David Asper Centre for Constitutional Rights
UNIVERSITY OF TORONTO

Submissions to the Standing Committee on Public Safety and National Security

Contributors:

Executive Director Cheryl Milne and Research Assistant Patrick Enright

Student contributors: Natasha Anzik, Calum Agnew, Simon Fraser, Daniel Sisgoreo

David Asper Centre for Constitutional Rights

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Faculty of Law, University of Toronto, 78 Queen's Park, Toronto, ON M5S 2C5

www.aspercentre.ca

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David Asper Centre for Constitutional Rights

The David Asper Centre for Constitutional Rights is a centre within the University of Toronto, Faculty of Law devoted to advocacy, research and education in the area of constitutional rights in Canada. The Centre houses a unique legal clinic that brings together students, faculty and members of the legal profession to work on significant constitutional cases. Through the establishment of the Centre the University of Toronto joins a small group of international law schools that play an active role in constitutional debates of the day. It is the only Canadian Centre in existence that attempts to bring constitutional law research, policy, advocacy and teaching together under one roof. The Centre aims to play vital role in articulating Canada's constitutional vision to the broader world. The Centre was established through a generous gift to the law school from U of T law alumnus David Asper (LLM '07).

This Submission has been prepared with JD students of the University of Toronto Faculty of Law with the Executive Director of the Centre and the expertise of leading scholars at the Faculty of Law. In particular, the Centre is grateful for the input of Professor Kent Roach, Prichard Wilson Chair, Professor Lisa Austin and Professor Audrey Macklin, Chair in Human Rights Law.

Introduction: A Political Earthquake and the Security of the Border

On November 9th 2016 the American people elected Donald Trump, to be the forty-fifth president of the United States. The President's statements throughout the campaign proved divisive and often sparked controversy. In the course of the election, Trump called for a "complete and total shutdown of Muslims entering the United States"[1]; declared that "Islam hates us,"[2] alleged that Mexicans were pouring across the border,[3] and promised that millions of undocumented immigrants would be deported immediately upon his taking the oath of office.[4] While many of these statements were readily dismissed as campaign rhetoric, the words have turned out to be more than mere bluster. Upon taking the oath of office, President Trump immediately signed a "Travel Ban" that refused entry into the United States of citizens from seven majority Muslim countries. And while the rollout of the order turned out to be chaotic, and US courts ultimately stayed the order (and its second version), the signing of the document sent a strong message to the international community that the Trump Administration had every intention of fulfilling even its most controversial campaign promises. In short, the international community was put on notice.

The effects of this political unrest were immediately witnessed at the Canadian border. Canadian citizens have been turned away for unarticulated or discriminatory reasons, with digital devices being searched extensively – and intrusively – as part of a larger crackdown initiative. Many of those targeted for these searches are members of ethnic minorities. This has led various human rights groups to express grave concerns, with the ACLU even documenting one extraordinary incident where a man was tackled by border officials after refusing to unlock his phone.[5]

This is the context within which the Canadian government has moved to pass Bill C-23 – an *Act* to amend the *Preclearance Act*. The Bill's purpose is to expand the powers of American authorities at the border to question, search, and possibly detain travelers entering the United States. Our submission focuses on the effects that these proposed changes will have on the *Charter* rights of travelers from Canada to the US, with close attention being paid to violations of digital privacy rights, and the enforceability of the *Charter* to remedy any alleged violations. We also argue that aspects of the Bill itself are unconstitutional because it violates the rights of travelers to be free from self-incrimination,

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[1] Jenna Johnson, "Trump Calls for 'total and complete shutdown of Muslims entering the United States," (7 December 2015) *The Washington Post*, http://washingtonpost.com/news/post-politics/wp/2015/12/07/donald-trump-calls-for-total-and-complete-shutdown-of-muslims-entering-the-united-states/?utm_term=.cc70deedb122

[2] The Editorial Board, "I Think Islam Hates Us," (26 January 2017), *The New York Times* https://www.nytimes.com/2017/01/26/opinion/i-think-islam-hates-us.html?_r=0

[3] Nolan D McCaskill, "Trump Says Illegal Immigrants Pouring Across the Border to Vote," (7 October 2016), *Politico* http://www.politico.com/story/2016/10/trump-immigrants-pouring-over-border-to-vote-229274

[4] Christopher Woody, "How Trump's Day 1 Deportation Plans Could Backfire," (20 January 2017), *Business Insider* http://www.businessinsider.com/trump-border-wall-deportation-immigration-plans-backfire-failure-2017-1

[5] Ron Wyden, "According to the Government, People Under Arrest Have More Rights Than Travelers at the Border," (18 April 2017), American Civil Liberties Union https://www.aclu.org/blog/washington-markup/according-government-people-under-arrest-have-more-rights-travelers-border

while also denying them the right to counsel under s 10(b) of the *Charter*. In light of this, the Asper Centre makes the following recommendations for amending the proposed legislation:

1. **Amend section 30 to allow those subject to preclearance to withdraw from preclearance zones if they no longer wish to enter the United States, in keeping with the current *Preclearance Act*, s.16(3).**
2. **Make it clear that the full range of *Charter* and *Canadian Human Rights Act* remedies including those related to discrimination will be available to claimants by providing that claims pursuant to s 24(1) of the *Charter* and the *Canadian Human Rights Act* are enforceable against the United States for actions of preclearance officers carrying out or purporting to carry out their functions and duties in the preclearance areas (i.e. exempting such claims from immunity under the *State Immunity Act*).**
3. **Make it clear that digital devices are not "imported goods" for the purposes of preclearance screening, and impose a standard of "reasonable suspicion" for all digital searches. Pass regulations under s.99.4 of the *Customs Act* to govern device searches by Canadian officials and preclearance officers that better protect privacy and self-incrimination rights.**
4. **Include a requirement that searches of digital devices should be tailored and proportionate to the reason the search was lawfully conducted, and should be accompanied by detailed notes of what was searched and why the search was conducted.**

We have also reviewed the submissions made by the British Columbia Civil Liberties Association and the Canadian Bar Association.[6] Except where we indicate below, we support their recommendations to revise the proposed legislation.

