Submission on Bill S-22

The *Preclearance Act*

IMMIGRATION LAW SECTION
THE CANADIAN BAR ASSOCIATION

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PREFACE

The Canadian Bar Association is a national association representing over 35,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the Immigration Law Section of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the Citizenship and Immigration Law Section of the Canadian Bar Association.

Submission on Bill S-22, The *Preclearance Act*

I. INTRODUCTION

The Citizenship and Immigration Section of the Canadian Bar Association (the "Section") is pleased to have this opportunity to comment on Bill S-22 at this early stage in the legislative process.

Bill S-22 presents unique and rather novel issues. Specifically, the Bill purports to establish a formal administrative structure for the preclearance of persons destined to the United States from Canadian territory. Of particular concern is the inclusion of a quasi-criminal enforcement structure which provides for the possibility of Canadian criminal sanctions by virtue of statements made to a representative of the United States government while on Canadian soil. The present form of the legislation requires that this submission address various concerns that are of both a legal and policy nature.

In this submission, we do not comment extensively on public policy issues because many of these are political choices. However, we do outline several specific public policy issues that the Government should reconsider. We will also address specific drafting problems in the Bill.

The Section was not consulted in the drafting of this legislation and only became aware of the Bill after it was tabled in the Senate. Therefore, this submission is a preliminary response to this most important legislative initiative. The Section looks forward to reviewing and commenting on the Bill in further detail in the future.

II. POLICY CONSIDERATIONS

The Section fully supports any initiative that encourages open and efficient movement of travellers and goods between the United States and Canada. There are a number of laudable policy reasons for having legislation governing preclearance facilities at Canadian airports. Canada has long enjoyed an excellent relationship with the United States. A feature of this relationship is a spirit of cooperation in matters involving security and management of our shared border.

Canadians respect the need of the United States to control who and what enters their country. The ability to achieve the free flow of goods, services and people is premised on the adoption of a process that ensures integrity of the border. In recent years there has been increasing pressure from the United States Congress to increase the effectiveness of their controls over customs and immigration. The Section is cognizant of the desire of the U.S. government to ensure that the integrity of its borders is not compromised.

We appreciate that the existence of United States preclearance customs and immigration areas in Canadian airports can result in substantial benefits to Canada. For example, an increased number of flights produces immediate economic benefits that are enjoyed by all Canadians. Both countries have declared the recent testing of an intransit facility at Vancouver International Airport to be a success. A number of other Canadian airports look forward to hosting similar facilities.

Quite apart from the economic rationale, legislation that clarifies and codifies the preclearance process in Canada and promotes the expansion of reciprocal opportunities to travellers entering Canada is long overdue. The United States has operated preclearance areas in Canada since 1974. The lack of a clear legislative foundation for such extra-territorial activities has raised questions about the legality of the conduct of United States customs and immigration personnel in Canada and about the rights and obligations of travellers entering the United States through preclearance areas.

Notwithstanding the legitimate policy objectives for enacting preclearance legislation, the Section cannot endorse the legislation in its present form due to the following concerns:

- the propriety, from a policy perspective, of granting significant law enforcement powers to a foreign government's representatives on Canadian territory which are not necessarily accountable to the domestic legal system;
- potential inconsistency with the *Canadian Charter of Rights and Freedoms*;
- the wisdom of granting extensive powers of detention, search, seizure, forfeiture and the use of force to preclearance officers;
- the propriety of requiring submission by travellers to the exercise of such powers and of not permitting voluntary withdrawal from preclearance areas;
- the lack of definition of the scope and procedure for exercising search and detention powers by pre-clearance officers;
- the standard to be satisfied by preclearance officers in exercising their powers, which is a departure from the standard required of Canadian peace officers in enforcing their search and detention powers under criminal and quasi-criminal statutes;
- the lack of safeguards and controls, which affords travellers little protection and denies meaningful access to rights and freedoms provided under the *Canadian Charter of Rights and Freedoms*;
- the propriety of creating criminal liability for persons who neither appear before a preclearance officer nor are directly involved in the preclearance process; and
- the propriety of creating criminal liability for “assenting” to the making of a “deceptive oral statement” to a preclearance officer.

