

[41] *R v Jones* (2006), 81 OR (3d) 481 (CA).

[48] In effect, *Jones* treats the border as *sui generis* for self-incrimination purposes. The state gets its cake and eats it too: customs investigators enjoy the relaxed self-incrimination standards that apply to merely "regulatory" proceedings, but they can also jail a traveller based on compelled answers. Travellers receive neither the use immunity from *White* nor the protections during penal investigations in *Jarvis*. Even if *Jones* is correct, lower courts would benefit from this Court's guidance about how to analyze self-incrimination problems at the border.

[49] Finally, this appeal also raises important questions about how the principle against self-incrimination applies when a border officer or another peace officer orders someone to unlock a digital device, or orders someone to assist the officer with a digital search. The Court of Appeal did not discuss whether a traveller's statutory obligation to answer questions also requires a traveller to unlock or manipulate a device.[42] Yet the Court of Appeal accepted that Mr. Townsend was protected by the principle against self-incrimination after being told to divulge the password, and that Mr. Canfield was protected after being told to pull up an obscene image (paras 151-154). From a self-incrimination perspective, there is no significant difference between answering a customs officer's question by performing an action (e.g. by typing in the password) or by making the equivalent verbal response (e.g. by saying aloud, "my password is 'MensRea123'"). This Court has already suggested that some actions – such as disclosing documents – may engage the principle against self-incrimination when the act itself has a "testimonial" quality.[43] Entering a password or pulling up a specific image will both help establish that someone had control over a digital device and knew what it contained – important facts in many prosecutions. The law surrounding this topic remains unsettled,[44] and this case presents an opportunity to help describe the proper analytical framework for these kinds of hard self-incrimination questions.

---

[42] See Currie, "Electronic Devices at the Border" at 314-317.

[43] *Thomson Newspapers Ltd. v Canada*, [1990] 1 SCR 425 at 609 (Sopinka J., dissenting, but not on this point); *BC Securities Commission v Branch*, [1995] 2 SCR 3 at para 47.

[44] See e.g. *R v Shergill*, 2019 ONCJ 54; S. Penney & D. Gibbs, "Law Enforcement Access to Encrypted Data: Legislative Responses and the *Charter*" (2017), 63:2 *McGill Law J.* 201.

4. How should a court assess investigators' good-faith reliance on the previous state of the law when the accused's *Charter* application has led to a systemic change?

[50] When one of this Court's decisions changes the law of criminal investigative procedure, the Crown has a common fallback argument under s. 24(2) of the *Charter*: investigators could not have anticipated this development in the law, and the police were acting in good faith when they relied on the earlier state of the law. Under the first prong of the *Grant* analysis, the Crown often argues this makes the officers' conduct is less serious, since it is unfair to hold investigators to a *Charter* standard that they could not have anticipated. The debate often focuses on whether the change in the law was reasonably foreseeable. In recent years, this Court has seen disagreements about whether police were operating in a "gray area,"[45] and submissions about whether a police service was negligent for relying on a historic practice.[46]

[51] An officer's good-faith reliance on the law must be balanced against the systemic nature of a *Charter* breach. A systemic violation is usually much more serious than an isolated incident.[47] Section 24(2) is specifically aimed at addressing "systemic concerns," and courts must remember "that for every *Charter* breach that comes before the courts, many others may go unidentified and unredressed because they did not turn up relevant evidence leading to a criminal charge".[48]

[52] The breaches in this case were systemic. While we have no idea how many Canadians were detained without being provided their right to counsel, or how many people had their devices searched under an unconstitutional law. But there are strong hints that the number was substantial. For example, Project Safe Haven screened over sixty travellers – yet found only one person worthy of enforcement activity.[49] As the Court of Appeal recognized, "[i]t is reasonable to conclude that thousands of individuals had their personal electronic devices searched pursuant to s 99(1)(a)".[50]

---

[45] *R v Spencer*, 2014 SCC 43 at para 77; *R v Fearon*, 2014 SCC 77 at paras 89-95.
[46] *R v GTD*, 2017 ABCA 274 at paras 20-22, 80-93, rev'd at *R v GTD*, 2018 SCC 7 at paras 2, 5.
[47] *R v AM*, 2008 SCC 19 at para 97 (per Binnie J.); *R v Harrison*, 2009 SCC 34 at para 25; *R v Paterson*, 2017 SCC 15 at para 44.
[48] *R v Grant*, 2009 SCC 32 at paras 70, 75.
[49] Agreed Statement of Facts at paras 19-20.
[50] *Canfield* (ABCA) at para 104.

[53] Accused persons do not litigate complicated *Charter* issues because they are especially public-minded, or because they believe they have a duty to help improve the law. They litigate because they want a remedy. Yet consider cases like *Cole*, *Vu*, *Spencer*, and *Fearon*. These cases are now major decisions in our criminal procedure canon. These cases redefined Canadians' digital privacy rights. All four accused had their electronic devices searched in contravention of s. 8 of the *Charter* – a significant intrusion on their informational privacy interests. But they all lost on s. 24(2), in no small part because their cases caused changes to the law that investigators could not have anticipated.[51] If Messrs. Cole, Vu, Spencer, and Fearon had realized their cases would end without a s. 24(2) remedy *even if* their important *Charter* arguments won the day, they probably wouldn't have made these arguments in the first place. Without a remedy, there is no reason to invest resources in a complex *Charter* argument or to spend years appealing to this Court.

[54] Section 24(2) requires courts to consider the *long-term* and *prospective* impact on the administration of justice.[52] But the present approach to "good faith" disincentivizes accused persons from making important *Charter* arguments – since they know a court will almost certainly admit the evidence because the investigators relied on the previous state of the law. Keep in mind that, over the 38-year history of the *Charter*, most of this Court's key criminal procedure decisions have stemmed not from plaintiffs who sought damages, nor from public interest litigants who asked for a declaration. Instead, they arose when an accused wanted evidence excluded. In practice, cases like this one are how many *Charter* rights develop. But accused persons will only bring these cases if there is a reasonable prospect of a meaningful remedy.

[55] To date, this Court has not directly addressed how to reconcile investigators' good-faith reliance on the law with the systemic impact of a widespread *Charter* breach. When balancing good faith against systemic breaches, courts are obviously concerned about opening the floodgates. Unless a court's s. 24(2) analysis accounts for an unexpected or significant change in the law, scores of prosecutions could flounder because of a landmark development in *Charter* doctrine. There are circumstances where this might not help the reputation of the administration of justice.

---

[51] *R v Cole*, 2012 SCC 53 at para 86; *R v Vu*, 2013 SCC 60 at paras 69-71; *R v Spencer*, 2014 SCC 43 at para 77; *R v Fearon*, 2014 SCC 77 at paras 91-94.

[52] *Grant* at paras. 67-71.

[56] If granted leave to appeal, the applicants will argue for a middle ground. Courts should consider an additional factor when weighing the three prongs of the *Grant* analysis: judges should recognize that – to borrow the language of economics – there are "positive externalities" when an individual accused stops a widespread *Charter* breach. An officer's reliance on the previous state of the law in *that precedent-setting case* may be outweighed by the value of encouraging accused persons to litigate novel *Charter* arguments that will indirectly benefit all Canadians. Accordingly, when a court asks whether exclusion of evidence would erode confidence in the administration of justice, the loss of crucial evidence in a few test cases might be an acceptable price to pay for protecting the *Charter* rights of millions of Canadians. Of course, this reasoning would not apply to the many other cases where the unconstitutional technique was used; it would only apply to the accused who changed the law. This would limit concerns about opening the floodgates.

[57] This is an issue worthy of the Court's consideration The Court's reasoning on the issue would also provide guidance for situations like those in *Reilly*,[53] where a single accused sought a stay of proceedings under s. 24(1) because of a systemic *Charter* breach. Throwing out every charge involving a few hours of "over-holding" before a bail hearing might be disproportionate and impractical. But the person who makes a precedent-setting *Charter* argument could be entitled to such a remedy.

PART IV: COSTS

[58] The applicants do not seek costs. They ask that no costs be awarded against them.

PART V: ORDER REQUESTED

[59] The applicants seek permission to appeal to this Court.

ALL OF WHICH IS RESPECTFULLY SUBMITTED. Dated at Edmonton, Alberta this 17th day of November, 2020.

SIGNED BY:

Kent J. Teskey, Q.C.
Counsel for the Applicant, Mr. Canfield

Evan V. McIntyre
Counsel for the Applicant, Mr. Townsend

[53] *R v Reilly*, 2020 SCC 27, rev'ing *R v Reilly*, 2019 ABCA 212.

