

INTERNATIONAL CIVIL LIBERTIES MONITORING GROUP

In collaboration with

**British Columbia Civil Liberties Association
Canadian Association of University Teachers
Canadian Labour Congress
Canadian Union of Public Employees
Ligue des droits et libertés**

**Report of the Information Clearinghouse on
Border Controls and Infringements to Travellers' Rights**

February 2010

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The Canadian Charter of Rights and Freedoms

Mobility Rights

6. (1) Every citizen of Canada has the right to enter, remain in and leave Canada.
- (2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right
 - a) to move to and take up residence in any province; and
 - b) to pursue the gaining of a livelihood in any province.

Legal Rights

7. Everyone has the 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.

Equality Rights

- 15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The Canadian Bill of Rights

2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to
 - (e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations.

Abbreviations and Acronyms

API	Advance Passenger Information
ATAC	Air Transport Association of Canada
CAIR-Canada	Canadian Council on American-Islamic Relations in Canada
CAPPS-II	Computer-Assisted Passenger Pre-Screening System (version 2)
CATSA	Canadian Air Transport Security Authority
CBP	Customs and Border Protection, U.S.
CBSA	Canada Border Services Agency
CHRC	Canadian Human Rights Commission
CRS	Computerized Reservation System
CSIS	Canadian Security Intelligence Service
DHS	Department of Homeland Security
EDL	Enhanced Driver's License
FBI	Federal Bureau of Investigation
GAO	General Accounting Office
HRTI	High-Risk Traveller Identification Initiative
IBET	Integrated Border Enforcement Teams
ICES	Integrated Customs Enforcement Systems
ICLMG	International Civil Liberties Monitoring Group
ICRA	Independent Complaints and National Security Review Agency
INSET	Integrated National Security Enforcement Teams
IPIL	Integrated Primary Inspection Line
IRPA	Immigration and Refugee Protection Act
ITAC	Integrated Threat Assessment Centre
NACC	National Airlines Council of Canada
NRAC	National Risk Assessment Centre
NSIS	National Security Investigations Sections
OPCC	Office of the Privacy Commissioner of Canada
PALS	Primary Automated Lookout System
PNR	Passenger Name Record
PPP	Passenger Protect Program
PTU	Passenger Targeting Units
RCMP	Royal Canadian Mounted Police
RFID	Radio-Frequency Identification
SIRC	Security Intelligence Review Committee
SITA	Société internationale de télécommunications aéronautiques
SPL	Specified Persons List
SPLAG	Special Persons List Advisory Group (SPLAG)
SPP	Security and Prosperity Partnership
SSSS	Secondary Security Screening Selectee
TRIP	Travel Redress Inquiry Program
TSA	Transportation Security Administration, U.S.

1. INTRODUCTION

The International Civil Liberties Monitoring Group (ICLMG) supports legitimate efforts to combat terrorism which is in itself a serious attack on human rights, but argues that these efforts must always respect human rights norms. It is not possible to defend democracy, the rule of law and a culture of human rights by abdicating these very principles. Security and freedom are not opposites. Respect for fundamental rights is an essential condition and a vital component of security.

In early 2008, in cooperation with civil liberties groups and partners from the labour movement, the ICLMG established the *Action-Research and Information Clearinghouse on Border Controls and Infringements to Travellers' Rights*. Its mandate was to document the impacts of “no-fly lists” and other government watch lists.

The Clearinghouse project aimed to:

- investigate the National Risk Assessment Centre (NRAC) travellers' profiling operations, practices and systems, including their degree of harmonization and interoperability with the U.S. Terrorist Screening Centre, as well as the extent of the proliferation and nature of the various watch lists and databases used for risk assessment and border controls.
- establish a mechanism (the “Clearinghouse”) to collect, document and systematize information in cases of individuals encountering problems at airports and border crossings due to application of the no-fly lists, Canada Border Services Agency's (CBSA) watch lists, and other watch lists, resulting in refusal of entry, secondary screening, or other measures that have a clear and very concrete impact on privacy rights and the rights of travellers.

Research on surveillance of travellers, border controls and watch lists began in March 2008 and is ongoing. The Clearinghouse was formally launched on June 18, 2008, on the first anniversary of the introduction of the Passenger Protect Program (PPP) – Canada's no-fly list – with its own websites www.travelwatchlist.ca and www.surveillancedesvoyageurs.ca, and a toll-free line for travellers to tell their stories.

These websites have allowed the collection of information from the public, and made possible the dissemination of information related to border issues, privacy and civil rights to a larger audience. The ICLMG, its members and partners have relied on the research findings to speak out against the deployment of new programs aimed at increasing the surveillance and monitoring of individuals. These include the U.S. Secure Flight program which threatens Canada's sovereignty, Enhanced Driver's Licenses (EDLs) with Radio-Frequency Identification (RFID), the increasing use of biometrics to identify and monitor travellers, and new technologies such as full body scanners that can see through the travellers' clothing, threatening their privacy rights. Information collected via the websites and toll-free line and through ongoing research is being used for public

education purposes, and to engage officials about abusive practices such as racial and religious profiling.

1.1 Border controls

Anyone who has travelled across the Canada-U.S. border in recent years is aware that since September 11, 2001, Washington and Ottawa have significantly increased controls in the name of the war on terror.

The number of entry-exit and travel-related security programs employing new technologies that only a couple of years ago would have been considered science-fiction is truly dizzying. These programs allow governments to risk-score travellers, as well as collect and retain an increasing amount of personal information.

A number of programs and initiatives – such as the Nexus program, NRAC, the High-Risk Traveller Identification Initiative (HRTI), the Canada no-fly list and the Integrated Border Enforcement Teams (IBET) – are a direct result of the growing efforts to integrate Canadian and U.S. security systems within the framework of the 2001 Smart Border Declaration between Canada and the U.S., and the subsequent 2005 Security and Prosperity Partnership (SPP) Agreement.

Since 9/11, identifying, assessing and mitigating risk are central to border management practices. CBSA readily acknowledges that its goal is to create a “virtual border” that is closest to the possible source of risk – and away from the traditional physical border.

CBSA programs comprise only one part, albeit a very large part, of the system now in place – or being developed – to control and monitor the movement of travellers. Below is a list of the Canadian programs and databanks that play a role in identifying, assessing and targeting travellers:

Canada Border Services Agency (CBSA)	Canpass and Nexus ¹	These programs are voluntary and involve additional costs to the traveller. For example, Nexus is a joint Canada-U.S. program allowing pre-screened and low-risk participants who submit their fingerprints and provide digital photographs or their irises to clear the border faster.
	Advance Passenger Information/ Passenger Name Record (API/PNR)	Airlines must provide API/PNR data upon takeoff or within 15 minutes of arrival in Canada to the CBSA through its PAXIS data system since 2003, which manages and stores API/PNR that it receives from airlines, travel agents and automated ticket systems.

¹ <http://www.cbsa-asfc.gc.ca/agency-agence/program-eng.html> (All links retrieved on October 12, 2009 unless otherwise noted.)

	Passenger Information System (PAXIS)	Implemented in 2002, the PAXIS system collates and assigns a risk score to arriving passenger and crew based on API/PNR information. In 2006, PAXIS, the key data system of the National Risk Assessment Centre (NRAC) risk-assessed approximately 96% of air travellers. ² CBSA plans to extend the use of the PAXIS application to other modes of transportation, such as buses and trains.
	National Risk Assessment Centre (NRAC)	Receives risk-scoring information from PAXIS and identifies high risk travellers using the same secret algorithms as the U.S. It also routinely shares information with U.S. Customs and Border Protection (CBP) and the Department of Homeland Security (DHS).
	Passenger Targeting Units (PTU) ³	The PTUs located at eight Canadian airports conduct further risk analysis on some or all passengers on selected flights. They validate PNR information against various enforcement and intelligence sources to assess the risk posed by selected travellers. Based on this assessment, an electronic “lookout” may be created, which generally results in the traveller undergoing a secondary examination.
	Integrated Customs Enforcement Systems (ICES) ⁴	The ICES database is designed to support the functions of frontline customs inspectors, intelligence and investigations personnel by allowing them to collect, analyze and disseminate information related to risks at the border. It also provides a common storehouse for customs enforcement data, e.g., data on arrests, seizures and ongoing customs investigations. All information pertaining to an enforcement action taken against an individual or business is entered into the ICES database. The personal information retained typically includes: the reason(s) the individual was referred to secondary screening; the results of the search and notes of interviews conducted during the secondary examination; tombstone data – name, age, address, citizenship, licence number, passport number, the identity of the travel companion(s), and enforcement actions taken (individual was searched, arrested, detained, etc.) and the results of the inquiry.

² <http://www.cbsa-asfc.gc.ca/agency-agence/reports-rapports/ae-ve/2008/target-ciblage-eng.html>

³ http://www.priv.gc.ca/information/pub/ar-vr/cbsa_060620_e.pdf

⁴ http://www.priv.gc.ca/information/pub/ar-vr/cbsa_060620_e.pdf

CBSA	Integrated Primary Inspection Line (IPIL) ⁵	The Integrated Primary Inspection Line – travel document reader – allows customs officers to query travellers against CBSA and immigration databases for previous enforcement, lookouts and lost/stolen/fraudulent documents in real time, to display intelligence information that warrants secondary inspection. It is used at airports, and at selected ferry, bus and rail locations.
	Primary Automated Lookout System (PALS) ⁶	PALS is the equivalent of IPIL at airports. It involves a licence plate reader at border crossings. In both IPIL and PALS the customs officers will check information on ICES.
	Customs Intelligence Management System ⁷	An online case management and occurrence reporting system and a national central storehouse for intelligence information. It provides Customs with the electronic tool to co-relate, analyze and distribute information.
	Automated Border Clearance pilot project	This two-year pilot project, previously known as the Electronic Primary Inspection Line, was launched in 2009 at Vancouver International Airport. During the pilot project, Canadians and permanent residents will be able to use an automated self-serve kiosk as an alternative to a primary inspection by a border services officer.
Canadian Air Transport Security Authority (CATSA)	Pre-board Screening	This involves screening passengers, carry-on baggage and personal belongings, and can involve search and seizure and a body pat-down.
	Boarding Pass Security Scan (pilot project) ⁸	BPSS is a “stand-alone” technology that scans boarding passes to ensure that the information contained in the barcode corresponds to a valid flight and that it has not been used previously that day. Passengers who have been selected for secondary screening by air carriers are automatically flagged by the system as their boarding pass is scanned. CATSA began scanning, collecting and keeping boarding passes for 24 hours at Pierre Elliot Trudeau airport in April 2009 but neglected to conduct a Privacy Impact Assessment as required by both Treasury Board and the Privacy Commissioner. ⁹ A CATSA spokesman said the information is only used if there is a security incident. The pilot project is scheduled to end in January 2010 but could last longer if CATSA determines more “research” is needed, he said. ¹⁰

⁵ <http://www.tbs-sct.gc.ca/rpp/2008-2009/inst/bsf/bsf04-eng.asp>

⁶ <http://www.tbs-sct.gc.ca/rpp/2008-2009/inst/bsf/bsf04-eng.asp>

⁷ http://www.tc.gc.ca/mediaroom/releases/nat/2001/01_H126e.htm

⁸ http://www.catsa.gc.ca/english/about_propos/rep_rap/pdf/plan2009-2010_2013-14/plan.pdf

⁹ <http://cnews.canoe.ca/CNEWS/Canada/2009/10/13/11390706-sun.html> Retrieved October 23, 2009.

Royal Canadian Mounted Police (RCMP)	Integrated Border Enforcement Teams (IBET) ¹¹	Under Smart Border Agreement, these teams are made of up of intelligence and enforcement personnel from the RCMP, the CBSA, the U.S. DHS, Canadian and U.S. law enforcement agencies (local, provincial and state) and the intelligence community. These teams are “strategically placed along the border” and identify and investigate people and organizations who pose a threat. Individuals can be arrested and goods seized.
	Integrated National Security Enforcement Teams (INSET) ¹² – previously National Security Investigations Sections (NSIS)	By refocusing NSIS, the RCMP says it has increased its capacity for the collection, sharing and analysis of intelligence among partners with respect to individuals and entities that are a threat to national security in major Canadian centres.
Transport Canada	Passenger Protect Program (PPP)	Canada’s no-fly list program, which came into force on June 18, 2007 (See Section 2).
Canadian Security Intelligence Service (CSIS)	Integrated Threat Assessment Centre (ITAC) ¹³	Created in October 2004 following the April 2004 publication of <i>Securing an Open Society: Canada’s National Security Policy</i> , “ITAC analyzes security intelligence from its various partner agencies and pieces together a picture of potential threats. These threat assessments are then distributed to members of the Canadian security intelligence community, provincial emergency authorities, first responders, and the private sector.”
	Front-end screening and Port of Entry Interdiction Program ¹⁴	Identifies security risks stemming from refugee claimants and screens refugee claimant information.

This list – which does not include other measures that target the entry of commercial goods or cargo – illustrates the very complex web of programs and databanks that come into play when a traveller boards a plane, domestically or internationally, a cruise ship, or travels by car, train or bus to the U.S. Each of these programs comes with its own set of rules and regulations.

¹⁰ Ibid

¹¹ <http://www.rcmp-grc.gc.ca/secur/ibets-eipf-faq-eng.htm>

¹² <http://www.rcmp-grc.gc.ca/secur/insets-eisn-eng.htm>

¹³ <http://www.itac-ciem.gc.ca/index-eng.asp>

¹⁴ http://www.priv.gc.ca/information/ar/200607/200607_pa_e.cfm

It is little wonder that travellers encountering serious problems at the border are often unable to understand why they are targeted, while those unfairly targeted or victims of mistaken identity or racial/religious profiling are unable to seek redress.

1.2 Advance Passenger Information (API)

In order to understand why some travellers are questioned extensively at the airport, it is useful to appreciate the amount of information that is collected on each and every person who travels by air (and eventually on all passengers travelling by bus, train or ship) forwarded and exchanged between different departments on both sides of the border.

