SUBMISSIONS OF THE CANADIAN CIVIL LIBERTIES ASSOCIATION

SUBMISSIONS TO: The Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182

FROM: The Canadian Civil Liberties Association
per Graeme Norton, Director, Public Safety Project

CANADIAN CIVIL LIBERTIES ASSOCIATION

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INTRODUCTION

The Canadian Civil Liberties Association (CCLA), formed in 1964, is a national organization with more than 6500 individual paid supporters, seven affiliated chapters across the country, and some 20 associated group members which themselves represent several thousands of people. Our membership includes a wide variety of callings, constituencies, and interests – lawyers, writers, homemakers, clergy, trade unionists, professors, minority groups, media performers, business executives, and others.

The CCLA was constituted to promote respect for and observance of fundamental human rights and civil liberties and to defend, extend, and foster the recognition of those rights and liberties. The CCLA's major objectives include the promotion and legal protection of individual freedom and dignity against unreasonable invasion by public authority, and the protection of procedural fairness. It is not difficult to appreciate the relationship between these objectives and many of the issues being examined by the Commissioner at this Inquiry.

It goes without saying that CCLA fully subscribes to the goal of combating terrorism. But certain methods which have been adopted to address terrorism can, themselves, weaken the viability of our system. The CCLA believes that we must ensure that civil liberties and fundamental freedoms are not undermined anymore than may be needed to achieve legitimate security objectives. The ensuing submissions should be read from this dual perspective.

THE RELATIONSHIP BETWEEN CSIS AND THE RCMP

Background

Term B (II) of the Inquiry's Terms of Reference gives the Commissioner jurisdiction to examine, and make recommendations regarding, the appropriate level of cooperation between the Canadian Security Intelligence Service (CSIS) and the Royal Canadian Mounted Police (RCMP). Whether better communication between these two agencies would have improved investigation of the Air India disaster is a question that has been frequently asked. There have been allegations that these agencies failed to consult, inform one another, transmit relevant material, and provide necessary assistance. In Bob Rae's report, there is a suggestion that "much of the information... CSIS had obtained through its investigation was not promptly shared with the RCMP"[1]. According to one media report an RCMP official charged that the "Mounties could have solved the case much sooner if CSIS had retained tapes of [certain] intercepted conversations..."[2].

Historical Separation

Significantly, the driving force behind the separation of intelligence gathering from law enforcement was not security; it was civil liberties. The separation grew out of recommendations set out in the 1981 Final Report of the McDonald Commission on RCMP Wrongdoing. This Commission came into existence, not because the RCMP had failed in some conspicuous way to protect national security, but rather because, in its zeal for security, it had overreached and committed some serious violations of civil liberties. The events that spawned the McDonald Commission included RCMP surveillance of legitimate dissenters (e.g. the Parti Québecois, the Waffle faction of the New Democratic Party, the National Black Coalition, and the National Farmers Union), some 30 years of illegal mail openings by the RCMP, and reports that the Force had committed burglary, theft, arson, and the unlawful invasion of confidential records[3].

Incentives for Impropriety in Intelligence Agencies

Investigations performed by law enforcement and intelligence agencies tend to be quite different in terms of both purpose and scope. Law enforcement agencies collect evidence for the purpose of prosecuting crime, which is generally confined to the period before a trial. In contrast, intelligence agencies engage in a wide range of different investigative techniques designed to glean information about ongoing matters of national security. They do not necessarily seek to prosecute crime, but rather to maintain informational networks that can be used for a variety of purposes.

As a result of their involvement in the prosecution of crime, law enforcement agencies must anticipate intense scrutiny of their conduct and material by partisan defence counsel in open court. Intelligence agencies would not expect similarly rough treatment by the impartial judges sitting at *in camera* hearings held for warrant applications. Where defence counsel would take great pains to discredit both material and conduct, judges hearing warrant applications would essentially review them. Moreover, defence counsel would likely know much more about a given case than would a judge. Thus, the anticipated use of material for subsequent prosecutions could help restrain law enforcement investigators from engaging in conduct that might undermine their case.

A purely intelligence-gathering agency has less incentive to be concerned about the appearance of propriety. In short, such an agency does not as readily expect to be found out when it misbehaves. This is not to say, of course, that such improprieties do not occur within the framework of law enforcement operations. Obviously, they have. The RCMP itself provides a telling example. Our point is simply that, as between a law enforcement and a purely intelligence gathering operation, the latter is more likely to attract such troubles because it has less motivation to avoid them.

