THE DEMOCRATIC Commitment

JOURNAL OF THE BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION JUNE 2000, VOLUME 34 NUMBER 1

What's inside

Little Sister's case makes it to Supreme Court of Canada

IN MID-MARCH, the Supreme Court of Canada heard our pleadings in the *Little Sister's Book and Art Emporium* freedom of expression case. This is certainly the longest-running lawsuit the BCCLA has ever been involved in, and probably the most important. Upon its outcome hinges not just the fate of our clients, but how Canadian courts conceive of the very purpose and meaning of expression rights.

At immediate issue is Canada Customs' continuing authority to prohibit entry to any expression materials—movies, videos, paintings, books, drawings—that its agents believe contravene the obscenity provisions of the *Criminal Code*. The government argues that, when it comes to dirty texts and pictures, it's best to find the nest and smash the eggs before they can enter the country and hatch into dangerous thoughts. We have argued that the expression rights are far too important to be left to the unquestioned whim of customs agents who have had

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The Little Sister's legal team on the steps of the Supreme Court of Canada.

Little Sister's case

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only a few hours of "training" in the art of separating the obscene from the innocent.

That is the "process" part of our case; but once before the highest court, we also took the opportunity to challenge the substance of the obscenity law the justices upheld in their *Butler* decision of 1992. *Butler* enshrined the so-called "Canadian community standard of tolerance of the possibility of harm" test of obscenity.

This test directs judges trying an obscenity case to decide the central issue of obscenity by asking themselves this question: "would the community of Canadians, taken as a whole rather than in any part, tolerate (that is to say, tolerate others seeing and reading rather than tolerate for their own perusal) the possibility of harm flowing from the changes in attitude and behaviour of persons exposed to the publication of this matter."

The judge needs hear no evidence to answer this question.

That this test is absolutely crazy is now evident to just about everyone in the country who attends to such things, including, I joyfully report, leading feminist organizations, including the Women's Legal Education and Action Fund (LEAF).

So the Court was angered in the morning when our counsel, Joseph Arvay, made our arguments, and the host of intervenors, including LEAF, rose to support us in asking the justices to reverse themselves on the *Butler* test... and it was positively furious in the afternoon when the government's lawyers failed to provide them with any plausible arguments with which to resist our pleadings.

Look forward to an interesting decision in this landmark case.

APEC final arguments completed

The BCCLA presented its oral argument to Commissioner Ted Hughes on Wednesday, June 28, 2000. The Association said that the evidence placed before the RCMP Public Complaints Commission over the past year clearly demonstrates that citizens' right to freedom of expression was violated by the RCMP, and that influence by government officials intent on sparing foreign leaders embarrassment played a key role in the RCMP's actions.

We are deeply thankful to **Michael Doherty** of the **B.C. Public Interest Advocacy Centre** for the enormous donation of his time and talents as our counsel throughout the marathon hearings.

Our written submission is on our web site: http://www.bccla.org/positions/freespeech/00apecargument.pdf.

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The Democratic Commitment *is a quartlery 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. Its mandate is to preserve, defend, maintain, and extend civil liberties and human rights in British Columbia and across Canada.*

The devil's advocate: trouble in the forests

A MESSAGE FROM BCCLA PRESIDENT CRAIG JONES

We know it is spring, because the logging—and the attendant protest—has begun in earnest. Along with the protesters come the inevitable injunctions, and the even more inevitable violations of the injunctions. As several municipalities' tourist bureaus vie for the coveted title of B.C.'s hot spot, this year, as last, the hottest spot in the province will not be the dusty semi-desert of the Cariboo, or the sunny Southeast Coast of the Island; it will be in the Elaho Valley, site of an Interfor logging operation. Various protest groups are arrayed against it, and it has spawned one of the more peculiar cases to have come before our Courts.

The Elaho Valley is public land, and it is, by all accounts, breathtakingly beautiful. Various groups maintain and use hiking trails in the area. Some argue that the logging is destroying this fragile wilderness. Last year, I would have liked to discover for myself both the beauty of the Elaho and the harms, if any, of the logging, but I couldn't, because there was an injunction in place preventing me from visiting the area. And don't think that it applied to me because I'm a ne'er-do-well protester; the injunction actually applied to you too.

