



THE CANADIAN  
BAR ASSOCIATION  

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L'ASSOCIATION DU  
BARREAU CANADIEN

## ***Bill C-23, Preclearance Act, 2016***

**CANADIAN BAR ASSOCIATION  
IMMIGRATION LAW, CRIMINAL JUSTICE AND  
COMMODITY TAX SECTIONS**

**March 2017**

## **PREFACE**

The Canadian Bar Association is a national association representing 36,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the CBA Immigration Law, Criminal Justice and Commodity Tax Sections, with assistance from the Legislation and Law Reform Directorate at the CBA office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the CBA Immigration Law, Criminal Justice and Commodity Tax Sections.

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# Bill C-23, *Preclearance Act*, 2016

## I. INTRODUCTION

The Immigration Law, Criminal Justice and Commodity Tax Sections of the Canadian Bar Association (the CBA Sections) are pleased to comment on implications of Bill C-23 for travellers.<sup>1</sup>

The CBA is a national association of over 36,000 members, including lawyers, notaries, academics and law students, with a mandate to seek improvements in the law and the administration of justice.

The CBA Sections made comprehensive comments on Bill S-22, the initial 1999 *Preclearance Act*. Our March 1999 submission and our May 1999 letter to the Foreign Affairs and International Trade Committee highlighted several concerns.<sup>2</sup>

Bill C-23 would grant significantly enhanced powers to foreign officers operating on Canadian soil, with a consequent diminishment of the rights of Canadians and other travellers on Canadian soil who will be subject to these powers, without adequate safeguards. Yet our comments are necessarily constrained by the limited disclosure of the government's intent or the considerations that led to drafting the bill in its current form.

Bill C-23 implements the *Agreement on Land, Rail, Marine, and Air Transport Preclearance between the Government of Canada and the Government of the United States of America* (the Preclearance Agreement). This agreement was negotiated when both Canada and the US were represented by different leaders and governments, with substantially different approaches and agendas. Those differences warrant a reexamination of the scope and contents of the agreement and this draft legislation that flows from it. Several recent developments give rise to serious concerns about how the significantly expanded powers of U.S. officers operating on

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<sup>1</sup> This submission will not address ancillary issues on the enforcement of agricultural, customs and related cross border legislative provisions.

<sup>2</sup> See Canadian Bar Association, *Letter to Foreign Affairs and International Trade Committee* (12 May 1999), available [online](http://ow.ly/LxjV309KTzQ) (http://ow.ly/LxjV309KTzQ). See also Canadian Bar Association, *Submission on S-22 Preclearance Act*, available [online](http://ow.ly/XXkO309KTCM) (http://ow.ly/XXkO309KTCM).

Canadian soil could be exercised. We therefore urge the government to engage in full consultations, and an extensive review before enacting this legislation that is so highly intrusive on personal liberties and rights.

The Bill refers to regulations, which we understand may already exist in draft. Presenting draft regulations with the Bill would give some insight of how particular powers would be exercised. This is particularly important given that subsection 27(1) states that a traveller bound for the US “*must comply with... (b) any requirement that is prescribed by regulation.*” Even without viewing draft regulations, we have serious concerns about many aspects of the Bill.

## II. POLICY CONSIDERATIONS

Cross-border travellers face many issues in circumstances where governments have both common and competing interests. This context highlights a tug of war between the recognition that open borders promote mutual economic interests, and the need to secure borders from threats. While Canada is committed to promoting the free flow of goods and people across our mutual border, there is increasing pressure by U.S. legislators to safeguard their borders. This has led to a demand for significantly increased powers for preclearance officers, and expanded jurisdiction on Canadian soil.<sup>3</sup>

In our view, the legislation should facilitate cross-border travel and transfer of goods, while ensuring respect for the rights and freedoms of Canadians and other travellers who pass through preclearance areas. The CBA Sections support transparent policies, rules and procedures that promote the free movement of travellers between Canada and the U.S. However, it is essential that we safeguard individual rights by balancing and further defining the extra-jurisdictional powers and authority of both the Canadian and U.S. governments.

Recognizing the legitimate policy objectives for enacting preclearance legislation, the CBA Sections do not support Bill C-23 in its current form for the following reasons:

- there are potential inconsistencies with the *Canadian Charter of Rights and Freedoms*;
- the Bill grants powers of detention, search, seizure, forfeiture and use of force to preclearance officers without ensuring appropriate limitations;

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<sup>3</sup> See The New York Times, *Preclearance at Foreign Airports Seen as a Necessity to Fight Terrorism* (July 25, 2016), available [online](http://ow.ly/XXk0309KTCM) (<http://ow.ly/XXk0309KTCM>).