PART VI: TABLE OF AUTHORITIES

CASES

	Para. #s
British Columbia Securities Commission v Branch, [1995] 2 SCR 3	49
Canada (Attorney General) v Bedford, 2013 SCC 72	3, 25
Canada (Attorney General) v Chambre des notaires du Québec, 2016 SCC 20	24
Dehghani v Canada (Minister of Employment and Immigration), [1993] 1 SCR 1053	27
Hunter v Southam Inc, [1984] 2 SCR 145	17
Lavallee, Rackel & Heintz v Canada (Attorney General), 2002 SCC 61	24
R v AM, 2008 SCC 19	51
R v Buss, 2014 BCPC 16	30
R v Cole, 2012 SCC 53	53
R v Fearon, 2014 SCC 77	50, 53
R v Fitzpatrick, [1995] 4 SCR 154	42, 45
R v Grant, 2009 SCC 32	31, 36, 50, 51, 54
R v GTD, 2017 ABCA 274	50
R v GTD, 2018 SCC 7	50
R v Harrison, 2009 SCC 34	51
R v Hudson (2005), 77 OR (3d) 561 (CA)	21
R v Jacoy, [1988] 2 SCR 548	29
R v Jacques, [1996] 3 SCR 312	17
R v Jarvis, 2002 SCC 73	44, 47, 48
R v Jones (2006), 81 OR (3d) 481 (CA)	47, 48
R v Monney, [1999] 1 SCR 652	17
R v Orbanski & Elias, 2005 SCC 37	37
R v Paterson, 2017 SCC 15	51
R v Porter, 2015 ABCA 279	46
R v Powers, 2006 BCCA 454	46

TEXTS & ARTICLES

	Para. #s
Canadian Bar Association. "Privacy of Canadians at Airports and Borders" (September 2017), online: <https://www.cba.org/CMSPages/GetFile.aspx?guid=04e96564-b5b6-441b-b6de-20b3e0874975>	2
CBC Radio, *Spark.* "Do you have to give up your passwords at the border?" (12 November 2015), online: <https://www.cbc.ca/player/play/2657526104>	2
Currie, Robert J. "Electronic Devices at the Border: The Next Frontier of Canadian Search and Seizure Law?" (2016), 14:2 *Can. J. Law & Tech.* 289	2, 20, 22, 49
Diab, Robert. "Protecting the Right to Privacy in Digital Devices: Reasonable Search on Arrest and at the Border" (2018), 98 *UNB Law J.* 96	2, 20
Federation of Law Societies of Canada. "Crossing the Border with Electronic Devices: What Canadian Legal Professionals Should Know" (14 December 2018), online: <https://flsc.ca/wp-content/uploads/2019/01/Crossing-the-Border-with-Electronic-Devices-What-Canadian-Legal-Profes....pdf>	2
House of Commons, Standing Committee on Access to Information, Privacy, and Ethics. *Protecting Canadians' Privacy at the U.S. Border* (December 2017)	2
MacDonnell, Vanessa A. "*R v Sinclair*: Balancing Individual Rights and Societal Interests Outside of Section 1 of the *Charter*" (2012), 38:1 *Queen's Law J.* 137	40
Penney, Steven & Gibbs, Dylan. "Law Enforcement Access to Encrypted Data: Legislative Responses and the *Charter*" (2017), 63:2 *McGill Law J.* 201	49
Penney, Steven. "'Mere Evidence'?: Why Customs Searches of Digital Devices Violate Section 8 of the *Charter*" (2016), 49:2 *UBC Law Rev.* 485	2, 20, 22, 30
Penney, Steven. "Standards of Suspicion" (2017), 65 *Crim. L.Q.* 23	36
Privacy Commissioner of Canada. "Crossing the line? The CBSA's examination of digital devices at the border" (21 October 2019), online: <https://www.priv.gc.ca/en/opc-actions-and-decisions/investigations/investigations-into-federal-institutions/2018-19/pa_20191021_cbsa/>	2
Soupcoff, Marni. "Get the state out of my smartphone", *National Post* (5 March 2015), online: <https://nationalpost.com/opinion/marni-soupcoff-get-the-state-out-of-my-smartphone>	2

Docket Number: 150156834Q1/
150291227Q1

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF EDMONTON

BETWEEN:

HER MAJESTY THE QUEEN

- and –

DANIEL EMERSON TOWNSEND and SHELDON WELL CANFIELD

Accuseds

AGREED STATEMENT OF FACTS

Pursuant to the provisions of section 655 of the *Criminal Code of Canada*, the following numbered paragraphs contain facts, which are alleged by the Crown and admitted by the Accuseds, **DANIEL EMERSON TOWNSEND and SHELDON WELLS CANFIELD** (DOB: 1987OCT26/1963SEP16). It is agreed that the within facts are admitted for the purpose of dispensing with calling evidence in respect of a *Charter* challenge to certain provisions of the Customs Act in respect of the following charges that **DANIEL EMERSON TOWNSEND and SHELDON WELLS CANFIELD:**

[TOWNSEND];

COUNT 1: ON OR ABOUT THE 22ND DAY OF MARCH A.D. 2014, AT OR NEAR LEDUC IN THE PROVINCE OF ALBERTA, UNLAWFULLY DID HAVE IN HIS POSSESSION CHILD PORNOGRAPHY, CONTRARY TO SECTION 163.1(4) OF THE CRIMINAL CODE.

COUNT 2: ON OR ABOUT THE 22ND DAY OF MARCH A.D. 2014, AT OR NEAR LEDUC IN THE PROVINCE OF ALBERTA, DID IMPORT CHILD PORNOGRAPHY INTO CANADA, CONTRARY TO SECTION 163.1(3) OF THE CRIMINAL CODE.

[CANFIELD]

COUNT 1: ON OR ABOUT DECEMBER 12, 2014, AT OR NEAR LEDUC, ALBERTA, DID HAVE IN HIS POSSESSION CHILD PORNOGRAPHY CONTRARY TO SECTION 163.1(4) OF THE CRIMINAL CODE OF CANADA.

COUNT 2: ON OR ABOUT DECEMBER 12, 2014, AT OR NEAR LEDUC, ALBERTA, DID IMPORT CHILD PORNOGRAPHY CONTRARY TO SECTION 163.1(3) OF THE CRIMINAL CODE OF CANADA.

FACTS:

1. The Canadian Border Services Agency (CBSA) is a federal government agency tasked with administering and enforcing the federal *Customs Act* and the Tariffs therein. Their uniformed Border Services Officers (BSOs) are peace officers with duties and powers as set out in the Customs Act.

2. The "Northern ICE Unit" is the common name given to the Northern Alberta Internet Child Exploitation Unit (NAICE), part of the Alberta Law Enforcement Response Team (ALERT), which is a joint force command made up of Edmonton Police Service (EPS), Camrose Police and Royal Canadian Mounted Police (RCMP) officers. NAICE is responsible for investigating child pornography and child luring occurring within the northern half of the province.

3. The Edmonton International Airport (EIA) is, despite the name, technically located in the municipality of Leduc, Alberta.

TOWNSEND

4. On March 22, 2014, the Accused Townsend was returning to Canada from a roughly five month stay in the United States of America, flying out of Seattle, Washington, on Alaska Airways flight 2584Y, arriving at Edmonton International Airport.

5. Townsend was a Canadian citizen in possession of a valid and current Canadian passport (Passport serial number WL 584525).

6. Townsend was travelling alone, with 3 bags.

7. A seizure of several digital devices occurred and Townsend's digital devices were held in a secure storage area within EIA by CBSA officers. Det. Dave Radmanovich of NAICE took custody of the seized items from the CBSA on March 24th, storing the items securely until a warrant was obtained for their examination.

8. A search warrant was obtained by Det. Radmanovich to search the devices on April 10, 2014, pursuant to which a forensic preview of one of Townsend's laptops (a black Acer laptop S/N NXM31AA00733401D747200 marked Exhibit 1-1) was conducted by George Edwards, a forensic tech with NAICE. Edwards' intent was to determine if a file called "daddy.jpg" was present, as he understood from the CBSA officers' notes of their dealings with Townsend that such a file was seen during their examination.

9. During the brief preview of the 500 GB hard drive within the laptop, Edwards located 3 images which he believed were child pornography, including one named "daddy.jpg".

10. Det. Radmanovich then obtained a second warrant which authorized seizure of data from the seized devices and a forensic analysis of same.

11. A forensic analysis was subsequently undertaken pursuant to that second warrant by Darren Murray of NAICE.

Hildebrand

12. On March 22, 2014, CBSA Investigator Trent Hildebrand was present in the secondary screening area to assist with examinations of digital devices as part of a special project operating at the time.

