

# the democratic

# Commitment

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## TRINITY WESTERN CASE A CIVIL LIBERTIES VICTORY

# Supreme Court gets it right!

THE SUPREME COURT of Canada's recent decision in *Trinity Western University v. British Columbia College of Teachers* is a major victory for civil libertarians, and for all Canadians. At issue in the case was whether the College can refuse to certify Trinity Western's teacher training program because of the university's code of conduct that requires students to refrain from "homosexual behaviour".

For the B.C. Civil Liberties Association, the Court's decision vindicates our five years of work to convince the courts, and the public, of the right principles to resolve this dispute. In this task, we were greatly assisted by Tim Delaney of Lindsay Kenney, who represented the Association at the B.C. Supreme Court, the B.C. Court of Appeal and the Supreme Court of Canada. We are sincerely thankful for his assistance.

In the busy world of fighting for civil liberties, it is occasionally worth pausing to catch our breath to reflect on the important decisions. What follows is a primer on the case and its implications.

### Freedom of religion v. equality

The challenge posed by the Trinity Western case for the BCCLA, and the Supreme Court of Canada, is how to reconcile two sets of conflicting values: freedom of religion and association on the one hand, and on the other, equality. In the context of this case, the conflict involves Trinity Western's right to create a learning environment that reflects instructors' and students' religious beliefs versus the

College's obligation to ensure teachers respect diversity including different sexual orientation.

Both sets of values are constitutionally protected in the *Charter of Rights and Freedoms*. Moreover, both values are important to the BCCLA and civil libertarians. Long before human rights legislation existed in British Columbia, our Association assisted individuals who complained about discrimination in the workplace, housing or public services. We also lobbied government to create legal protections against discrimination. Respect for diversity and equality for gays and lesbians were also animating reasons for our recent legal intervention to oppose the Surrey School Board's refusal to approve children's books that portrayed families with same sex parents for use in Surrey classrooms.



Tim Delaney, counsel

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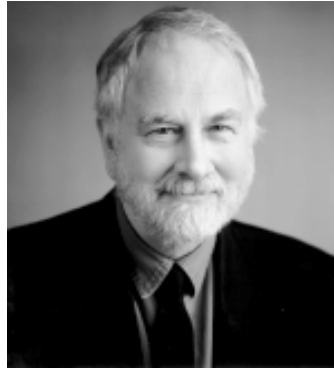
## THE DEVIL'S ADVOCATE / A message from our president

AS MANY READERS will be aware, Michael Ignatieff, the Carr Chair of Human Rights at the Kennedy School of Government at Harvard, gave a benefit speech for us May 7th. We filled the Telus Theatre at the Chan Centre at UBC for the talk. The preceding (and following) silent auction was great fun, and provided a badly needed dose of springtime liquidity for the Association coffers. The BCCLA and its supporters owe a great deal to David Sutherland and Alan Rowan for taking charge of this event and ensuring its success.

Michael Ignatieff's talk fascinated me, as much for what he did not say as for what he stressed. Michael did not frame his discussion of "The Rights Revolution and Beyond" in terms of the great philosophical preoccupation with justification and logical foundations. He did not ask the usual variants of the grand Enlightenment questions: "What are rights and why should I care about them?" or "Why should I be moral?" Instead, he considered the question of how it is that we came to care so much about the rights we care about, and how that story of beginnings might help us sort things out when rights conflict. This historical approach disoriented some of the philosophers—me included—but I thought it opened up a rich set of important considerations.

Let me explore just one. I have always viewed group or collective rights as problematical accessories to the "core" system of individual civil and human rights. Yes, yes, of course: in specific historical circumstances such as those in Canada, there will be a role for group language rights and even group racial rights in the case of aboriginal peoples. But I am always mindful of the devilish difficulties these group rights pose when it comes time to adjudicate them. Who speaks for the group? Does the group claim a right to be "left alone" by government—a relatively simple claim of a "negative right"—or does it claim a right to require government to perform in certain ways—a very ambitious claim of a "positive right".

