



CCLA NEWSNOTES

Canadian Civil Liberties Association/www.ccla.org

In this issue:

Hutterites Fight for Photo-free Drivers' Licenses2

CCLA Seeks Volunteers2

TTC Rejects Random Drug Testing of Employees2

CCLA urges Privacy Protection for Household Garbage.....3

Is Exclusion of Evidence a Proper Sanction for Charter Breaches?.....3

Supreme Court to Grapple with Malicious Prosecution4

Protecting Freedom of Expression on Public Property4

Maclean's Magazine Article not "Hateful" enough, According to BC Human Rights Tribunal5

CCLA Calls on Government to Facilitate Return of Canadian Citizen.....5

Supreme Court Ponders Constitutionality of Provincial Forfeiture Law.....5

CCLA Fights "Enhanced" Drivers' Licenses....6

Toronto Police Pressed for Data6

Ontario Government Declines to Order Probe of Contentious Publication Ban.....6

Provincial Hate Speech Restriction Under Attack7

Canadian Human Rights Commission Reviews Its Position on Internet Speech7

CCLA Urges Safeguards in Cross Border Policing.....7

Ten Years of New Teachers Get Civil Liberties Training8

CCLA Continues to Push for Closer Scrutiny of Taser Use8

CCLA TO BID FOND FAREWELL TO BOROVOY



The Canadian Civil Liberties Association will celebrate the illustrious career of General Counsel Alan Borovoy with a tribute dinner on April 28, 2009.

Alan has been raising hell without breaking the law for over 40 years. He has been the **CCLA's** chief spokesperson on issues such as opposition to capital punishment and the War Measures Act, film censorship, and the rights of welfare recipients. Now that he has decided to retire, **CCLA** will hold a gala event to honour him and wish him well.

The gala will take place at the Royal York Hotel in Toronto on Tuesday, April 28, 2009. A reception will start at 6 p.m., with dinner to follow at 7 p.m. Speakers for the evening include the Honourable Mr. Justice Ian Binnie, Supreme Court of Canada, Harry Arthurs, former President of York University, and Nadine Strossen, immediate past President of the American Civil Liberties Union. Edward L. Greenspan, Q.C. has agreed to act as Master of Ceremonies. An assortment of Alan's friends, colleagues, and sparring partners will add their two (or three) cents' worth, and Alan will, of course, be given a chance to respond.

"We are thrilled to be able to thank Alan in this significant way," said **CCLA** Chair John McCamus. "He has given so much to the organization that we wanted to see him off in style."

Proceeds from the event will benefit the important work of the **Canadian Civil Liberties Education Trust**, a valuable charitable organization that performs research and public education.

Event tables are available at \$2,500. Individual tickets, priced at \$200, will go on sale in mid-January. For further information or to purchase a table or ticket, please contact Caitlin Smith, Coordinator, Fundraising & Membership, at csmith@ccla.org or 416-363-0321.

BOROVOY HONoured TWICE
CCLA General Counsel A. Alan Borovoy has recently received two awards for his contributions to the law in Canada: the 2008 Ramon John Hnatyshn Award by the Canadian Bar Association, and the 2008 Guthrie Award by the Law Foundation of Ontario.

HUTTERITES FIGHT FOR PHOTO-FREE DRIVERS' LICENSES

"At the very least, the public should have had the opportunity to learn about the proposed scheme, review and debate it ... but that is precisely what did not happen here."

*Noa Mendelsohn
Aviv, CCLA Free
Speech Director*

The right of a religious group to keep their drivers' licenses without photographs was debated in a recent appeal before the Supreme Court of Canada. The case concerned a 2003 regulation, enacted in Alberta. This change ended an almost 30 year policy of accommodating the 252 members of the Wilson Colony Hutterites on the basis of their sincere religious objections.

Alberta justified its action on the basis that new threats such as terrorism and identity theft can be reduced with facial recognition technology and digital photos of licenses. Intervening in the court hearing, **CCLA** Special Counsel Mahmud Jamal, Colin Feasby, and David Grossman (Osler Hoskin Harcourt)

argued that the rule exacts too high a price in needless infringements of religious freedom. Moreover, the rule threatens this group's way of life. They suggested that the province had "create[d] an identity card scheme by stealth sheltered under the purposes of the *Traffic Safety Act*."

CCLA Free Speech Director Noa Mendelsohn Aviv told *The Globe and Mail* that such a scheme is highly controversial and raises many privacy concerns. "At the very least, the public should have had the opportunity to learn about the proposed scheme, review and debate it... but that is precisely what did not happen here."