- the propriety of requiring travellers to submit to the exercise of those powers, and not permitting their voluntary withdrawal from preclearance areas is questionable;
- the scope and procedure for officers to exercise search and detention powers by preclearance is insufficiently defined;
- the standard to be satisfied by preclearance officers in exercising their powers departs from the standard required of Canadian peace officers in enforcing their search and detention powers under criminal and quasi-criminal statutes;
- the Bill lacks safeguards and controls that would afford travellers sufficient protection and permit meaningful access to rights and freedoms in the *Canadian Charter of Rights and Freedoms*;
- denying the right to make a claim to protected person or Convention Refugee status at preclearance areas appears to be in violation of Canada's international obligations; and
- allowing preclearance officers to deny entry to Canada diminishes the rights of permanent residents.

In our view, these inadequacies can be remedied to deliver the desired economic and social benefits without sacrificing essential rights and freedoms or extending criminal liability unreasonably. We recommend significant changes to the underlying policy objectives and the language of the Bill.

### **III. SECTION BY SECTION COMMENTARY**

The CBA Sections endorse section 10 of the Bill, which makes it clear that, while they are authorized to exercise U.S. powers with respect to customs and immigration matters, preclearance officers must follow Canadian law in their powers of questioning, examination, search, seizure, forfeiture, detention and arrest.

#### **A. Applicability of Canadian Law and Protections**

The CBA Sections support the inclusion of section 11 of Bill C-23, which underscores the current state of law in Canada. The challenges with this legislation are twofold:

- achieving the balance of giving sufficient powers to preclearance officers with minimal intrusion and no infringement of the *Canadian Charter of Rights and Freedoms*; and
- defining restrictions on the exercise of the powers of a preclearance officer conferred under section 10 in light of the requirement to comply with Canadian law.

Section 12 of the Bill, on duties, taxes and fees, is unclear about whether a traveller has a right to seek a judicial remedy in Canada or in the U.S. for an administrative monetary penalty (AMP) assessed by the Inspecting Party.

Under the AMP review provision for Canadian customs matters, where penalties have been assessed by Canada Border Services Agency (CBSA) officers, a formal review process gives an opportunity to challenge the appropriateness of the penalty. However, section 40 states that a preclearance officer refusing to conduct preclearance or to admit persons or goods to the U.S. is not subject to judicial review in Canada. Bill C-23 should ensure that travellers through a preclearance area are afforded a similar review process under U.S. law.

### **RECOMMENDATION**

- 1. The CBA Sections recommend that section 12 be amended to require that travellers be entitled to the review processes of administrative monetary penalties or other civil sanctions in accordance with US laws.**

### **B. Traveller's Right and Ability to Withdraw**

Sections 18 and 30 of Bill C-23, on a traveller's obligations and ability to withdraw from preclearance, constitute a substantial change from the 1999 Act, which gives travellers an unqualified right to choose to withdraw from a preclearance area. A decision to withdraw terminates an examination. We believe that a traveller's ability to withdraw from a preclearance area is an essential right that should be subject only to the minimal restriction that there is no allegation of an offence. This approach recognizes that the traveller is on Canadian soil and entitled to minimal restrictions on freedom of movement.

It is recognized that US authorities are entitled to pose reasonable enquiries to travelers seeking entry to the United States, however the intrusiveness of the examination is certainly of concern, particularly when the traveler is compelled to remain in the examination to provide the reasons for wishing to withdraw.

The right to withdraw is meaningless without restrictions on the questions a traveller may be asked, and the length of time the traveller may be subjected to questioning. The proposed wording would allow preclearance officers to engage in fishing expeditions, asking intrusive questions about the person's political or religious views, past behavior and associations – all in the name of questioning them about their reasons for withdrawing.



The vague obligation under subsection 31(3) to avoid unreasonable delay for withdrawal provides insufficient protection. Travellers who believe their questioning is overly intrusive, lengthy or unjustified would have no remedy except to refuse to answer questions or walk away. At that point, they would face arrest and detention for not complying with section 30 (answering truthfully any question asked by a preclearance officer) or section 38 (obstructing or resisting a preclearance officer), including the use of physical force. The traveller might also face U.S. immigration consequences – and a possible charge under this Act – for withdrawing when directed not to do so by the preclearance officer. They would have no recourse under Canadian law, or possibly under U.S. law, to challenge a preclearance officer who exceeds powers granted by Canadian law. Preclearance officers would be virtually unaccountable, as the bill exempts their decisions from judicial review in Canada (s. 40), makes them exempt from civil liability (s. 39), and permits the U.S. to bar their extradition to Canada (s. 42).

