

CAUT TRAVEL ADVISORY

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Travelling to the United States: Your Rights at the Border

1. Land Borders

When travelling by land to the United States, you have to enter into US territory before you arrive at the customs and immigration office. Once there, you are under the exclusive jurisdiction of the laws of the United States. You are not subject to the Canadian Charter of Rights and Freedoms or to any other Canadian legislation.

2. Preclearance at Airports

Crossing into the United States through a Canadian airport affords significant rights to the traveller, whether Canadian or a foreign national. The major airports in Canada with direct flights to the USA have preclearance areas; usually attached to their in-transit areas. The preclearance areas are staffed by Preclearance Officers (PCO). The officer's role is to pre-clear travellers, goods, and means of transportation through US customs and immigration.

The preclearance areas in airports are on Canadian soil and governed by Canadian law. Although the PCO's are US Federal Employees, their actions in Canada and in the preclearance areas are governed by federal Canadian legislation known as the 1999 *Preclearance Act*.

2.1 Court of Competent Jurisdiction

Any criminal matter arising out of an incident with a traveller in a preclearance area, must be dealt with by Canadian courts. No provision of American law that would not be criminal under Canadian law may be administered in Canada. Criminal matters must be dealt with by Canadian authorities under Canadian law.

No civil action can be brought against a PCO in respect to anything that is done or omitted to be done by the officer under the *Preclearance Act*. Personal injury caused by a PCO acting outside of the jurisdiction of the *Act* may be pursued criminally. You cannot appeal to a Canadian court on a refusal by a PCO to allow a traveller to continue to the United States.

Anyone travelling to the United States through a Canadian airport, either travelling directly from Canada or transiting through Canada, must report for US customs and immigration inspection. If, after examining a traveller's luggage or mode of transportation, the PCO wishes for the traveller to enter into the preclearance area, they have the right to compel the traveller to enter the preclearance area and to obtain the assistance of Canadian Peace Officers to make the traveller comply.

Once entering the preclearance area, the traveller will be questioned by a PCO. The traveller has the right not to answer questions by the PCO. If the traveller chooses not to answer the questions of the PCO, the PCO can refuse to allow the traveller to continue to the United States. The traveller is then free to leave the preclearance area unless the PCO has reasonable grounds to believe that the traveller has committed an offence under section 33 or 34 of the 1999 *Preclearance Act*. (Simply not answering the PCO's questions does not constitute reasonable grounds to believe that an offence has been committed under section 33 or 34 of the *Act*.)

s. 33(1)

Every person who makes an oral or written statement to a preclearance officer with respect to the preclearance of the person or any goods for entry into the United States that the person knows to be false or deceptive or to contain information that the person knows is false or deceptive is guilty of an offence punishable on summary conviction and liable to a maximum fine of \$5,000.

(If a person is convicted in a Canadian court of a violation of s. 33 of the *Act*, the sentence does not constitute a criminal record.)

s. 34

Every person who resists or wilfully obstructs a preclearance officer or a Canadian officer in the execution of the officer's duty or any person lawfully acting in aid of such an officer

- a) is guilty of an indictable offence and liable to imprisonment for a term of not more than two years, or*
- b) is guilty of an offence punishable on summary conviction.*

A conviction under s. 34 will result in a criminal record for the traveller unless they receive a conditional or absolute discharge.

2.2 Detention and Use of Force

PCO's are authorized to use as much force as necessary, if while acting on reasonable grounds they are doing what is authorized under the *Act*. However, PCO's are not to use force intended or likely to cause grievous bodily harm or death unless they have reasonable grounds to believe that it is necessary to protect a person from either grievous bodily harm or death.

2.3 Searches

A PCO is authorized to conduct two types of searches: a frisk search which is a manual or electronic search of a traveller's clothed body and a strip search which means a visual inspection of a traveller's naked body. Neither type of search can be conducted on a member of the opposite sex. A PCO or any other officer or designate cannot observe a strip search of a person of the opposite sex.

A PCO can carry out a frisk search if he/she suspects, on reasonable grounds, that the traveller is carrying anything that would present a danger to human life or safety; or is carrying anything that would afford evidence of a violation of s. 33 of the *Act*.

A person can be detained by a PCO and strip searched if he/she believes that it is necessary for the same reasons as above: that is, the traveller is carrying anything that would present a danger to human life or safety; or is carrying anything that would afford evidence of a violation of s. 33 of the *Act*.

The traveller must be informed that he/she is entitled to be taken in front of a senior officer for a decision on whether it is necessary for a strip search and if the traveller so requests, he/she must be taken in front of the senior officer. The senior officer may direct the traveller to be searched only if the senior officer suspects on reasonable grounds that it is necessary to conduct a strip search to determine if the traveller is carrying anything that would present a danger to human life or safety; or is carrying anything that would afford evidence of a violation of s. 33 of the *Act*.

However, in the circumstances of a strip search, the PCO has to, prior to the search, and without delay, call a Canadian officer to conduct the strip search. If there is no member of the same sex to conduct the search, the PCO or the Canadian officer may designate any suitable same-sex person to conduct the search. The PCO may be present for the strip search of a traveller of the same sex.

If a PCO detains a traveller for violation of s. 33 of the *Act* or for an offence under any act of Parliament that could be punishable by summary conviction or indictment, (this would include s. 34 of the *Act*, but this wording is much broader) the traveller must be turned over to a Canadian peace officer as soon as possible.

2.4 Right to Walk Away

If at any point during the preclearance process, a traveller decides against seeking entrance to the United States, he/she can simply advise the PCO of that fact and leave the preclearance area and exit the airport *unless* the PCO suspects the traveller of violating section 33 or 34 of the *Preclearance Act*. In that case, the traveller can be prevented from leaving and must be turned over to a Canadian Peace Officer.

3. Summary

Generally speaking, if a US official suspects that a traveller has committed an offence under US legislation, the traveller can be detained if crossing a land border and subjected to US law. However, if the same suspicions arise at a Canadian airport, the US official (the PCO) has to turn the traveller over to a Canadian official, and the Canadian official may lay charges if it is determined that there is sufficient grounds to lay a charge in Canada under Canadian law. The matter would be adjudicated before Canadian courts.