The propensity to target the wrong people is a particular danger that would more likely inhere in a purely intelligence-gathering exercise. Since the goal of an intelligence investigation is to assess, understand, and predict, the idea is to learn as much as possible. Hence, the tendency to investigate an excessive number of people. Moreover, the idea is to discover almost everything there is to know about the targets,

including their most intimate habits and beliefs. Hence, the tendency to investigate an excessive number of people and activities. For all of these reasons, the intelligence orientation is much more threatening to civil liberties than is the law enforcement orientation.

The further that security surveillance is removed from the discipline of law enforcement, the greater the risk of blurring the line between improper subversion and legitimate dissent. The virtue of the law enforcement approach, for these purposes, is its focus on gathering evidence of relatively definable crime. So long as illegal conduct is the subject of investigative activity, there is less risk of snooping on legitimate dissenters. But, when security surveillance is divorced from law enforcement, investigations are more likely to involve vaguer, broader, and less definable matters. Such conduct threatens to imperil legitimate dissent.

Significantly, the revelations of abuses committed by the American FBI impelled the U.S. authorities, some years ago, to move in the diametrically opposite direction from what was done in Canada. Instead of creating an intelligence gathering agency divorced from law enforcement, the Americans amalgamated the FBI's domestic security investigations with its general criminal investigative division. The "express purpose" of this move, in the words of the then FBI director, was to handle domestic security investigations as much as possible "like all other criminal cases"[4]. The narrower focus of criminal investigations was seen as less likely to intrude upon lawful dissent.

Although the FBI has undergone a number of re-organizations since the above amalgamation, the U.S. has never created a separate agency to handle the domestic intelligence work performed by the FBI. Even America's special 9/11 commission explicitly recommended against the creation of a "new domestic intelligence agency"[5].

We appreciate the fact that not every investigation performed by a law enforcement agency can have a prosecutorial outcome or even purpose. But, whatever need there may be for flexibility, we believe it would be advantageous for the security intelligence agency to have law enforcement as well as intelligence collection functions. Even if

there is often a need to focus on tactics other than prosecution, the fact that the agency may have to prosecute at some stage could diminish some of its propensities to take questionable shortcuts.

CCLA's Perspective

In the opinion of the CCLA, the interests of civil liberties never required the separation of functions recommended by the McDonald Commission and adopted by the government of Canada. Indeed, our organization has consistently advanced the view that such separation constitutes a potential harm to civil liberties. It is virtually axiomatic that many of the problems associated with the inter-institutional relationship between the RCMP and CSIS would be ameliorated if the functions of law enforcement and intelligence gathering were housed in the same agency. Jurisdictional disputes, turf wars, and organizational jealousies would be less likely to develop and, in any event, could be more readily overcome if both of these functions were responsive to a single centralized command.

In advocating such reforms, we acknowledge that the separation proposed by the McDonald Commission appeared to have been influenced by the anticipated resistance of the RCMP to any progressive reform. It does not necessarily follow, however, that the RCMP would have to be involved in the kind of restructuring that we are recommending. Nor does it necessarily lie beyond the wit of the Canadian political establishment to reorganize – or even transform – the RCMP itself.

Recommendation #1: Canada's law enforcement and intelligence gathering activities should be housed in the same agency.

Traditional Canadian thinking regarding the appropriateness of ministerial intervention in law enforcement operations would also benefit from a significant overhaul. A primary reason that the McDonald Commission favoured the separation of intelligence gathering and law enforcement concerned the role of the relevant minister. In short, the

Commission believed that the government should play a more “hands on” role regarding the collection of intelligence than it does in the area of law enforcement; the fear was that direct government involvement in the activities of law enforcement could risk politicizing the police. As a result of this approach, it is generally seen as permissible for the minister to issue broad policy directives to the police but not to become involved in their day-to-day operations.

To be sure, the avoidance of a politicized police force is a commendable objective. Suppose, however, the minister were to learn that a particular criminal investigation was targeting someone and using methods that the government considered unacceptable. Without the ability to contact the police and direct them to desist, the minister could not be adequately accountable for such police activity. After all, broad policy directives issued after the fact may not provide sufficient redress.

In any event, why should it be assumed that the government has a monopoly on political motivation? There is simply no reason to believe that police officials are bereft of such predispositions. And what about all the other prejudices that could shape police behaviour? It has been alleged, for example, that certain police operations have been influenced by racism or homophobia within the constabulary. As between the appointed police and the elected government, why should it be the police who have the right to make the last mistake?

