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CCLA RECOMMENDATIONS ON THE PASSENGER PROTECT PROGRAM

CCLA agrees evolving aviation security measures are necessary to protect national security.

But to be effective CCLA argues, such measures must uphold Charter rights and the principles of natural justice.

Further, CCLA strongly recommends that such measures, and the decision-making processes relating thereto, must be clearly established in a comprehensive legislative framework.

Passenger Protect Program – brief overview

- The Passenger Protect Program (“PPP”), came into force June 18th, 2007 to address aviation security.
- There is no one statute or regulation outlining the mechanisms or decision-making processes of the PPP.
- Rather, the PPP is administered pursuant to sections of the *Aeronautics Act* (“AA”), the *Identity Screening Regulations* (“ISRs”), and administrative policies described further below.
- Transport Canada administers the PPP. Transport Canada collaborates with the RCMP and CSIS to obtain information for use in the PPP.
- The PPP operations include:
 - **SPLAG**: An advisory group with one member of TC, RCMP and CSIS, called the Specified Persons List Advisory Group (“SPLAG”). SPLAG is not created by a legislative instrument. SPLAG recommends individuals to the Minister of Transport (“Minister”), to be placed on a Specified Persons List (“SPL”);
 - **SPL**: a Specified Persons List refers to the names of individuals the Minister provides to air carriers and air reservations operators. Pursuant to s.4.81(1)(b) AA, the Minister can order air carriers to provide him with information on specified persons, for a period of 30 days.

- **Screening:** air carriers must screen potential passengers at the time of ticketing and at boarding to see if there is a match with a name provided to them by the Minister. The screening processes are set out in the *ISRs*. If there is a match, the air carrier must inform the Minister, and cannot issue a ticket or allow boarding – as the case may be – without Ministerial approval.
- **Emergency Direction:** upon being informed of a ‘match’ by the air carrier, the Minister or authorized officer may issue an Emergency Direction to do or refrain from any action (i.e. not to fly), if the criteria of s.4.76 and 4.77 AA are met. The air carrier, pursuant to the *ISRs*, must provide individuals subject to an Emergency Direction with the contact information for the Office of Reconsideration;
- **Reconsideration:** an individual placed on the SPL (presumably the only way for an individual to know this is after screening), or prevented from flying, may apply to the Office of Reconsideration regarding the placement of their name on the SPL, and the Emergency Direction. Transport Canada’s website indicates an individual may also apply to the Security Intelligence Review Committee, the Commission for Public Complaints Against the RCMP, or the Canadian Human Rights Commission.

Given the reports of a serious error in Canada in the case of Hani El Telbani and significant false positives in the USⁱ, the potential for error (procedural and/or substantive) at the many stages of decision-making of the PPPⁱⁱ, and the potential adverse impact upon a person specified by the PPP and/or prevented from flying, CCLA makes the following recommendations to ensure that Charter rights and the principles of natural justice are upheld.

CCLA Recommendations for PPP

Clear and Comprehensive Legislative Framework is Required for the PPP

1. A comprehensive legislative framework prescribing the operations and decision-making processes of the PPP.

Review of the Current Specified Persons List is Required

2. The current SPL process must be reviewed to ensure:
 - a. That the names currently on the SPL have been properly placed there; in particular, the review should determine if the procedural and substantive safeguards, listed below, have been followed in placing and maintaining the names on the list;
 - b. The review should identify problem areas and make suggestions for reform to comply with the Charter and principles of natural justice.

Specified Persons List Advisory Group: Review and Prescribe Decision-Making Procedures

3. There is no establishing legislative provision for the SPLAG. However the SPLAG is referenced in the Regulatory Impact Assessment Studyⁱⁱⁱ. It operates according to “Terms of Reference”, contained in the appendices of the MOUs between Transport Canada, CSIS and the RCMP.
 - a. The current Terms of Reference^{iv} must be reviewed for compliance with the Charter and principles of natural justice;
 - b. The Terms of Reference (or guidelines) must not exceed the scope of ss.4.81(1)(b), 4.76 or 4.77 AA^v. A review of the SPLAG guidelines is recommended to assess whether their scope is within the legal parameters of the AA.
 - c. Further, terms of reference for the SPLAG should be contained in a new legislative framework for the operations of the PPP. The decision-making processes of the SPLAG must be clearly established, and the meaning of all criteria for decisions-making, such as the phrase such as “reasonably suspected” of posing a “threat” – if maintained in the new legislative framework – must be clearly defined.
4. The Terms of Reference for SPLAG set out guidelines for recommending an individual be placed on the SPL, but they do not require that reasons be given unless the members of SPLAG are in disagreement. CCLA recommends:

