THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

February 14, 2024

Via email: CBSA.Preclearance-Precontrole.ASFC@cbsa-asfc.gc.ca

Travellers Policy and Programs Directorate
Travellers Branch
Canada Border Services Agency
Ottawa, ON K1A 0L8

Dear Travellers Policy and Programs Directorate:

Re: Canada Gazette, Part I, Volume 157, Number 50 Preclearance in the United States Regulations

I write on behalf of the Immigration Law Section of the Canadian Bar Association (CBA Section) in response to Canada Border Services Agency's (CBSA) consultation notice[1] proposing regulations under the *Preclearance Act*[2] (the Act) to adapt port of entry authorities under the *Immigration, Refugees and Protection Act* (IRPA). The CBA Section is grateful for the opportunity to meet with CBSA officials to discuss the proposed regulations prior to sending its written comments.

The CBA is a national association of 38,000 members, including lawyers, notaries, academics and students across Canada, with a mandate to seek improvements in the law and the administration of justice. The CBA Section has approximately 1,100 members across Canada practising in all areas of immigration and refugee law.

The proposed Regulations allow CBSA Officers to make admissibility determinations within preclearance areas. The CBA Section is concerned about the long-term impact on travellers, particularly permanent residents, who would be subject to compelled examinations in preclearance areas. The concerns outlined below are not limited to the proposed pilot location, as we anticipate further issues when preclearance is rolled out in additional locations.

1 Canada Gazette, Part I, Volume 157, Number 50: Preclearance in the United States Regulations, online.

2 *Preclearance Act, 2016* (S.C. 2017, c. 27), online.

Background

Many of the problems we raise on the proposed preclearance regulations stem from shortcomings in the Act and the *Agreement on Land, Marine and Air Transport Preclearance between the Government of Canada and the Government of the United States of America* (the Treaty) which was the basis for the Act. When the Act was being considered by Parliamentary Committees, the Government was unwilling to make substantive revisions because the treaty had already been negotiated and changes would require returning to the bargaining table with the US.

We reiterate our position that fundamental flaws in the Treaty and the Act should be revisited. [3] These include but are not limited to:

- Denying permanent residents the unequivocal right of entry afforded under the IRPA.
- Denying asylum-seekers the right to make a refugee claim in violation of Canada's international obligations and the IRPA, and the Supreme Court of Canada's decision in *Singh v. Canada Minister of Employment and Immigration*.[4] Deflection of refugees back to the US may give rise to refoulement. Refugees should be allowed to, at the very least, initiate a claim in preclearance areas.
- The lack of conformity with the *Canadian Charter of Rights and Freedoms*, reiterated below, and powers that are inconsistent with the IRPA resulting in divergent legal procedures and outcomes for individuals who appear in preclearance areas as opposed to conventional Ports of Entry.
- The seeming foreclosure of access to Canadian courts except in very limited circumstances given: US preclearance officers enjoy full civil immunity under the Treaty and the US government may only be sued in circumstances of death, bodily injury or damage to property.
- The lack of justification for the unprecedented expansion of powers to preclearance officers, despite the Act stating (in s.47(2)) that a border services officer may exercise the powers and perform the duties and functions conferred on them as if the officer were in Canada.
- The expansion of powers of questioning, detention, search, seizure, forfeiture, and the use of force by preclearance officers without appropriate limitations and without clear scope and procedure.
- The unprecedented lowering of the legal threshold for searches of personal digital devices, and the lack of safeguards around solicitor-client privileged data in those devices.

The Act includes a sunset clause at section 62.1 requiring the Minister to conduct an independent review five years after its entry into force. Given its entry into force on August 15, 2019 in conjunction with the ratification of the Treaty, the Act will be coming up for review this August 2024. The CBA Section wishes to participate in consultations regarding the review of the Act.

Recommendation:

1. With six months left until the August 2024 review, the CBA Section recommends that the enactment of regulations be postponed until the outcome of the review, as new regulations would need to be revisited based on the outcome of the August 2024 review, rendering the process of limited value.

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3 CBA, Preclearance Act, 2016, online.

4 *Singh v. Canada Minister of Employment and Immigration* [1985] 1. S.C.R. 177.

Charter concerns

Charter protections, including access to judicial review by the Federal Court, are not specifically guaranteed in the Act or the Regulations. CBSA's interpretation that the *Charter* is applicable by inference does not satisfy the CBA Section's concerns that it will ultimately lead to litigation.