13. Hildebrand is a digital forensic investigator with the CBSA, whose duties include computer forensic analysis, but who also provides outreach, training and assistance to border services officers at ports of entry on technical matters dealing

with examinations of computers. His role on March 22, 2014 was to assist the border services officers in their normal examinations of electronic devices, and to provide guidance to them.

14. Hildebrand was in plainclothes but wearing a CBSA vest and duty belt. He had a CBSA laptop equipped with forensic software with him.

15. Hildebrand's direct involvement in the screening of Townsend was limited. He briefly examined an iPhone belonging to Townsend, but primarily his role was to provide technical assistance in trying to get one of the laptops in Townsend's luggage to boot up. BSO Atherton and BSO Aboagye were at the time examining other devices of Townsend, but this particular laptop could not be turned on by them and BSO Hildebrand therefore assisted attempted to get it working, unsuccessfully. He had not managed to get it working by the point that BSO Aboagye found an image believed by her to by child pornography and all examinations ceased.

16. Hildebrand maintained continuity of the exhibits after Townsend fainted during the arrest process until BSO Aboagye had returned from hospital. He did not conduct any examination of the devices.

17. Hildebrand was present as part of Project Safe Haven, which was a 2 day special project for CBSA to run March 21-22, 2014, wherein up to 6 personnel were to be tasked with examining laptops for travelers arriving at EIA. Staffing limitations reduced the actual size of the project and only four personnel were assigned, and only to flights arriving in the evening on the two days.

18. Project Safe Haven was specifically intended to detect and prevent the importation of child pornography into Canada. The project involved up to 2 additional booths being staffed in the secondary screening area with trained digital forensic investigators and BSOs who were to assist in questioning and examining goods in the possession of travelers arriving with multiple laptop computers.

19. Over the course of two days, 56 passengers were screened as part of the project on Friday March 21st, and a further 12 on Saturday, March 22nd, including Townsend.

20. Townsend was the only traveler dealt with as part of the project that resulted in a seizure by CBSA officers.

CANFIELD

21. The Accused Canfield was returning to Canada from a one week vacation in Varadero, Cuba on December 12, 2014, aboard Sunwing Airlines flight WG696, arriving at Edmonton International Airport in Leduc, Alberta.

22. The Accused Canfield was travelling alone. Canfield was a Canadian citizen in possession of a valid and current Canadian passport (Passport serial number WH 443008).

23. Superintendent Sheetal Sehgal was on duty at the time of the arrest of Canfield. While the arrest was taking place, the duty officer for CBSA (the "RIO") advised Supt. Sehgal of the CBSA that the "ICE unit" would be contacted.

24. Sgt. Mike Lokken from NAICE called Supt. Sehgal later that evening to advise that they would not be attending that evening but would like copies of all notes for follow up. Accordingly, Canfield was not charged and allowed to enter Canada, albeit with his cell phone and charging cable having been seized by CBSA.

25. On December 31, 2014, a CBSA officer delivered a Samsung cell phone seized from Canfield during the above process to NAICE, where it was secured in an evidence locker while awaiting a warrant for its examination.

26. Cpl. Lara Bristow of NAICE was assigned by Sgt. Lokken to follow up on the Canfield matter. She obtained a s.487 search warrant to seize information and data from within the Samsung cellular phone.

27. The data on the seized phone was extracted using standard forensic tools. An examination of the data extracted from the cell phone was the discovery of 130 images and 17 videos which constituted child pornography within the meaning of section 163.1 of the Criminal Code of Canada.

ALL OF WHICH IS ADMITTED AS FACT.

DATED THIS 7th day of DECEMBER, 2017 at EDMONTON, in the Province of Alberta.

James Rowan
Crown Prosecutor

E V A C
~~Dane Butterwell~~ EVAN MCINTYRE
Counsel for the Accused

DANIEL EMERSON TOWNSEND
Accused

Kent Teskey
Counsel for the Accused

SHELDON WELLS CANFIELD
Accused

Docket No.: 150507325Q1\150291227Q1

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF EDMONTON

BETWEEN:

HER MAJESTY THE QUEEN

-and-

DANIEL EMERSON TOWNSEND

And

SHELDON WELLS CANFIELD

Accused

AGREED STATEMENT OF FACTS

ALBERTA JUSTICE
SPECIALIZED PROSECUTIONS
516 JOHN E. BROWNLEE BUILDING
10365- 97 STREET
EDMONTON, ALBERTA
T5J 3W7
TELEPHONE: (780) 422-0640
FAX: (780) 422-1217

JAMES ROWAN
CROWN PROSECUTOR

Exhibit Tag
Court of Queen's Bench

Case No.	150 291227 Q1 150156 834 Q1
Case Name	R.
VS	CANFIELD / TOWNSEND
Marked Ident.	
Entered Exhibit No.	25

Submitted By
☐ Crown/Plaintiff ☐ Defence/Respondent

DEC 1 17 — Date
NLV — Clerk

CTS1950(2008/04)

TABLE OF CONTENTS

TABLE OF CONTENTS

EXHIBITS

Proceedings taken in the Court of Queen's Bench of Alberta, Law Courts, Edmonton, Alberta

---

November 27, 2017	Morning Session
The Honourable	Court of Queen's Bench
Mr. Justice Belzil	of Alberta
J. Rowan	For the Crown
E. McIntyre	For the Accused Townsend
K. Teskey	For the Accused Canfield
N. Varevac	Court Clerk
K. Wittmeier, CSR(A)	Court Reporter

Discussion

THE COURT: All right. Good morning. Please be seated. Okay. Are we set to proceed?

MR. ROWAN: Waiting on witnesses, Sir. Most of the Crown's witnesses were subpoenaed for 10 o'clock, and so we're not going to need all of them at 9. I let most of them be. Mr. Arul was going to be the first Crown witness, as he is the first to deal with both accused. However, he has not arrived yet. I was expecting him by now, Sir, so --

THE COURT: Okay.

MR. ROWAN: -- I can make some inquiries if he is not here in the next couple minutes. I don't know if there is any other preliminary matters we can speak to. I should -- perhaps we should discuss the issue Mr. Teskey and Mr. McIntyre and I were discussing about not so much order of witnesses, but how exactly we're going to proceed with the questioning of witnesses.

MR. TESKEY: So perhaps I can start by saying this. There are two Indictments here. I have no interest directly with respect to Mr. McIntyre's Indictment nor I, so I take the position that I have no right of questioning to witnesses that are exclusive to the factual matrix of Mr. McIntyre's matter. I think he agrees with respect to mine. So there are one or two common witnesses, but otherwise, I would not seek to question witnesses that don't conform to my part of the factual matrix.

MR. MCINTYRE: I agree with that, and vice versa.

THE COURT: Sure. Sure. All right.

SIVA ARUL, Sworn, Examined by Mr. Rowan

THE COURT: All right. Mr. Arul, please.

Q MR. ROWAN: Mr. Arul, I understand you're employed by the Canadian Border Service Agency?
A Yes, I am.

Q And what is your job title with them presently?
A A targeting officer.

Q Pardon me?
A A targeting officer.

Q Okay. And you're a peace officer?
A Not under -- currently.

Q Not currently. If I can take you back in time -- get my dates exact. If I take you back in time to March 22nd, 2014, were you still with the CBSA on that date?
A Yes, I was.

Q And what was your job title and posting at the time?
A I was border services officer at the Edmonton International Airport.

Q Okay. And were you a peace officer at that time?
A Yes, I was.

Q Okay. I understand your capacity as a border services officer at Edmonton International Airport, you had occasion to deal with Mr. Townsend on that date?
A Yes, I was.

Q How did you first come into contact with Mr. Townsend?
A On that day in question I was assigned to work the primary inspection line.

Q Let me stop you there. We're probably going to hear from a number of border services officers about various interactions. It might be a good time to get an idea of whose who and how this all works. What is the primary inspection line?
A Travellers, when they first arrive into Canada, they come up to a borders officer -- officer at a inspection both. Not inspection booth, but interview booth, kind of, where

you're assigned for an eleven-hour shift in Edmonton, you see personally maybe 100 of travellers a day, 120.

Q So if I could, I want to go back now. We've got some general information about how the system works. Let me ask you about specifically, Mr. Townsend. Do you recall what flight Mr. Townsend was arriving on and where from?

A I don't recall the flight number. Looking on my notes, I would say it was a Seattle to Edmonton flight, but I don't remember the flight.

Q So describe what happened with Mr. Townsend from the moment he -- you first meet him or he first approaches you.

