

# the democratic Commitment

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## BCCLA CELEBRATES The End of Police Self-Investigation is Near

**T**he BCCLA celebrated the June 18 announcement by B.C. Provincial Solicitor General Mike de Jong that the Province would end the practice of police investigating themselves by establishing a new civilian investigation body. The announcement came in response to Commissioner Braidwood's recommendations in the inquiry into the death of Robert Dziekanski. Mr. Dziekanski died at Vancouver International Airport after he was apprehended by four RCMP officers and tasered five times.

"We simply cannot improve on Commissioner Braidwood's recommendations and we are thrilled that the province will move to implement them in the next year," said Robert Holmes, President of the BCCLA. "We offer our congratula-

tions to the province for taking this historic step, as well as our support and assistance in ensuring that the new body is as robust and independent as Commissioner Braidwood clearly hopes it will be."

The BCCLA was the only participant at the Braidwood Inquiry that argued for the end of the police investigating police system, and has advocated for the creation of such an agency for at least the past ten years.

Commissioner Braidwood determined that the officers' use of force was grossly excessive, unreasonable and unjustified. He powerfully recommended that every serious injury and death that is police-related, as well as other serious matters, where for

example, an RCMP officer may have allegedly contravened a provision of the Criminal Code, should be independently investigated by a civilian investigative agency.

The Braidwood Commission's recommendation of the establishment of an

*continued on page 6*

## BCCLA on the road



### Ottawa

Policy Director **Micheal Vonn** was in Ottawa in April appearing before the federal Public Safety Committee to make a submission on

the dangers of no-fly lists. The BCCLA is a long-standing critic of no-fly lists which are notorious for violating the rights of innocent travelers and have never been shown to increase aviation safety.



### Ottawa

Litigation Director **Grace Pastine** appeared as counsel in Ottawa with BCCLA counsel **Carmen Cheung** at the Afghanistan Public Interest Hearings. The



hearings are part of a probe launched by the Military Police Complaints Commission into the treatment of Afghan detainees.



### Yukon

Board member **Megan Vis-Dunbar** was in Whitehorse, Yukon where *Civil Freedom* hosted a public discussion to raise awareness of the *Civil Forfeiture*

Act. Megan spoke at the event on the effect of such legislation bypassing due process and privacy protections afforded by the Criminal Law.

## Guarding the Guardians

**S**imple truths need retelling often. Commissioner Braidwood has done that for us. In telling the story of the last moments of the life of Robert Dziejanski, he affirms that the tragic end of an all too precious life is a lesson for all who survive. That is, sad to say, no comfort to those who loved him. I cannot barely imagine his final moments. The last hours full of frustration. The final encounter that need never have happened the way it did. Agents of the state, yours and mine, who acted in our name and performed so woefully brought about his death. Tears of recognition of failure are essential. Commissioner Braidwood recounts why. Lurching downwards as each mistake is made. Robert Dziejanski's life flickering out. Then follies of mismanagement trying to obfuscate what a chance videotape made clear.

Two things must remain in focus. First, who guards the guardians? And second, how heavy is the burden of our responsibility? Commissioner Braidwood's recommendations deal, and appropriately so, largely with the former. *Quis custodiet custodiet?* We trace concerns over how guardians of order are to be reined in since Plato's *Republic* spoke of Guardians keeping us in line, leading by example and by force, and offering up their better selves as both model and justification.

But we have learned that guardians are all too human, all too frail. We defer to them largely due to an innate conservatism that is the glue of social cohesion. Without deference, we would lack practical encouragement to observe orderly patterns of life. But Plato's question troubles us still. Deference only goes so far. And when those to whom deference is to be afforded show themselves to be lacking, what are we left with?

The poet Juvenal wrote "*omne in praecipiti vitium stetit*" – everything, particularly every vice or wrong, comes to a halt at the precipice. We put in

place law enforcement officers because we need them, yet we immediately feel the need to put in place a check on their power. Judicial power is inadequate.