PART I: The Current State of Affairs: Chaos at the Border, and the Introduction of Bill C-23

The stories emanating from the U.S-Canadian border since President Trump took the oath of office have been troubling. Examples include the following:

False VISA Requirement: On March 5, 2017 Manpreet Kooner was travelling from Montreal to Vermont for a spa day with two friends. She would never make it. At the border, U.S. officials informed her that she needed an immigrant VISA from the U.S. embassy to enter the United States. This, of

[6] Canadian Bar Association, *Bill C-23, Preclearance Act, 2016* (March 2017*); British Columbia Civil Liberties Association, Written Submission to the Standing Committee on Public Safety and National Security Regarding Bill C-23, the Preclearance Act, 2016* (10 May 2017)

course, was not true. VISAs of this kind are only required for those seeking to stay and work in the United States.[7] Ms. Kooner was denied entry.

Religious Intolerance: Canadian citizen Fadwa Alouwi was traveling to Burlington, Vermont for a shopping trip on February 5th. Ms. Alouwi is of Moroccan origin and wears a hijab. Her parents and brother both live in the United States. She was fingerprinted, photographed and questioned about her religion and her views on Donald Trump. Ms. Alouwi's cell phone was searched for over an hour after she had given up her password to American officials. The police found recitation of prayers on her phone that were deemed "against the United States." Questions were also posed about her views on the recent shooting at a Quebec mosque.[8] She was denied entry.

Student Detained: On February 9th Canadian citizen Yassine Aber, aged 19, was travelling with teammates from the University of Sherbrooke to a track meet in Boston. Although his teammates had all been cleared, Mr. Aber was denied entry to the United States. He was questioned for five hours by American border officials who searched his phone and Facebook account. During the search, American officials found a picture of him with a friend who had previously left to join an Islamist organization. He was told that he could not be granted entry because he lacked the requisite papers, a passport or a valid immigration visa, none of which was true.[9]

Protestors: On January 19th Mr. Decuhna was traveling from Montreal with a partner and friend to attend the presidential inauguration and the subsequent "Women's March" on Washington. After being asked questions such as "Are you Anti- or Pro-Trump?" and whether he believed in violence. He was also fingerprinted and had his photograph taken by border officials.[10] He was denied entry to the United States.

On January 19th Sasha Dyck was traveling with seven others to attend the inauguration and the Women's March on Washington, but was denied entry into the United States at the Quebec/New York border. Despite the fact that she holds dual citizenship with the United States, she and her friends were turned away after being held for several hours, being fingerprinted, and having their cell phones examined.[11]

These are only a handful of what are now numerous examples of similar stories involving conduct of this kind at the US-Canadian border. The trend we are seeing is even more alarming when it is noted that

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[7] Kamila Hinkson, "Canadian women en route to Vermont spa denied entry to U.S., told she needs immigrant visa," (6 March 2017), *CBC News* http://www.cbc.ca/news/canada/montreal/canadian-denied-entry-us-immigrant-visa-1.4011202

[8] Steve Rukavina, "Canadian woman turned away from U.S. border after questions about religion, Trump," (8 February 2017), *CBC News* http://www.cbc.ca/news/canada/montreal/canadian-woman-turned-away-from-u-s-border-after-questions-about-religion-trump-1.3972019

[9] News Staff, "Canadian denied entry to U.S. after being questioned on mosque connections," (10 February 2017), *CBC News* http://www.cbc.ca/news/canada/montreal/another-canadian-citizen-refused-entry-united-states-border-1.3976230

[10] Steve Rukavina, "Montrealers bound for Trump inauguration turned away at border," (20 January 2017), *CBC News* http://www.cbc.ca/news/canada/montreal/montrealers-bound-for-trump-inauguration-turned-away-at-border-1.3944657

[11] News Staff, "Montrealer heading to Donald Trump inauguration turned away at border," (19 January 2017) ,*CBC News* http://www.cbc.ca/news/canada/montreal/canadians-turned-away-at-border-1.3943996

volume of digital searches on the US side of the border, even before Donald Trump took the oath of office, had increased fivefold from 2015-2016 (4,764 in 2015 to 23,877 in 2016).[12] In fact, serious concerns about digital searches have been raised by the media prior to the travel ban, such as the following incident involving a Canadian journalist in the preclearance area of the Vancouver Airport:

Journalist Denied Entry: Canadian photojournalist, Ed Ou was stopped by US Customs and Border Protection on October 1st, on his way to cover the protests of the Dakota Pipe Line for the CBC. When asked to provide passwords to his devices he refused, citing the need to protect confidential sources. Officials confiscated his mobile phones and, according to Ou returned them hours later after having tampered with their SIM cards.[13] It remains unclear what data was obtained by US authorities. He was refused entry to the US.