As the next best choice, I would have liked to have someone from the newspapers or TV to go in and report back to me on what's going on. Trouble is, the injunction stopped them, too. (Except for 'select' members of the media invited by the police: see my article in the *Vancouver Sun* "Focus" section, June 6, 2000). In fact, I understand there was for a time even a "no fly zone" to prevent TV helicopters from taking shots from the air. In short, a small section of British Columbia became, for almost a year, a fair imitation of Northern Iraq, and hardly anyone knew it.

Anti-protest injunctions are handed out with monotonous regularity in this province. This is a result of explicit Crown and RCMP policies not to enforce the criminal law against 'civilly disobedient' protesters, but rather to rely upon the courts to grant injunctions at the behest of the logging companies to prevent interference with their operations. Such is the regularity of the distribution of these injunctions that some have taken to calling the resource companies "injunkies". In this metaphor, the courts are their dealers, and a strange symbiosis has evolved.

Even by the generous standards of this province's courts, however, the Elaho injunction was something quite extraordinary. That is because it not only forbade interference with logging operations, but went further and banned any protest in the area nearby the logging operations. And, as I mentioned earlier, the injunction prevented you and I from simply walking the trails of the Elaho Valley, or from otherwise being within this court-created "bubble zone".

Now, you might think it is unfair that you, having had no notice of the injunction hearing (you almost certainly won't: resource companies prefer to file such motions *ex parte*, or without notice to anyone), should be bound by the terms of the Order. Tough. Even having no opportunity to participate in the debate, you could face arrest and jail if you dared to walk among the Elaho fern and fir. The first sentences handed down

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The devil's advocate

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to those who pled guilty to violating last year's injunction have been between 12 and 56 days, which seems to me extraordinarily harsh for first-time non-violent offenders; child molesters frequently get far less.

Of course, you, as a person affected by such an injunction, can apply to the court to have the Order "varied" to exclude you. Some lawyers (though not all that many, I suspect) would draft the appropriate papers and argue the matter for you for less than a thousand dollars. But how many hundreds of dollars should a citizen of British Columbia be forced to pay for the right of walking (or, I should add, even protesting) on public land? Just what does "public" mean anyway, in this peculiar context?

If you cannot afford to pony up, and if you lack the knowledge, skill, or time to make the argument in the Supreme Court yourself, then you could just stay the heck out of the Elaho Valley. If you didn't, you could wind up in jail, along with various protesters and at least one member of the media who has been caught within the Elaho Bubble. Nor could you argue in your defence that the injunction itself is unconstitutional, that you had a right to disobey it. The ancient law of contempt of court will not allow you attack it "collaterally"; that means that you must obey even an unconstitutional injunction.

In May of this year, the B.C. Civil Liberties Association argued as an intervenor in the B.C. Supreme Court that judges must weigh the *Charter* rights of those affected when it grants injunctions like that at Elaho. We argued that any such injunction must be carefully tailored to infringe the citizens' rights as minimally as possible.

On June 6th, Mr. Justice Vickers released his judgment on the arguments made by John Dives, the BCCLA's counsel, and by counsel for the Western Wilderness Committee, Angela McCue of the Sierra Legal Defence Fund. His Lordship agreed with the BCCLA's submissions when he wrote: "The public interest issue that must be protected in these proceedings is the right to lawfully protest and the right of public access to public forests."

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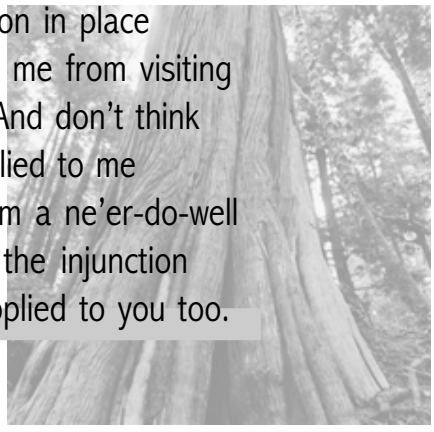


Vickers J. also adopted the Association's position on the over-reliance of injunctive remedies in logging disputes, and apparently shared our frustration with the Crown's and police's documented decisions not to enforce the criminal law in logging disputes.

