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Preclearance of Travellers from Canada to the US: Bilateral Cooperation or Intrusion on Sovereignty?

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Canada has allowed United States (US) Federal Inspection Services to operate air passenger preclearance in Canada since the 1950s. 'Preclearance' is the processing by US Federal Inspection Agencies of travellers and goods from Canada seeking entry into the US.

These arrangements were formalised by the 1974 Air Transport Preclearance Agreement between Canada and the United States of America. Under that Agreement, air preclearance services now clear some 8.5 million passengers a year at the Canadian airports of Vancouver, Edmonton, Calgary, Winnipeg, Toronto, Ottawa and Montreal (Dorval). Since that Agreement was signed, however, changes have been made to Canadian law; the Canadian Charter of Rights and Freedoms part of the Constitution Act, 1982, has granted and protected new individual rights. At the same time, border processing has evolved as a result of the rapid increase in trade between Canada and the US.

On 17 June 1999 the Government of Canada gave Royal Assent to Bill S22: '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 land and animal health'. Originally introduced in Parliament in December 1998, Bill S22, now known as the Preclearance Act was part of a 'reciprocal' arrangement between the US and Canada with respect to the powers of preclearance by officers of both countries in airport areas. However, Canada does not preclear travellers in the US, only the US does so in Canadian airports.

Until now, international passengers en route

to the US through a Canadian airport had to pass through Canadian Customs and Immigration before seeing a US preclearance officer. Intransit passengers from third countries at Canadian airports with preclearance facilities can now proceed directly to US preclearance, reducing two inspections to one. These services have been provided at the Vancouver International Airport on a pilot basis since June 1997. In addition, air transportation companies, prior to arrival in Canada, are required to provide preclearance officers with specified information about passengers passing through Canada en route to the US.

The statutory authority provided in the Act ensures the existence of the appropriate legal framework for border management and attempts to protect travellers' rights under Canadian law. US Federal Inspection Services are able to examine and seize goods and to administer certain monetary penalties under US border control statutes. US laws can be administered only in designated preclearance areas, subject to the Canadian Charter of Rights and Freedoms and relevant Canadian laws. No provision of US law that would be considered criminal under Canadian law could be applied in Canada; criminal matters are supposed to be dealt with by Canadian authorities under Canadian law. The Act applies to *every* traveller, not only Canadians, seeking entry to the US from a Canadian airport.

Main provisions of the Preclearance Act

Only travellers destined for the US may enter any preclearance area. Every traveller has the right during any part of the preclearance process to

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withdraw and leave the preclearance area unless the preclearance officer informs the traveller that the officer suspects, on reasonable grounds, that he has committed an offence, generally the making of an oral or written statement that the person knows to be false or deceptive, or if the person resists or wilfully obstructs an officer in the execution of his duty, in which instance the traveller will not be allowed to withdraw. If a traveller refuses to go to a preclearance area, the US officer may request a Canadian officer to bring the traveller to the preclearance area.

A preclearance officer is, if acting on reasonable grounds, justified in using as much force as is necessary for the purpose of doing what he or she is required or authorised to do under the Act. If a traveller refuses to answer any question asked for preclearance purposes, the preclearance officer may order the traveller to leave the preclearance area. Refusal to answer any question does not by itself constitute reasonable grounds for the officer to suspect that a search of the traveller is necessary or that an offence has been committed.

A preclearance officer may conduct a frisk search of any person if the officer suspects on reasonable grounds that the person is carrying anything that would present a danger to human life or safety, or that the person is carrying anything that would afford evidence of a contravention that the person has made a false oral or written statement. The preclearance officer may detain a person if he suspects that a strip search is necessary for the purposes allowed under the Act. A preclearance officer may seize any goods that he believes relate to a false or deceptive statement or afford evidence of contravention of the Act.

Any company operating any aircraft carrying passengers to the US must, before the arrival of the aircraft in Canada, provide a preclearance officer with specified passenger information, failing which the preclearance officer may refuse to preclear the passengers. This information is used so that preclearance officers may adopt appropriate measures to enforce the provisions of the Act.

Persons who make an oral or written statement to a preclearance officer with respect to themselves or any goods for entry into the US, knowing it to be false or deceptive, are guilty of an offence punishable on summary conviction and liable to a maximum fine of CDN \$5,000,000. Every person who resists or wilfully

obstructs a preclearance officer or Canadian officer in the execution of the officer's duties, is guilty of an indictable offence and liable to imprisonment for a term of not more than two years, or is guilty of an offence punishable on summary conviction. No decision of a preclearance officer to refuse preclearance or to refuse the admission of persons or the importation of goods into the US is subject to judicial review in Canada.

