

Democratic Commitment



JOURNAL OF THE BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

Video Surveillance in Public Places

by Dale Beyerstein, Director

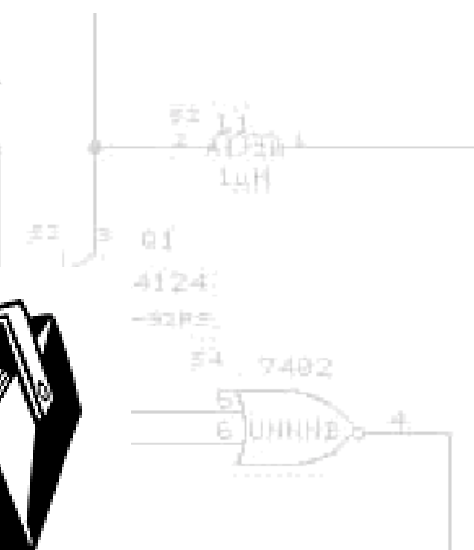
THE VANCOUVER POLICE want to use video surveillance in high crime areas of the city, specifically the Downtown Eastside. Closed circuit television (CCTV) involves the placement of video cameras to monitor activity on sidewalks, alleyways and other public places. Cameras pan the area and can be focussed or zoomed from a remote site. They can be driven by motion sensors to focus automatically on citizens' movements, or be controlled by observers who view activities from a remote site. Those who are observed are completely unaware that they are being tracked, perhaps for several minutes at a time, with cameras capable of zooming in closely enough to identify the titles of the books they are carrying. The BCCLA thinks this is a bad idea, because CCTV's costs will far outweigh its benefits.

Proponents of video surveillance

argue that it will decrease crimes against persons and property. But how likely is it that these goals, laudatory as they are, will be achieved by the use of CCTV? We argue that it will simply displace crimes, not decrease them.

It may appear that CCTV will reduce crime since it will be introduced at a time when crime rates are falling in Vancouver, by as much as 20 to 25 per cent in the past two years. Crime is already on the decline, in part thanks to other worthwhile measures like community policing and in part due to changing demographics. There are simply fewer men between ages 16 and 30, the group most widely believed to commit the types of crimes CCTV combats. If much of the crime prevention is in fact due to other factors occurring along with

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The Devil's Advocate:

A MESSAGE FROM BCCLA PRESIDENT CRAIG JONES



WELCOME TO THE DEVIL'S ADVOCATE, the first installment of what I hope will become a regular column in the *Democratic Commitment*, and one part of the increased dialogue I hope to promote between the Association's Board and our membership. In opening the discussion, I thought it would be appropriate to touch on a matter that has been the source of enormous controversy of late, Canada's child pornography laws.

A while ago I was sitting with a reporter who was explaining the 'angle' from which he was going to approach the 'story' on the BCCLA. "Sure," he said, "Civil Liberties is doing a great job. I mean it. Great job. But you guys are out there fighting and winning for the individual. Who's looking after the other side of the coin? Who's looking out for society?"

This is a question that I have heard again and again as I've picked my way through the minefield of interviews and call-in shows in the wake of the controversial decision in the 'child porn' case, *R. v. Sharpe*. I am saddened, I suppose, that the question needs to be asked at all. Who is protecting society? Isn't it by now obvious? We are! What is the point of protecting the rights of the individual if society does not benefit as a result?

In Robert Bolt's play *A Man For All Seasons*, Sir Thomas More is challenged by his son-in-law to explain his claim that we should extend the protections of the law even to Satan himself. Sir Thomas, the Lord Chancellor, responds with a Socratic question: "And what would you do, cut a great road through the law to get at the Devil?"

His adversary replies with the cry of the ages: "I would cut down every law in England to do that!"

"And when the last law was down," replies More, "and the Devil turned around on you, where would you hide then, the laws all being flat? This country's planted thick with laws from coast to



The hard fact is that complex issues do not lend themselves to facile solutions, and they do not lend themselves to table pounding populist rhetoric, either.

coast... and if you cut them down... d'you really think you could stand upright in the winds that would blow then?" A pause, then More sums up the driving philosophy behind legal 'due process': "Yes, I'd give the Devil benefit of the law, for my own safety's sake."

In recent weeks we have heard many cries to cut through More's 'thicket of laws' to get at the 'Devil' of child pornography. Many politicians advocate the chainsaw clearcut of the 'notwithstanding clause' to accomplish the task where the Parliamentary Paul Bunyan could otherwise not. Of course, they seek support by characterizing the issues in terms of demeaning simplicity: whose side are you on, the perverts' or the kids'?