*[R. v. Hutterian Brethren of Wilson
Colony]*

CCLA SEEKS VOLUNTEERS

*If you have a talent for website creativity, office filing systems, or research, please contact the **CCLA** office at mail@ccla.org. If you or anyone you know has an interest in or a talent for fundraising, membership development, or a leadership position on the **CCLA** Board or Executive, please contact Danielle McLaughlin at the **CCLA** office at education@ccla.org.*

TTC REJECTS RANDOM DRUG TESTING OF EMPLOYEES

In October 2008, the Toronto Transit Commission met to consider a proposed fitness-for-duty policy that would have subjected employees in "safety sensitive" positions to random drug and alcohol testing. Appearing before the commission, Noa Mendelsohn Aviv, director of **CCLA's** Free Expression Project, argued that, while public safety is an unassailable goal, *random* drug testing as proposed by the TTC would not necessarily have identified actual impairment. Moreover, there are any number of other reasons – such as illness or excessive fatigue – that could affect a person's fitness to operate in a safety-sensitive situation. What the policy would have undeniably done, however, was invade employees' privacy and undermine their dignity.

After hearing opposition from the **CCLA** as well as union representatives, the Commission voted against random drug testing, passing instead a policy that would allow for testing where there is reasonable cause to suspect impairment, such as might happen after an incident or accident.

CCLA URGES PRIVACY PROTECTION FOR HOUSEHOLD GARBAGE

Appearing in the Supreme Court of Canada in October, **CCLA** Special Counsel Jonathan Lisus and Alexi Wood (McCarthy Tetrault) argued that information gleaned from household garbage is so personal, intimate, and detailed that government searches must be subject to constitutional protection. In this case, the Calgary police had trespassed on a suspect's property six times, seizing and searching the contents of the garbage that had been placed out for city collection. The police never had a warrant, and knew that they did not have enough evidence to get one. The government argued that by virtue of leaving out household garbage for collection by municipal workers, an individual had abandoned the items and any reasonable expectation of privacy in them.

Lisus and Wood urged the court to reject, as too cavalier, this government position. In our communal society, **CCLA** pointed out, the government requires that individuals participate in a waste collection system by leaving their private garbage in a public place. Individuals reasonably expect that their garbage will be picked up by city workers and mixed with the personal discarded effects of other community members until the information in those items is effectively rendered anonymous or destroyed. Depositing waste with the city for storage, collection, and disposal, **CCLA** argued, does not mean we have abandoned our intimate information to the surveillance and investigative apparatus of the criminal justice system. The court has reserved judgment.

[R. v. Patrick]

IS EXCLUSION OF EVIDENCE A PROPER SANCTION FOR CHARTER BREACHES?

The Supreme Court of Canada will hear **CCLA's** arguments regarding the importance of ensuring that, where the police flagrantly violate the *Charter* rights of individual citizens, proper sanctions will follow.

When he was driving, Bradley Harrison was stopped, searched, and arrested by a police officer who had no reasonable grounds for the interception. The trial judge described this police action as a "blatant", "brazen" and "flagrant" breach of the *Charter*. The trial court found that the officer had not acted in "error or ignorance" but had known that his actions violated Mr. Harrison's fundamental rights. The judge further found that the officer lied to the Court, and his attempts to justify his actions during his testimony were "contrived and defy credibility".

Nevertheless, the trial judge decided to admit the evidence – a large quantity of illicit drugs –

obtained through the *Charter* breaches. The Ontario Court of Appeal upheld the trial judge's decision.

Frank Addario and Jonathan Dawe (Sack Goldblatt Mitchell), **CCLA** Special Counsel, argued that the courts must guard against appearing to condone unacceptable police conduct. Balancing the misconduct of the police against the "seriousness" of the offence committed by the suspect, as was done in this case, **CCLA** contended, effectively treats individual *Charter* rights as luxuries that are only worth protecting when the stakes are low. Court tolerance of such conduct and the creation of such a double standard, in the opinion of **CCLA**, would cause significant damage to the reputation of the administration of justice. Therefore, according to the **CCLA** factum, the impugned evidence should have been excluded in this case.

[R. v. Harrison]

SUPREME COURT TO GRAPPLE WITH MALICIOUS PROSECUTION

GIVE THE GIFT OF CIVIL LIBERTIES

Why not consider a year-end donation to the **Canadian Civil Liberties Association or Education Trust**? It makes a great gift for family and friends. Visit our website at www.ccla.org or call 416-363-0321.