Those appointed to that office are compromised in their ability to ensure an effective check on police power. By the time a judge rules on any given controversy, action has become recounting. So we must find something closer.

Commissioner Braidwood takes up the proposal that the BCCLA, through Murray Mollard, our former Executive Director, Jason Gratl, former President and current VP, Grace Pastine, our current Litigation Director, David Eby, current Executive Director, and others have pushed. Having a civilian agency other than the police investigate police conduct is a good thing. The concept is hardly as impractical as various law enforcement agencies and government agents

have made it sound. The United Kingdom, Ontario and other jurisdictions have led the way.

Attorney General Mike de Jong, deserves credit for having taken Commissioner Braidwood's work seriously. He accepted the report and endorsed having a civilian agency investigate police-related deaths and serious injuries. His leadership on this merits praise.

What then to make of the transition that we are in? The BCCLA has urged it. Having the police investigate themselves was inappropriate. Having an independent, civilian-led and run agency will, one hopes, lead to better investigations and more accountability.

We were all taught as children that the one who cut a pie or cake did not get to choose first which slice to take. Fairness exists in having "the other" check our work, and ensure we do not overstep our bounds, particularly where actions affect others.



Having a civilian agency other than the police investigate police conduct is a good thing.

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## 5 MAJOR WINS THAT PROTECT RIGHTS AND FREEDOMS

The end of the Olympics didn't end the effectiveness of your BCCLA. We've been working hard on behalf of our membership to protect rights and freedoms, and we're celebrating an historic win on a police accountability campaign of ours that has lasted more than a decade in B.C.

### 1 Ending the practice of police investigating themselves in B.C.

The BCCLA was the only party at the Braidwood Taser Inquiry that argued for **the end of the police investigating themselves in B.C.** Commissioner Braidwood adopted our recommendations on this point in their entirety – and then went further, saying that any civilian investigation body may start with former police officers, but must be 100% civilian within five years. In response to Commissioner Braidwood's recommendations, B.C. has since made the historic announcement that it will end almost 130 years of police self-investigation here and hand the BCCLA a victory after more than a decade of advocacy on this issue.

### 2 Preventing a police crackdown on the homeless

When the BCCLA caught wind of a brewing RCMP crackdown on the homeless living in Burnaby's Central Park, we swung into action. Burnaby has no emergency shelter, and no available social housing. After our phone calls to Burnaby's Mayor, the RCMP and B.C. Housing, **a cooperative crackdown between the RCMP and the City of Burnaby planned for June 21 and 22nd and targeting the homeless residents was cancelled**, and

as of this writing, three of the ten people living in the park have already been housed. We're continuing to monitor the situation and thank B.C. Housing and Progressive Housing for their quick and committed action.

We also thank Burnaby and the RCMP for being open to changing course at the last minute once they understood the implications of the *Victoria v. Adams* decision of the Court of Appeal, a decision that says that bylaws that make temporary shelters in parks illegal are unconstitutional when the homeless have nowhere else to go.

### 3 Ensuring the right to access government information

The BCCLA's arguments were adopted in part by the Supreme Court of Canada in a case brought forward by Ontario's Criminal Lawyers Association. In their decision, the Supreme Court held that **a citizen's rights to free expression can include the right to access information held by government**, where the information is not subject to privilege, and where release of the information is essential to advancing public discussion on the issue. The case breaks new ground and opens new avenues of redress for people frustrated with the failures of provincial and federal Freedom of Information systems.

### 4 Opening MPs expense accounts to the Auditor General

When the BCCLA heard that the major parties in Canada, save the Bloc Quebecois, were refusing to open their MP expense accounts to the Auditor General, we put the pressure on, writing a letter to the leaders of the parties expressing the importance of transparency and engaging in a high profile media campaign on the issue. The parties relented, and **an Ottawa Citizen article recognized the BCCLA's efforts as being part of the overwhelming pressure that forced the parties to change course.**

### 5 Ending unconstitutional police searches

The BCCLA helped end a dubious practice of police following hydro and electrical inspectors into suspected "grow op" houses without warrants by intervening in the *Arkinstall v. Surrey et al.* case. In that case, two residents refused to allow city "safety inspectors" in, so long as they were accompanied by police. In response, the City cut electricity to their home. **The unanimous ruling of the B.C. Court of Appeal adopted the position of Mr. Arkinstall's counsel and the BCCLA** and held that Surrey's bylaw violated the right to be free from unreasonable search.