In addition to these recent anecdotes, reports from the US about lack of training and abuse of authority of Customs and Border Protection over a period of time also raise significant concerns. One article noted that between 2005 and 2012, nearly one officer was arrested for misconduct every single day and that between 2007 and 2012, there have been approx. 1,700 allegations of excessive force.[14] A report by the American Immigration Council, reviewed abuse statistics by the US Customs and Border Protection, and the lack of action for 97% of cases.[15] The report describes the longstanding pattern of abuse and overstepping, the coinciding inaction, and the rapid expansion in the number of agents that has been met with inadequate training and experience.

Bill C-23: General Concerns

The *Preclearance Act,*[16] in operation since 1999, has proven to be an effective system for expediting the process of screening travelers at the border, while also aiming to ensure that Canadians enjoy the full protection of Canadian law when processed by American authorities. While the original legislation and the bilateral treaties upon which it and the proposed amendments are based, clearly state that Canadian law, and in particularly, the *Canadian Charter of Rights and Freedoms, Canadian Human Rights Act* and *Canadian Bill of Rights*, apply to the actions of US officials within the preclearance areas, the Asper Centre remains concerned about the force of these provisions especially in light of the proposed amendments.

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[12] *United States v Kolsuz,* (US 4th Cir. 2017) (Factum of the Amicus at 5).

[13] Andrea Peterson, "U.S. border agents stopped journalist from entry and took his phones," (30 November 2016), *The Washington Post*, https://www.washingtonpost.com/news/the-switch/wp/2016/11/30/u-s-border-agents-stopped-journalist-from-entry-and-took-his-phones/?utm_term=.fee503e7489e

[14] Garrett M. Graff, "The Green Monster: How the Border Patrol became America's most out-of-control law enforcement agency," (November/December 2014), *Politico Magazine* http://www.politico.com/magazine/story/2014/10/border-patrol-the-green-monster-112220?o=6

[15] Guillermo Cantor, Walter Ewing, & Daniel E. Martínez, *No Action Taken: Lack of CBP Accountability in Responding to Complaints of Abuse*, (May 4, 2014), https://www.americanimmigrationcouncil.org/research/no-action-taken-lack-cbp-accountability-responding-complaints-abuse

[16] *Preclearance Act*, SC 1999 c 20.

Bill C-23 proposes to amend the *Act* in several important respects. The Bill authorizes American border authorities to carry weapons in preclearance areas (on Canadian soil),[17] to perform strip searches on potential travelers,[18] and to detain – but not arrest – those attempting to enter the United States.[19] The Bill also enables US authorities to detain Canadians to compel them to answer questions posed to them by American authorities, or otherwise submit to coercive demands, even after they have declared that they no longer wish to enter the United States.[20]

The current climate, as noted above, should dictate a more cautious approach to expanded powers to better ensure that the Canadian constitutional and legislative protections are honoured, and are indeed sufficient to protect human rights such as equality, privacy and personal security. The Asper Centre urges the government to carefully examine and consider amendments that scale back the granting of additional powers to US authorities and at the same time to consider other legislative measures that reinforce an approach to search and seizure in respect of digital devices which acknowledges that they are unique items for storing significant personal information and, as such, require heightened privacy protections. As recent incidents have shown, Canadians are vulnerable to intrusive searches and unacceptable violations of personal privacy in preclearance and border zones.

PART II: Charter and Human Rights Violations at the Border

Equality Rights Violations by Officials

Human rights reports, such as the recent report of the Ontario Human Rights Commission,[21] have documented the impact of racial profiling in a number of contexts. The Commission also references data that 60% of Muslim interviewees indicated that they experienced unfair treatment while traveling, and that 79% said their friends/family had experienced unfair treatment. It noted also that 50% of all complaints to the National Council of Canadian Muslims were from Muslims turned away from border crossings with no explanation. The Canadian Human Rights Commission[22] and the UN Independent Expert on Minority Issues[23] have similarly expressed concern respecting practices within federal jurisdiction, including national security – an undeniably important impetus for border screening by both countries. The Canadian Human Rights Commission has stated unequivocally that racial profiling

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[17] Bill C-23, *An Act Respecting the Preclearance of Persons and Goods in Canada and the United States*, 1st Sess, 42nd Parl, 2016, s 61.
[18] *Ibid* s 22.
[19] *Ibid*
[20] *Ibid* s 30.
[21] OHRC, *Under suspicion: Research and consultation report on racial profiling in Ontario* (Toronto:2017) http://ohrc.on.ca/en/under-suspicion-research-and-consultation-report-racial-profiling-ontario/3-what-we-heard.
[22] Canadian Human Rights Commission, *Human Rights Accountability in National Security Practices: A Special Report to Parliament*, (Ottawa: November 2011), at p. 5.
[23] United Nations, Report of the independent expert on minority issues: Mission to Canada, 2010 at paras 62-63, online: http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A.HRC.13.23%20Add.2_en.pdf

offends the *Canadian Human Rights Act*.[24] Yet, many of the incidents that have occurred in recent months have the hallmarks of discriminatory practices and attitudes resulting in differential treatment on the basis of ethnic origin, religion and place of birth. Indeed, the two Executive Orders which purported to exclude people from seven listed countries, would offend Canadian law, yet if they had not been stayed by US courts, preclearance officers would have been tasked with implementing them on Canadian territory.

