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LEGISLATIVE SUMMARY

Bill C-23:

An Act respecting the preclearance of persons and goods in Canada and the United States

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Any substantive changes in this Legislative Summary that have been made since the preceding issue are indicated in **bold print**.

Legislative Summary of Bill C-23
(Legislative Summary)

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LEGISLATIVE SUMMARY OF BILL C-23: AN ACT RESPECTING THE PRECLEARANCE OF PERSONS AND GOODS IN CANADA AND THE UNITED STATES

1 BACKGROUND

Bill C-23, An Act respecting the preclearance of persons and goods in Canada and the United States (short title: Preclearance Act, 2016), was introduced in the House of Commons by the Minister of Foreign Affairs on behalf of the Minister of Public Safety and Emergency Preparedness and read for the first time on 17 June 2016.[1] The bill implements legislation to allow the Government of Canada to ratify the *Agreement on Land, Rail, Marine, and Air Transport Preclearance Between the Government of Canada and the Government of the United States of America* (Agreement), signed in Washington on 16 March 2015.[2] After being reported with amendments by the House of Commons Standing Committee on Public Safety and National Security,[3] Bill C-23 was adopted by the House of Commons on 21 June 2017 and received first reading in the Senate the next day.

1.1 Evolution of United States Preclearance in Canada

The term "preclearance" refers to an arrangement between two countries that allows customs and immigration officials from the country of destination to be located in the country of origin in order to clear or deny the admission of travellers or goods to the destination country.

Some form of United States (U.S.) preclearance activity has existed at Canadian airports since 1952, and the arrangement was first formalized in an agreement in 1974. A *Preclearance Act*[4] followed that agreement[5] and received Royal Assent in 1999, but it did not come into force until the corresponding *Agreement on Air Transport Preclearance*[6] was ratified in 2003.

Currently, preclearance facilities operate in eight airports in Canada, located at Vancouver, Calgary, Edmonton, Winnipeg, Toronto, Ottawa, Montreal and Halifax.[7] Although the opportunity to provide "in-transit preclearance" (ITP) for international passengers connecting to U.S. destinations is available to any airport with preclearance facilities, only Vancouver International Airport and Toronto Pearson International Airport offer ITP.[8]

The *Preclearance Act* of 1999 was reviewed in 2009, five years after coming into force. Conducted for the Department of Foreign Affairs and International Trade by the Inter*VISTAS* Consulting Group, the review assessed developments in border processing procedures and the impact of new technology and market dynamics on preclearance operations, summarized stakeholder consultations, and evaluated the effectiveness of the language of the Act and regulations as well as the administration of the Act. The final report, tabled in the House of Commons in August 2009,[9] identified opportunities to improve the language of the legislation and stated that some stakeholders had expressed interest in preclearance in other modes of transport.

Canada and the United States then signed the Beyond the Border Action Plan in 2011, which was intended to facilitate flows of travellers and freight between the two countries.[10] The implementation of the Canada–U.S. Shared Vision for Perimeter Security and Economic Competitiveness, under the Action Plan, called for a new multimodal preclearance agreement covering air, land, marine and rail transportation.[11]

The Agreement reached in March 2015 established the terms of preclearance operations, including:

- the applicable law (Article II);
- the operational (Article III) and infrastructure (Article IV) requirements for preclearance;
- the conditions that apply to passenger carriers' requests for preclearance (Article V);
- the operational obligations and authorities of the parties to the agreement (Article VI);
- the treatment of information collected by preclearance officers (Article VIII); and
- protections for and accountabilities of preclearance officers (Article X).

2 DESCRIPTION AND ANALYSIS

Bill C-23 is divided into five parts, as follows:

- Part 1 concerns U.S. preclearance officers conducting preclearance in Canada for travellers and goods destined for the United States. It sets out how preclearance areas will be designated, the powers of U.S. officers and the application of Canadian laws in preclearance areas.
- Part 2 deals with Canadian preclearance operations in the United States. It describes how the *Immigration and Refugee Protection Act* (IRPA)[12] will apply to travellers bound for Canada and authorizes the Governor in Council to make regulations to restrict or exclude the application of certain provisions of the IRPA.
- Part 3 of the bill amends the *Criminal Code* (the Code)[13] to provide U.S. preclearance officers with an exemption from criminal liability with respect to the carriage of firearms.
- Part 3.1 provides for an independent review of the administration and operation of the new Act.
- Part 4 repeals the *Preclearance Act* of 1999, makes a consequential amendment to the *Customs Act* and contains the coming-into-force provision.

The bill contains 65 clauses. The following description highlights selected aspects of the bill; it does not review every clause.

