

NEWSNOTES

A note from the General Counsel

“Because the freedom of no one is safe unless the freedom of everyone is safe”

Some Canadians feel that there is little need to advocate for fundamental rights in Canada. After all, Canada has maintained its democratic tradition for many decades. However, it takes commitment to maintain a free society, and this commitment requires passion, energy and dedication.

Since September 11, 2001, security imperatives have been presented as necessitating a diminution of fundamental rights: broader powers have been given to the police, the government has accepted that some people could remain in jail for many years without due process and that added surveillance tools are needed. Rights were seen as an impediment to good and effective security. CCLA has always advocated that rights and security objectives must be reconciled, and that they are both essential to the pursuit of democracy. A creative and innovative society requires privacy, freedom, equality and the rule of law: to ask for less is to diminish our ideals.

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In its advocacy work, CCLA aims to convince. First, it works to convince the general public that civil liberties and human rights cannot be taken for granted, that the greatest threats are complacency and indifference. Second, it tries to convince the powers in place that democracy requires an active pursuit of accountability - not to do as little as possible, or try to avoid responsibility. Getting away with



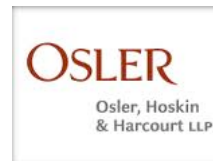
Pamela Boulay (NUPGE) and Nathalie Des Rosiers listening to a testimony during the G20 Hearing Days in Montreal on November 12.

breaches of civil rights ought to be frowned upon, not rewarded. Finally, CCLA also works to convince the people whose rights are violated that it is worth fighting for those rights, that they are not alone and that standing up for civil liberties matters.

During the last year, CCLA has witnessed serious violations of fundamental freedoms. This end of year newsletter outlines many of them. I want to thank our volunteers, our members and our staff for their commitment to civil liberties.

Nathalie Des Rosiers
 Nathalie Des Rosiers

CCLA & CCLET are grateful for the support of the following firms and foundations:



PUBLIC SAFETY

Litigation-**Divided Supreme Court Weighs in on Privacy in Electricity Consumption Data**

On November 24th, 2010, the Supreme Court of Canada released its judgment in *R. v. Gomboc*, which involved a constitutional challenge to the warrantless use of Digital Recording Ammeter (DRA) data by police.

The basis of the challenge rested on the fact that DRA data are capable of providing real-time information about the timing and quantity of residential electricity consumption, from which inferences can be made about what is happening inside a home. CCLA intervened in this case to argue that a warrant should be required before police can have access to DRA data because of its capacity to reveal information about people's private activities.

A divided Court found that the police did not breach Mr. Gomboc's Charter rights by accessing DRA data relating to his home. Four of the Court's nine Justices held that any privacy expectations associated with DRA data were not sufficient to require police to obtain a warrant before they access it. Three of the other five Justices held that DRA data can reveal personal

information about a customer and that concerns about access without a warrant are well-founded. These Justices, however, held that, because of a provincial Regulation that permitted police to access "customer information" generated by electricity providers, Mr. Gomboc did not have an expectation of privacy in the DRA data sufficient to trigger Charter protection. The remaining two Justices held that DRA data could reveal private information and that the existence of the provincial Regulation, about which Mr. Gomboc likely had no knowledge, was not sufficient to justify police accessing this private information without a warrant.

CCLA is pleased that, consistent with its submissions, a majority of the Court's nine Justices found that DRA data could reveal private and personal details about people's activities in their homes. We are, however, disappointed that more Justices did not agree with the point made in the dissenting opinion that, "the average consumer cannot be expected to be aware of the details of a complex regulatory scheme".

CCLA was represented by David Rose of the firm Neuberger Rose in this appeal and thanks him for his excellent work.

Litigation-**Supreme Court holds there is no right to lawyer during police interrogations**

The Supreme Court of Canada recently released judgments in a trilogy of cases that dealt with whether suspects are entitled to speak to their lawyers while being interrogated by police.

In a 5-4 decision, the Court held that the constitutional right to counsel does not extend so far as to grant detainees a right to have a lawyer present during police questioning. In the majority's view, "an initial warning, coupled with a reasonable opportunity to consult counsel when the detainee invokes the right" is sufficient and that police

need not "hold off" on further questioning just because a suspect indicates he or she wants to speak with counsel.

