

CANADIAN CIVIL LIBERTIES ASSOCIATION NEWS NOTES

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WWW.CCLA.ORG

Afghan Detainees: Torture is the real issue

As we write this article, it is still unclear whether the federal political parties will be able to reach an agreement on the issue of disclosure of documents regarding the transfer of Afghan detainees or whether this affair will precipitate a federal election. There is no doubt that the Afghan detainees case has become of symbol of the powers of Parliament versus the Executive, but it should also be a symbol of Canada's commitment to end torture.



Photo: Staff Sgt. Jeffrey Duran

that transferred detainees are being tortured it must request the cessation of torture or request the return of the detainees. It also has the obligation to monitor the treatment of detainees to ensure that the prohibition against torture is observed. When there are allegations that any of these obligations have not been fulfilled,

Canada must not only investigate but also develop policies and practices so that it does not happen again.

Under international law, Canada has legal obligations to uphold the prohibition against torture. These legal obligations require Canada to take prior precautions to ensure that any detainees it transfers will not be tortured, and that these detainees will be monitored after transfer. If Canada discovers

The systemic flaws that may have resulted in the transfer of Afghan detainees to torture must be corrected. Parliament has the duty to ensure that this be done and we hope that Canada's commitment to the prohibition against torture will not be undermined.

CCLA pushes press freedoms forward

The Supreme Court of Canada released two companion landmark rulings in December 2009 that modified defamation law to create a new 'responsible public interest communication defence'. CCLA, represented by Patricia Jackson, Andrew Bernstein and Jennifer Keating-Conroy (Torys LLP) intervened in both cases, urging the Court to increase protections for those Canadians who speak out on matters of public interest. Traditionally, the majority of defendants in defamation suits have had to prove that all their factual statements were true. Many statements made in the public interest cannot meet this threshold. The Court agreed with CCLA that defamation law was not sufficiently protective of freedom of expression.

Two more freedom of expression cases brought CCLA's pro bono counsel before the Supreme Court in 2010. Jason Maclean and Mahmud Jamal (Oslers LLP) represented CCLA in addressing freedom of the press in courthouses. Lower Quebec Court decisions found that the Charter's guarantees of freedom of the press and freedom of expression did not apply in courthouses. In CCLA's view, this exclusion would frustrate freedom of expression, freedom of the press, the promotion of open courts, and ultimately democracy and justice itself.

The second case arose out of racist and offensive remarks that a Montreal radio announcer made about "Arab and Haitian" taxi drivers. A class action proceeding was initiated on behalf of every

person who had a taxi licence in Montreal on November 17, 1998, and whose mother tongue was Arabic or Creole. The Superior Court found the remarks were defamatory, and awarded compensation of \$220,000 to be paid to a non-profit organization. The majority of the Court of Appeal overturned the ruling. The taxi drivers have appealed the Court of Appeal's decision to the Supreme Court.

Christian LeBlanc (Fasken Martineau) represented CCLA; a decision is still pending.

[*National Post et al v. R; Peter Grant et al. v. Torstar Corporation et al. and Douglas Quan et al. v. Danno Cusson; CBC et al. v. Attorney General of Quebec et al.; and Fares Bou Malhab v. Diffusion Metromedia CMR Inc. et Andre Arthur*]

In this issue...

- 2 Internet anonymity
- 2 Niqab bill
- 2 Walmart
- 3 Khadr

- 3 Panhandling
- 4 Death row
- 4 Sentence reductions
- 4 Immigration
- 5 Civil marriage

- 5 'Smart-grid' data
- 6 George Galloway
- 6 Campus free speech
- 6 Extradition
- 7 Municipalities

- 7 Airport security
- 8 Education
- 8 'No fly list'

Freedom of association and Wal-Mart

In November of last year, the Supreme Court of Canada released its decisions in two cases involving Wal-Mart's store closure in Quebec. CCLA Special Counsel Andrew Lokan and Jean-Claude Killey (Paliare Roland) had intervened to argue that the protection afforded to freedom of association must inform the court's reading of the *Quebec Labour Code*. Wal-Mart had closed its store in Jonquière, Quebec, allegedly in response to the union-forming activities of the employees at that location.