As the electoral process subjects the decisions of elected politicians to a level of accountability greater than that experienced by the average police officer, CCLA believes that giving the minister greater control of police could result in law enforcement agencies exercising a greater level of restraint. Without a clearly understood power to order that the police stop what they are doing, the minister’s duty of accountability would be largely inadequate.

<u>Recommendation #2</u>: There should be a significantly broader power for the government to direct the RCMP’s operations.

Finally, CCLA believes that the national security activities of the Canadian government are sufficiently important to warrant a degree of independent auditing that is presently lacking. The idea that such government conduct should be closely watched is not new to Canadian law; the Security Intelligence Review Committee (SIRC) already performs such an auditing function with respect to the activities of CSIS. In recommending the expansion of such scrutiny to *all* of the government's national security activities, we note the positive impact that SIRC may well have had on improving the behavior of CSIS over the past 20-plus years. The auditing provided by SIRC creates a degree of scrutiny that can cause officials to think twice about engaging in inappropriate conduct. Such heightened accountability is sorely lacking with respect to Canada's law enforcement agencies.

In order to enhance existing mechanisms for review and accountability, SIRC-style auditing should be extended to the national security-related activities of the RCMP. This would require giving an agency, independent of the RCMP, the government, and any potentially affected constituencies, the authority to access all relevant records, facilities, and personnel on an on-going basis. Such an agency should not be given decision-making power over any law enforcement or intelligence authorities. Like SIRC, its role would be essentially to disclose and propose, not to decide. The key to the agency's impact is the report it ultimately makes. The publicity resulting from an independent audit would operate to increase the pressures on government. This is the factor that could produce the needed corrections, changes, and reforms.

We are not committed to any one particular form that such an agency might take. The required auditing could be accomplished, for example, by extending SIRC's mandate, or through the creation of a brand new entity. As long as the level of scrutiny is appropriately enhanced, accountability will be improved.

<u>Recommendation #3</u>: With on-going access to records, facilities, and personnel, an agency, independent of the RCMP, the government, and affected constituencies should conduct self-generated audits of the government's national security policies and practices.

Taking Steps Towards Reform

The reforms we are advocating could be achieved in different ways. Perhaps, for example, CSIS might acquire law enforcement duties for security-related offences. If that were done, Canada would have two federal police forces – one handling security matters such as espionage, sabotage, and terrorism, and one handling more regular criminal investigations relating to such areas as customs, excise, and drug violations.

An alternative approach might entail leaving the domestic security work within a reorganized RCMP but, like the situation with the FBI, integrating it more fully with the criminal investigation branch. If that were done, CSIS would function only in a tightly defined area of counter intelligence and law enforcement against foreign-controlled security threats.

No doubt, there are additional structures that would accomplish the same objective. We are not now wedded to any one solution. Our objective here is simply to ensure that the collection of security intelligence is no longer divorced so completely from the job of law enforcement.

Since both civil liberties and the reduction of inter-agency rivalries would be the likely beneficiaries, it remains for us to urge a greater integration of the law enforcement and intelligence gathering functions. In combination with increased ministerial intervention and the extension of independent auditing, we believe the cause of both national security and personal liberty would be better served.

THE PASSENGER PROTECT PROGRAM

Overview

Canada's Passenger Protect Program (PPP) came into affect on June 18, 2007. The Program purports to increase the security of Canada's skyways by preventing people who pose an immediate threat to aviation security from boarding planes. The names of affected individuals are placed on a Specified Persons List (SPL), and if they attempt to board an aircraft, they are not permitted to do so.

CCLA's interest in the PPP is longstanding. Prior to the inception of the Program, CCLA met for consultations with representatives of the Ministry. Concerns we raised at those meetings included the goal of ensuring that the negative experiences of the U.S. No-Fly list were not imported into Canada. Under the American program, persons wrongly included on the No-Fly list have suffered significant injustices. The mobility rights of such persons have been impaired, even when they have done nothing wrong or pose no real threat. For many, air travel is the only way that they can see loved ones, do business, or enjoy a long-anticipated family vacation. Persons who are denied access to air travel could suffer damage to their relationships, reputations, and livelihoods; they could be cut off from friends and family members and could even lose their jobs.

There is no question that the enhancement of airline security is a desirable undertaking; however, democratic societies must do their utmost to protect the rights of those affected by invasive security measures. Unfortunately, CCLA does not believe that the PPP does enough to strike this balance.

