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PUBLICATION

Preclearance Bill Raises Concerns over Canadian Sovereignty

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Introduction

On June 17, 2016, Canada's Minister of Public Safety and Emergency Preparedness introduced *Preclearance Act, 2016* [Bill C-23] (the "Preclearance Bill"). It purports to implement 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"), which the United States and Canada signed on March 16, 2015.

The Preclearance Bill grants enhanced powers to United States Customs and Border Protection ("USCBP") Officers working at preclearance facilities in Canada. USCBP officers at the Canada-U.S. land border already possess the broad authority to question, search, detain, and arrest travellers because they carry out their duties while on U.S. soil. However, the situation is different in the case of USCBP officers who are conducting preclearance ("Preclearance Officers") because they carry out their duties while on Canadian soil.

Proponents of the Preclearance Bill claim that it is of significant benefit to Canadians, since it will help facilitate the movement of both travellers and goods into the United States. There is some truth to this, since the Preclearance Bill purports to implement Canada's obligations under the Preclearance Agreement. The Preclearance Agreement itself contemplates the expansion of preclearance to rail, marine, and land travel. It also contemplates the eventual establishment of Canadian preclearance facilities operating on U.S soil.

Despite the potential benefits of the Preclearance Agreement, numerous concerns have been raised regarding the broad powers that will be granted to Preclearance Officers under the Preclearance Bill. Critics of the Preclearance Bill say that it goes too far and that Canada has given up too much of its sovereignty.

A summary of the most significant provisions contained in the Preclearance Bill appears below.

Preclearance Officers Not Peace Officers

Preclearance Officers will not be given the powers of a peace officer. In other words, they will not have the same powers as the Police in Canada.

Preclearance Officers Must Comply with Canadian Law

The Preclearance Bill clarifies that a Preclearance Officer must act in accordance with Canadian law, including the *Charter of Rights and Freedoms*, the Canadian Bill of Rights, and the *Canadian Human Rights Act*. However, no action or civil proceeding may be brought against a Preclearance Officer in respect of anything that is done or omitted in the exercise of their powers or the performance of their duties and functions under the Preclearance Bill.

Such actions or civil proceedings must instead be brought against the United States directly and only if the United States is not immune under the *State Immunity Act*. The *State Immunity Act* provides that, unless it consents, a foreign state is immune from the jurisdiction of any Canadian court except where the proceedings relate to: (a) any death or personal or bodily injury, or (b) any damage to or loss of property that occurs in Canada.

As a result, civil proceedings based on a Preclearance Officer's alleged violation of Canadian law will be severely limited.

Preclearance Officers May Carry Firearms in Canada

At the present time, Preclearance Officers may not carry firearms on Canadian soil. However, the Preclearance Bill contains amendments to the Canadian *Criminal Code*, which will permit Preclearance Officers to possess, transfer, import, and export a firearm, prohibited weapon (which includes a Taser but also an automatic weapon), or restricted weapon (for example, a handgun) for the purposes of their duties or employment.

Although the Preclearance Agreement describes a Preclearance Officer's ability to possess the same firearms and other weapons that CBSA officers are authorized to possess in the same environment, the Preclearance Bill does not specifically limit a Preclearance Officer's authority in this manner. It simply exempts Preclearance Officers from applicable criminal laws relating to firearms and other weapons.

Preclearance Officers Authorized to Use Force

The Preclearance Bill states that a Preclearance Officer is justified in doing what they are required or authorized to do under the Preclearance Bill and in using as much force as is necessary for that purpose, if they act on reasonable grounds. However, Preclearance Officers are not justified in using force that is intended or likely to cause death or grievous bodily harm unless they have reasonable grounds to believe that it is necessary for self-preservation or the preservation (from death of grievous bodily harm) of anyone under their protection.

The United States May Exercise Primary Criminal Jurisdiction for Alleged Crimes Committed by Preclearance Officers

According to the Preclearance Bill, if a Preclearance Officer is charged with a criminal offense, the United States Government may give notice of its intention to exercise primary criminal jurisdiction over the matter, pursuant to the Preclearance Agreement. If this occurs, any Canadian proceeding against the Preclearance Officer will be stayed and alleged victims must rely on the U.S. criminal justice system for relief.

Traveller Obligations to Respond to Questions

According to the Preclearance Bill, unless they withdraw from preclearance, travellers bound for the United States must:

- Answer truthfully any question that is asked by a Preclearance Officer, in accordance with the Preclearance Bill;
- When directed, present any goods in their possession, open or unpack the goods, and unload a conveyance for which they are responsible or open any part of it;
- Comply with any other direction given to the traveller by a Preclearance Officer, police officer, or CBSA officer, in accordance with the Preclearance Bill; and
- Comply with any other requirement that is prescribed by regulation.

The Preclearance Bill gives Preclearance Officers the broad general power to question a traveller bound for the United States; there is no specific requirement that questions asked by the Preclearance Officer be reasonable or even relevant to their admissibility. Therefore, travellers could be asked about their religion or other potentially discriminatory issues. They may also be asked random questions such as whether they have ever smoked marijuana. Under the Preclearance Bill, a traveller bound for the United States would be required to answer these questions truthfully.