2.1 PART 1: PRECLEARANCE BY THE UNITED STATES IN CANADA

U.S. preclearance officers were empowered under the *Preclearance Act* of 1999 to conduct, in Canada, their duties and functions relating to customs, immigration, public health, food inspection, and plant and animal health under the laws of the United States, with the exception of any such duties and functions that would be considered criminal under Canadian law.[14]

The *Preclearance Act* of 1999 is repealed by Bill C-23 (clause 64 of the bill). The new Preclearance Act, 2016 not only reinstates powers and duties similar to those conferred on U.S. preclearance officers by its predecessor, but also builds on the newly signed Agreement by conferring reciprocal preclearance powers and obligations on both countries.[15]

2.1.1 DEFINITIONS

Part 1 of the bill sets out the definitions, powers, duties and functions of U.S. preclearance officers conducting preclearance in Canada for travellers and goods destined for the United States. A "preclearance officer" is a person authorized by the Government of the United States to conduct preclearance in Canada. "Preclearance" is defined in clause 5 of the bill as the exercise of powers, duties and functions under the laws of the United States (described in section 2.1.4 of this summary).

A "border services officer," defined in clause 5 of the bill, is the Canadian equivalent of a preclearance officer – meaning, an inspector or enforcement officer designated under subsection 9(2) of the *Canada Border Services Agency Act*[16] or designated or authorized under section 6 of the IRPA.

The terms "preclearance area" and "preclearance perimeters are defined in clauses 6 and 7 of the bill, respectively, and are designated by the minister or ministers responsible for the Act (as appointed by the Governor in Council in accordance with clause 4 of the bill).

2.1.2 APPLICABLE LEGAL FRAMEWORK

The following terms are defined in Article I of the Agreement:

- "Host Party" means the Party of the territory in which preclearance is conducted; and
- "Inspecting Party" means the Party responsible for conducting preclearance.

Article II of the Agreement, entitled "Applicable Law," stipulates that the "Inspecting Party shall ensure that the preclearance officers comply with the law of the Host Party while in the territory of that Host Party." Further, it states:

> The law of the Host Party applies in the preclearance area and the preclearance perimeter. Preclearance officers shall only exercise powers and authorities permitted and provided by the Host Party pursuant to this Agreement. Given that preclearance officers must also administer the Inspecting Party's laws in the territory of the Host Party, preclearance shall

> be conducted in a manner consistent with the law and constitutions of both Parties and with this Agreement, recognizing that the Parties shall apply the applicable standards set out in Article VI. The Parties acknowledge that the Inspecting Party shall not enforce the Inspecting Party's criminal law in the territory of the Host Party through activities such as arrest or prosecution.[17]

2.1.3 Travellers' Obligations

All travellers bound for the United States must, upon their entry in a preclearance area, immediately report to a preclearance officer and must have in their possession photo identification issued by the federal, provincial or local government or by a foreign government (clause 18 of the bill).

Clause 18(2) of the bill states that all travellers bound for the United States must therefore do the following (unless they choose not to proceed):

> (a) answer truthfully any question asked by a preclearance officer;
> (b) as directed by a preclearance officer, present any goods in their possession, open or unpack the goods, and unload or open any part of a conveyance for which they are responsible;
> (c) comply with any other direction given in accordance with the Act by a preclearance officer, police officer or border services officer; and
> (d) comply with any other requirement prescribed by regulation.

2.1.4 General Powers, Duties and Functions in a Preclearance Area or Preclearance Perimeter

Clause 10 of Bill C-23 authorizes a preclearance officer, while in a preclearance area or perimeter,

> [to] exercise the powers and perform the duties and functions conferred on them under the laws of the United States on importation of goods, immigration, agriculture and public health and safety, in order to determine whether a traveller or goods bound for the United States is or are admissible into that country and, if applicable, to permit them to enter that country.

It is expressly provided that preclearance powers and duties conferred under the laws of the United States on preclearance officers do not permit them to "exercise any powers of questioning or interrogation, examination, search, seizure, forfeiture, detention or arrest that are conferred under the laws of the United States" (clause 10(2) of the bill).

Furthermore, the exercise of any power and performance of any duty or function by a preclearance officer under United States law in Canada must be in accordance with Canadian law, including the *Canadian Charter of Rights and Freedoms* (Charter),[18] the *Canadian Bill of Rights* and the *Canadian Human Rights Act* (clause 11 of the bill).

For greater certainty, clause 9 of the bill provides that Canadian law applies, and may be administered and enforced, in preclearance areas and perimeters.

2.1.5 General Search and Detention Powers in Preclearance Areas or Preclearance Perimeters

The powers, duties and functions given to preclearance officers are contingent upon a number of factors. For example, the type of search permitted may depend on whether the traveller is in a preclearance area or within a perimeter area (defined in accordance with clauses 6 and 7 of the bill) and whether he or she has chosen to withdraw from the preclearance process.