Data Collection

The administration of the PPP requires the Ministry of Transportation, Infrastructure, and Communities (MTIC) to access extensive personal data regarding air travellers. Power to obtain such data is granted under section 4.81 of the *Aeronautics Act,* which permits the Minister to access information from airlines regarding persons entering,

departing, or travelling within Canada by air. Such information can include, among numerous other things, the passenger's address, date of birth, gender, travel agent, seating class, method of purchase, and complete travel itinerary.

The breadth of this ministerial power is cause for concern, as it permits the government to access far greater personal information than may be needed for the protection of aviation security. Excessive intrusions into personal privacy could easily result from this broad reaching power. To address this concern, there should be an explicit needs test with respect to the personal information that the Ministry can commandeer under the PPP.

A further data-related concern is the extent to which travellers' information can be disclosed to CSIS and the RCMP. As a result of section 4.82 of the *Aeronautics Act*, air carriers must, under certain circumstances, provide passenger data to both agencies. Subsection 4.82(12) of the *Act* limits the purposes for which CSIS employees are granted access to passenger data to the investigation of a "threat to the security of Canada," including "activities … directed toward or in support of the threat or use of serious violence against persons or property for the purpose of achieving a political, religious or ideological objective…"[6]. In contrast, subsection 4.82(11) of the *Act* permits disclosure of passenger information to RCMP officers if there is "reason to believe that the information would assist in the execution of a warrant."[7]

While the limitations placed on CSIS agents provide an appropriate safeguard on their powers of access, it is concerning that the constraints placed on RCMP officers are not equally narrow. As a result, peace officers appear to have broad discretion to access, use, and disclose relevant data in order to identify individuals wanted on a wide variety of warrants unrelated to terrorism. Such an expansion of the RCMP's *general* powers of surveillance is inappropriate under the guise of what has been presented as a counterterrorism power. To address this concern, the RCMP's access and use of relevant data should be subject to similar restrictions as those imposed on CSIS.

<u>Recommendation #4</u>: there should be an explicit needs test with respect to the personal information that the Ministry can commandeer under the PPP.

<u>Recommendation #5</u>: RCMP Officers' access to passenger data should be subject to similar limitations as those imposed upon employees of CSIS.

<u>SPL-Listing Clarification</u>

The PPP operates pursuant to a set of Regulations, called the *Identity Screening Regulations* ("the Regulations"), established under the authority of the *Aeronautics Act*. The Regulations are of a highly general nature, and are silent on what criteria are assessed when placing someone on the SPL. These details have been left largely in the hands of MTIC, which has stated that names will be placed on the SPL if:

- They are/have been involved in a terrorist group and there are reasonable grounds to suspect that they will endanger the security of an aircraft, aerodrome, the public, passengers, or crew members;
- They have been convicted of a serious or life threatening crime against aviation security;
- They have been convicted of a serious and life-threatening offence and may attack or harm an air carrier, passengers, or crew members.

Those who are deemed to fall into any of these categories, can be placed on the SPL. There does not appear to be an obligation to identify which of the above criteria resulted in a listing decision, or a requirement to link such a decision to specific evidence. This lack of clarity could raise serious difficulties for individuals challenging their inclusion on the SPL.

In order to remedy this concern, those responsible for listing decisions should be required to clearly articulate why an individual is on the SPL and to link that decision to specific evidence. Such information should be retained by the Ministry, so that it can be

made available to affected individuals in the case of a subsequent challenge. If the government asserts that certain evidence is of a classified nature, affected individuals should be permitted to have a security cleared Special Advocate acquire access to any information or evidence impugning them.

Recommendation #6: The reasons and evidence upon which a listing decision is based should be made available to the affected individual, or, at least, to a security cleared Special Advocate, if reconsideration is requested.

Advance Notice

While the foregoing listing criteria provide some guidance, they are not sufficiently clear to enable people who suspect that they may be on the SPL to be certain about their status. Under the PPP's current approach, such persons have to wait until they arrive at the airport with a paid ticket to learn that they are not permitted to fly. Providing for advance notification of SPL inclusion could reduce hardship and expense for affected individuals. It would also allow people who feel that they have been wrongly placed on the SPL to have an opportunity to challenge their inclusion *before* purchasing a plane ticket. In certain cases, overriding national security interests may justify not informing persons they are on the SPL. When such reasons are invoked, the Minister should be required to convey those reasons to an external independent agency responsible for auditing the operation of the PPP. This audit function could be performed by an existing body, such as SIRC, or a newly created entity. Either way, independent auditing would significantly improve the level of scrutiny and accountability to which the PPP is subjected.