A My recollection is not -- I don't have a full recollection of my encounter with Mr. Townsend on that day. From my notes that I could gather was that when he arrived, I started asking questions about where he travelled, and his answers were about travelling through the United States for five months, I believe. And then it -- his travel patterned seemed odd compared to the other travellers coming off that flight, over my experience. And so I started asking more questions in depth about who he met, what he was doing there. And based on the indicators that I was able to gather, I felt the selective secondary examination was necessary, so I coded in for an exam, and my encounter with him ended after that.

Q Okay. Did you have any dealing --

A My encounter ended after that.

Q Did you have any dealings with Mr. Townsend after you sent him on past primary that day?

A None.

Q Okay. So you didn't have any involvement with anything that happened at secondary or anything of the sort?

A I wasn't anywhere near secondary after.

Q Did you find when -- or did you find out that there was an enforcement action at secondary?

A I would guess sometime later that day, a couple hours later. I don't exactly remember at what time I was told.

Q Okay. Were you asked to document what had happened with Mr. Townsend?

A I was asked to do my notes -- my electronic notes, but that's about it.

Q In terms of a normal interaction with a traveller, do you take any notes as you're

Q What was the -- what did you base the decision on or what were the factors that led to him being sent to secondary?
A Mr. Canfield was travelling alone. He has multiple trips to Cuba, which as we -- as I indicated, has also a high-risk travelling tourism for child sexual exploitation. He was overly friendly, and he was very, like I say, he was very friendly and open about talking going there; innuendos talking about sex, I guess, looking at women on the beach. So it kind of raised my suspicions, and so I referred him for secondary exam.

Q Okay. And after Mr. Canfield was referred for a secondary examination, did you have any further dealings with Mr. Canfield?
A No, I did not.

Q At what point, if at all, did you learn that there had been an enforcement action in respect of Mr. Canfield?
A Same as Mr. Townsend, I don't recall exactly when. I would suspect sometime later that day.

Q With respect to Mr. -- when you referred him for secondary screening, was there anything in particular in terms of the coding that you put on his E311, what did that call for? Did that give any sort of particular heads up to the officer that dealt with him later?
A I'm not 100 percent, but I believe I coded him for child sexual exploitation material.

Q And going back to Mr. Townsend, same question. Now, what was the coding? Do you recall?
A I believe Mr. Townsend was a general selective, just to see something.

Q What is a random referral? Is that a term you are familiar with?
A Yes, I am.

Q In the customs context, what does that mean?
A The computer system, I guess -- I don't know what the parameters are -- choses a subject to be randomly referred to as a selective -- for a secondary examination.

Q Okay. And how does that computer selected or random selected process actually play out in terms of your interactions with a traveller, let's say at primary inspection?
A I conduct my interviews the same way. I -- if I have grounds that are for a secondary examination, I code it for the secondary exam. I think those take precedence. But if I don't have the grounds, then the computer codes it for random, then I code the card for random examination, and the point officer will send them in to secondary.

event, but if I determine with Mr. Rowan that we won't be calling the Canfield witnesses this afternoon, can I excuse my client for the afternoon?

THE COURT: Absolutely.

MR. TESKEY: Thank you very much.

THE COURT: All right. Thank you.

CRAIG ATHERTON, Sworn, Examined by Mr. Rowan

THE COURT: Mr. Rowan, why don't you -- at noon we will break, and then come back probably at 1 o'clock. How is that?

MR. ROWAN: Thank you, Sir.

THE COURT: Okay. Thank you.

Q MR. ROWAN: Mr. Atherton, sir, you're employed by the Canadian Border Services Agency?
A That is correct.

Q What is your current job title?
A Border services officer.

Q Okay. And that's -- you're a peace officer?
A Yes.

Q If I can take you back to March 22nd, 2014. What was your assignment or what was your employment. Were you employed by CBSA at that time?
A Yes, I was, yes.

Q And what was your job title then?
A I was a border services officer.

Q Okay. And where were you stationed at that time?
A I was at Edmonton International Airport.

Q Okay. And with respect to your shift at Edmonton International Airport on that date, March 22nd, what was your actual assigned duty on that date?
A I was assigned to secondary. Secondary is the examinationary (sic) after our primary

inspection.

Q Okay. And I understand, Mr. Atherton, that in your capacity as a border services officer working at secondary, you had occasion to become involved in an investigation or in dealing with a traveller by the name of Daniel Townsend?
A That is correct.

Q How did you first come across Mr. Townsend?
A I was stationed in the secondary area. He was in the lineup, and I pulled him next from the line in the secondary area.

Q Okay. Was anyone working with you at that point in secondary?
A Yes. There was my colleague, Border Services Officer Aboagye, and also an individual, Mr. Hildebrandt from our investigations team.

Q Now, just to be clear, when you say they're working with you, does everyone examine the same traveller or are they running their own areas?
A We were in the same booth together in secondary. And the booth is set up where there is two counters, and then there is two computers there. So we would be -- me and BSO Aboagye would be taking different people usually from the line. Mr. Hildebrandt was there to observe, and he came from investigations because we were currently working on a project.

Q Okay. And that was Project Safe Haven?
A That's correct.

Q Do you recall the nature of the project?
A Yeah. It was looking for indicators of child pornography, bestiality, that kind of thing.

Q Okay. So in respect to Mr. Townsend specifically, can you go through what happened with him when he reaches secondary?
A I was on the right-hand side of the counter. I pulled the individual up for examination, and then I proceeded to make an examination of his -- of his goods. His baggage, et cetera.

Q What time did he first arrive at secondary?
A I don't recall. And if I could look at my notes, I could --

THE COURT: Any objection? Go ahead, officer.

A Yeah. Thank you. That would be 18:34, approximately.

A Sorry, what was that?

Q Did you conduct an examination of Mr. Townsend's luggage and the contents therein?
A Yes, I did, yes.

Q Okay. And at what point does that examination start?
A That's the examination started -- give me one second here -- at approximately 18:35.

Q So what is going on between the 18:27 and 18:35 in terms of interactions with Mr. Townsend?
A That would be probably putting on the luggage, et cetera, on the counter. Establishing if it's his luggage, et cetera, asking the mandatory questions. Yeah, that's pretty much it.

Q What was the -- from looking at the E311, can you tell the reason why Mr. Townsend was referred to secondary or do you recall the reason why Mr. Townsend was referred to secondary?
A Yes. He was sent to secondary as a selective referral. I would know that by the coding on the card.

Q Okay. From the coding on the card, can you tell any particular reason or concern for which he was sent to secondary as a selective referral?
A Yes. That would be for child pornography or bestiality, et cetera.

Q So, as I understand it, then, around 18:35 the luggage is up on the counter. You've had some conversation with Mr. Townsend. What happens from that point on?
A I would start examining the luggage and the contents of the luggage. Ask some questions about his trip or where he been, et cetera.

Q And what -- in terms of going through his luggage, what was the result of going through Mr. Townsend's bags?
A The contents the of luggage, I had no concern in regards to contraband, et cetera, drugs, that kind of thing, but I do recall there was a lot of electronic devices.

Q Okay. And what was the significance of finding electronic devices?
A Just from -- it seems irregular to me to carry a lot of electronic devices on a trip.

Q And what if anything did you do as a result?
A During the questioning, I asked him where he had been, and he seemed kind of a little bit agitated.

THE COURT: Sorry, he seemed agitated?

A Yes.

THE COURT: Thank you.

A Also at some point, I don't remember exactly when, he moved around the front of my counter. And in my experience, like, when you see that kind of thing, and I was told in training that people are trying to hide something when they stand behind a counter. And so there was another indicator that maybe something further in my examination. And also the US is renowned as a source country for child pornography.

Q Okay. Did you conduct an examination of any of the electronic devices that you just mentioned?
A Yes, I did. I recall I started an examination of one of the cellphones.

Q Was the cellphone on or packed? Sorry, was he carrying the cellphone on his person or was it packed?
A I don't recall.

Q Okay. So what happened with the -- you said you started an examination of the cellphone. What happened with that?
A When I started conducting an examination of the cellphone, I came across some pornographic pictures on the cellphone.

Q Okay.
A And at the same time I was doing that, Officer Aboagye, she wasn't dealing with anybody else, and she offered to assist with the computer -- one of the computers to start an exam on that.

Q Let me stick with the cellphone for a second. In terms of cellphone, were you able to actually access the contents of the cellphone?
A Yes, I was.

Q Was there any password on the phone?
A I don't recall.

Q Okay. Did you require any assistance from Mr. Townsend to get into that cellphone?
A I don't recall that.