Any law conferring discretion to detain without express or implied criteria governing its exercise is an arbitrary law.<sup>4</sup> Hypothetically, an officer could question a traveller indefinitely if the traveller refuses to answer or offers answers unacceptable to the officer. By way of illustration, consider a Canadian citizen of Muslim faith who seeks to travel to the U.S. for a business trip. Due to the recent U.S. policy of “extreme vetting” Muslims, he is subjected to intensive and invasive questioning about his beliefs and associations. Offended by what he perceives to be discrimination on the grounds of religion, he advises that he no longer wants to travel to the U.S. and wishes to withdraw from the preclearance area. Instead of being permitted to withdraw, he is subjected to further intense questioning on the grounds that the officer does not believe he is withdrawing on principled grounds, but rather suspects he may be trying to conceal his associations. What is he to do? If he tries to leave, he will likely be found in violation of section 38 for resisting a preclearance officer. He could try to invoke subsection 31(3), but the officer could easily argue that the preeminent concern for national security demands further questioning.

The manner in which a traveler meets his or her obligation to provide the reasons for withdrawal should be addressed specifically. For example, a traveler withdrawing an application for entry to the United States could satisfy this obligation by providing their reasons for withdrawal in a written statement.

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<sup>4</sup> *Regina v. Hufsky*, [1988] 1 S.C.R. 621 at 633

## RECOMMENDATION

2. **The CBA Sections recommends that the Bill be amended to impose strict limits on questioning a traveller for the purposes of section 30, to ensure *Charter* compliance. This could be achieved by replacing the power to question the traveller on the reasons for withdrawal with a requirement that they provide a brief written explanation of their reasons for withdrawal, which would fully satisfy the obligation.**

### C. Strip Searches

A preclearance officer's authority to conduct a strip search under section 22 is a dramatic departure from the current *Preclearance Act*, which requires that all strip searches in preclearance areas be conducted by Canadian officers. While the Bill seemingly includes this requirement, subsection 22(4) undermines the intent of section 22 by allowing preclearance officers to conduct invasive strip searches where a Canadian border services officer is unavailable, unwilling or does not appear in time. If a Canadian officer applying Canadian standards on Canadian soil concludes that a strip search is not justified, a U.S. officer is legally permitted to ignore that determination and conduct a strip search anyway. It is unacceptable that a strip search by a preclearance officer could be conducted in a preclearance process without the involvement of a Canadian border services officer. A strip search should only occur upon mutual agreement of the U.S. and Canadian officers as to its need, and should also be conducted by or under the direction of the Canadian officer.

Even though Bill C-23 would require preclearance officers to exercise their powers and perform their duties and functions (including executing searches) in accordance with Canadian law, including the *Canadian Charter of Rights and Freedoms*, it is problematic to authorize U.S. officers rather than Canadian officers to perform invasive searches on Canadian soil. U.S. officers are unfamiliar and untrained in Canadian law enforcement methods and Canadian constitutional law, and are poorly positioned to apply Canadian law. They are more likely to inadvertently breach constitutional rights of Canadian citizens, and are virtually unaccountable for violating Canadian law. The CBA Sections recommend maintaining the requirement that only Canadian officers can execute invasive strip searches of the person.

Under section 25, a traveller has the right to be taken before a senior officer before conducting a strip search. It is unclear what role the senior officer plays in this process. Under subsection 25(2), the senior officer "agrees" that the search is "authorized under the applicable

section.” The senior officer is not required or entitled to undertake a substantive review of the merits of the search, including the reasonable grounds on which the decision was made by the preclearance officer or border services officer, and section 25 affords no additional rights to the traveller. The search would constitute detention, and affords the traveller rights under the *Canadian Charter of Rights and Freedoms*. However, legal advice would be difficult to obtain by a traveller in the circumstances.

### **RECOMMENDATIONS**

- 3. The CBA Sections recommend that Bill C-23 be amended to include a requirement that strip searches in preclearance areas be executed only by Canadian officers.**
- 4. The CBA Sections recommend that subsection 22(4) be deleted.**
- 5. The CBA Sections recommend that senior officers be given discretion under section 25 direct that a strip search not be conducted where the senior officer determines that that there are insufficient circumstances to warrant such an invasive act.**

### **D. Solicitor-Client Privilege at the Border**

As far as we have been able to determine, Canada does not have a defined – or readily accessible – policy for searches at the Canadian border that involve information protected by solicitor-client privilege. The U.S. Department of Homeland Security issued policy directives in 2009 detailing what constitutes a lawful search, and the process governing devices that are reviewed and detained at the border.

