

Written Submission to the Standing Committee on Public Safety and National Security
Regarding Bill C-23, the *Preclearance Act*, 2016

May 10, 2017

From the British Columbia Civil Liberties Association ("BCCLA")

Executive Summary

In this brief, the BCCLA sets out its chief concerns with Bill C-23, the *Preclearance Act*, 2016. At the outset, we wish to emphasize that the BCCLA understands the significant benefits of preclearance. However, our position is that even taking into account the different expectation of privacy that people have in a border area, many of the new powers Bill are simply not justified and could be found to be unconstitutional.

1. **The right to withdraw from preclearance must be protected.** The existing right of a traveller to withdraw from a preclearance area must be maintained. A traveller should not face additional questioning if opting to withdraw and the presumption against suspicion based solely on withdrawal must be included in the new statute. Requiring an individual to answer questions amounts to detention. In addition, the Bill permits overbroad sharing of information gathered through this questioning.
2. **Power to detain travellers.** Detention of an individual by a US preclearance officer should be permissible only if a preclearance officer has reasonable grounds to believe that that a traveller has committed an offence under an Act of Parliament punishable by indictment or summary conviction in connection with the travel being undertaken, and the Bill should be amended to continue to require US officers to hand people over to Canadian officers as soon as possible.
3. **Charter rights and remedies are not generally enforceable against the US and US preclearance officers.** The Bill is wracked with issues related to who is responsible for breaches of people's fundamental human rights, and how these should be remedied. The Bill should clarify what entity is liable for a breach of the *Charter of Rights and Freedoms* and human rights legislation by a US preclearance officer in Canada, how the United States will be effectively held to its obligations, and how compliance will be enforced against the United States.
4. **Canada needs stronger power to assert criminal jurisdiction if the U.S. does not prosecute appropriately.** Canada must be able to assert criminal jurisdiction over a US preclearance officer if the US initially claims primary jurisdiction but then fails to appropriately prosecute.
5. **US officers must not be given the power to conduct strip searches under any circumstances.** We strenuously object to conferring any power on US preclearance officers to perform strip searches in preclearance areas in Canada. There is no justification for this expanded power. Only Canadian officers should have to power to perform strip searches, and only in limited circumstances according to law.
6. **Travellers must be provided with appropriate notice.** Regulatory powers must be used to ensure that travellers are provided reasonable notice of their obligations in preclearance areas so that they may

choose not to enter a preclearance area in the first place. Regulations must impose a duty on operators to have signs posted in all preclearance areas about the right to withdrawal.

7. **Annual reporting on preclearance.** There should be a recurring duty on the Minister to cause an independent review of the Act and its administration every five years. A report based on the review should be provided to Parliament. In addition, there must be an annual obligation for the Minister to publish data about how the statutory powers are being exercised in each of the preclearance areas. Such regular disclosures will enable Canadians to evaluate whether the rights of travellers in preclearance areas are being appropriately protected.
8. **Training of US preclearance officers and Canadian officers.** We urge the government to ensure that US preclearance officers have robust training and development to perform their duties in accordance with Canadian law. A comprehensive education is crucial to prevent violations of Canadian law by US preclearance officers. Canadian officers operating in the United States must also have the benefit of a rigorous training program so that they may dispense of their duties in accordance with applicable US law.
9. **Preclearance should not result in the denial of entry of permanent residents or be used to bar asylum-seekers.** The acquired right of a permanent resident to enter Canada must be protected. Any decision about the admissibility of a permanent resident must be made in Canada for reasons of fairness. In addition, the law should not prevent a traveller seeking protection or refugee status from entering Canada through a preclearance area in the US.
10. **Adoption of recommendations regarding solicitor-client privilege, the return of detained goods and a review procedure for the seizure of Nexus cards made by the Canadian Bar Association.** We agree with a number of recommendations made by the Canadian Bar Association in their submission to this committee.

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Discussion and Recommendations

As an overarching matter, we have yet to hear, in the government's comments on this matter in the House, any compelling justification for the significant grant of coercive powers to US preclearance officers. While the security of the border is a paramount concern, it is not clear that the rights-infringing measures proposed in this Bill are necessary in order to achieve that important end. The principal justification that we are able to discern is simply that the United States desires that its agents possess these powers, and that Canada has agreed to them. This is not, in our view, an appropriate justification for the potential rights violations that could flow from this Bill.

1. Right to withdraw from preclearance must be meaningful

Bill C-23's provisions about a traveller's right to withdraw from a preclearance area is a significant departure from the current model and does not provide appropriate constitutional safeguards. While the current law preserves a traveller's right to not answer questions and to withdraw from the preclearance area at any time, Bill C-23 limits these liberties by requiring the traveller to answer questions about their rationale for withdrawal before they are free to leave. In essence, a traveller wishing to withdraw could be subject to arbitrary detention for questioning purposes and/or coerced under law to provide statements to the US preclearance officer or a Canadian officer, as the case may be.