*“What you leave behind is not what is engraved in stone monuments, but what is woven into the lives of others” – Pericles*

## What will your legacy be?

Your legacy may include your children or your grandchildren. It might include the work you’ve done, or the people you’ve helped throughout your life. It may include a legacy gift to the BCCLA.

### You can leave a legacy of freedom

A legacy gift is a statement about the values you have embraced throughout your life and what you want to leave behind for future generations. Designating the BCCLA as a beneficiary in your Will, RRSP or insurance policy gives you the opportunity to make a lasting difference. Your legacy gift will help the BCCLA continue to protect civil liberties and human rights in Canada.

### Leaving a legacy gift to the bccla

You may have already made a legacy gift to the BCCLA. If so, and you haven’t let us know yet, please advise our office. The better informed we are, the better able we’ll be to fulfill your wishes. It will also enable the BCCLA to plan for the future. Any information you provide will be treated in complete confidence.

For more information on making a legacy gift, please contact your financial planner or the B.C. Civil Liberties Association directly.

### BCCLA freedom circle

The Freedom Circle recognizes the BCCLA’s most dedicated supporters. If you are a monthly donor, have been a member of the BCCLA for at least five years in a row, or plan to leave a legacy gift to the BCCLA, you’re entitled to join the Freedom Circle and we will send you a special pin to wear proudly. Join today by contacting Sarah at [sarah@bccla.org](mailto:sarah@bccla.org) or 604.630.9750.

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## UN WATCHLIST

On June 7, 2010, the BCCLA, along with Abousfian Abdelrazik and the International Civil Liberties Monitoring Group, filed a lawsuit challenging Canada's implementation of the U.N. Security Council's anti-terrorism sanctions regime. Known as the **1267 Regime**, it is named after Security Council Resolution 1267.



The 1267 Regime is a Security Council sanction and regime targeting individuals and entities alleged

to be associated with the Taliban, Osama bin Laden, or al Qaeda. These parties are placed on what is known as the 1267 List.

Those placed on the 1267 List are subjected to, among other things, an international travel ban and an asset freeze. To the extent that individuals need to access their own funds in order to pay for subsistence food and shelter, they must make applications to the Security Council. Individuals are placed on this list without notice, and until recently, could not even be told why they are on the list to begin with. In any event, those placed on the 1267 List rarely – if ever – have full access to all of the information making up the allegations against them. A Canadian citizen can be placed on the 1267 List by a foreign nation without any independent review by Canada, and it is possible that Canada may not even have full access to the allegations against listed nationals.

Once placed on the 1267 List, individuals have absolutely no recourse to judicial – or even independent – review to challenge

the listing. The 1267 Committee retains final authority on decisions to delist. The 1267 Committee, of course, is the very body responsible for compiling the 1267 List in the first place.

Individuals are placed on this list without notice, and until recently, could not even be told why they are on the list to begin with.

### How is the 1267 Regime implemented in Canada?

The 1267 Regime is given effect by domestic laws executed by U.N. member states. As a party to the U.N. Charter, Canada is obligated to give domestic effect to Security Council resolutions.



The 1267 Regime is implemented into Canadian law via regulations issued by Order in Council. These regulations are known collectively as the *United Nations Al-Qaida and Taliban Regulations*.

It is these regulations that we are challenging in our lawsuit in the Federal Court. In addition to enforcing the asset freeze against individuals on the 1267 List, these regulations also prohibit any person in Canada, or any Canadian citizen outside of Canada, from providing any funds, property or financial resources to individuals. What that means is friends and family members cannot give money to assist a listed individual. Employers who want to pay a listed individual would have to petition the Security Council for permission to pay wages. Breach of these regulations may result in criminal liability and a penalty of imprisonment of up to 10 years.