Under the Act, preclearance laws can be administered in Canada in a preclearance area with respect to travellers seeking admission to the US, and with respect to goods to be imported into that country, subject to the Canadian Charter of Rights and Freedoms, the Canadian Bill of Rights, and the Canadian Human Rights Act. No US monetary penalties can be imposed in Canada if proceedings are instituted with respect to an act or omission that had taken place in a preclearance area and that constituted an offence under Canadian law. Nothing in the Act precludes a Canadian officer from enforcing Canadian law in a preclearance area.

During Parliamentary debate, the Senate added a new clause to Bill S22. Under that clause (Section 39), the Minister in charge of administering the Act is required to have an independent review of the Act conducted five years after it came into force. The Minister is required to table a report on that review in both the Senate and the House of Commons on any of the first 15 sitting days of each chamber after the review was completed.

An intrusion upon Canadian sovereignty?

A number of serious concerns about the Act have been raised by lawyers and advocacy groups, including the complaint that it would result in a serious abrogation of the rights of travellers on Canadian soil and a considerable intrusion upon Canadian sovereignty. After consultations, an attempt was made to address some of those concerns and provide clarity to the Act, including the protection of basic rights guaranteed by the Charter.

An action or other proceeding of a civil nature, where the US is not immune from the jurisdiction of a court in Canada under the State Immunity Act, could be brought against the US in respect of anything that was, or was purported to be done or omitted by a preclearance officer within the scope of his or her duties. However, a

very important exemption exists, which 'insulates' US preclearance officers in the administration of their duties: no decision of a preclearance officer to refuse preclearance, or to refuse the admission of persons or the importation of goods to the US, can be subject to judicial review in Canada.

The provisions of the Act are far-reaching and give US preclearance officers considerable powers with respect to persons seeking entry to the US, notwithstanding the fact that they are still on Canadian soil.

Legal implications of the Act

The Act and its application give rise to numerous legal questions that will no doubt result in future litigation, such as:

- (1) If a traveller is detained, will he or she be subject to US or Canadian legal protection of his or her rights when he or she may have violated US law?
- (2) If a detainee is a US citizen, will officers have to advise of his or her US constitutional rights, as required by the US Supreme Court decision in *Miranda*?
- (3) If a traveller is from a third country, will that country need to be notified through its local diplomatic staff?
- (4) At what exact moment would a traveller not be able to 'withdraw' from the preclearance area, effectively constituting a 'point of no return'?
- (5) Should a traveller be stopped for a potentially serious offence, such as drug trafficking or suspected terrorism; would he or she simply be allowed to walk away after entering the preclearance area and withdrawing back to Canadian territory? Could a US preclearance officer insist to a Canadian officer that a traveller be arrested on any grounds?

All the above issues will create interesting legal problems on both sides of the Canada-US border. ■

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- 12 'Rough Draft of Human Genetic Code Completed', Reuters online, 26 June 2000.
- 13 'The Icelandic Healthcare Database and Informed Consent', *The New England Journal of Medicine*, 15 June 2000, Vol 342, No 24.
- 14 'Rules for Research on Human Genetic Variation – Lessons from Iceland', *The New England Journal of Medicine*, 15 June 2000, Vol 342, No 24.
- 15 'One Side Effect of Genetic Testing: Fear' *The New York Times*, 16 May 2000.
- 16 'Heart Measurement Identifies Those at Risk for Sudden Death', Reuters online, 15 June 2000.
- 17 'Gene Type May Be Linked to Cancer Potential', Reuters online, 5 July 2000. The information available so far suggests that the real problem is cigarette smoking.
- 18 'Genetically Altered Mosquito May Help Fight Malaria', Reuters online, 21 June 2000.
- 19 'Gene Therapy Ordered Halted at University' *The New York Times*, 22 January 2000.
- 20 'Skeptics Fear "Book of Life" Could Spell Death', Reuters online, 26 June 2000.
- 21 'Scientific Origins of Eugenics' by Elof Carlson (<http://vector.cshl.org/html/eugenics/essay2text.html>).
- 22 *Buck v Bell*, 274 US 200 (1927).
- 23 'Health Insurers Claim Fears Over Genetic Testing', Reuters online, 10 July 2000.
- 24 'Maryland Rules on Paternity Challenges', Associated Press online, 29 June 2000.
- 25 'Democrats Press for Genetic Discrimination Bill', Reuters online, 21 June 2000.
- 26 'Genetic Discrimination Feared', Associated Press online, 26 June 2000.
- 27 'Sen. Addresses Genetic Bias Concerns', Associated Press online, 30 June 2000.
- 28 'Health Insurers Claim Fears Over Genetic Testing' Reuters online, 10 July 2000.
- 29 'House Banking Panel Passes Medical Privacy Bill', Reuters online, 29 June 2000.
- 30 House Resolution HR 2900 EAS 14 October 1999.
- 31 House Resolution HR 2878 IH 15 September 1999.
- 32 *International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW, et al v Johnson Controls, Inc*, 499 US 187 (1991).