Q Now, you mentioned pornographic images. Were those a concern to you?

A The nature of them, if in general when you would look at an electronic device, if there is a number of pornographic images on that, then maybe that would lead to something else if there is other electronic devices. So it was a concern, yes.

Q Okay. But at the time that you are looking at these images on the cellphone, were the images that you were seeing tariffed or prohibited or illegal in any fashion?
A No.

Q Okay. Now, you mentioned that often Border Services Officer Aboagye was assisting with a computer.
A That's correct, yeah.

Q Okay. So what was she doing while you were working on the cellphone?
A She began an examination of the computer.

Q Okay. So what happens next at this point?
A I do recall at some point I think when it was Officer Aboagye started to look at the computer, there was a discussion from the individual asking if he needed a lawyer.

Q And who was he asking that of?
A To both of us.

Q Okay. And what was the nature of that conversation?
A Just whether he would need a lawyer for us to open up the computer.

Q Okay. Now, you say to open up the computer. What do you know about the status of that computer that Officer Aboagye was working on?
A I don't recall.

Q Okay. How long did you spend going through this cellphone that you initially start examining?
A I don't recall that.

Q Okay. At -- what is the next event or what is the next thing that happens, then?
A I remember that Officer Aboagye had concerns about images found -- that she found on his computer.

Q And when you say a computer, a laptop computer?
A That is correct.

Q Okay. Did she raise that with you, or how were you aware of her concerns?

A Yeah. She raised it with Mr. Hildebrandt, Officer Hildebrandt.

Q And where was Officer Hildebrandt while all this was going on, then?
A He was directly behind us.

Q Okay. Was he actually dealing with any of these devices?
A I don't recall.

Q Did he deal with the cellphone that you were yourself going through?
A I don't recall that either.

Q Okay. So what was the nature of the concern that was expressed to Mr. Hildebrandt?
A That it was prohibited pictures or child pornography.

Q Okay. And what happened at that point that you observed?
A I didn't actually observe any of the images on the computer, but between -- I heard the discussion between Officer Hildebrandt and Officer Aboagye, and they were both in agreement that they were child pornography or prohibited images and to proceed with the arrest.

Q Okay. And so when was the arrest effected -- sorry. When was an attempt made to arrest the subject?
A I'll just take a look at my notes here. It was approximately 18:52.

Q And what actually happened in terms of arresting Mr. Townsend?
A During the arrest, the first part of the arrest was -- as the first part of the arrest took place, the individual started to go white and look faint, and we asked him if he was okay. And then he fell backwards and collapsed and -- or fainted and banged his head.

Q Okay. And what happened at that point?
A We immediately ran around the counter to check if he was okay. I radioed our superintendent on duty to contact EMS because I remember there was blood on the floor. Officer Hildebrandt, he -- we -- he used the first aid and made sure to keep the head still and not to move and keep it in the same position.

Q So while you were dealing with Mr. Townsend and his medical issue, what was happening with Mr. Townsend's luggage?
A Mr. Townsend's luggage was currently still on the counter. I don't recall who was watching it or -- but we were right there by the counter until we still had control.

A Yes.

Q You're supposed to be doing that?
A Sorry, repeat the question.

Q Have you received training about whether you're supposed to take the notes of your steps taken while you're searching an electronic device?
A No, not -- we haven't received training for that.

Q Okay. So no one has ever told you that you're supposed to be taking notes here?
A Yes, you -- when you have indicators, you would take notes.

Q Okay. I'm not talking --
A At some point.

Q Yes. But I'm talking about while you're doing a search of an electronic device, while you're in there, you open up a computer, say, just for example.
A Yes.

Q And you say, okay, I'm going to look at this file folder that's on the desktop. Do you have any -- do you know if you're supposed to be taking notes to indicate where you found these files, what steps you took while you're in the machine?
A No.

Q So as far as you know, you're not supposed to -- there is no real obligation for you to do that?
A There would be an obligation to do that if you found some images of the pathway of where the image was.

Q Okay.
A Not if you were just completing a cursory exam of the device. So if you did find something, you would make sure you would write the -- where that was found in the pathway.

Q But you didn't do that with respect to the images you found on the phone here, right?
A No.

Q Okay. So I think we've covered this, but I just want to the be clear here. So you have a code that's handed to you on a E311 card, yes?
A Correct.

A As far as I know, no.

Q Yes. So this table that you're at here with Mr. Townsend, a secondary screening table, it's not automatic that you would be on opposite sides of the table? I'm just having trouble envisioning the layout of the booth here.
A No, it wouldn't be automatic because we have a table here, like that with computers, and then we have two counters on either side where the examination will take place of the goods or their luggage. So generally you would ask across the counter questions to the individual.

Q So he -- the individual, whoever you're questioning, is on the other side of this counter?
A That is correct.

Q So what did you mean when you said you moved behind the counter?
A I noticed that during the examination, there was some point, I don't recall exactly when, but he was behind the counter in front of me. Not this counter, but the actual desk with the computers which is higher up. So you would have a desk like this, probably this high maybe with the computers, lower down is the counter.

Q Okay. So he was moving towards the higher part?
A Yes. So if he is standing in front of counter, and from other officer's experiences and my experiences as well, when somebody is more exposed, they're unsure of what to do with their hands or their -- and sometimes they will move behind the counter because they may be hiding something. That is an indicator.

Q Okay. So the cursory search you said you did of Mr. Townsend's phone here, I think you told my friend that in your general practice you would look at things like pictures, downloads, and the internet browsing history. Is that -- is that your general practice?
A General practice, yeah.

Q Okay. Have you received any training about whether you should have the device hooked up to the internet or not when you're conducting these searches?
A Negative.

Q You haven't received training about that?
A That's correct.

Q Okay. So can you recall in this circumstance, was this phone tapping into the internet or was it connected to the internet in any way or do you have any recollection?
A I don't recall.

Q Okay.

MR. MCINTYRE: If I might just have a moment, Sir.

THE COURT: Take your time.

Q MR. MCINTYRE: So continuing on with these searches, you said you look at document downloads as part of a cursory search?
A No.

Q You didn't -- that's not part of the thing you look at?
A Document downloads?

Q Or documents that are on the phone?
A No. I would look at downloaded images or a video. I wouldn't go to look at document downloads.

Q Okay. So this is probably more of appropriate to a laptop than a cellphone, but you look at video and pictures that may have been downloaded?
A Yes.

Q And so what sort of files do you usually look at? How do you search through those things?
A I would look at photos or a video. I mean, if there is videos there that have been maybe downloaded.

Q And you agree that when you go through a lot of these things, there is a lot of personal things on people's laptops, yes?
A That is correct.

Q So when you're conducting these searches as part of your secondary screening, here, you've probably seen a lot of very personal images that people keep on their phones and computers, yes?
A That's correct.

Q Lots of pornography, for example?
A Yes.

Q Perhaps personal videos between, you know, couples, those sorts of things?
A Yes.

A Thank you.

(WITNESS STANDS DOWN)

MR. ROWAN: The next witness is Nadine Aboagye.

THE COURT: Okay. Thank you.

MR. ROWAN: I'll go run and get her, Sir.

THE COURT CLERK: Sir, before you believe, I believe you have an exhibit.

THE COURT: Sir, do you have any --

THE COURT CLERK: Do you have any exhibits on you?

A No.

THE COURT CLERK: This is the only one, right?

A Yes.

THE COURT CLERK: Thank you so much.

A Yes.

THE COURT: Thank you, Mr. Atherton.

A Thank you.

NADINE ABOAGYE, Sworn, Examined by Mr. Rowan

Q MR. ROWAN: Ms. Aboagye, I understand you're employed by the Canadian Border Services Agency?

A That's correct.

Q And what is your job title with them?

A Border services officer.

Have you done other roles within the airport travel context?
A Oh, yes. I've done all the roles of a border services officer by that time.

Q Okay. So was there anything in particular going on on that particular date, March 22nd, 2014?
A Yes. There was a project going on that day called Project Safe Haven.

Q Okay. And what did Project Safe Haven involve?
A It involved some -- doing a secondary examinations of travellers with certain indications of things that may be on electronic devices. So any travellers coming in from certain countries, including the US, that may have electronic devices and may be employed in the technology field we were going to do some examinations or any, you know, prohibited or illegal images, bestiality, child pornography and such, and examine th e-- their technology for these types of things.

Q I understand that you had occasion to become involved in an inspection of or dealing with an individual by the name of Daniel Townsend.
A That is correct.

