

# the democratic *Commitment*

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**BC Civil Liberties Association**

Protecting the freedoms of  
British Columbians since 1962

## SAUVE V. CANADA (CHIEF ELECTORAL OFFICER)

# Federal prisoners win right to vote

## BCCLA intervention pays dividends

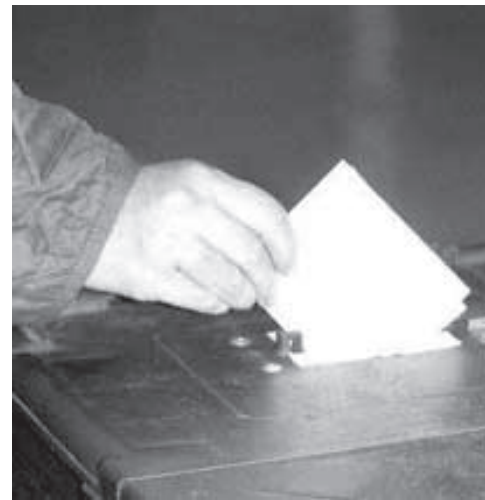
BY A NARROW MAJORITY (5-4), the Supreme Court of Canada has struck down the federal law that prohibits federal prisoners from voting in federal elections in *Sauve v.*

*Canada (Chief Electoral Officer)*. Writing for the majority, Chief Justice McLachlin found that the federal government could not justify the violation of prisoners' right to vote, guaranteed by section 3 of the Canadian *Charter of Rights and Freedoms*.

The B.C. Civil Liberties Association intervened in the case. We were ably represented by John Conroy, Q.C. of Conroy and Company. Many of the arguments in our factum were reflected in the reasons of the Court.

This was the second time that the Supreme Court of Canada had heard a challenge to a law taking away prisoners' voting rights involving Mr. Sauve. He had also challenged a prior law that forbid all prisoners, whether incarcerated in a provincial or federal correctional facility, from voting. After the Supremes had struck down that law, the government re-introduced legislation that drew a line based on prisoners who received a sentence of 2 years or more. These prisoners serve time in federal penitentiaries.

Unlike the dissent, whose reasons were delivered by Justice Gonthier, the majority insisted on a "stringent justification standard." In other words, they were not willing



to cut the federal government any slack on its onus to prove that the violation of the fundamental right was reasonably justified. In the words of McLachlin C.J.C.:

*Charter rights are not a matter of privilege or merit, but a function of membership in the Canadian polity that cannot lightly be cast aside. This is manifestly true of the right to vote, the cornerstone of democracy, exempt from the incursion permitted on other rights through s. 33 override.*

Thus, the Court recognized the fundamental importance of the right to vote as reflected in the fact that Parliament cannot use the "notwithstanding" clause to overrule a decision of the Supreme Court of Canada respecting voting rights.

In assessing the government's objectives to justify its action, the Court noted that the federal government had failed to demonstrate that

*continued on page 3*

# THE DEVILISH ADVOCATE / A message from our president

It is a season much concerned with information. Information about our governments which they are more determined than ever to keep secret, and information about us that our governments have decided they must have.

The B.C. Provincial Government recently announced that it intended to extend cabinet secrecy to any legislative committee attended by even a single cabinet minister! When we joined our potent protest to the general uproar against this, the government slightly amended the legislation to require the attendance of two cabinet ministers to trigger executive privilege. This satisfied the Information and Privacy Commissioner, but we remain opposed.

As more and more of the work of governance has shifted from the Legislative Assembly to Cabinet – a decay of parliament that deserves an entire essay to itself – it is more and more important that the citizenry at least retain access to those elements of the legislative process that continue to function. Secreting

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the work of legislators when they are joined by a couple of cabinet ministers is regressive, and we will persist in opposing it.

Cut to Ottawa, where the Department of Justice is rolling out its so-called "lawful access" legislative package. This little beauty will require internet service providers to assume the legal responsibility (and cost....to be handed on to the subscribers, naturally) for ensuring that all of their data are conveniently available to Canadian police and spy agencies.

The issue, from the government's point of view, is that the proliferation of new technologies associated with digital communication – particularly the many emerging flavours of wireless – is making it harder and harder to make a legal "tap". So, rather than pour

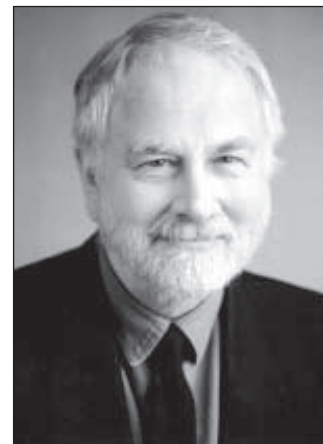
more money into playing catch-up with the technology, the government proposes to go right to the source, and require that the technologists design their new systems (or modify their existing ones) to facilitate "lawful access" of government to their data. Data being, of course, the contents of our email and histories of web browsing.