### Are there any Canadians currently on the 1267 List?

Abousfian Abdelrazik, also a plaintiff in this lawsuit, remains the only Canadian citizen on the 1267 List, despite the fact that both the CSIS and the RCMP have cleared him of involvement in any criminal activities. Mr. Abdelrazik was listed on July 31, 2006.

*continued on next page*

UN WATCHLIST *continued from previous page*

Since his listing, Mr. Abdelrazik has been subjected to an asset freeze at the direction of the Canadian government. He has had difficulty finding employment because potential employers would have to petition the United Nations for permission to pay his wages, though recently, a group of labour unions joined in defying the 1267 Regime and offered Mr. Abdelrazik a job. Recently, the Canadian government attempted to invoke his status on the 1267 List as justification for denial of his *Charter* rights to return home to Canada; ultimately, the Federal Court rejected Canada's position and ordered Mr. Abdelrazik's repatriation.

**Why is the BCCLA concerned about the 1267 Regime?**

The 1267 Regime imposes severe restrictions on personal liberty with almost no due process protections. Individuals placed on the list are provided with very little information as to why they've even been placed on the list. They are provided with almost no substantive evidence supporting the allegations that they have ties to terrorist organizations, which means

it is virtually impossible for them to mount meaningful challenges to the listing. These individuals simply discover – in many cases, when they attempt to travel or to withdraw money from their bank accounts – that they have been placed on a terrorist blacklist and subjected to serious deprivations of rights, even though they have been convicted of no crime (and in many cases, have been accused of no crime). Thus they are forced to prove a negative – that they are not associated with the Taliban or al Qaeda. As Mr. Justice Zinn of Canada's Federal Court has observed: "One cannot prove that fairies and goblins do not exist any more than Mr. Abdelrazik or any other person can prove that they are not an Al-Qaida associate." And in order to be delisted, these individuals must also prove their own innocence, contrary to the well-hewn principle that the accused *never* has the burden of proving his or her innocence.

Mr. Justice Zinn perhaps did not overstate the situation when he remarked that "[t]he 1267 Committee regime is . . . a situation for a listed person not unlike that of Josef K. in Kafka's *The Trial*."

**Paul Champ joins BCCLA board**



The BCCLA is pleased to announce that Ottawa lawyer Paul Champ is joining its board. Champ is winner of the BCCLA's

2009 Reg Robson award for his outstanding work on the Afghan detainee file and is currently counsel for the BCCLA on that file, and is also the BCCLA's lawyer on the BCCLA's challenge of the UN's 1267 Regime. Welcome Paul!

**BCCLA Interns**

Pictured clockwise from top left are: Hasan Junaid, Fiona Rayher, Safia Lakhani and Ian Kennedy.



BCCLA CELEBRATES *continued from page 1*

Independent Investigation Office follows on the Frank Paul Inquiry's Commissioner William Davies' recommendation of the same policy reform, the call of the Police Chiefs of British Columbia for this reform and new federal legislation that mandates the RCMP to pass investigations of serious matters

and police involved deaths to civilian investigation bodies where such bodies exist.

The public is justifiably suspicious when the police investigate themselves due to concerns about conflicts of interest and divided loyalties. "There is no way to ar-

ticulate how important this reform is to enhancing public confidence in our police," said Holmes. "The implementation of Commissioner Braidwood's recommendations will make B.C. a national leader in police accountability. B.C. residents have demanded it, and our province is delivering."