Q Can you tell us how you first came to be involved with Mr. Townsend?
A Yes. Again, I was in the secondary area, along with a colleague of mine as well, Officer Atherton, and he was the primary BSO that began the examination of Mr. Townsend. Mr. Townsend had a substantial amount of electronics, and so I asked my colleague if he would like my assistance just to help go through the exam because of what is -- again, it was quite substantial, the amount of electronics he had, and so I just thought it would help him if he had somebody to help him go through it, so that is when I came in to help out with that exam.

Q Okay. Now, at the time that you offer assistance in terms of dealing with numerous devices, how far in the examination had things gotten before you made that offer?
A I can't say exactly how far. I mean, it was relatively at the beginning because he had -- like I said, he a lot of items and he really had just begun the exam. I'm not sure how many minutes it would have been into the exam, but it would be what I would consider at the beginning of the exam.

Q Okay. So you offer to assist. What actually happened from that point forward?
A So from that point forward, I came over. There were a number of laptops on the examining table. My colleague was looking at one, and so I went to look at --

Q Sorry, your colleague, who is that?
A Sorry, Officer Atherton. And so I -- I believe there were three laptops. He was

looking at one, and so I began to look at a -- at a second. And at that time there was -- it was a password locked, and so I asked Mr. Townsend for the password. He was -- he seemed a bit nervous, and he said that -- he asked me something to the effect of, did he need a lawyer, and I said to him, Well, why do you think that you need one? And he said something about his employer, that being his employer's laptop. And then my colleague Mr. Atherton said something to the effect of, Well, you said that you were self-employed, so I don't understand how this is your employer's laptop. And at that point, he made some comment to the effect of, well, he wasn't actually working for them, but he still had some kind of legal contract with them. So I said, well, if you're concerned about giving me the password, you don't need to give it to me, you can just unlock it. And so he seemed satisfied with that and so he did unlock the laptop for me to do my exam.

Q Okay. Let me -- and let me stop you right there because you mentioned there are quite a few digital devices.
A Yes.

Q Which one in particular did Mr. Townsend unlock for you to conduct your examination on?
A I believe it was an Acer, but I can refer to my notes just to be sure of --

Q If you could --
A -- the -- of the model.

Q -- please.
A Okay. So I'm going to refer to the actual report. So not my notes but the actual *Criminal Code* Incident Report. And so that was -- yes. It was an Acer laptop, model VA70.

THE COURT: That is V as in -- V as in victor?

A V as in victor, yes. Sorry.

THE COURT: Okay.

A V as in victor, A as in alpha, 70.

Q MR. ROWAN: So I understand Mr. Townsend does something or other to the computer and it's unlocked?
A Right.

Q And just in terms of timing, and I don't know if you may need to refer to your notes, do you recall when you discovered this -- the image that sort of brings things to a halt?
A It was approximately ten minutes in, but if I could refer to my notes just to see.

Q Please.
A Yes. So it was -- according to my notes, so it was approximately 18:49. So I think I'll have to go back when I -- for the exhibit control. 18:49, that is the time that the item was actually found, not the time that the exam commenced.

Q Okay. And you mentioned -- that it had taken approximately ten minutes?
A I would say. My best guess is approximately -- because it wasn't very long, right? It was about ten minutes, yeah.

Q How often as a BSO at least sometimes stationed in secondary would you being doing an examination on a laptop or another digital device?
A It's quite common. I mean, that's part of the travellers' goods. So if they're coming to secondary for an exam, it's standard procedure. It happens all the time.

Q Okay. And you said that it take -- as best as you can determine, it seems like it took about ten minutes before you found this image. How does that sort of time compared between normal examination of a device?
A I would say that's very standard.

Q Did the fact that there was a special project on the go that weekend, how did that affect any of your actions during this -- during your dealings with Mr. Townsend and his goods?
A Well, because there was that special project, and he was referred back specifically for that project, I think we were probably a little bit more, you know, just aware and diligent, specially because of the massive amounts of items that he had. It's a bit unusual. I mean, most people might travel with one laptop, but to have three and all these other devices, it just seemed like we needed to pay a little bit more attention to what he may have there.

Q Okay. In terms of the referral to secondary, my understanding is that that's usually done by coding on an E311 form?
A That's correct.

Q Okay. Did you actually see the E311 form or the coding that had him sent to secondary?
A I did.

Q -- the subject to be arrested. Do you have to write down what steps you were taking while you are in the computer? What files you're looking at, what search functions you're doing, anything like that.
A Well, any detail is obviously the more detailed, the better. So if you're able to recall the steps that you took, certainly you should write it in your notebook.

Q Okay. So -- but you agree there is nothing in any of your reports or notes here about what steps you took while searching the computer, right?
A That is correct.

Q Okay. In fact, the first entry of your notebook is the 18:49, which I assume -- it says the "daddy.jpeg" image. That's when you found it, right?
A Correct.

Q That's the timing?
A That is correct.

Q But we're not really sure what time you started the search?
A No, and I've said that. I've given an approximation.

Q The approximation was about ten minutes?
A Correct.

Q Right. But it could be longer, right?
A I think if anything, it would probably be less.

Q Okay. But it could be longer because you're testifying three and a half years later, you can't remember how much time you spent on the computer. Is that correct?
A I'm sorry, I can't remember how much time I spent on the computer?

Q In Mr. Townsend's computer, you said your approximation was ten minutes. Could be more, could be less, but you don't have any specific memory of how long it was, right?
A Well, it's approximately ten minutes. It could be more or less, but not certainly a significant amount more or less.

Q And the first entry is the image you found, "daddy.jpeg" and it goes from there. You would agree there is no notes of what files you looked at prior to finding that, right?
A The first entry of what? I'm sorry.

Q In your notebook, you took no notes of any things that -- any steps you took prior to

Q Okay. Yes?
A Yes, sorry.

Q And do you ever look through e-mail or any of those sorts of things?
A I have in the past.

Q Okay. And videos, obviously, yes?
A Yes.

Q Photos?
A Yes.

Q Okay. How about internet search history? You ever look through those sorts of things?
A I have.

Q Okay. And so in this case, you said it was about ten minutes, and your protocol is to stop when you find an image, which you did?
A Correct.

Q Okay. But I would suggest to you you stopped because you found that image. You didn't stop because you done searching. Is that a fair way to put it?
A Well, I'm not sure what you're saying. Because as I said, the protocol is if you find something, at least for us at our port, you stop your search.

Q Sure.
A So, yes, I was done searching. I'm -- he is now going to be put under arrest, and my exam of those goods -- my exam of those goods stops.

Q Okay. But if you hadn't found it, you would have continued looking for other things at that point. Is that fair to say?
A Not necessarily. I mean, I will wait -- I will examine until a point until I'm satisfied that there no concern, you know. Every exam is dependant on the situation. So some exams last 15 minutes, other exams last 30 minutes, some exams last, you know, 45 minutes. It just depends on the circumstance, the person, and the amount of goods that they have.

Q Right. So it is very -- it's fluid in terms of how long these searches -- they can go up to 45 minutes, though, is what you're saying in some circumstances, yes?
A Certainly.

Q Sorry. We are trying to take -- be -- the Justice is trying to take notes as I expect my friends. Can you slow down just a little bit, please.
A Sure. Yes. Sorry, sir. Yes. Where did you want me to start off --

Q Okay.
A -- or continue on from?

Q Well, let me back up a bit. You said you found some indicators as you were going through his luggage in regards to sex tourism?
A Yes, sir. In terms of my experience, what I've seen in the past. The indicators were condoms, a penis ring, lubricants, it -- although it doesn't pinpoint that he was directly there foe that reason in terms of child sex tourism, in my experience, a multiplicity of indicators is usually a good way of going forward and kind of negating or confirming suspicions.

Q Just to be clear, where was Mr. Canfield travelling from?
A He was coming from I believe it was Varadero, Cuba.

Q Okay. Is -- was the fact that he was travelling from Cuba noteworthy or of interest in any way in terms of your customs examination process?
A It would have been, yes. As single male traveller male coming from Cuba in terms of other indicators.

Q What is the significance of Cuba and a single male traveller?
A In terms of our known intelligence and my experience, Cuba is known for child sex tourism and sex tourism. Often males go there to engage in sexual activity with children and could also happen -- fact -- images of that sexual activity if -- obviously referring to child pornography.

Q So, sorry. I don't mean to interrupt, just want to go back and get a few points of clarification there. But you were going through his bags, you already mentioned that you found certain items.
A Yes, sir.

Q What happens next?
A So I -- in addition to finding these items, another job of mine is to observe physical indicators, behavioral, the way answers are given, the way posture is, hands shaking, trembling, and while the conversation is happening in terms of the bag exam, I'm also looking at the way questions and answers and physical indicators.