These concerns will be addressed below in greater detail. It is the view of the Section that the inadequacies of this legislation may be remedied so as to deliver the economic and social benefits desired without sacrificing essential rights and freedoms or extending criminal liability unreasonably. Accordingly, changes will be suggested both with respect to the underlying policy objectives and the language of the Bill.

III. SECTION BY SECTION ANALYSIS

Following is a section-by-section analysis of the Bill which expands on the general concerns outlined above.

Section 2 - Definitions

New : Definition of Preclearance Officer Duties

The Section recommends that the Bill set out clearly and concisely the nature and extent of the preclearance duties to be exercised by a preclearance officer in Canada. This is critical as section 34 creates an offense for obstructing the officer in the exercise of such duties.

New: Definition of Administration of Preclearance Laws

Section 6 of the Bill establishes that preclearance areas are established for the administration of preclearance laws. The extraordinary nature of the activity would suggest that it would be appropriate to define "administration". This would provide clarity, particularly when considering the duties of a preclearance officer in the administration process.

"Preclearance Laws"

The problem with the sections which refer to "preclearance laws" is that those laws are not within the control of the Canadian government. Instead, those laws are passed by the United States government which may decide to make substantial amendments at any time after this Bill becomes law. A person may become liable to prosecution by indictment in Canada for resisting the enforcement of foreign laws that may be quite incompatible with our own. This may raise 'conflict of laws' questions in particular cases, in other words questions about which jurisdiction's law applies when one is more onerous than the other.

As discussed later in this submission, we propose that provisions which allow for the enforcement of U.S. laws on Canadian soil be deleted. A person should be able to voluntarily decide not to submit to a search by a preclearance officer, at which point the U.S. can impose remedies such as denial of entry into the U.S. or imposition of monetary penalties enforceable in the U.S.. The Section strongly doubts that the United States government would be prepared to enact similar laws which allow for the enforcement of Canadian law on U.S. soil.

Section 4 - Purpose

The stated purpose of the Act is "to permit the administration of preclearance laws in Canada, subject to Canadian constitutional safeguards, in order to facilitate the movement of travellers and goods between Canada and the United States, based on the principle of reciprocity."

The Section is of the view that the legislation clearly exceeds its stated purpose in many respects. As indicated above, this Bill grants considerable enforcement powers to the preclearance officer. These powers are not merely administrative but rather may result in penal sanctions to the same extent as is provided in Canada's *Criminal Code* and therefore have an impact on substantive individual rights.

Based on "the principle of reciprocity", the Section is of the view that this legislation should only become effective when similar legislation is passed in the United States. There is presently no U.S. legislation permitting the operation of Canadian preclearance areas on American territory and in fact there are no Canadian preclearance areas in United States airports. It is only when the U.S. enacts similar legislation that there will be true reciprocity. For example, at present, we do not know whether U.S. legislation will afford travellers access to U.S. Constitutional safeguards while traveling through a Canadian preclearance area in the United States. Will Canadians be assured that these safeguards will be consistent with similar safeguards available to travellers entering a U.S. preclearance area in Canada?

The Canadian government should follow the example of the *North American Free Trade Agreement*, which is truly bilateral and reciprocal in its form and content. The provisions of *NAFTA* were mirrored in each country's respective enabling legislation. This international initiative should follow a similar process.

Section 6 - Monetary Penalties

Section 6 provides that U.S. officials may not impose a monetary penalty if a proceeding is instituted in Canada with respect to an act or omission that is an offence in Canadian law punishable by summary conviction or indictment. In any other case, administrative fines may be imposed in accordance with "preclearance laws".

The Department of Foreign Affairs web-site indicates that U.S. officials are not empowered to insist upon immediate payment of such fines. However, there is no such provision in the legislation. As a result, preclearance officers could simply require a fine to be paid by making it a condition of being cleared through the preclearance area.

Given the previous activities of U.S. Customs officials in preclearance areas and the potential for ambiguous interpretation of this section, the Section is of the view that the legislation should:

- preclude the levying of administrative fines by U.S. officials in preclearance areas;
- provide clear and unambiguous language to the effect that any administrative fine imposed by reason of an act or omission of a traveller in a preclearance area may not form the basis for the institution of a proceeding for the recovery of such fine in Canada; and
- provide that travellers should be clearly apprised of their rights and obligations before entering a preclearance area, including the right to withdraw at any time.