API/PNR is one such set of information. CBSA began collecting API on October 7, 2002 and PNR on July 8, 2003, to identify persons (passengers and crew members) who may pose a risk to the safety of Canada before their arrival in the country. It targets all passengers, foreign visitors and Canadians alike.

API is contained within the machine readable zone portion of a passenger's or crew member's travel passport and includes the traveller's full name, date of birth, gender, citizenship or nationality and the travel document number.

1.3 Passenger Name Record (PNR)

PNR information includes personal data related to the traveller's reservation and travel itinerary as contained in a commercial carrier's reservation system or in one of the big four computerized reservations systems (Sabre, Galileo/Apollo, Amadeus and Worldspan) used by all travel agencies, including such popular sites as TripAdvisor and Expedia.

As Edward Hasbrouck, a San Francisco-based travel and privacy expert explains: "The CRSs [Computerized Reservation System] connect travel agents to airlines and other suppliers of travel services (hotels, car rental companies, etc.) and suppliers to each other, as well as storing the actual databases of reservations. As the oligopolistic repositories of data from many sources about travelers, the CRSs have the same central role and importance for travel data – and data privacy protection – that credit bureaus have for financial data."¹⁵

PNR was developed over time by the airline industry for customer service purposes, and contains more than 35 different fields of information, including the name of the person who reserved the flight, the name of the person who paid for it, the number and type of credit card, whether the passenger is travelling alone or the name of the travel companion, and whether the ticket was purchased at the airport on the same day. The PNR also contains references to meal preferences and health needs. And the collection of PNR is not limited to the collection of information related to airline tickets. All the data in the PNR, when cross-referenced, can in turn reveal such information as union membership, sexual orientation, political or religious beliefs.

¹⁵ http://www.hasbrouck.org/amazingrace2/index_7.html

“If you make your hotel, car rental, cruise, tour, sightseeing, event, theme park, or theater ticket bookings through the same travel agency, Web site, or airline, they are added to the same PNR. So a PNR isn’t necessarily, or usually, created all at once: information from many different sources is gradually added to it through different channels over time,” Hasbrouck says.

PNR contains information that can be analyzed and data-mined in conjunction with other intelligence information to identify allegedly high-risk travellers who are either singled out for extra attention at check-in or upon arrival at their destination, or are deemed too dangerous to fly.

As a recent SITA¹⁶ briefing paper makes clear, the development of interactive Advanced Passenger Information Systems in the late 1990s is making it possible for “passenger data to be collected earlier in the passenger journey – literally at check-in – allowing Governments to check watch lists and make board/no board directives to airlines prior to take-off.”¹⁷

When the government introduced amendments to the *Customs Act* in 2002 to force airlines to make PNR available to CBSA, the potential for abuse and misuse was not lost on Canada’s former Privacy Commissioner George Radwanski. He argued that the collection and retention of PNR would amount to a “Big Brother” databank¹⁸ and represented an unprecedented intrusion into the lives of law-abiding Canadians. Despite his protests, the government went ahead with the proposed amendments to the *Customs Act*, although it did change the data retention period from 6 years to 3.5 years.

The CBSA has the authority to obtain and collect such information under section 107.1 of the *Customs Act*, the Passenger Information (Customs) Regulations, paragraph 148 (1)(d) of the *Immigration and Refugee Protection Act* and regulation 269 of the Immigration and Refugee Protection Regulations.

Governments consider PNR risk analysis – along with biometrics – as key elements of border management procedures. SITA has been advocating deployment of its systems to make it easier for governments to reconcile API and PNR information to be used for data-mining, touting its technology as “extremely helpful” not only in the fight against terrorism, but also in criminal investigations.

Presently companies operating buses, trains and cruise ships are required to provide PNR information only upon request, although in February 2008 CBSA said it would expand its

¹⁶ Geneva-based, SITA was founded in 1949 as the *Société internationale de télécommunications aéronautiques*, a cooperative providing communications services between airports, and has evolved into a multinational information technology company specializing in providing and developing IT for the aviation industry. Its members are said to represent 90% of the total airline business worldwide. Paul Colby of British Airways is the Chair of the Board of SITA.

¹⁷ <http://www.sita.aero/pnr-data-leads-border-security-fight>

¹⁸ http://www.priv.gc.ca/media/nr-c/02_05_b_020926_2_e.cfm

surveillance of travellers entering the country to all modes of transport. The government is on record as saying it is still committed to expanding the PNR requirement.

Below is a chart from CBSA's January 2008 Pre-arrival targeting Evaluation Study showing which data is sent to the National Risk Assessment Centre and the timeframes for providing it:¹⁹

Mode	Information	Timeframes
Air - crew and passengers	API/PNR	Data must be provided upon takeoff or within 15 minutes prior to arrival in Canada. (Mandatory)
Marine - crew of commercial vessels	API from the crew manifest	As far in advance as possible, a minimum of 7 days prior to arrival (updated at the last port of departure before Canada). (Mandatory)
Marine - crew and passengers of cruise ships	API from passenger and crew manifests	As far in advance as possible, a minimum of 96 hours prior to arrival (updated at the last port of departure before Canada). (Upon request)
Rail - crew	Rail crew report	At least 2 hours prior to arrival at the port of entry. (Upon request)
Rail - passengers	API from passenger manifest	Information provided upon departure from the last station prior to arrival in Canada. (Upon request)
Bus	API	If requested, information provided upon departure from the last station prior to arrival in Canada.

1.4 The National Risk Assessment Centre

Little is known about the CBSA's NRAC except for the information it chooses to post on its website, although Mr. Justice Dennis O'Connor discussed its operations in *A New Mechanism for the RCMP's National Security Activities*, his second report on the events surrounding Maher Arar's rendition to Syria by the U.S. As a result of audits of various CBSA programs, the offices of the Canadian Privacy Commissioner and the Auditor General have also provided useful insights about the NRAC's work and the nature of its operations.

Created in 2004 as a function of the *Smart Border Declaration*, the NRAC is staffed by CBSA personnel and a small number of personnel from the Canada Revenue Agency. It has three main functions:²⁰

- To receive API/PNR data and analyze it for risk;

¹⁹ <http://www.cbsa-asfc.gc.ca/agency-agence/reports-rapports/ae-ve/2008/target-ciblage-eng.html>
Pre-arrival targeting Evaluation Study (CBSA) January 2008.

²⁰ http://www.sirc-csars.gc.ca/pdfs/cm_arar_rcmpgrc-eng.pdf page 160

- To receive terrorist watch list information from the United States;
- To receive and analyze advance commercial information for risk.

It also has an important immigration-refugee component as it maintains arrest warrants (with identifiers, such as photos) issued under the authority of the *Immigration and Refugee Protection Act (IRPA)*, and manages that information in the automated Canadian Police Information Centre (CPIC) system. It ensures that files on all previously deported persons are maintained in CPIC.²¹

According to the *Pre-arrival targeting CBSA Evaluation Study* released in January 2008, NRAC targeters review air travellers that PAXIS flags as reaching or exceeding one or more of the “national security” risk thresholds to determine if they pose a threat: “NRAC looks for threats to national security (e.g. weapons of mass destruction, radioactive materials), while regional targeters focus on contraband, environmental contaminants (e.g. pine beetles, chemicals) and other threats.”

The information received is cross-referenced against CBSA’s internal ICES databases to match lookout flags or identify any previous issues with arriving passengers. PNR information is fed into a risk-analysis system, which risk-scores passengers using algorithms developed from a large database of information.

“The algorithms are designed to identify constellations of factors that the CBSA states indicate increased risk. Passengers considered to be at high-risk for possible involvement with terrorism, as well as other serious crimes including smuggling and trafficking of drugs or people, are subject to closer questioning upon arrival in Canada,” said Mr. Justice O’Connor. “The CBSA – through the NRAC – may share API/PNR data that it collects with other government agencies for national security or defence purposes, where there are grounds to believe that the information relates to a real or suspected threat to Canada’s security or defence.”²²

Canada and the U.S. use the same risk scoring system. Canada’s NRAC automatically shares with the U.S. National Targeting Center information on travellers for whom terrorism or serious crime-related lookouts have been issued, pursuant to a 2005 memorandum of understanding. Travellers who are stopped at the border for secondary screening have been flagged through this lookout system (See Section 1.7 the Peace Arch border experience).

There are significant threats to privacy stemming from the information-sharing practices of CBSA. In the course of a privacy audit, Canada’s Privacy Commissioner found that border officers were sharing a large amount of information verbally with their U.S. counterparts rather than providing it on the basis of written requests. This was in contravention of both CBSA policy and a Canada-U.S. agreement. As a result of this

²¹ <http://www.vanguardcanada.com/DataSiftingThatcher>

²² http://www.sirc-csars.gc.ca/pdfs/cm_arar_rcmpgrc-eng.pdf page 159

practice, CBSA could not say “with a reasonable degree of certainty” how much of its information sharing activity was permitted under Canadian law.²³

When Auditor General Sheila Fraser looked into the activities of CBSA in 2004, she found “gaps and inconsistencies in the watch lists used to screen visa applicants, refugee claimants, and travellers seeking to enter Canada” and “no overall quality control.” “No one monitors delays in the entry or the quality of the data on watch lists.”²⁴

In a 2007 audit she criticized the low level of accuracy and reliability in the personal information collected, used and disclosed for security and intelligence purposes by the NEXUS and API/PNR program.²⁵

In her 2006-2007 report to Parliament, Privacy Commissioner of Canada Jennifer Stoddart warned: “There is a risk that foreign governments and agencies may use such information in ways that may have a harmful effect on law-abiding Canadians. [...] As we have already seen in the case of Mr. Maher Arar, the transfer of individuals’ private information outside Canada can have disastrous consequences.”²⁶

1.5 Targeting racialized Canadians

Maher Arar’s ordeal weighs heavily on the minds of many members of racialized communities, especially Arab or Muslim communities, when they travel. Repeatedly stopped, questioned and subjected to secondary screening, a number of respondents told the Clearinghouse that they do not travel outside of Canada as much as they did 10 years ago, and they avoid as much as possible visiting the U.S.

One Muslim man from Western Canada recounted how he has been repeatedly – and at length – searched and questioned about his religion, his travel and his life when he returns to Canada:

These incidents...really affected me psychologically; I began to think about being deported like Maher Arar and others. It was really stressful.

Every time I enter the airports or get ready to travel, I do so with the caution of a criminal who is careful not to get caught; the only difference is – I’m not a criminal.

²³ Privacy Commission of Canada, “Audit of the Personal Information Management Practices of the Canada Border Services Agency – Transborder Data Flows,” http://www.priv.gc.ca/information/pub/ar-vr/cbsa_060620_e.pdf

²⁴ Office of the Auditor General of Canada, “Chapter 3 – National Security in Canada – The 2001 Anti-Terrorism Initiative,”

http://www.oagbvg.gc.ca/internet/English/parl_oag_200403_03_e_14895.html#ch3hd4e

²⁵ Office of the Auditor General of Canada, “Chapter 3 – National Security in Canada – The 2001 Anti-Terrorism Initiative,”

http://www.oagbvg.gc.ca/internet/English/parl_oag_200403_03_e_14895.html#ch3hd4e

²⁶ http://www.priv.gc.ca/information/ar/200607/200607_pa_e.cfm

For many members of racialized communities, the targeting and profiling begins with the pre-screening of boarding cards and their personal belongings.

I had an incident at the Edmonton International Airport with a security guy – a security company worker – who searches people and their carry-on luggage. I was standing in line with other people waiting for my turn. He approached and said quietly to me: “After they’re done with you, I want to search you because... you know...”

Then after the thorough search, including x-raying my shoes and inspecting my laptop, he re-did the search all over again.

I felt humiliated because I was singled out among all other travellers... I suspect I was singled out because I look Middle Eastern and I have a beard.

Muslim man from Edmonton

The polite old man at the screening station informed me about being selected yet again for a "random" check (back-to-back, what are the odds? If I gambled, I'd wish my luck were that good!). This check was five times as thorough as the last. After checking my luggage for explosives, chemicals etc., he checked me for “non-metallic weapons” by patting me down; legs, arms, front, back, a very extensive pat-down indeed, any more and it would have been a strip-search – literally. I almost missed my flight....

Canadian Muslim man

If many racialized individuals are subjected to heavy-handed and extra security checks when they try to board a plane, it is little compared to the treatment they receive when they return home.

In mid-December 2009, 42-year old Charmaine Archer, travelling with her four-year-old son, said she was roughed up and strip-searched by customs officials at the Ottawa International Airport when she returned from her grandmother’s funeral in Jamaica. Customs officials did not pull any other Caucasians aside, she said, and when she asked why she was being singled out, she was told that it was because her ticket was booked at the last minute, she travelled only four days, and “obviously couldn’t afford it.”²⁷

It was definite racial profiling...I was humiliated, I felt powerless. I felt violated and just think it was total overuse of power because there was absolutely no reason from them to behave that way with me.

Charmaine Archer

²⁷ <http://www.cbc.ca/canada/ottawa/story/2009/12/17/ottawa-airport-strip-search-archer.html> (Retrieved December 20, 2009.)

In the past two years I have had difficulty returning to Canada after a trip. I have been searched at the Edmonton airport, detained for three hours without any reason. They combed every piece of paper or item in my baggage and on me, turned my personal belongings upside down, but didn't tell me why nor did they charge me.

African Canadian living in Alberta

I used to travel five or six times a year. Now it is down to three or four times. It is a regular routine to be hauled in for questioning and for additional searches by CBSA agent. On a recent trip from London, the Customs Immigration agent marked my customs declaration. I felt I would have to go in for additional screening... Sure enough, I was. [...] All my bags were opened and searched one by one. My laptop was taken for additional screening, so was my cell phone. ...

