

Fact-Checking the Canadian Government's Claims Made in Support of the Preclearance Act, 2016

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Introduction

For some time now, [I have warned Canadians](#) about the dangers of Bill C-23, also known as the [Preclearance Act, 2016](#). Many other Canadians have [expressed their concerns](#) to the Canadian Government as well. Even the Privacy Commissioner of Canada [objected to Bill C-23](#) due to the lack of restrictions placed on a United States Customs and Border Protection (“USCBP”) officer’s ability to conduct warrantless searches of a traveler’s electronic device on Canadian soil.

Unfortunately, our voices apparently fell on deaf ears because Bill C-23 received Royal Assent on December 12, 2017. According to the [recent Press Release](#) from Public Safety Canada, once enabling regulations are in place, Canada and the United States will begin the expansion of preclearance operations. In other words, USCBP officers working at preclearance operations in Canada (“Preclearance Officers”) will soon be in a position to exercise greatly expanded powers on Canadian soil.

Bill C-23 will give Preclearance Officers significantly greater powers than they previously possessed under the [Preclearance Act, 1999](#). These expanded powers include the following (among others):

- Unless they choose to withdraw their application for admission, travelers have a positive obligation to truthfully answer any question that is asked by a Preclearance Officer (even those that would be considered inappropriate) [Paragraph 18(2)(a)]. Under the prior [Preclearance Act, 1999](#), a traveler was only required to answer truthfully if he or she voluntarily chose to answer the question.

- Unless they choose to withdraw their application for admission, travelers have a positive obligation to comply with any direction given by a Preclearance Officer, in accordance with Bill C-23 [Paragraph 18(2)(c)]. This could include a direction to provide the traveler's password for their laptop or smartphone. Under the prior [Preclearance Act, 1999](#), travelers did not have such an obligation.
- Failure to answer any question may now result in the traveler being charged with resisting or willfully obstructing a Preclearance Officer, which can be punished by up to two years of imprisonment [Section 38]. Although a similar offense appeared in the [Preclearance Act, 1999](#), it also made clear that the mere refusal to answer a question asked by a preclearance officer was not sufficient, on its own, to support such a charge; this language no longer appears in Bill C-23.
- Travelers who choose to withdraw their application for admission have a continuing obligation to truthfully answer any question asked by a Preclearance Officer, for the purpose of identifying the traveler or *determining their reason for withdrawing* [Subsection 30(a)]. Under the [Preclearance Act, 1999](#), travelers were free to withdraw their application for admission and leave at any time. However, Preclearance Officers may now detain travelers who have withdrawn their application for admission until they provide a satisfactory answer regarding the reason for their withdrawal.
- Preclearance Officers have the authority to conduct strip searches in the following limited circumstances: (a) where the Canada Border Services Agency ("CBSA") declines to perform the strip search; (b) CBSA informs them that they are not able to perform the search within a reasonable time; or (c) CBSA agrees to conduct the strip search within a specific period but no officer arrives within that period [Subsection 22(4)].

Given the controversy surrounding this new legislation, I have decided to fact-check some of the claims made by the Canadian Government in support of Bill C-23.

The Charter of Rights and Freedoms (and Other Canadian Laws) will Protect Canadians **[FALSE]**

As the media [has reported](#), Prime Minister Trudeau personally defended Bill C-23 by claiming that the *Charter of Rights and Freedoms* (the "Charter") would protect Canadians. He stated the following:

When you're doing preclearance in Canada, the Canadian Charter of Rights and Freedoms and Canadian laws are in place, so there is extra protection when Canadians go through American customs in Canada because they are protected by the Charter on Canadian soil.

A similar statement appears [on the website of Ralph Goodale](#), Minister of Public Safety. To support his claim, specific reference is made to Subsection 11(1) of Bill C-23, which states the following:

A preclearance officer must exercise their powers and perform their duties and functions under this Act in accordance with Canadian law, including the *Canadian Charter of Rights and Freedoms*, the *Canadian Bill of Rights* and the *Canadian Human Rights Act*.

Clearly, the language of Subsection 11(1) suggests that Preclearance Officers located in Canada will be required to act in accordance with the Charter. However, it is unlikely that

Charter rights could ever be enforced against USCBP officers or the United States Government.

The language of Subsection 39(2) makes clear that 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 Bill C-23. Subsection 39(1) also makes clear that 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.