- a. For every individual whom SPLAG recommends be placed on, maintained, or removed from, the SPL, SPLAG must provide clear written reasons in support of their recommendation.
 - b. These reasons should reference the legislative framework under which SPLAG is operating.
5. Any information obtained, accessed, analyzed and presented by the RCMP and CSIS, to the Specified Persons List Advisory Group (“SPLAG”), must comply with the Charter.^{vi}
6. The SPLAG should use legal advice in its proceedings, to ensure all procedural and substantive safeguards have been met.^{vii}
7. The SPLAG must ensure that any information it provides to the Minister, for the purposes of determining whether an individual should be placed, maintained, or removed from the Specified Persons List (“SPL”), is:
 - a. accurate
 - b. lawfully obtained^{viii}
 - c. up-to-date; and
 - d. *complete*: i.e. it must include reasons, and references to the relevant statutory provisions regarding the decision-making process of SPLAG and the ensuing recommendation.

Minister of Transport and Specified Persons List: Proper Legal Procedures Must be Identified and Followed

8. The Minister must ensure that he^{ix}, or his authorized delegate, confirms that he has received complete, accurate, lawfully obtained, and up-to-date information regarding an individual recommended for the SPL.^x
9. The Minister must ensure that he, or his authorized delegate, conduct a complete and thorough review and analysis in reaching a decision of whether to add, maintain, or remove an individual from the SPL.^{xi}
10. There must be a defined process whereby an authorized mechanism determines every 30 days, whether the name of an individual on the SPL should remain or be removed.^{xii}
 - a. To take this decision, the mechanism must review each individual’s file every 30 days;
 - b. Such file must be kept up-to-date with any new information obtained by SPLAG;
 - c. Any new PPP legislative framework must prescribe a procedure to ensure this process has taken place.

Minister and Emergency Direction: Proper Legal Procedures Must be Identified and Followed

11. If an air carrier informs the Minister – i.e. in effect the officer on duty at the Transport Canada Situation Centre – that there is a ‘match’ (i.e. between the passenger’s name and a specified person on the SPL), the Transport Canada Officer should understand that this does not mean the automatic issuance of an Emergency Direction to prevent boarding.^{xiii}
12. The Minister – or his properly authorized delegate – upon notification of a ‘match’– should immediately and properly assess the situation to determine whether an Emergency Direction is required. CCLA recommends that:
 - a. There must be clear and proper authorization by the Minister, to the Transport Canada official on duty, that he or she can make the decision to issue an Emergency Direction^{xiv};
 - b. There must be a clear and timely process in place to obtain the relevant information pertaining to the name on the SPL and the passenger undergoing the screening process^{xv};
 - c. The Minister or his or her authorized delegate can take a decision to issue an Emergency Direction pursuant to s. 4.77AA, or to order that someone do or refrain from doing something to protect aviation security pursuant to 4.76AA. In other words, it must be clarified to all relevant Transport Canada staff that there are options other than “not to fly”, and such options must be identified.
 - d. There must be a clear process, or protocol in place, to determine that the passenger in the screening process warrants the issuance of an Emergency Direction not to fly. *The fact that a passenger is on the SPL is in and of itself not sufficient reason to issue an Emergency Direction that the passenger is not to fly. The Minister or his or her authorized delegate must ensure that the requirements of the AA are satisfied, namely (i) an opinion that there is an immediate threat to aviation security (s.4.76AA); (ii) or to the safety of the public, passengers or crew, (s.4.76);*
 - e. If it is determined to issue an Emergency Direction not to fly, or to take any action pursuant to ss. 4.76 or 4.77 AA, the properly authorized delegate must record written reasons explaining why the decision was made.
 - f. The written reasons, above in (e), must be made available to the affected individual in a timely manner. We recognize that some information may

be withheld for national security reasons, and accordingly a process must be implemented to ensure that any withheld information is done on a specified needs basis.