Section 99 of the *Customs Act* grants CBSA officers broad powers to examine goods imported into Canada, and goods are defined in subsection 2(1) of the Act to include any document in any form. The CBSA does not have a policy addressing claims of solicitor-client privilege over documents and electronic records on computers, smartphones or other Personal Digital Assistants (PDA). This may present a difficulty for people travelling outside of Canada with paper documents or electronic documents on their computers, smartphones and PDAs that are subject to solicitor-client privilege.

The CBA has asked the Minister of Public Safety to strike a working group to define the issues of solicitor-client privilege at the Canada-U.S. border and to establish a government policy on solicitor-client privilege and border searches.

Solicitor-client privilege is a pillar of the Canadian legal system, consistently upheld by the Supreme Court of Canada as paramount in ensuring public confidence in the administration of justice. Solicitor-client privilege is essential to protect against voluntary or compelled disclosure by one's lawyer absent the client's consent or court order.

Bill C-23 elevates the importance of solicitor-client privilege at the border. Canadian lawyers, Canadian citizens and residents must be entitled to claim solicitor-client privilege over electronic and physical documents at the Canada-U.S. border, including in preclearance areas.

#### **RECOMMENDATION**

- 6. The CBA Sections recommend that the Minister of Public Safety establish a working group that includes CBA representatives to develop a fair and balanced policy for searches at the Canadian border and in preclearance areas that preserves solicitor-client privilege over devices and documents. The policy should be applicable for persons entering or leaving Canada who use a preclearance area. The policy should allow claims of solicitor-client privilege, with ultimate recourse to a Canadian court.**

#### **E. Return of Detained Goods**

Subsection 34(4) does not require U.S. Customs and Border Protection (USCBP) to return goods that have been seized and detained from a Canadian person in the preclearance area. Subsection 34(4) reads, "*a preclearance officer may, to the extent and in a manner that is consistent with the laws referred to in subsection (1), return any goods that have been seized or dispose of any goods that they have seized or accepted.*" A formal seizure can take place for a number of reasons, and eventually it can be determined that no contravention occurred. For example, if a truckload of equipment is seized (for reviews of export controls laws), there is no requirement that it be allowed into the U.S. after the all-clear is given.

Further, laptops and PDAs can be seized and reviewed (which is allowable), but then not be returned. The USCBP can destroy seized laptops or PDAs rather than return them. There is no mechanism to request return instead of destruction.

## **RECOMMENDATION**

- 7. The CBA Sections recommend that section 22 of Bill C-23 be amended to state that if goods are seized in a preclearance area and a determination is made that there is no basis for further detention (e.g., no law has been contravened), the goods must be either returned to the owner of the goods or allowed to enter the U.S.**

### **F. NEXUS**

NEXUS is a cooperative program developed by the CBSA and the USCBP to allow expedited processing for low risk, pre-approved individual travellers at the Canada-U.S. border. NEXUS is a regulatory program that is discretionary in nature.

Bill C-23 does not address seizure of NEXUS cards in the preclearance area or cancellation of NEXUS cards. Currently, USCBP seizes NEXUS cards in Canadian preclearance areas, and Canadians have no redress mechanism under U.S. law when a NEXUS card is revoked by USCBP. A letter can be written to the USCBP Ombudsman but Canadians usually receive an email response 8-12 months later denying the appeal without written reasons. No opportunity is given to review the evidence (e.g. the seizing officer's notes) or argue the law.

NEXUS cards are confiscated in preclearance areas on a regular basis and for questionable reasons. Some recent examples in the preclearance area at Toronto Pearson Airport include:

1. A Canadian businessman (over 65 years old) with an excellent reputation who had his NEXUS card confiscated for the stated reason that his wife had a homemade muffin in her purse, and he should have looked in her purse before entering the preclearance area.
2. A family of five (three of whom were infants in strollers) had their NEXUS cards confiscated for the stated reason that their nanny (who did not have a NEXUS card) pushed a stroller with the two infants to the NEXUS booth. She was going to go into the preclearance line after the children had been precleared. The USCBP said it was too late and treated it the same as driving a car to a land border crossing with a non-NEXUS person in the vehicle.
3. A Canadian citizen with a valid U.S. work visa had his NEXUS card confiscated after he proactively applied for a new visa to commence in a few months. He lived and worked in the US and was acting prudently to ensure he always had a valid visa. The USCBP officer denied a new visa, cancelled the old visa, cancelled his NEXUS card and denied him entry into the U.S. There was no issue of illegal activity.