In mid-December, the Supreme Court will hear arguments about what duties Crown prosecutors owe to defendants and what is needed to prove that a prosecution is malicious. The tort of malicious prosecution is a key means of safeguarding the honesty and integrity of the office of the Crown prosecutor, an office that stands as the gatekeeper to the criminal justice system. The tort allows accused people to bring their prosecutors before the courts and present evidence that the criminal prosecution was undertaken with malice on the part of the prosecutor.

In their intervention before the Supreme Court of Canada, **CCLA** Special Counsel Bradley Berg, Allison Thornton, and Shashu Clacken (Blake Cassels Graydon) will argue that a prosecutor must have

more than just an “arguable case” before proceeding with a prosecution. In order to protect against the risk of innocent people being prosecuted, **CCLA** will argue, the Crown should hold an honest belief that there is sufficient credible evidence to probably prove criminal guilt. The prosecutor, as a “buffer between the police and the citizen,” is placed in a position of significant public trust and power and can never overlook the rights of the accused. Narrowing this role, according to **CCLA**, would undermine the integrity of the justice system and place innocent people at risk of spurious prosecutions.

This case originated in Saskatoon.

[Matthew Miazga v. The Estate of Dennis Kvello, et al]

PROTECTING FREEDOM OF EXPRESSION ON PUBLIC PROPERTY

“It’s not just for love and kisses. It’s also for angry indignation.”

Alan Borovoy, on free expression, at a McMaster University campus lecture

In late September, **CCLA** filed written arguments with the British Columbia Court of Appeal in a case involving a citizen’s right to express himself on public property. The facts of the case involved an individual who believed he had not been treated fairly by the government and by his former employers at the fire department. He decided to vent his frustration through passively displaying signs in the public foyers of a courthouse, the West Vancouver Municipal Hall, and in a fire station. He did so by standing in publicly accessible, but out of the way, areas. He did not accost people, but simply made his signs available for them to

read if they chose to. He was arrested under the *Trespass Act* and removed from the premises at each of the three locations.

Catherine J. Boies Parker (Underhill, Faulkner, Boies Parker), Special Counsel for the **CCLA**, argued that public bodies should not have the unfettered ability to exclude individuals from a normally and naturally public location simply because they disagree with the content of messages conveyed. Although at times decisions to limit expression might be warranted, it should be up to the government to justify its restriction in such a situation, she said.

[R. v. Breeden]

MACLEAN'S MAGAZINE ARTICLE NOT "HATEFUL" ENOUGH, ACCORDING TO BC HUMAN RIGHTS TRIBUNAL

The British Columbia Human Rights Tribunal has dismissed a "hate speech" complaint against *Maclean's* magazine concerning an article that depicted Muslims as seeking world religious domination. According to the Tribunal, the complainants did not demonstrate that the article had reached the levels of "hatred or contempt" required by the BC law.

Intervening before the Tribunal, **CCLA's** Free Speech Director Noa Mendelsohn Aviv argued for a narrow interpretation of the law; she said it should be limited to discriminatory practices in areas such as employment, housing, and services. According

to Mendelsohn Aviv, a broader reading of the law would chill all kinds of public debates and expressions of opinion necessary to a healthy democracy.

[Elmasry v. Roger's Publishing Ltd.]

Earlier in the year, the Canadian Human Rights Commission had turned down a parallel complaint against *Maclean's* magazine for reasons similar to those provided by the BC Tribunal. The Ontario Human Rights Commission had declined on jurisdictional grounds to send a similar case to a hearing.

CCLA CALLS ON GOVERNMENT TO FACILITATE RETURN OF CANADIAN CITIZEN

The Canadian Civil Liberties Association has called on the federal minister of foreign affairs to do whatever may be necessary to facilitate Abousfian Abdelrazik's return to Canada from Sudan. Abdelrazik, who is a Canadian citizen, claims he has been arbitrarily detained and tortured by Sudanese officials. While Abdelrazik

had previously been suspected of links to international terrorism, it appears that such concerns have waned in recent years. He is now free in Sudan, but is unable to return to his wife and children in Canada because of the government's refusal to grant him the necessary travel documents. At the time of writing, Mr. Abdelrazik continues to be stranded in Sudan.

SUPREME COURT PONDERES CONSTITUTIONALITY OF PROVINCIAL FORFEITURE LAW

Under Ontario's *Civil Remedies Act*, the government may seize money or property of any kind or value which is the likely result or instrument of "unlawful activity". But, unlike prosecutions under the *Criminal Code* with its elaborate safeguards including the need to prove guilt beyond a reasonable doubt, this Ontario law requires less proof and it contains fewer safeguards. In mid-November, the Supreme Court of Canada entertained a constitutional challenge of the *Act*.