In fact I would argue that the two decisions in the *Sharpe* case have unleashed an orgy of child exploitation in this country, but not of the sort produced by predatory paedophiles. Rather, we have been treated to the disquieting spectacle of politicians of all stripes falling all over one another to exploit the misery of abused children to their own political advantage. It is sad, and it is dangerous.

I need not here go into the substance of the so-called 'child porn law', or why we oppose it so vigorously; anyone interested can read our factum on the website, and there has been too much oversimplification of the issues to make me wish to attempt a brief summary. Suffice it to say that it is a bad law, an unjust law, unprecedented in a modern Western democracy. Parliamentarians know this, of course: they drafted it deliberately overbroadly because none of them wanted to be seen as 'soft on child porn'; the fact that the law addressed 'child porn' only peripherally didn't concern them. When the courts, perfectly predictably, struck it down, our federal representatives bleated and moaned like wounded herd creatures, pointing accusingly at the judiciary. But surely our judges are not bound to allow Parliament to be as ignorant, cynical and abusive of its citizens as it wants, are they? Many Parliamentarians seem to think they are.

The fact is that many of our elected representatives are not doing their jobs. Rather than attempting to inform the electorate of the issues, they prefer to spout soundbyte nonsense and shout about the simplicity of the solution. Well, I'm sorry, folks, there's a reason that a court hands down a 160 page decision, and it's not because their clerks had a free weekend. The hard fact is that complex issues do not lend themselves to facile solutions, and they do not lend themselves to table pounding populist rhetoric, either.

For every complex problem, the saying goes, there is a simple solution - and it is always wrong. We owe it to ourselves, and to the very notion of self-governance, to educate ourselves - and to the extent possible our fellow citizens - on the rich history and critical importance of fundamental civil liberties, and the complexity of the debate surrounding their application.

CCTV, then implementing these other measures without CCTV would be about as effective, without the large costs of CCTV in terms of both money and invasion of privacy. As Anatole France put it, "The casting of spells and anthrax has led to the death of many cattle".

Privacy in a public place

Some proponents of video surveillance argue that since a sidewalk, plaza or street is a public place, one cannot reasonably expect privacy in these places. This objection invites us to think of the public promenades of the previous century, where people went to observe and be observed, or their late-twentieth-century equivalents: the shopping malls and sidewalks in front of convenience stores that serve the same function for teenagers. Some people come to these places precisely to be observed, so it is absurd to think that someone's privacy is wrongfully invaded if they are observed there.

Of course, these are not private places in the same way as one's living room, but it does not follow that questions about invasions of privacy do not arise in such places. Stalking is one such example. We must also consider that in public places we are largely anonymous faces in a crowd, subject to the casual glance of a stranger but not the scrutiny of someone trying to determine what we are up to. Casual glances are one thing, prolonged observation by a person in authority is quite another.

What makes video surveillance *prima facie* objectionable is the built-in inequality of privacy. The watcher has her privacy preserved, because the watched person cannot observe back, nor is she even aware that she is

The only constraint is the worry that the videotape may later be reviewed by a supervisor or an agent of the Information and Privacy Commissioner who may happen to review that five minute segment of miles of videotape before it is erased.

being observed on a video terminal several blocks away; the watched person has no way to observe the watcher nor to know that someone is watching her.

This asymmetry of privacy is especially important when police are the watchers. Police officers have a difficult task being vigilant enough in their observation of the streetscape to deter crime while avoiding intrusion on people's privacy. What makes finding the right level of observation easier for the individual officer is that their observing is public; excesses can be noticed immediately by those being observed and other people at the scene. An officer who, with no justification, follows an attractive woman, or members of a racial or ethnic group, or an unaggressive panhandler, can be seen by everyone in the vicinity to be overstepping his authority. But the person monitoring a CCTV monitor from a basement several blocks away is under no such constraint by those being watched. The only constraint is the worry that the videotape may later be reviewed by a supervisor or an agent of the Information and Privacy Commissioner who may happen to review that five minute segment of miles of videotape before it is erased.

We should not be led down a slippery slope by arguments suggesting that,

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The Democratic Commitment is a quarterly publication of the British Columbia Civil Liberties Association. The Association was established in 1962, and is the oldest continuously active civil liberties association in Canada.

