BRIEF ON BILL C-23: PRECLEARANCE ACT, 2016

By:
International Civil Liberties Monitoring Group (ICLMG)
National Council of Canadian Muslims (NCCM)

Presented to:
The House Standing Committee on Public Safety and National Security
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About the authors

The International Civil Liberties Monitoring Group (ICLMG)

The ICLMG is a national coalition of Canadian civil society organizations that was established in the aftermath of the September 2001 terrorist attacks in the United States. The coalition brings together some 43 NGOs, unions, professional associations, faith groups, environmental organizations, human rights and civil liberties advocates, as well as groups representing immigrant and refugee communities in Canada.

In the context of the so-called 'war on terror', the mandate of the ICLMG is to defend the civil liberties and human rights set out in the Canadian Charter of Rights and Freedoms, federal and provincial laws (such as the Canadian Bill of Rights, the Canadian Human Rights Act, provincial charters of human rights or privacy legislation), and international human rights instruments (such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment).

Since its inception, ICLMG has served as a round-table for strategic exchange — including international and North/South exchange — among organizations and communities affected by the application, internationally, of new national security ("anti-terrorist") laws. ICLMG has provided a forum for reflection, joint analysis and cooperative action in response to Canada's own anti-terrorist measures and their effects, and the risk to persons and groups flowing from the burgeoning national security state and its obsession with the control and movement of people.

Finally, further to its mandate, the ICLMG has intervened in individual cases where there have been allegations of serious violation of civil liberties and human rights. The ICLMG has also intervened to contest proposed legislation, regulations and practices that contravene the Canadian Constitution, other Canadian laws and international human rights standards.

The National Council Of Canadian Muslims (NCCM)

The National Council of Canadian Muslims (NCCM) was founded in 2000 as an independent, nonpartisan, non-profit grassroots organization to be a leading voice for Muslim civic engagement and the promotion of human rights.

The NCCM's mandate is to protect human rights and civil liberties, challenge discrimination and Islamophobia, build mutual understanding between

Canadians, and promote the public interests of Canadian Muslim communities. We work to achieve this mission through our work in community education and outreach, media engagement, anti-discrimination action, public advocacy and coalition building.

The NCCM has testified before several parliamentary committees on important legislation, including previous iterations of the Anti-Terrorism Act, 2015; has participated in the Arar Commission, the Air India Inquiry, and the Iacobucci Internal Inquiry; and has appeared before the Supreme Court of Canada on cases of national importance.

The NCCM regularly provides media commentary on issues affecting Canadian Muslims. It offers frequent seminars and workshops on Islamic practices and issues of religious accommodation, and produces a number of publications, which include guides outlining Islamic religious practices for journalists, employers, educators, and health care providers. Our publications are regularly requested by government departments, local and national media outlets, police services, hospitals, schools, businesses, and various NGOs.

The NCCM documents and resolves discrimination and bias-related complaints. It produces reports on anti-Muslim sentiment and reports its findings annually to the ODIRH of the Organization for Security and Co-operation in Europe (OSCE). It has also presented findings at national and international conferences. The NCCM is federally incorporated and is funded primarily through private donations from Canadians. The NCCM does not accept donations from foreign organizations or governments.

1. Introduction

This brief presents our views and concerns on Bill C-23, the *Preclearance Act, 2016*, introduced in the House of Commons on June 17, 2016.

Canadians have had access to preclearance for air travel to the United States since 1999. Since that time, preclearance has become welcome by many for its convenience in travelling, benefiting both travel and commerce.

In general, from the public's perspective, it would appear that the current preclearance system has worked well. There have been no major incidents reported of the current preclearance system failing, and in fact Canadian officials have said as much that the system has been effective.

Given that, and given the amount of travel between Canada and the United States on a daily basis, it makes sense the Canadian government would take action to increase preclearance to the United States, including exploring the possibility of eventually opening Canadian preclearance areas in the United States

However, to implement this expansion to other airports and other means of transportation – including train – the Canadian and US governments undertook negotiations on a new preclearance agreement. This resulted in the *Agreement on Land, Rail, Marine, and Air Transport Preclearance between the Government of Canada and the Government of the United States of America*, signed between the two governments in 2015. Bill C-23 has been presented as making the necessary legislative changes in order to implement the Agreement, and therefore allow for the expansion of preclearance in Canada and begin Canadian preclearance in the United States.

The changes which would be implemented by Bill C-23, though, are not minor in scope and would significantly change the security protocols around US preclearance areas in Canada, including providing United States Customs and Border Patrol (USCBP) agents with expanded powers.

