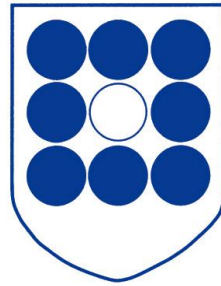


CANADIAN  
CIVIL LIBERTIES  
ASSOCIATION



ASSOCIATION  
CANADIENNE DES  
LIBERTES CIVILES

## **CANADIAN CIVIL LIBERTIES ASSOCIATION**

**NGO Submission: Second Universal Periodic Review of Canada**

**October 2012**

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## CANADIAN CIVIL LIBERTIES ASSOCIATION

### NGO Submission: Second Universal Periodic Review of Canada

#### 1. Introduction

The Canadian Civil Liberties Association (“CCLA”) submits this statement highlighting certain concerns about Canada’s implementation of its legal obligations pursuant to international human rights, refugee, and humanitarian law.

Since 1964, CCLA has worked to protect and promote civil liberties, human rights and fundamental freedoms across Canada. CCLA is a national, non-governmental, non-profit and non-partisan organization comprised of thousands of members from all walks of life. Through litigation, advocacy, education, and outreach, CCLA seeks to ensure compliance with Canada’s legal obligations pursuant to the *Canadian Charter of Rights and Freedoms*, and Canada’s international law obligations.

CCLA is cognizant of, and commends, Canada’s efforts in seeking to implement the rights and guarantees in the *Charter*, and in being an international leader in protecting LGBT rights. However, we believe that protection of rights requires constant vigilance, and some areas fall short of human rights guarantees and must be addressed.

At the 2009 Universal Periodic Review, Canada agreed to comply with international human rights law, international refugee law, and international humanitarian law, with respect to protecting refugees and asylum seekers, protecting national security, and upholding the right to be free from discrimination. Canada reflected its position either through acceptance of recommendations made by States or through its own Voluntary Pledges.

At the time of this Second Periodic Review of Canada, CCLA raises the following concerns:

- The rights of refugees, asylum seekers, and migrant workers remain at risk;
- The rights to peaceful protest are being eroded;
- Aboriginal women are disproportionately victims of violence and Aboriginal people generally are disproportionately incarcerated in prisons:
- Canada is pursuing a counter-terrorism strategy that fails to consistently ensure compliance with international human rights, refugee, and humanitarian laws, and undermines its commitment to the absolute prohibition against torture;
- Segregation in prisons is overused. The segregation of the mentally ill is particularly concerning.
- Accountability mechanisms for police and intelligence agencies must be strengthened.

CCLA expands upon these concerns below by addressing:

#### I. Refugees, Asylum Seekers, Migrant Workers

- II. Administration of Justice
- III. Violence Against Women
- IV. Torture, CIDT
- V. National Security and Counter-terrorism

## I. REFUGEES, ASYLUM SEEKERS, MIGRANTS

### a) Refugees and Asylum Seekers

CCLA is gravely concerned that Canada has passed legislation (Bill C31) which:

- removes certain important safeguards regarding *non-refoulement*;
- enables excessive Ministerial discretion to label asylum seekers as “designated foreign nationals”;
- enables mandatory detentions for “designated foreign nationals” that may result in asylum seekers being detained without review for up to six months
- enables separation of families during detention;
- creates impediments to family reunification with the 5 year moratorium for some refugees to seek Permanent Refugee Status; and
- creates the potential for serious and unjustifiable violations of the principle of *non-refoulement*, of *habeas corpus*, of the right to be free from arbitrary detention, and the corresponding legal guarantees found in the *1951 Refugee Convention and Optional Protocol*; the *ICCPR*, and the *UN Convention on the Rights of the Child*.

CCLA argues the right to be free from arbitrary detention and the principle of *non-refoulement* must be upheld and are non-derogable rights in international law.

CCLA was active in opposing this legislation when it was introduced as a Bill, and made submissions to Parliament arguing that, for the above reasons, the Bill should not pass.

We recommend that the offending sections of this legislation be repealed.

### b) Migrant Workers

CCLA is concerned that the Temporary Foreign Worker program creates serious gaps in legal protections wherein these individuals are at a heightened risk of exploitation and human rights abuses including trafficking risks; can lack access to justice and other remedies; can lack effective access to health care services; can be deprived of the rights to freedom of association including the right to collectively bargain as an essential tool of not only guarding against exploitation but also preserving inherent human dignity. CCLA is intervening in a case that challenges the constitutionality of the operation of the program.