In its submissions the CCLA argued that, under appropriate circumstances, it is necessary to give suspects access to a lawyer upon request in order to help reduce the likelihood of miscarriages of justice. The CCLA is disappointed that the Court did not adopt this position.

CCLA intervened in all three cases, represented by Jonathan Lisus of Lax O'Sullivan Scott Lisus (formerly of McCarthy Tetrault) and Alexi Wood of McCarthy Tetrault. [*R. v. Sinclair*, *R. v. Willier*, and *R. v. McCrimmon*.]

Litigation-**CCLA Intervenes to Argue Against the Mandatory Collection of Youth Offender DNA**

CCLA recently appeared before the Ontario Court of Appeal as an intervener in a constitutional challenge to the mandatory collection of DNA from young persons convicted of certain criminal offenses.

The organization argued that the DNA provisions of the Criminal Code must be looked at differently when they are applied to youth because of the unique situation and vulnerability of young offenders.

In CCLA's view, courts must retain some discretion not to make a DNA Order relating to a young offender, when this would not be in the best interests of the administration of justice.

Such discretion is the only way that both the state's interest in the collection of DNA and young offender's privacy interests can be appropriately balanced on a case-by-case basis.

CCLA was represented by David Rose of the law firm Neuberger Rose. [*R. v. J.B.*, *K.M.* and *D.R.*].

CCLA is seeking nominations for its board of directors. Please write us (mail@ccla.org) or call (416) 363-0321 to submit your nomination!

G20 Hearings Further Expose Violations of Rights

CCLA and the National Union of Public and General Employees recently co-hosted three days of public hearings into police conduct during the June 2010 G20 Summit in Toronto.

The primary objectives of the hearings were to increase public awareness about the serious violations of constitutional rights during the G20 Summit and to hold all levels of government accountable for the failings of Summit security.

The hearings, which were held in Toronto and Montreal, gave more than 55 individuals an opportunity



The Toronto Raging Grannies lighten up the atmosphere during the CCLA/NUPGE hearings with an original song.
Photo: David Smiley

to speak about their experience during the G20 Summit and how it has affected them personally.

Several legal and academic commentators also spoke about some key legal, political and social issues raised by the events of the G20 and shared their views on the appropriate next steps for seeking police accountability.

Over the three days of hearings, many individuals spoke of the excessive police conduct that they experienced during the G20 Summit, including alleged instances of unwarranted detentions and arrests, unreasonable searches, offensive remarks by police officers, and deplorable conditions of detention.

Many people also spoke of having been left with a sense of diminished faith in police following the G20 and ongoing trauma as a result of their experiences. Commentators discussed the violations of Charter rights to freedom of expression and assembly, the need for better legal frameworks to govern policing large public events, and the need for improvements to Canada's police accountability framework.

CCLA and NUPGE will be producing a report on these hearings which will be released in January 2011.

For more information:

<http://ccla.org/our-work/focus-areas/g8-and-g20/>



John Pruyn, whose artificial leg was yanked off by police at Queen's Park on June 26th, told his story during the Toronto G20 hearings. *Photo: David Smiley*

CCLA Successfully Pushes for Investigation of RCMP's G8/G20 Conduct

The Commission for Public Complaints Against the RCMP recently announced that it has launched a public interest investigation into the RCMP's role in the 2010 G8 and G20 summits. The investigation is being launched in response to a complaint filed by CCLA on October 18, 2010, which highlighted the need to investigate the RCMP's role in the following matters: (1) G8/G20 planning (including the location of the security fences), (2) infiltration and surveillance of individuals or groups before and during the summits, (3) planning and oversight of policing during the G20, (4) conditions at the Eastern Avenue detention facilities in Toronto. The Commission will be appointing an independent civilian investigative team and will publicly report its findings and recommendations. CCLA will be watching this investigation closely as part of its ongoing efforts to ensure accountability for the many violations of constitutional rights that occurred during the G20 Summit.

EQUALITY

Bill C-49 Punishes Asylum Seekers

A harsh new bill proposed by the federal government would penalize asylum seekers who arrive in Canada, and treat them like convicted criminals in violation of our own laws as well as our international obligations.