The government's communication line goes something like this: "shouldn't lawful AUTHORITY to access information be matched with the lawful POWER to access it? Don't you want the police and anti-terrorist agencies to be able to do their job for you?" Yes, all things being equal, of course; and yes again. But.....

Are all things equal when every Canadian's right to privacy – and most particularly, our right to privately communicate – takes such a huge hit? Isn't there something democratically suspect about a law that, in a way, makes it an offence to whisper too softly for the government to overhear you? A law that creates a legal duty to refrain from talking until you have facilitated state interception of what you say?

The BCCLA is going to fight very hard against this one. It is part of a pattern, certainly accelerated by the events of 9-11, but with earlier beginnings, in which government wants to know everything about us while revealing less and less about itself.

A democratic people should be moving things in precisely the opposite direction, and the BCCLA will push as hard as it can against this dark tide.



A handwritten signature in blue ink, which appears to read "John Dixon". The signature is fluid and cursive.

JOHN DIXON, PRESIDENT

there is a pressing and substantial problem posed by prisoners exercising the right to vote. Importantly, federal prisoners do not vote for Members of Parliament in the riding in which they serve time. Rather, they vote for candidates in their home constituencies thus avoiding any problem of prisoners swinging the outcome of an election due to block voting. This fact continues to be misunderstood by critics of the Court's decision including the Canadian Alliance who claimed that prisoners will now be able to determine the outcome of elections.

Instead, the government relied on abstract, symbolic objectives to justify its actions: (1) to enhance civic responsibility and respect for the rule of law and (2) to provide additional punishment or enhance the general purposes of the criminal sanction.

In response to the first objective, the Court found that the government's method of educating prisoners' about civic virtue was simply bad pedagogy:

*The 'educative message' that the government purports to send by disenfranchising inmates is both anti-democratic and internally self-contradictory. Denying a citizen the right to vote denies the basis of democratic legitimacy. It says that delegates elected by the citizens can then bar those very citizens, or a portion of them, from participating in future elections. But if we accept that governmental power in a democracy flows from the citizens, it is difficult to see how that power can legitimately be used to disenfranchise the very citizens from whom the government's power flows.*

In upholding the franchise for prisoners, the Court reviews the struggle for universal suffrage and the importance of the vote to prisoners as a means of reintegrating offenders back into civic society. This is an important point since the vast majority of prisoners will eventually be released back into the community. The Court also rejects the idea that some people, due to their actions, may be outcast completely from civil society.

With respect to the second governmental objective, additional punishment, the Court again finds that the government's use of arbitrary means undermines its justification. The Court concludes that denying the vote is inconsistent with the general objectives of sentencing. For example, disenfranchising prisoners will not provide a deterrence to them or the general public from committing crime. Nor, as noted above, will it assist in reintegrating prisoners back into civil society. Finally, the principle of retribution requires that the penalty fit the crime. Yet this principle of individualized justice is inconsistent with an arbitrary line that treats people in the pen for relatively minor drug or motor vehicle offences the same as people who commit serious violent crime.

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**Whether the federal government heeds the cries of some Canadians to deny prisoners the right to vote a third time remains to be seen. For now, the Sauve decision represents the Charter as it is supposed to function.**

Whether the federal government heeds the cries of some Canadians to deny prisoners the right to vote a third time remains to be seen. For now, the Sauve decision represents the *Charter* as it is supposed to function. When the government fails to do its homework by constructing thoughtful and measured responses to serious and demonstrable societal problems that take away *Charter* rights, the Supreme Court of Canada will step in and undertake that careful analysis in a dispassionate way. And will be willing to do so without being beholden to the sometimes volatile and emotional views of a majority of Canadians.

**i** To view the SCC decision in, visit: [www.lexum.umontreal.ca/csc-scc/](http://www.lexum.umontreal.ca/csc-scc/)

**i** To view the BCCLA's factum, visit: [www.bccla.org/othercontent/01sauvefactum.html](http://www.bccla.org/othercontent/01sauvefactum.html)



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The Democratic Commitment is a 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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# Riot at the Hyatt hearing drags on

The public hearing into police conduct at the 1998 ‘Riot at the Hyatt’, the scene of protests against Prime Minister Chretien, took another strange twist this fall.

In late September, counsel for Acting Commissioner Benjamin Casson tried to pull the plug on the public hearing, seeking to replace it with an inquiry into the incident by New Westminster Deputy Chief Constable Judd. The complainants were outraged by this, at least partly because they had been called to the hearing without being told what it was about.

In a letter to the Acting Commissioner, BCCLA President John Dixon stated that “Any time a public hearing – which is a completely open and transparent process presided over by a civilian adjudicator – is replaced by a police investigation, there will naturally be concerns that there will be less independence and less true civilian oversight of police, and thus less police accountability.”