Jurisprudence states that Government actions involving enforcement are subject to the *Charter*. As Canadian preclearance officers operating in preclearance areas in the US have enforcement powers and the US has consented to Canadian enforcement in preclearance areas, then this jurisdiction necessarily includes applying the *Charter*. The Supreme Court of Canada determined in *R. v. Hape*[5] that Canada's enforcement jurisdiction in international law only extends with the explicit consent of the foreign state.

Given the bilateral nature of the Treaty and the consent to exercise enforcement powers within the respective preclearance zones, the US has consented to Canadian enforcement jurisdiction on its territory. Thus, Canadian preclearance officers could not legally exercise their functions without *Charter* safeguards, including when exercising powers of questioning and interrogation in the context of examinations as governed by US law under s. 49, or when detaining persons "under the laws of the United States" in the preclearance area under s. 52(2) of the Act.

Recommendation:

2. The CBA Section recommends that the Act be amended to clearly state that the Charter is applicable and guarantee access to Judicial Review by the Federal Court.

Preclearance for Permanent Residents

Section 48(4) of the Act grants CBSA unprecedented authority to deny preclearance to permanent residents on grounds that would be specified in future regulations. The proposed regulations prescribe those grounds of inadmissibility to include ss. 34, 35, 36(1) and 37 of the Act. In our view there is no justification for this significant expansion of CBSA powers and consequent diminishment of the rights of permanent residents. Under ss. 19(2) and 27(1) of the IRPA, a permanent resident of Canada must be allowed to enter Canada upon showing that they hold that status. This is a statutory right with no limitation on it. Once a person is determined to be a permanent resident at a port of entry, they shall be allowed to enter Canada.

Enforcement Manual 4 (ENF 4) paragraph 11.4 states: "*[Border Services Officials] must remain cognizant of the fact that A19(2) gives permanent residents of Canada the right to enter Canada at a [Port of Entry] once it is established that a person is a [permanent resident], regardless of noncompliance with the residency obligation in A28 or the presence of other inadmissibility grounds. (…) [Border Services Officials] cannot refuse entry to a [permanent resident].*"[6]

The CBA Section believes the proposed regulations will result in situations where permanent residents are misled into believing that they are still in a compelled examination and must truthfully answer all questions regarding inadmissibility, even if it means incriminating themselves. We believe that the proposed regulations will unreasonably and unjustifiably expand the powers of CBSA officers to conduct compelled examinations of permanent residents in preclearance areas. This will have an adverse impact on the rights of permanent residents, who, when examined at conventional ports of entry, have the benefits of procedural safeguards of the IRPA, all substantive protections of the *Charter*, as well as oversight by the Federal Court.

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5 *R. v. Hape* [2007] 2 S.C.R. 292.

6 ENF 4 Port of Entry Examinations, s.11.4, online.

In the context of the consultation on the proposed regulations, CBSA has taken the position that a traveller in preclearance makes an "application" to enter Canada" and thus, the right to conduct an "examination" under s.15 of the IRPA applies. Travellers would therefore be obligated to "answer truthfully all questions put to them for the purpose of the examination…" per s.16 of the IRPA.

Section 1(1) of the proposed regulations would significantly expand the scope of the examination of permanent residents and would result in the compelled examination of permanent residents on grounds of inadmissibility that could subsequently result in the loss of their permanent resident status. There are no procedural fairness safeguards and limitations on these examinations, especially for permanent residents who have a statutory right of entry to Canada. While the Act gives preclearance officers the same powers as border services officers at ports of entry, it does not make them accountable to Canadian courts and Canadian law. This lack of accountability creates a substantial risk for serious abuse.

The CBA Section believes that this will lead to unjustifiable "fishing expeditions" by CBSA Officers on US soil, without the protection of Canadian law. Permanent residents – or temporary residents – who refuse to answer or who incriminate themselves could be detained and turned over to US officers for prosecution. Moreover, any self-incrimination at a preclearance area could be used to prosecute them or seek to strip their permanent resident status upon, or subsequent to, entering Canada.

Recommendation:

3. Given the lack of enforcement powers at ports of entry to initiate consequential actions on admissibility issues, the CBA Section recommends that the Regulations be amended to restrict an officer's authority to question travellers on this issue. The officer's authority to question a traveller ought to terminate upon their decision to not permit the traveller to enter through the preclearance area.