Under the terms of Bill C-49, men, women and children fleeing persecution, torture or death in their countries of origin, and who have arrived in Canada seeking a safe haven, could be placed in automatic mandatory detention with no opportunity for an independent review of whether this detention is fair or necessary, for a year. Even after an individual has been investigated, and his or her bona fide refugee status granted, further parole-like conditions may be applied to them, even if they are suspected of no wrongdoing and do not present any kind of risk. In addition, their ability to apply for permanent resident status – to settle in and make a home in Canada – may be frozen for five years. Furthermore, they would be unable to obtain interim travel documents for over five years, even to visit family in a safe third country.

Not only are these proposed measures unhelpful and unethical, they are also unlawful under Canadian and

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international law. One fundamental principle of international law establishes that states must not impose penalties on refugees who enter their country illegally if they are coming directly from a territory where their life or freedom was threatened. Yet Bill C-49 in a purported attempt to punish “human smugglers” is penalizing those persons who may, out of desperation, have used the services of someone else to secure false documents, passage on a boat, or some other kind of critical assistance.

The *Canadian Immigration and Refugee Protection Act* sets out its aims with respect to refugees and includes: offering safe haven, facilitating family reunification, and granting fair consideration to refugees as a fundamental expression of Canada's humanitarian ideals. CCLA believes that none of these aims are met in Bill C-49. Moreover, in its arbitrary detention of individuals, Bill C-49 represents a violation of several provisions in the Canadian Charter of Rights and Freedoms.

In light of its concerns over this proposed legislation, CCLA has joined a coalition of Organizations Calling for the Defeat of Bill C-49. CCLA's full position can be found on our website: <http://ccla.org/our-work/focus-areas/bill-c-49/>

Litigation**Fair & Equal Procedures for Immigration Sponsors**

When the government claims money from individuals, good policies, a fair procedure and equal treatment need to be in place. This is particularly important in an immigration context where there is a history of disadvantage and discrimination.

The Canadian Civil Liberties Association is asking the Supreme Court of Canada to consider these matters, submitting that several protections should be in place before the government tries to enforce financial claims against sponsors of immigrating family members: people should be given an opportunity to be heard; their personal as well as their financial circumstances must be considered; there should be some room for discretion with respect to

who is responsible for the situation – be it government agents, the individuals themselves, or another party.

Moreover, since such protections do exist in other situations in which the government is seeking to recover debt from individuals, the right to equality dictates that these protections must certainly be enacted in the immigration context, where sectors of the community face economic and political disadvantage and discrimination. Inflexible rules and an unfair process regarding these claims have caused serious emotional and financial stress on the individuals involved.

CCLA is represented by Guy Régimbald and Matthew Estabrooks from the law firm Gowlings. [*AG of Canada, et al. v. Pritpal Singh Mavi, et al.*]

Litigation**Immigrants & the right to healthcare**

Since 1957, the Canadian government has provided healthcare coverage for people living in Canada in precarious immigration situations - for example, those waiting for refugee status. This was done in compliance with international principles and for humanitarian reasons.

Recently, the government has refused to provide healthcare coverage to a woman who suffers from life-threatening health issues. The woman has

been living in Canada for many years but has not been able to regularize her immigration status.

On November 24, 2010, CCLA appeared before the Federal Court of Appeal to argue that the government's refusal to provide life-saving healthcare to a person living in Canada with precarious immigration status violates our *Charter of Rights and Freedoms* as well as our international commitments. A denial of healthcare to this woman would violate her right to life and to equality, as guaranteed in the Canadian Charter.

CCLA was represented by Iris Fischer and Lindsay Aagaard of Blakes. [*Nell Toussaint v. AG of Canada*]

FUNDAMENTAL FREEDOMS**Defamation Lawsuits and the Right to Dissent**

Freedom of expression is frequently described as one of the core principles of a free and democratic society. Since its inception, CCLA has been at the forefront of arguing for robust protection for freedom of expression. While much of this work has focused on criminal prohibitions that curb expression, civil lawsuits can also pose a very real threat to this fundamental right.