Clauses 13 to 16 of the bill empower a preclearance officer to conduct frisk searches and to detain travellers and their goods. These powers are limited such that they can be executed only in a preclearance area or preclearance perimeter, depending on the circumstances, and only if the required legal standards are met. Clauses 13 to 16 of the bill require either of the two legal standards: reasonable grounds to believe, or reasonable grounds to suspect. To lawfully exercise his or her search powers, a preclearance officer must satisfy the requisite legal standard; otherwise, the search may be found to contravene constitutionally protected rights.

The two standards, reasonable grounds to suspect or reasonable grounds to believe, are difficult to articulate and have been under Charter scrutiny for a number of years.[19] They are usually assessed on a case-by-case basis. Jurisprudence emanating from the Supreme Court of Canada provides some interpretive guidance, such as the following:

> [W]hile reasonable grounds to suspect and reasonable and probable grounds to believe are similar in that they both must be grounded in objective facts, reasonable suspicion is a lower standard, as it engages the reasonable possibility, rather than probability, of crime. As a result, when applying the reasonable suspicion standard, reviewing judges must be cautious not to conflate it with the more demanding reasonable and probable grounds standard.[20]

2.1.5.1 Frisk Search

For the purposes of Part 1 of the bill, a “frisk search” implies a search by manual or technical means of a person’s clothed body. Three legislative authorities in the bill grant U.S. preclearance officers the power to conduct frisk searches. Clause 13 of the bill states that a preclearance officer who has “reasonable grounds to suspect” that a person has on his or her person anything that would present a danger to human life of safety may conduct a frisk search. Anything found during the search that would present a danger to human life or safety may be detained. The second authority for a frisk search is restricted to a preclearance area (clause 21 of the bill), and the third applies at the time of withdrawal from preclearance (clause 32 of the bill).

2.1.5.2 Powers to Detain

When a preclearance officer has “reasonable grounds to believe” that a person has committed an offence under an Act of Parliament, the officer may detain that person. Any goods found on his or her person may be detained and serve as evidence of the offence (clause 14(1) of the bill).

When a person is detained under clause 14 of the bill, the U.S. preclearance officer must deliver the detained person to a Canadian border services officer or police officer "as soon as feasible" (clause 14(2)). The phrase "as soon as feasible" is not defined in the bill and replaces the terminology used in the preceding *Preclearance Act* of 1999: "as soon as possible." The phrase "as soon as feasible" is also found in the *Criminal Code* and in the *Immigration and Refugee Protection Regulations*, but it does not occur in the *Customs Act* in the context of detentions.

If a preclearance officer has "reasonable grounds to believe" that a traveller bound for the United States poses a risk of significant harm to public health, he or she may detain the individual (clause 15(1) of the bill) but must, "as soon as feasible," deliver the individual to a police officer, border services officer or person designated as a quarantine officer under subsection 5(2) of the *Quarantine Act*.

Pursuant to clause 16 of the bill, preclearance officers are "justified in doing what they are required or authorized to do under this Act and in using as much force as is necessary for that purpose" if they are acting on reasonable grounds. That being said, clause 16(2) of the bill specifies that

> a preclearance officer is not justified in using force that is intended or is likely to cause death or grievous bodily harm unless the officer has reasonable grounds to believe that it is necessary for self-preservation or the preservation of anyone under the officer's protection from death or grievous bodily harm.

This justification section is similar to the protection given to persons acting under the authority of the *Preclearance Act* of 1999. The final report of the *Preclearance Act* review suggested that the word "reasonably" be added immediately before the word "necessary" (i.e., "using as much force as is reasonably necessary").

2.1.6 Search and Detention Powers in a Preclearance Area Only

2.1.6.1 General Powers

In a preclearance area only, and for the purpose of conducting "preclearance" as defined in clause 5 of the bill, preclearance officers have the general authority to question travellers, to collect information from them, and to examine, search and detain any goods bound for the United States, as well as to direct persons to identify themselves, to report to a preclearance officer, and to state their reason for being in a preclearance area. The preclearance officer can also direct a traveller or an unauthorized person to leave the preclearance area (clause 20 of the bill).

2.1.6.2 Collection of Biometric Information

In conducting preclearance, preclearance officers may, to verify the identity of a U.S.-bound traveller, collect biometric information from the traveller, other than from the traveller's bodily substances (clause 20(2) of the bill).

Biometric information is defined in Part 1 of the bill as information derived from a person's measurable physical characteristics. Common biometric technologies

include those used for fingerprint, face, iris, and hand or finger recognition.[21] Clause 20(2) of the bill states that the preclearance officer is not permitted to collect biometric information unless notification is provided in the preclearance area through signage or other means of communication that travellers have the right to withdraw from the preclearance process.