CCLA Special Counsel: Andrew Lokan and Jean-Claude Killey (Paliare Roland LLP)

workplaces across the country. The majority of the Supreme Court, however, agreed with Wal-Mart, and found that a closure of an entire store – whether or not it was motivated by anti-union animus – was a sufficient reason to explain dismissals in the context of the legal arguments forwarded in these cases. They did note, however, that other sections of the *Labour Code* would offer employees a remedy against an employer who closes a workplace for anti-union motives.

[*Johanne Desbiens, et al. v. Wal-Mart Canada Corporation and Gaétan Plourde v. Wal-Mart Canada Corporation.*]

In CCLA's view, closing a single location within a large network of stores can have a substantial chilling effect on the exercise of the freedom of association in

CCLA wins safeguards to protect internet anonymity



CCLA Special Counsel Wendy Matheson and Natalie Biderman (Torys LLP) appeared in Divisional Court to intervene in a case that arises from a defamation lawsuit over anonymous comments made on an Internet discussion forum. The website operators, as well as eight "John Doe" commentators, are named as defendants. The Court was asked to decide the circumstances under which a website operator can be forced to turn over information that would 'unmask' anonymous forum commentators.

CCLA argued that, while the Internet should not be used as a shield to allow individuals to break the law, neither should a simple request to the Courts result in the disclosure of identifying information. Many people use online anonymity as a way to explore difficult is-

sues (political, legal, sexual, medical, etc.) that they might not feel free to explore publicly. Court orders that force individuals to reveal the identity of those who choose to participate anonymously could chill rigorous discussion, particularly on sensitive personal topics. Anonymity on the Internet may be important and a proper assessment of the reasons for the lifting the anonymity must take place. The Divisional Court agreed that protection of freedom of expression ought to be considered in ordering the disclosure of the identity of anonymous bloggers.

[*Warman v. Fournier and John Does 1-8*]

CCLA opposes Quebec's 'niqab bill'

The Quebec government has recently introduced Bill 94. CCLA is concerned by these developments, and strenuously objects to the generalized exclusion of niqab-wearing women from educational or other government institutions. Quebec's proposed legislation appears vague, may lead to abuse and further marginalization. It probably constitutes an unjustifiable denial of freedom of expression and religion, and may be unnecessary.

General Counsel Nathalie Des Rosiers wrote an op-ed in *Le Devoir* and CCLA is now making submissions to the National Assembly.

In Khadr, breach of *Charter* rights exists, but government must choose remedy

The Supreme Court of Canada has ruled on the case of Omar Khadr in a decision that reinforces human rights but leaves it to the government to choose the remedy for violation of those rights. CCLA intervened in the case, represented by Marlys Edwardh, Adriel Weaver and Jessica Orkin (Marlys Edwardh Barristers).

In a unanimous decision, the Court held that Omar Khadr's rights as a child, his right to legal counsel, his right to be free of improper treatment, and his right to *habeas corpus* had all been denied during his interrogation and detention at Guantanamo Bay. The Court found Mr. Khadr's interrogation violated Canada's international legal obligations and violated Mr. Khadr's *Charter* right that guarantees the right to life, liberty and security of the person.

The Court also said that Canadian officials provided information used by the US military authorities and this



Illustration: Andres Gutierrez-Torres

may be part of the case on which Mr. Khadr is currently held, and may be used at his ultimate trial.

The Court stopped short of ordering repatriation, saying it did not have sufficient information to assess the effect on foreign affairs, to determine what actions had already been taken by the Canadian government or to determine how a US Military Commission trial would affect Mr. Khadr's rights. The Court declared that Mr. Khadr's *Charter* right had been breached, and that Canada had participated in a process that was contrary to its international legal obligations and that a remedy had to be provided.

The Court provided the legal framework for the government to consider the actions it must take with respect to Mr. Khadr. The government has since requested that the information obtained in violation of Mr. Khadr's rights not be used in the course of these proceedings.

CCLA hopeful about recent announcement of new RCMP review mechanism

CCLA recently welcomed the federal government's announcement that it will be allocating \$8 million to enhance independent review of the RCMP.

For many years, CCLA has been calling for a more robust system of auditing RCMP conduct that is more public and independent. Recent public inquiry commissioners have

also suggested that a new review mechanism is required, and it appears that the government is now poised to take action on this front.

While the specific changes have not been announced, CCLA is hopeful that they will increase accountability and transparency within Canada's national police force. In CCLA's view, an independent review

mechanism is only truly effective if, at a minimum, it has the authority to conduct self-generated reviews; has extensive investigative powers, including access to all relevant records, facilities and personnel; and has the obligation to submit regular public reports to Parliament.