### c) Health Care for Refugees and Persons with Indeterminate Legal Status

CCLA is concerned that the recent changes to the funding of the federal Health Care envelope for refugees and persons with indeterminate immigration status will jeopardize their security of the person. Canadian law has failed up to now to recognize a right to healthcare as an aspect of security and dignity of persons. CCLA has written to the Minister of Citizenship and Immigration calling on him to reconsider the cuts to refugee healthcare.

## II. ADMINISTRATION OF JUSTICE

### a) Police Accountability

CCLA investigated and reported on serious violations of fundamental rights and freedoms which occurred during policing of the June 2010 G20 Summit in Toronto<sup>1</sup>, such as the use of kettling, mass arrests, and rubber bullets. CCLA monitored these policing tactics, conducted public hearings, and released two reports. CCLA also facilitated the complaints of individuals to the Ontario Investigative Police Review Director, which in May 2012 released a review finding serious planning, training and implementation failures regarding policing of the G20.

Since then, CCLA has observed and spoken out against the policing practices during the Montreal student protests in 2012, where such practices (as the repeated use of tear gas on protestors) have been disproportionate and have failed to protect and facilitate the rights to freedom of association, expression and speech of peaceful protestors. In particular, CCLA is very concerned about the limitations to the rights of peaceful protest that were brought in by the provincial government of Québec (Bill 78). While we welcome the new provincial government's commitment to amend this Bill, we will remain concerned until the bill is repealed.

CCLA is concerned the right to peaceful protest is being eroded. Violent disruptions of peaceful protests are unacceptable no matter where they occur.

CCLA is calling for appropriate disciplinary action, and compliance with international standards on policing. We urge Canada to provide an account of its policing accountability mechanisms and their efficiency.

### b) Mandatory Minimum Sentencing

The introduction of mandatory minimum sentences is imperiling fundamental rights in the criminal justice process. CCLA is opposed to the use of mandatory minimum sentences.

### c) On-line Surveillance

Proposed new legislation enhancing police powers with respect to online activities imperils privacy rights. CCLA concurs with the joint submissions on Bill C30 made by CIPPIC, and does not add further submissions here.

### d) Non-Lethal Weaponry and Technology

CCLA has demanded a better regulatory regime for the acquisition of non-lethal weaponry and technology by security forces to ensure that their use does not unduly threaten the life or health of the public.

On April 7, 2011, an 11-year old boy in Prince George, B.C. was reportedly stunned by RCMP officers using a Taser. This incident in CCLA's view raises serious concerns about the RCMP's policy on the use of Conducted Energy Weapons ("CEWs") and reinforces the CCLA's repeated demands for uniform national standards for the use of CEWs by law enforcement. The CCLA has been active in writing to the Commissioner of the RCMP to express our concerns and to request

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<sup>1</sup> To review CCLA's work on the G20 including our written reports, inquiries, correspondence, complaints, and other work, please visit <http://ccla.org/our-work/focus-areas/g8-and-g20/>

the RCMP to update its CEW policy to, at a minimum, include the safeguards regarding children and medical high risk groups that are contained in the national Guidelines for the Use of Conducted Energy weapons published by Public Safety Canada.

#### **e) Prison Conditions – Segregation and Overcrowding**

CCLA is seriously concerned about the overuse of segregation in Canadian jails regarding mentally ill persons, and failures of review processes that compound the potential for abuse. CCLA is party in the Inquest into the death of Ashley Smith, a mentally ill young woman subjected to repeated segregations who died by her own hands in prison, under the watch of correctional officers.

Overcrowding in correctional institutions is also a critical concern. Over half of Canada's prison population on any given day has not been convicted of any crime.<sup>2</sup> Recent reports indicate that double- and triple-bunking in cells built and designed for one person is increasingly common, and new criminal law measures are likely to greatly increase incarcerated populations.<sup>3</sup> The Justice Minister's recent comments that "double bunking is appropriate" is particularly concerning, and contrary to Canada's obligations under the *UN's Standard Minimum Rules for the Treatment of Prisoners*.<sup>4</sup>

CCLA calls for the immediate implementation of the recommendations of the Arbour Commission, investigation by the Federal Government, and a strengthening of oversight mechanisms for prison guards.

### **III. VIOLENCE AGAINST WOMEN**

CCLA is seriously concerned about the disproportionately high percentage of aboriginal women in Canadian prisons. It is reported that although aboriginal people make up only 3% of the population, over 30% of federal sentenced women are aboriginal women.

