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Marine Facilities Restricted Area Access Clearance Program

Comments on the Proposed Program as requested at the Public Stakeholder Consultation meetings prior to appearing in the Canada Gazette Part I

Submitted by ILWU Ship & Dock Foremen - Local 514

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The ILWU Ship & Dock Foremen - Local 514 (ILWU 514) has played a proactive role in the Working Group consultations regarding the proposed Program through direct participation in the Regional and National Public Consultations and through coordination with other participants in these working groups representing Labour.

The ILWU 514 has particular interest in the proposed Program, as our entire membership is captured by the 'designated positions' clause referred to in the Program. We have been given assurances from Transport Canada that not all our members will fall within the purview of this Program, however, we will be carefully assessing the role we will be asked to play when this Program is implemented.

[emphasis underlined]

The ILWU 514 is appreciative of the opportunity provided by Transport Canada to participate in the consultation phase of this Program and recognizes the work done by Transport Canada to prepare the draft Program in a relatively short period of time. Compliance with the *International Ship & Port Facility Security Code (ISPS Code)* is unquestionably essential to Canada's ability to survive in the highly competitive international trade and shipping environment, however this Program is not. The ILWU 514 is committed to assisting Transport Canada in meeting its obligations with compliance with the ISPS Code, the same cannot be said for the *Marine Facilities Restricted Area Access Clearance Program (MFRAACP)*. As a Union we feel that existing Acts and Regulations with proper policing will achieve better results. Why introduce additional measures without enforcing existing policies and procedures?

It is our belief that the proposed Program will not achieve the required level of security for Canadian port facilities and port workers. 'Bad Security equates to No Security'.

The following raises concerns with the proposed Program and makes general comments through the submission process as requested for at the Public Stakeholder Consultation meetings.

General Comments:

Historical and Comparative perspectives on Terrorism

To assess the impact of the events of September 11 on Canada, historical and comparative perspectives are helpful. One might say that the Marine Facilities Restricted Area Access Clearance Program is the offspring of tragic events of 9/11; an illegitimate offspring born out of fear.

When Canada joined the 'War on Terrorism' after the attacks of 9/11, the decision was based on historical precedents in the post-war world. The Cold War, in its early stages from 1945 to the early 1950's and the October 1970 crisis in Quebec offer two interesting similarities to the present situation, offering a number of useful lessons.

THE COLD WAR

In the latter half of the 1940's, Canada went to a so-called 'Cold War', against Soviet Communism. Just as Canadian troops today have found themselves fighting terrorists on the front lines in Afghanistan, so to did Canadian soldiers in the Cold War find themselves fighting Communists in Korea. Both wars included a 'home front' and the identification of enemies within sovereign borders. Both wars involved the direct participation of the Americans, through the generals directing the conflicts. Both were, at their initial, anxious stages raise issues of individual and group rights in contrast to the demands of society for security.

Igor Gouzenko was the first important Soviet defector who exposed a spy ring operated by Canada's professed wartime ally the USSR. The spy ring exploited the willingness of Canadian sympathizers to Communism to betray their own country on a perceived higher loyalty to the Socialist motherland. Canada received a wake up call, informed this to its allies and embarked on a prolonged struggle on many fronts with the new enemy (USSR) once its paternal partner (America) had taken over control of the situation.

The struggle lasted four decades with Canada being considered a junior partner at best.

Once Canada realized the extent to which the Soviet espionage ring had infiltrated the Canadian Government acted swiftly and firmly. There was a secret Order in Council, known only to a few Cabinet ministers, under the authority of the War Measures Act (even though the war had been over a few weeks prior to the Gouzenko defection). It empowered the government of the day to act against the suspected spies with little or no regard to civil liberties, outside the normal processes of the legal system. With its new found powers, the government patiently waited, consulted its allies, studied the gathered information and waited for the opportune time to strike against the adversaries of democracy.

