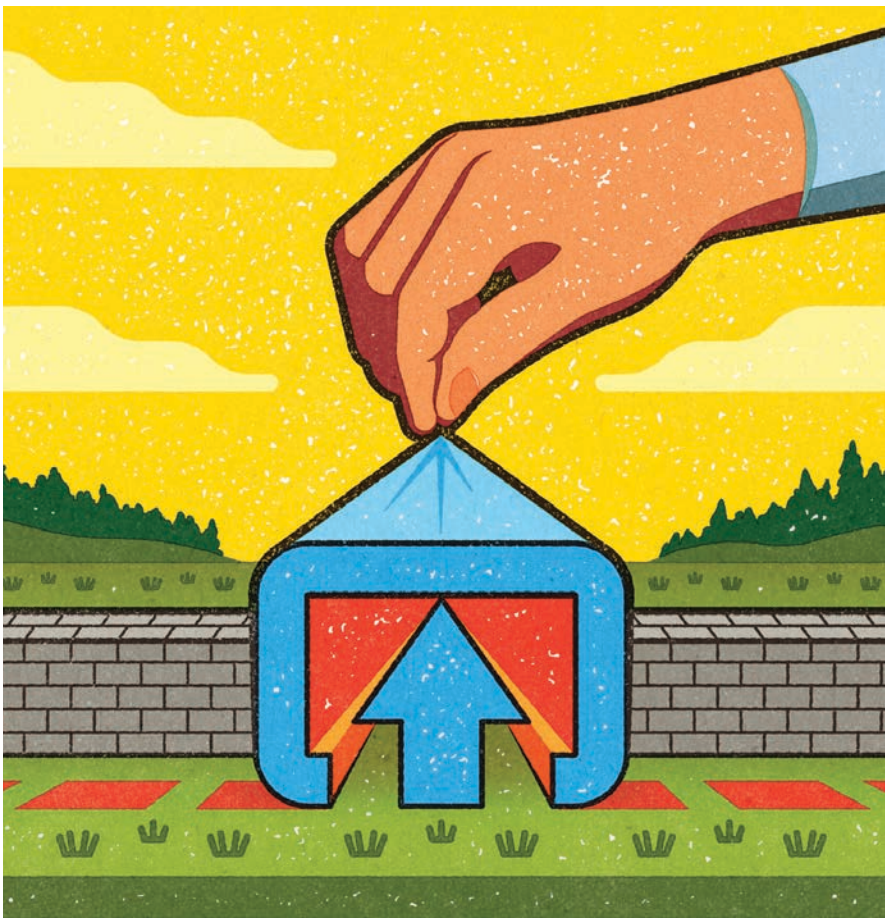
Preclearance bill raises concerns

Lawyers say federal government's bill expanding powers to refuse entry needs refinements.

By Mark Cardwell



Calgary lawyer Michael Greene is all for the faster movement and freer flow of legitimate goods and law-abiding people between Canada and the United States.

But the immigration expert says a slow read by informed jurists is needed of the federal government's proposed Preclearance Act to detect and flag provisions that might hinder the legal rights and constitutional freedoms of Canadian citizens, permanent residents and other people wanting to come here to live, work and/or visit.

"This is all about being vigilant at the front end," Greene, who is a senior partner with Sherritt Greene, says in regards to Bill C-23, An Act respecting the preclearance of persons and goods in Canada and the United States (short-titled the "Preclearance Act, 2016").

"You want to make sure you get it right now because once the horses are out of the barn it's hard to change the template," he says.

Tabled in the House of Commons on June 17 by Public Safety and Emergency Preparedness Minister Ralph Goodale, the bill provides for the establishment of preclearance areas and perimeters at air, sea, land and rail crossings in the United States.

Those areas would be staffed by officials with the Canada Border Services Agency who would be authorized to exercise their powers under Canada's Immigration and Refugee Protection Act, and to either permit or refuse travellers and goods bound for Canada entry here even before they arrive at a Canadian port of entry.

Essentially a trade agreement cemented during rookie Canadian Prime Minister Justin Trudeau's official visit to Washington to meet outgoing U.S. President Barack Obama in March, the act would both replace and expand on the provisions of the Air Transport Preclearance Agreement that was signed in 2001 between Canada and the U.S.

The new bill notably proposes an expansion of preclearance areas to several specific locations, including two of the nation's Top-10 airports (Toronto's Billy Bishop and Quebec City's Jean Lesage airports), Montreal's Central Station, and Rocky Mountaineer, a Canadian tour company that offers train vacations on four rail routes in British Columbia and Alberta.

ALEXIVELLA

According to the Canadian government press release announcing the bill, its provisions would, when passed (which is expected this fall), "further strengthen (the Canadian-American) relationship and enhance our mutual security, prosperity, and economic competitiveness."

That may be. But after a cursory reading of the new bill, some senior members of the immigration section of the Canadian Bar Association say they see some causes for concern from an immigration perspective contained in the new bill.

Red flags include proposed changes to people's right to withdraw from a preclearance area, and added powers to allow customs officials to detain people and question them about their motives for wanting to withdraw (and a legal obligation to be truthful in that regard).