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Special thanks to Simon Grant for helping us to find graphics for this issue and to Jamie Griffiths for allowing us to reprint her photo of Janine Fuller.

because there is nothing wrong with private individuals or the media using video cameras in a public place, we must therefore accept CCTV. In the former case, the camera and its operator are in public view and individuals can avoid stepping into the range of a camera trained on a building or another group of people, and can see when the cameras are trained on them or tracking them for prolonged periods, and take action to defend their privacy.

Nor should we fall down a second slippery slope starting with video cameras in places such as banks, the SkyTrain, or privately-owned stores and ending with CCTV on public streets. Where a CCTV device is present at an instant teller machine or the entrance to a building, it is relatively easy to post signs warning people of its presence. The space is relatively confined, and the notice can be spotted easily by people using the service. Since they pass through the area relatively quickly they can remember that they are in range of the camera while they are there. But when CCTV covers an entire district, people can easily enter the area without seeing the notice. And

even if they notice a sign upon entering the area, it is easy for them to forget its presence. Many shoppers, for example, will spend several hours in the area, going in and out of shops, thinking about their purchases or other matters, and can easily forget that they are under surveillance. The amount of signage required to counter this would be enormous, and would itself leave citizens with the feeling that they have entered the world of The Prisoner.

Defenders of video surveillance hold that those of us who are going about our legitimate business in a public place where video surveillance is used have nothing to hide, and so we should welcome the

increased security without worrying that our privacy is being invaded and without fearing the loss of anything we are legitimately entitled to. But this argument rests upon a confusion about our motives for wanting something to be kept private. It is simply not the case that the only reason for wanting privacy is to be able to do something that we shouldn't be doing. Some of us visit shops providing

electrolysis for hair removal or ones providing hair transplants, and in neither case do we wish to be recorded doing so by a camera which pans the storefront. Others visit adult literacy centres, drug counselling centres, herbal remedy stores, debt counselling services, a psychiatrist, urologist or a weight loss clinic – all legal pursuits, but not visits we want to have recorded.

Note that the BCCLA is not saying that CCTV is always an unjustifiable offence against privacy. What raises the question is that CCTV does not involve the notion of reciprocity involved in the expression “to observe *and* to be observed in a public place”. In the next section we introduce some principles designed to distinguish those cases where such observation is justifiable from those where it is not.

Criteria for acceptable video surveillance in public places

In order to be acceptable, video surveillance of a public place must:

- (1) fulfill an important purpose, such as reducing the risk of physical harm or other illegal activities and not simply the control of nuisance behaviours like panhandling;
- (2) not simply drive a problem from one area into another area that does not have video surveillance;
- (3) be less invasive of privacy than alternative means of addressing the problem;
- (4) be advantageous to all, or at least to most, of the people who are giving up their privacy;
- (5) provide the public with clear notification of its presence in the areas where surveillance occurs through, for example, a publicity campaign in the media to inform people of the locales where it is located;
- (6) inform the public of its rationale;
- (7) inform the public about who is monitoring the cameras, what use will be made of the tapes, how long they are to be stored, and other practical details;
- (8) be monitored by the Information and Privacy Commissioner with respect to its deployment and

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It is simply not the case that the only reason for wanting privacy is to be able to do something that we shouldn't be doing. Some of us visit shops providing electrolysis for hair removal or ones providing hair transplants, and in neither case do we wish to be recorded doing so by a camera which pans the storefront.

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- the use and storage of the tapes it generates;
- (9) fulfill its promise as a means of identifying suspects;
 - (10) not be used as part of a data matching program for purposes other than surveillance for the reduction of crime of the area in which it is installed; and
 - (11) be more efficient (in terms of loss of privacy, expense, and effects on other resources on the cost side, and increased security on the benefit side) than alternatives.

Trading privacy for safety

Privacy is one value among many; and at some point some set of other benefits will be of more value to an individual than privacy. Furthermore, there is room for rational people to disagree, within limits, on the values of these goods. The problem can become difficult, then, when we must decide on a social policy or program such as CCTV which imposes different costs and benefits on different individuals, given their differing situations and priorities. However, where the losses clearly outweigh the gains, skepticism about the ability to rationally measure these losses has academic interest but little practical worry.

The introduction of CCTV will result in relatively little benefit and at such a large cost that it cannot be justified. The major cost is to our privacy, and the major benefit promised is increased safety.