In mid-February 1946 the government did strike, it was with a series of dawn raids by leather-jacketed members of the drug squad of the Royal Canadian Mounted Police (RCMP). They stormed into Ottawa homes and apartments without specific warrants, detained numerous people (more followed in the days and weeks ahead) and seized papers and document in the raids. The detainees were transported to RCMP barracks, where they were interrogated for weeks. These detainees were never arrested under criminal charges and were never represented by counsel; habeas corpus was ignored. They were brought before a secret tribunal without representation. They were informed that they had no choice but to answer all questions put to them. They were deliberately not told that they had the right of protection against self-incrimination.

At the end of these trials, the Commission published a lengthy and widely read report in which it named no less than two dozen persons as spies and traitors to their country. At this point the detainees were turned over to the Courts. Charges under different statues were brought against these individuals, particularly the draconian Official Secrets Act. This Act made communication of classified information to a foreign power a serious offence, but did not distinguish between information that may be damaging and information that was harmless. Despite insurmountable odds only about half of the two dozen eventually were charged with criminal offences as a result of the inquiry were ever convicted. Those who had incriminated themselves before the Commission were all found guilty in court. Those who had resisted were mainly acquitted. Nevertheless, with one exception, all those acquitted were denied further employment with the government.

At the time, there was no great public outcry or criticism of the government's handling of these matters. The elite opinion within the legal community remained unperturbed of these proceedings. In retrospect, critics have described the treatment of the suspects as abusive of their rights and a serious violation of liberal democratic standards. Some have compared Canada's handling of these matters unfavourably with that of our neighbours to the south, the United States. Even in at the darkest days of McCarthyism, the Americans did not round up suspects before dawn, hold and interrogate them in secret and drag them before secret tribunals that would later officially name them as traitors without legal recourse.

There was a direct link between the Gouzenko affair and the Canadian government's Cold War internal security policies. In its wake, the security screening system was established for civil servants, immigrants, refugees and citizenship applicants. The screening system expanded to include defense industries and even to shipping on the Great Lakes. In all cases, the process was keep as secret as possible. For many years, there was no appeal process for persons denied a security clearance.

Witch-hunts plagued McCarthy-era America at all levels of government and extended throughout civil society, but not in Canada - at least publicly. There was a witch-hunt at the National Film Board (NFB). Multitudes of people lost their jobs and saw careers suffer. But unlike the infamous witch-hunt in Hollywood, there were few headlines and no names mentioned in the media. The government of Canada denied there was a purge. Behind the scenes, they gave the Secret Service and the newly purged NFB management a blank check to remove people of suspicion. By the end of this modern day Inquisition, some thirty-five (35) permanent or contract employees were terminated or encouraged to depart before they were targeted. The total number could only be confirmed decades later through documents acquired through the Access to Information. The Hollywood witch-hunt resulted in blacklists and ruined careers, but finally in the public vindication of those purged, those who were villains in the 1950's rose to folk hero status decades later. The same could not be said for the Canadian victims of the NFB purge who neither received notoriety then nor public vindication later. For better or for worse, that is how it was received in Canada.

Security screening was and has been an important instrument for the political policing of Canadian society. The Secret Service, first the RCMP and later the Canadian Security Intelligence Service (CSIS) has used screening as an effective tool for establishing sources within suspect organizations. The threat of loss of employment and deportation is an effective persuader for co-operation. As a side business and of its preparation of threat assessments for the government, the security service amassed an astounding volume of dossiers on Canadians and Canadian civil society. In the late 1970's the MacDonald Commission of Inquiry investigated RCMP wrongdoing and it discovered that the secret service held files on no less than 800,000 individuals and organizations (which represents roughly one in twenty-seven Canadians at the time). This kind of excess drew a tremendous amount of criticism that the Brian Mulroney government in the late 1980's ordered the closure of the Counter Subversion branch of CSIS, with most of its files to be destroyed or transferred to the National Archives.

What was distinctive about the Canadian Cold War security policy was its strict control of the Executive Branch of the federal government and the zeal with which the federal government guarded its seemingly exclusive rights. Yet after all this, the long term consequences were the strengthening of democratic accountability, transparency and greater concern for the protection of individual rights.