He added that the case has been fraught with difficulties and errors in judgement, both from the police’s own investigation, “and to be candid, with the manner in which your Office conducted its responsibility for overseeing the process.” He noted, however that “it may be that what you propose is the best option available to remedy a bad situation.”

If the new investigation goes ahead, the BCCLA insists that it must be thorough, fair, efficient and completely transparent.

At the end of October the adjudicator of the public hearing, Kenneth Murphy, ruled that the Commissioner did not have the authority to unilaterally withdraw a complaint, especially if the complainants themselves were opposed. Counsel for the Commissioner is now seeking to have this decision overturned in court.

All this activity comes on the eve of the legislature appointing a new permanent replacement for the departed Don Morrison.

The BCCLA has devoted considerable effort over our lifetime to establish a credible and effective civilian oversight agency for police. We are hopeful that the new Commissioner will make a priority of regaining public confidence in civilian oversight, so essential to police accountability in a democracy.



**POLICE CONDUCT** The outcome of the Hyatt matter will have wide implications for policing protests and the use of crowd control units. JOSH BERSON

## BCCLA continues dialogue with Vancouver Police

In the past few months, the BCCLA has been in frequent contact with the VPD on a number of issues, with more discussions planned in the future.

Executive Director Murray Mollard and Policy Director Vincent Gogolek met with VPD before the announcement of the ‘bait cars’ initiative to combat auto theft, and were able to give the police BCCLA’s likely areas of concern about the program and hear what the police planned to do.

They also met with the head of Internal Affairs to discuss the operation of the branch generally, and to express a number of concerns on behalf of the BCCLA about how the VPD carries out its investigations. More meetings with Internal Affairs are being planned for the near future.

Finally, a BCCLA delegation will meet with the new VPD Chief Constable, Jamie Graham at the end of November, to discuss, among other things:

- policing protest and in particular the chief’s comments in relation to the Woodward Building protest
- video surveillance in the downtown Eastside, and
- the War on Drugs and the chief’s comments that marijuana is a “gateway” drug, and
- policing conduct during IOC Olympic site visit.

## CUSTOMS HASN'T LEARNED ITS LESSON YET

# Little Sisters back in court

The on-going saga of Little Sisters Book and Art Emporium's battle with the Canada Customs and Revenue Agency (CCRA) is heading inexorably toward BC Supreme Court.

The case has been set down for three weeks of hearings in June 2003. The BC Civil Liberties Association is backing the case with financial, moral and intellectual assistance, and Joseph Arvay acting as counsel for Little Sisters.

The latest case began when CCRA prohibited two publications Little Sisters was trying to import from the United States, claiming they were obscene. The publications in question are volumes 18 and 24 of the gay male comic anthology *Meatmen* and it is reminiscent of the conduct which Little Sisters and BCCLA successfully challenged all the way to the Supreme Court of Canada.

That case began in 1986 when Canada Customs banned *The Advocate*, a gay magazine, on the basis that it was obscene. Since that time, Little Sister's Bookstore was targeted for special scrutiny by Canada Customs.

Little Sister's, with the B.C. Civil Liberties Association, challenged Canada Customs, and in late 2000, the Supreme Court of Canada struck down the "reverse

onus" provision under s. 152(3) of the *Customs Act* as unconstitutional since it put the onus of disproving obscenity on the importer. An importer has a *Charter* right to receive expressive material unless the state can justify its denial, the Court said.

As a result of this ruling, CCRA will have the burden of showing the material in question is obscene in the latest Little Sisters case.

However, this case is about more than whether or not two gay comic anthologies are obscene. BCCLA and Little Sisters will be asking the courts for a broader ruling about the nature of censorship at the border, in light of the high-handed conduct of the Canada Customs. Specifically, the court will be asked to rule that the obscenity provision of the Criminal Code (s.163(8)) is unconstitutional because it unduly restricts the freedom of expression rights of both creators and readers of text based products of the imagination, including drawings.

## CAMERAS IN COURTROOMS

## BCCLA intervenes in Supreme Court TV case


The BCCLA will be appearing as an intervenor in the Supreme Court of Canada early next year when the high court considers the question of TV cameras in the courts.

This case grew out of an application by a number of media organizations to televise the Glen Clark-Dimitrios Pilarinos breach of trust case. Although that case is over, the question of how and when to televise court proceedings will be heard by the Supreme Court in 2003.

The BCCLA is taking the position that television is THE medium by which most Canadians acquire news and information. As such TV does have an important role in accessibility and accountability of courtrooms, and thus public confidence in the judicial system. The principle that the courts are open to the public is a cornerstone of democracy, and should underlay the access provided to the media. Our position is subject to other important interests such as a fair trial and privacy. We argue that the balance between these two interests

should be determined by the judge hearing the case as part of their inherent jurisdiction over proceedings in the court. The judge would be able to put on whatever conditions are most appropriate and minimally impairing of access to the court. We note that this is already done in the case of publication bans, and that general approach should be adapted to the question of cameras in the courts, and is flexible enough to be able to accommodate new technologies that may be developed.