CCLA is also concerned about the alarmingly high rates of violence and death reported among Aboriginal women.

CCLA calls for Canada to investigate and address the root causes of disproportionately high rates of violence, and high rates of incarceration of aboriginal women. Efforts to investigate, remedy or provide redress to Aboriginal women – including inquiries into murders or disappearances such as the British Columbia inquiry – must provide meaningful participation to the Aboriginal communities and in particular to Aboriginal women.

### **IV. TORTURE, CRUEL, INHUMAN and DEGRADING TREATMENT**

#### **a) Lack of Legal Redress for Torture Victims**

CCLA calls upon Canada to recognize that the *State Immunity Act* (RSC 1985) should not be interpreted to continue to bar civil suits to victims of *jus cogens* crimes including torture, in keeping with Article 14 of the *UN Convention Against Torture* and its interpretations by the *UN Committee Against Torture*. Canada has recently amended the *State Immunity Act* to provide a right of action for victims of terrorism against a number of states. CCLA has urged the government to provide

<sup>2</sup> <http://www.statcan.gc.ca/pub/85-002-x/2011001/article/11440-eng.htm>.

<sup>3</sup> [http://www.rcinet.ca/english/daily/reports-2012/15-29\\_2012-08-28-prison-overcrowding-causing-violence/](http://www.rcinet.ca/english/daily/reports-2012/15-29_2012-08-28-prison-overcrowding-causing-violence/)

<sup>4</sup> <http://www2.ohchr.org/english/law/treatmentprisoners.htm>

equal rights to victims of torture.

**b) Principle of *Non-Refoulement*: Deportation and Extradition**

CCLA is concerned that Canada is deporting or extraditing individuals to the risk of torture, and in some cases relying upon diplomatic assurances which may be problematic.

CCLA is concerned that Canada is faced with extradition requests that may contain information tainted by torture. It is the position of CCLA that Canada cannot extradite where there is a risk that the Requesting State is relying upon information obtained under torture in its prosecution against a requested individual. It is also the position of the CCLA, as noted by the former UN Special Rapporteur on Counter Terrorism, Martin Scheinen, that extradition to the risk of a manifestly unfair trial may also be a violation of the principle of *non-refoulement*.

In the cases of international crimes, where there is a risk of torture, CCLA argues that Canada should not extradite but prosecute.

## V. NATIONAL SECURITY AND COUNTER-TERRORISM

**a) Security Certificates**

CCLA is concerned that information tainted by torture has formed the basis of **Security Certificates** issued in Canada against Named Individuals. Canadian courts have held that torture information may have been used in the bases of the Security Certificates against Hassan Almrei and Adil Charkaoui.

CCLA is also concerned that the principle of fundamental justice and due process continue to be denied when Named Individuals cannot fully know and challenge the case against them, and this concern is not cured by the 2008 introduction of Special Advocates who cannot fully discuss the case or receive instruction from Named Individuals. CCLA is concerned that the Security Certificate process creates a second tier of justice for non-citizens.

CCLA believes that the Security Certificate process is not compliant with the *Canadian Charter of Rights and Freedoms*, and due process guarantees in international law; does not demonstrably enhance national security; and does not uphold Canada's international legal commitment to the absolute prohibition against torture.

**b) Information Tainted by Torture**

Recently unveiled Directives from the Minister of Public Safety to the Canadian Security Intelligence Service, indicate that the Government is willing to allow use or sharing of torture-tainted information in certain circumstances.

CCLA argues that Canada must comply with its obligations in international law, and in domestic law pursuant to the *Criminal Code* and the *Charter of Rights and Freedoms*, to ensure that information procured from torture is never used as evidence in any proceedings, and must never be used to deprive an individual of his or her liberty.

CCLA also calls upon Canada to comply with Policy Recommendation 14 of the Report of the Federal Commission of Inquiry into the Events Relating to Maher Arar: "Information should never be provided to a foreign country where there is a credible risk that it will cause or contribute to the use of torture. Policies should include specific directions aimed at eliminating any possible

*Canadian complicity in torture, avoiding the risk of other human rights abuses and ensuring accountability.”*

### **c) Accountability of National Security and Intelligence Agencies**

CCLA is concerned that the lack of an integrated oversight and review mechanism of Canadian agencies may result in serious errors.