OCTOBER 1970 CRISIS IN QUEBEC

When Canada was asked to join the 'New Global War on Terrorism' it was not lacking in its own historical experience in dealing with terrorists. In October 1970, Canada faced its worst internal security crisis when the violent separatist group, Le Front de Liberation du Quebec (FLQ) kidnapped the British Trade Commissioner James Cross and later kidnapped and murdered the Quebec Minister of Labour, Pierre LaPorte. The Federal Government invoked the War Measures Act under a supposedly, and unproven, apprehended insurrection, that put Quebec under what could be described as a state of martial law. In the aftermath of the crisis, the RCMP Secret Service and the Quebec and Montreal police were mobilized to counter and quash by virtually any means be it fair or foul, the FLQ or its successors. Once again in

filling out the blank cheques that were issued to them, the security and police forces exceeded their lawful roles and as such their activities were subject to a series of federal and provincial Commissions of Inquiry.

It must be clearly stated that the Trudeau government during and after October 1970 was less than forthcoming in its justification of its actions before Parliament and the public. There was no apprehended insurrection; the failure of the government to follow up its claim with supporting evidence in invoking the wartime emergency powers was lacking, for there was no such evidence or at least nothing compelling.

The lesson to be learned, which is often repeated in modern history, is--intelligence failures are as often failures of governments to listen to their intelligence as of intelligence professionals failing to provide the listeners with intelligence.

At the time the RCMP believed that the crisis was essentially a criminal matter, to be solved by good, methodical and patient police work. James Cross was liberated by these means and possibly LaPorte's life might have been saved. Instead, the government, or at least the Prime minister and his close Cabinet associates from Quebec insincerely citing an exaggerated threat they knew to be false, chose to perform a coup de theatre, a symbolic demonstration of the power of the almighty federal government and the meek futility of violent resistance to it. From a liberal point of view, the October crisis offers a beneficial warning about how the state can lie and pretexts to increase its power and crush opposition. From a Machiavellian standpoint, Prime Minister Trudeau artfully manipulated a crisis not of his doing to effect an end that he felt was in the best interest of the Nation.

As a long term result of the crisis in Quebec and its aftermath, the War Measures Act was repealed and replaced with an emergency powers statute (Emergencies Act, R.S.C., 1985, c. 22) that legal experts acknowledge is much more measured and balanced. Also the MacDonald Commission recommendations led to separation of the Security Services from the RCMP and the creation of a civilian agency CSIS, which has a specific legal mandate for what it is authorized and not authorized to do. An elaborate mechanism of accountability, oversight, and review (SIRC) are attached to its operations. These extremely positive gains for democracy came about as a result of the violations of democracy exercised during the October crisis. History, it should be noted tends to repeat itself.

KEEPING UP WITH THE JONES

States will undoubtedly always attempt to seize opportunities offered by major security crises to enhance their coercive powers at the expense of individuals and group rights. They pray upon deep and enduring popular support in exploiting such opportunities from an ill-informed public and the long term result promises to be bleaker from a civil libertarian point of view.

The destruction on the Twin towers in NYC representing global capitalism and the attack on the headquarters of the US military might were brilliantly chosen for their simplistic symbolism encoded in the acts.

Canadians instinctively sympathized with the Americans, shared their anger and pain and to a large degree support the ideology of the war on terrorism. We followed the Americans into Afghanistan but had a reality check on the necessity to go into Iraq. Canadians by and large primarily see the war on terrorism as an American foreign policy issue not a multinational struggle. President Bush's pointed omission of Canada from his otherwise exhaustive list of countries officially thanked and is matter of fact dismissal of the need to offer an apology for the four Canadian soldiers killed as a result of American 'friendly fire' in Afghanistan were and are still perceived in Canada as insults. Public opinion analysis suggests that Canadians, like most of the world, have actually grown more distant from the US and definitely more critical of the American leadership since 9/11. One might say it's a form of risk management—removing oneself from the hazard if it cannot be engineered away.

Since 9/11 Canada has been fighting a war on two fronts. On one front we have the public face of the war on terrorism which Canada obediently fulfills its obligation as an ally in the broad coalition against terrorist movements and reassures its own citizens that it is doing what it can to protect their safety (MFRAACP is a prime example of a false front). The second front, less obvious to the general public is damage control or limitation; not in relation to terrorist acts, but in relation to the potential collateral economic harm to Canadian interests by the US interpretation of national security along its northern border with Canada.