But much more needs to be done on a political level. The courts have been forced to their current course by an abdication of responsibility by the police and by the Crown. In recent weeks, we have seen logging companies and protesters (including Interfor and the Western Canada Wilderness Committee, adversaries at Elaho) trying out newer, less confrontational approaches to dialogue over forestry. It is high time that our politicians made a similar commitment to revisit the ways in which the inevitable disputes are managed, so that the citizens need not be the ultimate losers of the War in the Woods.

Special thanks as always to our counsel, in this case **John Dives** of **Dives Grauer Harper**, who represented the Association *pro bono publico* during the unusually long chambers hearing.

Craig Jones
President

Our factum in the Elaho case is on-line at http://www.bccla.org/elaho.html.

New threats to campus free speech

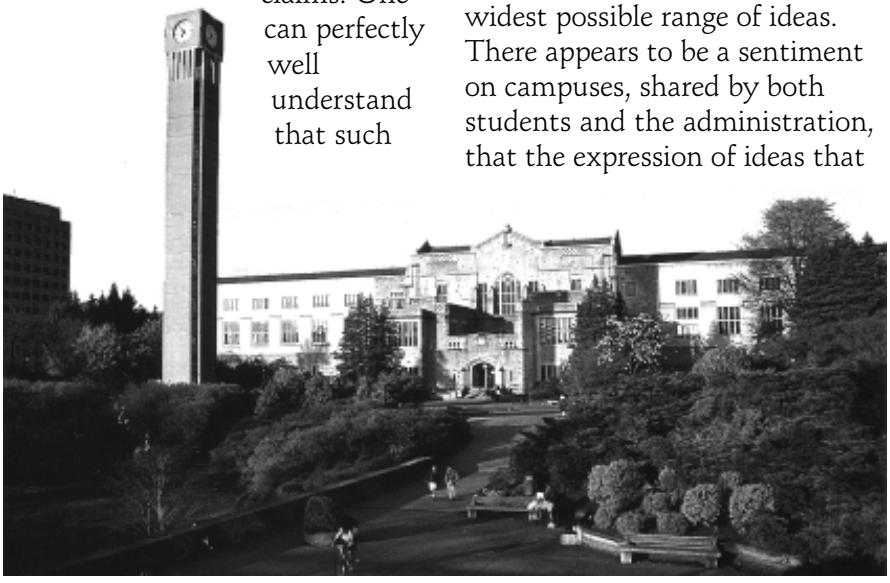
Several recent incidents on B.C. campuses reveal a troubling trend of stifling the speech we do not like:

- UBC's administration placed heavy financial requirements on a pro-life group that wanted to erect a large anti-abortion display
- UBC Alma Mater executive members destroyed a smaller pro-life display erected by the same group
- UVic Students' Society denied membership to a pro-life student group on the grounds that their expressed views contradicted the Society's official position on the issue
- a person on the UVic campus who displayed a sign and handed out pamphlets expressing his opposition to the aboriginal treaty process was first denied access to the Students' Society building, then hauled before a UVic harassment committee.

No doubt, these expressions were offensive to some. The two displays at UBC compared abortion to the Holocaust, and there are acute sensitivities surrounding aboriginal justice claims. One can perfectly well understand that such displays can cause anger and a desire that somehow they be made to go away. No one welcomes the expression of ideas that are hurtful or offensive to them.

Yet this natural human reaction—to silence those expressions that offend—must be resisted if we are to pay more than lip service to our commitment to a democracy. At the heart of a democratic society is the freedom to speak our minds on matters of public importance, and ideas about controversial issues such as abortion and aboriginal self-government clearly must be publicly aired and debated. Like many other ideas on sensitive topics, our expression of these may be intemperate, full of the passions that lie behind them. The public forum is by its very nature raucous at times: strong expressions come with the territory.

What is really discouraging about the above incidents is that they took place on university campuses, the very places where one would expect that tolerance of, even encouragement of, the widest possible range of ideas. There appears to be a sentiment on campuses, shared by both students and the administration, that the expression of ideas that are offensive to the majority is not to be tolerated, as if the ideas accepted by the majority have some special claim to truth, or to a higher morality. Even putting aside the error of equating popularity with truth or rightness, one can not but be struck by the arrogance of such an attitude.