While the agent was polite – they usually are – I had to spend a good hour and half answering questions such as what I believe in, am I a practicing Muslim, what are my views about the situation in the Middle East [...] After a thorough search, including being asked to empty my pockets and having gone through my wallet, I was told I could go. I asked why I was always pulled in during each visit [...] I pointed out almost all people in the hall being screened were all people of colour: South Asians, Chinese and people of African origin...I was told they were all random searches.

A Toronto area Muslim man who travels outside Canada for work

Upon returning from a trip to the Middle East, [...] I had my luggage thoroughly searched...The customs officer took a quick look at my card, noted my name and immediately directed me to the area where they search luggage.

Oddly enough, those before me and after me were not asked to do the same for some time, until another person was sent in: a black man. The customs officer searched my first piece of luggage extremely thoroughly, going through every single item, every sock, every book – even flipping through the pages, every paper, every pocket...everything. She proceeded to ask many questions in a painfully, agonizingly slow, monotone voice – as if to provoke me. I felt like a criminal... It was a very unpleasant experience. After patiently acting calm and composed with frequent smiles for about one hour, she let me go without going through the remainder of my luggage.

My wife and sister (both practicing Muslims who dress modestly and wear headscarves) and kids who followed me about three weeks later were also stopped in Edmonton and customs went through all nine pieces of their

luggage! They had a 3.5 year old and a 10-month old baby with them the whole time, customs didn't care.

Canadian Muslim man

An Ontario man described his ordeal at the Queenston-Lewiston Bridge at the Niagara Falls border crossing in the summer 2008 as he returned to Canada driving a used car purchased in Atlanta, GA. The CBSA officer held him for questioning for three hours and accused him of lying about the car.

I found it to be extremely unprofessional for a government official to act in such an unprofessional manner. [...]. He told about the three levels an issue could be raised to where each stage would cost me an arm and a leg.

At the back of his mind, the officer concluded that I was lying. Nothing could convince him otherwise. He presumed me guilty until proven innocent. I am a hardworking Canadian citizen and a family man who has never had any problem with the customs before [...] I had all the records of the purchase and the place the vehicle was purchased from.

I felt denigrated, humiliated and disrespected by the officer [...] He only acted out of suspicion and presumption of guilt without any evidence.

After spending more than three long and frustrating hours while our conversations did not produce any fruit, I then asked to speak to the officer in charge. When I explained the situation to the officer in charge, he was satisfied with my explanation and ordered his junior officer who was dealing with me all along to let me go.

I strongly believe that my name and my look and faith had led this young officer to jump to conclusions without any proof.

Ontario man of Middle Eastern origin

I'm sometimes mistaken for Moroccan or an Iranian by CBSA agents. My skin is a bit dark and I have an accent. They always ask where I was born even if it's plainly written on my passport. Once I say: "Portugal", their body language changes, they relax a bit."

Desiderio Fortunato

I attended the American Urology Conference in May 2008 (Orlando, Florida). The American Customs Officer looked at my Canadian passport (which had all my visas and Hajj stamps in Arabic). He asked me if I spoke Arabic. When I said: "No", he stared at me in disbelief. He paged through my passport again, and asked me if I could read any of the Arabic, to which I replied "no" again.

I do not speak Arabic ...I also added that “the Quran was available in English too, so there was no need for me to learn Arabic”. He made me feel very uncomfortable, and seemed to look around for someone before stamping my passport, and letting me go through. I should have asked him if there is a relationship between profiling and the ability to read Arabic, but I did not.

Ontario Doctor

Dr. Saxon Govender said that since he was interrogated and searched at the Coutts, Alberta border crossing, his name has been on a CBSA lookout and he has been told it will remain on the list for seven years. The Edmonton physician, a devout Hindu said that a religious artefact—*Vibhuti*, an ash carried by Hindus – was confiscated on October 13, 2009, following a search of his car. It was tested and showed trace amounts of an opiate derivative.

The guard called in another customs officer, who was standing off to the side with his hand on his gun, as if I was a real criminal, for crying out loud...It (the ash) was given to me 20 years ago by a priest in a temple, How do I know what was in it?²⁸

Dr. Saxon Govender

1.6 Racial profiling and Canada-U.S. information sharing

In the U.S., two reports published in early 2009 documented how Muslim Americans are disproportionately victims of the flawed terrorist watch lists. The Asian Law Caucus released *Returning Home: How U.S. Government Policies Undermine Civil Rights at Our Nation’s Doorstep*²⁹, outlining how it has received more than 40 complaints about extended interrogations, searches, detentions and even the copying of personal material from members of Muslims, South Asians and Middle Eastern communities.

In *Unreasonable Intrusions: Investigating the Politics, Faith & Finances of Americans Returning Home*,³⁰ the group Muslims Advocate listed the most common questions put to Muslims when they return home, which include: “What is your religion?” “What mosque do you attend?” “How often do you pray?” “What do you think of the war in Iraq?” “What charities do you contribute to?”

In the past few years, these questions have been put to a number of Canadian Muslim men who have been detained by U.S. Government agencies – the FBI, the CBP, DHS or all of these at the same time – when they have travelled south of the border. Some of the cases described in the following section also raise questions about the information that is shared between Canadian border and security officials and their U.S. counterparts.

²⁸ <http://www.cbc.ca/canada/edmonton/story/2009/12/08/edmonton-hindu-doctor-border.html> (retrieved December 13, 2009.)

²⁹ <http://www.asianlawcaucus.org/wp-content/uploads/2009/04/Returning%20Home.pdf>

³⁰ http://www.muslimadvocates.org/documents/Unreasonable_Intrusions_2009.pdf

Ali SeifEnnasr

On October 22, 2006, Tunisian-born Ali SeifEnnasr travelled from his home in Ottawa to Chicago to attend a two-week training session before taking up a new job in Toronto with U.S.-based IBA Management Consultant Inc.

His new employer provided the U.S. Immigration Authorities with all the relevant information to authorize his entry into the U.S. Mr. SeifEnnasr did not encounter any problems when he cleared U.S. customs in Ottawa on his way to Chicago. However when his plane landed, there were two CBP officers waiting for him at O'Hare airport. They arrested him, interrogated him at length and turned him back to Canada, saying he was a "threat to national security."

I believe Canadian officials – CSIS – shared information about me with the U.S. between the moment I boarded the plane and my arrival in Chicago.

I have been the victim of harassment by CSIS for several years. Between Aug. 19, 1998 and Nov. 18, 2004, CSIS officers approached me several times to work as an antenna for them, providing information on Arab countries and on the Arab-Muslim community in Ottawa...I have always refused, which, I believe, was the reason that my citizenship application was delayed for more than four years.

During his overnight detention at the Chicago airport, Mr. SeifEnnasr was questioned three separate times by FBI, CBP and DHS officials, and photographed and fingerprinted.

The FBI's main questions were...How many languages do I speak? Where was I born? My country of origin, when I left it, my family members there...? Did I work to overthrow the U.S. government? In what mosque in Ottawa do I usually pray?

Mr. SeifEnnasr said he felt he was a victim of ethnic and religious profiling. He also felt that the U.S. officials not only discriminated against him, but made his ordeal more humiliating by not allowing him to have access to his prayer mat in his cell, and by offering him a pork sandwich to break his fast at sunset, as it was the Ramadan.

Despite the help of his MP, Paul Dewar, in filing a number of official complaints, Mr. SeifEnnasr has not been able to clear his name nor travel outside Canada since March 2006.

Southern Ontario Muslim

A Canadian Muslim man living in Southern Ontario told the Clearinghouse that he had had an unfortunate encounter at the Detroit U.S. border crossing in the spring 2007. After being searched and questioned for nine hours by CBP, FBI and DHS officers, they said he was a threat to national security and pulled his TN NAFTA-rule visa. Until then, that visa had allowed him to work in the U.S.

The man, who did not want his name made public, works for a company that does business in both Canada and the U.S.

I was questioned at length about my religion, Islam, a trip made to Egypt a few years earlier, and different Islamic leaders. They wanted to know where I stood on popular Islamic speakers, and they questioned me about Jihad.

The officers seized his laptop and thoroughly inspected his car. He was fingerprinted and photographed, and then told his visa was no longer valid because he was a threat to national security. He was then allowed to drive back home.

The man said that not long before this event, a CSIS agent had approached him and asked him to share whatever he knew about the local Arab/Muslim community. He said he found it more than a bit suspicious when, a week after being turned back at the U.S. border, the same agent contacted him again, asking why he had not called him for help when he had been detained by U.S. officials.

Mahmoud Zeitoun

In March 2007, Mahmoud Zeitoun was also turned back from the U.S. under questionable circumstances.

He was an engineering student and head of the Lakehead University Muslim Student Association when he agreed to travel to Denver with a local dentist who was seeking accreditation in the U.S. He was to act as her patient for the exam.

Mr. Zeitoun, who was born in Lebanon but holds a Canadian passport, was detained and questioned for an entire day at Minneapolis-St. Paul International Airport, en route to Denver.

When CBP officials initially approached him at the airport, he was told he could only enter the U.S. on the condition that he departed the U.S. through a major port between 7:30 a.m. and 7:30 p.m., a restriction which conflicted with his planned return and ticket. When he asked to speak with a supervisor, he was told that he needed a visa to enter the country. CBP, DHS and FBI officials detained Mr. Zeitoun for 12.5 hours:

I felt insulted. I felt frightened. I felt very, very weak. It felt like torture. I had to sit in an interrogation room all day facing questions about whether I had ties to the Lebanese group Hezbollah, or if I knew about anyone else who has hatred towards the U.S. I was asked: "What do you think of suicide bombers? You think it's right, right? If you tell us anything, we'll let you in." I said: "Please. I am a Canadian citizen. You are talking to me about people I don't know."

Mr. Zeitoun also had his laptop seized and was told he would be put in a cell if he did not give the border guard his e-mail password.

He believes he was stopped in part because he had previously been detained at the U.S. border in Sault Ste. Marie in 2005 for more than five hours. At that time, a border official had made a note in the shared database that he had been turned back – something Mr. Zeitoun only found out when he was detained in Minneapolis.

Mr. Zeitoun told the Clearinghouse that he flew back to Canada after being allowed to call his brother, who contacted an instructor at Lakehead University. This instructor had contacted a Canadian national security investigator, who after a short call to a “friend” in the U.S., called back to say that Mr. Zeitoun would be released by 9 p.m.

Dr. Munir El-Kassem

A few months after Mr. Zeitoun’s ordeal, Dr. Munir El-Kassem was flying from Quebec City to Milwaukee, Wisconsin on May 5, 2007, when he was detained, fingerprinted and questioned for hours at a stopover at the Detroit airport.

I was asked why I was coming to the U.S. and I said I was going to give a lecture on Islam at an interfaith conference. I was taken into a separate room and for four hours flooded with questions ranging from my family in Canada to whether I had ever met Osama Bin Laden or Saddam Hussein. I was asked whether I loved “God or Allah.” All this time I couldn’t help thinking about Maher Arar...

Dr. El-Kassem is director of Clinics at the School of Dentistry at the University of Western Ontario, in London, a university chaplain, and well-known advocate for interfaith dialogue. A month after his ordeal, former foreign affairs minister Peter MacKay told him that he had instructed his staff to conduct a complete investigation into the event surrounding his detention. The minister also said that he had raised the issue with then U.S. Secretary of State Condoleezza Rice, who promised to investigate.

He still has heard nothing from Ottawa or Washington. Although he is often invited to speak to promote interfaith dialogue, he no longer travels to the U.S.

I don’t want to waste my time, being questioned and detained at the border. The result is that a moderate voice has been silenced and can no longer participate in peaceful dialogue.

Dr. Munir El-Kassem

1.7 The Peace Arch border crossing experience

The border crossing between Surrey, British Columbia and Blaine, Washington is the third busiest port of entry in Canada with more than two million vehicles a year.

On November 25, 2009, the actions of Canadian officials put the spotlight on this border crossing, known as the Peace Arch or Douglas crossing, when they detained, interrogated and photographed the well-known U.S. broadcaster Amy Goodman. She was questioned on whether she would be discussing the 2010 Winter Olympics at a Vancouver speaking engagement.

“I really didn’t know what he (border guard) was referring to... He clearly did not think I was telling the truth. He kept pushing: ‘You’re denying you’re talking about the Olympics?’, I said: ‘That wasn’t my plan for tonight,’” Ms. Goodman recounted on *Democracy Now!*, her daily TV/radio news program, airing on over 800 stations in the U.S. and in Canada. She said that she told the border official she would be speaking on medicare, climate change, the wars in Iraq and Afghanistan, and the worldwide economic meltdown.³¹

She was scheduled to speak at the Vancouver Public Library to promote her new book *Breaking the Sound Barrier*, and to take part in a fundraiser at Simon Fraser University.

Border guards also combed through her papers and the laptops belonging to her two travelling companions.

*There’s supposed to be a separation between the State and the press. The fact that the State was going through my documents, that they were rifling through notes, that they were asking what I was planning to speak about a, is a very serious issue. If journalists fear they will be monitored, it’s difficult for the public to get information. And information is the currency of democracy.*³²

Amy Goodman

About 90 minutes later, after having her picture taken, Ms. Goodman was allowed to continue on to Vancouver on the condition she leave Canada within 48 hours. A CBSA official said border guards are entitled to question people until they are satisfied that they “meet all the requirements of coming into Canada.”³³

Two weeks later, Marla Renn, a member of the Olympic Resistance Network in Vancouver said she was harassed by Canadian border guards after being turned back from the U.S. on her way to speak at a community event in Portland, Oregon. (She had previously turned back from the U.S. because she was unemployed.)