If people give up their privacy for CCTV, there must be at least a reasonable prospect that they will receive a tangible benefit in exchange. Not only this, but the benefit must be something they are entitled to in a public place. People are not entitled to be free from being politely approached by panhandlers or religious cult members offering tracts nor from seeing people who look like they might go into an alleyway to shoot drugs, *unless* they are physically accosted by them (notwithstanding that local merchants are convinced these people are bad for the tourist trade); therefore citizens should not be protected from these activities by state action.

Proponents of CCTV, including the Vancouver Police, claim that it has been shown to be an effective crime deterrent. However, the studies they cite do not provide much evidence, as they suffer from two major problems that are not adequately controlled for: the Hawthorne Effect and Displacement.

The first refers to a problem which plagues any study of human behaviour. The mere fact that the behaviour is studied influences the behaviour which is studied, in the short term. In the case of CCTV, the fact that there will be researchers monitoring the cameras and the neighbourhood, and technicians adjusting the cameras is itself likely to diminish crime in the short run as the system is installed and fine-tuned, given the presence of people hanging around with clipboards, cases of wires and pliers and the like. Even when researchers are not present, the novelty of the system will for a time deter crime. But over time the novelty wears off, criminals learn where the blind spots of the cameras are, and crime will revert to its previous levels. Thus a short survey period will show a sharp decrease in crime, but a longer one will show crime returning to previous levels. Many of the studies cited by proponents of CCTV are too short to give an accurate assessment of CCTV's actual deterrent effect.

The second problem, displacement, refers to the possibility that, while crime will decrease in the areas where the cameras are located, it will increase in surrounding neighbourhoods because criminals simply move to a new neighbourhood which is not monitored. The BCCLA's full brief on CCTV (available on the website, www.bccla.org) references empirical studies that demonstrate the effects of displacement. Suffice it to say that displacement makes sense in light of what we know of criminals' motivations. As British police officer Wesley

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Sharp put it, "Certainly the crime goes somewhere. I don't believe that just because you've got cameras in a city centre that everyone says 'Oh well, we're going to give up crime and get a job.'"

The combination of displacement and the Hawthorne Effect not only raises questions about whether CCTV will have a long-term effect on crime, it also suggests that the effects CCTV will have on crime reduction depend upon its continuing use; and thus its long-term invasion of privacy. If CCTV results merely in criminals moving to another area, the only way to have a meaningful effect on overall crime rates is for CCTV to spread throughout the whole city, until there are no more areas for crime to move into. And if, as the Hawthorne effect predicts, the effects of CCTV will wear off as the presence of cameras becomes taken for granted, more and more cameras will have to be installed in order to keep its effects from diminishing. Ironically, CCTV has features resembling the very drug problem it is usually invoked to solve: like addiction, it requires heavier and heavier doses for it to continue to have any effect. Thus, those who fear that the introduction of video surveillance is the thin edge of the wedge leading to greater and greater invasions of privacy are on solid ground. This in turn suggests that CCTV is not a relatively cheap, limited answer to the problems of crime.

As we argued in the introduction to this piece, CCTV, given the asymmetry of privacy necessarily involved in it; clearly does not result in a lesser invasion of privacy than alternatives. Police officers on the street do tend to intrude to a degree on individuals carrying out legitimate activities, but they also provide many immediate benefits, such as directing tourists to the Steam Clock and warning a parent that a child is starting to wander.

It is unrealistic to expect that everyone should benefit equally from the introduction of a new social policy or program, or even that their benefits over losses be equal. But we should at least expect that those who suffer a disproportional loss for others' gain can see that their loss is required for the wider social good. CCTV in Vancouver's Downtown Eastside fails to meet even a generous interpretation of these requirements.

There are three types of people affected by CCTV in a limited area:

- (a) those who live in the area but spend a good proportion of the day in part not covered by CCTV;

Those who benefit from video surveillance will be the people who rarely visit the CCTV area and live in a neighbourhood to which the crime has not been displaced.



- (b) those who live outside the area covered by CCTV but spend a good portion of their day in the area; and
- (c) those who both live and spend most of their time in the area.

Given the displacement argument outlined above, those in groups (a) and (b) gain little if the crime done to them occurs, not in the CCTV area but in the other area(s) where they spend their time. Even if they gain something from the reduction in crime in the CCTV area, this must be balanced against the invasion of privacy they must put up with while in the area. For most people, we submit, with this last cost filtered in, the loss will be considered greater than the gain.