Under the current law, there is no obligation on people in preclearance areas to answer questions at any time during the process (though of course a failure to answer questions as part of the usual immigration inspection can result in a traveller being denied permission to enter the US). If the traveller chooses to answer a question, there is an obligation on them to answer truthfully.¹ If the traveller refuses to answer any question asked, the US preclearance officer may order the traveller to leave the preclearance area.² The *Preclearance Act* is explicit that the refusal by a traveller to answer any question asked does not "in and of itself constitute reasonable grounds for the officer to suspect that a search of the traveller is necessary for the purpose of the act or that an offence has been committed."³ At present, the only legal authority that a US preclearance officer has to impede the withdrawal of a traveller is if they inform the traveller that they suspect on reasonable grounds that that the traveller has made a false or deceptive statement or has obstructed a US preclearance officer or a Canadian officer.⁴ If this is the case, the US preclearance officer may detain the traveller and must deliver them as soon as possible into the custody of a peace officer.⁵

Under Bill C-23, a traveller is no longer free to remain silent or to leave the preclearance area at any time. In preclearance areas in Canada, a traveller seeking to withdraw will have a legal obligation to answer truthfully to any question asked by a US preclearance officer for the purpose of identifying the traveller or of

¹ *Preclearance Act*, SC 1999, c 20, s 16(1).

² *Preclearance Act*, s 16(2).

³ *Preclearance Act*, s 16(3).

⁴ *Preclearance Act*, s 10(1).

⁵ *Preclearance Act*, s 24(2).

determining their reason for withdrawing.⁶ In addition to asking questions about why the traveller wants to withdraw, the US preclearance officer is further authorized to do the following:

- direct the traveller to identify themselves and to produce information that contains their photograph,
- to record and retain information obtained from the traveller from the questioning and the identification,
- to take and retain a photograph of the traveller if the identification provided doesn't enable their identity to be verified,
- to visually examine a conveyance used by the traveller,
- to open cargo compartments of a conveyance that transports goods on a commercial basis and to visually examine the contents, and
- if the officer has reasonable grounds to suspect that the traveller could compromise the security of or control over the border, to examine, using means or devices that are minimally intrusive, a conveyance used by the traveller.⁷

These powers are limited to the extent that exercising them would “not unreasonably delay” the traveller’s withdrawal.⁸ This limitation does not provide us with any comfort as it is only a temporal limitation and is imprecise – how will these terms be interpreted? What does it mean to “not unreasonably delay the traveller’s withdrawal”? The wording of the Bill attempts to distinguish this period of time for questioning from detention (which is permitted, *inter alia*, for the purposes of a strip search, or if the US preclearance officer believes the traveller has committed an offence). In practice, this distinction is likely meaningless. If one must answer questions and comply with directions under s. 30 of the Bill, the person is detained. If one is not permitted to leave, one is detained. At law, it is that simple.

Section 9 of the *Charter* guarantees the right not to be arbitrarily detained. The Supreme Court of Canada stated in *R. v. Grant*, that “the purpose of s. 9, broadly put, is to protect individual liberty from unjustified state interference.”⁹ The Court stated further that “a detention in the absence of at least reasonable suspicion is unlawful and therefore arbitrary within s. 9.”¹⁰ Under Canadian law, investigative detention is permitted only in circumstances in which there is a reasonable suspicion that a particular individual is implicated in a criminal activity under investigation, and then only if absolutely necessary and for the most minimal time possible.

The government’s stated rationale for these changes is that it wants to prevent the illicit probing of preclearance sites by people trying to find weaknesses in border security before leaving the pre-clearance area undetected. Even in the situation of a border point where there is an expectation of questioning and inspection for the purpose of crossing the border, we do not find that this rationale is a compelling justification to create a blanket power that could be used to subject any traveller to detention, without any

⁶ Bill C-23, *An Act respecting the preclearance of persons and goods in Canada and the United States*, 2016, s 30(a).

⁷ Bill C-23, s 30(2).

⁸ Bill C-23, s 31(3).

⁹ 2009 SCC 32 at 20.

¹⁰ *Ibid.* at 55.

reasonable suspicion that they are involved in criminal activity. Given that section 32 of the Bill provides the power to detain and question travellers who are suspected on reasonable grounds of committing an offence (which, as we note below, is overbroad and should be narrowed), we do not see the necessity to impose these requirements, which amount to detention, on travellers who are *not* reasonably suspected of committing an offence.

If the requirement to answer questions on withdrawal – absent any reasonably grounded suspicion – is left intact, it is not difficult to speculate that many travellers who are uncomfortable with US preclearance officer questioning and who withdrew, for completely innocent reasons including that they believe they are being subjected to discrimination by an officer, will find themselves in a situation of being essentially detained without justification. We are unaware of any evidence that the right to remain silent, and the right to withdraw, that travellers possess under the *Preclearance Act* pose a threat to border security, and the government has provided no compelling justification for infringing these rights. Given how significant a departure this regime is from the caselaw on investigative detention, it is reasonable to argue that this requirement could be found unconstitutional.

We note that the Canadian Bar Association’s submission provides an excellent illustration of how easily a traveller exasperated by what they perceive as intrusive questioning could end up in a precarious situation under Bill C-23, facing ongoing questioning by the US preclearance officer without any true recourse.¹¹ We agree with the CBA that the right to withdraw is not meaningful under the current provisions of Bill C-23 but we diverge from their position in terms of a remedy. While the CBA has proposed that the traveller’s obligation to answer questions be replaced with the requirement to provide a written statement, we do not think that this sufficiently protects the rights of travellers. We are aware of no sufficiently compelling justification to eliminate the right to withdraw in situations where there is no reasonable suspicion of an unlawful purpose on the part of the traveller.