I was held by U.S. border officials for six hours, during which time I was interrogated, fingerprinted, and my speaking notes were photocopied, before I was required to sign an official document stating that I had been refused entry into the U.S. because I could not prove I had ties and equities in Canada. Despite

³¹ http://i1.democracynow.org/2009/11/30/amy_goodman_detained_at_canadian_border

³² <http://statismwatch.ca/2009/11/26/border-guards-are-now-olympic-thought-police-amy-goodman-detained/>

³³ Josh Wingrove, “U.S. journalist says she was delayed at border, questioned about speech”, *Globe and Mail*, November 26, 2009.

having no criminal record, being married and now holding a professional teacher's degree, my unemployment since graduating three months ago was the official evidence cited.. Once released, I was physically escorted to the Canadian border, where officials there were given my cellphone, camera, and speaking notes by the U.S. border guards. I then endured another two hours of interrogation regarding my involvement in the anti-Olympics movement, including this slam-dunk question from Canadian border officials: "Were you planning to recruit people in Portland to the anti-Olympics cause?"³⁴

Marla Renn

If, in recent months there has been a strong focus on security related to the Vancouver Olympics, many of the stories told to the Clearinghouse project relate to the behaviour of U.S. border guards who appear unusually quick to draw their guns or their pepper spray.

Desiderio Fortunato learned the hard way that asking a CBP officer to say "please" can be dangerous for one's health and cause headaches at the border for years to come.

A Coquitlam B.C. dance instructor, Mr. Fortunato, 55, was pepper-sprayed, pinned down by U.S. border guards, handcuffed and questioned for three hours, because he had asked the border agent to be a bit more courteous. Mr. Fortunato, a native of Portugal who has been a citizen of Canada for more than 25 years, suspects he is often questioned at the border, because his skin is dark and he speaks with an accent.

The border officer was very rude. He asked me why I was visiting the U.S., what I did for a living and to turn off the car. It was one of those days, I just couldn't put up with the rudeness, and I decided to take a stand. So I asked him to say 'please'. We exchanged words and he threatened to use pepper spray ... I thought it was just a threat but he did it!

Following the incident, Mr. Fortunato had to meet with officials from CBP and the DHS to prove he does not have a criminal record, and to explain all over again why he was travelling to the U.S. He owns a second home in Blaine, Washington, which he uses as a get away place. Depending on the time of the year, he used to go to Blaine several times a week. But now the 25-km trip can take him upwards of two hours, because he is always stopped and sent to secondary screening.

Every time I travel to Blaine, my car is thoroughly searched from top to bottom... Some of the border officers know me and they are embarrassed that they have to go through the car and the questioning every time. I'm still waiting for an apology. I want them to live up to their commitment to treat visitors courteously.

³⁴ <http://www.straight.com/article-275905/vancouver/marla-renn-attempts-silence-dissent-wont-stifle-resistance-2010-olympics> (retrieved December 20, 2009.)

On March 13, 2009, Michael Greene, the owner of a technology company on San Juan Island, Washington, had several CBP officers draw their guns at him, a victim of mistaken identity.

The agent asked me my name and almost instantly I saw Customs agents pouring out of the building. An agent yelled for someone to get out of the car. At first I didn't realize he was talking to me and then there were between six and 12 agents with their guns pointing at me. I was handcuffed and taken inside for questioning... It was quite a shock.

Mr. Greene was returning home after attending a piping competition organized by the British Columbia Pipers Association at Simon Fraser University. He explained that after he was finally let go, he discovered that an Iowa fugitive described as “armed and dangerous”, with approximately the same birth date, has used the name Mike Greene as an alias. However the fugitive was also described as a 220-pound black man.

I told the agent: “I'm 190 pounds and very white.” The agent responded: “We must have scared the black out of you.”

Mr. Greene said the actions of the border officials were excessive. A few weeks later during the Easter week-end he was again stopped, although he had taken care to cross the border during a quiet time – early morning – and had immediately told the agent of his previous experience. Again, he was detained, and agents drew their guns. “I told them they were making a huge mistake.” He was then advised to clear up the confusion by applying to the DHS Trip Redress program. Six months later, he still has heard nothing back. Meanwhile, he has decided it is safer to stay home than to venture back to Canada.

Hector Perez, a Richmond resident, had a similar experience. He too could not quite believe when six to 10 CBP agents drew and pointed their guns at him when he tried to spend the Labour Day week-end on a shopping trip to Bellingham, Washington.

On September 6, 2009, I was crossing the Peace Arch border crossing with my wife and 23-month old daughter to do some shopping. The agent did the usual thing of checking our passports into their computer, and I thought we'd be on our way in a few minutes like usual.

But what happened next was so unbelievably surreal that I thought it was a joke, or I was not hearing correctly.

The border officer at the booth asked me to put the car into park and turn off the ignition, which I complied. I then heard him speak into a two-way radio and he said “something lane 6”. I did not think much of it at the time, but now I realize that it was the lane we were on. He then asked me to take the car key out of the ignition and hand it to him, which I also complied almost instantly. While this was happening, my wife, who was sitting in the back seat, noticed that a large number of customs officers started coming

out of the building. I was then ordered by the officer in the booth to step out of the car, and as I proceeded to do so I heard yelling: “ Get your hands up”. And so I did, and I saw at least 6-10 officers lined up side by side with their guns drawn and pointing at me and in the direction of the back of our car, where my wife and child were sitting.

Then they yelled at me to turn around with my hands up, and start walking backwards towards them. Then they told me to put my hands behind my back and as I did one of the officers handcuffed me and took me into the building with other officers trailing behind. And I could see all the people inside were staring at me, like I’m some kind of criminal to have something like this done to me.

I was taken into a windowless room with two or three other officers. One of them frisked me, another one snatched my wallet from my back pocket, and started to take my cash and count it... After they searched me, they took my wallet and my shoes, they un-handcuffed me and told me to sit in this room. And they shut the door. But a couple of minutes later they told me to come out and gave me my shoes and wallet back.

Mr. Perez, who is originally from the Philippines, was told by one of the agents that his birthplace did not even match the “armed and dangerous person” on their watch-list.

I did not file any complaints with the American authorities because I am afraid that it might make things worse. I somehow don’t trust the American authorities anymore after this experience. I hope this does not happen to anyone else because it’s humiliating and frightening.

The Peace Arch border crossing is not only one of the busiest, but also the location of a controversial new \$4.5 million Olympics Coordination Center described by DHS as “a key site for counterterrorism and security operations leading up to and during the 2010 Olympic Games in Vancouver.”

The centre, which is housed in a 25,000 square foot non-descript warehouse in Bellingham, can accommodate 54 representatives of up to 40 state, federal, local, tribal and Canadian agencies, Washington State Patrol Capt. Greg Miller, lead planner for the centre told the *Associated Press*³⁵ in July 2009.

The Associated Press reported that DHS has leased the space for two years, and could lease it for at least another two beyond that. Customs and Border Protection might move its air-and-marine branch into the building and continue to use the facility for years, if not decades.

³⁵ http://seattletimes.nwsources.com/html/travel/2009542927_webolympicsborder26.html

Even before these incidents in 2009, the Clearinghouse project had received a number of stories from individuals who reported being detained unfairly or treated rudely by U.S. customs officials.

I'm always asked to step aside when I go to the U.S., which means being questioned for 10 to 30 minutes. It's a bad situation, especially when I'm travelling with a companion.

Surrey resident who has a common English language name

Every time I travel to the U.S. either by air or via the Peace Arch crossing, I'm always stopped and interrogated. I wish I could do something about it. I am unfairly treated and targeted because of my religious and racial origin.

Vancouver Muslim student

Andrew Feldmar, a 69-year old well-known Vancouver psychotherapist still cannot travel to the U.S. to visit his children who live there, ever since a CBP officer stopped him at the border station in August 2006, typed his name into an Internet search engine, and deemed him inadmissible because of a 2001 article he had written about experimenting with LSD in the 1960s. Held for four hours and fingerprinted, he was turned back and barred from entering the U.S. until he can prove he has been “rehabilitated”, although he has no criminal record.

About the same time, José Santos of Langley B.C. and his family were on their way to Bellingham, Washington, (near the border crossing) for a poetry reading in a coffee shop. A victim of mistaken identity, Mr. Santos, who has the same name as a U.S. fugitive and sported at the time impressive mutton chops, was held at the border by U.S. officers for several hours, while his wife and child were held separately.

Meanwhile a border official slipped a note to his wife Carla Braun that read: “Are you and your son being held hostage by this man? You can tell us the truth. You are safe here.”

1.8 Harmonization of databanks

The harmonization of databanks between Canada and the U.S. has led to uneven application of border control rules and regulations, but for some travellers, incomplete or incorrect information in those databases have also caused serious problems.

A Rutgers student who made the Dean’s list, Patrick Adams of Newark, N.Y. will not soon forget his aborted trip to Montreal in May 2008. Travelling with his grandmother by train from New York to Montreal, he was planning to attend his cousin’s graduation ceremony at McGill University.

My grandmother woke me up to tell me that the customs agents were checking documents... eventually they asked me to come with them to a car

in the back. My grandmother and I were confused and didn't know what was going on...One of the four customs officers asked me why I was visiting Canada and if I had ever been convicted of a crime. I said: "No." He then asked me if I had been arrested and I said: "Yes, once before." He then read the charges: obstruction of justice and resisting arrest. I was surprised he knew this! I said I had been arrested, however the case had been dismissed for lack of evidence.....since the case had never gone to trial and I was innocent, I was shocked and embarrassed.

Because the information available in the shared CBP and CBSA databases was not up to date, Patrick ended up stranded in the middle of the night at the Quebec-New York border, after he and a French tourist were unceremoniously escorted off the train and driven to the Plattsburgh border crossing.

Patrick's grandmother had no idea what had happened to him. His cell phone batteries were not charged and he had no way to contact her to let her know where he was.

This whole experience was a complete nightmare. Perhaps the officer that took me off the train thought I was a dangerous person. He may have had even less sympathy for me because he could see that I was young ...and I was dressed in boots and a hooded sweatshirt...

Patrick Adams

2. THE PASSENGER PROTECT PROGRAM

The PPP which came into force on June 18, 2007 remains a highly secretive government initiative. In 2007, Transport Canada estimated the cost of its implementation at \$13.8 million over the first five years, and \$2.9 million per year after that.³⁶ To this day, it has never been discussed nor reviewed by Parliament. Yet a handful of bureaucrats, with CSIS and RCMP input, are placing individuals considered an "immediate threat to aviation security" on a no-fly list with serious consequences. Individuals have no way of finding out in advance whether they are on the list, why they have been singled out, how to correct erroneous information in their files, or how to defend themselves.

In order to understand how Canada came to develop and implement the PPP in 2007, it is useful to examine the evolution and growth of the U.S. no-fly list and its impact on all travellers.

2.1 The impact of the U.S. no-fly list

On September 11, 2001, there were exactly 16 names on the original watch list the U.S. used to screen air passengers.³⁷ By the end of 2008, there were approximately 1.1 million names on a myriad of watch lists, including the no-fly list.

³⁶ http://www.priv.gc.ca/information/ar/200809/200809_pa_e.cfm (retrieved December 20, 2009)

³⁷ <http://www.aclu.org/safefree/resources/18752res20041110.html>

According to the FBI watch list audit by the U.S. Justice Department's Office of the Inspector General released in early May 2009, that list has an error rate of nearly 35%.³⁸ The list, drawn from as many as 16 different intelligence agencies³⁹, is riddled with mistakes and inaccuracies. Some individuals are especially vulnerable as their names are often misspelled as are those who share common names such as Robert Johnson or the ubiquitous John Smith.

In October 2006, the CBS public affairs show *60 Minutes* obtained a copy of the U.S. no-fly list and found that it contained the names of 14 of the 19 September 11, 2001 hijackers – who had been dead for five years – and a number of high profile people, such as convicted terrorist Zacarias Moussaoui, serving a life sentence in Colorado, and Saddam Hussein, who was on trial in Baghdad at the time. The show also revealed that Bolivian President Evo Morales and Lebanon's Nabih Berri – currently speaker of the Parliament – were also on the list. (After the show aired, the FBI said it had removed their names from the list.)⁴⁰

As the American watch lists ballooned, so did the number of complaints from passengers delayed or denied access to air travel. Thousands of travellers, including infants, well-known personalities – such as the late Senator Edward Kennedy and even Canada's former defence minister Bill Graham – discovered that they had the same name or similar name as someone else on the list and would always be subjected to extra screening. Even some federal air marshals⁴¹ have been barred from boarding the flights they were assigned to protect, because their names were mistakenly put on the list, while former Homeland Security Secretary Michael Chertoff admitted in 2008 that a single major U.S. carrier records 9,000 false positives a day.⁴²

The Transportation Security Administration (TSA) in the U.S. maintains two different watch lists. The best known is the no-fly list, a list of people who are not allowed to fly under any circumstances. The other is called the "Selectee list", which contains the names of people whose boarding passes will always be marked with SSSS (Secondary Security Screening Selectee), and who will always undergo intensive extra screening of their person and carry-on bags.

It is next to impossible to have one's name removed from the U.S. no-fly list. Maher Arar is still on it more than two years after the Commission of Inquiry chaired by Mr. Justice Dennis O'Connor exonerated him, and categorically found that there was no evidence linking him to terrorist activity. The Canadian government apologized for his mistreatment and awarded him more than \$10 million in compensation. But his name and that of other members of his family remain on the U.S. list.

³⁸ <http://www.usdoj.gov/oig/reports/FBI/a0925/final.pdf>

³⁹ <http://www.gao.gov/new.items/d06385.pdf>

⁴⁰ http://www.cbsnews.com/stories/2006/10/05/60minutes/main2066624_page3.shtml?tag=contentMain;contentBody

⁴¹ <http://www.nationalterroralert.com/updates/2008/04/30/air-marshals-grounded-in-no-fly-list-mixup/>

⁴² <http://www.nytimes.com/2008/05/15/opinion/15thu3.html>

Only the law enforcement or intelligence agencies that put the name on the list can remove an erroneous listing.⁴³ In 2007, to counter complaints by travellers who were victims of false positives and misidentification, DHS set up the Travel Redress Inquiry Program (TRIP), which was supposed to help travellers bypass red tape by placing their names on a “cleared” list. From the outset, the DHS-TRIP program was criticized as ineffectual by travellers and civil liberties activists alike. A September 11, 2009 report by the U.S. DHS Inspector general has now confirmed that “in most cases” the program has done little to improve the situation.