# CCTV IN SCHOOLS

## What are we teaching our children?

*The BCCLA and the Freedom of Information and Privacy Association sent a joint submission opposing the section of Bill 20 that facilitates more CCTV in schools. This article is an excerpt from the submission.*

**T**he central mission of our public schools goes beyond providing basic skills and knowledge to students; public schools have a central role in teaching the values of our free and democratic society and preparing students to become fully engaged democratic citizens. Privacy is an important value in our society, as is the presumption of innocence (the vast majority of students will not engage in activities that give rise to a call for video surveillance). Public schools must not only teach these values to students but must strive to reflect all democratic values in their practices. Indeed public schools are arguably one of the only heterogeneous, liberal democratic institutions left in society where young people can develop and debate concepts about personal identity, friendship and community.

School boards and society at large must be on guard against taking away the open society of the academy and replacing it with the closed society of the reformatory. Video surveillance tends in the latter direction rather than the former.

We are not opposed to all video surveillance in public school, but rather insist on the demonstration of a compelling need. This is an

area in which failure to provide specific justification sees rampant proliferation of surveillance, as noted by Andrew Hope in “CCTV, school surveillance and social control” (British Educational Research Journal, Vol. 35, No. 6, December 2009, pp. 891-907) which reported on CCTV (closed circuit television) use in UK schools.



Hope comments on the insidiousness of “function creep” in school surveillance: Initial CCTV placement tended to focus on protecting the perimeters of schools against intruders, but cameras were soon installed in the corridors, computer rooms and libraries of many educational institutions. CCTV also crept into more controversial school spaces, such as student toilets and classrooms.

Hope notes that video surveillance tacitly embeds certain values in the school environment; that “rather than enculturating citizens to be rule obeying and law abiding, this approach seeks to ensure that technological systems exist

to thwart individuals’ disorderly instincts.” In other words, surveillance technology is not value-neutral. The hyper-regulation of public school spaces has important moral implications.

Privacy and Charter rights more generally are always a matter of weighing and balancing. The need for a thoughtful and evidence-based approach to video surveillance is particularly acute because of persistent overestimation of the efficacy of video surveillance by the public. Study after study has shown that video surveillance has extremely limited utility, that video surveillance has almost no deterrence effect, and that small effect most often attributable to displacement. In some instances, a targeted, problem-specific use of a camera, for example to monitor a computer laboratory in which there have been repeated thefts, may be an appropriate response. But general monitoring of student behaviour is an unacceptable intrusion into students’ private lives and offers no quantifiable increase in students’ safety.

Careful, fact-based assessments are needed in this area and those are provided for under the current legislative scheme (s. 26 c) of FOIPPA. The effect of the School Surveillance Amendments is to eliminate any criteria or necessity for such an assessment.

# GOVERNMENT DEMANDS CITIZENS' HEALTH RECORDS

The BCCLA is a founding member of the BC Health Privacy Coalition. Our Coalition partner, the BC Persons With AIDS Society, recently published an article on a legislative amendment that poses a dire threat to British Columbia's medical privacy. These are excerpts from the article, *E-health Developments*, by Ross Harvey.

**T**he BC government dropped a well-hidden bombshell on April 21 when it tabled Bill 11, the Miscellaneous Statutes Amendment Act (No. 2) 2010 in the Legislature.

Nestled deep within the Bill's 190 separate sections – most of which make very minor amendments to everything from the *Adult Guardianship and Planning Statutes Amendment Act* to the *Vancouver Enabling Act* – are four sections that may alter drastically how and how much and to what purposes the provincial Government can get its hands on your personal health information.

According to the BC Information and Privacy Commissioner in an April 22 letter to the Health Minister, “these amendments will allow for extensive sharing of personal information across numerous public bodies.”

In a nutshell, the amendments allow the Health Minister (which in practice means the bureaucracy within the Health ministry) to require a health authority – or any other “public body” – to “disclose personal information” if “it is reasonably needed to fulfill a stewardship purpose”. “Stewardship purposes” include health

The BCCLA opposes the dramatic re-routing of the government's approach to e-health contained in Bill 11, which has shocked many of those people who have long argued that electronic medical records can be built to be privacy protective. There is no doubt the benefits of e-health could be achieved while respecting privacy; but it is now equally clear that BC's e-health “privacy protections” are going to be fundamentally illusory. The Association will continue to work diligently to reinstate our fundamental right to medical privacy.

program development, operation, monitoring and evaluation, health systems planning, maintenance and improvement, the conduct or facilitation of research into health issues and – just for good measure – anything else the Minister may prescribe.

