Notes for Presentation to the Standing Committee on Transport, Infrastructure and Communities

Thursday, November 25, 2010

RE: Bill C-42 An Act to amend the *Aeronautics Act*

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Thank you to the Committee for the invitation. I am appearing on behalf of the British Columbia Civil Liberties Association to express our opposition to Bill C-42.

Commissioner Stoddart has already done a commendable job of outlining concerns about the privacy implications of Bill C-42, stressing that Canadians' information will be broadly disclosed for a variety of purposes. As important as the privacy issues are, they are almost a red herring. In following the discussion on this matter, we have been dismayed that the subject of Secure Flight itself and the grave rights violations involved in the overall program have been so little touched upon.

The committee has heard endless iterations on the theme of the rights of the US to the sovereignty of its airspace, but disappointingly little about the rights of Canadian citizens. It is our submission that in enacting Bill C-42, Canada will be complicit in a no-fly regime that does not comport with the rule of law. We say that the US Secure Flight Program violates international law and subjecting Canadians to the Secure Flight regime through the mechanism of Bill C-42 violates the Canadian Charter.

What is proposed under Bill C-42, is that Canada supply passenger information to the US, in order that passengers may be granted or denied permissions to transit US airspace on the basis of unknowable and unchallenge-able criteria. Every country in the world is sovereign over its airspace, and yet this innovation by the US is, to our understanding, without precedent and essentially stands to completely subvert the current practice of global traffic and trade which, as Mr. Caron from the OPC alluded to, enshrines by international conventions the freedom to fly over a sovereign country. It is possible for a sovereign state to make rules regarding this transit, and US Secure Flight's "rule" is to deny travel permissions to persons on their watchlists. However, the analysis does not stop there.

Travel watchlists are an increasingly important discussion in the international community. The BCCLA recently published a paper on the United Nation Security Council's 1267 Regime, which is a watchlist for individuals and entities subject to international travel bans and asset freezes. We say that this watchlist violates international law and the Canadian constitution for failure to provide due process rights, also known as natural justice.

There is some variation in the requirement of due process rights in different contexts, but it typically includes:

- the right to an independent and impartial adjudicator;
- the right to know the case against you; and
- the right to be heard.

These are all familiar elements of what is called due process and are understood by virtually everyone as elements of basic fairness. Such rules are at the heart of our own Charter as well as in instruments of international law such as the Universal Declaration of Human Rights which provides that "Everyone has

the right to an effective remedy by the competent national tribunal for acts violating the fundamental rights granted to him by the constitution of by law."

The UN"s 1267 watchlist is created on the basis of secret evidence; an individual listed has no opportunity to make their case before the 1267 Committee prior to being placed on the blacklist; there is no mechanism to review the accuracy of the evidence; and there is only a very limited ability to participate in a delisting request and no opportunity to present one's defence or assert one's rights.

This regime has come under strident attack ranging from a resolution by the Parliamentary Assembly for the Council of Europe harshly criticizing the regime, to the Supreme Court of the United Kingdom striking down the domestic legislation implementing the 1267 regime in that country, for failure to comport with the principles of natural justice. In our opinion, Canadian implementation of the 1267 Regime is a violation of both the Canadian Charter and the Canadian Bill of Rights.

This is relevant to this discussion because the US Secure Flight program is even more devoid of due process protections and the rules of fundamental justice than the 1267 Regime.

Let me attempt to bring some clarity to this matter. Canadians attempting to travel to many destinations in Europe, the Caribbean and South America will be prevented from doing so on the basis of a secret watchlist of a foreign country which provides absolutely no form of process or redress. The highly unsatisfactory process to attempt to provide recourse for the scandalous number of "false positives" is not a mechanism of redress for people correctly listed. Some of these "correctly" listed people will be familiar to you as Canadians who have no criminal records, exonerated of any links to terrorism or terrorist organizations. Such people have no redress, no process, no remedy.

As we have listened to questions regarding how Canada will assist Canadians who are denied boarding by Secure Flight, we have heard no credible plan for repatriating and protecting Canadian citizens who will be denied permission to return to Canada and endangered by the smear of terrorist involvement while vulnerable in a foreign country.

The simple fact is that a bill that is being touted as a safety measure, not only enables a program that can nowhere provide evidence supporting the claim that it demonstrably improves aviation safety, but which clearly will be actively endangering the security of Canadians abroad. As the Supreme Court of Canada said in the Charkaoui decision, a process that "may bring with it the accusation that one is a terrorist"… "could cause irreparable harm to the individual".

We say, Canada must not be complicit in a program that defies the rule of the law. The argument that purported security trumps all other constitutional considerations has no merit. There will always be a necessary weighing and balancing, but as the Supreme Court stated in Charkaoui: "security concerns cannot be used to excuse procedures that do not conform to fundamental justice at the s.7 state of the analysis."

Fundamental justice is not an enemy of security. In fact, there is no security without fundamental justice.

We urge Canada to work with her international partners to come to agreements on aviation security programs that respect the rule of law. Countries the world over are grappling with these issues. Secure Flight represents what we believe is an unprecedented alteration of global travel with vast implications for travel, trade and tourism. The international community needs to be engaged.

You may recall that Canada was not supposed to be in this position because our security "harmonization" efforts and development of our own no-fly list was supposed to exempt us from the imposition of the US list. The pattern is very clear. These "exemptions" do not last. Obviously the next "exemption" to be rescinded will be Canadian domestic over-flights. The time to act is now. Thank you.