It found serious flaws in the area of security, privacy, timeliness, and performance management. It also said that not only were some airlines not using the “cleared list” but that one carrier mistakenly used the cleared list to flag flyers for secondary screening.”⁴⁴

It is against this backdrop that Canada set about to develop and implement its own no-fly list, especially as news reports in 2006 detailed publicly for the first time that Canadian airlines were using the U.S. no-fly list for domestic flights, despite the fact that Canadian law did not require it.⁴⁵

In his comparative study of the U.S. and Canadian no-fly lists, University of Victoria political scientist and privacy advocate Colin Bennett suggests that Canada developed its own list to try to counter the use of the U.S. no-fly list domestically: “Both options, handing over passenger lists, or checking those names against the US lists, were considered unacceptable to the Canadian government. Checking the names against a more precise and ‘Canadian-made’ list was therefore regarded as a more palatable alternative”.⁴⁶

As domestic carriers were using the U.S. list, an increasing number of Canadian passengers were being snagged with no recourse except the ineffectual DHS-TRIP.

One of them was Winnipeg New Democratic Party MP Pat Martin who spent almost two years trying to get his name off the U.S. list.

It has been a real hassle. You are literally detained while they decide whether they will give you a boarding pass. It's a hell of a stigma.

MP Pat Martin quoted in the *Toronto Star*, October 28, 2006

The MP's name was eventually removed from the list but it is unclear how this was achieved.

⁴³ <http://www.wired.com/politics/security/news/2005/09/68974>

⁴⁴ http://www.btonline.com/businesstravelnews/headlines/frontpage_display.jsp?vnu_content_id=1004023 167 retrieved October 23, 2009.

⁴⁵ http://web.uvic.ca/~polisci/bennett/pdf/No%20fly%20lists%20_final_.pdf

⁴⁶ Colin Bennett, “Unsafe at Any Altitude: The Comparative politics of “no-fly lists” in the United States and Canada,” http://web.uvic.ca/polisci/bennett/pdf/No%20fly%20lists%20_final_.pdf

In that year – 2006 – Transport Canada received between 40 and 50 complaints from Canadians inconvenienced, delayed or grounded because of the application of the U.S. no-fly list in Canada.

When the ICLMG requested similar information for 2008, a Transport Canada official said it did not keep any statistics involving the U.S. list.

2.2 U.S. list still in use in Canada

Canadian airlines – most notably, Air Canada – have continued to check the names of their passengers against the U.S. no-fly list even after Canada’s Passenger Protect Program (PPP) came into force on June 18, 2007. In fact, even before the Canadian no-fly list came into force, both Transport Canada and the Canadian airline industry predicted the continued use of the U.S. list.⁴⁷

When the Clearinghouse research project met with Transport Canada officials in Ottawa on May 6, 2008, Allan Kagedan, then Chief of Air Security Policy at Transport Canada, acknowledged that Canadian airlines were still using the U.S. list. He blamed much of the false positives and misidentification problems encountered by travellers in Canada on the bloated American list. He suggested there was little Canada could do to put a stop to the practice, since the airlines could do what they wanted.

Shahid Mahmood

Canadian cartoonist and architect Shahid Mahmood may have been the first casualty of the U.S. no-fly list, in Canada. In May 2004, Air Canada refused to sell him a ticket to fly from Vancouver to Victoria. However, his wife was allowed to purchase hers.

A resident of Toronto, Mr. Mahmood filed a complaint with Air Canada and the Canadian Human Rights Commission (CHRC) claiming he had been a victim of racial profiling. Since May 2007, Air Canada has provided him with various explanations including that he was too late to board (but his wife was not) and that he did not have proper identification (although he had a driver's licence, which was all that was required at the time).

In December 2009, the CHRC finally agreed to refer the issue to the Canadian Human Rights Tribunal, thus setting the stage for a first ever public inquiry into the use and misuse of no-fly lists in Canada.

Deputy chief commissioner David Langtry wrote to Mr. Mahmood that the evidence shows he was flagged, but that Air Canada “provided contradictory explanations” as to why. “Having regard to all the circumstances, further inquiry at the tribunal is warranted,” he wrote.⁴⁸

⁴⁷ <http://www.redorbit.com/news/display?id=943116>

⁴⁸ <http://www.thestar.com/news/canada/article/740920--tribunal-to-probe-no-fly-case> (Retrieved December 20, 2009)

“Two prime ministers have gone by and we're on our second U.S. president and still no end in sight,” Mr. Mahmood said, pointing to the lengthy delay to get answers that has prevented him from travelling to the U.S. for more than five years.

Abdullah Almalki

In early December 2009, Abdullah Almalki, a Canadian tortured in Syria, and one of the three men at the centre of the Iacobucci Inquiry, was scheduled to speak at a workshop on “two-tier citizenship” at the annual meeting of the Canadian Council for Refugees being held in Windsor, Ont. However, the Ottawa engineer was not able to attend as he was prevented from boarding a flight to Windsor from Ottawa. Although he was initially given a boarding pass for the flight it was pulled minutes before boarding. He was told that he could fly only to Toronto because he was “restricted from travelling in the U.S. airspace”

The next day, when the issue was raised in the House of Commons, Public Safety Minister Peter Van Loan suggested there was little the government could do when it comes to other countries, which keep their own watch lists. “We don't control the American no-fly list,” he said. “We don't control the no-fly list of any other country.”

“It just made me very frustrated to find out that I can't freely travel within Canada even - and without any justification,” Mr. Almalki explained. He said that he is still suffering the consequences of the “terrible misinformation that Canadian agencies falsely spread about myself and my family.”

“Whose decision was it to prevent me from boarding a domestic flight to Windsor?” he asked. He indicated that earlier in 2009, his wife and oldest son, then aged 15, had problems boarding a plane in Vancouver until his wife showed airport officials a copy of the 544-page Iacobucci inquiry report.

Adil Charkaoui

There is evidence that on June 3, 2009, the U.S. no-fly list forced an Air Canada flight from Fredericton to turn back when it flew over northern Maine on its way to Montreal.

That plane was carrying Adil Charkaoui and two CBSA officers assigned to escort him. Mr. Charkaoui, a Moroccan-born father of three and Canadian permanent resident, was arrested under a security certificate in 2003 and branded a terrorist by CSIS. In February 2009, the Federal Court lifted many of the restrictions against him and he was free to travel for the first time in six years.

On May 31, 2009 he embarked on a cross-Canada speaking tour to highlight the plight of security certificate victims and denounce secret trials in Canada. He told the media that he was about 45 minutes into the flight from Fredericton to Montreal, when U.S. officials ordered the plane to turn back to New Brunswick where he and the two CBSA agents were removed.⁴⁹

⁴⁹ <http://www.cbc.ca/canada/story/2009/06/26/charkaoui-flight-return026.html> (Retrieved December 20, 2009).

Mr. Charkaoui said the airline told him someone called U.S. officials about his presence on the flight, even though he had obtained permission from Transport Canada and the CBSA to travel. Labelled a terrorist by CSIS and imprisoned for two years under a security certificate, his name was not on the Canadian no-fly list, since he had been allowed to fly from Montreal to Halifax a few days earlier. (Note: In October 2009 a Federal Court judge quashed the security certificate against Mr. Charkaoui on the basis of the evidence the government allowed the Court to consider.)

Air Canada spokesperson Isabelle Arthur told the *Canadian Press* by e-mail that the June 3, 2009 flight “had been cleared by the American authorities prior to takeoff [but] was subsequently refused entry into U.S. airspace.”

Prime Minister Stephen Harper weighed in as well, telling a CBC reporter that Canada regularly co-operates with “our American friends” on matters of security and, since Mr. Charkaoui was on the U.S. no-fly list, Canada had an obligation to enforce it.⁵⁰

It is unclear how Canada’s prime minister found out about this information, as the U.S. list is a tightly guarded secret. In fact, it is so secret that Cathy Berrick, the former Director of Homeland Security and Justice Issues for the General Accounting Office (GAO), is on record as saying that the American government sanitizes the lists it gives to airlines because the intelligence agencies that supply the names do not want them circulated to airport employees in foreign countries for fear that they could end up in the hands of terrorists.⁵¹

Mr. Charkaoui told the *Montreal Gazette* that he was allowed to fly to Vancouver as part of his cross-country tour at the end of June 2009,⁵² but did not indicate which airline he used or whether the plane had flown over U.S. airspace.

Hernando Calvo Ospina

What happened to Mr. Charkaoui brings to mind a similar event which occurred two months earlier to Hernando Calvo Ospina, a Colombian journalist who lives in France. On April 18, 2009, Mr. Ospina – who has criticized U.S. foreign policies – was on his way to Nicaragua via Mexico, on assignment for *Le Monde Diplomatique*. Five hours before the Air France flight from Paris to Mexico was scheduled to land, it was diverted to Fort-de-France, Martinique. The captain told the passengers that the Americans were not allowing the plane to fly over U.S. territory because one of the passengers was considered a threat to their national security.

When the plane landed on French soil, Mr. Ospina was the only passenger removed from the plane. A French official told him he was being questioned at the request of U.S.

⁵⁰ Ibid

⁵¹ http://www.cbsnews.com/stories/2006/10/05/60minutes/main2066624_page3.shtml?tag=contentMain;contentBody

⁵² <http://www.montrealgazette.com/news/Charkaoui+puzzled+latest+clash+with+authorities/1732859/story.html>

authorities. “He said I should know that, after Sept. 11, 2001, the Americans had stepped up their ‘cooperation’ work.”⁵³ After answering a few questions including whether he was a Catholic and if he knew how to handle firearms, Mr. Ospina was allowed to go. Air France provided him with a hotel and meals until it could put him on a flight to Managua.

The U.S. is in the midst of implementing its new Secure Flight program (See Section 3), which transfers the responsibility of checking passenger names against government watch lists from airline carriers to DHS. The program is being phased-in for domestic flights in the U.S. in 2009. It is not known whether Canadian carriers will continue to have access to and use the U.S. no-fly list for Canadian domestic flights once the program is completely implemented.

In March 2009, the National Airlines Council of Canada (NACC), which represents the four largest Canadian carriers – including Air Canada – suggested that the application of Secure Flight rules in Canada “is a direct result of the failure to ensure that Canada’s no-fly list is an accepted part of a continental aviation security system.”⁵⁴

In any case, its impact will be felt in Canada in 2010, when it will include all international flights that originate or land in the U.S. or overfly U.S. airspace, unless Canada and the U.S. come to some sort of agreement.

2.3 The Public Safety Act

The first public acknowledgement that Canada was considering its own no-fly list came in August 2005 when Transport Canada announced it would consult with stakeholders on the “implementation of a passenger assessment program, known as Passenger Protect.” However, Ottawa claims it paved the way for the no-fly list when it rushed the introduction of Bill C-42, the *Public Safety Act* which amended the *Aeronautics Act*, two months after the terrorist attacks of September 11, 2001 in the U.S.

Widely criticized, Bill C-42 was withdrawn, slightly revised, and reintroduced as bill C-55, which died on the order paper in September 2002. The same Bill C-17 was reintroduced a month later and again died on the order paper in 2002. Finally, Bill C-7 the *Public Safety Act* was introduced in February 2004 and received Royal Assent on May 6, 2004.

Although the *Public Safety Act* and the crucial amendments to the *Aeronautics Act* were the subject of considerable debate and scrutiny over more than two years, there were no public indications that the government was planning to introduce its own made-in-Canada no-fly list.

In *Privacy Implications of Aviation Security Measures*, a submission to the Commission of Inquiry into the Investigation of Bombing of Air India Flight 182, the Privacy Commissioner of Canada Jennifer Stoddart stated that her staff had reviewed key

⁵³ <http://www.alternet.org/story/139606/>

⁵⁴ http://ca.news.yahoo.com/s/capress/100101/utrael/flight_security_2 (Retrieved January 2, 2010).

testimonies by ministers and officials between December 10, 2002 and late March 2004 before all relevant parliamentary committees. They concluded: “These witnesses did not raise the possibility that the government intended to introduce a no-fly program.”⁵⁵

Tellingly, most public comments at the parliamentary committee, including those by the ICLMG and former privacy commissioner George Radwanski, focused on section 4.82 of the *Aeronautics Act*, which gave CSIS and the RCMP the right to receive and analyze API and PNR data from air carriers and operators of aviation reservation systems without a warrant and to match passenger information against any other data under their control. The amendments also allowed for the Transport minister to issue Emergency Directions under Article 4.76.

The federal government claims that read together, these amendments to the *Aeronautics Act* give Transport Canada the authority to create and maintain the no-fly list or the list of persons who may pose an “immediate threat to aviation security,” known as the Specified Persons List (SPL). The program as such is not mentioned in the law and the Identity Screening Regulations⁵⁶ setting out the PPP’s “guidelines” have never been reviewed or voted on in Parliament.