CCLA will continue to monitor these developments.

Regina votes unanimously to repeal anti-panhandling by-law

The Regina City Council has voted unanimously to repeal its "Tag Day Bylaw," which was being used to ticket individuals who panhandled in the city without a permit. In a September 2009 letter to the Council, CCLA suggested that the use of the by-law in this way could violate the *Charter* guarantee of freedom of expression and represented unsound social policy. There is little

difference between the upturned hat of a homeless person and a politically expressive banner or a loud advertisement. Asking for charity is a form of expression. CCLA applauds the town's decision to repeal the by-law, and suggests that the issue of panhandling, homelessness and poverty will need to be addressed in a more comprehensive manner.

CCLA urges review of decision against Canadian on U.S. death row

CCLA recently submitted a brief in an American court on behalf of the only Canadian currently on death row. Ronald Allen Smith has been on death row for over 27 years and has been involved in extensive litigation since his original death sentence in 1983. Most recently, he submitted a petition to have his death sentence commuted. This petition was rejected in a split decision from the Court. While the dissenting justice would have granted Smith's petition, the majority felt that it was constrained from doing so by the prevailing legal framework.

Smith is now seeking a review of this decision by the full panel of the



Court. The brief filed by CCLA supports Smith's petition for review, arguing that it would amount to cruel and unusual punishment to carry out Smith's death sentence after he has already lived under strict conditions of confinement on death row. CCLA's brief relies on the international and comparative law regarding the cruel and unusual nature of imposing a death penalty after a prolonged detention. It suggests that the appropriate remedy in Smith's case is to commute the death sentence and replace it with a non-capital life sentence.

Supreme Court holds that sentence reductions can be granted when rights violated

CCLA recently welcomed the Supreme Court of Canada's judgment in a case involving an Edmonton man whose ribs were broken by police after he led them on a high speed chase, conduct which the Court found to be an excessive use of force.

As an intervener in this case, CCLA argued that sentence reductions should be available where state conduct violates individual rights, and that this remedy should be available even where it would involve a reduction below a mandatory minimum sentence. The Court's decision affirmed that judges can hand out reduced sentences where the state has violated the rights of an accused, even if the abuse was not so excessive that it amounted to a *Charter* violation. While the Court held that mandatory minimum sentences set out in the Criminal Code should generally apply, in exceptional cases a sentence reduction below a manda-

tory minimum may be necessary to remedy particularly egregious misconduct by state agents. As Justice Louis LeBel wrote, "a sentence cannot be 'fit' if it does not respect the fundamental values enshrined in the *Charter*."

CCLA has long-opposed the use of mandatory minimum sentences in Canada's criminal justice system, primarily because they strip judges of the discretion necessary to craft appropriate sentences on a case-by-case basis. Though this ruling reinforces the applicability of mandatory minimum sentences, CCLA is pleased by the Court's decision that such punishment can be diverged from where necessary to redress egregious state misconduct.

The CCLA thanks Andrew Lokan and Danny Kastner (Paliare Roland Rosenberg and Rothstein) for their great work in this case.

[*R. v. Nasogaluak*]

Who Belongs? Rights, Benefits, Obligations and Immigration Status

CCLA is launching a research and advocacy project on the status of immigrants in Canadian society. Immigration status plays an important role in how rights, benefits and obligations are allocated. Rules regarding voting rights, access to social services, employment and property ownership often make distinctions on the basis of immigration status.

CCLA plans to release a discussion paper this summer, followed by a conference in late September. The following are some of the questions that will be explored: What is the current situation with respect to immigration status distinctions in different sectors such as voting rights, employment, professional affiliations, board membership, investment rules and access to social services? How has the concept of citizenship evolved over time and internationally?

CCLA thanks the Maytree Foundation for its generous support for this project.

For more information or to participate, please contact Cara Zwibel, at czwibel@ccla.org or (416) 363-0321 ext. 255.

A call for an end to segregation of mentally ill prisoners

Canadian prisons need to drastically re-evaluate their use of solitary confinement, especially where it concerns those with mental illness, CCLA said in a letter sent to the federal Minister of Public Safety. In March 2010, CCLA joined the Criminal Lawyers Association, the Canadian Association of Elizabeth Fry Societies, the John Howard Society of Canada, the B.C. Civil Liberties Association, and the Schizophrenia Societies of both Ontario and Canada to voice concern about the practice of solitary confinement.