BCCLA is being represented by Len Doust, Q.C. of McCarthy Tetrault, and BCCLA Director Jason Gratl of Bolton, Muldoon.

 Our factum is available at [www.bccla.org/othercontent/02courtcameras.html](http://www.bccla.org/othercontent/02courtcameras.html).

# A new era for human rights in B.C.

## Procedural reforms receive BCCLA's conditional support

British Columbia's much maligned system for making and adjudicating human rights complaints has been given a major procedural overhaul by the Liberal government. Some equality seeking groups have scorched the government for eliminating the B.C. Human Rights Commission, formerly headed by Mary Woo Sims, as part of these reforms.

However, the B.C. Civil Liberties Association has come out in cautious support of the changes – but only on the condition that the reforms ensure that the new system is accessible, efficient and fair. In our brief to Attorney General Geoff Plant, we cautiously support the move to a direct access model in which complaints are heard directly by the B.C. Human Rights Tribunal rather than being investigated and vetted by a human rights commission. However, the move to such a model requires significant new authority and resources for the Human Rights Tribunal. The BCCLA recommended that:

- the Tribunal have the power to dismiss groundless complaints, have flexible procedures, and encourage mediation but only with the consent of the parties,
- that a one year time limit on filing complaints be retained,
- that the Minister of the Attorney General be given a legislative responsibility to educate about human rights,
- that an independent body should have the legislative authority to monitor human rights enforcement in the province, and
- that the right to adequate representation for complainants *and* respondents should be in-

cluded which were previously performed by the Human Rights Commission.

The Association also recommended that the B.C. Human Rights Tribunal be given additional resources to carry out its new tasks, many of which were previously performed by the Human Rights Commission.

At press time, amendments to the *Human Rights Code* reflect most of our recommendations. However, a six month limit has been placed on filing though that may be waived by the Tribunal if appropriate in the circumstances. This remains inadequate. We also remain concerned that no statutory status has been given to the right to have legal representation in the amendments. The government has introduced a new human rights clinic program to provide legal representation to complainants but this measure will always be vulnerable to funding cuts. As the tribunal itself will have significant power to create its own rules, we will be writing the Chair of the Human Rights Tribunal with our concerns.

The BCCLA has a long standing interest in a well-functioning human rights regime. Promoting and defending human rights in British Columbia remains as much a part of the BCCLA's current mandate as it was 40 years ago when we were founded. Before the existence of human rights legislation, we assisted individuals with complaints of discrimination by their employers, landlords and other public service organizations. Meanwhile, we lobbied for laws that would prohibit discrimination while providing victims of discrimination with an effective and efficient process for timely resolution of complaints. Though our current laws prohibit discrimination, the goal of an effective and fair process still remains elusive. We are hopeful that the latest reforms will move us toward attaining that goal.

### BREAKING NEWS

At press time, the BCCLA is intervening in the City of Vancouver's efforts to obtain an injunction to remove campers around the old Woodward's building. The Association is arguing that the city's street bylaw prohibiting structures offends Charter principle of freedom of expression. We are represented by Leo McGrady, Q.C. of McGrady, Baugh & Whyte.

# BCCLA responds to Dept. of Justice consultation on DNA database

Once again, we let our views be known about the important topic of DNA testing.

In 1994, the BCCLA released a position paper supporting the establishment of the DNA data bank, and the amendment of legislation to allow police to obtain warrants to collect DNA samples from suspects in serious crimes, and to bank DNA information for legitimate law enforcement purposes. At the time, the BCCLA did not oppose such a scheme.

The BCCLA's latest submission, prepared by board member Ann Pollak, is a response to a discussion paper from the federal Department of Justice. The BCCLA position paper sets out a number of concerns including:

- Privacy: There is a need for increased protection of privacy and clear oversight of the database. We recommend that the Privacy Commissioner of Canada have a clear oversight and auditing authority.
- Mentally disordered offenders: This category of offenders requires greater protection than other convicted offenders. We recommend that the burden should not be on mentally disordered offenders to demonstrate why a sample should not be authorized; the government should bear this onus.
- Retroactivity: We are concerned about ex parte orders where an offender is not represented; we recommend that offenders should have the right to be heard, even if it is after the fact.
- Procedural issues: There should be clear limits on detention of a convicted offender for the taking of a sample; we recommend 12-24 hours.
- Additional samples: The current margin of error is acceptable and cannot justify the liberty intrusions of ordering resampling due to administrative error.

The consultations are intended to support a Parliamentary review of the databank scheduled for June, 2005.