Recommendation #7: Individuals should be permitted to verify whether they are on the SPL, unless doing so would undermine a demonstrable national security interest.

<u>Recommendation #8:</u> When individuals are not informed of their inclusion on the SPL because of national security concerns, the Minister must convey the reason for this decision to an external independent agency responsible for auditing the operation of the PPP.

<u>The Need for an Independent Adjudication Process</u>

At present, challenges to listing decisions are made through the Office of Reconsideration (OoR), which is operated by Transport Canada. The OoR's mandate is not clearly set out in the Regulations; its operational policies, instead, appear to be determined by MTIC. In the result, there is a lack of clarity surrounding the operation of the OoR - a situation that could be remedied by better defining the mandate and procedures of the OoR in the Regulations.

A central deficiency of the OoR process is its lack of independence. Currently, reconsiderations of listing decisions are performed by employees of MTIC, who are subordinates of the Minister responsible for the original listing decision. This proximity renders the independence of such persons highly questionable. As long as those performing the reconsideration remain employees of the Ministry, the process will be defective. Those seeking reconsideration must be entitled to a process that is independent in both appearance and fact. Such a system would require that all cases be subject to thorough and truly *independent* adjudication on their merits by outsiders to the Ministry. Until such independence is achieved, the fact that the same Minister is responsible for both listing and reconsideration decisions will result in a reasonable apprehension of bias.

Of further concern is the lack of clarity regarding the information that the OoR can disclose to applicants. This threatens to deprive affected individuals of a meaningful adjudication process. In order to remedy this defect, the Regulations should be amended to include a requirement that, upon request, the Ministry must disclose the evidence on which a listing decision was made to all applicants. When such evidence is security sensitive, it should be given to a security cleared Special Advocate to review on the impugned person's behalf. The Regulations should also clearly state that

independent adjudicators are empowered to consider any new evidence that the applicant may wish to adduce.

A further defect of the OoR process is the form of the review that it provides. As there is no mention in the Regulations of an entitlement to an oral hearing, it appears that the reconsideration process may be based entirely on written material. While this may often be appropriate, it is likely that situations will arise in which a written adjudication process cannot adequately probe the matter. When, for example, the veracity of certain evidence is challenged or significant issues of credibility are at stake, the applicant should be entitled to an oral hearing. Furthermore, regardless of whether an oral hearing is required, all applicants, or, at least, their security cleared Special Advocates, should be given reasons for the outcome of the reconsideration process. Such measures would enhance confidence in the process and ensure that each case is examined to the necessary extent.

A final defect of the OoR process is its apparent lack of remedial options. Given the significant losses that claimants may have suffered by the time that they reach the OoR, the office should be able to do more for them than simply recommend the removal of their names from the SPL. To enable a more satisfactory remedy for affected persons, any adjudicator who determines that an individual's inclusion on the SPL was without reasonable grounds, should be empowered to remove their name from the list. In addition to taking such action, PPP adjudicators should be empowered to financially compensate affected persons for losses they have suffered. This would allow wrongly listed persons to feel as if they had been truly made whole by the reconsideration process and instill a degree of public faith in the system that might otherwise be lacking.

<u>Recommendation #9</u>: The mandate and processes of the Passenger Protect Program's adjudication process should be clearly set out in the Regulations.

<u>Recommendation #10</u>: The Passenger Protect Program's adjudication process should be fully independent of MTIC.

<u>Recommendation #11</u>: Upon request, the Ministry should be required to disclose, at least to a security cleared Special Advocate, all evidence upon which a decision to include an individual on the SPL is based.

<u>Recommendation #12</u>: The Regulations should empower Passenger Protect Program adjudicators to provide for an oral hearing in appropriate circumstances.

<u>Recommendation #13</u>: All decisions made by Passenger Protect Program adjudicators should be accompanied by written reasons which are communicated to the affected individual, or, at least, to a security cleared Special Advocate.

<u>Recommendation #14</u>: Passenger Protect Program adjudicators should be empowered to remove names from the SPL when their original inclusion was without reasonable grounds.

<u>Recommendation #15</u>: Passenger Protect Program adjudicators should be given the power to award compensation to persons who have suffered personal or financial hardship as a result of being wrongly placed on the SPL.