Positive group right claims are hard to distinguish from political claims, and involving the Courts in crafting awards and remedies for them inevitably blurs the distinction between the legislative and judicial branches. This is the "if you can't win an election, try to win a lawsuit" brand of rights activism, and it may serve, in the long run, to undermine confidence in all rights.



Michael Ignatieff's account of the crucial role of the Holocaust and the civil rights movement in the United States disrupted, or at least complicated, my priggish attitude toward group rights. The global revulsion against the crimes committed by the Nazis against the Jewish People, and the upwelling of support for complete enfranchisement of Blacks in the 1950s and 60s, were decidedly "group" phenomena. And they played crucial roles in animating the "rights revolution" that has given the concept of rights a central place in Western legal systems. They provided, if you will, the "heart and soul" of the human movement that is formalized and bureaucratized in rights law. They are a large part of why we *feel* the way we do about rights, and unless we value rights highly, they would become empty words—as they were in the constitutional instruments of the now defunct Soviet Union.

So I was very moved by Ignatieff's talk, and a bit chastened, and am resolved to think more warmly about group rights. In this I am reminded of the great phrase in W. H. Auden's libretto for *The Magic Flute*, where (I think it was Sarastro) sings of the need for "the mind that loves and the heart that reasons". Michael Ignatieff's story of the emotional roots of the rights revolution made that connection, and it was that connection that gave his presentation such power. What a great evening!



John Dixon  
President

# Distributing flyers on TransLink property

ON NOVEMBER 22, 2000, Ron Churchill, while campaigning for the Alliance Party during the Federal election, was asked by SkyTrain security to leave the Edmonds SkyTrain station.

Churchill subsequently launched a constitutional challenge to his removal, and on April 18, 2001, Mister Justice Wilson found the request that Churchill leave TransLink property violated his right to freedom of expression. The Justice went on to find that the limitation was not saved by section 1 of the *Charter*. He ordered that TransLink's Safety Rule 12 be read down by reading in TransLink's supplemental policy on electioneering originally passed on October 1, 1993, which the Justice found had not been properly applied to Mr. Churchill. The Justice also declared "that the petitioner is entitled to distribute

political literature pursuant to Safety Rule 12, as read down to include the October 1, 1993 guidelines".

While the case was before the Court, the Association expressed our concerns regarding Article 12 of the Transit Conduct and Safety Regulations. TransLink voluntarily reviewed the regulations, and on April 20, 2001 TransLink's Board of Directors approved new regulations.

These new regulations expressly allow for the distribution of printed material for non-commercial purposes on TransLink property, other than transit vehicles or fare-paid zones, as long as the activity does not hinder the use of the transit system. It is particularly encouraging that this regulation applies to all non-commercial activities, not only electioneering, and that no prior approval is needed.

## Intervening in *R. v. Sharpe*

THE ASSOCIATION intervened at both the B.C. Court of Appeal and the Supreme Court of Canada in John Robin Sharpe's challenge to the constitutionality of the child pornography provisions of the *Criminal Code*. Now that the law has, with certain limited exceptions, been found constitutionally sound, Mr. Sharpe returns to trial on two charges of possession of child pornography and two charges of possession for the purpose of distributing child pornography. The Association is now contemplating intervening at Mr. Sharpe's trial.

In assessing the child pornography law on constitutional grounds, the Supreme Court of Canada recognized that the law had to be properly "construed, and interpretations that may minimize the alleged overbreadth must be explored". Nevertheless, the Court

acknowledged that "courts in future may refine the analysis in light of the facts and considerations that emerge with experience".

For instance, the Court noted that what may be reasonably viewed as art is a difficult question. This question was to be left to the trial judge to determine on a variety of factors. The Court listed several factors, but explicitly said that the factors to be considered would be refined as the case law develops.

The materials in question in the Sharpe case include products of his imagination: drawings and fictional stories. The Association wishes to ensure that the court fully considers civil liberties values of freedom of expression and autonomous thought in coming to its decision on the law and facts in this case. We hope to meet with Mr. Sharpe's counsel soon.