Reconsideration Must Comply with the Charter and Principles of Natural Justice

13. The SPL process, including Reconsideration, undermines the presumption of innocence, and puts the burden on the specified person who has been denied boarding, to prove he or she should not be on the SPL. CCLA recommends that this process be reviewed.
14. The Office of Reconsideration must provide written reasons to the specified individual explaining why an Emergency Direction has been issued, and why the OoR will uphold or reverse the Emergency Direction, and explaining why it will recommend the maintenance or removal of the individual's name from the SPL. If necessary, a security cleared Special Advocate acting for the individual, could be used to assess sensitive information pertaining to national security.
15. When an Emergency Direction has been issued against a person, the air carrier is to provide that person with the contact information for the Office of Reconsideration^{xvi}. CCLA recommends that the person also be informed, at that time by the air carrier, that he or she is entitled to appeal to the Security Intelligence Review Committee, the Commission for Public Complaints Against the RCMP, the Canadian Human Rights Commission, and to pursue judicial review in the Federal Court; CCLA recommends that the contact information for the offices of each of the above be provided to the individual.^{xvii}

Privacy Rights Must be Protected with respect to the SPL

16. The SPL must be protected with respect to information sharing and security among air carriers, and within a particular air carrier's systems and mechanisms. The PPP should continue to receive and implement the recommendations of the Office of the Privacy Commissioner.^{xviii}
17. Any sharing of the SPL with foreign governments must comply with Charter protections, and also with any recommendations of the Privacy Commissioner. CCLA further recommends the use of legal advice (i.e. cleared for national security), prior to and during any exchange of information on specified persons with foreign governments.

Exercise of Administrative Powers Must be Lawful

18. The PPP must ensure at each stage that any official is acting within the scope of the powers prescribed to him/her in the *Aeronautics Act*, and not *ultra vires*. Where power may be delegated, it must be clear that an official has been

authorized to exercise that power; that is, unless the Minister has officially delegated a specific delegable power to an official, the official should not exercise such delegable power – this is of particular concern with respect to the issuance of Emergency Directions in ss. 4.76 and 4.77AA, and with respect to the SPLAG and the SPL pursuant to s. 4.81(1)(b)AA.

ⁱ See generally ACLU website on No-Fly Lists, available at <http://www.aclu.org/national-security/frequently-asked-questions-about-no-fly-list>. See also, “Just How Much Does That Cost, Anyway? An Analysis of the Financial Costs and Benefits of the “No-Fly” List”, Marcus Holmes, Homeland Security Affairs, Volume V, No.1; January 2009, available at <http://www.hsaj.org/?fullarticle=5.1.6>.

ⁱⁱ The case of Hani El Telbani is of particular concern, and is currently being judicially reviewed by the Federal Court. This case is also the first time an Emergency Direction was issued in Canada (June 2008), and the first time an individual sought Reconsideration.

ⁱⁱⁱ The Regulatory Impact Assessment Study was issued with the Identity Screening Regulations, June 18, 2007, but is not part of the regulations, and therefore is not law. The Study refers to the creation of an Advisory Group, and a Memorandum of Understanding between Transport Canada, CSIS, and the RCMP. The Identity Screening Regulations, SOR/2007-82 April 27, 2007, Canada Gazette, Vol. 41, No. 10- May 16, 2007, came into force on June 18, 2007. The ISRs were amended in 2008, Identity Screening Regulations SOR/2008-250 and these amendments and the accompanying 2008 impact assessment are available at <http://www.gazette.gc.ca/rp-pr/p2/2008/2008-09-17/html/sor-dors250-eng.html>.

We are seeking copies of the MOUs, and have relevant excerpts from the October 2008 study for the Office of Reconsideration in the case of Hani El Telbani (“2008 Study”). The Office of Reconsideration, Transport Canada, commissioned an Independent Study upon receiving Mr. El Telbani’s request for reconsideration after an Emergency Direction not to fly was issued against him. There are many procedural and substantive concerns regarding the treatment of Mr. El Telbani’s case, including the fact that Transport Canada waited for almost a year to release the findings of the study to Mr. El Telbani’s counsel; the study found that the decision to place Mr. El Telbani on the SPL and to maintain his name on the SPL was done without lawful authority and should be declared of no force and effect; and the Emergency Direction not to fly issued against Mr. El Telbani was done without lawful authority.