**i** To view the Association's 1994 position paper, visit: [www.bccla.org/positions/privacy/94dna.html](http://www.bccla.org/positions/privacy/94dna.html)

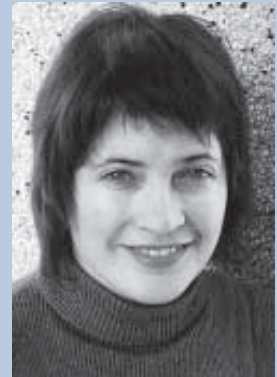
**i** The BCCLA's latest response is available at [www.bccla.org/othercontent/O2DNAbank.html](http://www.bccla.org/othercontent/O2DNAbank.html)

## MEET YOUR BOARD MEMBERS

# Ann Pollak

Ann Pollak's Directorship in the BCCLA was a long time coming. A board member since 1999, she had been working out her own particular view on pornography years before. That it accorded with the Association's position on pornography was critical, of course, to her fit with the BCCLA's political philosophy. But it took some time before her career and the Association's work intersected paths.

Professionally, Ann's early practice in criminal law led her to a particular interest in the criminalisation of mental illness. She served for six years on the board of the Vancouver Mental Patients' Association, and later worked as a staff lawyer at the Mental Health Law Program representing mentally disordered offenders before the BC Review Board.



In 1999 she became the staff lawyer at Prisoners' Legal Services, defending the liberty interests of federal and provincial prisoners in BC. PLS was a branch office of the Legal Services Society, until its closure in August of this year due to government cutbacks. The service has now been taken over by the West Coast Prison Justice Society with Ann continuing as its part-time Executive Director. She points to this work and her efforts with the BCCLA as ways she tries to keep the ember of prisoners' rights burning.

Ann was recently appointed to the BC Review Board and sits part-time as an Alternate Chairperson. This tribunal determines the degree of liberty appropriate for criminally accused persons found either unfit or not criminally responsible by reason of a mental disorder, taking into account public safety and the needs of the accused.

According to Ann, what gets her out to BCCLA Board meetings is plain old intellectual fun:

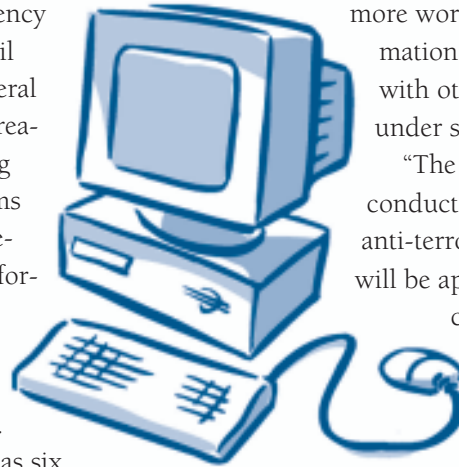
"Turns out I needn't have waited all those years to sort out my position on pornography, as the discussion is not in the least dogmatic. The meetings are like a good coffee house debate where issues are vigorously argued from all angles in the prism of politics and philosophy, only at the end of the debate the association has a position that it can put out there with considerable credibility."

# ‘Big Brother’ database for air travel latest anti-terror blow to privacy

If you thought the security inspections at airports were intrusive, you ain’t seen nothin’ yet.

The Canadian Customs and Revenue Agency (CCRA), has come under attack from civil libertarians, privacy activists and the federal and BC Privacy Commissioners for the creation of a new government data base using little-debated amendments to the Customs Act to do it. The new data base, which rejoices in the name Advance Passenger Information/Passenger Name Record (or API/PNR for short), requires airlines to provide detailed information on everyone they carry on flights outside Canada.

This information can be held for as long as six years. The Advance Passenger Information database will include the name, date of birth, gender, travel document type/number/date of issue, citizenship and/or nationality and the Passenger Name Record.



more worrisome is the fact that this information will be available to be shared with other government departments, under section 107 of the Customs Act.

“The worst part of the government’s conduct is that it is using the excuse of anti-terrorism to create a data bank that will be applied to any purpose it chooses,” Mollard added. “Pure hypocrisy.” In a searing letter to Elinor Caplan, the Minister of National Revenue, federal Privacy Commissioner George

Radwanski said that most of the information being collected has little or nothing to do with potential or actual Customs violations. “We will all be in this enforcement data base for reasons of being suspected of something else – indeed, anything else,” he wrote, “The overwhelming majority of this information is unlikely to ever be used for Customs purposes, and its only real potential use is under the sharing provision of section 107 of the Customs Act.” In contrast, Bill C-17 (*Public Safety Act*), which was reintroduced at the end of October, deals with access to exactly the same sort of airline information collected by CSIS and the RCMP. This bill provides that the information collected must be destroyed within seven days, unless it is “reasonably required for the purposes of transportation security or the investigation of threats to the security of Canada.” As well, CSIS and the RCMP must review the retained information at least once a year and must order the information to be destroyed if there is no justification for its retention. Note that the previous version of Bill C-17 was strongly attacked by the BCCLA (see *Democratic Commitment*, August 2002 Vol. 36, No. 1) and many others.