Those who benefit from video surveillance will be the people who rarely visit the CCTV area and live in a neighbourhood to which the crime has not been displaced. It might be thought that those who live and work in the area gain the most – a satisfying result, since they tend to be the worst off in the community – but this would be a mistake. First of all, they lose the most from the invasion of their privacy since they spend the most time in the CCTV area. And second, they lose more of their privacy than many other people in the area because of what makes them the worst off in society. If they live in a dreary single room occupancy hotel, they spend a far greater portion of their day outside under the gaze of the camera than those who work in a place without CCTV. And living in the area is highly correlated with being a member of a group most likely to be targeted by a panning camera because they are the most suspicious in the eyes of those panning the camera. Native, indigent-looking or other people are far more likely to be targeted than someone in a suit. A recent *Vancouver Sun* article pointed out that a large number of the assaults in this area occur not on the streets, but in rooming houses or other areas not covered by the cameras. In fact, the article suggested that a larger percentage are occurring indoors because of the increased presence of police on the streets. Of course minimising these assaults

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is of the greatest public concern, but it is not clear that CCTV is the answer to this problem.

Legal Requirements for CCTV

The use of video surveillance by the Vancouver Police is covered in B.C.'s *Freedom of Information and Protection of Privacy Act*, and comes under the jurisdiction of the Information and Privacy Commissioner. The *Act* requires criteria 5 – 8 of this paper (see page 4), and in addition, directs that the videotapes which constitute a record must be disposed of properly and completely erased before disposal. The *Act* also requires that individuals have the opportunity to view a record that is used in a decision concerning them, and therefore requires that tapes be kept for at least a year if they are to be used against a person. However, for practical reasons, the Information and Privacy Commissioner cannot monitor the miles of videotape that CCTV will generate each day.

Identifying suspects and Data Matching

One of the hottest areas in Artificial Intelligence research is devising artificial intelligence programs for facial recognition. To date, machines do far too poorly on these tasks to avoid miscarriages of justice if their 'identifications' were to be relied upon in criminal proceedings. A large part of the problem is that computers rely on the same two-dimensional images that are produced by a videotape. Where machines must identify people whose faces are at an angle, or have a different expression, their success rates are intolerably low. So humans will be doing the identifying; and humans do not do very well either in identifying people who they do not know well from videos, especially when people are wearing hats or different clothes. A recent study in *New Scientist* found that only 61 per cent of subjects accurately identified people they did not know from videotape footage.

A further study by the same authors reports that when subjects knew the people on the videos, their accuracy rate jumped to over 90 per cent. "Over 90 per cent" is one and a half times better than 61 per cent; but we shouldn't let this higher figure lead us to think that video identification under CCTV is not likely to produce a travesty of justice in a large number of cases. Extrapolating these data to the real world of identification of suspects from video, and adding to them the extensive data provided by

psychologists working in perception which show that people's expectations influence their perceptions and memories, we are faced with a dilemma. Where police or witnesses view video images of people unknown to them, their perceptions are not much better than flipping a coin. But where the image on the video is known to the identifier in the sense of being someone suspected of having just robbed one's store, or of a police officer trying to identify that troublemaker they've been watching for years, the identification from a video image of a face taken from an odd angle may be less accurate than flipping a coin.

Expectations in the latter case can cause even trained perceivers to read into fuzzy images what they think they should see. This raises the prospect of minorities generally thought to be the 'criminal type' being falsely identified from videotape. And, because those trying to identify suspects are not relying on their own judgment, which they know to be fallible, but on a high-tech gizmo which we think to



Even if we confine ourselves to the monetary costs of CCTV, the experience of the UK (which in 1999 was estimated to have spent up to £500,000,000 per year on CCTV) should remind us that as the initial promise of CCTV is not met, the usual answer is to simply spend more on it to attempt to derive the expected benefits.

be infallible, they express judgments with a far higher degree of confidence than they are entitled to. In other words, CCTV is the visual analogue of the polygraph.

In the future it may be considered practical to combine data from video images from CCTV with other records – credit card receipts, PharmaNet records or police incident files, to name just three – to bring about a "surveillance society" in which citizens' legitimate movements are tracked and recorded. Obviously some citizens, political dissidents or those with an alternative lifestyle, are at a greater risk than others. In addition, there are the concerns of the previous subsection about the accuracy of identification of individuals from CCTV. It is hard to say whether the greatest harm from such data matching would come about in the short run where many people will be falsely accused of being in a certain place at a certain time or in the long run when the technology improves and they are accurately

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tracked, with the result that people will have virtually no private life left that is not under the watchful eye of the state.