As part of CCLA's efforts to guard against civil lawsuits being used as a tool to curb expression, CCLA made submissions to the Ontario Attorney General's Advisory Panel on Anti-SLAPPs in August of this year. SLAPPs (short for "strategic litigation against public participation") are lawsuits started against individuals or groups who speak out or take a position on an issue of public interest.

The goal of a SLAPP suit is to silence those who present critical or dissenting views by forcing them to engage in what may be a lengthy and costly legal battle.

CCLA recently learned of a number of lawsuits that pose a threat to freedom of expression.

One example is a lawsuit started by the former mayor of Aurora, Ontario, against individuals who posted comments critical of her leadership on a local blog. Her lawsuit, which she started when she was still Mayor and just prior to an election, seeks over \$6 million in damages. She will also be asking the Court for orders disclosing the identities of those who posted to the blog anonymously. As a public official, the Mayor has many avenues of recourse open to her to denounce and

correct any comments or misstatements that she takes issue with on the local blog. Using a lawsuit to attempt to silence critics is always

troubling, but particularly so when done by public officials. CCLA will be seeking the Ontario Superior Court's

permission to intervene in the Mayor's motion seeking the identities of the anonymous bloggers.

CCLA's submissions to the Panel argued for robust and effective anti-SLAPP legislation and the creation of an independent public agency to assist SLAPP defendants. Our submissions are available on our website: <http://ccla.org/2010/08/31/ccla-urges-attorney-general-to-protect-ontarians-against-abusive-law-suits/>

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Using a lawsuit to attempt to silence critics is always troubling, but particularly so when done by public officials.

Thanks to pro-bono special counsel in the following cases:

- ◆ *CCLA v. Toronto Police Service* (Ontario Superior Court) Representation by Paul Cavalluzzo, Michael Wright & Adrienne Telford (Cavalluzzo Hayes Shilton McIntyre & Cornish LLP)
- ◆ *R. v. N.S. et al.* (Ontario Court of Appeal) Representation by Bradley Berg & Rahat Godil (Blake, Cassels & Graydon LLP)
- ◆ *Globe and Mail v. Attorney General of Canada* (Supreme Court of Canada) Representation by Christopher Bredt & Cara Zwibel (Borden Ladner Gervais LLP) and Jamie Cameron (Osgoode Hall Law School)

- ◆ *Toronto Coalition to Stop the War v. Canada (Public Safety and Emergency Preparedness)* (Federal Court of Canada) Representation by Sonia Bjorkquist & Jason MacLean (Osler, Hosking & Harcourt LLP)
- ◆ *R. v. National Post*. (Supreme Court of Canada) Representation by Jamie Cameron & Matthew Milne-Smith (Davies Ward Phillips & Vineberg)
- ◆ *Toronto Star Newspapers Ltd. v. Canada* (Supreme Court of Canada) Representation by Jonathan C. Lissu & Alexi N. Wood (McCarthy Tétrault LLP)

CONFERENCES

Rights Watch: Law Students help CCLA monitor civil liberties issues across the country

For the second year in a row, the CCLA has teamed up with Pro Bono Students Canada to create and maintain a vital resource to monitor and publicize civil liberties



issues affecting people across the country. Students from every law school in Canada are participating in the CCLA-PBSC Rights Watch blog. The students monitor civil liberties issues in their regions and post stories, links to news articles and opinion pieces highlighting issues emerging from the courts, legislatures and community groups.

As part of this exciting project, all of the students who contribute to the blog were invited to the second annual Rights Watch conference, a one-day event in October that brought together leading advocates, academics and lawyers to examine issues including the rights of Canadians detained abroad, religious freedoms in the courthouse, and damages awarded for Charter breaches.

The Rights Watch blog is an excellent source of information about what's going on across Canada and allows users to write comments and debate issues with others.

Visit the Rights Watch blog:
www.ccla.org/rightswatch

Who Belongs? Immigration from a Civil Liberties Perspective

Despite Canada's strong commitment to fundamental rights and to the principle of multiculturalism, immigrants to Canada continue to face significant obstacles upon arrival.

The government and media frequently approach immigration issues from a national security perspective, giving the human rights and humanitarian dimensions of world migration little attention.

CCLA would like to see a shift in this way of thinking, with more emphasis on the civil liberties dimensions of immigration issues.