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**“In a world where information is power, this is as an unjustified information grab by the government as ever seen before.” – Murray Mollard.**

The PNR will include, but not be limited to, the following types of personal information:

- all the passenger’s destinations
- form of payment for the ticket
- seat selection
- number of pieces of baggage checked
- date the booking was made

The BCCLA acted together with the Freedom of Information and Privacy Association, the Public Interest Advocacy Centre and five other groups to register their protest with the Minister, Elinor Caplan. “In a world where information is power, this is as an unjustified information grab by the government as ever seen before,” said BCCLA executive Director Murray Mollard. “Canadians must stand up and resist this unbridled collection of personal information.” Even

**i** For the full text of the letter, see the Commissioner’s web site at [http://www.privcom.gc.ca/media/nr-c/02\\_05\\_b\\_020926\\_e.asp](http://www.privcom.gc.ca/media/nr-c/02_05_b_020926_e.asp)



# New pitfalls for Canadians of Middle Eastern origin travelling to the U.S.

By now, most readers will have heard about Maher Arar, a Canadian citizen and resident for the past 15 of his 32 years. For those who don't know, on September 26, Mr. Arar was detained by U.S. Custom authorities in New York as he waited to transfer to his flight to his home in Montreal having left Europe from Zurich. Canadian officials were left in the dark as to why American authorities detained him and sent him back to Syria, the country of his birth.

What most may not know is that the net cast by the Americans to bag Mr. Arar is also catching thousands of innocent Canadian citizens.

The "Special Registration" program requires any individual who is a past national of Iran, Iraq, Libya, Sudan or Syria to report to U.S. Custom officials every time he or she seeks to enter the U.S. These individuals are then photographed, fingerprinted and interviewed. They must also report upon leaving the United States.

The BCCLA has written the Honourable Bill Graham, Minister Responsible for Foreign Affairs to urge him to protest this program to American authorities. We argue that the requirements are difficult to justify:

- it will cause real hardship for thousands of Canadians, especially those who travel to the United States on a regular basis to visit family, friends or for work;
- the list of targeted countries is notable as much for countries left off the list as for those included; not on the list are Yemen, Somalia and, unbelievably, Saudi Arabia. Yet all are known to spawn or harbour terrorists connected with September 11. This list smacks more of political opportunism than serious terrorist hunting;
- the registration requirement is also an inappropriately blunt instrument that does not distinguish between someone born in Iran but living in Canada since he was the age of 10 as compared to someone who is 40 who has recently received Canadian citizenship;

- finally, this program is immediately suspect as unfair discrimination because it tars thousands of innocent people as suspect merely because of their country of origin which is as much a proxy for targeting people on the basis of their religion (Muslim).

Though we have not received a direct response from Mr. Graham, his actions to protest the American's program – including pressing U.S. Secretary of State Colin Powell and issuing a travel advisory to Canadians travelling to the U.S. – indicate that he is very serious about seeking changes.

## BCCLA concerned about RCMP's new anti-terrorism force

The BCCLA is keeping an eye on the RCMP's recently formed Integrated National Security Enforcement Teams (INSETs), created last year as part of the federal government's anti-terrorism initiatives. According to the RCMP, the INSETs' mandate is to "increase the capacity for the collection, sharing and analysis of intelligence among partners with respect to targets that are a threat to national security".

Recent activities of the Vancouver INSET however, suggest that the force may be targeting political activists under the guise of fighting terrorism:

- In July INSET officers raided the home of David Barbarash, a spokesperson for the Animal Liberation Front, looking for evidence relating to an ALF action that took place in Maine three years ago. That action included graffiti writing and relatively minor mischief in clubhouse of a local gun club.
- In September INSET conducted a fruitless search of the home of aboriginal activist John Rampanen looking for unauthorized guns.

While governments profess a need to remain vigilant to protect us against new threats of terrorism, the BCCLA will continue to remain vigilant in monitoring and countering anti-terrorism initiatives that are an unjustified intrusion of civil liberties.