Much of the uproar over incidents at the Canada-US border has been a result of apparent discriminatory practices at locations other than preclearance areas. Individuals feel understandably violated by intrusive questions based upon stereotypical and blatantly discriminatory views of one's ethnicity, skin colour, place of birth and religion. The lack of recourse for the harm caused by border officials who may be acting unlawfully adds to the sense of grievance and helplessness for those denied entry.

Unreasonable Searches and Arbitrary Detention

The Asper Centre has reviewed the submissions of the British Columbia Civil Liberties Association and shares its concerns about the expanded powers of preclearance officers to detain and search travelers under the Bill. As they noted, the Supreme Court of Canada has explicitly held that strip searches are inherently humiliating and degrading, and can inflict psychological trauma on an individual.[25]While the Court has also recognized that there is a reduced expectation of privacy in the context of border searches, that does not render strip searches any less intrusive in and of themselves.[26] Indeed, as the Court stated in *Vancouver (City) v Ward*, "Strip searches are inherently humiliating and degrading regardless of the manner in which they are carried out and thus constitute significant injury to an individual's intangible interests."[27] It is particularly concerning, in light of the context, that the Bill goes so far as to permit such searches by preclearance officers even when a Canadian official refuses to do so.

Unlike strip searches, detention is considered reasonable in a broader range of circumstances. However, the *Charter* protects against detention that is arbitrary. It also establishes protective rights that mitigate against unjustified state intrusion including the right to be informed of the reasons for the detention,[28] the right to counsel,[29] and the right to silence.[30] While we argue below that some aspects of the Bill in relation to detention of people wishing to leave the preclearance area are unconstitutional, the powers conferred on preclearance officers inherently impinge upon constitutional and human rights. The

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[24] *Supra* note 21, at p.8; See also Tribunal decisions, *Davis v. Canada Border Services Agency*, 2014 CHRT 34; *Tam v Canada (Canada Border Services Agency)*, 2013 CART 41.
[25] British Columbia Civil Liberties Association, *Written Submission to the Standing Committee on Public Safety and National Security Regarding Bill C-23, the Preclearance Act, 2016* (10 May 2017) at p.13, citing *R.v. Golden*, 2001 SCC 83 at paras 89-90.
[26] *R v Simmons*, [1988] 2 SCR 495, at paras 50-54.
[27] *Vancouver (City) v Ward*, [2010] 2 SCR 28, at para 71 [*Ward*].
[28] *R v Smith*, 1991 CarswellNS 29, [1991] 1 SCR 714.
[29] *R v Bartle*, 1994 CarswellOnt 100, [1994] 3 SCR 173.
[30] *R v Hebert*, 1990 CarswellYukon 7, [1990] 2 SCR 151 [*Hebert*].

concern is therefore in relation to the ability of travelers to seek redress if the powers, such as the power to detain travelers in the preclearance area, are exercised in a manner that exceeds constitutional authority.

Summary

Arguably, discriminatory practices by US officials offend the US Constitution, but as noted below in respect of remedies, other than lodging a complaint with US Customs and Border Protection, there is little or no recourse for those affected. As the Bill C-23 makes clear in s.40, there can be no judicial review of a refusal to admit to the US. While both the Treaty and Bill C-23 unequivocally state that the *Canadian Charter of Rights and Freedoms*, the *Canadian Human Rights Act*, and the *Canadian Bill of Rights* apply in the preclearance area, these provisions ring hollow without clear enforcement mechanisms. It is within this context, as illustrated by the incidents described earlier, that the purported legal protections set out in the Bill must be viewed.

PART III: Inadequate Remedies for Rights-Violations

As Chief Justice McLachlin has reminded us in the past: "a right, no matter how expansive in theory, is only as meaningful as the remedy provided for its breach."[31]

We agree with the submissions by the BCCLA that the Bill creates confusion about who is responsible for breaches of traveler's fundamental human rights. There are real concerns as to whether those subject to preclearance in Canada will have access to a meaningful remedy. Section 39 of the *Act* provides civil redress only for acts carried out by American authorities that are not subject to state immunity.[32] Section 3 of the *State Immunity Act* specifically provides that the foreign state is not subject to the jurisdiction of any court in Canada. And while the *State Immunity Act* makes an exception for "any death or personal or bodily injury, or any damage to or loss of property that occurs in Canada"[33] it makes no explicit exception for public law remedies for *Charter* breaches.

In *Vancouver (City) v Ward*,[34] damages were awarded under s.24(1) of the *Charter* for a strip search that was in violation of the claimants rights under s.8, but that did not cause injury. A key harm caused by such searches is to the person's dignity and psychological integrity. As held in *Schreiber v. Canada (Attorney General)*,[35] the exception under s.6 of the *State Immunity Act* does not extend to mental or

[31] *Ontario v 974649 Ontario Inc.*, 2001 SCC 81 at para 20.
[32] *Supra* note 17, s 39(2).
[33] *State Immunity Act*, RSC, 1985, c S-18, s 6.
[34] *Ward*, *supra* note 27.
[35] *Schreiber v. Canada (Attorney General)*, [2002] 3 SCR 269, at para 80.

psychological harm and is unlikely to extend to a claim of deprivation of rights under the *Charter* absent physical harm (psychological harm must rise to the level of nervous shock to be covered). In other words, the type of claim made in *Ward* could not be made against the United States for an unlawful strip search conducted by a preclearance officer.

