Brief submitted to the Standing Senate Committee on National Security and Defence regarding its study of Bill S-7, *An Act to amend the Customs Act and the Preclearance Act, 2016*

International Civil Liberties Monitoring Group

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About the ICLMG

The International Civil Liberties Monitoring Group (ICLMG) is a national coalition of Canadian civil society organizations that was established after the adoption of the *Anti-Terrorism Act* of 2001 in order to protect and promote human rights and civil liberties in the context of the so-called "War on Terror." The coalition brings together 45 NGOs, unions, professional associations, faith groups, environmental organizations, human rights and civil liberties advocates, as well as groups representing immigrant and refugee communities in Canada.

Our mandate is to defend the civil liberties and human rights set out in the Canadian Charter of Rights and Freedoms, federal and provincial laws (such as the Canadian Bill of Rights, the *Canadian Human Rights Act*, provincial charters of human rights or privacy legislation), and international human rights instruments (such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment).

Active in the promotion and defense of rights within their own respective sectors of Canadian society, ICLMG members have come together within this coalition to share their concerns about national and international anti-terrorism legislation, and other national security measures, and their impact on civil liberties, human rights, refugee protection, minority groups, political dissent, governance of charities, international cooperation and humanitarian assistance.

Since its inception, ICLMG has served as a round-table for strategic exchange — including international and North/South exchange — among organizations and communities affected by the application, internationally, of new national security ("anti-terrorist") laws.

An important aspect of the role of the ICLMG is the dissemination of information related to human rights in the context of counter-terrorism and the expanding – and largely unaccountable – national security apparatus. This information is distributed to members of the coalition who in turn broadcast it to their own networks.

Finally, further to its mandate, the ICLMG has intervened in individual cases where there have been allegations of serious violation of civil liberties and human rights. The ICLMG has also intervened to contest proposed legislation, regulations and practices that contravene the Canadian Constitution, other Canadian laws and international human rights standards. This includes submitting briefs and appearing before House and Senate committees, including in regards to *The Preclearance Act, 2016*, the *Act to establish the National Security and Intelligence Committee of Parliamentarians*, and the *National Security Act, 2017*.

Introduction

On March 31, 2022, the government representative in the Senate introduced Bill S-7, *An Act to amend the Customs Act and the Preclearance Act, 2016*.[1] This bill has come as a response to the findings in *R. v. Canfield*,[2] which invalidated s. 99(1)(a) of the *Customs Act*, in regards specifically to the search of personal electronic devices (PEDs) – including cell phones, laptops, etc. – of individuals entering Canada via a port of entry.[3]

It is crucial that the rules for searches of individuals and their possessions at Canada's borders are clearly stated, both to protect the rights of travelers as well as to ensure the protection of people in Canada. Unfortunately, the proposed changes in Bill S-7 significantly miss the mark. The proposed threshold of "general reasonable concern" is overly-broad, and is compounded the lack of other safeguards or protections in the law.

We believe that if Bill S-7 is adopted without significant amendments, the rights of Canadians and other travellers will be placed at severe risk. Moreover, through our coalition's work on national security and anti-terrorism, we are acutely aware that such rules do not impact all Canadians or all travelers evenly. Muslims, and people believed to be Muslim, report regular instances of racial profiling, being held for secondary screening, being questioned about their religion and their political beliefs, all without the need for justification.[4] Should this new threshold be adopted, we worry that it would not only fail to address this issue, but exacerbate it by enshrining in law the fact that PEDs deserve a low threshold for searches.

In the following brief we will examine five areas of the bill where we believe improvement must be made, and make relevant recommendations:

1. The proposed threshold of "reasonable general concern" for the searching of PEDs by Canadian border services officers (BSOs), as well as by US preclearance officers (PCOs) operating in Canada
2. Lack of safeguards and accountability in the legislation
3. The amending of rules regarding the hindering of the work of a customs officer, transforming it into a hybrid offence

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[1] Legisinfo, S-7 *An Act to amend the Customs Act and the Preclearance Act, 2016.* Accessed on: 9 June 2022. Online at: https://www.parl.ca/legisinfo/en/bill/44-1/s-7

[2] 2020 ABCA 383 [Canfield].

[3] Government of Canada, "Government of Canada introduces Bill to safeguard traveller privacy and rights in the examination of personal digital devices," canada.ca, 31 March 2022. Online at: https://www.canada.ca/en/border-services-agency/news/2022/03/government-of-canada-introduces-bill-to-safeguard-traveller-privacy-and-rights-in-the-examination-of-personal-digital-devices.html

[4] "Under Suspicion: Research and consultation report on racial profiling in Ontario," Ontario Human Rights Commission, April 2017, p. 58. Online at: https://www3.ohrc.on.ca/sites/default/files/Under%20suspicion_research%20and%20consultation%20report%20on%20racial%20profiling%20in%20Ontario_2017.pdf.