Three Federal Commissions of Inquiry have reported that inadequate review processes of all agencies, including the manner in which information is shared among agencies, may actually impede effective government-wide anti-terrorism strategy.

CCLA, in accordance with the findings of the Commissions of Inquiry, agrees that (i) Canada must create integrated oversight and review mechanisms of the integrated national security activities of Canada’s agencies; (ii) any Canadian agency mandated to perform national security work should have independent civilian review of its national security activities; (iii) a centralized co-ordinating body or office mandated to oversee, and review information flows among agencies; this office would receive and coordinate sensitive national security information and determine whether it should be forwarded to other Canadian agencies. In addition, CCLA has been calling for independent oversight of the Canadian Border Security Agency which exercises significant coercive powers and is not currently subject to independent civilian oversight.

### **d) Canada’s Anti-Terrorism Act (2001)**

CCLA is concerned that the definition of “terrorism” in the *Anti-Terrorism Act (2001)* is overbroad and potentially criminalizes legitimate behavior. CCLA has intervened before the Supreme Court of Canada to argue that the clause should be struck down or interpreted narrowly.

CCLA is concerned that the Canadian government is considering renewal of two sunsetted provisions in the *ATA* providing for “investigative hearings” and “recognizance with conditions”. CCLA believes these provisions are contrary to Canada’s democratic traditions, may result in profiling and discrimination, and may result in normalizing exceptional powers. Further the Bill does not include the Supreme Court of Canada’s direction that testimony cannot be used for the purposes of deportation, CCLA notes that Canadian law enforcement has successfully thwarted domestic terrorist plots (e.g. Toronto 18) through the tried methods of surveillance, evidence gathering, laying of criminal charges and prosecution.

### **e) CANADA-US Security Perimeter**

Canada and the US have entered into an agreement to create a North American Security Perimeter, which envisions “greater information sharing and pooling” and “integrated policing”, among other goals. CCLA is concerned that international legal standards and obligations may not be properly implemented, particularly with respect to privacy rights, fairness and due process, and the right to be free from discrimination.

The agreements between both nations have been done at the executive level with limited public participation. CCLA made submissions to the Canadian Working Group with respect to our concerns and the legal standards which must be upheld. The Canadian-US Working Groups have released some privacy principles that are not legally binding, and leave unanswered questions.

CCLA along with its international partners the ACLU and Privacy International UK has called upon Canada to implement binding legal standards with the US that will uphold due process and privacy rights, prevent profiling and discrimination, and guard against the use, sharing or recycling of

information tainted by torture. – **12 Core Legal Principles, attached as an appendix to this document.**



**ANNEX**

**12 CORE LEGAL PRINCIPLES  
OF THE CANADIAN CIVIL LIBERTIES ASSOCIATION (CCLA),  
AMERICAN CIVIL LIBERTIES UNION (ACLU), AND PRIVACY INTERNATIONAL (UK),  
REGARDING THE PROPOSED CANADA-US SECURITY PERIMETER**

# CCLA – ACLU – Privacy International (UK): 12 Core Legal Principles

*In February 2011, U.S. President Obama and Canadian Prime Minister Harper reached an agreement to create a “North American Security Perimeter.” This plan outlined the following objectives: “addressing threats early, trade facilitation, integrated cross-border law enforcement, and critical infrastructure and cybersecurity.”*

*However, greater harmonization of U.S. and Canadian security policies such as a continental entry-exit system must not lead to large scale surveillance systems . Both countries recognize a constitutional right to travel, and the legal systems of both countries recognize that privacy is a fundamental right.*

*In order to ensure that implementation of the Security Perimeter comports with both nations’ longstanding values of privacy and civil liberties, we call on both leaders to require that the proposed Canada-U.S. Security Perimeter Cooperation Agreement adhere to following principles:*