Neither are preclearance officers liable individually for anything done or omitted in the exercise of their powers, duties or functions under the Act,[36] nor are they considered servants of the Crown, which would render Canada responsible for rights violations by preclearance officers.[37] This means that it is questionable whether rights violations can be remedied in an award of damages, declaratory relief, or any other means that may that may be deemed appropriate under s 24(1) of the *Charter*. This reality is particularly troubling in light of the authorization American officials have been given under section 22 of the proposed legislation, which allows them to perform strip searches in circumstances where Canadian officials are unavailable or unwilling to participate in the examination.[38]

Administrative Remedies

As noted above, s.40 of the Bill makes it explicit that judicial review is not available for any refusal to conduct preclearance or to admit. It is also questionable whether administrative proceedings are available for the acts of preclearance officers, particularly under the *Canadian Human Rights Act* but even possibly under the *Charter*. If the Human Rights Tribunal is considered to be a court under s.3 of the *State Immunity Act*, then it has no jurisdiction to hear a complaint against the United States except as discussed above. This was held to be the interpretation by the Ontario Human Rights Tribunal in a complaint against Barbados.[39] While no court has considered this directly, and not in light of the specific provision that preclearance officers must exercise their powers in accordance with the *Canadian Human Rights Act*, it is certainly unlikely that a claim under that Act could be brought against the United States for discriminatory actions of its preclearance officers unless the claim meets one of the narrow exceptions within the *State Immunity Act*.

Summary

The proposed legislation gives American border officials the statutory authority to act within Preclearance areas on Canadian soil. This presents the novel legal issue of whether the *Charter* can apply to foreign officials acting within Canada, under the authority of a Canadian statute. By specifically maintaining its immunity under the *States Immunity Act* under the provisions of Bill C-23, and by excluding personal liability of preclearance officers, the Act provides only very limited ability to seek

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[36] *Supra* note 17, s.39(2).
[37] *Ibid.*
[38] *Supra* note 17.
[39] *Bentley v. Consulate General of Barbados/Invest Barbados*, [2010] CarswellOnt 9446, 2010 HRTO 2258, 86 C.C.E.L. (3d) 206, at para 18.

redress for violations of human rights for only those acts that cause death, bodily harm and damage to property. It is recommended that immunity under the *States Immunity Act* not extend to any violations of the *Canadian Charter of Rights and Freedoms, Canadian Human Rights Act*, or *Canadian Bill of Rights* including those related to discrimination.

Part IV: The Proposed Legislation Violates Sections 9 and 7 of the *Charter*

Arbitrary Detention under Section 9 of the *Charter*

Section 30 of the proposed legislation is constitutionally problematic because it creates a situation of arbitrary detention contrary to s.9 of the *Charter* which provides protection against such unjustified state interference.[40] Detention can be either *legally compelled* or *a reasonable perception*, and arises where a person's freedom of action is constrained by the force of law, or – because of the actions of state officials – he or she reasonably believes that "walking away" is no longer an option.[41] Section 30 of the proposed legislation states that travelers who wish to withdraw from preclearance must, first, truthfully respond to any questions posed to them by preclearance officers, including their reasons for withdrawal.[42] They must also comply with any other directive given by an officer, including the production of identification, and compliance with further searches of one's vehicle or commercial conveyances.[43] Failure to comply with these strictures places them in contravention of the *Act* and may also provide the "reasonable grounds" needed for authorities to engage in a more intrusive search.

A reasonable person would not feel free to simply walk away from the scenario contemplated by the Bill. Section 30 allows officers to engage in additional searches of vehicles and conveyances even after a traveler has declared his or her intention to turn around and leave a Preclearance area. In such a case it is hard to imagine anyone believing, reasonably or otherwise, that it is a viable option to simply refuse to comply with these procedures and leave.

Detention is thereby being used to coerce travelers into capitulating. This is not a lawful use of detention. There is no legal justification possible within immigration law for a state to detain a person who, at the moment of detention, does not seek entry, unless there are reasonable grounds to suspect a breach of the criminal law.

Detention gives arise to a number of rights that are immediately engaged, including the right to be informed of the reasons for the detention,[44] the right to counsel,[45] and the right to silence.[46] Bill C-23

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[40] *R v Grant*, 2009 SCC 32, at para 20.
[41] *Ibid* at paras 41-43.
[42] *Supra* note 17, s 30(a).
[43] *Supra* note 17, s 30(b) - s 31(1)(2).
[44] *R v Smith*, 1991 CarswellNS 29, [1991] 1 SCR 714.

makes no provisions for these protective rights.

The Right to Counsel under Section 10(b) of the Charter

Section 10(b) of the *Charter* states that, upon detention, a person has the right to "retain and instruct counsel without delay and to be informed of that right."[47] This means that authorities may not begin questioning a detained person before he or she has had the opportunity to contact counsel; any questioning made after the right has been infringed may be subject to exclusion in subsequent criminal proceedings.[48]

It is clear that section 30, at best, invites violations of the right to counsel by not providing for the retention of counsel after a situation of detention has crystalized. At worst, the omission renders the *Act* unconstitutional on its face. Since s 30 creates a situation of detention, there is simply no exception to the constitutional requirement that travelers have access to counsel, and that they be promptly informed of this right.

Right to Silence Under s 7 of the *Charter*

The right to silence is considered a "basic tenet" of the law and proscribes any action by a police officer, or person in authority, that requires detained persons to answer questions or provide evidence that may incriminate themselves in future criminal proceedings.[49] Therefore, like the right to retain counsel, the privilege against self-incrimination arises the moment a person is detained by a person in authority.[50] This means that authorities cannot compel a detained person to provide biographical data, or any other information that may incriminate themselves in a subsequent criminal trial.