In order to further this goal, CCLA, in conjunction with the David Asper Centre for Constitutional Rights and with the support of the Maytree Foundation, hosted the Who Belongs conference from September 23-25, 2010 in Toronto. The conference saw academic experts, leading legal practitioners, community workers and members of the public come together to discuss how immigrants experience discrimination and to examine areas and avenues for law reform.

Conference participants tackled crucial issues including the rights of temporary foreign workers, access to social welfare benefits, health care for persons with precarious immigration status or "no status", citizenship and statelessness, voting

rights for non-citizens and the criminalization of immigration. More information about the conference, including some of the papers and presentations delivered by speakers, are available through CCLA's website at: <http://ccla.org/our-work/focus-areas/who-belongs/>. Video clips of the various panels from the conference will also be posted on the website in the coming weeks.

As part of CCLA's ongoing work in examining immigration issues from a civil liberties perspective, we have produced a discussion paper and are

asking for feedback from members of the community. We want to hear which issues most affect immigrant communities and to find out about the legal and policy issues that need to be addressed most urgently. CCLA invites you to read the discussion paper available on our website, and provide us with your views and thoughts by emailing discrimination@ccla.org.

CCLA's work in the area of immigration has become even more pressing in recent weeks and months with this summer's arrival of the Sun Sea, a boat carrying hundreds of Tamil refugee claimants. The government subsequently introduced Bill C-49, which purports to punish human smugglers who bring people to Canada illegally. You can read more about our work on this issue in this issue of NewsNotes, as well as on our website, under "Focus Areas".



Rights, Benefits, Obligations
and Immigration Status

EDUCATION

Have you ever seen a naked mole rat? And what does this odd rodent have to do with civil liberties?

Thanks to the work of CCLET Education Coordinator April Julian, children in some Ontario elementary

schools are learning that picture books can lead them to serious discussions about their rights and freedoms. Mo Willem's charming picture book "Naked Mole Rat Gets Dressed," explores questions about following rules and challenging conventions when a singular member of the species decides to don clothes. When told that naked mole rats don't wear clothes, he asks, "Why not?"



This simple two-word question is the basis for an in-depth critical thinking civic engagement workshop. Children as young as seven engage in

critically analyzing the meaning of freedom of expression and limits to that freedom – what is "reasonable"? Should the majority decide what one individual must wear? What are the purposes for school and family rules about what we wear? Do the rules achieve their goals? What are some of the side effects or unintended results when the majority makes decisions for smaller groups or individuals?

Children who can think critically about their rights and their responsibilities are better prepared to live in a diverse community. Understanding that different views are acceptable and that we can disagree with one another respectfully are important aspects of democratic and civic engagement. There are even indications that schools where these ideas are alive and at work are less likely to find difficulties with bullying and other forms of violence.

Thanks to the support of the Law Foundation of Ontario and others, CCLET has been in the business of educating for democracy for well over a decade. Through its Teaching Civil Liberties program in faculties of education and the Civil Liberties in the Schools programs that engage students



April Julian, CCLET's education coordinator, with students in grades 4 & 5 in Deanna Bielawski's class at Hanover Public School in Brampton.

from grades 1 to 12, CCLET has given thousands of teachers and students an opportunity to spend time thinking about and engaging with the principles that guide our policy makers, law makers and our judiciary. CCLET staff and volunteers are proud to be among those who help to guide Canada's next leaders and voters.

About CCLA's Education Program

Canadian Civil Liberties Education Trust (CCLET) is a non-profit research and educational organization created in 1968 by the Canadian Civil Liberties Association.

CCLET's function is to introduce Canadians to the exploration of civil liberties and to help in the development of democratic habits. Since the early 1990s, CCLET has developed a unique approach to teaching civil liberties in the classroom.

Through the Civil Liberties in the Schools and the Teaching Civil Liberties Projects, which are funded by the CCLET and the Law Foundation of Ontario (LFO), the organization provides free workshops, seminars, and in-class sessions in schools, educational institutions, and faculties of education, engaging teachers and students in lively debate about their rights and freedoms.