The use of biometrics[22] may have implications for privacy rights protected by law. Their use could be subject to the *Privacy Act* in the public sector and the *Personal Information Protection and Electronic Documents Act* in the private sector.[23] In recent years, the Canadian and U.S. governments have turned to biometrics-based technologies to increase the security of documents, airports and border crossings.[24] Because biometric data are personal data, the Office of the Privacy Commissioner of Canada has expressed concern in this respect.[25]

The concern has been raised "that increased surveillance with new technologies by governments (and private corporations) has not been accompanied by changes to legislation to ensure that privacy is being protected."[26]

The bill provides a limitation on biometric information collected *after* a traveller's withdrawal from the preclearance process (clause 33 of the bill, described in section 2.1.7.3 of this Legislative Summary). Further, Article VIII of the Agreement states:

> The Inspecting Party [the Party responsible for conducting preclearance] shall ensure that information collected by preclearance officers during preclearance operations shall be treated in accordance with the applicable laws and policies of the Inspecting Party, including those that provide for the protection of personal data against inappropriate access, use or disclosure. The information collection activities of the Inspecting Party during preclearance operations in the territory of the Host Party [the Party of the territory in which preclearance is conducted] are also subject to the independent review and oversight of the appropriate agencies and entities of the Inspecting Party, including those charged with the protection of privacy and civil liberties.[27]

Article VI of the Agreement also states that "[p]reclearance officers shall have the authority to collect any information from travellers for the purpose of administering the laws of the Inspecting Party as they apply to preclearance."[28]

2.1.6.3 Frisk, Strip, X-ray or Body Cavity Searches

Clauses 20 to 26 provide the legal framework that empowers U.S. preclearance officers to question travellers, conduct frisk searches, detain travellers for the purpose of a strip search, and request that travellers undergo an X-ray or body cavity search.

Before any of the following searches are conducted – a frisk search (under clause 21 of the bill), a strip search (under clause 22 of the bill) or a monitored bowel movement (under clause 23 of the bill) – a traveller must be informed of his or her right to be taken before a senior officer (clause 25(1) of the bill).

In the preclearance area only, the legal threshold permitting a preclearance officer to conduct frisk, strip, X-ray or cavity searches is lowered from reasonable grounds to believe to reasonable grounds to suspect.

Clause 21 of the bill stipulates that a frisk search is warranted when a preclearance officer has “reasonable grounds to suspect” that a traveller has concealed goods on his or her person.

Clause 22 of the bill provides that a preclearance officer may detain a traveller for the purpose of conducting a strip search. A “strip search” (defined in Part 1 of the bill) is a visual inspection of a person’s naked or partly clothed body. The preclearance officer may do so only if he or she has “reasonable grounds to suspect” that the traveller is concealing on his or her person goods or anything that would present a danger to human life or safety and that such a search would be necessary for the purpose of conducting preclearance.

When a traveller is detained for the purposes of a strip search under proposed clause 22 of the bill, the U.S. preclearance officer must immediately request that a Canadian border services officer conduct the search and advise the officer of the grounds on which the traveller was detained (clause 22(2) of the bill). The border services officer may conduct the strip search if he or she has “reasonable grounds to suspect” that the traveller has on his or her person concealed goods or anything that would present a danger to human life or safety, and that the strip search is necessary for the purpose of conducting preclearance (clause 22(3) of the bill).

Pursuant to this clause of the bill, the strip search should be conducted by a Canadian border services officer. However, a U.S. preclearance officer may conduct a strip search if he or she believes that the legal grounds specified in clause 22 of the bill continue to exist *and* one of the following circumstances exist:

- a border services officer has declined to conduct the search;
- the Canada Border Services Agency (CBSA) advises that no border services officer is available to conduct the search “within a reasonable time”; or
- the CBSA and the preclearance officer agree that a border services officer is to conduct the search but no such officer is available within that period (clause 22(4) of the bill).

The bill does not specify circumstances in which a border services officer might decline to conduct the search. This clause gives preclearance officers greater search authority than that provided by the *Preclearance Act* of 1999, by which strip searches were to be conducted by Canadian officers only but could be observed by a preclearance officer (section 22 of the *Preclearance Act* of 1999).

Bill C-23 provides that a strip search conducted by a Canadian border services officer pursuant to clause 22(3) of the bill “may be observed by a preclearance officer who is of the same sex as the traveller or, if no such preclearance officer is available, by any suitable person of the same sex as the traveller that a preclearance officer may authorize” (clause 22(5) of the bill).