^{iv} The Terms of Reference are set out in Appendix A of each MOU between TC and RCMP and CSIS, and provide that SPLAG may consider the following information to determine if a person may pose a threat to aviation security:

- Individual who is or has been involved in a terrorist group and who it can be reasonably suspected, will endanger the security of any aircraft or aerodrome or the safety of the public, passengers or crew members;
- An individual who has been convicted of one or more serious and life-threatening crimes against aviation security; and
- An individual who has been convicted of one or more serious and life-threatening offences and who may attack or harm an air carrier, passengers or crewmembers

The 2008 Study paraphrases paragraph 1 of the MOUs, and states that these paragraphs in each MOU is “similar”, as follows:

- page 4, 2008 Study: “Terms of Reference (TORs) for SPLAG are set out at Appendix “A” to each of the MOUs. They provide further detail concerning its purpose and function, as well as the administrative arrangements to support it. The Mandate paragraph at page 1 of the TORS states: “The purpose of the Passenger Protect Advisory Group [note, the Study says use of the term Passenger Protect Advisory Group seems to be an error] is to recommend persons it believes may pose an immediate threat to aviation security. The Advisory Group regularly reviews information on persons who, in the opinion of the Members, are known or suspected to pose an immediate threat to aviation security; or to any aircraft or aerodrome or other aviation facility, or to the safety of the public, passengers or crewmembers. The decision of the Minister or delegated officer to specify a person will be based on a reasonable suspicion that a specified individual would pose an immediate threat to aviation security should he or she board an aircraft.” [Note, the 2008 Study finds that this definition may not be consistent with s.4.81(1)(b)AA, because the statute does not refer to “reasonable suspicion” or “immediate threat”. Accordingly CCLA recommends legal review of the terms of reference of SPLAG to ensure compliance with the AA].

^v **Aeronautics Act**, R.S.C. 1985, c. A-2

Section 4.81(1)(b) provides:

The Minister, or any officer of the Department of Transport authorized by the Minister for the purposes of this section, may, for the purposes of transportation security, require any air carrier or operator of an aviation reservation system to provide the Minister or officer, as the case may be, within the time and in the manner specified by the Minister or officer, with information set out in the schedule:

(b) that is in the air carriers or operator’s control, or that comes into their control within 30 days after the requirement is imposed on them, concerning any particular person specified by the Minister or officer.

Section 4.76 provides:

If the Minister is of the opinion that there is an immediate threat to aviation security or to any aircraft or aerodrome or other aviation facility, or to the safety of the public, passengers or crew members, the Minister may direct any person to do, or to refrain from doing, anything that in the opinion of the Minister it is necessary to do or refrain from doing in order to respond to the threat, including directions respecting:

- (a) the evacuation of aircraft and of aerodromes or other aviation facilities, or portions of them;
- (b) the diversion of aircraft to alternate landing sites; and
- (c) the movement of aircraft.

Section 4.77 provides:

The Minister may authorize any officer of the Department of Transport to make, subject to any restrictions or conditions that the Minister may specify, any direction that the Minister may make under section 4.76 whenever the officer is of the opinion that there is a threat referred to in that section.

2004, c. 15, s. 5.

^{vi} *Infra*, note 8.

^{vii} Although of no legal force, the 2007 Regulatory Impact Assessment Study [note: I will provide you with a proper cite for this study – the one weblink I was given does not seem to contain the Study – although I have read excerpts of the Impact Study in the 2009 Privacy Commissioners Audit Report, *infra* note 18], stated that the SPLAG would work with legal advice. However, the 2008 Study reported that no legal advice to-date had been used by SPLAG.

^{viii} It may be impractical to expect the Minister of Transport to oversee or assess the legality of information provided by the RCMP or CSIS. However, some process whereby the RCMP and CSIS provide an assurance that the information was lawfully obtained would be prudent. In the case of Hani El Telbani, CSIS members visited him at his home prior to his flight, interrogating him although they had no warrant, and he had never been convicted of a crime nor had he been a member of a terrorist group, according to his counsel's submissions, as reported in the 2008 Study.