Although Canadians would still be able to commence civil proceedings against the United States Government if the conduct of a Preclearance Officer resulted in death, personal/bodily injury, or damage/loss to property, there are many instances where the Charter could be violated and where no recourse would be available. For example, the United States would be protected against a Charter violation involving a warrantless search of a traveler's electronic device or discrimination based on race, religion, country of origin, or sexual orientation.

When the Privacy Commissioner of Canada [testified](#) before the *Senate Standing Committee on National Security and Defence* (the "Senate Committee") on Bill C-23, he said essentially the same thing:

Cabinet members, including the Prime Minister and the Minister of Public Safety, have sought to reassure Canadians by saying Canadian law, including the *Canadian Charter of Rights and Freedoms*, will apply to US officers as they perform their duties and exercise their powers in pre-clearance facilities (section 11 of Bill C-23). However, the principle of state immunity as enacted by the *State Immunity Act, 1985* would appear to make the protections of section 11 of Bill C-23 hollow, as these protections could not be enforced in a court of law, except in circumstances largely irrelevant to the present discussion.

Even criminal conduct by a Preclearance Officer may not be protected by Canadian law. Section 62 amends the Canadian *Criminal Code* so that, if a Preclearance Officer is charged with a criminal offense (for example, sexually assaulting a traveller), the United States Government may give notice of its intention to exercise primary criminal jurisdiction over the matter. If this occurs, any Canadian proceeding against the preclearance officer will be stayed and the alleged victim must rely on the U.S. criminal justice system for relief.

Bill C-23 Will Offer Better Protection **[FALSE]**

As [the media has reported](#), Prime Minister Trudeau justified Bill C-23 by claiming that it would offer better protections to Canadians. He stated the following:

If we didn't have preclearance in Canada, people would be passing customs in the United States, and in the United States American laws dominate and control the behaviour of people in border crossings

The Prime Minister is correct when he says that USCBP officers along the Canada-U.S. land border have greater powers to search, question, and detain travelers; this is true because they are located on U.S. soil. However, this does not justify giving more of these same powers to Preclearance Officers in Canada.

The Prime Minister's claim would only make sense if Canada did not already have preclearance operations in Canada or if the Canadian Government's failure to pass Bill C-23 would result in the closure of all existing preclearance operations in Canada. The fact is that U.S. preclearance already takes place in most major airports in Canada (Calgary, Edmonton, Halifax, Montreal, Ottawa, Toronto, Vancouver, and Winnipeg) without Preclearance Officers possessing the expanded powers contemplated by Bill C-23. The United States also did not indicate an intention to close its existing preclearance operations if Bill C-23 did not pass.

The [Preclearance Act, 1999](#) had already established a successful frame work for the preclearance of U.S.-bound travelers in Canada. It gave Preclearance Officers sufficient authority to perform their duties while also protecting the rights of Canadians. The enactment of Bill C-23 unnecessarily expands the powers of Preclearance Officers, which offers far worse (not better) protection to Canadians.

The New Powers Will Rarely Be Used [FALSE]

As [the media has reported](#), when speaking to the Senate Committee, Public Safety Minister Ralph Goodale claimed that the expanded powers granted to Preclearance Officers would rarely be used. Unfortunately, based on what often occurs along the Canada-U.S. border, where USCBP officers already have these expanded powers, the risk of abuse is certainly a significant one.

The media have reported on instances of Canadians [being questioned more aggressively](#), or being detained/denied due to their [country of origin](#) or [sexual orientation](#). If Preclearance Officers in Canada are given greater powers approaching those that USCBP officers already possess at the land ports of entry, they are more likely to act in the same manner, especially if aggrieved travelers have no legal recourse against such conduct.

It is true that some new powers, such as the authority to conduct strip searches in certain circumstances, may not be exercised frequently. However, other powers such as the ability to detain a traveler who has already withdrawn his or her application for admission, until they answer questions regarding their reason for their withdrawal, could be frequently utilized. Preclearance Officers could also frequently utilize the threat of criminal prosecution under

Section 38 in order to compel travelers to respond to questions or to turn over their smartphone passwords.

Why did the Canadian Government Make These Misleading Claims?

Clearly, the Canadian Government made the above claims because it wanted Bill C-23 to become law. There is no doubt that Bill C-23 will result in the expansion of U.S. preclearance operations to additional Canadian Airports (such as Billy Bishop Airport in Toronto) and to other modes of travel (i.e. land, rail, and marine); this is clearly a significant benefit for Canada. However, one wonders if the price that Canada paid was just too high.