The right against self-incrimination, on this ground, is violated by the proposed legislation. Section 30 requires a traveler in a situation of detention to provide personal information to authorities as well as his or her "reasons for withdrawing." All answers must also be truthful – regardless of whether this information may incriminate the traveler in any criminal activity (failure to comply with these compulsions immediately places the traveler in contravention of the *Act*).

This requirement does more than merely invite violations of the privilege against self-incrimination – it renders the legislation, by its very existence, unconstitutional. Section 30 sets up a situation of detention by constraining the actions of those subject to preclearance, and section 30(a) adds to this a requirement that the detained person must respond truthfully to any questions posed. If the provision goes unamended, then, this combination should prove fatal to the legislation in courts. The right to silence has

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[45] *R v Bartle*, 1994 CarswellOnt 100, [1994] 3 SCR 173.
[46] *Hebert, supra* note 30
[47] *Canadian Charter of Rights and Freedoms*, s 10(b), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
[48] *R v Strachan*, 1988 CarswellBC 699, [1988] 2 SCR 980; See also: *R v Wittwer*, 2008 SCC 33.
[49] *Hebert, supra* note 30 at para 20.
[50] *Ibid* at para 65.

been deemed a "principle of fundamental justice" under s 7 of the *Charter*, and one's life, liberty, and security of the person can only be abridged in accordance with these principles.[51]

Summary

Section 30 of Bill C-23 creates on its face arbitrary detention by requiring those subject to Preclearance to answer questions, and to comply with various orders, *regardless of whether they have voiced a desire to withdraw from the inspection.* Such a requirement means that the actions of those subject to preclearance are restricted by the law itself – a situation of legally compelled detention. And, even if the *Act* does not establish a *legally compelled* situation of detention, it undoubtedly qualifies as a form of *subjective* detention. A reasonable person would not feel, at the moment a s 30 situation arises, that he or she has the right to simply walk away and exit preclearance.

This situation sets up a number of *Charter* violations. Upon detention a person must be provided with the reasons for the detention, the opportunity to obtain counsel, and the right to silence. The proposed legislation more or less ensures that these rights will be violated, however, by setting up situations where officers are unlikely to offer reasons as to why the traveler has been detained; they are not required to inform travelers of their right to counsel under the *Act*; and the *Act* actually *requires* the compulsion of potentially self-incriminating evidence. This latter requirement will likely render the legislation itself unconstitutional, as the combination of detention under s 30 and the requirement of truthful disclosure under s 30(a), self-evidently violates the right to silence under s 7 of the *Charter*.

We therefore recommend that s 30 be repealed or amended to allow those subject to preclearance to voluntarily withdraw from preclearance at a time of their choosing without detention or delay.

PART V: Protecting Digital Privacy Rights at the Border

Section 8 of the *Charter* guarantees the right to be free from "unreasonable search and seizure."[52] A "search" occurs where law enforcement officials engage in an examination of goods in a place where the person subject to the search has a "reasonable expectation of privacy."[53] While it might seem obvious that travelers have a reasonable expectation of privacy in the contents of their personal computer or cell phone, the inquiry is a context-sensitive one. The courts have consistently held that one's expectation of privacy is significantly diminished at the border, as travelers fully expect to be subject to a screening process, where privacy interests must give way to the state's legitimate interest in maintaining its

[51] *Ibid* at para 6.
[52] *Canadian Charter of Rights and Freedoms*, s 8, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
[53] *Hunter v Southam*, [1984] 2 SCR 145, 1984 CarswellAlta 121 at paras 24 - 25.

sovereignty.[54] This is why, at the border, items such as luggage, suitcases, and purses – places where people would normally have a heightened expectation of privacy – can all be searched without any demonstrable cause or reasonable suspicion. These items are considered only "imported goods" for the purposes of the *Customs Act*, and thus examination of their contents does not amount to a "search" under the *Charter*.[55]

But the designation of a digital device as a mere "good" for the purposes of border searches is an awkward fit at best, and offensive to personal privacy at worst. A personal computer is not like a brief case or a filing cabinet.[56] It is the place where we store our most personal correspondences – with clients, lawyers and medical professionals. It is preferable that such items should be considered as goods in the custody or possession of a person under s.99.3 of the *Customs Act* which speaks of non-intrusive searches only where there is no suspicion.

Importantly, the current approach to digital privacy at the is inconsistent with the Supreme Court's position in other contexts. The Court has recognized the need to adapt our interpretation of s 8 to the shifting contours of new technology[57] and, in a series recent of judgments, has affirmed the singular role that digital devices play in our lives.