^{ix} The current Minister of Transport, Infrastructure and Communications is John Baird, hence the use of "he" and "his" in these recommendations.

^x The Office of the Privacy Commissioner, in its 2009 Audit (*infra* note 18), found that SPLAG was still providing incomplete and insufficient information to the Minister regarding recommendations to place persons on the SPL.

^{xi} The 2008 Study found that the file presented to the Minister regarding Mr. El Telbani was incomplete and inadequate; and further that the Deputy Minister did not request additional information even when he was advised such information was available.

^{xii} The 2008 Study found that SPLAG maintained Mr. El Telbani's name on the SPL for 5 months. The Minister did not conduct a review of Mr. El Telbani's status on the SPL in the entire 5 months; although s. 4.81(1)(b) only permits the Minister to require air carriers and reservation operators to provide information on a specified person for a period of 30 days. That period may be renewed but only by the Minister. Further, CSIS received new information concerning Mr. El Telbani after his name had been placed on the SPL, but CSIS did not provide that information to the Minister.

^{xiii} "No-Fly List" is a misnomer as it suggests the list is determinative in and of itself as to whether a person is barred from boarding an aircraft. CCLA recommends some sort of guidelines be issued to Transport Canada Duty Intelligence Officer informing them of these guidelines.

^{xiv} The 2008 Study found that the Transport Canada official on duty in the case of Hani El Telbani was not properly authorized to make any decision about an Emergency Direction.

^{xv} We understand that information is available at the Transport Canada Situation Centre, and we recommend that it is ensured such information is complete, and a clear protocol exist to ensure proper consideration of that information to determine if there is a “threat” warranting the issuance of an Emergency Direction.

^{xvi} ISR s. 7.

^{xvii} These additional appeal routes are not set out in the ISRs, and are not required information to be conveyed to the specified person in the ISRs. However, these appeal routes are listed on the Transport Canada website, at <http://www.passengerprotect.gc.ca/appeals.html>.

^{xviii} The Office of the Privacy Commissioner of Canada has provided continual overview and recommendations about privacy concerns arising with respect to the PPP. Most recently, the Privacy Commission completed a 2009 Audit Report of the PPP, available at http://www.priv.gc.ca/information/pub/ar-vr/ar-vr_ppp_200910_e.cfm , finding that many of its recommendations from its 2005-2006 Privacy Impact Assessment had been incorporated by Transport Canada: namely creation of enforceable standards for the ISRs with respect to the handling and protection of personal information by air carriers; increasing the minimal age for screening passengers from 12 to 18 in the ISRs; establishment of personal information retention schedules and InfoSource listings for PPP information; implementation of Standard Operating Procedures for the Office of Reconsideration and for Transport Canada Intelligence Duty Officer [note – the 2008 Study found that the Duty Intelligence Officer erroneously relied on the SOP to conclude he had the authority to issue an Emergency Direction preventing Mr. El Telbani from flying]; recording details of calls from air carriers regarding positive or negative matches with the SPL; and placing a summary of the Privacy Impact Assessment and responses to the Privacy Commission’s questions about the PPP on Transport Canada’s website. However, it is notable that the 2009 Audit Report also set out the following concerns about the PPP: (i) Minister not provided with complete information regarding decisions to add or remove names from the SPL (para. 55); (ii) In its training programs of Transport Canada has not demonstrated that the SPL application used to disclosed specified persons list information to air carriers ahs been certified and accredited to meet Government Security Standards – the information technology system must be certified and accredited to protection sensitive information generated by the PPP (para. 55); (iii) there are no requirements at present that air carriers report any security breaches of PPP information to Transport Canada – TC has responded that it is conducting a review and may consider self-reporting, (para. 75); (iv) TC must ensure that air carriers protect PPP information and against the likely hazard of inappropriate disclosure of SPL information if two air carriers are relying on a paper copy of the SPL (para.75); and (v) no evidence that information TC relied upon by the RCMP or CSIS was inaccurate (para 48) – note this appears to be in contrast to the findings of the 2008 Study regarding Mr El Telbani.