Q Okay. If I can just stop you there. I -- not to be difficult, but Madam Court Reporter

and the Justice are going to have very sore hands at the rate you're still talking.

A Oh, sorry. Yes.

THE COURT: Just try to slow it down, okay?

A Yes, Sir, yes. Sorry.

MR. ROWAN: It's going to be a very long day for the court reporter if you keep up that pace.

A Sure.

Q So if you can just go a little more slowly, please.

A Sure. Yes. Mr. Canfield also displayed several physical indicators as well. Referring to breathing heavy, profusely sweating, had cotton dry mouth where -- when he talked, you could hear the chap and the tongue in his mouth. His arms, hands, had -- were shivering and shaking leading to me -- me to believe that some nefarious activity could be happening in addition to the source country and some of the items I found in his luggage. At that point, in my experience, I wanted to conduct a cellphone examination to ensure Mr. Canfield wouldn't be smuggling any prohibited or obscene images in Canada. At that point, I asked Mr. Canfield if he could -- if there was a possibility he had child pornography on his cellphone, and the physical indicators immediately became more apparent. He got agitated and anxious. Mr. Canfield kind of hemmed and hawed and said, "I'm not sure." And that's what I'm referring to, as he hesitated.

Q Let me stop you there. You said he -- you said his words were, "I'm not sure." What was that in response to exactly in terms of what you had said do him?

A That was in response to my question, "Is there any images such as child pornography on your cellphone?" The response itself obviously heightened my suspicion when Mr. Canfield said, "I'm not sure." At that point, as I mentioned, he had -- the indicators were a more apparent. I asked him once again very clearly if he had any images or any videos of child pornography on his cellphone. Mr. Canfield sighed and said, "Yes." I instructed him to pull up the images that he thought would be the most obscene or rather clear-cut image of child pornography. I had him turn around kind of positioned the phone to me so I could see what he is doing or to ensure he is not going to -- excuse me -- delete any images. While he was pulling up through his -- you know, going -- opening his phone gallery, going through the images, I noticed other images that are -- through my view, were obviously children and there was several images of this. Mr. Canfield opened an image, and an image immediately, in my opinion, contained child pornography. I can go through a description if you like, sir.

Q Just very -- without getting in too much detail --

THE COURT: I don't think -- we have some students watching. I do not think we have to get into the details unless counsel think its important.

MR. TESKEY: No, that's fine.

THE COURT: All right. Go ahead, Officer.

MR. ROWAN: I take it's admitted that it is not a close case.

MR. TESKEY: No. So, I mean, we're dealing with a constitutional challenge, but the fact that it was reason to believe that it was is not in dispute.

MR. ROWAN: Okay.

MR. TESKEY: This is not a close case.

MR. ROWAN: Thank you.

Q MR. ROWAN: So you've seen the image. What happens at that point?
A I radio -- or rather call my superintendant, Superintendant Segal (Phonetic) to come in. I wanted to inform him of the situation and the pending arrest. And also that I would need an assisting officer. Superintendant Segal provides me BSO Joshua Holly to assist me, and I -- I immediately put it -- the cellphone in my support side pocket to ensure continuity. And I at this point believed that he had child pornography. I called Mr. Canfield back up to my counter and placed him under arrest. Read him his rights and caution, and he confirmed that he wanted to speak to a lawyer and he understood his arrest and his caution.

Q And what happened at that point?
A At that point, sir, we performed a frisk for officer public safety. The physical was non-resultant. I reread Mr. Canfield arrest, rights, caution verbatim off of my -- out of my officer reference notebook and he again once affirmed he understood his arrest he understood his right to counsel, he wish to be afforded the rights, and he understood the caution.

MR. ROWAN: I don't -- and I don't believe, My Lord, that

the matter of his qualifications. We do intend to have Mr. Vinette qualified as an expert witness. As per my letter to your Lordship of November 1st, my understanding that those qualifications are not in dispute.

THE COURT: Are they admitted?

MR. TESKEY: That is correct. Yes, Sir.

THE COURT: All right. Let's put a clear statement on the record what -- exactly what he is being qualified in.

MR. BERNARD: So Mr. Vinette's area of qualification was provided to my friends pursuant to Section 657.3 of the Criminal Code on March 15th, 2017, and the area of expertise as is follows.

Mr. Vinette will be tendered as an expert in the operations, policies, and procedures relating to the Canada Border Services Agency's administration and enforcement of legislation governing the movement, management, and processing of people and goods crossing the Canadian border. And that's it.

THE COURT: My practice with experts is to request that that be placed into writing, and then marked as an exhibit. So I don't need it today, but perhaps we can just have that typed up. We can simply mark it as an exhibit, so there's no confusion later, as to what he's being qualified in.

MR. BERNARD: Perhaps, if my friends are agreeable, after we've dealt with the other two expert witnesses the Crown intends to call, we can simply just have my letter of 657.3 Notice marked. It contains the qualifications for all the experts we'll be calling.

MR. TESKEY: That's fine.

MR. MCINTYRE: That's fine, Sir.

THE COURT: All right. So let's have the witness sworn, please.

DENIS VINETTE, Affirmed, Examined by Mr. Bernard

Q Thank you. Now, I understand, sir, that you've brought a copy of your curriculum vitae with you; is that correct?

Q Okay. Tab 2, or sorry, point 2 under the authority says: .SB 1 CBSA's current policy is that such examination should not be conducted as a matter of routine.

We agree on that, correct?

A Yes, correct.

Q It should only --

> They may only be conducted if there's a multiplicity of indicators that evidence of contraventions may be found on the digital device or media.

You see that there?

A Yes.

Q Okay. And I take it that something to the effect of "except if there's good reason otherwise" should be added to the policy in effect in terms of how it's practiced.

A It's, it's -- the officer needs to be able to articulate the reasons for any search that they would undertake, especially if it's outside of the provision of the direction provided here.

Q So if we go back to paragraph 110. If the officer was to say, in the words of 110, He was nervous, he was a foreign national, it was suspicious. Various things that are in here. So long as he gave reasons for it, it really is irrelevant what standard he's come to in terms of his belief.

A If the officer still has doubts, in terms of the compliance with the border requirements, then he may still elect to refer the individual for further examination which could entail examination of the goods, as well as electronic media as a good.

Q And if, at secondary screening, the secondary screener had the same doubts, he would be authorized, under your policy, to search anyway?

A Yes.

Q Okay. Even if that comes nowhere close to being a reasonable ground to suspect?

A Correct.

Q Okay. So if that's the case, can we agree that the CBSA policy directing grounds, and reasonable grounds and suspicion are really, at best, a guideline rather than a requirement?

Indictment Nos. 150291227Q1/150156834Q1

IN THE COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL DISTRICT OF EDMONTON

BETWEEN:

HER MAJESTY THE QUEEN

- and -

SHELDON WELLS CANFIELD

Applicant (150291227Q1)

- and –

DANIEL EMERSON TOWNSEND

Applicant (150156834Q1)

AFFIDAVIT OF MR. DENIS R. VINETTE, Director General,

International Region, Operations Branch of the Canada Border Services Agency

I, Denis R. Vinette, of the City of Ottawa, **MAKE OATH AND SAY AS FOLLOWS:**

I. Introduction of affiant

1. I have personal knowledge of the matters to which I depose or have received the information from others, in which case I do verily believe it to be true.

Exhibit E

Canada Border Services Agency | Agence des services frontaliers du Canada

OPERATIONAL BULLETIN: PRG-2015-31

TITLE: Examination of Digital Devices and Media at the Port of Entry – Interim Guidelines

Date of Issue:	Mode(s):	Target Audience:	Area of Interest:
2015-06-30	All	National	Port of Entry

Details:

- The purpose of this operational bulletin is to provide interim guidance on a CBSA officer's authority to examine digital devices or media at ports of entry. Clarification will be provided on when such examinations should and can be performed, and will explain limitations to these authorities.

Authorities:

- Digital devices and media, along with digital documents and software, continue to be classified as 'goods' in the context of the border. A CBSA officer's authority to examine goods is specified under the *Customs Act* and the *Immigration and Refugee Protection Act* (IRPA).
- Paragraph 99(1)(*a*) of the *Customs Act* provides CBSA officers with the legislative authority to examine goods, including digital devices and media, for customs purposes only. 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.
- Subsection 139(1) of the IRPA allows for the search of digital devices and media at the ports of entry where there are reasonable grounds to believe that the person has not revealed their identity or has hidden, on or about their person, documents that are relevant to their admissibility; or has committed, or possesses documents that may be used in the commission of people smuggling, human trafficking, or document fraud. The purpose of this search must be confined to identifying the person, finding documents relevant to admissibility or that may be used in the specified offences, or finding evidence of the specified offences.
- Examination of digital devices and media must **always** be performed with a clear nexus to administering or enforcing CBSA-mandated program legislation

Canada

This is Exhibit E referred to in the affidavit of Denis R. Vinette sworn before me this 1st day of March 2017

Christopher J. Nelligan
A Notary Public in and for the Province of Ontario

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.