Of note, Article VI of the Agreement states that with respect to personal searches and partial body searches (prescribed in paragraphs 12 and 13 of this Article) "the search of a transgender person or a transsexual shall be performed in accordance with the policies of the Party performing the search" and that with respect to personal and partial body searches the

> Host Party shall not impose higher standards on actions of preclearance officers under paragraphs 12 and 13 than are applicable to the same actions undertaken by officers of the Host Party Inspection Agency in the Host Party territory.[29]

Clause 23 of the bill states that a preclearance officer may detain a traveller bound for the United States for the purpose of a monitored bowel movement if the officer has reasonable grounds to suspect that the goods are concealed within a traveller's body, that such monitoring would permit the retrieval of the goods, and that the monitoring is necessary for the purpose of conducting preclearance.

As is the case with strip searches for concealed goods, the U.S. preclearance officer must deliver the traveller into the custody of a Canadian border services officer "as soon as feasible" and advise the traveller of the grounds for his or her detention. The Canadian border services officer is the only officer empowered to conduct the monitored bowel movement search; in such a case he or she must have reasonable grounds to suspect that the goods are concealed within the traveller's body, that the monitoring would permit the retrieval of the goods, and that the monitoring is necessary for the purpose of conducting preclearance (clause 23(3) of the bill).

Before conducting a search of a traveller under clause 21, 22 or 23, the preclearance officer or border services officer must inform the traveller of his or her right to be taken before a senior officer. If a traveller is taken before a senior officer, the search is permitted only if the senior officer agrees that it is authorized under the applicable section (clause 25(2) of the bill). A search would therefore be authorized if the legal threshold continues to be met.

The final report of the *Preclearance Act* review made the following suggestions with respect to similar sections of the *Preclearance Act* of 1999:

> It is interesting to note that the preclearance officer, the Canadian officer and the Senior Officer must all "suspect on reasonable grounds." This implies that each must make his/her own analysis of the facts and come to an independent conclusion. Were it otherwise, the review by a senior officer would not provide additional protection to travellers.[30]

Clause 24 of the bill allows a preclearance officer or Canadian border services officer to request that a traveller undergo an X-ray search or a body cavity search if he or she has "reasonable grounds to suspect" that the goods are concealed within a traveller's body, that such a search would permit the identification or retrieval of the goods, and that the search is necessary for the purpose of conducting preclearance.

Despite clause 18(2)(c) of the bill,[31] no X-ray search or body cavity search may be conducted unless the traveller consents (clause 24(2)). It should be noted that X-ray searches may be conducted by X-ray technicians only, with the consent of a

physician, and that only a physician may conduct a body cavity search (clause 24(4) of the bill).

2.1.7 Traveller Withdrawal

Unless he or she is detained, a traveller may withdraw from preclearance without departing for the United States (clause 29 of the bill). Upon doing so, however, he or she cannot leave a preclearance area or perimeter without truthfully answering any question asked by a preclearance officer under clause 31(2)(b) of the bill for the purpose of identifying the traveller or determining his or her reason for withdrawing. The traveller must also comply with any other direction given by a preclearance officer in accordance with clause 31(2) (clause 30 of the bill).

An explanatory memorandum on the Agreement states that such "new provisions would allow preclearance officers to mitigate concerns around border probing (e.g. by requiring identification and allowing questioning as to the reason for withdrawal)."[32]

2.1.7.1 Powers of a Preclearance Officer upon a Traveller's Withdrawal

Clause 31(1) of the bill provides that, after a traveller has indicated that he or she is withdrawing from preclearance, the powers, duties and functions of preclearance officers are limited to those enumerated in clause 13 (frisk search for a dangerous thing), clause 14 (detention for an offence), clause 15 (detention for a significant risk of harm to public health) and clause 32 (powers with respect to a suspected offence). Clause 31(2) of the bill stipulates that a preclearance officer is empowered, for the purpose of maintaining the security of or control over the border between Canada and the United States, to:

> (a) direct the traveller to identify himself or herself and produce photo identification;
>
> (b) question the traveller for the purposes of identifying him or her or determining the reason for withdrawing;
>
> (c) record and retain information obtained from the traveller, including by making a copy of the traveller's identification;
>
> (d) take and retain a photograph of the traveller if the traveller is not able to produce photo identification;
>
> (e) visually examine a conveyance used by the traveller and, if the conveyance transports goods on a commercial basis, open its cargo compartments to visually examine the contents;
>
> (f) examine, using means or devices that are minimally intrusive, a conveyance used by the traveller, without opening or entering it, if the preclearance officer has reasonable grounds to suspect that the traveller could compromise the security of or control over the border.

The preclearance officer's powers may exercise these powers only to the extent that doing so would not "unreasonably delay" the traveller's withdrawal (clause 31(3) of the bill). What would constitute an unreasonable delay is not defined.