4. Canadian citizens with NEXUS cards have had their NEXUS cards unilaterally revoked by the USCBP since the initial recent US Executive Order on foreign entry.

When a NEXUS card is revoked by the CBSA, travellers are entitled to a more robust appeal procedure to the NEXUS Redress Committee and the Recourse Directorate.

#### **RECOMMENDATION**

8. **The CBA Sections recommend that Bill C-23 be amended to make any decision to confiscate or cancel a NEXUS card in a preclearance area reviewable by the NEXUS Redress Committee and Recourse Directorate. Alternatively, the State parties should be required to adopt an alternate review process with all elements of procedural fairness and due process.**

#### **G. Denying Entry to Permanent Residents**

The *Immigration and Refugee Protection Act* states that a border services officer will allow a permanent resident to enter Canada once the officer is satisfied that the person has that status. This is an unqualified right, and is a fundamental quality of the status of being a permanent resident of Canada. Subsections 47(3) and 48(5) of Bill C-23 would change this, authorizing border services officers operating in preclearance areas in the US to refuse to permit a traveller, including a permanent resident, to proceed to travel to Canada. This is an unacceptable and unnecessary change. While we do not challenge the authority under subsections 48(4) and (5) to permit border services officers in a preclearance area to issue inadmissibility reports to permanent residents, there is no justification for a change to the current law permitting permanent residents to enter Canada.

Similarly, the Bill gives Canadian preclearance officers the power to turn away persons who are seeking to enter Canada to make a claim for refugee protection. Given the purpose of this legislation is to facilitate cross-border movement of people and goods, while enhancing national security, there appears to be no justification for restricting refugee claims, arguably in violation of Canada's obligations under the UN Convention on Refugees.

#### **RECOMMENDATIONS**

9. **The CBA Sections recommend that the Bill be amended to unequivocally permit permanent residents to enter Canada.**

- 10. The CBA Sections recommend that the Bill be amended to permit persons seeking protection or Convention Refugee status to proceed to the port of entry to make a claim.**

#### **IV. CONCLUSION AND SUMMARY OF RECOMMENDATIONS**

While there are legitimate policy objectives for enacting preclearance legislation, the CBA Sections cannot support Bill C-23 in its current form. The CBA Sections urges the government to undertake thorough consultations before enacting this highly intrusive legislation, and makes the following recommendations on the policy objectives and language of the Bill. We trust that our comments will be of assistance, and would be pleased to provide any clarifications requested.

**The CBA Sections recommend that:**

- 1. section 12 be amended to require that travellers be entitled to the review processes of administrative monetary penalties or other civil sanctions in accordance with U.S. laws.**
- 2. the Bill be amended to impose strict limits on questioning a traveller for the purposes of section 30, to ensure Charter compliance. This could be achieved by replacing the power to question the traveller on the reasons for withdrawal with a requirement that they provide a brief written explanation of their reasons for withdrawal, which would fully satisfy the obligation.**
- 3. Bill C-23 be amended to include a requirement that any strip searches in preclearance areas be executed only by Canadian officers.**
- 4. subsection 22(4) be deleted.**
- 5. senior officers be given discretion under section 25 to refuse to conduct a search where the senior officer determines it is unnecessary or would not be appropriate.**
- 6. the Minister of Public Safety establish a Working Group that includes CBA representatives to develop a fair and balanced policy for searches at the Canadian border and in preclearance areas that preserves solicitor-client privilege over devices and documents. The policy should be applicable for persons entering or leaving Canada who use a preclearance area. The policy**

- should allow claims of solicitor-client privilege, with ultimate recourse to a Canadian court.**
- 7. section 22 of Bill C-23 should be amended to state that if goods are seized in a preclearance area and a determination is made that there is no basis for further detention (e.g. no law has been contravened), the goods must be either returned to the owner of the goods or allowed to enter the U.S.**
  - 8. Bill C-23 be amended so that any decision to confiscate or cancel a NEXUS card in a preclearance area is reviewable by the NEXUS Redress Committee and Recourse Directorate. Alternatively, the parties should be required to adopt an alternate review process with all elements of procedural fairness and due process.**
  - 9. the Bill be amended to unequivocally permit permanent residents to enter Canada.**
  - 10. the Bill be amended to permit persons seeking protection or Convention Refugee status to proceed to the port of entry to make a claim.**