We are greatly concerned that these expanded powers will have negative repercussions on the civil liberties of travellers from Canada to the US who pass through preclearance zones, as we will examine further on.

These concerns are compounded by the fact that these amendments are being proposed without public presentation of evidence that an increase in security measures is required. Public Safety Minister Ralph Goodale has stated on multiple occasions that the increased security is meant to "prevent the illicit probing of pre-clearance sites by people trying to find weaknesses in border

security before leaving the pre-clearance area undetected."[1] However, the government has not produced a known case of this occurring, even though the current preclearance regime has been in place nearly two decades.

The lack of evidence to support these amendments are important. In our work, we have observed the creep of national security laws over the past 20 years: there is always a reason to ask for more powers. It is incumbent, though, that such powers are justified, particularly when they introduce new potential threats or limits on civil liberties and human rights.

Based on this lack of evidence, our first recommendation, which underlies the rest of this brief, is that Bill C-23 itself appears on the most part to be unnecessary. However, recognizing that it is meant to implement an already-negotiated agreement, we propose the recommendations in this report in the hopes that Bill C-23 can be strengthened to ensure the protection the rights of Canadian citizens, permanent residents and other travelers travelling through preclearance areas.

We have also recently seen how changes in the political landscape and atmosphere can have significant impacts on how travelers are treated at the border, given that there is wide discretion on who can and cannot enter the United States (as is the right of all countries). However, this possible volatility means that we must keep in mind the potential misuses of regulations. We have already seen reports of racial, religious and political profiling at US border crossings. If we are to allow for more US border agents in Canada, the regulations around their actions and the protections of travelers' rights must be solid.

We also know that members of diverse communities, including people of colour, Muslims, LGBTQI, people with disabilities and others are disproportionately impacted by security legislation. It is important that we consider the impact of any legislation on all communities and peoples in order to ensure that our rights and freedoms are protected.

We do not believe that Bill C-23, as it is currently written, takes these considerations into account. It is possible that the original *Agreement* which Bill C-23 is to implement did not either. In that case, the agreement itself may necessitate a review.

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[1] Goodale, R. (2017, Feb. 21). "Pre-clearance." Canada. Parliament. House of Commons. *Edited Hansard 144.* 42nd Parliament, 1st session. Retrieved from the Parliament of Canada website: http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&DocId=8786011#Int-9392536

However, we would hope that Canada has maintained enough leeway in the current agreement to take into account the potential negative repercussions of the Bill C-23, and be able to implement amendments accordingly.

2. Provisions of C-23

a) How will protections granted by the Canadian Charter of Rights and Freedoms be adequately implemented and enforced in preclearance areas?

Bill C-23 will grant USCBP agents greater powers to question, search and detain travelers on Canadian soil, as well as allow certain agents to carry firearms (example: sections 13, 14, 15, 20 to 24, 28, 31(2), 32). Underlying these greater powers as a safeguard is the assurance, granted in section 11 that:

> 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*.

This provision is meant to provide security and peace of mind. Its explicit inclusion is an improvement on the existing law, but concerns remain around its implementation. In particular, the bill is silent on how USCBP agents will be trained Canadian laws and who will do such training. Given that the agents are granted immunity from civil liability (see section 39(2)) and that the United States government is granted broad immunity itself under the *State Immunity Act* (see article 39(1) of Bill C-23), there would be little recourse for an individual who believes their charter rights have been infringed by a USCBP agent. This makes the need for clear rules around in-depth, recurring training a must. CBSA representatives have made it clear that USCBP preclearance officers are already trained by CBSA agents. With the greater powers that would be granted under Bill C-23, this training should be made explicit in law.

Recommendation 1: That C-23 make training of USCBP agents by CBSA officers explicit, and that such training be recurring on a biannual basis (every two years)

Recommendation 2: That the Canadian government explore further options to ensure the accountability of either individual officers or the US government in the event that a charter right is breached.

b) The right to withdraw from preclearance

The existing Preclearance Act gives travelers the "right, at any stage of the preclearance process, to leave a preclearance area without departing for the United States, unless a preclearance officer informs the traveler that the officer suspects on reasonable grounds that the traveler has committed an offence under section 33 or 34" and that the traveler must then "report without delay to a customs officer and immigration officer for inspection" (see section 10, *Preclearance Act*).

Bill C-23 proposes important changes to the right to withdraw, a right which we believe should be fundamental to any preclearance law.

Under Bill C-23, travelers may no longer withdraw from withdraw from the preclearance process at any time. Instead:

> "Unless they are detained under this Act, every traveller bound for the United States may withdraw from preclearance and, subject to section 30, may leave a preclearance area or preclearance perimeter without departing for the United States." (Section 29)

This brings two important – and concerning changes – to the withdrawal process.