In *Morelli (2010)* Justice Fish remarked that "it is difficult to imagine a search more…extensive, or invasive of one's privacy than the search…of a personal computer"[58] and in *Cole* the Court held that the information stored in a personal computer goes to the "biographical core" of a person that s 8 of the *Charter* was meant to protect.[59]

In *Vu* the Court explicitly drew a distinction between computers and other kinds of goods. In doing so the Court highlighted the "immense" storage capacity of digital devices, their capacity to retain information users have tried to erase, and their ability to connect to far-reaching geographical locations. For all these reasons, the Court concluded that computer searches are "markedly different" from that of ordinary receptacles.[60]

The Court took it a step further in *R v Spencer*.[61] In *Spencer*, the Court held that subscriber information – a form of identifying 'metadata' – required a warrant before it could be reasonably searched by law enforcement authorities. Unfettered access to this information, it was determined, was inconsistent with the privacy interests enshrined in, and protected by, s 8 of the *Charter*.[62]

And, finally, in *Fearon*, the Court affirmed that even in the context of searches "incident to arrest" –

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[54] *R v Simmons*, 1988 CarswellOnt 91, [1988] 2 SCR 495 at para 52.
[55] *R v Buss*, 2014 BCPC 16 at para 32; See also: *Customs Act*, RSC, 1985, c 1, s 99(1).
[56] See: *R v Vu*, 2013 SCC 60 at para 41. [*Vu*]
[57] *R v Telus Communications Co.*, 2013 SCC 16 at para 53.
[58] *R v Morelli*, 2010 SCC 8 at para 2.
[59] *R v Cole*, 2012 SCC 53 at para 2.
[60] *Vu*, *supra* note 56 at paras 24, 40 - 45.
[61] *R v Spencer*, 2014 SCC 43.
[62] *Ibid* at para 74.

liberal searches of the immediate surroundings after a suspect has been arrested – digital devices require special consideration.[63] A device could only be searched, it was held, to the extent that the search is rationally connected to the purpose of a criminal investigation, such as examining recently sent text messages.[64] The decision also noted that whether the phone was password protected was not an indicator of the owner's subjective expectation of privacy.[65]While *R v Buss*[66] held that compelling the owner to provide the password to digital devices such as phones and laptops was not an infringement of the right against self-incrimination under s.7 of the *Charter*, the Supreme Court's approach here suggests that a higher court might take a different stance making this another area of unsettled law. The Court has made clear that its approach to self-incrimination will be generous in situations where a person forced to reveal information faces potential criminal or other severe consequences and is not simply operating in a regulated field.[67]One concern here, as underlined by the findings of the Arar and Iacobucci inquiries, is that once digital information enters American intelligence data-banks it may be used in ways that expose individuals to severe consequences including potential criminal prosecutions and detentions throughout the world.[68]

It is very likely, then, that actions taken by officials under the authority of the new Bill with respect to digital devices will not survive constitutional scrutiny in the courts. The thrust of the Supreme Court's recent jurisprudence suggests that digital devices will not, and should not, be treated as ordinary "goods" such as a briefcase or a filing cabinet; even when crossing the border people can, and do, have a reasonable expectation of privacy in their digital devices. The Canadian Bar Association specifically addresses the lack of protection for solicitor client privilege, a constitutionally protected right under s.7. We support their call for explicit policy to protect this important right more explicitly.

The Asper Centre submits that, in the context of the border, a reasonable search means that the search is based, at a minimum, on a standard of "reasonable suspicion." This is not too onerous a threshold. Reasonable suspicion is a lower standard than "reasonable and probable grounds" and requires only that an official have reasonable grounds to believe that a person is *possibly* engaged in criminal activity or otherwise poses a threat to national security.[69]

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[63] *R v Fearon*, 2014 SCC 77.
[64] *Ibid* at para 76.
[65] *Ibid* at para. 53.
[66] *Supra*, note 55.
[67] *R v White*, [1999] 2 S.C.R. 417; See Also: *R v Fitzpatrick*, [1995] 4 S.C.R. 154.
[68] Canada, Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar. *Report of the Events Relating to Maher Arar. Analysis and Recommendations* (Ottawa: Minister of Public Works and Government Services, 2008). Online: http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher_arar/07-09-13/www.ararcommission.ca/eng/AR_English.pdf; Canada, Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin. *Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin* (Ottawa: Minister of Public Works and Government Services, 2008). Online: https://web.archive.org/web/20081022003752/http://www.iacobucciinquiry.ca/pdfs/documents/final-report-copy-en.pdf
[69] See: *R v Chehil*, 2013 SCC 49 at para 27.

This is consistent with the approach some U.S. courts have taken in this regard. U.S. courts have generally rejected an "anything goes" approach to privacy rights at the border,[70] and in the important case of *United States v Cotterman*, the Ninth Circuit held that a search of digital devices that extended beyong the border required "reasonable suspicion" to be lawful.[71] In the U.S. context, this standard requires a particularized and objective basis for instigating the search that cannot be satisfied by either random or arbitrary considerations.[72] However, the US law remains as unsettled as Canadian law in this regard. Therefore, we recommend a proactive legislative approach that better protects digital privacy while striking the necessary balance expected of a border search.[73]

Summary

The Asper Centre submits that an inspection of digital devices at the border amounts to a "search" for the purposes of s 8 of the *Charter* and, as such, must be conducted in a reasonable manner. This means that, at a minimum, the search must be conducted on the basis of "reasonable suspicion" to meet constitutional scrutiny. Because of the singular role that digital devices play in our lives it is inappropriate that these items continue to be classified as "imported goods" for the purposes of border searches under the *Customs Act*. A computer is not like a piece of luggage or a briefcase. It has the capacity to store a trove of personal information, private correspondences, and confidential business records. It is, in other words, a "fastidious record-keeper" of every aspect of our lives.[74] It also could constitute a compelled form of self-regulation that, by placing data into American intelligence systems, could result in severe consequences.

This has two significant implications for the proposed legislation. First, under the proposed legislation searches of digital devices would not be proscribed by section 10(2) of the legislation itself, which explicitly prohibits American officials from engaging in searches that are not in accordance with the *Charter of Rights and Freedoms*.[75] And, second, it means that those subject to unreasonable searches of digital devices by American authorities will not – as shown above – have any recourse to a constitutional remedy under s 24(1) of the *Charter*.

