

Speaking Notes for BCCLA Submission to the Standing Committee on Public Safety and National Security on April 29, 2010 regarding the Canadian and American no-fly lists.

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Introduction

The submission of the BC Civil Liberties Association is meant to complement that of the International Civil Liberties Monitoring Group. I will be discussing the Passenger Protect Program and Roch Tasse will follow with a discussion of Secure Flight

Passenger Protect

The Passenger Protect Program, Canada's "no-fly list" came into force in June of 2007.

The Regulatory Impact Analysis Statement of the Identity Screening Regulations explicitly cite the push from foreign governments in the development of the program, specifically noting the program as being "as a significant step towards achieving the goal of developing a comparable approach to passenger assessment, which the Security and Prosperity Partnership identified as a milestone.

Passenger Protect was meant not only dissuade the US from its repeated threats starting in 2005 to impose the US no-fly list on all Canadian flights crossing into US airspace, it was meant to curtail the use of the US no-fly list by airlines in Canada.

The BCCLA wrote to Transport Canada in 2006 regarding Canadian airlines, most notably Air Canada's use of the US no fly list for domestic flights in Canada. The response came that QU: "Transport Canada has no regulatory or legislative authority in place to prevent Air Canada from taking this action. However, we are of the understanding that once the Canadian program is in place, Canadian air carriers will be in a position to end this practice."

Not only is it unthinkable that Transport Canada has no authority to prevent passengers on domestic Canadian flights from being subjected to the watchlist of a foreign country complied on the basis of secret criteria, but further, the practice of vetting domestic passengers against the US list has indeed not stopped with the introduction of our own program.

We have, as it were, the worst of both worlds.

While the Passenger Protect Program is by no means as notorious as its US counterpart, it is nevertheless deeply flawed and very likely unconstitutional.

The essential components of the program are ostensibly the 2004 amendments to the Aeronautics Act (which were enacted via the Public Safety Act, 2002). The key provisions, ss. 4.76 to 4.771 are entitled "Emergency Directions" and provide authority for the Minister or the Minister's delegate to make an emergency direction where the Minister is of the opinion that there is an "immediate threat" to aviation security or safety. An emergency direction comes

into force immediately upon being made, but ceases to have force 72 hours after it is made, unless repealed.

If you are wondering how a person is vetted and listed months in advance as being an “immediate” threat to aviation security it was explained to me by thusly: the person is a generic threat and they become an “immediate” threat the minute they try to get on a plane.

Such bizarre semantic attempts to rhetorically pound square pegs into round holes are the signature of the Passenger Protect Program.

At no time during the debates on this bill was it ever even suggested that these provisions were to be the legislative underpinning of a Canadian no-fly list. While the Public Safety Act was certainly debated, there has never been any Parliamentary debate on the creation of a Canadian no-fly list.

Regulations were passed and guidelines drafted so that the program that is supposedly authorized on the basis of emergency direction provisions looks like this:

An Advisory Group made up of representatives from Transport Canada, CSIS and the RCMP review names submitted by CSIS or the RCMP for inclusion on the Specified Persons List. The Specified Persons List, which is nowhere accounted for in the statute, is used to vet every passenger over the age of 12 attempting to board Canadian flights. Passengers are required to show government issued ID in order to be vetted against the list and if a match made on the basis of name, gender and date of birth, the airline staff must immediately inform the Minister of Transport or the Minister’s delegate who will then “decide” whether to issue an emergency direction barring the person from getting on the plane and barring the airline from allowing the person to get on the plane. The person who has been issued an emergency direction has no immediate recourse but can contact the Department of Transport’s Office of Reconsideration if they wish to challenge their inclusion on the no-fly list. The Office of Reconsideration uses independent external advisors for a review of the applicant and issues a recommendation to the Minister on whether the decision to include the person on the no-fly list should be reconsidered.

That is the bare bones outline.

Since its inception, there have been serious and persistent concerns about the legality of this program.

To begin with, the legislative scheme does not add up to the program. There is no provision for a *LIST* in the no-fly *list*. There is such a profound disconnect between the enabling legislation, the regulations and the actual program the legislative scheme purports to authorize that numerous legal opinions maintain that the program would not even be found to be “prescribed by law” for the purposes of Charter.

If this vague and disjunctive legislative scheme, which even Parliamentarians voting on the bill did not see as authorizing a Canadian no-fly list, were to be found sufficiently prescribed by law for the purposes of the Charter, it remains exceedingly vulnerable to challenge on the basis of

an almost complete denial of procedural fairness. For example, the Minister's discretion is virtually unfettered and appears to be improperly exercised in practice. An audit by the Office of the Privacy Commissioner of Canada found that so called Minister's delegates 'decisions' were little more than rubber stamping decisions of the Advisory Groups which operates on the basis of non-exhaustive, vague and legally non-binding guidelines and is only required to give reasons to substantiate its decisions where there is a split decision.

Various Charter rights are at issue in this scheme, but the central one is undoubtedly our section 7 right to life, liberty and security of the person, and the right not to be deprived thereof except in accordance with the principles of fundamental justice. The implications of being denied the right to board an aircraft are deeply serious, and at the most dire are the implications for a person who is denied the ability to board a flight to come home to Canada from abroad.

This scheme is in fact, being legally challenged right now. The challenger had applied to the Office of Reconsideration for a review and here are just some of the things that the independent reviewers found in that review:

- that the Deputy Minister did not have the necessary information to make the decision he was required to make and did not have a reasoned recommendation;
- that the information in the Advisory Committee's file, which was never submitted to the Minister, was not only "too vague, selective and incomplete", but did not meet the legal requirements;
- the decision of the Advisory Committee to maintain this person's name on the list was made without legal authority and the did not meet the requirements of the Act.

The independent reviewers recommended that the person's name be removed from the list and their recommendation was summarily dismissed.

In conclusion

The government has repeatedly been called to produce and failed to produce one shred of evidence to support the proposition that no-fly lists increase aviation safety and security;

The current system was effectively implemented through stealth, was never debated and neither was spelled out nor seemingly even envisioned in the enabling legislation;

The legislative misfit with the program is so pronounced as to make it doubtful that this program is even prescribed by law for the purposes of the Charter.

Even meeting that hurdle, it nevertheless still abrogates from an array of constitutional rights, most markedly section 7 and the utter failure to respect due process and procedural fairness.

It is long since past the time to end the silent bureaucratic implementation of security programs that so deeply affect the rights of Canadians and Canadian sovereignty; but the matter is all the more pressing because of even more invidious rights violations yet to come.