4. The delay in requiring the Minister of Public Safety to publish regulations in regards to preclearance officers' search of PEDs

1. The proposed threshold of "reasonable general concern"

In response to the *Canfield* decision, the government is proposing the creation of a new, untested threshold to allow Canadian BSOs, and US PCOs operating in Canada, to search PEDs carried by travelers. This new threshold would be known as "reasonable general concern," and would be situated somewhere between the current "no-threshold" searches of goods carried by individuals under s. 99 (1)(a) of the *Customs Act*, and the threshold of "reasonable grounds to suspect," also found in other sections of the *Customs Act.*

We find the creation of a new threshold of "reasonable general concern" in order to search personal digital devices at the border deeply worrisome, and we are strongly opposed to its adoption.

Every day, tens of thousands – and in pre-COVID times, hundreds of thousands – of Canadians and foreign travellers enter this country.[5] Most of them will be carrying a cell phone, laptop, tablet, smartwatch or other personal digital device. Many will be carrying multiple devices. All of these devices carry troves of intimate information about the individual person, from health to financial to personal records. They also carry intimate information about the people in our lives – our family, friends, colleagues and more.

If any devices carry a reasonable expectation of privacy, these do. Much more so than a suitcase, wallet, purse or other piece of luggage.

In other contexts, the Supreme Court of Canada has recognized the deep privacy interests at play when it comes to computers and personal electronic devices. For example, in *R. v. Morelli,* the Supreme Court found that "it is difficult to imagine a search more intrusive, extensive, or invasive of one's privacy than the search and seizure of a personal computer."[6] Further, in *R. v. Fearon*, Cromwell J. wrote that: "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 (S.C.C.), 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."[7]

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[5] "International Travellers Entering or Returning to Canada, by Type of Transport," Statistics Canada. Accessed on 9 June 2022. Online at: https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=2410004101&pickMembers%5B0%5D=1.1&cubeTimeFrame.startMonth=01&cubeTimeFrame.startYear=2019&cubeTimeFrame.endMonth=12&cubeTimeFrame.endYear=2021&referencePeriods=20190101%2C20211201.

[6] *R. v. Morelli,* [2010] 1 S.C.R. 253 at para. 2

[7] *R. v. Fearon*, 2014 SCC 77, [2014] 3 S.C.R. 621 (S.C.C.), at para. 51

It is recognized that when the standard-bearing case on searches at the border – *R. v. Simmons* – was heard in 1988, PEDs were not yet common for travelers, and therefore do not appear in the three categories the SCC used to illustrate the different expectations of privacy at play:

- routine questioning and searches of baggage;
- strip or skin searches; and
- body cavity searches.[8]

This underlines the importance of considering where, in this ascending list of searches that invoke expectations of privacy, a search of a PED would fall. Importantly, this list also does not include the search of mail, which the *Customs Act* grants the same level of protection as a strip or skin search (reasonable grounds to suspect).[9]

Increasingly, decisions by Canadian courts have grappled with the question of how to view searches of PEDs at the border. This includes *R. v. Canfield*, but also the recent Ontario Superior Court decision *R. v. Pike*. In it, Harris J. writes:

> **48** In the same manner as with search warrants and search incident to arrest when the subject is a personal digital device, search powers at the border must be re-assessed. As in those contexts, there is fundamental difference between a regular customs search and the search of a personal digital device. The unprecedented repository of privacy in a personal digital device requires expansion of Chief Justice Dickson's three categories of search from *Simmons*.
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> …
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> **52** The information on a personal digital device is all-encompassing. The core biographical information to be gleaned from a personal digital device could be used to construct an extraordinary, intricately detailed profile of the owner of the device. Such a profile would be highly accurate and dauntingly comprehensive--physically and psychologically. If one were to set out to clone an individual, seizing and extracting information from their digital devices would be a good place to start. A personal digital device mirrors who we are. It is the manifestation of both our external and internal life. [10]

Similarly, in the ABCA decision in *R v. Al Askari*, an immigration case, the court found that border officials cannot engage in suspicionless searches of PEDs.[11]

The government's solution is the creation of the novel threshold of "reasonable general concern." This proposed threshold is unacceptable for several reasons.