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[70] *U.S. v Seljan*, 547 F. (3d) 993 at 1000 (9th Cir. 2008).
[71] *U.S. v Cotterman*, 709 F (3d) 952 (9th Cir. 2013).
[72] *Ibid* at 968.
[73] This is also consistent with the responses to the public consultation conducted by Public Safety Canada which found that a majority of respondents were concerned about digital privacy and called for clear protections. Public Safety Canada, *National Security Consultations: What we learned report*, (Hill+Knowlton Strategies: May 19, 2017).
[74] *Vu*, *supra* note 56 at para 42.
[75] *Supra* note 17 at s 10(2).

Conclusions and Recommendations

Any new law that encroaches upon civil liberties and human rights should, perhaps now more than ever, be scrutinized with the utmost caution. Bill C-23 is not responsive to the current context. It contains many provisions that run roughshod over important *Charter* interests, including the right against unreasonable search and seizure and the right to life, liberty and the security of the person. We therefore recommend that the legislation be amended along the following lines to ensure that it remains *Charter* compliant.

Recommendation #1: **Allow those subject to Preclearance to leave if they no longer wish to enter the United States.** If the Bill is passed in its current form it will be nearly impossible for the government to convince a court that section 30 does *not* establish a situation of detainment. The simple fact is that where a traveler has made a decision to exit preclearance, he or she is not free to do so; travelers must stay and comply with the requirements of the *Act*. This is, ipso facto, a situation of detainment which confers a number of rights upon travelers subject to questioning, including the right to counsel and the right to silence. Since these rights only arise in a situation of detainment, the government can avoid these rights violations by simply allowing those subject to preclearance to leave on their own volition.

Recommendation #2: Make it clear that the full range of *Charter* and *Canadian Human Rights Act* remedies including those related to discrimination will be available to claimants by providing that claims pursuant to s 24(1) of the *Charter* and the *Canadian Human Rights Act* are enforceable against the United States for actions of preclearance officers carrying out or purporting to carry out their functions and duties in the preclearance areas (i.e. exempting such claims from immunity under the *State Immunity Act*). A constitutional right is only as meaningful as its remedy.[76] As it currently stands, there is – we have argued – strong reason to believe that the proposed legislation would leave claimants without a remedy for rights-violations that occur within the designated preclearance zones where only American officials are involved. This is significant because the legislation ensures Canadians that the *Charter* will not fall silent in these areas.[77]

Recommendation #3: Make it clear that digital devices are not "goods" for the purposes of preclearance screening, and impose a standard of "reasonable suspicion" for searches of digital devices. Pass regulations under s.99.4 of the Customs Act to govern device searches by Canadian officials and preclearance officers that better protect privacy rights. Many of the most troubling instances of privacy violations at the border can be attributed to the classification of digital devices as "imported goods" under the *Customs Act*.[78] This means that cell phones and computers can be treated like mere commodities and subject to intrusive searches. This stance, however, is markedly inconsistent with the Supreme Court's jurisprudence on the subject, where it has consistently held that a computer is

[76] *Supra* note 48.
[77] *Supra* note 43.
[78] *Customs Act*, RSC, 1985, c 1, s 99(1).

not to be treated like an ordinary good.[79] It is, instead, to be treated as the place where we all store our most personal information, where we correspond with friends, family members, and trusted professionals. As such, it is worthy of enhanced privacy protections under the *Charter*.

For this reason, Parliament should require a standard of "reasonable suspicion" before digital devices can be searched at the border. Such a requirement would not impose too high a burden on American preclearance officials. Reasonable suspicion is a lower standard than that of reasonable and probable grounds, and requires only that there be reasonable grounds to believe that a traveler is *possibly* engaged in a criminal enterprise or otherwise poses a threat to national security.[80] This is assessed on a standard of common sense, with due regard to the experience and training of border officials.[81]

Recommendation #4: Any search of digital devices should be tailored to the reason if was lawfully conducted, and should include detailed notes of what was searched and why. In *Fearon* the Court noted that the warrantless search of digital devices was an "extraordinary power" that requires special consideration of privacy interests.[82] For this reason, the Court imposed a requirement that searches of digital devices incident to arrest must be limited to the reason the search was conducted. We recommend a similar standard be imposed at the border. The ability to sift through one's emails, confidential records, photographs and internet history without a warrant is indeed an "extraordinary power." For this reason, only the content rationally connected to the purpose of the search should be liable to inspection. For example, if a computer is searched on the reasonable suspicion that a traveler is importing child pornography, officials may not have the liberty to scour through the person's emails, social media, and internet history, but may well be allowed to search downloaded materials on the computer.

The Court in *Fearon* also held that, in searches incident to arrest, an officer is required to take detailed notes of what had been searched and why.[83] Because the search requires neither a warrant nor reasonable and probable grounds, it was considered necessary that officers take detailed notes of what parts of the digital device were searched and the purpose for the search. Imposing this burden in preclearance zones would, similarly, ensure that American officials are held accountable if digital devices are searched in a manner that is excessively intrusive or not rationally connected to the original purpose of the search.

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[79] *Supra* note 21.
[80] *Supra* note 30.
[81] *R v Mackenzie*, 2013 SCC 50 at para 63.
[82] *Fearon*, supra, at para 16.
[83] *Ibid* at para 83.