The 2008 Correctional Investigator's report into the

death of Ashley Smith, who committed suicide in her segregation cell while her guards watched, highlighted the inadequate mental health resources in prisons, the reliance on segregation to manage mental illness, and the detrimental impact segregation can have on mental health.

CCLA is particularly concerned about the impact that significant periods of isolation and deprivation has on those with mental health issues. In the words of Canada's Federal Correctional Investigator, this practice is "not safe, nor is it humane."

CCLA to advocate for equal access to civil marriage

Last summer the government of Saskatchewan proposed amendments to the *Marriage Act* which would allow civil marriage commissioners to refuse to marry same sex couples; however, rather than tabling the proposed amendments in the legislature, the government first asked the Court of Appeal of Saskatchewan to rule on their constitutionality.

Although CCLA will be arguing against the proposed amendments, we remain staunch advocates of freedom of religion and reasonable accommodation. However, in this case, CCLA Special Counsel Merrilee Rasmussen will be intervening before the Court to argue that the proposed amend-



ments would lead to unjustifiable violations of the right to equality. Civil marriage commissioners in Saskatchewan are the only government employees

able to perform these secular marriage ceremonies, and allowing equal access to a basic government service is part of their jobs. Allowing a general right to deny a government service based on personal religious beliefs would open the door for marriage commissioners to deny a civil marriage based on discriminatory factors depend-

ing on their religion. Same-sex couples should not have to fear that the government employee they ask to sign their papers will refuse to do so because he or she feels they are not entitled to marry.

The *Charter* must protect against warrantless access to 'smart grid'-type data

CCLA will intervene in May before the Supreme Court of Canada in a case involving the use without a warrant of Digital Recording Ammeter (DRA) technology by police. Installed on a home's electricity supply line, this technology provides information about when and how much energy a residence is consuming. The police suggest that distinct cycles of electricity use indicates the possibility that a home is being used as a marijuana grow operation.

CCLA Special Counsel David Rose (Neuberger Rose LLP) will argue that the data can be used to make reli-

able inferences about activities inside residential dwellings that go beyond whether or not a grow-op might exist. Such information should only be available to police after they have obtained a warrant from a judge authorizing the installation of a DRA. CCLA will argue that a warrant requirement will also reduce the possibility that innocent homes will be subjected to surveillance and intrusions. This case has added significance with the emergence of the so-called "smart grid," which will make DRA-type data much more widespread.

[*R. v. Gomboc*]

Visit www.ccla.org/rightswatch/ to read and comment on daily civil liberties news

The right to be heard: CCLA intervenes in Galloway Case

CCLA has presented arguments in a case that raises critical issues regarding Canadians' freedom of expression – including their right to hear others – and freedom of association.

George Galloway, a British Member of Parliament, was invited to Canada by Canadian civil society groups. Days before his arrival the Canadian government wrote to him saying that he was inadmissible to Canada because he had engaged in terrorism and was a member of a terrorist organization. He had participated in an aid convoy to the occupied territories, and provided in-kind and financial donations to the Prime Minister of the Palestinian National Authority, who is also the leader of Hamas, a listed terrorist organization. The government has the discretion to admit inadmissible persons if their presence would not be "detrimental to the na-



tional interest." CCLA is very concerned about the implications of the government's position in this case. Freedom of expression encompasses not only the right to express a view, but also to hear the views of others.

Canadians' freedom of expression rights must be taken into account when a foreign visitor, who was invited to speak to Canadians, is denied entry by the Canadian government.

CCLA thanks Jason Maclean and Sonia Bjorkquist (Oslers LLP) for their work on this case.

[Galloway et al. v. Minister of Public Safety and Emergency Preparedness et al.]