Intervening at the hearing, **CCLA** Special Counsel Bradley Berg and Alison Thornton (Blake Cassels

Graydon) argued that the overriding purpose of this law is not to compensate the victims of illegality but rather to deter or punish its commission. To the extent that such illegality can include *Criminal Code* crimes, the law, according to **CCLA**, would not be a valid exercise of provincial authority under the Canadian Constitution.

The Court has reserved judgment.

[Robin Chatterjee v. Attorney General of Ontario]

CCLA FIGHTS "ENHANCED" DRIVERS' LICENSES

CCLA recently voiced strong opposition to legislation, proposed by the Ontario government, which would introduce privacy invasive "enhanced" drivers' licenses (EDLs) and photo cards. Bill 85, which would create a new class of drivers' licenses and photo cards that could be used to facilitate entry to the United States, gives the government the green light to include radio frequency identification (RFID) technology in several government issued documents. RFID, which was originally introduced to track livestock and warehouse goods, could be misused to track auto license holders without their knowledge. The Bill also gives government new powers to use biometric facial recognition software and share a wider range of information with other governments.

Appearing before Ontario's Standing Committee on General Government, **CCLA's** Public Safety Project Director Graeme Norton argued that the government should abandon its EDL proposal unless significant steps are taken to limit its potential privacy threats. Specifically, Norton asserted that the Bill should provide greater limitations on how biometric photo-data can be used and the entities with which it can be shared. He also called on the government to abandon the proposed use of RFID technology, or, in the alternative, at least to use the most secure technological option available. Finally, Norton called on the government to ensure vigorous independent auditing of EDLs if the proposal does move forward. The government did agree to limit how the data can be used but it is proceeding with the use of the RFID technology.

TORONTO POLICE PRESSED FOR DATA

On the basis of a very narrow reading of Ontario's freedom of information law, the Toronto police have denied the *Toronto Star* access to their statistics in an electronic database that could shed light on the newspaper's accusations of police racial profiling. Since the statistics are contained in such a database, the police invoked a highly technical argument in order to block access to their material. The Ontario Privacy Commissioner sided with the *Star* and the police took the matter to court. The Divisional Court reversed the Privacy Commissioner and found for the police. From there, the *Star* appealed.

Houweling (Torys) argued that interpretation of such a law should not turn on the technicalities of what software may or may not be in use in any given government database.

According to **CCLA**, access to such information is essential for the ability of the public to monitor the behaviour of important government agencies such as the police.

The Court has reserved judgment.

[Toronto Police Services Board v. Rankin]

Intervening in the Ontario Court of Appeal, **CCLA** Special Counsel Wendy Matheson and Alisse

ONTARIO GOVERNMENT DECLINES TO ORDER PROBE OF CONTENTIOUS PUBLICATION BAN

Ontario Attorney General Chris Bentley has refused a **CCLA** request for an independent investigation into why the *Crown* asked for a publication ban over the objections of defence counsel in the recent criminal trial of aboriginal activist Shawn Brant. Usually, it's the defence, not the prosecution, that requests publication bans regarding pre-trial proceedings. In this case, the *Crown* sought the ban and the defence objected. The Court ultimately imposed it.

provoked widespread public debate about the conduct of the Ontario Provincial Police in this matter. **CCLA** pointed out to the Minister that, "citizens frequently take great interest in criminal proceedings and accused persons may have a legitimate interest in ensuring public scrutiny of their experience with the justice system." **CCLA** further referred to a newspaper editorial stating that the publication ban seemed "to protect the police rather than ... either the accused or the public ..."

Questions about this incident arose when, after the publication ban was lifted, the unveiled information

PROVINCIAL HATE SPEECH RESTRICTION UNDER ATTACK



Suite 506, 360 Bloor
Street West
Toronto, Ontario
M5S 1X1

Phone:
416-363-0321

Fax:
416-861-1291

E-Mail:
mail@ccla.org

CCLA Newsnotes

Staff: *Abby
Deshman, DS
McLaughlin, Noa
Mendelsohn Aviv,
Graeme Norton, and
Caitlin Smith*

*We're on the
Web!*

See us at:

www.ccla.org

Yet another provincial hate speech restriction came under attack this fall in a case involving some homophobic flyers in Saskatchewan. While **CCLA** repudiated the content of the speech, it argued that that the applicable law should be struck down as unconstitutional, or else read narrowly - to prohibit acts of discrimination not expressions of opinion.

"In a robust democracy we must have a high degree of tolerance for debates

about moral issues, even when expressed in polemical terms," **CCLA** argued.

