Presentation to the Standing Committee on Access to Information, Privacy and Ethics in its study of the **Privacy of Canadians at Airports, Borders and Travelling in the United States**

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Hello, and thank you to the Committee for the invitation to participate in this very important and timely study.

Canadians are increasingly concerned about their privacy in the context of the border and cross-border data flows. Our association assists individuals in understanding their privacy rights and just this morning, in fact, the Canadian Internet Registration Authority announced that they are jointly funding our project with the Canadian Internet Policy and Public Interest Clinic to produce a privacy and security guide for electronic devices at the border.

Canadians need reliable information and practical advice in this realm. They also need appropriate protection in law and policy.

There are a vast number of topics that could be discussed in this context and only a few can be addressed in a given presentation. I will be discussing the US *Privacy Act* and information sharing agreements, and my colleague is going to discuss the appropriate threshold for searches, the new preclearance bill and solicitor-client privilege.

The US *Privacy Act*

We support the recommendation of the Office of the Privacy Commissioner of Canada that Canada ask to be added to the list of designated countries whose citizens are covered by the US *Privacy Act*. As the OPC sets out in its March 8th letter to the Ministers of Justice, Public Safety and Defence, this would increase the level of data protection for Canadians to that granted to individuals from various European countries. We note that the US *Privacy Act* offers only limited privacy protections given an array of exemptions, significantly including exemptions for law enforcement and national security. Nevertheless, Canadians who have come to understand that they are denied even these limited protections in contrast to individuals from other countries are right to call for this to be remedied.

The Need for an Audit of Information Sharing Agreements

The recently released report on Canada's first ever consultation on the National Security Framework clearly provides important context for the Committee in this study. It is evident that Canadians care very deeply about privacy and are adamant that powers of investigation for

law enforcement and national security purposes must be demonstrably necessary, proportionate, and accountable.

A deeply problematic secrecy has created a growing mistrust with respect to cross-border data flows and concern about the genuine harms to Canadians that have resulted. Recall that when a flurry of news stories broke about individuals in Canada denied entry to the US on the basis of mental health information accessed by US border officials, the Ontario Information and Privacy Commissioner had to do an investigation to find out how US border officers were accessing Canadians sensitive personal health information. Her report outlines how this information was being logged in CPIC (the Canadian Police Information Centre) and accessed by the FBI via a Memorandum of Cooperation with the RCMP. That agreement allowed the FBI to decide which other US organizations to give the information to and those entities included the Department of Homeland Security, which includes US border officials.

We should note quickly that even if Canadians do eventually become covered by the US Privacy Act, it will not prevent this type of sensitive personal information disclosures throughout law enforcement and national security agencies.

How much and what kinds of personal information are Canadian agencies providing to US agencies through such information sharing agreements? To our knowledge: no one knows the answer to that question.

We understand that the OPC had some years ago attempted an audit of such agreements and was unable to get the information. The OPC has again requested the cooperation of the government in amassing these information sharing agreements in order to have a comprehensive picture of what these all important information flows actually consist of. We trust that the Committee will appreciate the imperative for an audit of current information sharing agreements and call upon the government to ensure full cooperation with the OPC for this urgently needed work.

Hello, I'll begin by discussing pre-clearance and the thresholds for searches.

Pre-clearance Bill

Currently, electronic devices are considered "goods" in the context of the Canadian border and in preclearance areas in Canadian airports and there are no statutory safeguards to protect them from arbitrary search by border agents.

Preclearance areas are designated zones in airports in which US agents are empowered to process US-bound travelers. *Bill C-23, An Act respecting the preclearance of persons and goods in Canada and the United States* was introduced last June and is intended to repeal and replace the existing Act.

Bill C-23 contemplates that preclearance areas will be expanded beyond airports and could be established at rail, marine and land crossings. It expands the powers that US agents have and, in our view, unjustifiably limits the rights of travelers in the preclearance area. We have expressed our concerns with Bill C-23 in testimony to the Committee on Public Safety and National Security and will make our written submission available to this committee as well.

Under both the existing and the contemplated preclearance law, a traveler cannot be arbitrarily strip searched. An agent must have reasonable grounds to suspect in order to have the legal authority to detain the traveler for a strip search. The OPC has recommended that an identical threshold for the searching of digital devices be written into Bill C-23. In a letter to the Standing Committee on Public Safety and National Security, the OPC asks that "Bill C-23 be amended to place border searches of electronic devices on the same footing as searches of persons and therefore their performance should require reasonable grounds to suspect."

The BCCLA endorses this position as well as the OPC's further recommendation to make a consequential amendment to the *Customs Act* to similarly protect the privacy of Canadians returning home through Canadian borders. We agree with the OPC that "the idea that electronic devices should be considered as mere goods and therefore subject to border searches without legal grounds is clearly outdated and does not reflect the realities of modern technology."

Interestingly, the interim policy documents of the CBSA do appear to acknowledge that it is not appropriate to classify digital devices as "mere goods". A CBSA Operation Bulletin from 2015 does not provide for suspicion-less searches but rather, states that searches may be conducted if there are "a multiplicity of indicators that evidence of contraventions may be found on the digital device."

The BCCLA supports the OPC's call to codify this policy through legislative amendments. The law should require a border agent – whether CBSA or American - to have reasonable grounds to suspect that a contravention of law has occurred before they may lawfully search an electronic device.

Such legislation would provide legal clarity and transparency to Canadians while also giving existing policy the force of law. It would also support the recognition by the Supreme Court of Canada that the search of an electronic device is an extremely privacy intrusive procedure.

And finally, just two short points.

Solicitor-Client Privilege

The first about solicitor-client privilege: this is a matter that the Canadian Bar Association flagged for the Committee on Public Safety and applies to ordinary border crossings as well as pre-clearance areas. Neither we nor the CBA can tell whether Canada has a defined policy about claims of privilege over documents and electronic records on digital devices. As this

privilege is a fundamental aspect of our legal system, we want the government to shape a policy that recognizes solicitor-client privilege and entitles travelers to make a claim of privilege over physical or electronic information at the border.

Secondly, we would also like to draw your attention to our recommendation to curtail the power of US officers to strip search travelers in Canada under Bill C-23. Last month at the Committee on Public Safety we strenuously objected to conferring any power on US preclearance officers to perform strip searches in preclearance areas in Canada. Under current law, a US agent has no legal authority to strip search a traveler. If he or she has reasonable grounds to suspect that a strip search is necessary, a Canadian agent must agree that such grounds exist and only they can perform the search. Only Canadian officers should have to power to perform strip searches in Canada, and only in limited circumstances according to law.

That concluded our prepared remarks. We look forward your questions.