1. **HIGHER STANDARDS PREVAIL:** Where there are differing standards of legal safeguards between the two countries, the standard granting the greater protections to individuals should be adopted.
2. **ADHERENCE TO EXISTING OBLIGATIONS:** Both countries must uphold the *International Covenant on Civil and Political Rights*, the *1951 International Convention Relating to the Status of Refugees* (including the principle of non-refoulement), the *UN Convention Against Torture*, and the *UN Convention on the Rights of the Child*, and all other relevant international human rights laws to which either country is party.
3. **LEGITIMATE, NECESSARY AND PROPORTIONAL:** States must comply with the *International Covenant on Civil and Political Rights’* prohibition against arbitrary or unlawful deprivation of an individual’s right to privacy. In order to ensure that a limitation on the right to privacy is not arbitrary, it should be legitimate, necessary and proportional as follows:
  - a. It must be essential to achieving a specific, legitimate aim that is specified in advance.
  - b. It must be the least intrusive means possible of achieving such an aim.
  - c. It must be proportional to the interest to be protected.
  - d. To ensure these principles are met, any limitation must be based on individualized suspicion or evidence of wrongdoing.
4. **COLLECTION:** States should only engage in targeted, lawful collection of personal information.
  - a. Surveillance and “intelligence” about domestic subjects must be individually targeted, based upon individualized suspicion of wrongdoing, and subject to judicial oversight.
  - b. The creation of dossiers, watchlisting, “intelligence” collection, investigation and infiltration must never be based on individuals’ exercise of their rights to freedom of expression and religion.
  - c. New technologies permitting broader forms of surveillance must be subject to full public

consultation and debate, authorized by law, necessary and proportional, and subject to independent assessment and oversight.

**5. LIMITS ON INFORMATION SHARING:** Any information exchanges between security and intelligence agencies must be subject to clear controls and limits – both between Canadian and U.S. agencies and among domestic agencies. In particular, information shared among or between national intelligence agencies must be subject to a public, written agreement between the national agencies with respect to purpose, use, storage, dissemination.

a. Any information sharing must be restricted to its particular purpose, and not used, disseminated or stored for secondary uses.

b. The storage of personal information must be subject to rules limiting the duration of its retention to reasonable periods.

c. Information should never be shared with third countries that are suspected of engaging in or condoning serious violations of human rights, including torture or cruel, inhuman, or degrading treatment or punishment.

**6. OVERSIGHT AND ACCOUNTABILITY:** Information collection, sharing, use, dissemination, and storage practices must be subject to independent oversight, review, and accountability procedures. This applies to all intelligence agencies, in both countries, engaged in information sharing practices. In Canada, the federal Privacy Commissioner for example, would have the expertise to monitor and review all information sharing agreements and practices. In the United States, such independent oversight could be provided by the Privacy and Civil Liberties Oversight Board – an institution created by Congress in 2007 yet which has stood vacant ever since as presidents Bush and Obama have refused to nominate members to the Board.

**7. NONDISCRIMINATION:** In the treatment of personal information, there must not be any discrimination between U.S. and Canadian citizens, or between citizens and permanent residents of either country.

**8. DUE PROCESS:** No person should be subject to impingements on their right to travel or other ill effects without full due process, including:

a. The right to notice of the deprivation and of the legal and factual bases for the deprivation.

b. The right to access and review the evidence against them.

c. The right to challenge the accuracy or reliability of the evidence against them, and to receive redress.

d. The right to challenge adverse designations through an adversarial process before a judge and subject to judicial review.

e. Cooperation between countries and jurisdictional issues shall not be permitted to form a barrier to individuals seeking redress.

**9. WATCH LISTS:** Watch lists must be narrowly focused on persons who pose a genuine and immediate threat. No person should be placed on a watch list (or denied access to a “trusted traveler” whitelist) unless:

a. They are given full due process as outlined above, including the right to notice that they have

been included on a watch list or excluded from a whitelist.

b. There are tight, well-defined criteria by which individuals are added to a watch list, or excluded from a whitelist.

c. The watch list is subject to independent oversight, including rigorous procedures for the removal of names that should not be on the list.

d. The agencies involved in placing names on the watch list or denying access to a whitelist refrain from using “guilty by association” in targeting individuals.

10. **DATA MINING:** Security screening determinations or any other decisions that produce legal effects or significantly affect the data subject may not be based solely on automated processing of data. A form of appeal and other due process rights must be provided when automatic decision making processes are used.

11. **CYBERSECURITY:** All cybersecurity measures must comply with the principles listed above.

12. **FOREIGN INFORMATION SHARING AND MUTUAL ASSISTANCE:** Steps must be taken to ensure that domestic law enforcement can never use foreign law enforcement to circumvent legal safeguards that apply to the domestic agency. A law enforcement agency must not carry out surveillance on one country’s citizens on behalf of another country’s law enforcement agencies in circumstances where those agencies are prohibited from carrying out such surveillance on their own.

**Canadian Civil Liberties Association | American Civil Liberties Union | Privacy International  
(UK)**

**Endorsed in Canada by the Rideau Institute and Gar Pardy.**