Photo: Greg Stadhman

Campus free speech: Coulter and Israeli Apartheid Week

Two specific incidents on Canadian university campuses raised the duty of universities to ensure that minority voices are not silenced due to security concerns. In March, an event planned by the York University student group Christians United for Israel was cancelled after the student group was unable or unwilling to pay the extra security costs required to host the event. The well-publicized cancellation of Ann Coulter's speech due to security concerns also raises similar questions regarding universities' responsibility to ensure that controversial speakers can be heard – as well as students' tolerance for allowing dissenting points of

view to be expressed. Ms. Coulter was subsequently given plenty of opportunities to discuss her views in the national media, but the same cannot be said of all silenced speakers. In the case of the York University event, which organizers have said was intended to be a counterpoint to the opinions expressed during Israeli Apartheid Week, the implications were particularly troubling. Israeli Apartheid Week is highly controversial both on campus and in the wider community, making it all the more important that dissenting voices be heard.

Don't allow extradition to possible persecution, CCLA argues

Canada's human rights obligations to not return refugees to countries where they are at risk of persecution supercedes our obligations under extradition treaties, argued CCLA before the Supreme Court. Tiberiu Gavrilă, a member of the Roma minority, was found to be a refugee in 2004 after fleeing Romania. Romania requested his extradition for forging visas in that country. Mr. Gavrilă appealed the decision.

Consistent with Canada's commitments under the *Convention Relating to the Status of Refugees*, the *International Covenant on Civil and Political Rights*, and the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, CCLA said that the principle of *non-refoulement* – the duty not to remove people to countries where they may face torture or persecution – is paramount. Our human rights commitments, CCLA asserted, should be respected. The principle of *non-refoulement* is also

reflected in Canada's *Immigration and Refugee Protection Act*, which states that Canada should provide a safe haven for those with a "well-founded fear of persecution based on reasons of race, nationality, religion, membership in a social group and political opinion." The outcome of this case will have a critical bearing on the application of refugee law in Canada.

[Tiberiu Gavrilă v. Minister of Justice (Canada)]

A win and a loss for arguments that municipalities should not sue their constituents in defamation

Decisions were released in two cases involving municipalities that decided to respond to constituents' criticisms through defamation lawsuits.

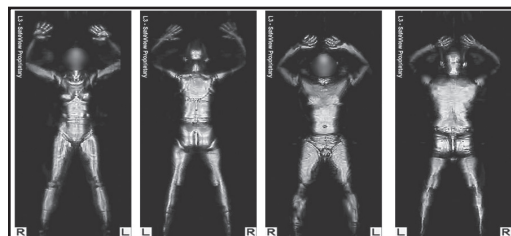
In the first case, the Quebec Court of Appeal overturned a lower court's judgment that prohibited a group of individuals from 'defaming a municipality'. CCLA Special Counsel Karim Renno and David Grossman (Oslers LLP) intervened to emphasize the freedom of speech implications of municipalities suing for defamation in general, as well as the risk posed by the broad order restraining future speech that was issued in this case. The case stems from a lawsuit initiated by the Municipality of Rawdon, Rawdon's Mayor and the Director General of the city. The lawsuit alleges that a number of individual constituents defamed the two public officials and the city itself while chatting on an online forum. Before the matter came to trial, the Quebec Superior Court ordered the defendants to refrain from making any future statements that would 'defame' the municipality.

In the second case, the County of Wellington is funding three government officials to launch what was initially a \$2.4-million defamation suit against Mr. Manderson, a seventy-three year old retiree who operates a website that is often critical of local government and government officials. CCLA intervened to bring a motion to dismiss the lawsuit. Special Counsel Ryder Gilliland (Blakes LLP) argued that the tremendous disparity in resources between the state and individuals inevitably means that individuals will be at a severe disadvantage in defamation litigation brought by government. The Court declined to dismiss the lawsuit, holding that the law in the area was too uncertain to permit the dismissal at such an early stage in the proceedings. If the matter goes to trial, such arguments may be raised again.

[*Prud'Homme et al. v. Rawdon et al.*, and *Whitcombe and Wilson v. Manderson*]

CCLA calls for measured approach to airport security

CCLA General Counsel Nathalie Des Rosiers recently addressed a roundtable of federal Parliamentarians assembled to consider the issue of airport security. Des Rosiers focused on recent steps that have either been taken or proposed to increase the safety of Canadian airports and airplanes, including the introduction of body scanners and country-based profiling of air travelers.



Body scanners are of concern because they can generate images of travelers that reveal what is beneath their clothes, including their naked bodies. Such images pose very serious threats to the privacy of the travelling public. In CCLA's view, the benefits of body scanners have not been fully demonstrated, and it appears that they offer few real enhancements to aviation security. Potential terrorists could, for example, still hide objects in their body cavities. If such devices are to be used in Canadian airports, they should only be used as an alternative to pat down searches for those travelers who would rather be scanned than physically searched and they must be subject to extensive privacy protective safeguards. Most analysts agree that the fight against terrorism requires better intelligence, not additional technology, so that terrorists are stopped before they reach the airport.