The Canadian policy dilemma on the second front has been how to sufficiently reassure the US on border security so that commercial traffic can be consistently maintained, while not surrendering a critical degree of Canadian sovereignty in the process. That is another issue for debate and not within the scope of this submission.

What has Canada done on the first front? It has involved more resources for security and intelligence; a streamlined security decision making structure within the federal government at both the bureaucratic and political levels; new and expanded legal powers for anti-terrorist law enforcement and investigation (as a result of playing to the fears of the public); and the closer coordination and sharing of information with its allies (as a result of exemptions to foreign states in the Privacy Act and PIPEDA). All these have helped maintain Canadian economic security by reassuring the US that Canada is enforcing adequate security standards on its own.

Winston Churchill while at his stay at the White House was notorious for walking around the hallways nude after exiting the shower. One day after his morning shower, as he was walking the hallways he came across a shocked President upon seeing him nude. The Prime Minister calmly remarked, 'As you can see Mr. President I have nothing to hide!' One may argue the same for Canada, when the Americans take away our bathrobe by indicating these security measures are not enough.

On a more somber note, Canada has taken another series of initiatives under the guise of the Smart Border agreements. These initiatives involve a series of ongoing negotiations with the States on such matters as pre-clearance of container traffic at the point of origin; fast-tracking of safe persons and goods; collection and retention of a wide range of data on persons traveling by air across the border; the application of high-tech surveillance equipment along the border; expansion of the Integrated Border Enforcement Teams (CBSA plays an integral role);

and the highly controversially, a 'safe third country' agreement to reduce the flow of refugees across the border.

On the topic of people moving across the border, in January 2003, five mysterious 'Arabs' who had allegedly entered the United States from Canada were the subject of an all-points terrorist alarm, endorsed no less than the leader of the Free World, Mr. George W. Bush. Within a few days the story collapsed and was revealed as a hoax. [Not unlike the snow bridge these Arabs must have crossed on their newly purchased Bombardier snowmobiles.] Nonetheless, despite an angry demand from Canadian Immigration Minister Denis Codere, New York Senator Hilary Clinton refused to apologize for her claim that the non-existent suspects had entered the United States via Canada.

There is very little evidence that suggests that Canadian security is any less vigilant than that of America. Canadian and American authorities share common databases on the bad guys (and if Transport Canada has its way on port workers as well); exchange intelligence on a regular, indeed institutionalized basis and cooperate closely on cross border enforcement.

What doesn't help the Canadian government's cause and I guess to a lesser degree the port workers concerns are the influential forces within Canada always at attention to reinforce American suspicions: a federal party that will remain nameless; some provincial ministers; the National Post, Global and CTV News; and the multitude of so-called terrorist experts. They have all relentlessly endorsed that Canada is a haven for terrorists, where feebly security enforcement and loose social liberalism combine to create a safe haven for terrorists threatening the United States.

Moving on, critics of government security policy after 9/11 have charged that the anti-terrorist legislative changes brought before Parliament are largely a result of the pressures of 'keeping up with the Jones.' Indeed, among these critics is none other than the former Director of CSIS, Mr. Reid Morden. Canada one might say was indeed forced to legislate specifically in response to an American policy decision, in the case of federal aviation regulations demanding advance production of a range of personal information on passengers arriving from abroad at US airports. Canada had no choice one would argue, short of losing landing rights for Canadian carriers, even though this American policy did necessitate overriding existing Canadian privacy legislation.

During the passage of the Anti-Terrorism Act, a certain amount of controversy was generated by provisions for preventative arrest and investigative hearings; both were subjected to sunset clauses. Preventative arrest is limited to 48 hours, although refusing to comply could lead to imprisonment. At all times, however at all times a person held under arrest is fully represented. Hearings (investigative) are modeled somewhat after the American grand jury system, but even when a person is brought before such a hearing could be forced to testify against others, Charter protection against self-incrimination is explicitly recognized. Sounds good in theory but the 'taste is in the pudding.' As one knows, the Charter is being poked and prodded as it tries to find an equilibrium in the ever changing Canadian legal system.