Even putting aside the error of equating popularity with truth or rightness, one can not but be struck by the arrogance of such an attitude.

It is an axiom that everyone, both those in the majority and those in the minority, think that their beliefs are true—that is what it means to hold a belief. But the fact that one holds a belief doesn't make it true, nor does the fact that the majority share that belief.

Assuming that students and members of the administration still care about the truth, the BCCLA is truly dismayed at their reaction in the above incidents, and at the necessity to try to convince universities—the very places where freedom of speech should be sacrosanct—of the importance of tolerance for unpopular or offensive ideas.

Banning controversial groups from public spaces

Libraries, community centres and other public spaces across B.C. are coming under increasing pressure to deny meeting space to so-called hate groups. (We say "so-called" because members of the groups often referred to possess a variety of ideas, only some of which could be classed as involving hatred towards minorities.) The BCCLA finds the proposal that those applying to meet in public spaces should be screened according to their ideas about race or sexuality repugnant, and has made submissions in several instances where this issue arose, urging public officials not to cave in to such demands.

Two of these incidents involved libraries: the Victoria Public Library and the Vancouver Public Library. In each case the argument was that allowing "hate" groups to meet in library meeting rooms gives the groups credibility, a "seal of approval" from the library in question, and leads to increased violence against minorities. As public institutions, it was argued, libraries should demonstrate their abhorrence of hatred and intolerance by denying meeting space to groups which espouse them.

In submissions to each of the library boards, and in public meetings, BCCLA representatives have opposed such restrictions. We share with equality-seeking groups a repugnance for racist and homophobic attitudes, and have tried to address these in our publications, in casework and in legal actions. However, we balk at state restrictions on the public expression of such attitudes.

Libraries are state institutions. It is one thing for an organ of the state in a democracy to promote certain ideas (such as tolerance) and to come out publicly against racism and homophobia. It is quite another for a state institution to use its authority to interfere with the expression of intolerant views and attitudes. In the latter case, it crosses the line into a form of censorship. True, the group could meet elsewhere, and so such a library policy is not like criminal or human rights law. Yet it is clear that a state agency is denying the group a benefit normally available to all citizens simply because of the content it its speech. That makes it a form of censorship. In addition, a policy denying a group access to public spaces because of the beliefs shared by the group infringes on the group's freedom of association.

The argument that in renting space to such groups a library is giving them credibility is also fallacious. The current policy of both libraries is not to consider the content of a group's ideas in deciding whether to rent space to them. Thus, a group with any ideas whatsoever, no matter how bizarre, can meet there. If there is little reason to suppose that the Flat Earth Society gains

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credibility for its views because it can meet in public library space, then there is equally no reason to suppose that a group whose views are racist gains credibility.

In fact, for a library to try to institute such a policy would involve it in sorting out groups with acceptable ideas from those with unacceptable ones, thus giving credibility to those who it allows to meet. The practical difficulties involved in such an undertaking, let alone the flak a library would receive from allowing, for example, a pro-life or a pro-choice group to meet, argue strongly against such a policy.

Finally, libraries in particular are institutions whose mandate is to provide access to the widest possible range of ideas, institutions whose stacks contain books expressing contrary views on virtually every conceivable topic, including race and sexuality. A library would have some fancy stepping to do to reconcile its mandate with a policy of denying meeting space to groups that preach intolerance.

To their credit, both libraries have so far resisted the pressure to deny meeting space to groups that espouse intolerance. We are somewhat concerned that in doing so, the Vancouver Public Library did agree to require groups wishing meeting space to agree not to violate the *Criminal Code* or the *Human Rights Code*. This requirement seems to be targeted at speech, and could place a "chill" on expression since it is not at all clear ahead of time what speech might run afoul of these laws. On the whole, however, we applaud the libraries' standing up for freedom of expression.

New Prince George policy

The issue does not seem to want to go away. Recently, the City of Prince George struck a Task Force on Hate Activities, and accepted in principle the Task Force's recommendations. These include a very broad definition of "hate activity" as:

> "an act or attempt by an individual or group directed at a person, property or public order that demonstrates intentional hostility to another because of race, religion, sexual orientation, place of origin, ethnicity, disability, gender, age or other identifiable characteristic"

and a recommendation to adopt a "zero tolerance" policy towards hate activities. They also include a recommendation:

> "to deny access to public space, facilities and properties within the jurisdiction of the City of Prince George, and owned or leased by recipients of City grants to any individual or group that promotes views and ideas which are likely to promote discrimination, contempt or hatred for any person, and encourage others who rent facilities to do the same."