BEHAVIOURAL PROFILING

Background

The term “behavioral profiling” generally refers to a security technique which involves observing airline passengers for specific behaviors that supposedly indicate they may pose a heightened threat to aviation security. This technique appears to focus on behavioral manifestations, such as body movements, eye movements, changes in vocal pitch, and other indicators of stress or disorientation[8]. Facial reactions to interview questions, such as eyebrows raised and drawn together, a raised upper eyelid, or lips drawn back toward the ears, as well as specific reactions to uniformed officers or sniffer dogs, may also be looked at.[9] Passengers who demonstrate some of these behaviors may be identified as posing a heightened risk and “triaged” into a different security process with a higher level of scrutiny. They may then be subjected to more thorough targeted interviews designed to probe their intentions more closely than those of other passengers.

Behavioral profiling appears to have been pioneered in Israel, though it is now being used on a trial basis at several U.S. airports. For example, Boston’s Logan Airport now streams passengers according to estimated risk under a program called Screening of Passengers by Observation Techniques (SPOT)[10]. The program relies upon observations of atypical behavior patterns to identify suspicious persons who are flagged for closer attention. This program apparently does not attempt to extrapolate presumed intentions, but merely conducts observations for suspicious external behaviors[11].

Behavioral Profiling at the Inquiry

Several participants in the Air India Inquiry have suggested that behavioral profiling could be a useful aviation security tool in Canada, though a specific proposal of how the technique could be implemented does not appear to have been suggested. Of particular note are comments made in the 2006 report of an Advisory Panel that

conducted a review of the Canadian Air Transport Security Authority Act (the CATSA Advisory Panel). This report identifies possible methods of observation, such as voice analysis (measuring stress levels) and physiological response (polygraph-like tests), and then goes on to describe how behavioral profiling might be implemented, stating:

> "the Suspect Detection System consists of a booth in which a three-minute polygraph is administered through voice recording to discern whether a person may have criminal intent, based on the principle that fear will be reflected in measurable psycho-physiological parameters. If specific parameters are triggered, a further face-to-face examination is conducted."[12]

At present, it is not clear that CATSA has the legal authority to introduce such measures, so their implementation in Canada would likely require amendments to the current statutory or regulatory framework.

A leading proponent of behavioral profiling at the Inquiry has been the Air Line Pilots Association (ALPA). ALPA's submissions state that:

> "ALPA also endorses the concept of behavioral recognition as a means of determining the trustworthiness of certain passengers. CATSA needs to have trained observers to look for signs of suspicious behavior and resolve issues with those who merit closer scrutiny. Observation, evaluation and response to human behavioral factors are keys to this system. Savings gained through less scrutiny of trusted individuals would allow the efficient allocation of additional screening resources to a small portion of the traveling public."[13]

The submission goes on to recommend that:

> "The government should move quickly, with industry, to prototype, fine-tune, and deploy a human-centred security screening system employing behavioral recognition concepts."[14]

CCLA's Perspective

CCLA does not endorse the introduction of behavioral profiling techniques in Canada at this time. Indeed, we have some serious concerns about how the introduction of such measures might interfere with the civil liberties of air travellers. The extent of these concerns, however, is difficult to estimate without having a clearly articulated behavioral profiling proposal to respond to. Working in the abstract, it is possible to anticipate certain concerns that behavioral profiling might raise and to recommend some minimum safeguards that should be taken to ensure that it interferes with civil liberties as little as possible. This is the approach taken by the CCLA in this submission.

A primary concern with a behavioral profiling system could be the extent to which it might illegitimately target the wrong people. An overly expansive model may, for example, allow security agents to target persons in all areas of an airport, effectively turning the entire facility into a place of intense scrutiny. This concern has been raised in the United States by the American Civil Liberties Union (ACLU), which filed a law suit on behalf of an African-American individual who was allegedly stopped under the SPOT program in a *public terminal* area of Boston's Logan airport. The ACLU alleges that the individual was told that if he refused to produce identification he would be arrested or banned from the airport indefinitely.[15]

While heightened scrutiny may be justified for persons boarding aircraft, it is an excessive measure to impose against those who are merely seeing off family members or visiting the airport for any other non-travel-related purpose. In order to protect such persons' legitimate privacy interests, it would be necessary to ensure that they were not treated in the same fashion as persons boarding aircraft. It is, thus, imperative to ensure that behavioral profiling techniques are only permitted in secure pre-boarding screening areas where individuals have a lower expectation of privacy.