(“Public body”, by the way, means everything from hospitals to provincial mental health facilities to Community Living British Columbia to the BC Transplant Society ... and so on.)

And there's more. Another part of the Bill allows the Health ministry “if (it) is satisfied that the collection, use or disclosure of personal

information is reasonably needed to fulfill a stewardship purpose, (to) enter into an information-sharing agreement with any person”. At law, a “person” can be any individual or “body corporate” (company, agency, registered non-profit society, etc.).

In Committee study of the Bill on May 4, Minister Kevin Falcon maintained the purpose of the proposed law was to bypass health authorities' petty privacy concerns about sharing information like “health care card numbers, information on hospital admittance information...demographic information, income information, which allows us to actually operate the health care system in British Columbia”. The problem is, as noted above, that's not what the legislation says. The Bill itself casts a dramatically wider net. The Bill was whistled through Committee study and received its Third Reading on May 4. At the time of this writing, it was awaiting Royal Assent.

It appears our provincial government wants unfettered access to everyone's personal health information and, having secured it, wants to be able to do anything they like with it. Indeed, they seem to have more or less given up on eHealth entirely.



## BCCLA heads north for August: 14 workshops, 14 days, 4400 kilometres

The BCCLA will be blazing a trail across northern B.C. and we need your help to make it a success!

Historically the BCCLA supported community civil liberties advocacy groups across B.C., especially in rural and underserved centres like Quesnel and Prince George. We're working to revitalize these groups through a series of public workshops across the province on issues of police accountability. With the Province moving to sign another 20-year policing contract with the RCMP starting in 2012, we want to make sure that northern B.C. residents have their voices heard about what kind of policing services they want.



BCCLA Executive Director David Eby will be visiting the following northern communities this summer to run “know your rights” educational workshops and get feedback on RCMP practices that the BCCLA will pass on to the Solicitor General. We'll also be looking for community leaders who will act as our community contacts, and ultimately help us re-establish BCCLA community groups across the province.

**If you can help the BCCLA promote a workshop in any of these areas, please contact BCCLA Executive Director David Eby directly at [david@bccla.org](mailto:david@bccla.org)**

TO THE CONVERTED *continued from page 2*

As a free and democratic people we must take ownership of our law enforcement. What is done by the police is done in our name. If we have a problem, it is our responsibility as those who govern democratic society, to do something about it. John Stuart Mill wrote scathingly about those who professed a love of liberty yet who shrank from the need to defend those whose work ensured and protected it. Oscar Wilde spoke sarcastically about evading the “sordid necessity for caring” because someone else had been put in place to care for us. We cannot fall into either error. Neither can those who serve in the law enforcement.

John Stuart Mill wrote scathingly about those who professed a love of liberty yet who shrank from the need to defend those whose work ensured and protected it.

Commissioner Braidwood has mapped out how the checks and balances on police power may be put in place. It is our duty to make that work. Given that the BCCLA has pushed for it, we bear

a special, and I might say awful, responsibility. We have asserted that having an independent civilian investigative agency deal with allegations of police misconduct in cases involving death and serious injury is a must. While we are not responsible for administrative failures in execution of that plan, as a democratic citizenry we must take responsibility for having suggested and pushed for it and for the police conduct that is supposed to be checked by it. When the police slice the cake, the independent civilian agency will choose which piece to take. But we must remind ourselves that both the cutting edge, the scrutiny and the choices made are ours.

## Your Rights on Trial

We work daily in all levels of court to defend and preserve rights and freedoms. Here are some of the high-profile cases we're working on.