Clearly these recommendations go way beyond what the two libraries were asked to do, and include far more behaviour than is covered by the *Criminal Code* and the *Human Rights Code*. We have written to the city about our concerns, and have asked to speak to City Council when the matter comes up for further discussion.

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Discriminatory speech: The Citizen's Research Institute case

SHOULD SPEECH THAT expresses a discriminatory attitude be banned? That is the issue in an upcoming Human Rights Tribunal hearing at which the BCCLA will present oral and written arguments as an intervenor.

The hearing stems from a complaint against a group called the Citizens Research Institute (CRI), which circulated a pamphlet entitled "Declaration of Family Rights". When filled out by parents, the Declaration purports to forbid the school from exposing their children to any views of the "homosexual lifestyle" as acceptable.

A complaint was brought by several persons to the Human Rights Commission against the Institute. The Commission then referred the complaint to the Human Rights Tribunal under paragraph 7(1)(a), which bans speech that "indicates discrimination or an intention to discriminate" against protected groups.

The BCCLA does not oppose 7(1)(a), so long as it is properly interpreted. If a person has the authority to discriminate (such as an employer or restaurant manager), and indicates an intention to discriminate (places an employment ad which says "women need not apply," or a sign in the restaurant saying "blacks will not be served"), then the speech can properly be restricted since uttering the speech in effect is an act of discrimination.

However, neither the CRI nor any parent who submitted a declaration has the authority to set the school curriculum. Why should it be against the law for a parent to tell a teacher or principal what they think should or should not be in the curriculum? Saying they don't want their children exposed to positive ideas about gays and lesbians may be reprehensible, but it ought not be illegal.

Teachers, principals, school boards and the Ministry of Education are all required by law to provide a positive and welcoming environment for all students, and to protect students from harassment and discrimination, including gay and lesbian students.

If some school teachers kept the Declaration on file and in so doing allowed it to create a demeaning and intolerant atmosphere for gay and lesbian students, arguably they may be subject to a human rights complaint. Indeed, such a complaint, if successful, would provide a strong precedent for imposing an obligation on school authorities to ensure that all students, and in particular gay and lesbian students, are not subject to discrimination or an atmosphere of intolerance no matter what views some parents might have.

Thus, the BCCLA is intervening in this case on the interpretation of paragraph 7(1)(a) of the *Code*. If it were interpreted in such a way that the submission by parents of the Citizen Research Institute's declaration were caught by the section, the threat to freedom of expression would be huge. If citizens cannot express and distribute their ideas even though the ideas be intolerant of others' lifestyles, then as a democratic society we are in deep trouble. To ban such expression would effectively cleanse the public forum of much that must be publicly debated if we are as a society ever to grow and mature.

Why should it be against the law for a parent to tell a teacher or principal what they think should or should not be in the curriculum? Saying they don't want their children exposed to positive ideas about gays and lesbians may be reprehensible, but it ought not be illegal.

Case updates

CURRENT CASES AND LAW REFORM WORK

Refusal to certify Trinity Western University challenged

THE B.C. COLLEGE of Teachers has received leave from the Supreme Court of Canada to appeal a B.C. Supreme Court decision, upheld by the B.C. Court of Appeal, striking down the College's decision not to certify the teacher education program at Trinity Western University. The BCCLA will intervene in the case.

Trinity Western, a private Christian university, has a code of conduct under which students agree not to engage in "Biblically condemned" conduct, including extramarital sex and homosexual behaviour. The College feared that, without a requirement that the final year be taken at Simon Fraser University to introduce Trinity Western education students to secular values, these students might discriminate against gays and lesbians when they graduate and teach in the public school system. The College also judged that it is not in the public interest to accredit the program because the university's code of conduct allegedly discriminates against homosexuals.