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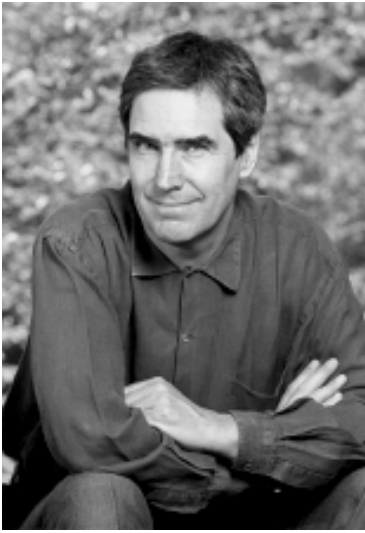
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The Democratic Commitment is a quarterly publication of the British Columbia Civil Liberties Association. The Association was established in 1962, and is the oldest continuously active civil liberties association in Canada. Its mandate is to preserve, defend, maintain, and extend civil liberties and human rights in British Columbia and across Canada.

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OUR RECENT FUNDRAISING event with Michael Ignatieff was an overwhelming success. A sold out crowd of more than 300 attended his talk at the Chan Centre. The silent auction raised almost \$6,500 to support the activities of the Association. Special thanks to Mr. Ignatieff and his wife Suzanna for making all this possible. We would also like to thank the following companies and individuals for their donations to our efforts:

John Nicholson, Pacific Palisades Hotel	John Ferrie Gallery
Office of the President, University of Victoria	Judy Williams
Debbie Gaudet, House of Anansi	Lazy Gourmet
Mark Pradine, Via Rail Canada	Little Sister's Book & Art Emporium
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Parolin & Company	Paul Mercs Concerts
Canadian Broadcasting Corporation	Peer 1 Networking
Don Dickson and Associates	Penticton Lakeside Resort
Paul at TR Trades Reproductions	Ping's Wings Wandering Wok
Linda at KeeperKard	Richard Tetrault
A Kettle of Fish	Saturna Lodge and Restaurant

## Thanks for Michael Ignatieff event

Acklands – Granger, Inc.	Shaughnessy Restaurant
Alan Twigg	Sheraton Suites Le Soleil
Bacchus – Wedgewood Hotel	Subeez Café
Black Hills Estate Winery	Sumac Ridge Estate Winery
Bob Krieger	Topanga Café
Bridges Restaurant	VanDusen Gardens
Cactus Club	Via Rail Canada
Carousel Theatre Company	Warren Bourgeois
Chan Centre	Wedgewood Hotel
Cheshire Cheese Inn	Cathy Newell
Cin Cin	Barb Newell
Crowne Plaza Hotel Georgia	Nikki Mahal
Da Pasta Bar Restaurant	Katalin Actis
Delta Pacific Resort	Charlie Kirkley
Dix BBQ & Brewery	Tracy Sullivan
Fairmont Vancouver Airport	Hayley Potten
Harbour Cruises	Denise Griffith
Hawthorne Mountain Vineyard	Ryan Resch
Hester Creek Winery	
Inniskillin Okanagan (Vincor)	

# An appreciation of Lil Woywitka, for 25 years at the BCCLA

I FIRST MET LIL at what now seems to be an almost unimaginably distant place both in time and circumstance. It was in 1979, some 22 years ago, in a little shoe box of an office at the corner of Hastings and Cambie, in the utterly misnamed Empire Building.

The Trudeau dream of spending Canada's way to a just society was then yielding to harder fiscal realities, and one of the immediate casualties was the B.C. Civil Liberties Association, which had suddenly found itself surviving on the merest of shoestrings. Lil was working a few hours a week as the last remaining financially compensated staff member of a once robust staff of a dozen or so. As far as I know, her salary was paid from the meagre sums collected from the Association's 250 or so members.

I arrived at this office along with another philosophy student, Janet King. We had been conscripted into service by one of our professors, Jim Dybikowski, who was the BCCLA's president at the time. The idea was that we would receive a bit of informal training as volunteers from the executive assistant Lynda Hird and from Lil. We'd answer phones and take messages and see visitors, and generally keep the storefront open for a few more hours each week, at least until the Association was forced to close.

I recall that Lynda took us very efficiently through our duties and gave us both a sense of importance and responsibility that motivated us quite effectively. Lynda then left, and Janet and I spent some time with Lil, who I imagine had been struggling in the background with a piece of Gestetner paper on some weary old IBM Selectric typewriter.