Section 8 - Access to a Preclearance Area

This provision precludes non-travellers from entering a preclearance area. This provision is potentially in direct conflict with provisions of the *Canadian Charter of Rights and Freedoms*, which allow a person who is detained to retain and instruct counsel without delay**.** This section should be amended to allow counsel access to this area, unless the powers to detain, search and seize by preclearance officers are eliminated.

Section 10 - Limitations on the Rights of Travellers

The Section strongly objects to the inclusion of this section in the Bill as it is presently drafted.

The basic components of the provision are:

- the traveller can voluntarily withdraw from the preclearance process and depart the area; and
- the right of voluntary departure cannot be exercised by the traveller if a preclearance officer informs the traveller that the officer suspects on reasonable grounds that there has been a contravention of ss. 33 or 34.

Sections 33 and 34 provide that it is an offence for a person to make, participate in or assent to the making of a false or deceptive oral or written statement to a preclearance officer or to resist or willfully obstruct a preclearance officer in the execution of the officer's duty.

This provision has serious technical problems. The traveller has a right to leave a preclearance area until the point in time that the preclearance officer informs the traveller that s/he suspects a contravention of ss. 33 or 34. The very act of a traveller attempting to depart after he or she is informed of the suspicion may constitute an offence under s. 34 (obstruction), even if the suspicion were later determined not to

have been reasonable. Further, the statute does not provide any standard as to how the traveller is to be "informed". Could the "informing" be verbal or must it be in writing? Does it have to be in English and/or French? As presently worded, a francophone Canadian could presumably be charged with obstructing a preclearance officer for disobeying a spoken English command.

In addition, by withdrawing the right of voluntary departure, the traveller is being 'detained'. Generally speaking, Canadian statutes do not permit the detention of a person merely upon suspicion. Rather, they require that the official have actual belief based upon reasonable and probable grounds that can be objectively reviewed.

While this section creates the impression that travellers have the right to leave a preclearance area it in fact creates a substantial restriction on that right. This goes to the very core of the powers that have been created by this legislation. We question whether it is necessary to take away a traveller's choice to withdraw their application to enter the United States. While this provision may have some merit in an intransit area, we cannot see any justifiable reason for applying it to preclearance areas. In our submission, the detention of a traveller on Canadian territory is not an appropriate power to grant a preclearance officer.

Persons seeking to enter the United States through a preclearance area are engaging in voluntary activity. They should be allowed to change their minds as to whether they wish to continue travelling to the United States at any time prior to boarding the flight. Although U.S. officials may wish to pursue lines of questioning, to have search and seizure powers or to impose administrative penalties upon individuals, the Section is of the view that such matters should be undertaken in conjunction with and under the auspices of Canadian officers.

If the object of the administration of a preclearance area is screening and interdiction, this goal can be readily accomplished with the assistance of Canadian officers. The U.S. government is entitled to develop its own remedies enforceable on its own soil for a person's acts or omissions in a preclearance area -- for example, preventing a person's entry into the United States.

Canadian law enforcement officials, who are present at all international airports which contain preclearance areas, can be immediately notified if there is a suspicion of a contravention of any Act of Parliament. This would permit the Canadian process to assume jurisdiction over the traveller.

Section 12 - Use of Force

Our concerns about this section should be viewed in conjunction with our submissions with respect to the offences in sections 33 and 34 and the detention powers in sections 10, 22 and 24.

Under this section a preclearance officer may use such force as is necessary to perform the prescribed duties in this Bill. Accordingly, it is possible that a preclearance officer may physically restrain and detain a traveller based on the officer's mere suspicion that there has been a misrepresentation or attempt to deceive. In our view, this is unnecessary and unacceptable. U.S. preclearance officers can adequately carry out their functions without exercising any force whatsoever.

Section 13 - Assistance by Canadian Officers

Canadian officers must have a more central role in the administration of the preclearance function. Accordingly, this section should provide a mandatory obligation on preclearance officers to obtain assistance from Canadian officers forthwith.