First, section 30 would allow for a preclearance officer, even if no offense is suspected, to further question the traveler on why they wish to withdraw, request photo ID or take a photograph of the individual, copy their identifying documents, and examine the vehicle in which the individual must be traveling. We believe these powers to be excessive and that travelers, upon request to withdraw, should be permitted to leave with no further action on the part of the preclearance officer.

Proponents of C-23 have stated that section 31(3) minimizes the impacts of these actions, as it stipulates that these actions should not "unreasonably delay the traveler's withdrawal," and that the term "reasonable" is backed by jurisprudence. While we find "reasonable" to remain too vague, we also believe that, even with more precision, 31(3) would not allay concerns about withdrawal.

Our concern is that in being required to answer further questions regarding the reason for withdrawal, the traveler could then be in a situation where those questions give the officer further grounds for greater delay, detention or other actions.

For example, a Muslim traveler may be asked in a preclearance zone about their religion or their view on US policies. They are uncomfortable

with the line of questioning, and ask to withdraw. The preclearance officer then asks them to explain why. The traveler is then forced to explain themselves, which could put them in an unwanted situation, regardless of the powers of the officer. But even more, admitting to being uncomfortable with a line of questioning or with US policies could, feasibly, be grounds to "reasonably suspect" that the individual poses a threat to border security, and makes them subject to further action (search, detention, etc.). We believe this constitutes an infringement of the rights of the traveler.

This concern is further compounded by the removal of section 16(3) of the current *Preclearance Act*:

> The refusal by a traveller to answer any question asked by a preclearance officer does not in and of itself constitute reasonable grounds for the officer to suspect that a search of the traveller is necessary for the purposes of this Act or that an offence has been committed under section 33 or 34.

By removing this safeguard, there is increased ambiguity as to what the preclearance officer may see as grounds for further delay, detention or other actions. We believe a similar safeguard should be maintained in Bill C-23.

We are also concerned about the substitution of the wording that a traveler "[may leave] at any stage of the preclearance process" (see section 10, *Preclearance Act*) for "unless they are detained under this act" (see section 29, *Preclearance Act, 2016*). The inclusion of "detain" in section 29 further limits the ability of an individual to withdraw, particularly in the event of a decision to strip search a traveler.

If the preclearance officer decides to strip search a traveler, they are by definition detained (both according to section 22(1) of Bill C-23 and in the law). The traveler has therefore lost the ability to withdraw at "any stage of the preclearance process" and may face invasive searches even if they no longer wish to pass through preclearance. (We address further concerns regarding strip searches later in this brief). We believe travelers should maintain the right to withdraw, at any time, without further action.

Finally, there is some vagueness about whether, upon expressing their desire to withdraw, an individual could still be subject to a frisk.

While sections 31 and 32 do not explicitly mention the ability to frisk, section 31(1) states:

> 31 (1) A preclearance officer is, after a traveller has indicated that he or she is withdrawing from preclearance, permitted to exercise only the powers, and perform only the duties and functions, under this section and sections 13 to 15 and 32 with respect to the traveller.

Section 13 allows for a preclearance officer to frisk a traveler. We oppose the ability of a preclearance officer to frisk a traveler who has expressed their desire to withdraw from preclearance.

Recommendation 3: That Bill C-23 be amended to allow travelers to withdraw from preclearance at any point, without further questioning or frisking/searching, unless detained for reasonable suspicion of committing an offence under an Act of Parliament (for clarity, this would entail the redaction of section 31).

Recommendation 4: That Bill C-23 explicitly state that a decision to withdraw from preclearance is not grounds for further suspicion.

c) The ability of US preclearance officers to conduct invasive searches, including strip searches

We are concerned with section 22(4)(a), which would allow a preclearance officer to conduct a strip search "if a border services officer declines to conduct it." We believe that if a CBSA officer declines to conduct a strip search, it is likely unwarranted, and it should not be up to the preclearance officer to decide to go forward with it. It is true that, in the case of a decline by the CBSA officer, the traveler could request that the issue be brought before a senior officer (see section 25(1)). We do not believe it should have to escalate to that point, though. If a CBSA officer declines, the strip search should not go ahead. If this section was meant to take into account other, more specific eventualities, it should be modified to explicitly state those eventualities.

We would also note that there is a lack of clarity in section 25(1) as it does not specify whether the senior officer is a CBSA senior officer or possibly a senior preclearance officer (in the immediate case, a more senior USCBP officer). We believe that it should be, in all cases, a senior CBSA officer.

Recommendation 5: That 22(4)(a) be removed from Bill C-23.