# Reefer madness?

## Senate rolls radical new policy / Liberals pitch reforming marijuana laws in speech from the throne

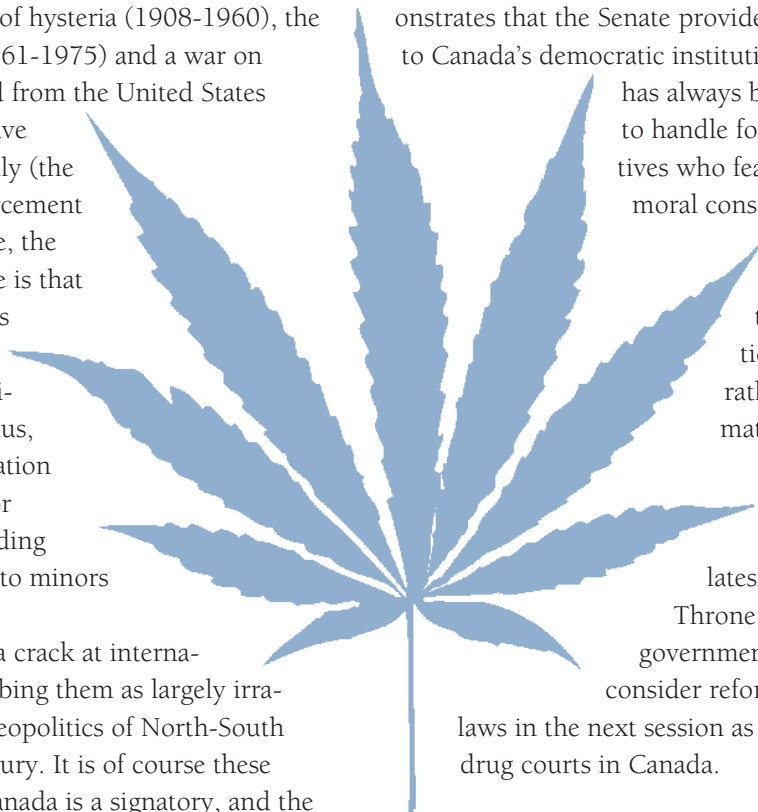
THE SENATE SPECIAL COMMITTEE ON ILLEGAL DRUGS has tabled its far reaching report: *Cannabis: Our Position for a Canadian Public Policy*. Taking up the torch of the ignored Le Dain Commission which recommended decriminalization over 25 years ago but going even further, the Senate makes the case for radical and wide ranging reforms including the legalization of the use of marijuana, an amnesty for all those convicted of the possession of marijuana and government regulation of the growth and sale of marijuana.

Wow! What have these Senators been smoking?!

Noting that Canada's history of drug policy can be characterized by periods of hysteria (1908-1960), the search for lost reason (1961-1975) and a war on drugs mentality imported from the United States and that these policies have been a complete and costly (the annual cost of drug enforcement is up to \$1 billion) failure, the Senate's guiding principle is that criminalizing behaviour is only justified when the behaviour causes a significant danger to others. Thus, under a regime of legalization there will still be room for criminal regulation regarding illegal trafficking, selling to minors and impaired driving.

The Senate also takes a crack at international conventions describing them as largely irrational and a product of geopolitics of North-South relations in the 20th century. It is of course these conventions, to which Canada is a signatory, and the continuing war-on-drugs mindset of our American neighbours that pose the greatest impediment to reforming drug laws.

Despite its much maligned status, its report demonstrates that the Senate provides significant value to Canada's democratic institutions. Drug reform has always been a topic too hot to handle for elected representatives who fear being tarred by moral conservatives. But with a public mood that favours reform and treating drug addiction as a medical rather than criminal matter, the Senate's contribution is extremely timely. Meanwhile, in its latest speech from the Throne, Canada's federal government has promised to consider reforming marijuana laws in the next session as well as expanding drug courts in Canada.



**i** The Senate Committee's report is available on line at: <http://www.parl.gc.ca/37/1/parlbus/commbus/senate/com-e/ille-e/rep-e/summary-e.htm>

# Supreme Court of Canada to scrutinize marijuana possession law

There seems to be a convergence of sorts around this country's continuing War on Drugs. Along with the recently released Senate report, the report from the House of Commons Committee examining drug laws due in November, and Parliament's stated intention to reshape laws regarding marijuana, this December the Supreme Court of Canada is set to hear arguments about the constitutional validity of the law that criminalizes possession of marijuana.

The B.C. Civil Liberties Association is set to join with others attacking the law. Our hope is that a decision by the Supreme Court of Canada knocking down this insane law will be the last boost needed to confine the law – a law that creates more harm than good – to the legislative dustbin.

The BCCLA is represented by Joe Arvay and Matt Pollard of Arvay Finlay.

Our argument is premised on the principle that the state is only authorized to use the criminal law to prohibit behaviour that harms others. The lower courts have made important findings of fact that marijuana does not cause harm to others and, except when it is ingested in large quantities and frequently, causes little harm to those that use it. These findings are mirrored in the report by the Senate committee (facing page). Any harm that is caused by the use of marijuana to society, for example driving under its influence, can be addressed through specific laws that proscribe that behaviour.

Marijuana, far from harming others, is actually used by thousands of Canadians for reasons they believe to be life enhancing in various ways. Some of the benefits of marijuana use enjoyed by individual Canadians include relaxation, social connection, enhanced creativity and appreciation of culture and spirituality. Thus, not only do Canadians who use marijuana risk incarceration but they are deprived of the enjoyment and enhancement of life that they believe marijuana use provides to them. For these reasons, the BCCLA will argue that the criminal prohibition on marijuana use violates Canadians' rights to life, liberty and security of the person under section 7 of the *Charter of Rights and Freedoms*.