### Afghanistan Public Interest Hearings / Military Police Complaints Tribunal

**I**n April, lawyers for the BCCLA and Amnesty International returned to hearings in Ottawa before the Military Police Complaints Commission. The Commission has launched an important inquiry to determine what military police officers knew about the torture of prisoners transferred from Canadian to Afghan custody, and what efforts, if any, they made to investigate when it became evident that transferred detainees were being abused.

Senior officials from the Canadian Forces, National Defence and Foreign Affairs have testified before the Commission.

The hearings are based on complaints that were filed by Amnesty and the BCCLA in 2007 and 2008. Since the filing of the complaints, more information about the conditions of these prisoners has been made public. For example, evidence from a report by a Canadian official visiting the Afghanistan National Directorate of Security prison in Kandahar, on November 5, 2007 noted that implements of torture described by a prisoner were discovered in his cell.

Information obtained by human rights monitoring groups and the recent testimony of senior diplomat Richard Colvin strongly suggests that Canada's conduct in Afghanistan is in serious breach of domestic law and its international obligations. The proof of torture in Afghan prisons and the proof that transferred prisoners have been tortured is overwhelming, and it is very disturbing.

There is abundant evidence that high-ranking military officials were aware that former Canadian Forces detainees were likely tortured by Afghan authorities, yet they failed to investigate whether any members of the Canadian Forces should be charged for their role in facilitating these crimes. The public has a right to know why there was a failure to investigate these very serious breaches of domestic and international law.

The Canadian military has been handing over captured Afghans to Afghan authorities since late 2005. The United Nations, foreign governments, international organizations and Afghanistan's own independent human rights commission have all documented pervasive and widespread torture in Afghanistan.

The federal government has repeatedly attempted to shut down the inquiry. Federal lawyers argued that the MPCC lacks jurisdiction to hear the complaints and have tried to prohibit the MPCC from proceeding. The Commission originally began hearings in June 2009, but the hearings were derailed after the federal government failed to provide documents to the Commission and challenged the Commission's jurisdiction in Federal Court.

The hearings have adjourned for the summer pending further document disclosures, but will resume in the early fall of 2010.

The Commission is a quasi-judicial body which was established by Parliament to provide for greater public accountability by the Canadian Forces military police and the chain of command. The Commission is independent of both the Department of National Defense and the Canadian Forces.

The BCCLA and Amnesty are represented by lawyers **Paul Champ** and **Khalid Elgazzar** of Champ and Associates, and **Carmen Cheung**, **Greg McMullen** (articled student) and **Grace Pastine** of the BCCLA.

## R v. National Post / Supreme Court of Canada

The BCCLA was disappointed by a recent Supreme Court of Canada decision that limits the ability of the press to pledge journalist-source confidentiality. This case was of real importance to the freedom of the press, as it concerned the degree of confidentiality the press can promise its sources. The Court determined that “[t]he bottom line is that no journalist can give a source a total assurance of confidentiality.”

The case concerned the *National Post*'s refusal to provide the RCMP with a document they received from a source whom the *Post* promised to keep secret. The document appeared to indicate that then Prime Minister Chretien had a conflict of interest in relation to a business development in his riding, which is related to the alleged scandal known as “Shawinigate”. The bank claimed the document was a forgery, and the RCMP obtained a search warrant and assistance order requiring the *Post* to produce the document.

The RCMP wished to run forensics on the document.

The BCCLA's central argument was that the *Post*'s communications with their confidential source – including the document itself – is protected by s. 2(b) of the Charter (particularly the promise of freedom of the press) and is privileged.

The Court determined that in appropriate circumstances the courts will respect a promise of confidentiality given by a journalist to a source. However, the Court found that the public's interest in being informed about matters that might only be revealed by secret sources is not absolute and could be outweighed by other factors. The Court found that a journalist's claim for protection of secret sources can be assessed properly using the case by case model of privilege. Under that model, the media party seeking to uphold a promise of confidentiality must prove, among other things, that

the public interest in protecting the source outweighs the public interest in a criminal investigation. Although the Court indicated that sometimes the journalist-source relationship will be privileged, the tone of the judgment suggests that it won't be often.