CCLA intervened in the Saskatchewan Court of Appeal, and was represented by Special Counsel Andrew Lokan (Paliare Roland).

[Whatcott v. Saskatchewan Human Rights Tribunal]

CANADIAN HUMAN RIGHTS COMMISSION REVIEWS ITS POSITION ON INTERNET SPEECH

The Canadian Human Rights Commission has commissioned Professor Richard Moon to conduct a policy review regarding "hate speech" and the internet. **CCLA** Free Speech Director Noa Mendelsohn Aviv and General Counsel Alan Borovoy met with Prof. Moon, and identified the various dangers that flow from limiting the free expression of opinion. They also pointed out certain special attributes of

the internet, including the availability of all forms of speech from sources outside of Canada, the prevalent use of the internet for conversation by young people, and its use by the media.

As we were going to press, the Moon report was released. For more on this, see our next issue.

CCLA URGES SAFEGUARDS IN CROSS BORDER POLICING

In a recent communiqué to the Department of Justice, **CCLA** called for special civil liberties protections to be made a part of a new government proposal to allow American police officers to conduct policing operations in Canada. Under the government's initiative, certain US officers would be permitted to act as peace officers in Canada under the supervision of Canadian police. Similarly, certain Canadian officers would be granted concurrent powers to conduct police operations in the US.

CCLA's recommendations addressed a wide range of issues, including the need to thoroughly train American officers regarding Canadian policing standards, the importance of effective disciplinary sanctions, and the importance of guidelines on sharing of information.

Granting American officers the right to police in Canada would usher in significant changes in law enforcement, the effects of which are not entirely known, said **CCLA's** Graeme Norton. It is not yet known whether and how the government will proceed with this initiative.

TEN YEARS OF NEW TEACHERS GET CIVIL LIBERTIES TRAINING



CCLET's Danielle McLaughlin speaks at Seneca College in October 2008

After a decade of engaging many thousands of Ontario's teacher candidates in the exercise of educating for democracy, the **Canadian Civil Liberties Education Trust (CCLET)** returned to where it all began. In September 2008, **CCLET** Executive Director Alan Borovoy and Education Director Danielle McLaughlin met with the Ontario Association of Deans of Education to thank them and update them on the progress of **CCLET's Teaching Civil Liberties Project**. Thanks to the Deans, who have warmly welcomed Danielle and her colleagues into their faculties since the early 1990s, many of Ontario's teachers have a better understanding of the conflicts of rights that will arise in their classrooms and in society – and how they can turn these conflicts into an opportunity for teaching critical thinking. This project continues to be supported by a generous grant from the Law Foundation of Ontario.

CCLET staff members Alan Borovoy, Davin Charney, Abby Deshman, Danielle McLaughlin, Noa Mendelsohn Aviv, Graeme Norton, Julie Stewart, and volunteers Dr. Harry McKay, and Alexi Wood, also continue to address students and other members of the public in a wide variety of arenas. These include: high school law and civics classes; Seneca College's program for law clerks and legal administrators; the Summer Law Institute for high school law teachers held by the Ontario Justice Education Network (OJEN); a certification program for aboriginal teacher-candidates at Nipissing University; an Additional Qualifications course for teachers; a conference for international students at York University; a course on civil liberties taught by Alan Borovoy at Glendon College, York University; the Ontario Bar Association's Law Week program for high school students; a conference for provincial prosecutors; a workshop for deaf middle-school students; the Joseph Howe conference in Halifax on freedom of expression; an address on campus free speech to faculty and students at McMaster University; and many more.

Each year **CCLET**, in collaboration with the Toronto District School Board, holds a civil liberties conference for more than 200 high school students. In November 2008, Alan Borovoy again delivered the keynote address, while workshops on current civil liberties issues were led by volunteer experts including The Hon. The Very Rev. Lois Wilson, former independent Senator; Barbara Jackman, immigration lawyer; Prof. Anthony Doob, professor of criminology; Sydney Goldenberg, former human rights lawyer; Alexi Wood, lawyer and former **CCLA** project director; and Pam Shime, human rights lawyer and activist.

CCLA CONTINUES TO PUSH FOR CLOSER SCRUTINY OF TASER USE

In a recent presentation to the Toronto Police Services Board, **CCLA** Public Safety Project Director Graeme Norton called for greater independent scrutiny of how Tasers are used by police. In this presentation Norton urged the Board to create an independent audit system for the municipal police force, which he argued would ensure greater public confidence in how this dangerous weapon is used. He told the Board that, "auditors should be given on-going access to police records, facilities, and personnel in order to conduct self-generated probes into Taser use." To date the Board has resisted taking such action.