With Lynda gone, Lil took the opportunity to continue our education. She had, by this time, worked for a few years for the BCCLA, and she was obviously delighted to have captive pupils whom she could fill with her own knowledge and experiences of the Association.

Lil's take on what we needed to know was somewhat more practical. It focused initially on prudential matters. She mentioned that there was a doctor just above the BCCLA office who had a suspiciously large clientele of drug addicts, who were often too stoned or strung out to count accurately the number of flights of stairs they



*Lil Woywitka, membership secretary, in a photo from 1998*

had to go up to get their fixes. They might wander in from time to time, and sometimes could be found sleeping in the hallway in the early morning. They generally needed polite redirection. I suspect that in a certain sense the good-willed idea of "polite redirection" represents Lil's ruling attitude toward all people with problems who come to the Association.

**We also learned from Lil of Association's "special" clients: people who had slipped past the edge of sanity, had fallen into the neighbourhood of Hastings and Cambie, and had come to view their lives as one long civil liberties violation.**

We also learned from Lil of the Association's "special" clients: people who had slipped past the edge of sanity, had fallen into the neighbourhood of Hastings and Cambie, and had come to view their lives as one long civil liberties violation. Of course, Lil would not have said it quite that way. Rather, she used a narrative form of storytelling, giving vivid oral histories of each person's adventures with the Association and with the rest of the world. That these people were special is perhaps best reflected in the fact that more than one of them subsequently died in broad daylight gun battles with police. In any event, it was clear that Lil was both fascinated by these individuals, had genuine affection for them despite their craziness and unpredictability, and liked the challenge of dealing with them.

## Thanks to Lil

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We also gained a cannily accurate picture about the politics of the association, and the psychological profiles of its members. It was evident that Lil found these people just as fascinating and even more sympathetic. One person who truly impressed her was Reg Robson. "He's so organized, John. You won't believe it!" was a constant refrain in Lil's remarks about Reg. Lil was in awe of Reg. I think that the main reason for this was that Reg had devised a filing system for the office that was as comprehensive and ambitious as it was unintuitive, and Lil had yet to master it. In fact, only vestiges of it existed in practice. I think Lil felt guilty for not actually implementing Reg's grand design.

Moreover, she was constantly reminded of this failing because she was surrounded by boxes upon boxes upon yet more and more boxes of the dead, but not yet properly buried, prose of the Association's various scribes.

Janet and I were thoroughly entertained by those conversations. They gave us a great deal to talk and think about. A few months passed and the Association's doors did not close. By some miracle, the Legal Services Society thought that the BCCLA deserved money for an executive assistant and, if I recall correctly, for office rent. Our membership also came through generously in that time of need and, in effect, funded Lil's salary. We moved to ever so slightly more congenial surroundings. An executive assistant, Barbara Fairchild, replaced Lynda, and then I replaced Barbara. Then I left and John Westwood took over. Lil stayed on through all this and was a constant.

When I think back to those first conversations with Lil, I realize that it was evident then that she was going to be with us for the long term. The Association's work was stimulating and exciting to her. Just as important, it put her in the midst of a whole pantheon of actors who could engage and exercise her capacity for psychological insight and her natural affection for others.

In time, she did master Reg's filing system. I think the breakthrough came when she and I were actually implementing Reg's plan, and she came up with the brilliant idea of colour coding. For some reason, that

allowed a measure of visual recognition to reinforce Reg's opaque alphanumeric jumbles of upper and lower case letters and Arabic and Roman numerals. I still see the file codes on some of the letters and other documents I receive from the BCCLA. It brings a twinge of pride for an important but unremarked achievement that belongs to Lil that will tie together the Association's institutional identity probably for as long as it exists. In fact, she has very many such contributions to her credit.

It has now been well over a decade since I worked with Lil in the BCCLA office. Much has changed, and generally the health and organization of the Association has continued to improve from that inauspicious beginning over 20 years ago. But despite my long absence, I know just what sort of colleague Lil has been

**But despite my long absence, I know just what sort of colleague Lil has been over these more recent years. She will have been a resourceful, dedicated and unfailingly reliable colleague, who takes serious pride in her work and in the work of the Association.**

over these more recent years. She will have been a resourceful, dedicated and unfailingly reliable colleague, who takes serious pride in her work and in the work of the Association. And she will also have been the sort of person who will take home with her the concern and affection she shows for her co-workers through the day.