**THE TENTH ANNUAL CCLET
BERNARD CHERNOS
ESSAY COMPETITION**

**TAKE
THE CHALLENGE
AND WIN \$500!**

For more information about CCLET's student competitions, visit:
www.ccla.org/education

NATIONAL SECURITY

Spotlight

Canada and the U.S. No-Fly List

In Canada, we have constitutional and legal safeguards to protect an individual's right to privacy. This right encompasses protection of an individual's personal information. These safeguards emerge from the fundamental understanding that "the right to privacy is at the heart of democracy." Under the Canadian Charter of Rights and Freedoms and international law, Canada has legal obligations to demonstrate that any limits to the right to privacy is necessary to achieve a lawful objective, proportional, reasonable and of minimal impairment.

CCLA is working to ensure that Canada's aviation security efforts protect both national security and the right to privacy. CCLA is concerned that a new bill - Bill C-42 an Act to Amend the Aeronautics Act - would allow Canada to hand over passengers' personal information to a foreign government, without any legal safeguards. The Canadian constitution and international law, however, require Canada to ensure that the personal information of Canadians is subject to rigorous legal safeguards. If Canada fails to insist upon legal safeguards, Canada will be failing in its legal obligations and exposing Canadians to a violation of their privacy rights, and the possible violation of other fundamental human rights such as liberty, security of the person, due process, and equality, among others.

In November 2010, CCLA appeared before the Parliamentary Committee on Transport, Infrastructure and Communities to argue that Bill C-42 is unconstitutional and dangerous. CCLA argued that it must be redrafted to ensure it complies with law.

As currently written, Bill C-42 will allow Canadian airlines to provide the U.S. Transport Administration (TSA) with passenger information on flights that enter U.S. airspace but do not land there. The U.S. TSA's Secure Flight Program will compare Canada's passenger information with U.S. Watch Lists. In effect, Canada is saying that Canadian privacy laws no longer apply to this information, and the U.S. can do whatever it wants with this information.

CCLA believes Bill C-42 is a dangerous bill. There is no guarantee that passenger names, or Passenger Name Records (PNRs) will not be used by the U.S. to place Canadians on U.S. Watch Lists on the basis of "inference" or error. There is no guarantee that the U.S. TSA will not share the personal information of Canadian passengers on overflights with other U.S. agencies (e.g. immigration, customs), or with third countries.

CCLA is very concerned that there are no legal safeguards, oversight measures, or full redress mechanisms regarding the transferred personal information. Safeguards should speak to modalities of transfer, scope of information transferred, limitations on use, and retention and deletion of information.

Furthermore, CCLA is concerned that Canada wants to diminish Canadians' privacy rights to cooperate with the U.S. No-Fly Lists, while the U.S. No-Fly Lists are currently being challenged in U.S. courts. The American Civil Liberties Union has filed a complaint stating that the U.S. No-Fly List is "unconstitutional" and "un-American" because it deprives people of their fundamental liberties without any due process. Currently, there are estimated to be 1 million names on the U.S. Terrorist Watch List, from which the U.S. No Fly List is derived.

CCLA argues that any law to share information on overflights should comply with the Canadian Charter of Rights and Freedoms and with international law. This means that there must be rigorous legal safeguards in place regarding the scope of information provided, permissible lengths of retention, independent oversight and access to legal redress. (Redress mechanisms should not simply be a "mailbox" for complaints, but should provide adequate legal remedies.) Implementation should be periodically reviewed to ensure compliance with these legal safeguards. Finally, CCLA argues that there should be a Sunset Clause wherein the Bill would expire in two years, and Parliament would revisit the necessity of renewing the Bill.

Failing the necessary redrafting to ensure proper legal safeguards, Bill C-42 should not be passed.

CCLA & CCLET are:

- ◆ Nathalie Des Rosiers - General Counsel
- ◆ April Julian - Education Coordinator
- ◆ Anne Lee - Administrative Assistant
- ◆ Penelope Chester - Communications & Fundraising Coordinator
- ◆ Johanna Groenberg - Administrative Coordinator

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Program Directors

- ◆ Noa Mendelsohn Aviv - Equality
- ◆ Danielle McLaughlin - Education & Administration
- ◆ Graeme Norton - Public Safety
- ◆ Sukanya Pillay - National Security
- ◆ Cara Faith Zwibel - Fundamental Freedoms