



Customs and Immigration Union
Syndicat des Douanes et de l'Immigration

**Submission to the
House of Commons' Standing Committee
on Public Safety and National Security**

Bill C-23

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

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The Customs and Immigration Union (CIU), formerly known as Customs Excises Union Douanes Accise (CEUDA), has a long history of involvement in border security and immigration enforcement issues on behalf of its members who include front line officers working to protect the safety and security of Canadians.

The CIU seeks to offer its members' operational insights to identify areas of concern and, where possible, to offer what it believes to be informed improvements.

The CIU has offered these concerns and suggestions to CBSA management, Government Ministers and in appearances before both House and Senate Committees.

On behalf of CIU, I am pleased to appear before the House Public Safety and National Security Committee with respect to Bill C-23, An Act respecting the preclearance of persons and goods in Canada and the United States. As Committee members are aware, C-23 is the legislation which will implement the Canada-US Pre-Border Clearance Agreement which was itself part of the original 2011 Beyond the Border Agreement.

The CIU supports improvements to trade and traveller processing when public and officer safety and security are not compromised. We support the sharing of information through a modernized lookout system and defined exit-entry information sharing.

Some of CIU's concerns with the Pre-Border Clearance provisions contained in Bill C-23 are similar to those that were brought to this Committee last week.

Following the release of the initial Beyond the Border Agreement and Action Plan, the CIU has closely followed the ongoing evolution of this issue up to and including the release of the latest Agreement and now Bill C-23 which will implement it.

From the outset, CIU has identified several issues of concern. These include:

1. Which country's laws apply to the activities of pre-border clearance officers;
2. Who will provide law enforcement assistance to US officers operating in Canada and how will that be done;
3. Travelers' ability to withdraw;
4. How will protection from double jeopardy for CBSA officers be assured;
5. Deployment at international airports in Canada and CBSA officer arming approval;
6. Immigration and refugee consequences.

Changes have been brought to Bill C-23 from what was originally proposed in these areas. There are some issues that remain unclear which hopefully the Committee will pursue with the Minister and officials.

1 – Application of law

Part 1 of C-23 authorizes a federal Minister, designated by Governor in Council, to designate preclearance areas and preclearance perimeters in Canada, in which preclearance may take place.

Part 1 also recognizes the authority of US designated officers to perform pre-border clearance activities and stipulates that Canadian law, including the Charter of Rights and Freedoms, applies to their activities in Canada.

Part 2 confirms that reciprocal authority and responsibilities will apply to CBSA officers performing pre-border clearance in the US. The Act also references the possibility of 'other public officers' as designated by the US.

The CIU is unclear as to what is intended by this and how – if at all – such designations will be made, on what grounds they will be made and with what authorizations or restrictions. It would be helpful if this were clarified.

2 – Provision of assistance to US officers

Part 1 now also authorizes CBSA officers to assist US officers in performance of duties in Canada but s. 35 and 36 appear to create distinctions between police and border service officer authority, and it references s. 163.4(1) Criminal Code authorization under the Customs Act regarding Criminal Code enforcement. This needs to be clarified and there should be an expansion of the designation of those officers by CBSA.

Issues have been raised regarding the actual requirements of US 'preclearance officers' to notify and involve CBSA officers should they wish to conduct a strip search of persons travelling to the US.

While that requirement is expressly articulated in s. 22(2) of the Act, s. 22(4) authorizes the US officer to conduct the search if no CBSA officers are available *or* if the CBSA officers decline to do so.

CIU believes that this provision should be removed from the Bill (and Agreement) especially as Bill C-23 expressly notes that Canadian law applies to all actions taken in preclearance areas and that other US authority does not. [Sections 9, 10 and 11]. Should a strip search be required in a preclearance area in Canada, it should be under the authority of Canadian Officers.

Clarification should be obtained from the Minister including whether the Government will secure Memorandums of Understanding with US authorities on this issue.

This could be expressly required if it were included as a pre-condition in the original designation of a preclearance area by the Minister [sections 6-8] or by Governor in Council Regulations which are authorized under s. 57.

3 – Traveler's ability to withdraw

Section 29 of the Act expressly articulates the right of a passenger to withdraw from the preclearance process.

Section 20(2) of the Act also prohibits the collection of biometric information from a traveler unless clear notice of the right to withdraw is posted in the preclearance area.

Even when a traveler chooses to withdraw, preclearance officers still have extensive authority pursuant to sections 30-32 including to conduct a strip search on defined grounds. The Act requires [32.2] notification and participation of CBSA officers in s. 22 but with the same exceptions as noted above in s. 22(4).

Accordingly, it is also recommended that the Minister secure Memorandums of Understanding with US authorities on the circumstances in which CBSA approval and participation is required.

4 – Preventing double jeopardy of officers

Part 2 of the Act grants the Attorney General of Canada the exclusive authority to commence and conduct a prosecution of a Canadian officer with respect to an act or omission committed in the United States.

This is an important provision which was recommended by the CIU to ensure there was no potential double jeopardy for CBSA officers and that Canada would retain ultimate jurisdiction.

5 – Airport application and CBSA officer status

Section 36 of the Act confirms that officers designated by CBSA under s. 163.4 of the Customs Act have the arrest-without-warrant authority under sections 495-497 of the Criminal Code.

Given the potential increased involvement of CBSA officers in such situations, this should result in designation of all CBSA officers working at international airports as there is an increased potential that they will be called on to act.

Further, this fact supports the long overdue overall approval of arming of CBSA officers at international airports, especially if they are working in enforcement scenarios with US officers or armed Canadian police officers.

Recent events at airports around the world confirm that times have changed and that the fully trained and armed CBSA officers now working at international airports – with their sidearms locked in a cupboard – should be allowed to carry their sidearms for the protection of themselves and the public they serve. Further, there is an insufficient number of police officers on duty.

This can be accomplished by the Minister helping CBSA achieve the required exemption from Transport Canada as was recently done for other Departments' Enforcement Officers (for example, Wildlife Officers).

Pre-border clearance at international airports and elsewhere may be a good idea for both countries. However, before CIU can endorse the provisions of this Bill, it will be important that details be worked out to appropriately protect the privacy rights of the people that it is designed to benefit.

Minister Goodale reported earlier to the Committee that “there is no power or authority or right or privilege conferred on an officer of one country that is not equally conferred on the officer of the other country.” (...) “They exactly mirror each other”.

Does this mean that a CBSA Officer can carry a firearm if she or he is working on American soil, in the preclearance area of a US international airport?

6 – Immigration and refugee issues

Part 2 authorizes the Governor in Council to make regulations adapting, restricting or excluding the application of provisions of the *Immigration and Refugee Protection Act* and other Canadian legislation in preclearance areas and preclearance Perimeters.

In addition to this, Canadian officers performing pre-border clearance in the US apply Canadian laws but s. 48(1) expressly confirms a traveller in a pre-border clearance area is *not* in Canada for the purposes of IRPA and that a refugee claim under s. 99 of that Act cannot be made.

In light of the current issues of increased refugee claims being made by people entering Canada from the US, clarification of this matter should be sought from the Minister regarding refugee claims and the application of the Safe Third Country Agreement to this.

In conclusion, the CIU would like to see additional changes made to the Pre-Border Clearance Agreement in order to improve and clarify Bill C-23.

There are a number of issues identified in this Brief which we urge the Committee to raise with the Minister and government officials in order to address and resolve them.

I appreciate the opportunity to appear before you today and would be pleased to answer any questions you may have.

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