She has now worked for us for 25 years this way. There are only a few of us who have been around as long or nearly as long.

When we leave others will probably easily fill up our places. The chattering classes abhor a vacuum as much as nature does. But it is difficult to imagine the same thing happening with Lil's position once she leaves. So we'll have to make sure she stays around as long as possible.

One way that we can hope to do this is to express our recognition and gratitude for the important difference she has made to our little community over the last quarter century. Thank you, Lil, for sharing your talents and your time with us. We look forward to having you as a colleague in the years ahead.



John Russell  
March 29, 2001

## Trinity Western

*continued from front cover*

But at the same time, freedom of religion—the right to hold and practice religious beliefs without the unreasonable imposition of disadvantages or withholding of benefits from the state—is an equally important civil libertarian value. Moreover, the right to freely associate with like-minded individuals to pursue a common goal without interference from the state is a value that the BCCLA is willing to fight for.

The facts of the Trinity Western case set up a clash of these values. Trinity Western University is a private Christian university in the Fraser Valley. It receives no public funding. The provincial government has conferred upon the university the authority to grant degrees in a variety of disciplines including education. When the university applied for certification for its teacher training program by the B.C. College of Teachers (BCCT) in the mid-nineties, the teaching program's students completed their final year of studies at Simon Fraser University. Trinity Western wanted to be fully accredited so that students could complete their entire teacher training program at the university.

To encourage a Christian learning environment, Trinity Western's code of "Community Standards" requires students to refrain from practices that are biblically condemned including drunkenness, swearing, dishonesty, abortion, and sexual sins including premarital sex, adultery, *homosexual behaviour* and viewing pornography.

The B.C. College of Teachers is a self-governing body set up by the provincial government to regulate the teaching profession, including teacher training and qualifications required to teach in public schools in B.C. As part of their mandate, the college accredits teacher training programs, and considers the "public interest" when deciding whether to certify a program.

In the case of Trinity Western's teacher training program, two sub-committees reviewed Trinity Western's teacher training program and recommended certification to the full College. Their recommendations were subject to certain conditions to mitigate concerns about Trinity Western's code of Community Standards and its impact on teachers trained at the university once they are in public classrooms. The full College subsequently refused to certify Trinity Western's program.

The College's position is that the prohibition on "homosexual behaviour" is discriminatory because gay and lesbian students seeking teacher training cannot attend Trinity Western. Furthermore, the College was concerned that any teacher trained at the university was likely, due to a professed belief that homosexuality is a sin, to discriminate against gay or lesbian students in public classrooms.

### Supreme Court of Canada decision

For the Supreme Court of Canada, the solution to the problem of apparently conflicting values is to recognize two important distinctions. First, the Court ruled that there is an important difference between beliefs and conduct. Second, the Court also recognized a distinction between the private and the public spheres. Though these distinctions are often criticized, they are central to civil libertarian principles.

On the Court's distinction between belief and conduct, it is worth citing directly from the judgment:

Instead, the proper place to draw the line in cases like the one at bar is generally between belief and conduct. The freedom to hold beliefs is broader than the freedom to act on them. Absent concrete evidence that training teachers at TWU fosters discrimination in the public schools of B.C., the freedom of individuals to adhere to certain religious beliefs while at TWU should be respected. The BCCT, rightfully, does not require public universities with teacher education programs to screen out applicants who hold sexist, racist or homophobic beliefs. For better or worse, tolerance of divergent beliefs is a hallmark of democratic society. [at paragraph 36]

Importantly, the Court also ruled that the College's mandate extends to consideration of matters impacting equality. Thus, Trinity Western's prohibition on homosexual behaviour, which contradicts legal protections for gays and lesbians, is fair ground for scrutiny by the College of Teachers. The BCCLA agrees with this position and we had urged the Court to require the College to consider Trinity Western's code, since public schools have a duty to promote equality and respect for diversity.