Refugee Claims at the Border

The proposed regulations do not permit refugee claims to be initiated at preclearance areas. The CBA Section has grave concerns about the legality of this measure and perceives increased risks for travellers on their return to the US after attempting to file a claim. While the CBA Section intends to delve into this issue further during the 2024 review of the Act, we urge IRCC to consider the implications for claimants given that a delay in making a refugee claim can be held against them.

Recommendation:

4. The CBA Section recommends that the regulations require officers to at least note claimants' attempt to file a refugee claim in Global Case Management System (GCMS), and to give them a written confirmation of their attempt to do so.

Withdrawal from Preclearance

While s. 54 of the Act gives travellers the right to withdraw from a preclearance interview, there is no requirement that travellers be informed of their right to do so. The CBA Section also takes issue with the lack of accountability for preclearance officers.

The mechanism to withdraw from preclearance in the US is governed by the laws of the US. Section 56 of the Act stipulates that border services officers must exercise the powers afforded to them by US law. Section 55 of the Act stipulates that a traveller requesting withdrawal from preclearance is subject to the laws of the United States.

Since the US has yet to enact legislation governing preclearance by Canada in the US, we urge the federal government not to pass legislation where the legal rights of Canadian permanent residents are left unprotected, except by foreign legislation that has neither been proposed nor enacted.

Recommendations:

5. The CBA Section recommends that the proposed regulations be delayed until the US has enacted legislation governing preclearance by Canada in the US.

6. We urge CBSA to amend the proposed regulations to specify certain protections for preclearance applicants in the US seeking to enter Canada. Withdrawn or refused applicants turned over to US authorities may suffer serious consequences including prolonged incarceration and possible refoulement to countries where they may be in danger. They may, for example, self-incriminate and expose themselves to prosecution and removal from the US. This will likely happen to foreign nationals whose status is precarious in the US or those alleged to be inadmissible.

Rights awareness at preclearance areas

Given the serious consequences set out above, individuals approaching a preclearance area will not likely have full awareness of the possible results of doing so, and of the consequences of being turned away. CBSA suggested placing signs at preclearance areas to advise individuals that they cannot make a claim for asylum at a preclearance area. Signs at the preclearance area, or along the road leading to it, will be difficult for individuals to read, understand and process, and may not offer them a reasonable opportunity to turn around without reaching the preclearance area.

Recommendations:

7. The CBA Section recommends that signage be designed to be easy to read and understand, and give clear enough information for individuals to make informed decisions. It must be in a location that allows the individual to make the decision to not approach the preclearance area without risking being apprehended by either US or Canadian authorities.

8. Clear and transparent communication on the consequences of being turned back at a preclearance post must be made available to potential applicants long before they approach the preclearance area. Information should be available on the IRCC webpage, among others, and widely publicized using all means of communication, including social media.

Similarly, the CBA Section believes that individuals at preclearance areas will not have full understanding of the legal significance and consequences of their attempted entries when they are turned away.

The codification of a requirement to inform travellers of their right to withdraw and to give travellers documentation confirming the result of the preclearance application will help better inform travellers of any potential consequences on their future applications for preclearance or entry to Canada at conventional ports of entry.

Recommendations:

9. The proposed regulations be amended to mandate officers to inform travellers of their rights, in particular their right to withdraw from a preclearance examination at any time.

10. The proposed regulations be amended to require officers to give travellers documentation evidencing their interactions in preclearance areas and the legal significance of the outcome.

Consultation

While the CBA Section was consulted in the context of Bill C-23, which became the *Preclearance Act, 2016*, this is the first opportunity to offer comments on the Regulations. Given the serious impact that the proposed regulations will have on the rights of travellers, particularly permanent residents seeking to enter Canada, we recommend that the proposed regulations be referred to the Parliamentary Committee for consideration before they are finalized.

We further request that the CBA Section be consulted during five-year review of the Act in August 2024.

Conclusion

As noted in our 2017 submission, we support a procedural framework to promote the free movement of travellers between the US and Canada while upholding the safeguard of individual rights. If the extra-jurisdictional powers of the Canadian government are not clearly articulated in the proposed preclearance regulations, it increases uncertainties on whether and to what extent procedural safeguards apply to preclearance applicants.

We look forward to the opportunity for further discussions about the preclearance pilot and the regulatory framework, being fully aware that the framework will not only govern preclearance in Covey, Quebec but also future preclearance centres in other locations across the US and beyond.

Yours truly,

(original letter signed by Véronique Morissette for Gabriela Ramo)

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