Recommendation 6: That section 25(1) be modified to read "senior CBSA officer."

d) The ability of US preclearance agents to carry firearms

We are concerned about the lack of precision in the bill around preclearance officers carrying firearms.

First and foremost, we are concerned by the possibility that foreign officers, who are granted civil immunity in Canada and are not allowed to be tried on criminal charges in Canada unless the US consents, to be allowed to carry firearms in Canada.

At the May 8th hearing meeting of the House of Commons Standing Committee on Public Safety and National Security, CBSA officials clarified that the ability of preclearance officers to carry firearms will fall under the same restrictions as CBSA officers. This means that preclearance officers will only carry firearms in those specific roles where a CBSA officer would carry a firearm, which are specific instances (it was stated, for example, that a preclearance officer working in a preclearance area would not be permitted to carry a firearm).

While this satisfies some of our concerns, we believe that it must be made explicit in the law to prevent future confusion and/or creep.

Recommendation 7: That preclearance officers be held accountable under Canadian law for the discharge of any firearm.

Recommendation 8: That Bill C-23 make it explicit that the circumstances in which preclearance officers may carry firearms are the same as those governing CBSA officers.

e) Privacy protections of those going through preclearance

We are concerned that the wording of Bill C-23 appears to weaken the privacy protection of travelers who pass through preclearance. In the current legislation, preclearance officers must use passenger information "only in the administration and enforcement of this Act and preclearance laws"; must destroy such information after 24 hours, "unless the information is reasonably required for the administration or enforcement of Canadian law or preclearance laws"; must take "reasonable measures to protect specified passenger information … from unauthorized use and disclosure" (section 32).

None of these safeguards are included in Bill C-23. In fact, the only mention of privacy is in section 33 (1):

> No person is permitted to disclose or use information obtained from a traveller after their withdrawal from preclearance except for the

> purpose of maintaining the security of or control over the border between Canada and the United States or as otherwise authorized by law.

Therefore, under Bill C-23, privacy protections are only explicitly given if a traveler requests to withdraw. While the obligation for preclearance officers to follow Canadian law as well as the *Charter*, the removal of explicit instructions is concerning. This is even more so when we consider:

- the broader discretion of sharing information related to national security under the Security of Canada Information Sharing Act;
- the lack of protection in the United Sates regarding the sharing of foreign citizens' information (will information collected by a US preclearance officer be transmitted back to the US? Bill C-23 is silent);
- the current lack of clarity around privacy rights regarding personal electronic devices at both the Canadian and US borders (knowing that searches of electronic devices and requests for social media passwords have increased in recent months)

Recommendation 9: Bill C-23 should explicitly guarantee the protection of personal information provided during the preclearance process. It should utilize, among other wording, the same language as the current Preclearance Act, including limits on use of information and the need to destroy information after 24 hours.

f) The ability of permanent residents to return to Canada via future preclearance areas in the United States or other countries

Canada has not yet established its own preclearance zones in other countries, most notably the United States. Bill C-23 lays out provisions for these international Canadian preclearance areas to be established.

While we are not opposed to the creation of Canadian preclearance zones abroad, we believe that certain changes and clarifications must be brought to C-23 before any are established.

First, we are concerned that Canadian preclearance zones are considered "Canada" when it comes to screening of individuals and goods for entry into Canada (see section 47(5)), but that it is not considered "Canada" for the purposes of the Immigration and Refugee Protection Act, specifically when it comes to requests for asylum (see section 48).

While the Safe Third Country act would already prohibit refugees from a third country coming to Canada from the US to request asylum, preclearance zones in other countries could in fact present a new barrier for those who wish to come to Canada and claim asylum upon arrival. This should be changed in the law.

Second, we are concerned about the vague language regarding the prevention of a permanent resident re-entry into Canada (see section 48(4), (5) and (6)). In commenting to the House of Commons Standing Committee on Public Safety and National Security on May 8, Minister Goodale stated that this denial of re-entry would only be in cases of serious issues, such as "serious criminality." This should be clearly reflected in the legislation.

Recommendation 10: That the committee explore language that would ensure that preclearance areas do not infringe on the ability of asylum seekers to enter Canada.

Recommendation 11: That Bill C-23 be amended to reflect that permanent residents will only be denied re-entry through pre-clearance in cases of "serious criminality."

g) Ensuring public input on international agreements

While we are pleased to be giving our input on C-23 at this time, we have concerns about the process which led to the introduction of C-23 and potential limitations on the impact that these consultations may have.