However, the Court also required a public body like the College of Teachers to recognize all constitutionally

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## Trinity Western

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protected values relevant to its responsibilities, including freedom of religion and association. On the facts of the case, the College's failure to consider these values proved fatal.

Though it recognized that the College should examine Trinity Western's code, the Court also considered whether the rule against homosexual behaviour would be found to be discrimination under B.C. human rights legislation. Though the code clearly has a discriminatory effect—openly gay and lesbian students would not likely wish to attend the university because of the code—the Court found that Trinity Western's standards were not discrimination as prohibited in B.C.'s *Human Rights Code*. This legislation exempts non-profit private groups like charities, educational institutions or social groups from the law, if the objective of the group will necessarily entail discrimination. This exemption had previously been found by the Supreme Court of Canada to be constitutional since it protects freedom of association in the private sphere.

Having found that the code of conduct was not discrimination in law, the Court turned to the question of whether there was any evidence that students trained at the university had actually exhibited discriminatory conduct in public school classrooms. On this point, the College provided no evidence and indeed had not looked for such evidence. Nor did the Court buy the College's argument that no evidence could be found since teachers trained at the university were sufficiently deprogrammed by taking their final year at SFU to avoid any discriminatory conduct in the classroom.

### Implications and conclusions

So what if teachers trained at Trinity Western are found to conduct themselves inappropriately in the classroom based on their religious belief that homosexuality is sinful? The BCCLA argued that if a teacher trained at Trinity Western exhibited discriminatory conduct in schools, then that teacher should be disciplined by

school administrators, school boards and indeed the B.C. College of Teachers. The Court endorsed this approach.

But, as Ian Hunter suggested in a recent op-ed piece in the *Globe and Mail*: Why shouldn't a Trinity Western trained teacher, who is a counsellor at a public school, be able to tell a student confused about his sexual orientation that homosexuality is a sin? How

**Whatever the College might do, one would think that it will take more than a few rotten apples to decertify Trinity Western. After all, the application of a systemic remedy should require evidence of systemic harm.**

meaningful is freedom of religion if you can't act on it? While Mr. Hunter seems to have missed the point of the Court's decision, as well as a decade of jurisprudence that extends human rights protection to sexual orientation, would such conduct be grounds for stripping Trinity Western of its certification? Does it matter how many teachers trained at the university act inappropriately?

What will the B.C. College of Teachers do in light of this decision? Should the College now look for evidence of concrete harm, whether that be explicit discriminatory behaviour or the opinions of supervisors of teachers trained at Trinity Western?

Whatever the College might do, one would think that it will take more than a few rotten apples to decertify Trinity Western. After all, the application of a systemic remedy should require evidence of systemic harm. That said, serious evidence of a problem with teachers trained at the university, even on a sporadic basis, will legitimately give the College reason to pause.

Outside the context of this case, the Supreme Court of Canada's decision in the case has the potential to be a seminal case for offering our society a way of reconciling conflicting constitutional values. The central distinction between belief and conduct, the recognition that different standards apply to private and public institutions and the emphasis the Court placed on the need for concrete evidence of harm to justify state action—something the Court has been increasingly shying away from in its willingness to defer to legislators—are crucial rulings that reflect civil liberties principles. The *Trinity Western University* decision will indeed be a precedent that the BCCLA will call upon in its future interventions.



# NDP enacts anti-SLAPP legislation

READERS OF *The Democratic Commitment* will be familiar with the problem of SLAPPs: Strategic Lawsuits Against Public Participation. Typically, they involve powerful corporate plaintiffs suing an individual or a small group of activists. Characteristically, these lawsuits have little or no legal merit. Often, the suit is launched and then languishes as the plaintiff deliberately forestalls pursuing the litigation.

The effect, if not the intent, of this legal action is to silence vocal critics. As defendants focus on defending the lawsuit, their resources and energy are taken away from their main goal: participating in discourse on issues of public interest.