2.1.7.2 Additional Powers for a Suspected Offence

Pursuant to clause 32(1) of the bill, additional powers are available to a preclearance officer who has reasonable grounds to suspect that a traveller who is withdrawing from preclearance has committed an offence. In such a case, the officer may, among other things, and for the purpose of maintaining security or control over the border:

- collect information from the traveller;
- examine, search and detain goods in the traveller's possession or control;
- conduct a frisk search of the traveller, if the officer also has reasonable grounds to suspect that the traveller has concealed goods on his or her person; and
- detain the traveller for the purpose of a strip search, if the officer also has reasonable grounds to suspect that
  - the traveller has on his or her 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.

Any powers exercised under clause 32(1) with respect to a traveller constitute a detention of the traveller (clause 31(3) of the bill).

Furthermore, clause 32(2) of the bill stipulates that the strip search referred to in this section is to be conducted under the same checks and balances as those proposed under clauses 22(2) to (5), 25 and 26 (described in section 2.1.6.3 of this Legislative Summary).

When the *Preclearance Act* of 1999 (then known as Bill S-22, Preclearance Act[33]) was referred to the Standing Senate Committee on Foreign Affairs, the Canadian Bar Association recommended to the Committee that legal counsel be granted access to the preclearance area, in order to comply with Charter provisions and thereby allow a person who is detained to retain and instruct counsel without delay.[34]

Foreign Affairs Canada officials subsequently informed the Committee that a regulation would be drafted to ensure that, in the case of a detention or strip search, legal counsel would be allowed access to the preclearance area to meet with a client.[35]

With respect to the right to counsel, the Agreement states that:

> If the Host Party Inspection Agency is required by law to ensure that a person is informed of their right and given the opportunity to consult counsel in its territory, the Inspecting Party shall also be required to ensure that, in the same circumstances, a person is informed of their right and given the opportunity to consult counsel when operating in the Host Party territory.[36]

Of note, the Agreement uses the following language to describe the legal threshold to detain:

> If a preclearance officer has reasonable grounds to suspect when in Canada, or reasonably suspects when in the United States, that the traveler wishing

> to withdraw has committed an offence under Host Party Law, the officer may detain the traveler and exercise all authorities under this Article for border integrity and border security purposes.[37]

2.1.7.3 Limitations Regarding Information

Clause 33(1) of bill states that information obtained from a traveller after his or her withdrawal cannot be disclosed or used "except for the purpose of maintaining the security of or control over the border." The bill does not further define or enumerate the circumstances under which information may be disclosed for the purpose of maintaining the security of the border.

Bill C-23 does provide a limit with respect to collected biometric data, but it applies only to information obtained from the traveller *after* his or her withdrawal from the preclearance process.

Clause 33(2) of the bill states that it is not permitted to collect any biometric information after a traveller has indicated that he or she is withdrawing, or to use a photograph obtained under clause 31(2)(d) or 31(1)(b) for the purpose of producing biometric information, or to disclose such a photograph for the purpose of biometric information.

2.1.8 Civil Liability and Immunity

Clause 39 of the bill states that an action or proceeding of a civil nature, in which the United States does not benefit from the immunity prescribed within the *State Immunity Act* with respect to the jurisdiction of a court in Canada, may be brought against the United States in respect of "anything that is, or is purported to be, done or omitted by a preclearance officer in the exercise of their powers or the performance of their duties and functions." That being said, the bill further provides that no action or proceeding of a civil nature may be brought against a U.S. preclearance officer in respect of something he or she has done or omitted to do in the exercise of his or her powers or duties and functions (clause 39(2)).

2.1.8.1 Decision Not Reviewable

Clause 40 of the bill specifies that the decision of a preclearance officer to refuse the admission of persons or goods into the United States in accordance with the laws of the United States is not subject to judicial review in Canada.

2.2 Part 2: Preclearance by Canada in the United States

2.2.1 Definitions

The definitions that apply to Part 2 are found in clause 46 of the bill. The terms "preclearance area" or "preclearance perimeter" are defined to mean an area in the United States that is designated as such by the Government of the United States under the Agreement and designated as a customs office under section 5 of the *Customs Act*.[38]

"Preclearance" in Part 2 means the exercise of powers and the performance of duties and functions by a Canadian border services officer or other public officer under clauses 47 to 51 and regulations made under clause 57(1)(a) of the bill.

2.2.2 Applicable Legal Framework

"Preclearance legislation" is defined in clause 46 of the bill as the provisions of an Act of Parliament or its regulations that apply in respect of the entry of persons or the importation of goods into Canada, including provisions relating to customs, agriculture or public health and safety; and the provisions of an Act of a provincial legislature or its regulations that authorize the collection by a border services officer of taxes, fees, mark-ups or other amounts. It does not include any provision that creates an offence or any provision of the IRPA or its regulations.