Much of what is included in C-23 has come about as part of the negotiations for the *Agreement on Land, Rail, Marine, and Air Transport Preclearance between the Government of Canada and the Government of the United States of America.* However, there was no public scrutiny at that time of what the potential legislative implications were of the agreement. The result is that while we may provide input on all aspects of Bill C-23, it is unclear which parts can be modified, or which parts are prescribed by the agreement. It also raises the question of whether the government will be willing to re-open discussions on the agreement based on the concerns heard at the SECU committee.

Recommendation 12: That all international agreements that will impact *Charter* rights and freedoms go before the appropriate committee for review before being agreed to.

3. Conclusions

Given the lack of public information around the necessity to tighten security at preclearance areas, concerned that such major changes are being brought to the Preclearance Act. In such instances, it raises concerns of "security creep": that security measures, even without justification, continue to become more stringent by default since rules must always be tightened. It is true that the current regulations were put in place before Sept. 11, 2001, but they have continued to prove to be effective. The simple timing of enactment should not be enough to justify increasing restrictions.

While the more explicit guarantee of protecting travelers' rights and freedoms is a welcome addition, it does not outweigh the more concerning aspects of this bill. We therefore cannot support Bill C-23 in its current form.

We would like to encourage the members of the SECU committee to work to strengthen the protection of Canadians' and other travelers' rights in preclearance areas which, more and more, will take the place of physical border crossings, as they expand beyond air travel to train, ferry, etc.

We thank the committee for considering the above-noted concerns on Bill C-23, and for your work in studying this piece of legislation. We would be pleased to discuss our recommendations before the committee (see Annex A for the full list of recommendations).

Tim McSorley, ICLMG National Coordinator
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Annex A

Recommendation 1: That C-23 make training of USCBP agents by CBSA officers explicit, and that such training be recurring on a biannual basis (every two years)

Recommendation 2: That the Canadian government explore further options to ensure the accountability of either individual officers or the US government in the event that a charter right is breached.

Recommendation 3: That Bill C-23 be amended to allow travelers to withdraw from preclearance at any point, without further questioning or frisking/searching, unless detained for reasonable suspicion of committing an offence under an Act of Parliament (for clarity, this would entail the redaction of section 31).

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Annex B

ICLMG member organizations

Amnesty International
Association québécoise des organismes de coopération internationale
B.C. Freedom of Information and Privacy Association
Canadian Arab Federation
Canadian Association of University Teachers
Canadian Council for International Co-operation
Canadian Council for Refugees
Canadian Ethnocultural Council
Canadian Federation of Students
Canadian Friends Service Committee
Canadian Labour Congress
Canadian Muslim Forum
Canadian Muslim Lawyers Association
Canadian Peace Alliance
Canadian Union of Postal Workers
Canadian Union of Public Employees
Canadian Unitarians for Social Justice
CARE Canada
Centre for Social Justice
Confederation of Canadian Unions
Canadian Office and Professional Employees Union
Council of Canadians
CUSO
David Suzuki Foundation
Development and Peace
ETC Group
Fédération nationale des enseignantes et des enseignants du Québec
Greenpeace
Independent Jewish Voices
International Development and Relief Foundation
Inter Pares
KAIROS
Lawyers Rights Watch Canada
Ligue des droits et libertés
National Anti-Racism Council of Canada
National Council of Canadian Muslims (NCCM)
National Union of Public and General Employees
Ontario Council of Agencies Serving Immigrants
Mining Watch Canada
PEN Canada

Primate's World Relief and Development Fund
Public Service Alliance of Canada
Unifor
The United Church of Canada
United Steelworkers of America

Observer organization

Canadian Journalists for Free Expression

Friends of ICLMG

Gerry Barr; Senior Adviser Public Affairs, Directors Guild of Canada, and former President and CEO of the Canadian Council for International Cooperation.

Hon. Edward Broadbent; former leader of Canada's New Democratic Party and first president of the International Centre for Human Rights and Democratic Development.

Hon. David MacDonald; former Canadian Secretary of State and former minister of Communications.

Brian Murphy; independent writer, policy analyst and human rights advocate.

Roch Tassé; political analyst with special focus on human rights, civil liberties and national security, and former National Coordinator of ICLMG (2002-2015).

James L. Turk; Distinguished Visiting Professor, Ryerson University, and former Executive Director, Canadian Association of University Teachers.

The Very Rev. Lois Wilson; former moderator of the United Church of Canada and retired senator.

The late Hon. Warren Allmand (September 19, 1932 – December 7, 2016); former Solicitor General of Canada and a past president of the International Centre for Human Rights and Democratic Development (Rights & Democracy).

The late Hon. Flora MacDonald (June 3, 1926 – July 26, 2015); former minister of Foreign Affairs and former minister of Communications.