Furthermore, we do not support the extent to which the Bill broadens the scope of offences in relation to which a US preclearance officer may prevent a traveller from withdrawing from a preclearance area. As mentioned above, a US preclearance officer may currently detain a traveller wishing to withdraw if they believe on reasonable grounds that the traveller has made a false statement or has obstructed an officer.¹² Sections 14(1) and 32 provide much broader powers for a US preclearance officer who has reasonable grounds to suspect that a traveller has committed an offence under an Act of Parliament. Section 14(1) provides a power of detention generally, whether or not the traveller withdraws. Section 32 provides a range of powers in respect of travellers withdrawing from preclearance that the US preclearance officer believes

¹¹ Under Bill C-23, rather than simply being able to walk away, a traveller will be subjected to a further line of questioning about their reasons for withdrawing. In this context, a traveller is obligated to keep answering questions until the US preclearance officer is satisfied. If the traveller remains silent or does not provide adequate replies, they could be liable for obstructing an officer under s. 38 and face a maximum penalty of two years imprisonment. The traveller could try to appeal to the temporal limitation on the US preclearance officer’s powers (that they cannot “unreasonably delay the withdrawal”). This limitation is imprecise, as already noted, and is of limited value given that the US preclearance officer could maintain that further questioning is required to protect national security. Canadian Bar Association, *Bill C-23, Preclearance Act, 2016* (March 2017) at 5. Available at <https://www.cba.org/News-Media/News/2017/March/Bill-C-23,-Preclearance-Act>.

¹² *Preclearance Act*, s. 24(1).

on reasonable grounds has committed an offence under an Act of Parliament. If such grounds exist, the US preclearance officer may detain the traveller and exercise the following powers:

- direct the traveller to identify themselves and to produce photo identification
- to take and retain a photograph of the traveller if the identification supplied by the traveller doesn't allow their identity to be verified,
- question the traveller,
- collect information from the traveller,
- examine, search and detain goods in the travellers possession or control,
- conduct a frisk search of the traveller if there are reasonable grounds to suspect that the traveller has on their person concealed goods
- detain the traveller for the purpose of a strip search if there are reasonable grounds to suspect that the traveller has on their person concealed goods or anything that would present a danger to human life or safety and the search is necessary for the purpose of maintaining the security of or control over the border.

In the BCCLA's view, this grant of power is overbroad because a US preclearance officer need only believe that a traveller has committed an offence under any Act of Parliament, at any time, whether related to crossing the border or not. For example, this wording could allow a US preclearance officer to exercise all of these powers if they knew that an individual had a conviction for marijuana possession from 20 years prior, had harmed fish contrary to the *Fisheries Act*, had committed an offence as a minor that was dealt with under the *Youth Criminal Justice Act*, or committed an infraction of the *Canada National Parks Act*. This wording also appears in section 24(1) of the existing *Preclearance Act*. We think that the language is overbroad and should be limited so as to make clear that US preclearance officers only have these powers when they have reasonable grounds to suspect that a traveller has committed an offence under an Act of Parliament in connection with the travel, not just any offence at any time, however disconnected from their current situation or travel. This is broader than the current scope of offences under the *Preclearance Act*, but tailored to the objectives of the Bill which is to enhance aviation safety and border security, instead of casting the net unduly widely to capture any offence ever committed in Canada by any traveller.

The BCCLA is also concerned with the scope of the potential information sharing under the bill when someone withdraws from the preclearance area. Section 33(1) states that information collected from travellers after their withdrawal cannot be used, except for the purpose of maintaining border security between Canada and the United States, "or as otherwise authorized by law". This broad additional authorization permits a potentially wide range of use and sharing of this information, including sharing to foreign governments, after which point Canada would have no control over the information or its use. As it

may be US preclearance officers collecting this information under Canadian authority, this information will likely be retained by US authorities and Canada will have no ability to control its use to begin with.

In general, we reiterate that the Bill's broad potential restriction on the right of travellers to withdraw from preclearance areas unimpeded is unjustified, and of great concern to the BCCLA.

➤ **Recommendations regarding Withdrawal:**

- Ensure that the right of a traveller to withdraw from a preclearance area remains meaningful. This can be achieved by:
 - Adding a provision reflecting the current s. 16(3) to provide that the refusal to answer any question asked by a US preclearance officer or a Canadian officer does not in and of itself constitute grounds for the officer to suspect that a search of the traveller is necessary or that an offence has been committed.
 - Removing the traveller's obligations to answer questions and to follow directions if they choose to withdraw from preclearance.
 - Adjusting the language in s. 32 so that it only enables a US preclearance officer to interfere with a traveller's right to withdraw from the preclearance if the US preclearance officer suspects on reasonable grounds that the traveller has provided false or deceptive information or has obstructed an officer, or has committed an Act of Parliament in relation to their presence in the preclearance area and their travel.

2. Power of US Preclearance Officer to detain travellers who are not withdrawing

We note that similar to the current *Preclearance Act*, Bill C-23 enables a US Preclearance Officer to detain travellers who are not withdrawing from the pre-clearance area in certain contexts. Currently, a person may be detained if the US officer believes, on reasonable grounds, that that the traveller has made a false or deceptive statement or has obstructed a US preclearance officer or a Canadian officer, or has committed an offence under an Act of Parliament punishable by indictment or summary conviction. Under Bill C-23, this is expanded to allow detention "if a preclearance officer has reasonable grounds to believe that a person has committed an offence under an Act of Parliament." As noted above, we object to the extent of this expansion, and suggest a change to permit such detention only where there are reasonable grounds to suspect that a traveller has committed an offence under an Act of Parliament punishable by indictment or summary conviction in connection with the travel, not just any offence at any time. Such a scope, which is narrower than under the existing *Preclearance Act*, would be properly linked to the objectives of the Bill which is to enhance aviation safety and border security instead of acting as a possible dragnet for any person who has ever committed an offence.