Section 7 also requires that if the state is going to deprive Canadians of life, liberty or security of the


person, it can only do in accordance with the principles of fundamental justice. We will argue that these principles include:

- the harm principle (that the state can only prohibit behaviour that harms others),
- a presumption against legal moralism (that the state can not prohibit behaviour merely on the basis that it is perceived by some to be morally bad),
- proportionality and overbreadth (that punishment must fit the blameworthiness of the crime and that laws that seek to prevent an evil must not catch many other innocent people),
- privacy (that the state must not unnecessarily intrude into the private lives of Canadians without good cause).

When considering these principles in the context of the use of marijuana, which the Supreme Court of Canada must do in this case, it is evident that a law prohibiting marijuana use offends each principle. Since a law proscribing marijuana use with a criminal sanction violates so many principles of fundamental justice, it follows that this law cannot be saved by section 1 of the *Charter*. The result: this law violates the constitution and must be struck down.

In addition to our *Charter* attack, we will argue that the law is unconstitutional as it falls outside of the legislative competence of Parliament. Criminal laws must seek to address a particular evil that does not exist with marijuana use. Nor is the law appropriately created under any other branch of federal power.

This case promises to be a seminal piece of jurisprudence in the battle against those who continue to wage a costly and destructive war on drug consumption.

 To view the BCCLA factum, visit our website at [www.bccla.org/othercontent/O2marijuanafactum.html](http://www.bccla.org/othercontent/O2marijuanafactum.html)

## Staff update

The BCCLA office continues to experience changes. Former Policy Director Lindsay Lyster has accepted an appointment as an adjudicator to the B.C. Human Rights Tribunal. We wish her well at a time of important changes and challenges to B.C.'s human rights regime.

Replacing Ms. Lyster as Policy Director is Vincent Gogolek who comes to the Association with a wealth of experience in government policy and law. Mr. Gogolek's background includes experience as a journalist, working with the Ontario government as a senior policy advisor in the Ministry of Inter-governmental Affairs, a staff lawyer with Legal Aid Ontario and an editor with the Canadian Bar Association. We look forward to working with Mr. Gogolek as part of the BCCLA team.

## Board update

Well known criminal lawyer and BCCLA Director Jim Williams, formerly of Smart & Williams, has been appointed to the B.C. Supreme Court of British Columbia. Jim first joined the Association's Board of Directors in 1992 after learning about us during his involvement in police complaint hearings before the Vancouver Police Board. With his experience as a police officer and as a seasoned criminal lawyer, Mr. Williams contribution to the Association often, though not exclusively, centred on matters involving policing and criminal law. He wrote the Association's position on diversion and most recently reviewed the forthcoming revision to the Arrest Handbook for legal accuracy. In between, he provided sound advice and representation to the Association on various issues and always answered our call for assistance.

The BCCLA wishes Mr. Justice James Williams well in his future responsibilities for dispensing justice to British Columbians.

## United Way donations

Don't forget that you can designate the BCCLA as a specific recipient of your United Way donation!



# Homer Stevens

(1923 – 2002)

## BCCLA Honourary Director

**ONE MEASURE OF A MAN** is the degree to which he is willing to risk his liberty for his beliefs and his principles. By this account, Homer Stevens was a giant. In true Gandhian tradition, Mr. Stevens spent a year behind bars for contempt of court for defying an injunction against strike picketing. The President of the United Fisherman and Allied Workers Union from 1948-1977, Mr. Stevens lived a life in fishing fighting for the rights of workers. He campaigned for the return of Japanese Canadian fishermen and their families who were interned during World War II. Accepting the BCCLA's request to become an Honourary Director in 1973, Homer wrote then BCCLA President Reg Robson: "Basically, I certainly agree with the aims and objectives of the B.C. Civil Liberties Association and to the extent it is possible, would be willing to do my best to assist in extension of its work. I am therefore pleased to accept the invitation and in doing so, I wish you to know that I consider it an honour to be named as a Director." Mr. Stevens remained an Honourary Director of the BCCLA until his death on October 2, 2002. Mr. Stevens is survived by Grace, his wife of 54 years, three sons, one daughter and several grandchildren.

*One way to honour Mr. Stevens's contributions to civil liberties is to make a gift in his name to the BCCLA Endowment Fund. Gifts to this Fund are placed with the Vancouver Foundation and create a lasting legacy for protecting civil liberties and human rights in B.C. For more information contact BCCLA Executive Director, Murray Mollard at 604-687-3013.*

## FINANCIAL ALERT!

Due to a reduction in our gaming grant of nearly \$20,000, the Association is facing a serious revenue shortfall for 2002. If you have not yet made your donation or renewed your membership this year, now is the time! Your support is deeply appreciated. A tear-out coupon is attached to this newsletter or call our office at 604-687-3013.

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