Costs vs. benefits

Even if we confine ourselves to the monetary costs of CCTV, the experience of the UK (which in 1999 was estimated to have spent up to £500,000,000 per year on CCTV) should remind us that when the initial promise of CCTV is not met, the usual answer is to simply spend more on it to attempt to derive the expected benefits. And we have noted above

several reasons for doubting that it is capable of delivering the benefits its proponents are looking for. And when we add to this the invasion of privacy of innocent people going about their business in a public place, it is clear that the introduction of CCTV on public streets is entirely unjustified.

The full text of this position paper, with academic citations is available at <http://www.bccla.org/positions/police/99videosurveillance.html>.

The City of Vancouver's "Safer City" Initiative:

<http://www.city.vancouver.bc.ca/tyderk/cderk/960723/a22.htm>

Privacy International

http://www.privacy.org/pi/issues/cctv_fa.html

Police Searches for Alcohol

SHOULD POLICE HAVE AUTHORITY TO SEARCH the handbags or backpacks of people who might intend to consume alcohol in public?

This question was hotly debated in the media when the BCCLA publicly criticized the Vancouver Police for searching backpacks and handbags of people traveling downtown during the Symphony of Fire fireworks competition, and seizing any alcohol found if the person could not give a plausible explanation for its possession. The Association was especially critical that force would be used against those refusing to consent to the search.

Police estimated that up to 300,000 people would flood the downtown area, and they couldn't take the chance that widespread alcohol consumption would result in another "Stanley Cup riot".

They claimed that it was reasonable to believe that anyone with a backpack or large bag going downtown on a fireworks night carried alcohol, and so the search and seizure were legal.

We are not convinced. The BCCLA does not oppose laws banning drinking alcohol in a public place, nor do we oppose seizing liquor where it is clear the person intends to break the law by drinking it in a public place. What we cannot abide are the searches. The test for a legal search is "reasonable and probable grounds to believe" that a person possesses alcohol *and* that it will be consumed illegally. This is a fairly high standard — mere suspicion (which we would argue is the



Police searching people on their way to Vancouver's fireworks.

most police can claim in this case) is simply not enough.

Nor do police fears of a riot make the searches legal. First, the vast majority of people attending the fireworks were law abiding citizens — families, groups of friends, couples, and so on — who, even if they brought a bottle of wine, were hardly likely to start a riot. As for the few idiots who would get drunk and cause trouble, there is ample authority for police to deal with the situation on a case-by-case basis.

Clearly, the fear that something bad could happen, and the mere suspicion that people with backpacks might be carrying liquor for illegal consumption should not be grounds to allow wholesale suspension of a citizen's right to be free from unreasonable police searches. The price of this extra ounce of prevention is just too high.

Detention of Anti-Serb Protesters

WHAT SHOULD POLICE DO when a large and potentially violent group of protesters threatens an individual peacefully expressing a contrary view? You'd think that would be a no-brainer: protect the individual. Not so for the Vancouver Police.

The BCCLA received two complaints from citizens who were detained by police, in one case held in jail for a few hours, when their protests infuriated a group of Serbs protesting the bombing in Yugoslavia several months ago.

Neither of the complainants wished to file a formal complaint against the officers. Since the BCCLA was more interested in clarifying police policy in such situations than it was in jeopardizing individual officers' careers, we wrote to the Chief asking for an explanation. In supporting the officers' actions, the Chief replied that police acted to prevent a breach of the peace. Given the possibility of violence, "... we had a duty to intervene. Weighing the options, removing one protester who takes a contrary view is much less likely to result in a major breach of the peace than to attempt to protect one individual as that person's actions incite a large crowd."

We argue to the contrary. The duty of police is to maintain law and order

and to protect citizens' fundamental rights. Here, the two individuals had a clear right to peacefully express their views, and the Serb protesters had no right to commit violence or even threaten to commit violence in order to stop those views being expressed. Police should have offered to protect the two, even if police were correct that protecting them would have resulted in an altercation

Police should have offered to protect the two, even if police were correct that protecting them would have resulted in an altercation between the police and the Serbs.

between the police and the Serbs. If this is police policy, then on principled grounds it is wrong.