In 2009, the Office of the Privacy Commissioner of Canada (OPCC) conducted an audit of the no-fly list program under Section 37 of the Privacy Act which offers a limited scope for investigation. Ms. Stoddart acknowledged in November 2009, that more scrutiny is needed but that she does not have the legal power to do it. “It (the program) remains opaque. Its impact on the lives of Canadians remains opaque and that is a concern,” she said, adding that she hoped there would be a bit more transparency, parliamentary review and insight on the workings of the program.⁵⁷

2.4 Designating “Specified Persons”

According to Transport Canada, an individual’s name can be put on the Specified Persons List (SPL) if it is of:

- a person who is or has been involved in a terrorist group, and who, it can reasonably be suspected, will endanger the security of any aircraft or airport, or the safety of the public, passengers or crew members;
- a person who has been convicted of one or more serious and life-threatening crimes against aviation security; and,
- a person who has been convicted of one or more serious and life-threatening offences and who may attack or harm an air carrier, passengers or crew members.⁵⁸

⁵⁵ Jennifer Stoddart *The Privacy Implications of Aviation Security Measures*, Submission in Response to the Commission of Inquiry into the Investigation of the Bombing of Air India flight 182, (November 6, 2007), p 7. http://www.priv.gc.ca/information/pub/asm_071107_e.pdf

⁵⁶ <http://guava-main.pwgsc.gc.ca/rp-pr/p1/2008/2008-05-24/html/reg2-eng.html>

⁵⁷ <http://www.thestar.com/news/canada/article/727268---no-fly-watchdogs-blasted> (Retrieved December 20, 2009).

⁵⁸ Transport Canada website, *Backgrounder: About the Specified Persons List, Passenger Protect Program and Identity Screening Regulations*. <http://www.tc.gc.ca/corporate-services/oor/ppp/background.htm>

In 2008, Transport Canada's Office of Reconsideration asked two independent security advisors, Allan F. Fenske and Wendy Sutton,⁵⁹ to review the complaint of a man whose name was placed on the SPL and barred from flying.

In their report, dated October 28, 2008, Mr. Fenske and Ms. Sutton indicated the PPP is plagued with serious problems, and its legal and regulatory framework needs to be reviewed.⁶⁰ (See more in Section 2.5.)

The report is instructive. A Special Persons List Advisory Group (SPLAG) meets face-to-face at least every 30 days – or more frequently if new information is to be reviewed – to recommend the addition or removal of a name from the SPL. The names to be reviewed are submitted either by the RCMP or CSIS. There are three voting members: the Director General of Security and Emergency Preparedness at Transport Canada, and a senior officer of CSIS and of the RCMP. Other officials also attend the meetings, including alternates to voting members, the Chief of the PPP, and a note-taker provided by Transport Canada's Director of Intelligence.

Participants may contribute to the discussion and, according to Fenske and Sutton's report, "all present make an effort to scrutinize the information with a healthy sense of skepticism... however, it is the three voting members that make the decision ... and the Chair determines the recommendation to the Minister".

It is important to note that the committee's terms of reference "do not call for the committee to give reasons to substantiate why they recommend that a person be specified," unless the committee submits a divided opinion, which had yet to occur when the report was written.

Moreover, while the Regulatory Impact Analysis Statement of the Identity Screening Regulations state that the advisory group will work "with the benefit of legal advice"⁶¹, there is no indication that the committee seeks outside legal counsel.

2.5 Lack of clarity and legal framework

The findings of Transport Canada's consultants discussed above reinforce the arguments made by privacy, human rights and legal experts who have insisted from the outset that the PPP is not adequately supported by a regulatory and legal framework.

⁵⁹ Allan Fenske is a former Director General, Canadian Forces Grievance Authority. Wendy Sutton teaches at Osgoode Hall Law School, and is a former Legal Chair of the Canada Pension Plan/ Old Age Security Review Tribunal.

⁶⁰ Report for the Office of Reconsideration dated October 29, 2008, obtained by the Clearinghouse research project.

⁶¹ <http://www.gazette.gc.ca/archives/p2/2007/2007-05-16/html/sor-dors82-eng.html>

In their June 28, 2007 resolution calling for a moratorium and a parliamentary review of the program, Canada's Privacy Commissioners argued that the *Aeronautics Act* did not provide a "clear or adequate legislative framework to support the PPP."

This concern was again echoed before Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182 chaired by former Supreme Court Justice, John C. Major: "There is no clear and obvious legal or regulatory framework for this program," argued Toronto lawyer Raj Anand.⁶²

Ms. Stoddart pointed out that the criteria on Transport Canada's website for including persons on the list "leave a great deal of room for discretion." A Transport Canada official acknowledged this, suggesting there is no limit to ministerial discretion when applying the PPP.

*The authority of the Minister, the legal authority of the Minister to prevent someone from boarding an aircraft, is very broad. So the legal justification is really in the development of the program. These guidelines indicate, you know, this is what would be used, but that does not fetter the discretion of the Minister either.*⁶³

Brion Brandt, former director of Policy, Security and Emergency Preparedness Policy at Transport Canada in testimony before the Air India Commission on June 5, 2007

Mr. Brandt also said that law enforcement and intelligence services gather information about persons "from any source that's available, including other jurisdictions,"⁶⁴ but did not say how police and intelligence officers ensure the information is valid and accurate.

"In designing Passenger Protect, the federal government aimed to safeguard Canadians' privacy and human rights, and to ensure that legitimate air passengers are not unnecessarily inconvenienced by the application of the PPP," said former Transport minister Lawrence Cannon in an October 2007 letter to the ICLMG. He said that his department had worked with the Privacy Commissioner of Canada Jennifer Stoddart "to bolster privacy and human rights protections as well as to develop a defensible rationale for moving forward with passenger assessment."

However, Ms. Stoddart is on record as saying that Transport Canada has provided "no evidence demonstrating the effectiveness of no-fly lists" despite her repeated requests for such information. In her 2007-2008 report tabled in Parliament in December 2008, she criticized the Canadian no-fly list program and governments that "appear to believe that

⁶² Weir Foulds LLP *Supplementary Submissions* to the Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182, <http://www.majorcomm.ca/en/submissions/Lata%20Pada%20-%20Supplementary%20Submissions%20re%20New%20Evidence.pdf>

⁶³ Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182, Transcripts of Public Hearing, Volume 40, June 5, 2007, p.4876.

⁶⁴ *Ibid*, p 4875.

the key to national security and public safety is collecting, sorting and analysing mountains of personal data – without demonstrating the effectiveness of doing so.”

*Canadians expect the government to take measures to protect them; equally, they expect these measures will respect their rights, including their right to privacy, and also conform to the rule of law. This includes legal standards, such as due process, the right to consult counsel, the right to see evidence held against you and other elements of procedural fairness that underpin our justice system.*⁶⁵

Jennifer Stoddart

The two independent reviewers agreed a Charter review is needed:

*During the course of our review, we have identified a number of places where there appears to be a lack of alignment – perhaps even a gap or disconnect – between the administrative policies and procedures adopted to exercise the powers under paragraph 4.81(1)(b) and section 4.76 for the purposes of the PPP and the statutory requirements of those provisions, as we understand them.*⁶⁶

They also found that as of October 29, 2008, the Minister of Transport had not signed the proper instruments allowing delegation of powers to the deputy minister of Transport as provided in sections 4.76 and 4.81 of the *Aeronautics Act*.⁶⁷

Moreover, the OPCC audit found that since the implementation of the no-fly list program in June 2007 and sometimes after February 2009, the deputy minister did little more than rubber-stamp the SPLAG committee’s decisions to add or remove names from the SPL as he was not provided with complete information.

“The decision to place someone on the Specified Persons List and to subsequently refuse that permission to board an aircraft are serious ones. A decision to deny boarding could have a negative impact on the individual’s reputation and his or her work opportunities and ability to travel in the future,” the Privacy Commissioner said in her November 17, 2009 report to Parliament.⁶⁸

⁶⁵ Jennifer Stoddart, *Annual Report to Parliament 2007-2008 – Report on the Privacy Act*. (Ottawa: Privacy Commissioner of Canada, 2007), p.52. http://www.priv.gc.ca/information/ar/200708/200708_pa_e.pdf

⁶⁶ Report for the Office of Reconsideration, October 29, 2008, signed by Allan F. Fenske and Wendy Sutton, Independent Security Advisors.

⁶⁷ Section 4.76 of the Act authorizes the minister or an authorized officer to issue an Emergency Direction to prevent someone from boarding an aircraft. Section 4.81 authorizes the minister or any authorized person to compel the airline industry to provide information on a specified person.

⁶⁸ http://www.priv.gc.ca/information/ar/200809/200809_pa_e.cfm (Retrieved December 20, 2009).

2.6 First known victim of Canada's no-fly list

On June 4, 2008, at a major Canadian airport, a man of Palestinian origin was served an "Emergency Direction" stating: "The Minister of Transport, Infrastructure and Communities has determined that you pose an immediate threat to aviation security." He became the first known person barred from boarding a plane in Canada as a result of the PPP.

The Canadian resident was on his way to his home country via London, where he was planning to spend a month to maintain his residency status and visit his family.

Since that fateful day he has been involved in a series of legal actions to have his name removed from the no-fly list and to challenge the constitutionality of the program. He is also arguing that the *Aeronautics Act*, the Identity Screening Regulations and the PPP violate his privacy rights as they authorize the collection, retention and sharing of personal information and the creation of the SPL.

In the affidavit filed with his Federal Court application, the complainant said he did not have a criminal record, nor has he ever had any "problems" with the police, as he has always conducted himself properly and has a good reputation within the community. His lawyer, Johanne Doyon of Montreal, points out that he was never informed that his name had been placed on the list. As he has not been given any opportunity to see the evidence used to place him on that list, he has no way of defending himself.

A Supreme Court ruling in 1998 in the Baker case established there is a duty to procedural fairness. This ruling was further reinforced in a June 2008 Supreme Court ruling, *Ms. Doyon* won on behalf of Adil Charkaoui, which found that CSIS had a duty to disclose all information in its possession concerning individuals arrested under national security certificates. It would follow that the man needed the information to allow him to find out why he was on the no-fly list so that he could clear his name.

In her motion she stated that barring her client from flying had violated his rights and created an irreparable prejudice, since the man was supposed to have been in his home country before June 28, 2008 to maintain his residency. Now, his life, security and freedom were compromised, and he risked being arrested if he returned there. Amnesty International has widely documented how this country routinely imprisons and tortures persons suspected of terrorism.

Lindsay Scotton, the Manager, Privacy Impact Assessments, Audit & Review Branch at the OPCC, has previously warned that the consequence could be dramatic if a resident of another country was barred from flying to Canada: "For example, if a person is prevented from boarding an aircraft in a foreign country, let's say Syria, or Pakistan, and the police of the local jurisdiction are notified by the RCMP, what might happen to that person? It is not dramatic to say the passing of the information to the police in Syria might be life threatening to that individual. Certainly, knowing what we do know now about what happened to Maher Arar, we must be aware that the revelation of this sort of information

could have very serious consequences. And the person is stranded at the airport or in the foreign country, maybe with family members who are also at risk. We see this as one of the very large problems.”⁶⁹

Citing national security provisions of Section 38 of the *Canada Evidence Act*, lawyers representing Transport Canada refused to provide the information the man requires to clear his name, prompting his lawyer to turn to the Federal Court in an attempt to resolve the issue.

Transport Canada is also withholding information on the number of persons who have been prevented from boarding an aircraft since July 1, 2008, citing national security, and arguing that the disclosure of the information could reasonably be expected to threaten the safety of individuals.

2.7 Office of Reconsideration

In June 2008, the man filed an urgent appeal with the Office of Reconsideration of Transport Canada asking that his case be heard before the end of the month to avoid further prejudice, which was denied.

When Transport Canada unveiled the PPP to stakeholders in 2005, this office was touted as a reliable and efficient complaint mechanism for any individual barred from flying.

The Office of Reconsideration, part of the Access to Information Department of Transport Canada, has a two-pronged mandate: to review decisions related to the Marine Workers Transportation Security Clearance initiative; and to review complaints by airline passengers who have been denied boarding under the no-fly list.

An independent contractor examines the secret evidence, interviews the complainant and recommends a course of action to the Transport Minister, who has the final say about whether the person’s name will be removed or stay on the list.

*Transport Canada sends a letter to the applicant advising of the Minister's decision. The Office of Reconsideration aims to complete each review within 30 days, but some reviews take longer.*⁷⁰

In fact, when the two contractors were mandated to investigate the man’s complaint on June 20, 2008, they were given until October 24, 2008 to complete their report, some four months. During the course of the investigation Ms. Doyon and her client met with the investigators and provided them with approximately 50 supporting documents. Months

⁶⁹ Lindsay Scotton, *The Passenger Protect Program – Canada’s No-Fly List*, presentation to the St. Paul University Ethics & Privacy centre, January 12, 2008, p. 4.
<http://www.ustpaul.ca/EthicsCenter/documents/LindsayScotton.pdf>

⁷⁰ Transport Canada, *The Office of Reconsideration: The process*. <http://www.tc.gc.ca/corporate-services/oor/ppp/process.htm>

went by, and neither the lawyer nor her client heard anything from the Office of Reconsideration.

By mid-April 2009, Ms. Doyon sent a formal notice demanding an answer within 10 days. She received a letter stating that an answer was forthcoming. In mid-June 2009, one year after the urgent appeal was submitted, the lawyer received a number of documents, including the report. Unbeknownst to her, the report had vindicated her client a full seven months earlier.

In their report, Allan F. Fenske and Wendy Smith found 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 (a finding that was confirmed in the subsequent OPCC audit);
- The information in the SPLAG file, never submitted to the minister, was not only “too vague, selective and incomplete” but did not meet the legal requirements;
- The decision of the SPLAG to maintain his name on the list was made without legal authority;
- The decision to list the complainant’s name did not meet the requirements of the Act, (as related to the definition of an actual or attempted action that could threaten aviation safety and the identification of the threat);
- The intelligence analyst did not conduct or conclude an assessment of his own or evaluate whether an immediate threat to aviation security existed and he did not meet the three requirements to issue the Emergency Directive.⁷¹

They recommended to the Minister that:

- The man’s name be removed from Canada’s no-fly list;
- The minister sign a proper delegation instruments “to promote clarity and certainty”;
- A complete legal review of the PPP be undertaken in line with the arguments made by the victim’s lawyer that the program is unconstitutional because it contravenes section 7 of the *Canadian Charter of Rights and Freedoms*, since persons who are put on the SPL have no right to disclosure, to be heard and to know why they are targeted.