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[8] *R. v. Simmons,* [1988] 2 S.C.R. 495
[9] *Customs Act*, s. 99(1)(b)
[10] *R. v. Pike,* 2022 ONSC 2297
[11] *R. v. Al Askari,* 2021 ABCA 204

We are expected to believe that a "reasonable general concern" will be based on specific, objective criteria, when the wording of the threshold indicates the exact opposite. A "general concern" is by definition broad, and would not be based on any specific or individualized concern, but rather the feeling that a border agent has based on the circumstances. While government officials have argued that "reasonable" will mean that the border official will need to demonstrate objective criteria, this is not laid out in the law (and will instead be left for regulations). Even if the regulations are sufficiently specific and are appropriately followed, "reasonable" does not improve on the broad and sweeping nature of "general concern." Such a threshold would therefore continue to allow for nearly unfettered access to PEDs of travellers, belying the higher expectation of privacy that such devices deserve.

Why should we be worried? During Senate committee hearings, several Senators raised concerns about racial and religious profiling, including speaking powerfully about their own experience at the border.[12] Our coalition has documented, over the past 20 years, testimonies that reflect the same problems: people from specific countries, religions, ancestries and races face greater profiling at the border.[13] This is especially true for Muslims, and those believed to be Muslim.[14] And we see how these prejudices are justified: Pro-democracy activists from Egypt are declared security risks by Canadian border agents because they are affiliated with a Muslim party.[15] A Ph. D. student is told their secondary screening is because they are from Somalia – a predominantly Muslim country.[16] Reports from Muslim Canadians of back to back "random searches" while seeing fellow white travellers waved through, or of being asked at length about their religious and political views, clearly demonstrate the problem.

A "reasonable general concern" threshold will not ensure that those who already bear the brunt of profiling at the border will have their privacy rights protected in regards to searches of their digital devices. Instead, it will simply make it more acceptable.

During Senate hearings and court cases, the government has attempted to minimize this issue, stating that in 2019, digital devices were searched for less than 0.012% of travellers to Canada. But as Cromwell J also held in *Fearon*: "... we must keep in mind that the real issue is the potentially broad invasion of privacy that may, *but not inevitably will*, result from law enforcement searches of cell phones."

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[12] Standing Senate Committee On National Security And Defence, Meeting Evidence, 30 May 2022. Online at: https://sencanada.ca/en/Content/Sen/Committee/441/SECD/55555-E

[13] See, for example, "Report of the Information Clearinghouse on Border Controls and Infringements to Travellers' Rights," International Civil Liberties Monitoring Group, February 2010. Online at: http://travelwatchlist.ca/updir/travelwatchlist/ICLMG_Watchlists_Report.pdf

[14] Supra note 4

[15] Almihdi, Maan. "Lawyers for Egyptian asylum-seeker facing deportation say oversight of CBSA needed," *The Canadian Press*, 19 May 2021. Online at: https://www.ctvnews.ca/canada/lawyers-for-egyptian-asylum-seeker-facing-deportation-say-oversight-of-cbsa-needed-1.5434076?cache=mservzueifrab

[16] Nasser, Shanifa. "Canadian files complaint after CBSA agent allegedly tells him 'You're Somalian' as reason for questioning," *CBC News*, 15 October 2020. Online at: https://www.cbc.ca/news/canada/toronto/cbsa-racism-complaint-1.5762676

The number of past searches is not the issue, but rather the powers that such searches grant to BSOs and PCOs moving forward.

What is the solution? It is already found in the law. While not perfect, *reasonable suspicion* sets a known standard with known requirements to justify a search.

It is also the threshold for searching mail which crosses the border. For most people, the majority of what was previously sent to them by the post, including across the border, is now stored locally on my phone and laptop. Why should we not use the standard that we already know?

This standard has been supported by the Office of the Privacy Commissioner of Canada in 2019:

"We recommend that the expression 'multiplicity of indicators' in the CBSA's Policy be replaced with 'reasonable grounds to suspect' for digital devices and that the *Customs Act* be amended to reflect this higher threshold."[17]

In 2017, the House of Commons Standing Committee on Access to Information, Privacy and Ethics reached the same conclusion:

> **Recommendation 2:** That the threshold of "multiplicity of indicators" required for the search of electronic devices set out in the operational bulletin of the Canada Border Services Agency entitled Examination of Digital Devices and Media at the Port of Entry – Guidelines be replaced with the threshold defined in law of "reasonable grounds to suspect."[18]