Currently, a US Preclearance Officer must deliver any traveller detained "as soon as possible" into the custody of a peace officer.¹³ Bill C-23 has a similar requirement but changes the language to "as soon as feasible" and requires the traveller to be delivered to a police officer or border services officer.¹⁴ We support a restoration of the "as soon as possible" wording which requires immediate transfer to Canadian

¹³ *Preclearance Act*, SC 1999, c 20, s 24(2).

¹⁴ Bill C-23, s. 14(2).

authorities, as opposed to “feasible” which could be interpreted to mean that the transfer can wait until operational reality makes it convenient. The fact of the changed wording sends an unambiguous message that such transfers will be permitted to go more slowly under Bill C-23, and that other priorities may legitimately be placed ahead of conducting the transfer. We are aware of no evidence to suggest why this change is necessary. Even if it makes operations easier or more efficient for US preclearance officers, this must be weighed against the fact that the detention of an individual in Canada by an agent of a foreign government is a very serious matter, and people who are detained are constitutionally entitled to expeditious treatment with a view to ending their detention as quickly as possible.

➤ **Recommendation on detention:**

- Section 14(1) should be amended to permit detention by a US preclearance officer only if a preclearance officer has reasonable grounds to believe that that a traveller has committed an offence under an Act of Parliament punishable by indictment or summary conviction in connection with the travel.
- Section 14(2) should be amended to require delivery of the detained person to a Canadian police or border services officer “as soon as possible”.

3. Charter rights and remedies are not generally enforceable against the US and US preclearance officers

While it has been repeated often that Bill C-23, like the *Preclearance Act*, states that a US 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*, it is our position that this is, in large part, meaningless because it will be all but impossible in most cases to obtain a remedy against the United States for violations of these human rights guarantees.

Constitutional and human rights liability: Section 11 of the Bill states 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*.” However, it appears that it will be nearly impossible, in many cases, to hold the United States to account for human rights violations. Section 39(1) provides that civil proceedings, which we presume includes litigation under the *Charter* or human rights legislation, may be brought against the United States in respect of a US preclearance officer’s exercise of powers or performance of duties under the Act – unless the United States is immune from such actions under the *State Immunity Act*. The *State Immunity Act* provides that, unless the United States consents, it is immune from most civil proceedings in Canada unless they relate to a death or personal or bodily injury, or the damage to or loss of property. Therefore, unless someone dies or is injured, a Canadian is statute-barred from successfully suing the United States government for a *Charter* breach, and the US government would similarly not be liable under the *Canadian Human Rights Act* if the Canadian Human Rights Commission were to file a complaint on a traveller’s behalf.

As a result, it appears as though most travellers whose rights are infringed will not, in cases that do not involve death or injury, be able to obtain an effective remedy.

It does appear that the United States government could be liable for a civil tort action related to a death or injury, though individual officers are immune from civil liability under section 39(2).

In addition, section 39(3) states that the US officers are not Crown servants for the purpose of the *Crown Liability and Proceedings Act*, which purports to have the effect that the United States is not considered “government” when its agents exercise the governmental power given to them by this Bill. This creates a very confusing state of affairs in terms of liability for breaches of the *Charter* – as the *Charter* (and the *Bill of Rights*) are only binding against government. Even if the *State Immunity Act* did not allow a *Charter* action against the United States, this section could be interpreted as protecting them from liability for breaches of the *Charter* and *Bill of Rights*.

If the United States government is not liable under the *Charter*, then is Canada liable for *Charter* violations due to the fact that it conferred the power to begin with? The same provision section 39(3) suggests that Canada cannot be held liable for the actions of US preclearance officers, as they are not servants of the Crown under the *Crown Liability and Proceedings Act*. Even if Canada is found by a court to be liable for *Charter* and human rights violations of US preclearance officers, and the US action was determined to be in violation of the *Charter* or the *Canadian Human Rights Act* – how would Canada ensure that US preclearance officers, and the US government, complied with any direction given by the court when Canada has no authority to direct the US officers to begin with?

Hopefully, the United States would simply comply, but if they fail to do so completely, or fail to do so at all, will Canada require the United States to comply and, if necessary, to change its practices? If Canadian urging is ineffective at securing compliance by the United States, what then? There appears to be no mechanism to ensure such compliance beyond the use of persuasion, short of suspending preclearance operations, or terminating the agreement. We are certain that these latter two drastic remedies will not be employed by the government, and nor would we urge them on the government given the significant policy and economic disruption that would be involved. We are seemingly left, then, with a lack of any means by which to ensure United States compliance with Canadian law and rulings of Canadian courts and tribunals, should the United States fail to respect them of its own accord.