Not only did Transport Canada officials reject the recommendations, they indicated that the man’s name would remain on the SPL.

Ms. Doyon is pursuing the case invoking many of the same arguments she used to successfully defend Adil Charkaoui, in order to have her client’s name removed from the no-fly list. The federal government’s case against Mr. Charkaoui, accused of being a terrorist, began to unravel when the court ordered the Government’s lawyers to reveal their evidence against him. The Federal Court judge reviewed the evidence and ruled that most of it could be disclosed without endangering national security. The security

⁷¹ Report for the Office of Reconsideration, October 29, 2008, signed by Allan F. Fenske and Wendy Sutton, Independent Security Advisors.

certificate was declared null and void in October 2009 when Ottawa, citing national security concerns, refused to disclose the information to the public.

2.8 The role of CSIS

The October 29, 2008 report of the two investigators to the Office of Reconsideration makes it clear that it was the CSIS representative on the SPLAG who argued the man's name be added to the no-fly list.

The investigators' report cautions however that "SPLAG is not in receipt of the best evidence in respect of a case it considers ... The information is selected from its [CSIS] files that can range from sophisticated conclusions on the basis of multiple grounds and sources to individual pieces of isolated information severed from their surrounding and underlying context."⁷²

The report also reveals that two days before the man of Palestinian origin was barred from flying to see his family, two CSIS officers visited him at his home. They drove him to a coffee shop where they questioned him.

They did not have a warrant and told him that "they had information on his family that could cause problems" in his home country and "they could use it if he did not cooperate with them. They indicated to him that they could correct the situation if he worked with them."

The next day, they contacted him again. When the man refused to meet them they said that "they had nothing against him." Two days later, he was barred from flying.

The man filed a formal complaint with Security Intelligence Review Committee (SIRC) against the two CSIS officers alleging they treated him "illegally" and violated his Charter rights but the Committee still has not heard his case.

In 2007, the Canadian Council on American-Islamic Relations in Canada (CAIR-Canada) said that CSIS intelligence gathering activities were increasing, as hundreds of members of Arab communities and Muslims across Canada had been interviewed at their work places, homes and in the vicinity of local mosques. CSIS agents told the men they did not need to have a lawyer present, and they were asking them to cooperate by sharing information on members of their communities.

In April 2007, the Montreal weekly – *The Mirror* – quoted a former Concordia student, now a mechanical engineer, who explained how he was approached by CSIS:

I got a call from a CSIS agent a couple of months ago asking for a meeting at a café downtown on Peel Street. I was asked numerous questions concerning my own involvement in the Muslim community

⁷² Ibid.

[and] was asked by the CSIS agent to not bring a lawyer to the meeting. The agents acknowledged that they had no specific incriminating evidence against me, but explained in a non-direct fashion that they simply wanted to gather information on our community, leading me to feel suspect in Canada simply because of my religion.⁷³

Mohammed

The Tunisian-born Ali SeifEnnasr, who was turned back at the Chicago airport and lost his job in 2006, tells of a similar story, as does the Southern Ontario man who was turned back and had his visa revoked by U.S. officials the following year (see Section 1.6). Other young Muslim men have told the Clearinghouse project that they too were invited for a “coffee” and a “chat” and told they need not bring a lawyer along.

Although far from being a scientific survey, a significant proportion of the Muslim or men of Arab origin who told their stories to the Clearinghouse project about being repeatedly subjected to lengthy questioning at airports or routinely sent to secondary screening upon returning to Canada, are engineers, computer or telecommunications experts, or are studying to become one of these professionals. Several others hold medical degrees, and a few are community activists.

2.9 False positives

The most frequent travellers’ stories to the Clearinghouse websites and toll-free line relate to false positives or misidentification.

The travellers’ testimonies are very similar. Most report that they realize that something is amiss when they are unable to print their boarding cards at the self-serve kiosks travellers are encouraged to use. When they turn to airline staff at regular check-in counters, they are invariably told to wait while their tickets and identity documents are checked. And checked again. Usually, this involves one or more calls to a supervisor, while the traveller – by then singled out among others waiting in line – is forced to wait 10, 15, 30 minutes or more, while phone calls are made, supervisors are consulted and documents checked.

Many of the travellers who have been delayed in this manner are members of Middle Eastern or Muslim communities. Some of the individuals who have encountered problems when trying to check in have been told to “change your name” to avoid future delays. Others have been urged to join an airline loyalty program to accelerate boarding procedures. A number of passengers have missed flights and were denied compensation.

All, however, have experienced severe anxiety and stress, and a number of them have even given up on air travel.

⁷³ <http://www.montrealmirror.com/2007/040507/news1.html>

It's all very intriguing, as well as very annoying and a bit sinister. I have never been in trouble with the law in any country. In fact, I have never even lost a point from my drivers licence! To say the least, I was very upset by this incident.

Retired Ontario high school teacher

In the past few years, it has become customary for me to expect to be delayed at the airport. When I have inquired, I was advised my name was on the U.S. watch list, and therefore I had to have "extra" treatment. This being for flights within Canada.

Western Canada businessman

My daughter and I both have the same initials and are on the no-fly list. Not that this has prevented our travel, but it has proved to be time-consuming and somewhat embarrassing. The first time I was given this information I was flying with my employer and it made me appear suspect... My daughter...who was quite young and nervous about flying, was also flagged and made to wait ...

Saskatchewan woman

Every time (I encountered problems) I was also told to change my name. Yesterday was the last occurrence and today, I officially started looking into changing my name. I travel internationally a lot and have my own list of "no-fly-to" cities for fear of arrest by less accountable officials. It is coming down to my own safety. Prior to doing so, I need to find out which names the "wanted criminal" list actually has, so I'll know what part of my name to change.

Vancouver man who has a common English name

About a year ago travelling from Pearson to Ottawa on Air Canada I was delayed at the check-in counter and told my name was on a list. When I got annoyed... I was told to change my name.

Ontario doctor with a Middle Eastern name

Most cases of misidentification and false positives involve Air Canada, as it continues to use the U.S. no-fly list, despite that fact that it is not required under Canadian law or regulation (see Section 2.2).

John Pass, winner of the Governor General's award for poetry in 2006, was flying to the Northwest Territories to give readings of his work in regional libraries and schools, on a tour sponsored by the libraries and the Canada Council for the Arts on April 27, 2008, when he was told that his name was on a no-fly list.

Unable to obtain his boarding card, he was delayed and questioned about his identity by an Air Canada agent:

I was eventually allowed to board and was told that the reason for this procedure was that I was on a no-fly list and that the same hassle and

insult would be experienced whenever I attempted to fly. The full extent of information or remedy provided to me... was that I should acquire an Aeroplan card.

BC poet John Pass

“As a Canadian citizen with no criminal record and no history of previous incidents or issues with airlines, I believe I was entitled to an apology and explanation,” he added. Instead, Mr. Pass was given contradictory and confusing information by Air Canada and Jazz customer services (although he had not flown on Jazz).

A day earlier another award-winning Montreal author, Jaspreet Singh, on a book tour to promote his new book *Chef*, was flying from Calgary to Ottawa and then, from Montreal to Calgary, and was unable to access the electronic check-in facilities.

I was subjected to a lengthy and detailed questioning in which my ability to travel was put into question... Air Canada employees informed me that I was on a “list” but refused to give me particulars [... Air Canada staff also made] “the preposterous suggestion that I change my name...

Montreal author Jaspreet Singh

After the author cancelled two high profile events in Toronto because he was unnerved by these experiences, his story became public, prompting Air Canada to publicly respond that it had looked into the issue and they had now rectified the problem. But Mr. Singh, who grew up in India and moved to Canada in 1990 where he received his PhD in chemical engineering from McGill University, never found out why he was singled out.

For some travellers “going public” has allowed them to find solutions to travel with a modest measure of confidence, but has not necessarily provided them with satisfactory explanations.

Glenda Hutton’s story is a case in point. A retired school secretary from Courtenay, BC, she was told to forget about her life-long dream of travelling the world. In October 2007, flying from Comox to Calgary, she was told her name matched a name on some unspecified watch list. After certain hesitation and considerable delay, she was eventually allowed to board the Air Canada flight, but the incident worried her. She and her husband Ken, a 25-year veteran of the military, were just a few weeks away from taking a dream trip to Thailand. When they returned home, they checked with their travel agent who was told by Japan Airlines that Glenda’s name was on a no-fly list.

They did say they could probably get us out of Canada but they didn’t think it was a very good idea to go to Thailand or Japan because they couldn’t guarantee that I wouldn’t have any problems with the authorities there.

Glenda Hutton

The airline refunded most of the cost of the tickets and the Courtenay couple began looking for answers. Why was Glenda on a list? What could she do to get off it? And how could she fulfill her retirement dream of travelling the world?

Nineteen months and several thousand dollars later, Glenda and Ken finally got to see the Panama Canal and enjoyed a wonderful cruise. It was quite a journey.

I'll never know what happened, but I'm sure that if I hadn't gone to the press or kept writing letters and being in their face all the time, I wouldn't have resolved it.

Glenda Hutton

When Mrs. Hutton talks of “them”, she is referring to her Member of Parliament, Passport Canada, Transport Canada, the CBSA, Foreign Affairs and the U.S. DHS. She pestered them and demanded answers. Initially nobody wanted to help her. As usual, Canadian government officials referred her to the U.S. DHS to clear her name. But the DHS said they couldn't help her.

Because the delays were not related to flights within or bound for the U.S., DHS TRIP is unable to address your concerns. We have closed your inquiry.

DHS official

Finally, someone suggested to Glenda that she try to obtain a NEXUS card although she wasn't planning to visit the U.S. The NEXUS card, according the CBSA website “is designed to expedite the border clearance process for low-risk, pre-approved travellers into Canada and the United States.”

Mrs. Hutton decided to give it a try. If she could obtain the card, surely she wouldn't be considered a risk. She applied, sent in the \$50 non-refundable application fee, and the mandatory documents. Within days, she was asked to come in for an interview with DHS and CBSA officials in Vancouver.

She had to provide a record showing she had no criminal record, her fingerprints, and even a letter from the National Parole Board, although she has never been charged with any offence. Moreover, the NEXUS card required her to provide biometric data – photos of her face and iris.

“There was absolutely no problem (obtaining the card). No flag. I think people were told to get their act together,” she said.

What happened over the 19 months since she was first singled out on that flight from Comox to Calgary remains a mystery.

Nobody is going to apologize for what happened to me.

Glenda Hutton

2.10 A heavy cost

Mrs. Hutton's story ends on a positive note, although she points out that the ordeal represented about \$2,000 in cancellation fees, as well as travel expenses and costs associated with obtaining her NEXUS card, which is valid for only five years. Not to mention the stress and anxiety of not knowing what could happen to her next time she tries to board an airplane.

Another BC resident told the research project that he began encountering problems when flying a few years ago. It became the norm that neither he nor his wife were able to print their boarding cards from the automated kiosk. They were invariably questioned, singled out and delayed when they tried to board a plane.

I found the whole experience inconvenient and frightening.

BC resident

He suspected they were on some sort of no-fly list but had no idea why both he and his wife, both Canadian citizens with no criminal records, were targeted. In frustration, he turned to a Vancouver lawyer for help.

This lawyer, he said, had "connections" with then Public Security Minister Stockwell Day and officials at the U.S. embassy in Ottawa. It's not clear what the lawyer did or told these officials, but the BC resident said he no longer encounters any problems when he flies, either domestically or internationally.

For this man, the \$16,000 in legal fees was well worth it.

But the cost of being singled out cannot only be measured in dollars and frustration. For some travellers it has meant giving up air travel altogether.

Alistair Butt, who lives in the Ottawa area, was 15 when he first encountered problems trying to board a flight from Montreal to St. John's, NL. His parents were told he had the same name as someone else on the no-fly list.

After long delays and discussions between airline and Transport Canada officials, Alistair was eventually allowed to board the flight. However, his parents were worried that he would always be targetted and might find himself marooned in another country and unable to return home.

For more than two years, they have tried to obtain some sort of guarantee that Alistair wouldn't encounter any more difficulties when he flew. His mother, Heather Dunbar, who holds the rank of Major at the Department of National Defence, tried every avenue. She turned to her MP, Transport Canada officials and airline companies, but no one has been able to offer any help.

There was no help or information at all provided by Transport Canada, Ms. Dunbar said, although one official suggested her son should change his name.

He (the official) said it had nothing to do with Transport Canada but blamed everything on the airlines...

Heather Dunbar, Alistair's mother.

Since Alistair was singled out in June 2007 and his story became public, his family has given up its annual winter holiday in the sun. Alistair, an award-winning student, was offered the opportunity to travel to several exotic destinations last year as part of a summer student exchange program. But without any guarantee that he would be able to fly without complications, his parents nixed the idea. Instead, his summer exchange was in Pittsburgh, PA, because his parents drove him there and back. Curiously, although his name triggers all kinds of alarms when he tries to board a plane, he had no problem crossing the border in the U.S. or returning home.

2.11 What recourse?

As Heather Dunbar quickly realized, there is no recourse for victims of false positives, as many other travellers have realized since no-fly lists were introduced.

When John Pass wrote to Transport Canada about being singled out by the airline, and the confusing information he was given by both Air Canada and Jazz, he received the following e-mail more than two months after filing his complaint:

Please be advised that Transport Canada officials have reviewed your letter and have determined that the department is not in a position to assist you further because the problems you have experienced do not appear to be linked to our program. In light of this, it may be that your difficulties are caused by your name matching a name on the U.S. list. Therefore, I advise you to contact the U.S. Department of Homeland Security's Traveler Redress Inquiry Program (DHS TRIP) at <http://www.dhs.gov/trip>.