Actions required by CBSA officers:

- Where there is a multiplicity of indicators, or further to the discovery of undeclared, prohibited, or falsely reported goods, officers are authorized to conduct progressive examinations of digital devices and media for evidence of contraventions or to support allegations.
- Evidence may include, for example, electronic receipts for goods; information that refers to the acquisition or origin of the goods; or information that may afford evidence of a contravention to CBSA-mandated legislation that governs the admissibility of people and goods, plants and animals into and out of Canada. Such evidence may, for example, uncover the following: a confirmation of identity; receipts and invoices for imported goods; contraband smuggling; or, the importation of obscenity, hate propaganda or child pornography.
- Where the identity or admissibility of a traveller is in question, officers are justified in performing examinations of digital devices and media to discover the traveller's true identity, evidence of false identities, or other documentary evidence pertaining to admissibility.
- Where evidence of a criminal offence is discovered during the examination process, officers must be cognisant of where the regulatory examination crosses over to the realm of a criminal investigation. Officers must determine on a case-by-case basis, through consultation with their supervisor, whether or not to continue the regulatory examination and identify any possible impacts on potential criminal investigations.
- Officers must follow the CBSA Enforcement Manual Part 9 instructions on securing evidence and on referrals to Criminal Investigations, as well as following regional requirements for referrals to Inland Enforcement or Intelligence.
- CBSA officers shall conduct examinations of digital devices and media with as much respect for the traveller's privacy as possible, considering that these examinations are usually more personal in nature than baggage examinations.

Examination Progression

- Prior to examination of digital devices and media, and where possible, CBSA officers shall disable wireless and Internet connectivity (i.e. set to airplane mode) to limit the ability of the device to connect to remote hosts or services. This will reduce the possibility of triggering remote wiping software; inadvertently accessing the Internet or other data stored externally; or changing version numbers or dates.
- Initial examinations of digital devices and media should be cursory in nature and increase in intensity based on emerging indicators.
- CBSA officers shall only examine what is stored within the device. Officers are not to read emails on digital devices and media unless the information is already downloaded and has been opened (usually marked as read).
- CBSA officers shall notate in their notebooks the indicators that led to the progressive search of the digital device or media; what areas of the device or media were accessed during the search; and why. This is to protect both the integrity of the information within the digital device and the officer.

Passwords and Enforcement

- With the exception of devices that are biometrically (i.e. fingerprint) protected, CBSA officers shall not allow a traveller to input a password into a digital device or media themselves. This practice reduces the risk of any contents being altered and allows for the continuity of evidence.
- In instances where access to digital devices and media are password protected, officers are to request the password to access the device and record it, as well as any alternate passwords provided, in their officer notebook.
- In cases where the device is biometrically protected, CBSA officers may allow the traveller to input the biometric information while the officer monitors and controls the device (for example, the officer may hold the device while the traveller allows the device to read their fingerprint). Should the CBSA officer find information that provides evidence of a contravention, they should then deactivate the password protection on the device or media.
- Passwords are not to be sought to gain access to any type of account (including any social, professional, corporate, or user accounts), files or information that might potentially be stored remotely or on-line. CBSA officers may only request and make note of passwords required to gain access to information or files if the information or file is known or suspected to exist within the digital device or media being examined.
- Conversely, a traveller may voluntarily provide information and passwords to access external data in certain circumstances in order to show compliance;

CBSA officers should advise travellers that they are not required to access or provide external information, but may voluntarily choose to do so. The login information or password shall not be compelled or recorded in these cases.

- If a traveller refuses to provide a password to allow examination of the digital device, media or the documents contained therein, or if there are technical difficulties that prevent a CBSA officer from examining the digital device or media, the device or media may be detained by the CBSA officer under the authority of Section 101 of the *Customs Act*, on the form K26, *Notice of Detention*, for examination by a CBSA expert trained in digital forensic examinations. For IRPA-related examinations, the device or media may be detained under the authority of subsection 140 (1) of the IRPA on the form IMM5265.
- Until further instructions are issued, CBSA officers shall not arrest a traveller for hindering (Section 153.1 of the *Customs Act*) or for obstruction (paragraph 129(1)(d) of IRPA) solely for refusing to provide a password. Though such actions appear to be legally supported, a restrained approach will be adopted until the matter is settled in ongoing court proceedings.
- At the conclusion of a non-resultant examination, the traveller shall be advised that though their password will be protected in accordance with privacy laws, they may nonetheless change it if they wish to do so.

Contact Information:

Program Compliance and Outreach Division, Traveller Programs Directorate

If you have any further questions, please forward them through the regional Corporate and Program Services Divisions, which (if required) will then send an email to the Port of Entry Operations' generic inbox: CBSA-ASFC_Ops_Travellers-Voyageurs.

Approved by: Barry Kong, Director
Programs Compliance and Outreach Division
Traveller Programs Directorate
Programs Branch

Effective Date: 2015-06-30	**Updated:** N/A

Additional bulletins: http://atlas/ob-dgo/bso-asf/bulletin/index_eng.asp

Exhibit F

Canada Border Services Agency | Agence des services frontaliers du Canada

"Protected B"

Regional Operations Bulletin

Program Services – Pacific Region

BULLETIN #2012-008

TITLE: Examination of Portable Computers and Mobile Communication Devices

Date of Issue:	Mode(s):	Target Audience:	Area of Interest:
October 1, 2012	N/A	Regional	Traveler

*Please note that this is only an interim bulletin to be replaced by a future HQ Operational Bulletin.

Details:

The purpose of this regional bulletin is to provide clarification on the authority of CBSA officers to examine portable computers and mobile communication devices. There has been an influx of complaints from the public about these types of examinations, including how and why they are carried out, and what authority we have to examine electronics.

Guidelines:

There is no CBSA policy or guideline specific to the search of these devices. The following information will assist in the examination of such items, and in addressing clients' questions or concerns regarding the process.

The courts uphold that there is a reduced expectation of privacy when crossing the border, including the examination of digital devices. There is no greater expectation of privacy for the search of a digital device than for that of a pocket, purse, or wallet search. These searches will not be conducted as a matter of routine unless indicators are present that evidence may be found.

Taking the time to explain to the traveller why the device is being examined and what they can expect will reduce the likelihood of a public complaint.

It is expected that officers will put each device through a progressive examination based on indicators, evidence, and reasonable grounds. When criminality is suspected based on evidence, a client is subject to Charter protections no different from normal practice.

Travellers will usually be allowed to view examinations of their digital devices but will be kept at a safe distance to avoid any intentional or incidental interference.

As discussed in Bulletin #2012-001, Examination of Electronic Accounts, officers must ensure the wireless capacity of the device is turned off, preferably by the owner, prior to examining it. Officers may only examine what is stored in the device.

Officers may ask for a password to log in to the device only. Officers cannot ask for passwords and log into a person's personal accounts without the formal legal authority provided by a warrant.

Officers must document details of these examinations in their notebooks and, if required, in ICES, FOSS, or ORS. Officers are encouraged to review the guidelines recently distributed in Regional Bulletin #2012-007, Note Taking.

Officers should be in a position to clearly articulate the reasons for progressing from a cursory exam to a progressive exam, and at what point such indicators became apparent. This will ensure enforcement actions are undertaken within the realm of policy and the Charter.

Reference:

- R. v. Leask, 2008 ONCJ 25 (*www*)
- R. v. Whittaker 2010 NBPC 32 (www)
- Customs Enforcement Manual - Part 4, Chapter 3
- Customs Enforcement Manual - Part 2, Chapter 8
- Customs Enforcement Manual - Part 2, Chapter 14 (PDF, 201KB)
- http://atlas/sor-rso/divisions/caps/rp/sb/2012/2012_02_14_eng.asp
- Regional Operations Bulletin 2012-001, Examination of Electronic Accounts
- Regional Operations Bulletin 2012-007, Note Taking

Contact Information:

Program Services Unit, Corporate and Program Services Division

Any questions regarding this bulletin should be directed to Isabel McCusker, Program Services via email at Isabel.mccusker@cbsa-asfc.gc.ca or phone 604-666-8635.

Effective Date: October 1, 2012	**Updated:**