Bill C-23 appears to us to create a situation in which it will be nearly impossible in most cases for an aggrieved individual, the Courts, and the Canadian Human Rights Tribunal to effectively hold the United States government to account for human rights violations. Any Canadian concerned with the oversight and accountability of those who wield state coercive power would be rightly troubled by this. It is highly problematic for the Crown to delegate coercive power to any third party, including foreign agents, while shielding itself from liability for the exercise of those powers. It is highly problematic for US agents to be wielding government power, but to be legally treated as if they are not performing a government function and therefore, potentially not be liable under the *Charter* for breaches. The possible de-coupling between the

delegation of power, and effective accountability for the exercise of that power, is highly objectionable and a formula for trouble in the future.

➤ **Recommendations regarding civil and *Charter* liability:**

- The Bill is wracked with issues related to who is responsible for breaches of people's fundamental human rights, and how these should be remedied. The Bill should clarify what entity is liable for a breach of the *Charter of Rights and Freedoms* and human rights legislation by a US preclearance officer in Canada, how the United States will be effectively held to its obligations, and how compliance will be enforced against the United States.
- Clarify who is liable for a breach of United States law by a Canadian officer operating in preclearance areas in the United States.

4. Canada needs stronger power to assert criminal jurisdiction if the U.S. does not prosecute appropriately

Criminal liability: With respect to the criminal liability of a US preclearance officer, it appears that the US has primary criminal jurisdiction over a current or former US preclearance officer.¹⁵

Section 62 of the Bill amends the *Criminal Code* to state that the Attorney General of Canada will stay any criminal court proceeding in relation to the act or omission of a preclearance officer if the United States gives notice that it is exercising primary criminal jurisdiction under the Agreement. The proceeding may only be recommenced if the United States gives notice that it is waiving its jurisdiction, or if the United States “has declined, or is unable, to prosecute the accused and the accused has returned to Canada,” and if the Attorney General does not give notice of recommencement within one year from the date that she stayed the charge(s), the proceeding is deemed never to have been commenced.

This section of the Act, and the associated sections of the Agreement, raise the concern of what could happen if the United States asserts jurisdiction, commences a proceeding, but does not follow through appropriately and the accused does not return to Canada. It is not uncommon for law enforcement officers to evade criminal responsibility in justice processes in the United States. The US criminal justice system has had well-publicised issues of perceived bias in favour of law enforcement officers who are subject to allegations of improper use of force. The BCCLA is concerned that US preclearance officers who are alleged to commit crimes in Canada may, in some instances, not be subjected to an appropriately rigorous and fair prosecution or trial. What if the US prosecutor initiates a prosecution, but then chooses to stay the prosecution, or merely deprioritizes it, due to a lack of available evidence or witnesses – a gap that might be due to the very fact of prosecuting the offence in the US at some distance from the location in Canada where it took place? This would be entirely unjust, but is totally possible under this Bill. Under the proposed language, if the prosecution remains open, would this count as the US prosecutor having declined or being unable to prosecute? As a matter of accountability for those being given extraordinary law enforcement-like powers, it is important that US preclearance officers are not able to escape criminal liability should the United States assert primary criminal jurisdiction and then fail to appropriately prosecute them. Any calibre of prosecution would be sufficient to displace Canadian jurisdiction. While we do not advocate for a system

¹⁵ Bill C-23, s 42.

that would place an accused officer in a situation of “double jeopardy”, having to face a second Canadian prosecution after an unsuccessful but completed American one, we are very concerned that the automatic giving up of primary jurisdiction may have unjust results.

In deciding whether to waive primary criminal jurisdiction in respect of Canadian officers in the United States, the Attorney General is required to consider factors such as the impact on the evidence and witnesses if a trial were held in Canada for an offence committed in the United States, which country has the greater interest in the prosecution, and the severity of sentence that might be given if the Canadian officer were convicted in the US. These are appropriate considerations, and this Bill leaves Canadians in the position of hoping that the US Attorney General may exercise his discretion according to similar considerations with a focus on ensuring justice for officers and affected persons alike.

In the event the US does assume jurisdiction, we question the extent to which Canadians affected by alleged criminal offences on the part of US officers will be able to effectively participate in the criminal justice process. Will they be able to effectively act as witnesses? Will they have their expenses paid to travel to attend any trial or proceeding, which could take place at a significant distance from the location of the alleged crime? Will they be eligible for victim support funding that may be available under certain circumstances to victims of crimes committed in Canada? Will a potentially faraway US prosecutor be able to obtain the evidence required to support the case? Will the US prosecutor, likely strained for capacity, prioritize an alleged crime committed outside the United States? None of this is clear.

Modifying the Bill so that the Attorney General of Canada can recommence proceedings, or so that charges can be laid in Canada, when the United States claims jurisdiction but is deemed to have waived it by a failure to prosecute the offence within a reasonable time (different from the more general condition of being “unable” to prosecute in the current Bill) might help to remedy this potential problem. If the United States initiated the prosecution but then failed to follow through, whether by mere inaction or by staying the charges, this could allow Canada to take jurisdiction without placing an officer in a condition of double jeopardy. Canada could permit the United States reasonable leeway in conducting its prosecution, and the United States would have an incentive to proceed with appropriate speed in doing so. This would not deal with the situation of a prosecution that is unsuccessful because of poor prosecution or other factors, but it might at least avoid the situation in which a prosecution could be “buried” due to inaction that does not meet the legal test of having declined to our being unable to prosecute found in the current Bill.

➤ **Recommendations regarding criminal liability:**

- Ensure Canada can assert criminal jurisdiction over a US preclearance officer if the US initially claims primary jurisdiction but then fails to prosecute the officer within a reasonable time.