Section 16 - Compulsory Truthfulness

The Section is of the view that it is unnecessary and inappropriate to create a separate offense of a passenger in Canada being untruthful with a foreign officer (sections 33 & 34). The simple denial of entry is a forceful remedy together with whatever additional remedies the preclearance officer may impose under U.S. law.

Sections 19 to 24 - Search and Detention

Under current practice, travellers in a preclearance area are searched on a consensual basis only. The decision to refuse to submit to a search by a traveller is usually accompanied by the withdrawal of the application to enter the United States. U.S. preclearance officers have no authority to forcibly search, seize or detain.

The Section is of the view that any powers of search should be minimal and non-intrusive. It may therefore be appropriate to conduct a frisk search, as this process has become an accepted practice for air travellers. Again, as in the case of security searches, there is an option to withdraw from the search process and depart the premises.

The rationale for restricting search and detention in this fashion is simple: the process is one of preclearance. In fact, U.S. officials have full and ample opportunity to intercept the traveller upon his or her entry into the United States. That person and his or her baggage may be subject to whatever search and detention procedure has been deemed appropriate and lawful by the legislature in that jurisdiction.

In sections 19 to 24, the Canadian government is proposing to give powers of search and detention to foreign officers that are broader than those enjoyed by Canadian peace officers. These powers are exercised in a setting where there is no access to American constitutional and legal safeguards and no effective access to safeguards provided in the *Canadian Charter of Rights and Freedoms*.

The statutory model for these wide powers is found in the *Customs Act.* For example, that Act grants the following search powers to Canadian customs officers:

98. (1) An officer may search
(a) any person who has arrived in Canada, within a reasonable time after his arrival in Canada,
(b) any person who is about to leave Canada, at any time prior to his departure, or
(c) any person who has had access to an area designated for use by persons about to leave Canada and who leaves the area but does not leave Canada, within a reasonable time after he leaves the area,

if the officer suspects on reasonable grounds that the person has secreted on or about his person anything in respect of which this Act has been or might be contravened, anything that would afford evidence with respect to a contravention of this Act or any goods the importation or exportation of which is prohibited, controlled or regulated under this or any other Act of Parliament.

(2) An officer who is about to search a person under this section shall, on the request of that person, forthwith take him before the senior officer at the place where the search is to take place.

(3) A senior officer before whom a person is taken pursuant to subsection (2) shall, if he sees no reasonable grounds for the search, discharge the person or, if he believes otherwise, direct that the person be searched.

(4) No person shall be searched under this section by a person who is not of the same sex, and if there is no officer of the same sex at the place at which the search is to take place, an officer may authorize any suitable person of the same sex to perform the search.

The *Customs Act* is Canadian legislation that protects the integrity of Canadian borders and Canadian society. For such purpose, Canadian courts have held that the mere suspicion of an officer that there are reasonable grounds to suspect the concealment of illegal goods is sufficient to justify what would otherwise be an unreasonable search. As Mr. Justice Gonthier of the Supreme Court of Canada noted in *R. v. Jacques*, [1996] 3 S.C.R. 312 :

> National self-protection becomes a compelling component in the calculus.
>
> I accept the proposition advanced by the Crown that the degree of personal privacy reasonably expected at customs is lower than in most other situations. People do not expect to be able to cross international borders free from scrutiny. It is commonly accepted that sovereign states have the right to control both who and what enters *their* boundaries. (emphasis added)

In *Dehghani v. Canada (Minister of Employment and Immigration*), [1993] 1 S.C.R. 1053, Mr. Justice Iacobucci of the Supreme Court of Canada observed, at p. 1072:

> . . . at a border the state has an interest in controlling entry into the country. Individuals expect to undergo questioning with respect to their entry into Canada whether that be in the immigration or customs context. These interests and expectations dictate that examination of a person for purposes of entry must be analyzed differently from the questioning of a person within Canada.

However, these same powers are not justified when protecting the sovereignty of a foreign nation's borders on Canadian territory, particularly when there is ample opportunity to provide protection in a less intrusive manner. Persons coming into Canada have recourse to rights of appeal and judicial review in Canadian courts. Canadian officers are directed by and are accountable to Canadian legislation and authorities. U.S. preclearance officers, on the other hand, report to authorities who are not governed by Canadian law. Their decisions are not reviewable by Canadian courts.

