SUPPLEMENTARY BRIEF ON BILL C-23: PRECLEARANCE ACT, 2016

By:
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Presented to:
The House Standing Committee on Public Safety and National Security
May 26, 2017

1. Introduction

This supplementary brief presents a list of concrete amendment proposals for Bill C-23, the *Preclearance Act, 2016*, which we submit to the members of the House of Commons Standing Committee on Public Safety and National Security (the Committee) for your due consideration.

In our previous briefs, we outlined our deep reservations over multiple aspects of Bill C-23, recommending substantial changes to the bill. However, following the submission of our briefs, the testimony of the Canadian Muslim Lawyers' Association to the Committee and informal discussions with committee members, it became clear that any proposed modifications to Bill C-23 must be in line with the provisions of 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 Agreement), signed between the Canadian and US governments in 2015.

We have therefore undertaken a study of the Agreement, and identified changes that we believe would help to improve Bill C-23, while not contravening the Agreement. These are listed below in section 2.

However, we find it necessary to first express our deep reservations and concerns with the process surrounding the Agreement and its implementation through Bill C-23.

As we noted in our briefs, the fundamental flaw we see in Bill C-23 is a lack of accountability for US preclearance officers (USPCOs) in Canada:

- Regarding civil suits, US preclearance officers will have full immunity. The US government will also benefit from broad immunity under the *State Immunity Act,* which shields it from all charges save and except for situations of death, bodily harm or damages to property.[1]

- Regarding criminal charges, the US maintains primary jurisdiction over any preclearance officers accused of committing any crime in Canada, short of terrorism, murder or aggravated sexual assault.[2] Canada may ask for jurisdiction in the case of "important offences"[3], but it is still up to the US government to agree to transfer jurisdiction to Canada.

The result is that, while Bill C-23 guarantees Canadians that a "preclearance officer must exercise their powers and perform their duties and functions under

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[1] The Agreement, p. 19

[2] The Agreement, p. 20

[3] The Agreement, p. 21

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*"[4], there is little to no way for a Canadian or Canadian courts to take action should a preclearance officer violate those laws.

This fundamental flaw is not simply part of Bill C-23, but is rooted in the Agreement. Therefore, despite the commendable consultation being carried out by this committee, the issue of accountability can only be solved by a re-negotiation of the Agreement and not through amendments to the Bill.

There are other aspects of Bill C-23 that cannot be changed due to components of the Agreement, including the ability for US preclearance officers to conduct a strip search should a CBSA officer decline to do so, and the ability of for US preclearance officers to detain, question and search a traveler after they state their intent to withdraw from preclearance.

Therefore, while we submit these amendments for your consideration and believe they will aid in addressing some concerns with Bill C-23, we strongly believe that this consultation should have taken place during the negotiations of the Agreement.

Any international agreement that will have such a serious impact on Canadian laws and on the rights of people residing in (or traveling through) Canada, must be negotiated in an open, accountable fashion. To do otherwise undermines both Canada's democracy and sovereignty.

2. Proposed amendments

Regarding preclearance in Canada, we recommend:

- Adding an oversight mechanism for USPCOs within the Bill
- Maintaining the current clause in the *Preclearance Act* that withdrawal is not considered grounds for suspicion of committing an offence
- Amending paragraph 30(a) to read "answer truthfully any question asked by a preclearance officer under paragraph 31(2)(b) for the purpose of identifying the traveller or of **obtaining** their reason for withdrawing" rather than authorizing USPCOs to conduct an investigation to "**determine**" same.
- Adding a clause obligating USPCOs to inform passengers of their right to withdraw prior to any detention

[4] Article 11, Bill C-23

- Adding a clause obligating USPCOs to inform travellers of the precise moment when an investigation into a suspicion of commission of an offence has begun
- References in the Bill pertaining to the detention of travellers and goods to be delivered to the CBSA should be changed from "as soon as feasible" to "immediately"
- Maintaining the current clause stating that traveler information should be destroyed after 24hrs, unless it is needed for any further action related to preclearance or other offences under an Act of Parliament
- Establishing stricter guidelines for the retention and disclosure of traveler information
- Adding a clause explicitly limiting USPCOs to carrying firearms only in situations when CBSA officers may carry firearms
- Adding a clause stating that USPCOs must be trained before deployment, and re-trained every 2 years
- Adding a clause stipulating that in the case of an "important offence" committed by USPCOs, Canada will file for primary jurisdiction
- Amending section 25(1) to read "senior Canadian officer"

Regarding Canadian preclearance areas (PCAs) abroad (in US or otherwise):

- Amending the Bill to allow Canadian permanent residents to re-enter Canada without restriction
- Amending the Bill to state that PCAs should be deemed Canadian soil in regards to all aspects of the *Immigration and Refugee Protection Act*
- Adding a clause restricting the disclosure of information gathered at PCAs with foreign officers
- Amending the bill to delineate the circumstances in which a traveller who has passed preclearance screening may be required to be re-examined upon actual entry to Canada.

NB: Given our concerns about the process, we would also raise the possibility of striking the section of the Bill regarding Canadian PCAs abroad. The government could then engage in a thorough consultation with stakeholders around the establishment and management of Canadian PCAs abroad. From what we understand, there are no immediate plans to establish PCAs in other countries, so more time could be taken for such a consultation.

Other recommendations:

- Adding an explicit clause protecting solicitor-client privilege
- Enumerating the PCA classes
- Adding a clause providing for mandatory review of the *Preclearance Act, 2016*, in 3-5 years