Combined with the Canadian Security Intelligence Services Act and the Security Offences Act and the Immigration and Refugee Protection Act form the basis of a comprehensive Canadian national security legislation, which will be further altered by the Public Safety Act. The opportunity that was offered by the 9/11 terrorist attacks was shrewdly seized by the covert Canadian security and intelligence community, which has ended up with much more than it would ever dream of had it not been for 9/11.

Racial profiling, the targeting of people born in certain so-called 'high-risk countries' attempting to enter America - and there somewhat special treatment, including interrogation and fingerprinting has raised official protests from Canada. The protests are based on Canadian citizens whose treatment at American airports seems to be discrimination on the basis of their country of birth. Canada does practice effective ethnic profiling in its own anti-terrorist security measures, but as we have learnt from history, does so in a guarded, less public manner than the Americans (Application for TSC - Box 17 'Complexion'). This is a parallel to the McCarthy era in the United States during the Cold War, when Canadians righteously congratulated themselves on avoiding the excesses of Communist witch-hunting in the States, but doing some of the same things behind closed doors away from public scrutiny.

CONCLUSIONS

Canada's response to 9/11 does indicate on the surface that indeed we are 'trying to keep up with the Jones', more as an important guide to public policy if nothing else. Like the Cold War, the current war on terrorism is a multilateral effort once again under American supervision and leadership. As a small participant in the alliance, Canada has to do many things to keep up its part of the bargain. However, at the same time, Canadian public opinion demands some distance from the appearance that Canadian policy is dictated from the White House. This opinion is further reinforced when the US leadership is viewed by many in Canada as immoderate and frankly potentially dangerous, which by all accounts seems to be the case today. The US rationale for going to war in Iraq was the fear of Weapons of Mass Destruction (WMD) would be used by Saddam Hussein's regime against the free democracies. To date, no WMD have been found.

As historical precedents, the Cold War and then the October 1970 Crisis demonstrate that Canada is capable of acting forcefully, with relatively few restraints, in dealing with a perceived threat associated from within to a threat from without. These historical precedents are double-edged. If these precedents suggest a capacity for repressive and illiberal actions in the name of national security, the case can be made that the long-term result of both these crises was to strengthen the fabric of liberal democracy and the protection of civil liberties. Canadians have learnt from experience about the consequences of overreaction. Let's not overreact and ram MFRAACP down the throats of port workers. There needs to be 'checks and balances' in the system. There is 'wiggle room' between the Canadian and American responses to dealing with national security. The responses are partly generated by the direction of the terrorist threat primarily against the United States and partly generated by differences in the political cultures.

In closing, we would like to bring to Transport Canada's attention a couple of interesting articles on national security and terrorism.

The first article is taken from the **Privacy Commissioner of Canada's Appearance before the Subcommittee on National Security of the Standing Committee on Justice and Human Rights** report held on February 10, 2003 in Ottawa.

Mr. George Radwanski, Privacy Commissioner of Canada stated:

As I said in my annual report, recently tabled, in Canada today the fundamental human right of privacy is under unprecedented assault. A series of government initiatives, either under way or being contemplated, threaten to cut the heart out of privacy, as we know it. We are at risk of losing privacy rights we have long taken for granted. These government initiatives grew out of a call for increased security after September 11, and anti-terrorism is their purported rationale. I use the word purported advisedly, because the aspects that present the greatest threat to privacy either have nothing at all to do with anti-terrorism or they will do nothing to enhance security. The government, quite simply, is using September 11 as an excuse for a number of measures that have no place in a free and democratic society.

The second article appeared in a recent *Globe and Mail* article titled, 'Democracy must not be eroded, PM tells Russians', Mr. Martin said he told Russian Prime Minister Fradkov that, '...Canada understands that Russia faces a "terrible problem" in the violence emanating from the breakaway republic Chechnya, but he cautioned the that the "fight against terrorism will only be won if, in fact, the rights of individuals are respected."