As well, the police decision to detain the two individuals is questionable from a legal standpoint. The "breach of the peace" section of the *Criminal Code* allows police to detain a person who is breaching the peace (committing violence) or who is a threat to breach the peace. To our knowledge, there is no authority in that section for detaining the victim or potential victim of violence.

B.C.'s new *Police Act* allows not only for complaints against individual officers but also for service and policy complaints. Unwilling to accept the Chief's response, we have written to the Police Complaint Commissioner to ask that the Vancouver Police Board investigate our complaint and rule on the policy espoused by the Chief. Our complaint is currently under investigation.



Electronic Updates

- To help better serve complainants, the Association has added on-line referral information and an easily-accessible copy of the case acceptance policy to our web site.

Our list of web resources at <http://www.bccla.org/otherlinks.html> now contains links to the *Red Book* Directory of Services in the Lower Mainland (which was recently put online at <http://www2.vpl.vancouver.bc.ca/dbs/redbook/htmlpgs/home.html>).

Our 'other link' page also has information on a number of agencies we frequently refer complainants to.

Also online is a more easy-to-find copy of the Association's Case Acceptance Policy: <http://www.bccla.org/caseaccept.html>.

- As mentioned in the last *Democratic Commitment*, those who prefer can now receive the newsletter view e-mail. Please let us know if you are interested by e-mailing info@bccla.org.

- A special resource worth mentioning for international privacy news: the Global Internet Liberty Campaign (<http://www.gilc.org/>).

Legal Updates

CURRENT BCCLA CASES



Little Sisters

THE BCCLA AND CO-PLAINTIFFS Little Sisters Book & Art Emporium are on our way to the Supreme Court of Canada.

Readers may recall that, in a 2 to 1 decision, the B.C. Court of Appeal upheld a lower court ruling that although in screening material destined for the gay and lesbian bookstore Canada Customs systematically violated the equality and free speech rights of gay and lesbian readers, writers and booksellers, its censorship regime is not so flawed that it cannot be fixed. We argued the opposite — that so long as bureaucrats are making sensitive decisions about what Canadians can and cannot read, the system is bound to violate civil liberties. We are adamant that Canada Customs' censorship powers be struck down.

Given the importance and the high profile of this case, many organization applied to intervene at the Supreme Court. Those granted intervenor status on our side (“Yea!”) include: the

Women’s Legal Education and Action Fund (LEAF), the Canadian Civil Liberties Association, Equality for Gays and Lesbians Everywhere (EGALE), Canadian Conference on the Arts, and PEN Canada, a writers organization. Intervening on the other side (“Boo!”) are Equality Now, a feminist organization, and the Attorneys General of B.C. and Ontario.



photo: jamie griffiths

We filed our written argument with the SCC in August, and expect that the federal Crown and the intervenors will soon make their written submissions. If all goes well, the case will be heard in the winter sitting of the SCC (roughly, January to Easter).

Our factum is online at <http://www.bccla.org/lifactum.html>.

Surrey School Board Book Ban

AFTER A DEFEAT IN B.C. SUPREME COURT, the Surrey School Board has appealed the decision to the B.C. Court of Appeal. In addition, the petitioners in the case — Surrey parents, teachers and students — have cross-appealed. As we did at the trial level, the BCCLA will intervene at the appellate level.

In 1997, the Surrey School Board refused to approve three books for inclusion in the Kindergarten and Grade 1 curriculum because they depict families with same-sex parents in a positive light. The Board argued that some parents in the school district wanted the books excluded because they contradicted the parents' moral and religious beliefs that homosexual relationships are sinful. It also argued that the books were age-inappropriate because they raised issues of sexuality at too early an age.

The petitioners argued that the books were age-appropriate (no sexuality issues were raised, merely reference to “two moms” and “two dads”), that the expression rights of students and teachers were violated, and that combating discrimination against gay and lesbian required resource materials which

present homosexuality in a positive light.

In its intervention, the BCCLA argued that the Board had illegally imported religion into the schools, contrary to section 76 of the *School Act*, which ensures separation of church and state.

In a 1998 ruling, the court relied heavily on the BCCLA's submission in striking down the Board's decision and ordering it to reconsider the request for approval of the three books.

Profound issues are at stake in this case. How far must our public schools go in protecting gay and lesbian students from discrimination? And while recognizing the importance of parents' involvement in their children's formal education, where do “parents' rights” end and those of our secular public school system take over?

The Association is especially grateful to lawyers **Chris Sanderson, Chris Gora, and Keith Bergner** for donating their time and talents to represent us in this case.