In a preclearance area or perimeter, the above-noted preclearance legislation applies to any travellers or goods bound for Canada, as if the traveller had entered Canada and the goods had been imported into the country (clause 47 of the bill). Clause 47 also states that a border services officer (defined in the same manner as in Part 1 of the bill, with the exception that this officer is specifically assigned to conduct preclearance in the United States) may exercise the powers and perform the duties and functions that are conferred onto him or her by preclearance legislation as if the officer were on Canadian soil.

Border search and detention powers in Canada are currently provided to the CBSA through the *Customs Act* and its applicable regulations.

Bill C-23 does not expressly authorize Canadian border services officers working in preclearance areas to conduct frisk and strip searches or to detain a traveller (as it does for U.S. preclearance officers in Part 1). Although Canadian border services are authorized to exercise preclearance powers, these powers are limited by clause 49(1), which states that a border services officer is not allowed to exercise any powers of questioning or interrogation, examination, search, seizure, forfeiture, detention or arrest, except to the extent that such powers are conferred on the officer by the laws of the United States.

The preamble to the Agreement expressly states that "there is a need to respect the sovereignty of both Parties" and recognizes the "sovereign right of the Host Party to prescribe criminal and civil law in its territory, to investigate any potential breaches of law, and to require preclearance officers to comply with this law."

2.2.3 Application of the *Immigration and Refugee Protection Act*

Clause 48 specifies that, for the purposes of the *Immigration and Refugee Protection Act*, a traveller in the preclearance area is outside Canada. Clause 48(2) states that no claim for refugee protection may be made to a border officer in a preclearance area.

Furthermore, clause 48(5) confers the authority on the border officer to refuse entry into Canada to a permanent resident. This is in contrast with the current situation, in which CBSA officials have the authority to write inadmissibility reports but permanent

residents can nevertheless enter Canada and have their case heard by the Immigration and Refugee Board of Canada.

2.2.4 Travellers' Obligations on Withdrawal

Any traveller bound for Canada may withdraw from preclearance (unless he or she is detained) and may leave a preclearance area or perimeter without departing for Canada (clause 54 of the bill). For greater certainty, clause 54(2) specifies that:

> despite any obligation that would otherwise apply under section 47, under the *Immigration and Refugee Protection Act* or under the regulations, a traveller who withdraws from preclearance is not required to answer any question asked of them for the purpose of conducting preclearance.

Subject to the laws of the United States, a traveller who chooses to withdraw from the preclearance process must:

- answer truthfully any question asked by a border services officer for the purpose of identifying the traveller or of determining the reason for withdrawing; and
- comply with any other direction made by a border services officer that such an officer is authorized to make under the laws of the United States when a traveller withdraws (clause 55 of the bill).

Clause 56 states that once a traveller has indicated that he or she is withdrawing from preclearance, "a border services officer or other public officer is not permitted to exercise any powers, or perform any duties or functions, other than those authorized under the laws of the United States when a traveller withdraws."

2.3 Part 3: Related Amendments to the *Criminal Code*

In Part 3 of the bill, U.S. preclearance officers are exempted from being found guilty of an offence under the *Criminal Code* or the *Firearms Act* for possessing, transferring, or exporting a firearm, prohibited or restricted weapon, prohibited device or ammunition for the purpose of their duties or in the course of their employment or for failing to report the loss, theft or finding of such items (clause 61).

2.4 Part 3.1: Independent Review

Bill C-23 did not initially provide for an independent review of the Act and its administration and operation five years after its coming into force. This requirement was added by the House of Commons Standing Committee on Public Safety and National Security in the report it issued after its study of the bill.

Thus, similar to section 39 of the *Preclearance Act* of 1999, new clause 62.1 provides that, five years after its coming into force, an independent review of the *Preclearance Act, 2016* must be conducted, and the responsible minister must table the report in each Chamber.

2.5 Part 4: Consequential Amendment, Repeal and Coming into Force

Clauses 63 to 65 set out a consequential amendment of the *Customs Act*, the repeal of the predecessor statute, the *Preclearance Act* of 1999, and the coming into force provision.