By continuing the current practice of consensual searches in preclearance areas, there is still ample protection for the United States. Individuals who do not wish to submit to a search can be denied admission. If the U.S. wishes to pursue further remedies against an individual they can do this once the person has landed in the United States. Persons who are uncooperative or dishonest or attempt to violate U.S. customs and immigration laws at a preclearance area may find themselves unable to enter the United States in the future or subject to arrest and penalty if they do.

The standard for searches under some of these sections is whether the officer "suspects" on reasonable grounds. In reality, however, this is no standard at all because a suspicion is not something which can readily be reviewed in court. This provision is therefore inconsistent with, among other things, the right to be free from unreasonable search and seizure in section 8 of the *Canadian Charter of Rights and Freedoms*.

Further there are differing standards to be applied by preclearance officers between the search provisions (ss. 21 and 22) and the detention provision (s. 24). This latter section provides that the preclearance officer can only detain when he or she "believes" on reasonable grounds, which is a higher and more acceptable standard. We do not understand why a preclearance officer would have the express power to detain under s. 24 of the Bill when the *officer believes on reasonable grounds* that the traveller has contravened section 33 but would be allowed to detain a traveller to conduct a frisk or strip search when the officer merely *suspects on reasonable grounds* that there has been a contravention of s. 33. These standards appear to be inconsistent.

Frisk Searches (sections 19-21)

The policy objectives of these provisions can be met by the current practice of consensual searches. Individuals who do not wish to submit to a search can be denied admission.

There is also a technical deficiency in these sections. It is clear that the frisk search is performed by the preclearance officer. However, s. 23 provides that the preclearance officer must inform the traveller of the right to be taken before a senior officer to determine if the search should be conducted. Apparently it is the senior officer who directs the frisk search under s. 21 in this process. Accordingly, the operation of s. 21 should be made expressly subject to s. 23.

Strip Searches (sections 22 - 23)

The policy objectives can be met by the current practice of consensual searches. Strip searches are more properly conducted after a traveller has arrived in the United States.

Section 22

Under sections 9 and 10 of the *Canadian Charter of Rights and Freedoms*, everyone has the right not to be arbitrarily detained and everyone who is detained has the right, *inter alia*, to retain and instruct counsel without delay and to be informed of that right. Under this Bill these rights would be effectively denied. Detention based upon mere suspicion is not reasonable and therefore probably "arbitrary". As well, section 8 of the Bill would make it illegal for legal counsel to enter a preclearance area, thus allowing a person to be detained without the right to retain and instruct counsel without delay. Currently, U.S. Customs and Immigration officials do not allow access to counsel in preclearance areas.

For the same reasons as noted above, s. 22 must be made expressly subject to s. 23.

Section 23(1)

The search authorized by a senior officer is the strip search of a traveller as required by a preclearance office as a result of a suspected contravention of s. 33. Under this section, Canadian officers appear to be acting as agents for U.S. government authorities in the enforcement of U.S. preclearance laws. We suggest that this is inappropriate.

Section 23(3) Strip Searches by "any suitable person"

This section would allow "any suitable person" to conduct a strip search if no officer of the same sex can be found. While such a power might be justifiable in the context

of Canadian customs officers, it is completely unacceptable when applied to foreign officials who are not answerable to Canadian authorities. In addition, there are no criteria defining who might be "suitable". Does it include ticket agents or passengers? The Section recommends that the second sentence of this section be removed in its entirety.

Section 28 Forfeiture

This section would allow U.S. preclearance officers to institute U.S. forfeiture procedures for goods seized in Canada. It should be deleted. Canada has no control over the preclearance laws that would be enforced. U.S. forfeiture provisions and policies are already extremely onerous and could quite conceivably become more so in the future. For instance, such laws could be interpreted to allow forfeiture of property when the owner is unaware of or did not intend the violation. Moreover, it is questionable whether people whose goods were seized and forfeited outside the U.S. could avail themselves of protections and appeal rights found in U.S. law. Even if travellers could avail themselves of appeal rights, they would often be prohibitively expensive due to the need to hire U.S. counsel. In any event, it appears that they would not be able to enjoy the benefit of property rights protected in the U.S. Bill of Rights but not enshrined in the Canadian Constitution.