Recommendation #16: To whatever extent behavioral profiling is adopted, it should only be permitted in secure pre-boarding screening areas where individuals have a lower expectation of privacy.

A further way in which behavioral profiling could illegitimately target the wrong people is through the introduction – intentionally or otherwise – of techniques that are racially or culturally biased. Other participants in the Inquiry have expressed this concern; the CATSA Advisory Panel Report, for example, states:

> "We have some concerns about the application of this approach in Canada. However interpreted, it implies a degree of discretion assigned to frontline personnel to make judgments about passengers – judgments that might have serious impact on individuals… We would note as well the danger of such a system of passenger analysis being misunderstood as 'profiling,' which in its ethnic, religious and racial forms is generally seen as inappropriate, if not illegitimate, in Canada."[16]

Such concerns are well founded, as it may be very difficult to ensure that certain nuanced cultural norms, such as facial movements, gestures, and other habits, are not mistaken for suspicious behaviors. In order to ensure that behavioral profiling is equitable, great pains must be taken to make certain that all such techniques do not unfairly affect certain racial or cultural groups.

<u>Recommendation #17</u>: To whatever extent behavioral profiling is adopted, all efforts should be taken to ensure that it does not unfairly affect certain racial or cultural groups.

In addition to CCLA's concerns about behavioral profiling targeting the wrong people, we are also concerned that it may target the wrong conduct. Excessively broad behavioral profiling could result in individuals being detected for reasons that have nothing to do with airline security; this could represent an unwarranted expansion of government surveillance powers, with no corresponding aviation security benefit.

Persons, for example, who are nervous dealing with authorities because of immigration matters or outstanding warrants, may be as likely to attract the attention of airport authorities as those who are a security threat. Drawing a distinction between such persons may prove very difficult, and people could be increasingly detained for conduct

that would have otherwise gone undetected. Extending the power of government to identify such persons under the guise of an aviation security initiative could be a spurious spillover effect of a behavioral profiling program. To protect against such an outcome, measures must be taken to ensure that behavioral profiling is not used for any objective beyond the detection of serious threats to the safety of our airways.

<u>Recommendation #18</u>: To whatever extent behavioral profiling is adopted, its use should be restricted to the detection of conduct that poses a risk to aviation security.

The implementation of a behavioral profiling program that is appropriately targeted and adequately respectful of civil liberties will be a difficult task. Should the government decide to undertake such an endeavor, it must acknowledge the difficulty of this task and ensure that its efforts are closely scrutinized. This could be accomplished by requiring an independent body to audit all efforts made by agencies employing such techniques.

Auditors would need to be attentive to all potential deficiencies in the administration of such programs; however, special attention should be given to any over-breadth or discriminatory effects of the use of behavioral profiling techniques. If such problems are identified, they should be corrected, with the input of auditors, in the briefest timeframe possible. Oversight of this nature would likely markedly decrease the negative impact of a behavioral profiling program on civil liberties.

<u>Recommendation #19</u>: To whatever extent behavioral profiling is adopted, regular independent audits should be conducted to identify and correct any problems associated with its use; auditors should pay particular attention to any overly broad or discriminatory effects of such programs.

SUMMARY OF RECOMMENDATIONS

THE RELATIONSHIP BETWEEN CSIS AND THE RCMP

Recommendation #1: Canada's law enforcement and intelligence gathering activities should be housed in the same agency.

Recommendation #2: There should be a significantly broader power for the government to direct the RCMP's operations.

Recommendation #3: With on-going access to records, facilities, and personnel, an agency, independent of the RCMP, the government, and affected constituencies should conduct self-generated audits of the government's national security policies and practices.

THE PASSENGER PROTECT PROGRAM

Recommendation #4: there should be an explicit needs test with respect to the personal information that the Ministry can commandeer under the PPP.

Recommendation #5: RCMP Officers' access to passenger data should be subject to similar limitations as those imposed upon employees of CSIS.

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<u>Recommendation #10</u>: The Passenger Protect Program's adjudication process should be fully independent of MTIC.

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<u>Recommendation #12</u>: The Regulations should empower Passenger Protect Program adjudicators to provide for an oral hearing in appropriate circumstances.

<u>Recommendation #13</u>: All decisions made by Passenger Protect Program adjudicators should be accompanied by written reasons which are communicated to the affected individual, or, at least, to a security cleared Special Advocate.