The BCCLA has been concerned about the rise of such litigation, as we continued to receive numerous complaints about alleged SLAPPs. Although SLAPP suits are not as common here as they are in the United States, the BCCLA supports legislative protection to ensure that citizens are free to participate responsibly in the democratic process without the threat of legal action. In 2000, the provincial government introduced an exposure bill to signal its intent and to encourage feedback from interested groups and individuals. The BCCLA provided extensive commentary and suggestions on the bill.

Although SLAPP suits are not as common here as they are in the United States, the BCCLA supports legislative protection to ensure that citizens are free to participate responsibly in the democratic process without the threat of legal action.



Creating proper legislation poses a significant challenge. It must protect against SLAPPs, while ensuring that a fundamental right in democratic society, the opportunity to go to court to protect one's rights, is not jeopardized. The BCCLA advocated an approach

that is flexible and that permits the courts considerable discretionary authority to police the process of justice to balance the objectives of democratic participation with access to justice.

Bill 10, the *Protection of Public Participation Act*, is the product of this balancing act. Its highlights include:

- **Protecting public participation**

The bill defines “public participation” as communication or conduct that is intended to influence public opinion or promote lawful action by the public or government in relation to matters of public interest.

However, this definition excludes certain types of conduct: criminal charges, breaches of the *Human Rights Code* (which is meant to protect prohibitions against hate speech), contraventions of court orders, damage or destruction of real or personal property, physical injury, trespass and conduct that is otherwise “unlawful or an unwarranted interference” with the rights or property or another.

- **Lawsuit with an improper purpose**

Only those lawsuits which have an “improper purpose” are subject to the law. An improper purpose exists if the plaintiff has no reasonable expectation of succeeding at trial and a principal purpose of launching the lawsuit is to

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## Protecting public participation

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dissuade the defendant or others from engaging in public participation, to divert the defendant's resources from public participation or to penalize the defendant for public participation.

- **Reform of the law of defamation**

Importantly, the bill reforms the law of defamation by creating an occasion of qualified privilege for "public participation".

- **Procedure**

The bill sets out a legal process for defendants to apply to the court to summarily dismiss a lawsuit, to obtain reasonable costs to defend a lawsuit that is suspect and to receive punitive damages if a lawsuit is a SLAPP.

In principle, the Association supports the legislation as it was introduced in first reading. However, an amendment to the bill was made prior to third reading when the phrase "unlawful" interference was added to the exemption from the definition of public participation. The BCCLA fears that this change may fundamentally undermine the utility of the law since courts might be reluctant to find that any particular communication or conduct constituted "public participation" if a plaintiff is alleging in the lawsuit that such conduct is a breach of the plaintiff's rights, and thus unlawful. This problem is one that the BCCLA had identified in prior drafts of the legislation, and that had appeared to be remedied by the first reading.

Ultimately, the impact of this legislation will depend on its interpretation and application in real cases.

## Protection of Public Participation Act

### Excerpt

2 The purposes of this Act are to:

(a) encourage public participation, and dissuade persons from bringing or maintaining proceedings or claims for an improper purpose, by providing

(i) an opportunity, at or before the trial of a proceeding, for a defendant to allege that, and for the court to consider whether, the proceeding or a claim within the proceeding is brought or maintained for an improper purpose,

(ii) a means by which a proceeding or claim that is brought or maintained for an improper purpose can be summarily dismissed,

(iii) a means by which persons who are subjected to a proceeding or a claim that is brought or maintained for an improper purpose may obtain reimbursement for all reasonable costs and expenses that they incur as a result,

(iv) a means by which punitive or exemplary damages may be imposed in respect of a proceeding or claim that is brought or maintained for an improper purpose, and

(v) protection from liability for defamation if the defamatory communication or conduct constitutes public participation, and

(b) preserve the right of access to the courts for all proceedings and claims that are not brought or maintained for an improper purpose.

The new legislation is on-line at [http://www.legis.gov.bc.ca/2001/3rd\\_read/](http://www.legis.gov.bc.ca/2001/3rd_read/).

# Drug courts and a new sex offender registry

TWO OTHER INITIATIVES of the departing provincial administration have drawn the ire of the BCCLA.