5. US officers must not be given the power to conduct strip searches under any circumstances

The *Preclearance Act* provides that a US preclearance officer may detain any person for the purpose of a strip search if they suspect on reasonable grounds either that the person is carrying anything that would present a danger to human life or safety or that the traveller is carrying anything that would afford evidence that the

traveller made a false or deceptive statement.¹⁶ The US preclearance officer is not authorized to perform the strip search, however. Instead he or she must without delay request a Canadian officer to conduct the search.¹⁷ After receiving such a request, the Canadian officer may conduct the strip search if they too suspect on reasonable grounds that a strip search is necessary.¹⁸ The US preclearance officer who detained the traveller may observe the strip search (provided that they are the same sex as the detainee) but has no power to perform it under the current law.¹⁹

Bill C-23 provides the US preclearance officer with somewhat broader powers to detain a traveller for a strip search: in addition to reasonable grounds to suspect that the traveller has on their person concealed goods or anything that would present a danger to human life or safety, a US preclearance officer will also have the power to detain a traveller if there are reasonable grounds to suspect that the search is necessary for the purpose of conducting preclearance (i.e. the exercise of powers and performance of duties and functions under the laws of the United States on the importation of goods, immigration, agriculture and public health and safety).²⁰ We do not have concerns about these powers to detain for the purpose of a strip search.

Bill C-23 reflects the current law insofar as it requires a US preclearance officer to immediately request a Canadian officer on detaining a traveller for a strip search and to request the Canadian officer to conduct the search and advise of the grounds on which the traveller was detained.

However, under the Bill, the US preclearance officer may conduct the strip search if the Canada Border Services Agency advises the US preclearance officer that no Canadian officer is available within a reasonable time, or the Canadian officer does not arrive within a specified period.²¹ We are deeply opposed to these provisions. First of all, it is not clear what constitutes a “reasonable time”, or who gets to determine what is a “reasonable time” – the Canadian officer or the US preclearance officer? We do not see a compelling reason why a U.S. officer should be permitted to conduct a strip search simply because of how busy Canadian officers might be at any given moment. Moreover, it is reasonable to speculate that the CBSA may with time become comfortable with saving resources by not making Canadian officers reasonably available for such searches given that the US preclearance officer can step in should a Canadian officer be unavailable. Further, it seems to us to be unreasonable to permit a US preclearance officer to conduct an invasive search simply because a Canadian officer may be late for a scheduled appointment to conduct the search. In addition, Canadian officers may themselves become comfortable with their US counterparts, with whom they will hopefully have positive and professional relationships, performing these searches. Given the looseness of the Bill’s language, it is not difficult to imagine that the normal and collaborative relationship between Canadian and US officers could promote a willingness on the part of CBSA to focus on other

¹⁶ *Preclearance Act*, s 22(1).

¹⁷ *Preclearance Act*, s 22(1).

¹⁸ *Preclearance Act*, s 22(2).

¹⁹ *Preclearance Act*, s 22(2).

²⁰ Bill C-23, ss 5 (definition of “preclearance”), 10(1) and 22.

²¹ Bill C-23, s 22(4)(b) and (c).

duties and not provide strip search support within a reasonable time, allowing US preclearance officers to conduct the searches instead.

Given that section 16 of the Bill allows US preclearance officers to exercise as much force as is necessary to carry out their duties, including to preserve themselves or others from grievous harm, and could restrain an individual who was genuinely threatening, it is impossible to imagine what kind of circumstance would justify allowing U.S. officers to conduct strip searches. Surely a traveller who presents an imminent danger could be restrained until a Canadian officer arrived, and just as surely, the presence of Canadian officers will be hastened by a situation of genuine danger. There is simply no need for a strip search without waiting for a Canadian officer. While it is clearly important that any genuinely necessary search be conducted quickly and that the time spent detained be minimized, the desire on the part of the U.S. authorities for a rapid strip search and the trivial reasons that a Canadian officer is waylaid on the way to an appointment to conduct a search, or Canadian officers are overstretched and cannot attend quickly, must not be a basis for Parliament to confer such exceptional powers on US preclearance officers.

In addition, we are very disturbed that Bill C-23 provides a US preclearance officer is with the authority to conduct the strip search themselves if a Canadian officer “declines to conduct it.”²² On what basis would a Canadian officer decline to perform the strip search? Presumably, it would be if the Canadian officer is not in agreement with the US preclearance officer that there are reasonable grounds to suspect that a strip search is necessary. There is simply no situation imaginable in which a US officer should be granted the power to conduct a strip search that Canadian officers do not consider necessary to perform. This language is especially troubling given our concerns about how, and the extent to which, US preclearance officers will be familiarized with Canadian law and the lack of clear accountability for breaches of human rights.

In the civil contract between the people and the state, Canadians expect that their fundamental liberties will only be infringed in extremely limited and justifiable circumstances. The Bill’s unprecedented grant of power to perform strip searches by the US preclearance officers is unprecedented and untethered from any justification of which we are aware. A strip search is a *prima facie* violation of the *Canadian Charter of Rights and Freedoms*, though it may be justified in limited circumstances. The Supreme Court of Canada has made clear that strip searches are inherently humiliating and degrading, and can inflict psychological trauma on an individual.²³ It is a power that Canadians entrust the Crown’s sworn peace officers to exercise over us in the most limited of circumstances, incidental to arrest, and only when absolutely necessary. In the view of the BCCLA, such a power must never be delegated by the Crown. There are some powers that we can only entrust to those who are sworn to serve us and to uphold the Constitution of Canada through their oath. Our certainty in this is bolstered by the unclear mechanism to ensure accountability under the *Charter* for this delegation. There is no basis for Canada to delegate the power to strip search travellers to foreign

²² Bill C-23, s 22(4)(a).