The Preclearance Bill also makes it a criminal offense to make false or deceptive statements to a Preclearance Officer. Any person who makes an oral or written statement to a Preclearance Officer, with respect to the preclearance of a person or goods, which the person knows to contain information that is false or deceptive is guilty of a summary conviction offense and is subject to a maximum fine of $5,000.00. In other words, not answering a Preclearance Officer's question truthfully may result in criminal prosecution.

In addition, the Preclearance Bill also gives Preclearance Officers the broad general power to examine, search, and detain goods. USCBP currently takes the position that its officers may demand passwords for a traveller's smartphone or laptop for further examination, since they constitute goods bound for the United States. Although CBSA also takes a similar position in relation to travellers arriving in Canada, the constitutionality of such conduct is still uncertain. Given the uncertainty of the law in this area, it might have been advisable to impose some limits on a traveller's obligation to provide this information to a Preclearance Officer, who is acting on Canadian soil.

Instead, the Preclearance Bill imposes criminal liability on any person who resists or willfully obstructs a Preclearance Officer in the exercise of their powers or the performance of their duties/functions. Therefore, a traveller who refuses to provide a password for his or smartphone or laptop could be found guilty of an indictable offense and could be sentenced to a prison term of up to two years.

At the present time, travellers bound for the United States may withdraw their application for admission and choose to leave the preclearance area. Preclearance Officers generally only have the authority to detain a traveller (for the purposes of turning them over to a police officer) if they suspect that the traveller has committed a Canadian offense (for example, a controlled substance violation).

Therefore, if a traveller bound for the United States is asked an inappropriate question, they may refuse to answer the question and simply withdraw their application for admission. Although the Preclearance Officers will likely refuse to inspect the traveller the next time they seek admission to the United States, they do not currently have the power to detain a traveller or to compel them to answer questions.

The Preclearance Bill still states that every traveller bound for the United States will be able to withdraw from preclearance (unless they are detained in accordance with the Preclearance Bill) and then leave the preclearance area or perimeter. However, it imposes continuing obligations on the traveller to:

- Truthfully answer any question asked by a Preclearance Officer for the purpose of identifying the traveller or of *determining their reason for withdrawing*; and
- Comply with any other direction given by the Preclearance Officer in accordance with the Preclearance Bill.

In other words, travellers who decide to withdraw their application for admission are still required to truthfully answer questions regarding why they are withdrawing their application for admission. Refusing to answer such questions may also result in criminal prosecution since it is an offense to resist or willfully obstruct a Preclearance Officer.

Powers of Preclearance Officers to Search and Detain

Preclearance Officers will have the authority, at least within the preclearance area or perimeter, to conduct a frisk search of a person if they have reasonable grounds to suspect that person of possessing concealed goods or anything that would present a danger to human life or safety. They will also have the authority to detain anything found during the search that would present a danger to human life or safety.

Preclearance Officers will have the authority to detain persons or goods, in a preclearance area or perimeter, if they have reasonable grounds to believe that such persons have committed an offence under an Act of Parliament. However, they are also required to deliver the persons or goods into the custody of a police officers or Canada Border Services Officer (“CBSA”) as soon as it is feasible to do so.

Preclearance Officers will have the authority to detain a traveller, in a preclearance area or perimeter, if they have reasonable grounds to believe that the traveller possesses a significant harm of risk to public health. However, they must deliver the traveller into the custody of a police officer, CBSA officer, or quarantine officer as soon as it is feasible to do so.

One of the most controversial search provisions gives Preclearance Officers the authority to perform strip searches. Preclearance Officers may detain a traveller for a strip search if they have reasonable grounds to believe that the traveller is in possession of concealed goods or anything that would present a danger to human life or safety. They are supposed to immediately request that a CBSA officer perform the strip search. However, Preclearance Officers also have the right to perform the strip search on their own if:

- A CBSA officer declines to perform the strip search;
- CBSA informs them that they are not able to perform the search within a reasonable time; or
- CBSA agrees to conduct the strip search within a specific period but no CBSA officer arrives within that period.

Even if a CBSA officer performs the strip search, a Preclearance Officer (of the same sex) may observe the strip search. If no such Preclearance Officer is available, they may authorize any person of the same sex to observe the strip search.

Preclearance Officers will have the authority to detain a traveller for the purpose of a monitored bowel movement, if they have reasonable grounds to suspect that the traveller is concealing goods inside their body (i.e. controlled substances). However, they must deliver the traveller into the custody of a CBSA officer (who conduct the monitoring) as soon as feasible and explain why the traveller was detained.

Preclearance Officers may request that a traveller undergo an x-ray or body cavity search if they have reasonable grounds to suspect that the traveller is concealing goods inside their body. However, the traveller must consent before this can occur, unless the officer has reasonable grounds to suspect that there is a clear and substantial danger to the traveller's health or safety. In such cases, the Preclearance Officer must deliver the traveller to a police officer or CBSA officer who will transfer the traveller to a medical facility for the search.

Before conducting a frisk search, strip search, or monitored bowel movement, a Preclearance Officer or CBSA officer must also inform the traveller of their right to be taken before a senior officer. If the traveller is brought before a senior officer, the search may proceed only if that officer agrees that the search is authorized under the Preclearance Bill.

Conclusion

Clearly, several provisions contained in the Preclearance Bill should be a cause of significant concern for Canadians. Fortunately, the Preclearance Bill is in its Second Reading in the House of Commons so amendments are still possible. Canadians should communicate their concerns to their Members of Parliament while there is still time to do so.