CCLA is also involved in the following issues: Go to www.ccla.org for further information.

Freedom of speech: CCLA criticized Ottawa Council's proposed ban on "insulting" "indecent" "loud" or "boisterous" language on city streets and sidewalks.

Freedom of religion: CCLA weighs in on Waterloo Region District School Board policy of allowing the Gideons to offer free Bibles to fifth grade students in public schools.

Freedom of Association: CCLA, represented by Joshua Phillips and Anthony Singleton (Green & Chervcover) presented oral arguments before the Supreme Court of Canada in *Attorney General of Ontario v. Fraser et al.*

Mandatory minimum sentences: CCLA Special Counsel Paul Monahan and Emmeline Morse (Fasken Martineau DuMoulin LLP) will intervene in May in *R. v. Nur*.

Charter remedies: CCLA thanks Stuart Svonkin and Jana Stettner (Torys LLP) for the excellent representation in *Vancouver v. Ward*.

Access to justice: CCLA thanks Joseph Arvay and Alison Latimer (Arvay Finlay), and Benjamin Berger (UVic law), for the excellent representation they provided in *R. v. Caron*.

Trial fairness: CCLA Special Counsel Anil Kapoor and Lindsay Daviau intervened before the Supreme Court in *R. v. F.A. et al.*

CCLET asks kids “What’s not fair?” in new ways

Students at a Toronto high school recently noticed a sign in their local pizza hangout that told patrons that students from their school were not permitted to play games, loiter or to bring outside food into the restaurant. The students felt this sign was unfair because it was directed only to students at their school. They discussed the issue with CCLET staff members and decided to write a letter to the manager, explaining the reasons for their objection to the sign. Two days later, the sign came down.

about the issues that are of concern to them – and asking for their ideas on the lawful and peaceful means

story posted on the website, they can email us at education@ccla.org. We are looking for text, video clips, images, audio – or whichever medium tells your story best.



In addition, with the financial assistance of the Law Foundation of Ontario and the Sir Joseph Flavelle Foundation, CCLET has completed an animated 90-second promotional video. The video gives viewers a taste of the animated series of CCLET’s civil liberties stories that engage kids from ages 6-11 in fun critical thinking exercises about rights and freedoms. The series and accompanying interactive website are currently in development.

Canadian Civil Liberties Education Trust has launched a webpage www.ccla.org/whatsnotfair that is seeking stories from young people

that can or have been used to solve the problems. If you or a young person you know would like to see their

CCLA is pleased to announce that the **Honourable Susan Cooper**, a partner at Chandler & Cooper, Barristers & Solicitors in Iqaluit, has been **appointed Judge of the Nunavut Court of Justice**. Justice Cooper was called to the Northwest Territories Bar in 1988, the Alberta Bar in 1990, and the Nunavut Bar in 1999. She served on the CCLA Board of Directors from 2000 to 2010.

Canada’s “No Fly List” in need of transparency

Hani El Telbani, a Montreal student of Palestinian origin, was prevented from boarding a flight to Saudi Arabia in June 2008 as a result of his improper inclusion on Canada’s “no-fly” list.

The Program has no clear legal framework for how it should operate. It is fraught with the potential for error, ‘false positives’, and the exercise of improper discretion in decision-making.

Independent consultants engaged by Transport Canada determined that Mr. El Telbani’s name was improperly included on the “no-fly” list and he is now seeking a judicial review by the Federal Court. If the case proceeds it will be the first to challenge Canada’s Passenger Protect Program. Mr. El Telbani’s experience raises concerns about how information is procured for the Program, and how decisions are made to determine whether or not a person is permitted to fly.

In CCLA’s view, there must be a timely and comprehensive review of this program, with special attention given to its compliance with the *Charter* and legal fairness requirements and statutory authority. When an individual is prevented from flying under the Program, that person must be provided with reasons for the decision, access to their file and an opportunity to appeal the decision to an effective and independent review body.

CANADIAN CIVIL LIBERTIES ASSOCIATION / CANADIAN CIVIL LIBERTIES EDUCATION TRUST

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