²³ *R.v. Golden*, 2001 SCC 83 at paras 89-90.

officials. We urge the committee to amend Bill C-23 so that that all powers for the US preclearance officers to perform strip searches be removed.

➤ **Recommendation regarding strip searches:**

- Do not confer powers to perform strip searches in preclearance areas in Canada to US preclearance officers. Maintain the status quo that in limited circumstances, Canadian officials may perform strip searches of travellers in preclearance areas.

6. Inadequate notice to travellers

We recognize that there are regulatory powers in the Bill respecting obligations on the operator of a facility, including to post signage or other means of communication with respect to preclearance areas and preclearance perimeters. We ask the Committee to urge the government to use these powers to ensure that travellers are aware what their obligations are in a preclearance area prior to entering. Canadians and other foreign nationals will not be familiar with what kind of powers the US preclearance officers have been delegated under this law and will likely be unaware that they can withdraw at any time from the process.

We are particularly concerned about travellers being aware of what their rights and obligations are because Bill C-23 contemplates that there may not even be signage in the preclearance areas or perimeters themselves. Section 20(2) provides that a US preclearance officer is permitted to collect biometric information from the traveller only if notification that travellers may withdraw from preclearance is provided in the preclearance area itself. This implies that such notification will not be mandatory at all facilities, and that such notification is not required *prior to* entering preclearance areas or perimeters.

If the rights of travellers on our soil will be affected by the possible interrogation and possible detention and strip searches by US preclearance officers in these areas, it is vitally important that they be informed as such so that they may choose not to enter in the first place. The need for notice to be provided to travellers in advance is especially critical if our first set of recommendations in relation to meaningful withdrawal are not adopted.

We note that for travellers arriving at a location designated as a preclearance area in a conveyance, the conveyance itself becomes part of the preclearance area as soon as it is stationed such that all or part of it is outside the preclearance area.²⁴ Bill C-23 should provide some kind of mechanism for such travellers to be notified of their rights and obligations in preclearance areas and to be provided with an option to leave the conveyance prior to the conveyance becoming part of the preclearance area. There could be a regulatory

²⁴ Bill C-23, s 6(2).

requirement for operators of these conveyances to distribute notice to travellers and to provide them with a reasonable opportunity to exit the conveyance prior to stationing it next to a preclearance area.

➤ **Recommendations regarding Signage and Notice to Travellers:**

- Use the regulatory power in s.43(1)(c) of Bill C-23 and expand as required to ensure the following are legal requirements when the statute comes into force:
 - Require that signage be posted outside of a preclearance area and/or some form of notice be distributed to travellers. The signage or other form of notice must inform travellers of their rights and obligations inside a preclearance area so that they may choose not to enter.
 - Require operators of conveyances destined for a preclearance area in preparation for departure to the US provide a reasonable opportunity for travellers to exit the conveyance prior to stationing it next to the preclearance area.
 - Require notice to be posted in all preclearance areas to inform travellers of their right to withdraw.

7. The government should report annually to Parliament on preclearance

The *Preclearance Act* mandates that the Minister conduct an independent review of the Act five years after it came into force, and to have a report about it presented to the House of Parliament.²⁵ We support the inclusion of a similar but expanded clause in Bill C-23, with a recurring duty to review and monitor the implementation of the statute to ensure that the program is not compromising the rights of travellers in preclearance areas.

In addition, there should be a duty to publish a report on an annual basis that discloses data about activities occurring in each individual preclearance area, including the following:

- How many travellers exercise their right to withdraw
- How many travellers are subjected to additional questioning and the reason(s) for it
- If strip search powers are delegated to US preclearance officers (though we stress that such powers should not be conferred), how many people are strip searched by US preclearance officers and the reason for it (i.e. Canadian officer is not available or didn't arrive within a specified period of time)
- How many travellers are subjected to a monitored bowel movement
- How many travellers are subjected to a body cavity search
- How many travellers are arrested
- For all of the above matters, the race and nationality of the travellers concerned

²⁵ *Preclearance Act*, SC 1999, c 20, s 39.

➤ **Recommendations regarding Review of the Act and Reporting:**

- Add language to Bill C-23 that requires the Minister to cause an independent review of the Act and its administration to be conducted and to cause a report of the review to be laid before Parliament five years after the legislation comes into force and every five years thereafter.
- Add a duty for the Minister to publish a report on an annual basis with data about each preclearance area and how statutory powers such as detaining travellers, questioning and search and seizure powers have been exercised. The report must include information about the nationality and race (if possible) of the travellers concerned.

8. Training of US Preclearance Officers and Canadian Officers

Bill C-23 does not expressly provide for any training to be provided to US preclearance officers operating in Canada or to Canadian officers operating in the United States, nor does it require any other professional standards to be met. We are concerned about the practicalities of foreign officers becoming familiar with Canadian law, including the *Canadian Charter of Rights and Freedoms*, the *Canadian Bill of Rights* and the *Canadian Human Rights Act*. While the Bill provides that a US preclearance officer must exercise their powers and perform their duties and functions in accordance with such law, it is not at all clear how US preclearance officer will learn about and adapt to the changes between their law enforcement culture and ours.