On the facts of the case, the Court determined that the document and envelope were physical evidence of a crime and that accordingly compelling disclosure of the document was in the public interest. The BCCLA takes the position that the document and envelope had little value as physical evidence, and the suggestion that the evidence was valuable was highly speculative. It is troubling that the Court accepted these policing rationales at face value, and the BCCLA will continue to monitor this issue.

The BCCLA was represented by **George Macintosh Q.C.** and **Tim Dickson** of Farris.

## Ministry of Public Safety and Security v. Criminal Lawyers' Association

Supreme Court of Canada



he BCCLA's arguments were adopted in part by the Supreme Court of Canada in a case concerning the right of the public to access government information. The case concerned the Ontario Provincial Police's suppression of a report that detailed a flawed investigation of a 1983 murder.

The Supreme Court held that a citizen's rights to free expression can include the right to access information held by government, where the information is not subject to privilege, and where release of the information is essential to advancing public discussion on the issue. However, the Court held that there is no general right to access information. Writing for a unanimous seven-judge panel,

McLachlin C.J. and Abella J. held that “the scope of s. 2(b) protection includes a right to access to documents only where the access is necessary to permit meaningful discussion on a matter of public importance, subject to privileges and functional constraints.”

The BCCLA intervened in the case to argue that citizens cannot freely express themselves unless they

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have access to the government information on which to base their expression. The case did not go as far as the BCCLA had hoped, but it nonetheless breaks new ground and opens new avenues of argument for people frustrated by the failures of provincial and federal Freedom of Information systems.

Cathy Beagan Flood, lawyer for the BCCLA states, “Before this decision, Canadians only had a statutory right to government information. Now they will have a constitutional right. It will be more difficult for government to justify suppression of information.”

**Cathy Beagan Flood** and **Iris Fischer** were counsel for the BCCLA. Both are of the firm Blake, Cassels & Graydon LLP.

### **Arar v. Ashcroft**

U.S. Supreme Court

The U.S. Supreme Court refused to consider the claims of Maher Arar, the innocent Canadian man who was rendered to torture in Syria by the U.S. government. Mr. Arar has been involved in a U.S. federal lawsuit challenging his rendition to Syria by the U.S. government, where he was tortured, forced to falsely confess, and released after one year without ever being charged. Although the decision of the Court is hardly surprising, it is bitterly disappointing and is another setback for holding officials accountable for illegal acts.

The BCCLA joined with Canadian and international human rights organizations and scholars in support of Mr. Arar’s petition. We

argued that Mr. Arar is entitled to a remedy under US law for the serious human rights violations he experienced.

The BCCLA was represented by **Russell Cohen**, **Rene Kathawala**, **William Lin** and **Justin Bagdady** of Orrick, Herrington and Sutcliffe.

### **Arkininstall et al v. Surrey**

B.C. Court of Appeal

In a tremendous victory, the B.C. Court of Appeal struck down provisions of British Columbia’s *Safety Standards Act* that allowed municipal electrical and fire inspectors to demand entry into anyone’s home to do an electrical safety inspection if they suspected the home was being used for marijuana-growing. The BCCLA intervened in the case.

The case was brought by two residents of Surrey who refused to allow safety inspectors to enter their home as long as they insisted on being accompanied by police officers. In response, the City

of Surrey simply cut the power supply to the home, forcing the couple and their young child to abandon the house.

In a unanimous ruling, a five-member panel ruled that the search of houses without warrants violates the Charter. Chief Justice Lance Finch wrote that the provisions of the Act that “authorize the warrantless entry and inspection of residential premises for the regulatory purpose of inspecting electrical systems for risks that may be associated with marijuana grow-operations” infringe section 8 of the Charter.

The Court ruled that an administrative warrant should be required in order to protect the individual’s expectation of privacy, and that requiring administrative warrants would not undermine the public interest in safety.

The BCCLA was represented by **Brent Olthuis** of Hunter Litigation Chambers and **Micah Rankin**.

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