<u>Recommendation #14</u>: Passenger Protect Program adjudicators should be empowered to remove names from the SPL when their original inclusion was without reasonable grounds.

<u>Recommendation #15</u>: Passenger Protect Program adjudicators should be given the power to award compensation to persons who have suffered personal or financial hardship as a result of being wrongly placed on the SPL.

BEHAVIOURAL PROFILING

Recommendation #16: To whatever extent behavioral profiling is adopted, it should only be permitted in secure pre-boarding screening areas where individuals have a lower expectation of privacy.

Recommendation #17: To whatever extent behavioral profiling is adopted, all efforts should be taken to ensure that it does not unfairly affect certain racial or cultural groups.

Recommendation #18: To whatever extent behavioral profiling is adopted, its use should be restricted to the detection of conduct that poses a risk to aviation security.

Recommendation #19: To whatever extent behavioral profiling is adopted, regular independent audits should be conducted to identify and correct any problems associated with its use; auditors should pay particular attention to any overly broad or discriminatory effects of such programs.

NOTES

[1] The Honourable Bob Rae, *Lessons To Be Learned* (Ottawa: Air India Review Secretariat, 2005) at 16.

[2] Robert Matas, “Intelligence Ignored” *Globe and Mail* (Air India Backgrounder 2003), online: Bell Globemedia Interactive <http://www.theglobeandmail.com/backgrounder/airindia/pages/s_ignored.html>.

[3] Philip Rosen, The Canadian Security Intelligence Service, (Ottawa: Library of Parliament, Research Branch, 1996) at 1; online: <http://www.parl.gc.ca/information/library/PRBpubs/8427-e.pdf>

[4] Clarence Kelly cited in John T. Elliff, *The Reform of FBI Intelligence Operations*, (Princeton: Princeton University Press, 1979) at 77.

[5] The 9/11 Commission Report: *Final Report of the National Commission on Terrorist Attacks Upon the United States* (Authorized Edition), National Commission on Terrorist Attacks at 423-424.

[6] Subsection 4.82(12) of the *Aeronautics Act*, R.S. 1985, C. A-2 states: “A person designated under subsection (3) may, if authorized by a senior designated person designated under that subsection, disclose information referred to in subsection (7) to an employee of the Canadian Security Intelligence Service for the purposes of an investigation with respect to a ``threat to the security of Canada'' referred to in paragraph (*c*) of the definition of that expression in section 2 of the *Canadian Security Intelligence Service Act”*; The relevant provisions of the *Canadian Security Intelligence Service Act*. 1984, c. 21, describe "threats to the security of Canada" as “activities within or relating to Canada directed toward or in support of the threat or use of acts of serious violence against persons or property for the purpose of achieving a political, religious or ideological objective within Canada or a foreign state”.

[7] Subsection 4.82(11) of the *Aeronautics Act*, R.S. 1985, C. A-2 states: “A person designated under subsection (2) may disclose information referred to in subsection (7) to any peace officer if the designated person has reason to believe that the information would assist in the execution of a warrant.”

[8] Eric Lipton **“**Faces, Too, Are Searched at U.S. Airports” *The New York Times* (17 August, 2006), online: The New York Times Company < http://www.nytimes.com/2006/08/17/washington/17screeners.html>

[9] The Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182, Inquiry Transcript, pg. 8025 (October 23, 2007).

[10] Review of the Canadian Air Transport Security Authority Act, *Flight Plan: Managing the Risks in Aviation Security - Report of the Advisory Panel*, (Ottawa: Ministry of Transportation, 2005), online: <http://www.tc.gc.ca/tcss/CATSA/Final_Report-Rapport_final/chapter7_e.htm#72> (accessed November 23, 2007).

[11] *Ibid.*

[12] *Ibid.*

[13] Air Line Pilots Association, International, “Submission to the Advisory Panel on the Canadian Air Transport Authority (CATSA) Act, 1 June 2006 at 7; online: <http://www.tc.gc.ca/tcss/CATSA/ Submissions-Soumissions/ALPA_e.doc> (accessed on November 23, 2007).

[14] *Ibid* at 10.

[15] American Civil Liberties Union, News Release/ Communiqué, “ACLU of Massachusetts Challenges Use of Behavioral Profiling at Logan Airport” (10 November 2004), online: <http://www.aclu.org/safefree /general/18765prs20041110.html> (accessed November 23, 2007).

[16] *Flight Plan: Managing the Risks in Aviation Security - Report of the Advisory Panel*, *supra* note 11.