It is important that US preclearance officers undergo a rigorous training and development program to ensure that they understand all aspects of Canadian law and use of force doctrines, especially with respect to questioning, interrogation, examination, search, seizure, forfeiture, detention and arrest. While such training standards do not need to be prescribed in law, Canada must take every opportunity to ensure that US preclearance officers are properly educated.

9. Preclearance should not result in the denial of entry of permanent residents or be used to bar asylum-seekers

In their submission, the CBA emphasizes that there is no justification for including provisions in Bill C-23 that allow a Canadian officer to deny entry to a permanent resident in a preclearance area and to turn away persons seeking to enter Canada to make a claim for refugee protection.²⁶

We agree with the CBA that Bill C-23 should uphold the unqualified right of a permanent resident to enter Canada. Questions of admissibility to Canada, in respect of a permanent resident, ought to be dealt with and determined while a permanent resident is in Canada. They should not be marooned abroad while they are engaged in the process of having their admissibility determined, and possibly challenged. Officials can and do make errors on admissibility determinations. We must bear in mind that under the *Immigration and Refugee Protection Act*, a permanent resident may be determined to be inadmissible if an officer has “reasonable grounds to believe” that he or she was convicted of one or more offences outside Canada. Making this determination often requires detailed legal analysis, which is simply not possible at a Canadian preclearance site abroad and which, in any case, can give rise to reviewable errors. Fairness requires that such an assessment be made in Canada, where the permanent resident has a full opportunity to respond to the

²⁶ Canadian Bar Association, Bill C-23, *Preclearance Act*, 2016 (March 2017) at 10-11. Available at <https://www.cba.org/News-Media/News/2017/March/Bill-C-23,-Preclearance-Act>.

process, to obtain counsel, and to challenge an erroneous decision that could result in their removal from Canada. For this reason, a system should be created that would allow such permanent residents to receive an initial notice of their potential admissibility at the preclearance station, allow them to proceed to Canada and either be met by CBSA in Canada, or be subjected to a duty to report to CBSA upon their return to the country. If they failed to appear, they could be subjected to an arrest warrant.

Bill C-23 similarly prohibits anyone from making a refugee claim at a preclearance station outside Canada. The BCCLA shares the concerns of the CBA that such a power could be in violation of Canada's obligations under the UN Convention on Refugees. Those who plan to make a refugee claim in Canada should not be prevented from doing so at preclearance stations.

At present, a refugee claimant who flies to Canada is not subject to the *Safe Third Country Agreement*. Canadian preclearance stations abroad should not become a tool to prevent travel of asylum seekers to Canada. If preclearance stations expand to a great number of important connection points for flights to Canada in the United States, access to Canada could become increasingly difficult for asylum seekers, against the spirit of our adherence to the *Refugee Convention*.

➤ **Recommendations regarding Permanent Residents and Refugee Claimants:**

- Change s. 48 of Bill C-23 to ensure that a traveller with a permanent resident status who may be considered inadmissible is able to return to Canada in order to have their admissibility determined once they have returned.
 - Remove any power to refuse to permit a permanent resident to enter Canada through a preclearance area.
- Change s. 48 of Bill C-23 to permit persons seeking protection or Convention refugee status to proceed to the port of entry to make a claim.

10. Solicitor-Client Privilege

In their submission, the CBA highlights the importance of solicitor-client privilege as a pillar of the Canadian legal system and the lack of clarity about whether Canada or the United States has a defined policy which respects such privilege in border searches. The CBA recommends that the Ministry of Public Safety establish a working group to develop a fair and balanced policy for searches in preclearance areas that preserves solicitor-client privilege over devices and documents.²⁷ The BCCLA endorses this recommendation by the CBA.

11. Return of Detained Goods

The BCCLA further supports the discussion and recommendation in the CBA's submission about the return of goods that are detained or seized in preclearance areas.²⁸ There must be clear mechanisms under

²⁷ Canadian Bar Association, Bill C-23, *Preclearance Act, 2016* (March 2017) at 7-8.

²⁸ Canadian Bar Association, Bill C-23, *Preclearance Act, 2016* (March 2017) at 8-9.

the law for travellers to have any seized or detained goods returned to them should it eventually be determined that no contravention occurred.

12. Seizure of Nexus Cards

We also agree with the CBA that travellers whose NEXUS cards are revoked in a preclearance area deserve a stronger appeal procedure than is currently available. We therefore adopt their recommendation to add language to Bill C-23 that would subject decisions to revoke or confiscate a NEXUS cards in preclearance areas to review by the NEXUS Redress Committee and Recourse Directorate. Alternatively, the State parties should provide an alternative review process that respects due process and procedural fairness.²⁹

13. Conclusion

Bill C-23 proposes broad changes to the powers of US preclearance officers operating in Canada and enables Canadian officers to exercise powers in preclearance areas in the US. In this submission, we have outlined our primary concerns about how the law could unjustly interfere with the rights of people travelling through preclearance areas. Bill C-23 demands careful and serious consideration. We hope that our discussion and recommendations will assist the Committee in its deliberations.

²⁹ Canadian Bar Association, Bill C-23, *Preclearance Act, 2016* (March 2017) at 9-10.