The BCCLA intervened at both the trial level and at the B.C. Court of Appeal in support of Trinity Western. We argued that:

(1) since there was no evidence whatsoever that Trinity Western graduates teaching in the public schools have discriminated against gays or lesbians or failed to protect them from discrimination, the College's decision was patently unreasonable and

(2) even if the Code of Conduct discriminates against homosexuals, the right of citizens to form private associations or religious communities and to limit membership to those who share their views, and not be disadvantaged by the state because of this, is fundamental to a democratic society.

No date has been set for the Supreme Court of Canada hearing.

Surrey School Board book ban back in court

ON JUNE 21, 22 AND 23 the BCCLA intervened in the B.C. Court of Appeal hearing regarding Surrey School Board's decision not to approve three children's books that depict same sex couples for use in kindergarten and grade one classrooms.

The School Board is challenging a B.C. Supreme Court decision that struck down that decision. The court did so largely on the basis of the BCCLA's arguments as intervenors that the decision was based on religious views, and therefore violated the requirement in the *School Act* that public schools be conducted on "strictly secular and non-sectarian" principles.

In our submission, we argue that although secular values often have roots in religious views, what makes them "secular" is that they are held irrespective of their religious credentials. Since the evidence before the court is that the board was concerned about a conflict between the books and some Surrey parents' religious views on homosexuality, the board's decision clearly violates the *School Act*.

Our factum in the Court of Appeal is on-line at http://www.bccla.org/surreysb.html.

> **Our** schools play a central role in establishing the democratic foundations of B.C. society. Inculcation of the principal values of tolerance, independent thought and responsible choice in children is an essential element of developing a citizenry capable of exercising a democratic mandate.
>
> *—excerpt from our factum*

BCCLA critiques proposed Youth Criminal Justice Act

In April 2000, the BCCLA presented a written submission to Parliament on Bill C-3, the *Youth Criminal Justice Act*. This Act overhauls the *Young Offenders Act* and has two principal objectives.

First, the *Act* incorporates principles of restorative justice through the promotion and increased use of alternative measures such as counselling and diversion programs for less serious offences.

Second, it incorporates a punitive retributive justice approach in dealing with classes of young offenders who are deemed to be 'violent'.

In the BCCLA's submission, we supported Parliament's incorporation of restorative justice principles while addressing the need for Parliament to consider remedying some of the flaws in the *Act* that are clearly detrimental to the proper treatment and rehabilitation of young offenders.

We focused attention on the present moral climate surrounding issues of juvenile justice, especially cases of youth violence. In particular, we suggested that fears generated by sensational treatment of violence-related issues arising from rare instances of "swarming", or other perceived "youth gang" activity, have consistently been shown to be unsupported by hard empirical facts. For this and other reasons, we suggested that deciding public law on the basis of a few anomalous, but high profile cases such as the tragic murder of Reena Virk, offends notions of justice.

The BCCLA provided six key recommendations for Parliament to consider:

- that Parliament remove a section of the Act that would allow identities of youthful offenders, and their records, to be published under certain circumstances.
- the bill be amended to strengthen a young offender's right to privacy by removing subsections that would allow a young offender's records to be disclosed to schools for "rehabilitative purposes".
- existing provisions that permit young offenders to be placed in secure facilities with adults under special circumstances be removed.
- improved safeguards for an accused's rights against self-incrimination by removing subsections that would make it easier for confessions or statements possibly made unknowingly or under duress to be admitted into proceedings.
- definitions of 'violent offence' and 'serious violent offence' be modified to include the necessity of demonstrating criminal intent as an element of the offence. As worded, it was only necessary to show that an act "causes or creates a substantial risk of causing bodily harm".
- that the age at which adult sanctions can be applied be lowered from 16 to 14 years.

Secure Care legislation

Although supporting, in principle, the idea of short-term detention of children who are at immediate high risk of serious harm because of drug addiction and/or prostitution, the BCCLA came out swinging against the government's proposed "Secure Care" legislation. The major problem with the legislation is that it allows for detention for up to 30 days—a much longer period of time than is necessary to take the child out of the dangerous situation and put together a treatment plan, and this period can be extended to 90 days. We are also opposed to the inclusion of youths 16 to 18 years old in the regime.

Finally, we would support secure care legislation only if adequate services are in place which children can access voluntarily and on a timely basis. These services are currently not available, and we have no confidence that they will be there when the new law is proclaimed in 10 months.