It also proposes changes to the provision that currently prohibits security officers from the U.S. working on Canadian soil from doing body searches of people in preclearance without their Canadian colleagues being notified and present.

Under the new bill, Americans could perform strip searches if a Canadian security official is not available or declines to assist.

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Another potential bombshell is s. 48(4) of the proposed Preclearance Act 2016, which would permit CBSA officers the right to turn away permanent residents if they determine the permanent resident has not met his or her residency requirements. Under Canadian law, Canadian citizens and permanent residents cannot be refused entry into Canada.

"The new legislation would authorize officers to prepare a report outlining the relevant facts should they believe a foreign national or permanent resident is inadmissible under Immigration and Refugee Protection on grounds to be specified in regulations," Public Safety Canada spokeswoman Mylène Croteau wrote in an e-mailed response to a query from *Canadian Lawyer* asking for examples or conditions under which a Canadian permanent resident could be refused entry into Canada at a preclearance area under the proposed law.

"If the Minister (or his delegate) is of the belief that the report is well founded, the subject of the report may be refused preclearance. Travellers who are refused preclearance will be advised of the reason for the refusal. The traveller could choose to seek a review of

the officer's decision before the Federal Court (judicial review). This refusal does not prevent the traveller from seeking to enter Canada at a regular port of entry in the future," she wrote.

The government intends, added Croteau "to develop regulations that will outline the grounds of inadmissibility under which both FNs and PRs may be refused preclearance."

A similar proposal that is raising some eyebrows is s. 48(1), which provides that travellers in preclearance areas or perimeters outside Canada who are seeking to enter Canada for the purposes of the Act could also be refused entry.

"As such, both refugee protection claims and flag-poling will not be possible at preclearance facilities and perimeters," Vancouver immigration lawyer Steven Meurrens, a partner in Larlee Rosenberg, wrote in a recent blog about the new bill ("flag-poling" refers to the process of applying at a Canadian port of entry after a brief visit to the United States). "Indeed, since preclearance perimeters and areas are deemed to be outside of Canada, then port of entry work permit applications will not be possible at them."

"We have no idea what impact that might have on immigration to Canada," adds Greene. "If we start blocking people from going on to a port of entry, could that choke off immigration to this country?"

A past national chair of the CBA's immigration section and one of a half-dozen section members who volunteered this summer to go over Bill C-32 with a fine-tooth comb and to help draft a possible submission to government recommending changes before the act is passed, Greene says the bill's language reflects the closed-door process that led to its creation.

"Lawyers weren't privy to it [and] only learned about it in detail when the bill was tabled," says Greene. "It certainly appears to have some holes in it."

Howard Greenberg, national practice leader, immigration at the Toronto offices of KPMG Management Services LP, agrees. "From the little I've seen so far, somebody needs to take a really close look at this legislation before it passes," he says.

According to Greenberg, the wording and provisions in Bill C-32 — and their potential impacts and fallouts — reflect the divergent objectives of officials in Canada and the U.S., which has reached similar preclearance agreements with several countries and has more than 500 customs and borders agents stationed at 15 airports in Europe, the Middle East, the Caribbean and a half-dozen here in Canada.

"From the Canadian side, there is a need to move people and goods faster and more efficiently with the certainty they have been properly reviewed," says Greenberg. "But the thinking from the U.S. side is that they want to know as much as possible about travellers to the U.S. before they reach U.S. soil."

He notably referred to a recent article in the *New York Times* that illustrates the inextricable ties between preclearance and security for U.S. officials.

"The expansion of Preclearance in

strategic locations will further strengthen our ability to identify those who may pose a national security threat prior to encountering them on U.S. soil," R. Gil Kerlikowske, commissioner of the U.S. customs and border agency, told the *Times*.

Tom Ridge, first secretary of the U.S. Department of Homeland Security-*cum*-security consultant, added: "The further out you can push the border the better."

For Greenberg, provisions of Bill C-32 that deal with investigative powers, withdrawal rights, and the collection and use of fingerprints and biometric data by U.S. customs officers on Canadian soil "will have to be flushed out more" to ensure a balance between efficiency, security and rights. "These kinds of trade-driven things are always touchy because they deal with rights and obligations and there are lots of diplomatic implications," says Greenberg.

It was no different in 1999, he added, when he and Michael Greene teamed up to present a brief for the CBA at a Senate committee hearing on the first preclearance agreement, which was enacted in 2001.

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"We might have aggravated a few people for some changes we suggested that were implemented," recalls Greenberg. Notable changes included the right to withdraw from an examination from a preclearance area and limitations on the investigative powers of U.S. officials on Canadian soil — two issues that are again under the microscope in Bill C-32.

"This is round 2," adds Greenberg. "At this stage, the goal is to do a close examination of some parts of this legislation to help ensure the preservation of our constitution and laws [and] ensure a balance with security concerns carry through. The difficulties will be in the nuances [and] the application of eventual regulations, which we haven't seen yet." ***CL***