The creation of a special “drug court” is apparently in its final stages of development. A provincial court judge would be assigned to monitor offenders who are accepted into a specialized treatment program. The court program would be available only to those who have committed drug related offences, and who are deemed to have a drug addiction related to their criminal activity. In exchange for a guilty plea, and a promise to participate in the drug treatment program, the offender would be entitled to access to special drug treatment. The program would include intense therapy and monitoring and would require abstinence for successful completion. Proponents of the program point to its success elsewhere in the United States and Ontario and emphasize that treatment is “voluntary” rather than coerced.

The BCCLA opposes the drug court proposal. First, the Association has long been opposed to the criminalization of drug use. The program is not true diversion, in which an accused can admit some moral responsibility for his or her conduct without acquiring a criminal record. Second, timely access to treatment for those who really want help with a drug dependency must not be on the condition that they at first admit guilt to a crime.

As a matter of good health policy, governments should provide timely access to voluntary treatment. However, if treatment is not available, the answer is not to allow selective access to treatment through the criminal justice process. This solution is wrong in principle, but also an inappropriate use of scarce court resources.

On a related note, the BCCLA has now applied for leave to intervene in the trilogy of appeals to the Supreme Court of Canada which are challenging Canada’s law that criminalizes possession of marijuana. We hope that these cases will declare the law against possession of marijuana unconstitutional. Joe Arvay of Arvay Finlay is representing the BCCLA.

## Provincial sex offender registry enacted

A second legacy of the recently defeated government is the creation of a sex offender registry. Ujjal Dosanjh’s long-standing promise was realized when his government passed the *Sex Offender Registry Act*. This Act creates a registry that records information about anyone committing a wide range of sexual offences, including sexual assault. The law will allow public officials to track the whereabouts of anyone in the registry, and will require offenders to report regularly to government officials.

The government says the registry is needed for two primary reasons. First, it is meant as tool for crime *prevention*. Second, it is meant as a tool for crime *investigation*.

The BCCLA has expressed reservations about the registry. Though the public safety justification for creating a registry for *child* sex offenders who have a very high recidivism rate is more compelling, it is not clear that offenders who commit the other types of sexual offences included in the registry are as likely to re-offend. Thus, from a crime prevention point of view, the justification for a much broader sex offender registry is less convincing. Furthermore, the BCCLA Board of Directors is concerned about the retroactive creation of sanctions against those convicted previously of a sex offence.

Civil libertarians generally do not support the addition of intrusive state sanctions after the offender has been sentenced. Though the registry doesn’t increase jail time, it will no doubt have negative consequences for offenders, as public officials seek out information on sex offenders’ whereabouts. Finally, in a time of limited resources for criminal justice, one must ask whether this is the wisest use of scarce resources.

The province’s new Premier, Gordon Campbell, has already met with other Western provincial premiers to discuss embarking on a joint effort to create a regional sex offender registry. The BCCLA will continue to monitor this issue.

*The Sex Offender Registry Act is on-line at [http://www.legis.gov.bc.ca/2001/3rd\\_read/gov11-3.htm](http://www.legis.gov.bc.ca/2001/3rd_read/gov11-3.htm).*

## Board of Directors update

The B.C. Civil Liberties Association extends thanks and appreciation to the following directors whose terms have ended:

JOHN COX (2000), Vancouver

BOB LANE, Nanaimo

BOB SEEMAN, Vancouver

### New Board members for 2001 are:

LARRY COHEN, a former lawyer who is now active in business.

JASON GRATL, who recently finished his articling year. He worked with the Canadian Civil Liberties Association while a student at the University of Toronto.

STAN PERSKY, philosophy professor at Capilano College returns for his second stint on the Board.

MAXINE RUVINSKY, assistant professor at the School of Journalism of the University College of the Cariboo in Kamloops.

# Are you thinking about your financial future?

## Reviewing the terms of your will?

If so, please remember the B.C. Civil Liberties Association endowment fund.

Bequests, gifts of capital property and assignment of life insurance policies are just some of the ways supporters can make an important contribution to the future of civil liberties in B.C., while at the same time realizing substantial tax savings. All gifts are placed in the capital account of the endowment fund, and only 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. Contact our office at (604)687-2919 or e-mail [info@bccla.org](mailto:info@bccla.org) for more information!



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