See our media release at http://www.bccla.org/press_releases/securecare.html and the full text of our position paper on the topic at http://www.bccla.org/positions/children/securecare.html.

Use of video surveillance increasing

Since the Vancouver Police Department's proposal to introduce video surveillance cameras on public streets in the downtown eastside in 1999, the BCCLA has turned its attention to the increasing use of this technology to track citizens' movements.

The Department's proposal is not the first proposed use of video cameras in public spaces; indeed, there is an alarming wide spread use of the technology, often without adequate notice to citizens. However, the police proposal forced a public debate on the intrusiveness of this technique and its efficacy and led to the BCCLA developing a position paper on the proposal. The following items update our work on video surveillance related matters.

RCMP video surveillance in a Kelowna park

In the fall of 1999, the BCCLA filed a complaint with the Privacy Commissioner of Canada regarding the use of surreptitious video surveillance of a public park in Kelowna. The Kelowna camera had initially been kept secret by the RCMP until the media reported its use. The RCMP subsequently provided public notice and confirmation of its use via the media.

The BCCLA generally opposes the use of video surveillance cameras by police in public places. In our complaint to Commissioner Bruce Phillips, we focused on the requirement in the *Police Act* for public notification of the collection of personal information, something the RCMP failed to do in Kelowna until several weeks after the camera was in use. We also hoped for a strong statement from the Commissioner raising concerns about the utility and privacy implications about police video surveillance.

In his response, Mr. Phillips acknowledged that there is a concern about citizens' privacy even in public spaces especially in the context of video surveillance. However, he largely dismissed our concerns noting that the initial use of the video surveillance was in conjunction with a criminal investigation, which does not require public notification.

We have sent a further letter to the Privacy Commissioner pointing out that he may be mistaken regarding whether the RCMP voluntarily notified the media.

Furthermore, Mr. Phillips noted that the police are required to obtain a warrant to use video surveillance under the *Criminal Code* but he gave no indication whether this requirement had been respected in the circumstances. We also urged him to more rigorously defend his position that the "deterrent effect of the video monitoring in many instances may be quite impressive". The BCCLA's review of the literature suggests that video surveillance is better at displacing crime rather than preventing it.

We await his response.

Police video surveillance of public demonstrations

Police are increasingly using video cameras to record people

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Video surveillance

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and events at public demonstrations. Whether it be an anti-police rally or the latest version of "Riot at the Hyatt", protesters are concerned about the propriety of the police using the cameras in the first place and if they are used, what the police do with the images that are recorded.

Given the implications for privacy and the free speech rights of protesters, the BCCLA will consider this issue in the coming months.

Video surveillance as a condition of an adult store license

The Association recently intervened before the Motion Picture Appeal Board in an appeal of a condition sought to be imposed by the Director of Film Classification on an operator of an "adult store" that would require that the entrances to individual booths that screened pornographic films be captured by video surveillance and that such video tapes could be seized upon demand by the Director or the police.

The objective of the condition is ostensibly to ensure that staff enforce rules about no minors and only one person enters a booth at a time. The Association is very concerned that the video surveillance condition would undermine the privacy and free speech interests of the patrons of this store and would become a standard for all adult stores that operated porn booths. We argued that the Director and the Appeal Board ought to consider *Charter* values such as privacy and freedom of expression in exercising their discretion under the *Motion Picture Act* to impose conditions on an operator, especially given the sensitive nature of the material in question. In our submission, we argued that most people would be willing to divulge that they shop at Department Store X but that they would be much more circumspect in disclosing the fact that they frequent Adult Store XXX, which proves our argument that patrons have a reasonable expectation of privacy not to be subject to state surveillance when visiting adult stores.

In an interesting twist to the hearing, counsel for the Director argued that neither the Director nor the Appeal Board could consider our arguments because no constitutional notice had been given under the *Constitutional Questions Act*. We countered by arguing that we were not challenging the constitutional validity of the condition nor seeking a constitutional remedy under that Act, but rather encouraging the Appeal Board to take into account important values like privacy and free speech when deciding whether the condition was appropriate.

The Appeal Board agreed that they had jurisdiction to consider a *Charter* values argument but have reserved on the merits of the appeal. Legal counsel for the Director has indicated that they may seek a judicial review of the decision to consider a *Charter* values argument.