Transport Canada Security Communications Desk

It has been standard practice for Transport Canada to refer complainants to the U.S. DHS even when passengers have experienced problems flying within Canada. Mr. Pass said he has no intention of contacting the Americans. Many air passengers share his view: the cost of obtaining redress via the U.S., which also involves providing massive amounts of personal information to a foreign country, is a price they are not willing to pay. And as Glenda Hutton found out, if the passenger encounters problems on flights that are not "within or bound for the U.S.", DHS-TRIP is unable to offer any help.

When I inquired how to be removed from the list, I was advised to contact the U.S. TSA folks and provide my personal information, after

which, I might be removed from the list – needless to say, I did not and will not provide a foreign government any personal information.

Canadian frequent flyer snagged by a no-fly list

Last week I visited the office of my Member of Parliament ... I explained my situation. The person in the office gave me the e-mail address of Air Canada customer service. I wrote to them with my concern. They sent me a form letter explaining how I could make it easier to board a flight in the future: by sending in a notarised copy of my passport a number of days before my next flight. They did not explain how my name got on this no-fly list, nor how to get off it.

Ontario retiree

It does not appear to make much difference whether you are an award-winning student, an award-winning poet, a regular traveller or even a Crown Attorney, there is little recourse for victims of false positives.

Liberal Senator Colin Kenny discovered this in 2008. The senator, who chairs the Senate's Standing Committee on National Security and Defence Committee, rose in the Senate on May 28, 2008 to complain that he didn't appreciate the answer he had received from then Transport Minister Lawrence Cannon in response to a letter outlining the problems experienced by his sons. It appears that his eldest son, Robert, a Crown Attorney in Toronto, had been routinely stopped before boarding any flight in Canada or in the U.S.

"When Robert started getting checked, we thought it was just bad luck, but now that two of my boys are being checked, it seems like more than coincidence," the senator said.

In response Mr. Cannon suggested that "your sons arrive earlier for their flights and bring along additional documentation to facilitate the verification of their identities," adding that the two men – Robert and his younger brother James – were not on the Canadian no-fly list and encouraged them to contact the U.S. DHS.

Senator Kenny was not amused: "If the best we can do for people caught on the list is to say, 'Go and check a website,' I do not think this government is doing much to take care of Canadians For all Canadians who are caught in this trap – and there appear to be thousands of them – is this how they are shipped off, and is this how they are dealt with by the Government of Canada?"

The senator's office has not responded to several requests for an update on his sons' recent travel experiences.

3. SECURE FLIGHT

While the Canadian PPP and the U.S. no-fly and watch lists have made life miserable for many airline passengers – and unbearable for others – the introduction of the U.S. Secure Flight program in the coming months could literally ground many Canadians and visitors to Canada.

The “Final Rule”⁷⁴ of this program was published in late October 2008 by the Bush administration. The program will give the U.S. a *de facto* right to decide who gets to travel to and from Canada, since the vast majority of Canadian flights to and from Europe, the Caribbean and South America overfly American airspace. The U.S. agreed to exempt only flights that “transit the airspace of the continental United States between two airports or locations in the same country, where that country is Canada or Mexico.”

Under these rules, travellers will have to provide their name, gender, date of birth and travel redress number (if they have one) when they book their flights. This information will be relayed to DHS and the CBP – preferably 72 hours in advance – who will in turn issue a “boarding pass result” back to the airline. The “result” will instruct the airline to issue an unrestricted boarding pass, deny permission to travel, or issue an enhanced screening requirement (SSSS). These regulations will give access to the U.S. to a whole subset of information – including API – on air passengers who are not entering the U.S. but merely overflying its airspace.

The aim of Secure Flight is to shift pre-departure watch list responsibilities from airline operators to the TSA, to remove the secret watch lists from the hands of airline companies. There have been suggestions that the existing no-fly list in the U.S. has never been very useful for security purposes, since DHS never trusted the airlines with the truly secret lists.

For many privacy and human rights advocates in the U.S., the Secure Flight program is simply a friendlier name for the scandal-plagued CAPPS-II (Computer-Assisted Passenger Pre-Screening System, version 2) which was scrapped following the release of a damning report by the GAO.⁷⁵

Austin-based Infoglide Software, one of the TSA’s Secure Flight contractors (and one of the original four companies that used illegally obtained PNR data in the CAPPS-II 2002 trials) appears to have acknowledged the similarities between the two programs. In its promotional material, the company argued its “entity analytics” have put it in the forefront of data-mining technology, describing them as a tool for “mining today’s ever growing sources of data.”⁷⁶

⁷⁴ http://www.tsa.gov/assets/pdf/secureflight_final_rule.pdf

⁷⁵ <http://www.gao.gov/new.items/d04385.pdf>

⁷⁶ <http://www.infoglide.com/documents/press/P090715.htm>

Since March 2009, at least four unnamed American airlines have begun using Secure Flight domestically. However, the total number of carriers currently using Secure Flight in their daily operations is not known, since TSA keeps its directives secret.

TSA says its goal is to check passengers on all domestic commercial flights by early 2010. On May 15, 2009, airlines began asking passengers to provide their name as it appears on the government-issued identification with which they will be travelling. On August 15, 2009, they began to ask passengers to enter their date of birth and gender when making airline reservations.

“TSA’s goal is to vet 100 per cent of passengers on all domestic commercial flights by early 2010, and 100 per cent of passengers on all international commercial flights into, out of, or over the U.S. by the end of 2010,” TSA said in a statement in August 2009.⁷⁷

These measures will have a serious impact on the sovereignty of Canada and Canadians’ right to privacy, as the ICLMG wrote to the Transport minister in December 2008. “This creates a very real possibility that the Charter rights of Canadians, and their right to privacy, will be violated. It also raises serious questions about the ability of Canada to concretely implement truly independent visa, immigration, refugee and trade policies.”

In its letter, the ICLMG warned that disclosure of personal information to DHS on passengers travelling to certain destinations – particularly Cuba – could lead to unpleasant consequences. “For example, this information could be used to identify Canadian companies who do business with Cuba, or penalize travellers who have visited Cuba by subsequently refusing them entry in the U.S.”

In May 2009 – almost six months after receiving the letter – the department responded that the letter had been forwarded to the Public Safety Minister. It provided no other response to the substantive questions raised by the ICLMG. (To date, the Public Safety Minister has not responded to the December 11, 2008 letter.)

There is nothing in the published regulations or in official documents that outline the standards to be applied or that describes how decisions will be made to issue these new travel credentials, nor are there any mechanisms for travellers to find out why they are denied permission to fly. And, like the Canadian PPP, none of the decisions are subject to any due process or judicial review.

There have been reports that Canada, Mexico and some Caribbean countries have been holding talks with the U.S. on the issue of providing passenger information for flights over American international airspace. However, the National Airlines Council of Canada indicated it is not aware of any progress. In a November 2009 letter to Transport Canada, the four largest carriers said they are concerned that TSA might suddenly enact the new regulations forcing them to break Canadian privacy laws.⁷⁸

⁷⁷ <http://www.tsa.gov/press/releases/2009/0812.shtm>

⁷⁸ http://ca.news.yahoo.com/s/capress/100101/utrael/flight_security_2 (Retrieved January 2, 2010).

Moreover, the Air Transport Association of Canada (ATAC) which represents Canada's smaller operators has warned that if implemented, Secure Flight could cause chaos in airports in the event of Internet or communications outages. It has also pointed out that, if implemented, the new American regulations forcing airlines to submit passenger information to DHS will place Canadian air carriers in contravention of both the *Canadian Aeronautics Act* and our *Personal Information Protection and Electronic Document Act*.

Despite repeated requests for information on how Canada intends to address these concerns, Transport Canada has refused to say anything beyond the official talking points.

The Government of Canada is aware of the U.S. plans to implement Secure Flight over the coming years, and continues to work with the U.S. Government to minimize the impact on air travellers, while enhancing aviation security. The U.S. Government and the Department of Homeland Security have provided assurances that they will work with us to implement the Secure Flight program in a way that recognizes our respective privacy and security interests. The U.S. has also indicated that it values Canadian aviation security initiatives and the efforts made by the Government of Canada through the Passenger Protect Program.

Nancy Dawson, Senior Policy Analyst Transport Canada

(**Note:** On the eve of sending this report to print, an internal Public Safety Department report obtained by the *Canadian Press* under the *Access to Information Act* revealed that Canada, under pressure from the U.S to bolster its no-fly list program, was in the process of developing its own version of Secure Flight. This raises numerous concerns and questions with regards to the amount of information that will be collected on travellers, the standards and criteria to be applied to put a person on the list, the number of people who will be added to the list to satisfy U.S. requirements and the legislative basis to implement such a program.)

4. CONCLUSIONS

The staggering number of complex programs, rules and regulations, border controls and watch lists have had an indisputable impact on all travellers on both sides of the border. While many of these programs were established in the wake of September 11, 2001, there were already existing efforts to integrate Canadian and U.S. security systems within the framework of the 2001 Smart Borders Agreement between Canada and the U.S., which was subsequently consolidated and extended in the 2005 SPP Agreement.

Many travellers with names such as Smith, Martin and Khan, have been victimized by these programs. But it is members of racialized communities, especially those from Muslim and Arab communities, who have borne much of the brunt of these ill-considered

measures – measures too often characterized by sloppy, arbitrary enforcement and badly-drafted legislation, with little or no evidence provided that they are actually effective as security measures.

Submissions to this research project has repeatedly highlighted cases where racial, religious, ethnic and social profiling have played a role in the unfair or mistaken targeting of people for whom travel – even within Canada – has become a stressful, difficult and unjustifiably costly proposition. And for some, the consequences have been even more severe: loss of income and employment, separation from family, and the inability to ever return to one’s place of residence.

In all cases, however, the travellers’ stories illustrate that there is no credible redress mechanism for passengers who are repeatedly questioned, detained and sent to secondary screening at the airport or for individuals who are always “randomly” stopped or turned back at the border. They point to the need for an external oversight mechanism for the CBSA. In *A New Review Mechanism for the RCMP’s National Security Activities*, Mr. Justice Dennis O’Connor recommended the creation of a new body, the Independent Complaints and National Security Review Agency (ICRA), to review the activities of federal agencies such as RCMP and CBSA, pointing to the need to fill the accountability gaps he uncovered in his investigation of Maher Arar’s rendition to torture. He also recommended a new oversight mechanism that would also cover Transport Canada’s national security activities, such as the no-fly list.

As importantly, there is no indication that the border watch lists and no-fly lists have made us safer. But there is considerable evidence that the growing amount of data collected on individuals when they travel, within and outside Canada, is being used to build massive databanks of information whose ultimate use is neither controlled nor overseen by our government, or regulated by our laws.

This information, including PNR and API, as well as records on the number of trips made by individuals at a specific border crossing, or the name of the traveller’s companion, is collected, sifted, cross-referenced, stored and shared with government agencies on both sides of the border – and with other foreign governments. This raises serious concerns about privacy, and about the use and misuse of faulty and unreliable information that could have disastrous consequences.

Despite repeated requests, the federal government has never provided any justification for Canada’s no-fly list program. As noted by Canada’s Privacy Commissioner, it has not provided “any evidence that is reasonably likely to assist in the detection, prevention or investigation of terrorist threats to aviation security”.

Moreover, a report prepared by two independent investigators for the Office of Reconsideration at Transport Canada has found serious problems with the legislative framework of the PPP. The report recommended that the legislation be reviewed in light of the *Canadian Charter of Rights and Freedoms*, in line with similar recommendations made by Canada’s privacy commissioners, as well as civil and human rights advocates.

Travellers should brace themselves for the introduction of the U.S. imposed regulations scheduled to come into force in Canada later this year. Canadian airline representatives have warned that the new rules will “create a perfect storm,” and force them to break Canadian privacy laws.

With Canada’s no-fly list program facing a constitutional challenge, and mounting concerns over privacy and the deployment of biometrics and other new technologies that target travellers, the issue of watch lists and border controls will have a dramatic impact on our individual and collective future. Parliament urgently needs to address these issues.

Since June 2007, the highly secretive no-fly list program has operated under the radar of Canadians and has been virtually ignored by Parliamentarians despite the very serious consequences on the lives of those unfairly targeted. The program lacks not only transparency but oversight. As the U.S. appears set to impose its own rules establishing who will be allowed to fly internationally from Canada, MPs and Senators must examine Secure Flight regulations to ensure compliance with the fundamental laws of Canada and its Charter of Rights and Freedoms, but also to assure its sovereignty.

5. SUMMARY OF FINDINGS AND POLICY CONSIDERATIONS

- In light of the discretionary and arbitrary powers granted to CBSA officials, and the lack of any accountability mechanism governing their actions, it is imperative that the government implement the recommendations of the O’Connor Commission calling for an “integrated complaint and review mechanism” over the operations of all agencies involved in national security operations. This would include CBSA and Transport Canada.
- It is quite apparent from the testimonies collected by the clearinghouse project that racial or religious profiling is a determining factor in the way individuals are treated at Canada/U.S. border crossings and airports, and caught or inconvenienced by no-fly lists and other watchlists. The government must acknowledge this reality and Parliament should engage in a review of these practices to reaffirm that they are inappropriate under the *Canadian Charter of Rights*.
- The potential for abuse and violation of travellers’s rights is exacerbated by the lack of any meaningful redress mechanisms as well as by the Canada-US Smart Border Declaration which has led to unprecedented information sharing between Canadian and American authorities resulting from the harmonization and/or integration of databases and the creation of Integrated Border Enforcement Teams (IBETS).
- Parliamentarians must engage immediately in a full examination of the legal and Charter implications of Canada’s no-fly list program and of any new program being developed by Canada to mirror the more “robust standards” imposed under

the U.S. Secure Flight program that is scheduled to come into force in the coming months. Special attention should be given to the following concerns: lack of legislative basis, lack of due process and judicial review, use of arbitrary and discretionary powers and criteria to list individuals, lack of any meaningful redress mechanism, data collection and information sharing, potential violation of privacy rights, potential violation of Canadian laws by Air Canada and other airlines implementing U.S. requirements.