May 12, 1999

Mr. Bill Graham
Chair, Standing Committee on
Foreign Affairs and International Trade
House of Commons
Room 637, 180 Wellington Street
Ottawa Ontario K1A 0A6

Dear Mr. Graham,

Re: Bill S-22 - *The Pre-Clearance Act*

The Citizenship and Immigration Section of the Canadian Bar Association (the "Section") is pleased to have the opportunity to appear before the Foreign Affairs Committee of the House of Commons regarding Bill S-22, *The Preclearance Act*. In this letter, we wish to highlight some of our major concerns, given that the Bill has been substantially amended since we prepared our original brief. However, the original brief is still relevant in that it correctly states our position on the basic structure of the legislation and many of the provisions of the Bill which have remained unchanged.

We wish to reiterate that the Section is strongly supportive of having preclearance facilities, including in transit pre clearance facilities, at Canadian airports. We believe that this provides a substantial convenience to Canadian travellers, and a competitive benefit to Canadian air carriers. Legislation is much needed in this area, as there appears to be little or no legal authority for the way in which preclearance areas are presently being operated.

Bill S-22, however, represents a substantial intrusion upon Canadian sovereignty in that it gives officers of a foreign government the power to enforce foreign preclearance laws on Canadian soil. The Section believes that preclearance and in-transit facilities can be legislated in an effective manner that is less intrusive, particularly for Canadian citizens and permanent residents. We also have concerns about the legal implications of the Bill. While some of our arguments were effectively addressed with the amendments made before the Senate, we still have substantial concerns with the Bill as it is presently drafted, and we recommend that changes be made before it is passed into law.

Our key concerns include the following:

1. The Section remains of the view that it is possible to achieve our goals by continuing with a voluntary, rather than compulsory, framework. Persons wishing to go to the U.S. would voluntarily submit themselves to examination and if necessary, search. If they did not wish to undergo or continue with this process, they could withdraw their application to enter the U.S. and leave the preclearance area. We do not believe it is necessary to create Canadian offences for resisting the enforcement of foreign laws on Canadian soil. We believe that sections 33 and 34 should be removed and that Section 10 should be amended to clearly provide a right of withdrawal.

2. The Section believes it is not necessary to grant preclearance officers the power to enforce U.S. laws on Canadian soil. In particular, we see no reason for granting the power to levy administrative fines or to seize property and declare it forfeit pursuant to U.S. law. Those in favour of the Bill argue that the U.S. officers should have the same powers that they enjoy at land crossings, where they are operating from American soil. With respect, we believe that there is a major distinction, which is both legal and geographic. If we grant these powers, they can result in enforcement of penalties or the forfeiture of goods in Canada, for doing things which are not offences under Canadian law. Furthermore, access to American appellate or judicial review process is much more difficult due to the absence of U.S. counsel and U.S. courts. It would also appear that, unlike persons at inland crossings, persons at preclearance areas may not have the protection and benefit of the U.S. Constitution.

3. Use of force - We are particularly concerned about section 12, which authorizes preclearance officers to use “as much force as is necessary” in order to effect their purposes. At the very least, this Section should be modified by the term “reasonably” prior to “necessary”. However, we question whether the section is necessary at all if a voluntary framework is adopted.

4. Detention - The Section believes that sections 10 and 22 of the Bill contain an unacceptably low threshold for detention by a preclearance officer. Both of those Sections allow for detention based on mere suspicion. It is our belief that this is constitutionally questionable. Although the Supreme Court of Canada has allowed such a threshold with respect to Canadian Customs officers' powers over persons who are seeking to enter Canadian territory, we question whether this low threshold is justifiable when we are protecting another country’s territory. We submit that the test contained in Section 24 (belief on reasonable grounds) is preferable.

5. Use and destruction of passenger information - Although section 32 purports to create a process whereby information will be quickly destroyed, it appears to in fact create a process

whereby the information could be stored indefinitely on the grounds that "it is reasonably required for the enforcement of preclearance laws". Under the broad wording of this Section, it would not be difficult for authorities to justify keeping passenger information obtained from private sources for the purposes of determining travel routes and patterns, etc. We believe this may represent an unwarranted intrusion into privacy rights.

6. Offence Provisions - the Section remains firmly opposed to the creation of Canadian offences for resisting or misleading a foreign preclearance officer. The government responded to our initial concerns by modifying section 33 to make it a summary conviction offence that does not create a criminal record. They neglected to do this with section 34 and we can see no reason why, at the very least, it should not be similarly amended. However, we reiterate that it would be preferable to delete these sections entirely. Although one of the justifications for this legislation is to create a similar situation at preclearance areas to what exists at the land crossings, it should be noted that there is presently no Canadian offence governing representations made to U.S. preclearance officers at land crossings.

   Although section 33 was substantially amended before the Senate, we are concerned that it is still too broad. We recommend that if this section is to remain, it should be qualified by stating that misrepresentation must be "material" in order to create an offence.

   The Section recognizes that there is a substantial distinction between in-transit preclearance and the preclearance of those whose travel originates on Canadian soil. We can see much greater justification for the enforcement powers created by this Bill applying in in-transit areas, for persons who never intend to enter Canada. While we believe such a legislative scheme could be created, we remain concerned that this not be used as a justification for extending the legislative reach to travellers who begin there journeys in Canada.

We would be pleased to elaborate on our concerns and to continue our discussions with the Department of Foreign Affairs and International Trade and the House Committee on Foreign Affairs.

Yours truly

Michael A.E. Greene,
Treasurer,
National Citizenship and
Immigration Law Section