Sections 29 to 32 Disclosure of Passenger Information

Suitable safeguards should be imposed so as to restrict the use of such information to matters relevant for entry purposes. Accordingly, such information should not be used for collateral matters such as income tax collection.

Sections 33 and 34 Offences and Punishment

Section 33 provides that every person who makes, participates in or assents to the making of a false or deceptive oral or written statement to a preclearance officer with respect to the preclearance of travellers or goods is guilty of a summary or indictable

offence. Section 34 provides that every person who resists or willfully obstructs a preclearance officer or Canadian officer in the execution of the officer's duty or any person lawfully acting in aid of such person is guilty of a summary or indictable offence.

Sections 33 and 34 are unnecessary and fundamentally flawed. There is insufficient justification for the creation of Canadian criminal offences to enforce the laws of a foreign state. This is particularly so where U.S. law currently permits the permanent exclusion of persons who make misrepresentations to U.S. immigration officers. A statute which was intended to provide for the administration of a preclearance process should not incorporate criminal sanctions which would be initiated by foreign nationals in Canada.

Section 33

We also have serious concerns about other aspects of section 33.

The Section is of the view that the use of the phrase "makes, participates in or assents to" creates extensive liability that could attach to persons whose connection to the traveller is remote. Clearly, the traveller's statements and declarations are relevant, but the language also includes persons who purportedly participate in the deception or falsehood or merely assent to it. The word "assent" is vague and overbroad.

The danger of this provision is best appreciated by way of the following illustration. A Canadian worker intends to enter the United States to attend business meetings at a U.S. parent or subsidiary operation. A preclearance officer would be primarily concerned with whether the traveller intends to work in the United States without proper authority. The traveller's Vice President of Human Resources prepares a letter in support, honestly believing that no work permit is required under U.S. immigration laws and that the activity does not require such documentation. The traveller relies on this instruction. The traveller presents the letter to the

preclearance officer and asserts that he or she is travelling to the United States for business purposes.

The preclearance officer determines that the activity is actually employment requiring a work permit and denies entry. Further the officer takes the position that the traveller's declaration and the letter of support is false and deceptive. The employee and the Vice President have both contravened s. 33. The Vice President's liability arises from the participation in the making of a false declaration.

Further, the provision could arguably apply to those who are travelling with the person making the false or deceptive statement, such as friends or family members, who are unaware that the statement is false or deceptive.

The Section therefore recommends:

- the section must only encompass false or deceptive statements that are "knowingly made", in other words, with criminal intent or a guilty mind;
- the false or deceptive statement must be "material" to the preclearance issues addressed by the preclearance officer; and
- the words "participates in or assents to" should be removed.

If the section is allowed to stand, it should be restricted to false or deceptive statements of the traveller and the penalty should be the denial of boarding.

Section 34

Preclearance officers are not accountable to any Canadian authority and indeed are excused from individual civil liability. Constitutional and legal remedies available in the U.S. are denied to travellers in preclearance areas outside of the United States. The decisions of preclearance officers are not reviewable by Canadian courts. We therefore urge that the preclearance process remain entirely voluntary. If a traveller does not wish to submit to the process, he or she should be allowed to leave the

preclearance area and risk not being allowed entry into the United States in the future.

Canadian officers are subject to the supervision of their Canadian superior officers and ultimately the Canadian courts. Travellers have rights of appeal and judicial review against decisions of Canadian officers. Under Bill S-22, a preclearance officer acting in bad faith is not subject to any Canadian supervision.

IV. CONCLUSION

The Section has serious concerns regarding Bill S-22 in its present form. We believe the Bill would result in the serious abrogation of the rights of travellers on Canadian soil and a considerable intrusion upon Canadian sovereignty. We believe the Bill needs to be rethought and should go through substantial conceptual and language changes before becoming law. While there are doubtless economic benefits to permitting preclearance on Canadian soil, we believe these can be achieved in a manner which is considerably less intrusive than what has been proposed in Bill S-22.