While the government has also argued that "reasonable suspicion" is too high a threshold and would damage national security, the courts have once again disagreed. In *R. v. Pike*, Harris J. rejected the submission that having a reasonable grounds to suspect standard would be too burdensome, noting at paragraph 77:

> Reasonable suspicion has been held to meet constitutional requirements in other contexts and would impose a standard protective of the public interest at the border.[19]

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[17] Crossing the line? The CBSA's examination of digital devices at the border, Office of the Privacy Commissioner of Canada, 21 October 2019. Online at: https://www.priv.gc.ca/en/opc-actions-and-decisions/investigations/investigations-into-federal-institutions/2018-19/pa_20191021_cbsa/

[18] "Protecting Canadians' Privacy At The U.S. Border: Report of the Standing Committee on Access to Information, Privacy and Ethics," Standing Committee on Access to Information, Privacy and Ethics, December 2017. Online at: https://www.ourcommons.ca/Content/Committee/421/ETHI/Reports/RP9264624/ethirp10/ethirp10-e.pdf

[19] Supra note 10 at para. 77

Therefore, we strongly believe that the committee should amend Bill S-7 to include a threshold of "reasonable grounds to suspect" in order to allow for the search of a PED by a BSO or a PCO.

> **ICLMG Recommendation 1:**
> That Bill S-7 be amended to replace "reasonable general concern" with "reasonable grounds to suspect."

2. Lack of safeguards around privacy and accountability

Bill S-7 also lacks any sufficient safeguards to ensure that privacy rights are protected more generally, and that there are clear routes of accountability for those who see their rights violated.

While specific amendments should be further considered, areas that require improvement include the following:

- Specific record-keeping requirements in regards to note taking by BSOs and PCOs,
- Ensuring that technical procedures and requirements are in place to disable network connectivity, in order to limit the scope of the search to only that which is stored on the phone, and
- Rules for password collection and retention limits

Moreover, there must be specific mechanisms for complaint, redress and independent oversight. This is particularly crucial in regards to US PCOs, given that there is a current lack of any form of redress should they violate the rights of travellers.

A word of caution on redress and oversight, though: We have been asked to be reassured that after-the-fact complaints and review (particularly as proposed in the newly introduce Bill C-20, *An Act establishing the Public Complaints and Review Commission and amending certain Acts and statutory instruments*, will help ensure that this new threshold does not run roughshod over our rights. We disagree with this argument. Complaints and review place the burden on those impacted to work to fix the system, after already having to go through a stressful, unacceptable and often demeaning process at the border. Instead, it is important that the law itself meets a standard that will protect the rights of Canadians and other travellers, and that after the fact review is used to ensure it is doing that job.

> **ICLMG Recommendation** 2:
> That Bill S-7 be amended to explicitly include procedural safeguards, as well as access to independent mechanisms for complaint and redress.

3. The amending of rules regarding the hindering of the work of a customs officer, transforming it into a hybrid offence

Bill S. 7 would amend s. 153.1 of the *Customs Act*, which sets out the penalty for hindering an officer. In doing so, it would create a hybrid offence punishable on summary decision, as well as by indictment. Such a reform would have significant consequences in the immigration system. This is because any individual convicted of a summary offence which can also be an indictable offence is thereby deemed inadmissible on the grounds of criminality. [20]

It is unclear why this modification is necessary, having received no explanation by government officials appearing before the Senate, nor has it been explained anywhere else. It is important that any such change be accompanied by reasons and by evidence. This is even more concerning given that racialized people who are profiled at the border face a greater risk of being accused of hindering an officer, placing them also at higher risk of being declared inadmissible for what could be a minor act of hindering an officer – one which poses no threat to the security of Canada or people in Canada.

ICLMG Recommendation 3:
That s. 153.1 of the *Customs Act*, remain a purely summary offence.

4. The delay in requiring the Minister of Public Safety to publish regulations in regards to preclearance officers' search of PEDs.

Finally, Bill S-7 would add a new section to the *Preclearance Act, 2016* that would allow the Minister of Public Safety to "give directions respecting examinations, searches and detentions" to PCOs in regards to their examination and detention of PEDs. However, the minister would only be required to publish those directions in the Gazette within 60 days of issuing them. This would mean that for two months, US PCOs could operate under secret directives from the Minister. We are unclear as to why this secrecy would be necessary, and would instead suggest that the directions must be published 60 days prior to their coming into effect.

ICLMG Recommendation 4:
Amend Bill S-7 such that directions from the Minister of Public Safety granted under the new s. 45.1 are required to be published 60 days before coming into effect.

[20] *Immigration and Refugee Protection Act*, s. 36(2)(a)