NOTES

1. Bill C-23, An Act respecting the preclearance of persons and goods in Canada and the United States, 1st Session, 42nd Parliament.
2. *Agreement on Land, Rail, Marine, and Air Transport Preclearance Between the Government of Canada and the Government of the United States of America* [*Agreement on Land, Rail, Marine, and Air Transport Preclearance*], Tabled in the House of Commons, Parliament of Canada, Sessional Paper 8532-412-50, 22 April 2015.
3. House of Commons, Standing Committee on Public Safety and National Security, *Twelfth Report*, 1st Session, 42nd Parliament.
4. *Preclearance Act*, S.C. 1999, c. 20.
5. David Johansen, *Legislative Summary of Bill S-22: Preclearance Act*, Publication no. LS-332-E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 28 April 1999.
6. Global Affairs Canada, *Agreement on Air Transport Preclearance Between the Government of Canada and the Government of the United States of America*.
7. In addition, to support efficient transborder passenger transportation services in these locations, U.S. “pre-inspection facilities” exist at marine terminals in Vancouver, Victoria and Prince Rupert and at a passenger rail terminal in Vancouver.
8. In-transit preclearance allows international passengers to bypass the Canadian customs process.
9. Inter*VISTAS* Consulting Group, Preclearance Act *Review: Final Report*, Report prepared for Foreign Affairs Canada, 22 June 2009, Sessional Paper 8560-402-1019-01, Tabled in the House of Commons, 19 August 2009.
10. Public Safety Canada, *Beyond the Border Action Plan*.
11. Canada Border Services Agency, “Trade Facilitation, Economic Growth and Jobs,” *Perimeter security and economic competitiveness*.
12. *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.
13. *Criminal Code*, R.S.C. 1985, c. C-46.
14. Johansen (1999).
15. *Agreement on Land, Rail, Marine, and Air Transport Preclearance*.
16. *Canada Border Services Agency Act*, S.C. 2005, c. 38.
17. *Agreement on Land, Rail, Marine, and Air Transport Preclearance*, art. II.2.
18. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
19. See, for example, *R. v. Mann*, [2004] 3 SCR 59; *R. v. Kang-Brown*, [2008] 1 SCR 456; *R. v. Chehil*, [2013] 3 SCR 220; and *R. v. MacDonald*, [2014] 1 SCR 37.
20. *R. v. Chehil*.

21. Lalita Acharya and Tomasz Kasprzycki, *Biometrics and Government*, Publication no. 06-30-E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 16 April 2010.

22. Ibid. As Acharya and Kasprzycki point out, biometrics (and other recognition tools) have been the subject of debate: civil liberties advocates "see them as part of an increasing trend towards a 'surveillance society' in which governments and private corporations are collecting increasing amounts of personal data, sometimes without justification." See also Jay Stanley and Barry Steinhardt, *Bigger Monster, Weaker Chains: The Growth of an American Surveillance Society*, American Civil Liberties Union, New York, January 2003.

23. Acharya and Kasprzycki (2010).

24. Ibid.

25. See, for example, Office of the Privacy Commissioner of Canada, *Data at Your Fingertips Biometrics and the Challenges to Privacy*, February 2011.

26. Acharya and Kasprzycki (2010). Citing the Office of the Privacy Commissioner, these authors state: "The [*Privacy Act*], which came into force in 1983, has not been substantially amended since its introduction. The Privacy Commissioner of Canada has stated that, because of technological and other changes, the privacy landscape has changed radically over the last 20 years and the Act is an 'outdated law that leaves the Office of the Privacy Commissioner of Canada virtually powerless to protect the privacy rights of Canadians relating to information collected, used and disclosed by the federal government.'" Office of the Privacy Commissioner of Canada, "Privacy Commissioner tables report calling for urgent reform of Canada's Privacy Act," News release, Ottawa, 5 June 2006. See also Office of the Privacy Commissioner of Canada, *Commissioner's letter to the ministers of Justice, Public Safety and Defence calling for greater protection of Canadians' privacy rights in the U.S.*, 8 March 2017.

27. *Agreement on Land, Rail, Marine, and Air Transport Preclearance*, art. VIII.1.

28. Ibid., art. VI.6.

29. Ibid., art. VI.16.

30. Inter*VISTAS* Consulting Group (2009), pp. 18–19.

31. Clause 18(2)(c) states that unless he or she withdraws from preclearance under clause 29, a traveller bound for the United States who is in a preclearance area must comply with any other direction given to him or her in accordance with this Act by a preclearance officer, police officer or border services officer.

32. "Explanatory Memorandum on the *Agreement on Land, Rail, Marine, and Air Transport Preclearance between the Government of Canada and the Government of the United States of America*," *Agreement on Land, Rail, Marine, and Air Transport Preclearance*, p. 2.

33. Bill S-22, An Act authorizing the United States to preclear travellers and goods in Canada for entry into the United States for the purposes of customs, immigration, public health, food inspection and plant and animal health (short title: Preclearance Act), 1st session, 36th Parliament.

34. Johansen (1999).

35. Ibid.

36. *Agreement on Land, Rail, Marine, and Air Transport Preclearance,* art. VI.18.

37. Ibid., art. VI.24.

38. *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.).