The date for the Court of Appeal hearing has not yet been set, but the factum is on the BCCLA's web site at <http://www.bccla.org/surreysb.html>.

APEC Hearings

THE RCMP PUBLIC COMPLAINTS COMMISSION hearing continues regarding the conduct of the RCMP during the APEC conference in Vancouver in November of 1997. The BCCLA is a complainant and is well represented by **Michael Doherty**, a lawyer with the B.C. Public Interest Advocacy Centre. Current witnesses include police officers and civil servants who had significant involvement with the events at APEC.

The hearing is open to the public and runs from 9:30 am - 4 pm daily. It is located at the Plaza of Nations, Suite A, 301-770 Pacific Boulevard in Vancouver. Witnesses are

scheduled until the end of 1999; final arguments will be heard in the new year. It is worth noting that the hearing takes every third week off, so if you are interested in

attending, contact the RCMP PCC at 666-5555 for an updated schedule of hearings. Transcripts of witness testimony can be viewed on the Internet at: <http://www.tscript.com>.



B.C. Election Act

DURING THE SUMMER, the BCCLA intervened before the B.C. Supreme Court in a constitutional challenge to restrictions on third party advertising and publication of opinion polls during provincial elections. The law restricts third parties to spending \$5,000 during elections and requires the publication of certain information when publishing an opinion poll. The goal of the restrictions according to the government is to make elections more fair. The BCCLA argued that the restrictions have the effect, if not intent, of unduly limiting citizens' participation during an

election. They permit political parties and candidates to effectively define the issues for the electorate, rather than *vice versa*. The BCCLA also argued that the objective of the opinion poll publication requirements is not adequately pressing to override the fundamental constitutional rights of free speech and free association. The Court has reserved its judgment which is expected sometime in the fall of 1999 or the new year.

Art Grant of Grant Kovacs Norell, assisted by BCCLA Policy Director Murray Mollard, ably represented the BCCLA in court.

R. v. Sharpe

SPARKING FURTHER CRIES FOR INVOKING the notwithstanding clause in the *Charter of Rights and Freedoms*, two of three judges of the British Columbia Court of Appeal recently ruled as unconstitutional the criminal law which prohibits the possession of child pornography.

In *R. v. Sharpe*, both Madam Justices Southin and Rowles relied extensively on the BCCLA's arguments as an intervenor in concluding that there was not adequate justification for the possession offence. Madam Justice Southin was blunt: in her view, state prohibitions on the private possession of the expression of one's own thoughts could never be justified. Madam Justice Rowles took a more nuanced approach, finding that the law's objective was legitimate (preventing direct and indirect harm to children from child porn) and that the prohibition achieved this objective. However, she held that the state had no justification in prohibiting the possession of products of

one's own imagination and written material for one's private consumption, and as such, the law is unconstitutionally overbroad.

The BCCLA also argued that the definition of child pornography was unconstitutional in that it prohibited possessing pictures of sexual activity that itself was legal. The Association's position is that a possession offence is legitimate but only when it prohibits the possession of images of real children engaged in sexual activity.

The Association was admirably represented by **John McAlpine, Q.C.** and **Andrew Gay** of McAlpine Gudmundseth Mickelson and assisted by **Bruce Ryder**, a professor at Osgoode Hall Law School.

The BCCLA is preparing to intervene before the Supreme Court of Canada which is scheduled to hear the case January 18, 2000.

The full judgment in *R. v. Sharpe* can be viewed on the Internet at: <http://www.courts.gov.bc.ca>.



Giving through the United Way

If you contribute to the United Way through a pledged payroll deduction plan, you have the option of specifying a particular organization to support.

The BCCLA is not a United Way affiliate and does not receive funding automatically.

Should you wish to contribute to the BCCLA through the United Way, please indicate on your United Way form that you wish to designate the BCCLA to receive part or all of your donations. Details will be taken care of by the United Way.

Are you thinking about your financial future? Reviewing the terms of your will?

If so, please remember the BCCLA Endowment Fund.

Bequests, gifts of capital property and assignment of life insurance policies are some of the ways in which supporters can make an important contribution to the future of civil liberties in BC, while at the same time realizing substantial tax savings.

All gifts are placed in the capital account of the Endowment Fund, and only the interest can be used by the board of directors for the Association's work.

A bequest to the BCCLA's Endowment Fund is a gift that keeps on giving.



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