Supreme Court Nixes Random Use of “Drug Dogs” in Schools

In May 2008, the Supreme Court of Canada ruled that the police may not randomly use dogs to sniff for illegal drugs in the schools of this country.

In a Sarnia high school about 2 years ago, the police were invited to bring their dogs on the premises so that they might look for illicit drugs. The students remained “locked down” in their classrooms while the dogs roamed the corridors and the gymnasiums which contained the students’ school bags and possessions.

“Entering a schoolyard does not amount to crossing the border of a foreign state”, thundered Mr. Justice Louis Lebel of the Supreme Court. The Court held that the use of dogs this way amounted to a “search” within the meaning of the Charter. In this case, the search was deemed “unreasonable” because the police had neither obtained a warrant nor did they have reasonable grounds to believe that any particular student was harbouring unlawful drugs. Only one student was found to be in possession of such drugs, but the drugs could not be used as evidence when he was subsequently charged and prosecuted.

CCLA was represented in the case, both at the Ontario Court of Appeal and the Supreme Court of Canada, by Jonathan Lisus of McCarthy Tetrault. Lisus had argued that students’ backpacks are “akin to a study, bedroom, and office rolled into one”. As such, they attracted privacy rights. [R. v. A.M.]
TASER POLICIES UNDER SCRUTINY

Following the death of a Polish immigrant in Vancouver who had been “TASERed” by the RCMP, governments at many levels have begun to review their TASER policies. CCLA has been using the opportunity to push for reform.

On the provincial front, CCLA has called upon the Ontario government for stricter deployment guidelines and auditing of how TASERs are used. In Toronto, CCLA Public Safety Project Director Graeme Norton made a presentation to the Police Services Board urging stricter standards for both the use and oversight of TASERs. Subsequently, Norton’s comments were carried throughout the national media. The thrust of these comments was that “TASER policies need to ensure that use is only permitted when lethal force would otherwise be justified or where there is an imminent threat to life or limb.”

GOVERNMENT STANDS BY CSIS DESPITE SIRC REPORT

In an April letter to the Canadian Civil Liberties Association (CCLA), federal public safety minister Stockwell Day declared that CSIS had acted “appropriately” in the case of Mohamed Monsour Jabarah. Yet, just a few months earlier, the federally-appointed independent agency, the Security Intelligence Review Committee (SIRC), said its investigation revealed that CSIS had violated several of Mr. Jabarah’s constitutional rights.

In the summer of 2002, Mr. Jabarah, a Canadian citizen, then 19-years-old, wound up in Oman in the custody of CSIS. At the time, CSIS reportedly “facilitated” his transmission to the United States where he finally pleaded guilty to involvement in terrorist conspiracies against U.S. embassies. He sustained a life sentence.

Since that time, CCLA has been attempting to find out exactly what happened. Two public safety ministers assured the civil liberties group that CSIS had handled things properly. But, in the summer of 2007, SIRC found otherwise.

Several months later, CCLA asked the current minister, Stockwell Day, what the government had done regarding those CSIS employees who may have misbehaved. But, in April, Mr. Day openly disagreed with SIRC. Shortly thereafter, CCLA called upon the government either to “disclose publicly the reasons for its disagreement with SIRC” or “convene an independent inquiry to resolve” the issue”.

“In no event,” said CCLA General Counsel Alan Borovoy and Public Safety Project Director Graeme Norton, “should this stand-off [be allowed to] continue”. 

Thanks to the assistance of Swerve Design, and the tenacity of CCLA’s Law Foundation of Ontario Public Interest Articling fellow Julie Stewart, CCLA’s new and significantly improved website will soon be up and running. You will still find your favourite civil liberties organization at www.ccla.org - but with a fresh new look!
AIR INDIA INQUIRY URGED TO RECOMMEND REFORM OF "NO FLY" PROGRAM

The Air India inquiry has received 19 recommendations from CCLA relating to airline security and police governance. Currently, individuals whose names appear on Canada’s no-fly list do not generally find out until they arrive at the airport and attempt to board a flight. Moreover, such individuals are not entitled to an independent review of the listing decision if they believe they have been wrongly included. Nor do they have a right to compensation in the event that a mistake is found or acknowledged.

Graeme Norton, CCLA’s Public Safety Project Director, called for independent review with compensatory rights. He repeated these proposals in media interviews and at a privacy roundtable at the U of T law school.

The CCLA brief also dealt with “behavioural profiling” and the relations between CSIS and the RCMP.

SASKATCHEWAN COURT OF APPEAL REVERSES SUSPENSION OF NURSE

The Saskatchewan Court of Appeal confirmed the free speech rights of William Whatcott, an anti-abortion nurse, who was disciplined for two counts of professional misconduct for picketing in front of Planned Parenthood Regina. The Court allowed his appeal and quashed the penalty imposed by the licensing agency.

Although the objective of Whatcott’s discipline was found to be “pressing and substantial”, the Court concluded that the decision to discipline Whatcott was not rationally connected to the objective of upholding public respect for the standing and status of licensed practical nurses. These findings could therefore not be upheld.

Intervening in the case, CCLA Special Counsel Andrew Lokan argued that Whatcott should not have been disciplined for airing his views. He argued that phrases such as “harmful to the best interests of the public” and “tends to harm the standing of the profession,” in the agency’s code of conduct, should not readily be interpreted to apply to expressions of personal opinion, particularly ones unconnected to the speaker’s professional life and on matters of morality.

While such professional bodies do have some power to regulate off-duty conduct of members, Lokan argued that the further the expression is removed from the member’s professional capacity, the harder it should be to justify limiting the expression. The agency has applied for leave to appeal to the Supreme Court of Canada. [Whatcott v. Sask. Assn. of Licensed Practical Nurses]

CCLA ANNUAL GENERAL MEETING will be held June 25, 2008 at 8pm.

PLACE: Room 4-422, Ontario Institute for Studies in Education, 252 Bloor Street West, Toronto

SPEAKER: Kenneth P. Swan, CCLA Vice-President

TOPIC: "Report on International Cooperation Among Civil Libertarians"
CCLA added its voice to the fight against Bill C-10, an omnibus bill that would give the Minister of Heritage the power to deny tax credits to film and television productions that she believes contravene public policy.

Appearing before the Senate Committee on Banking, Trade and Commerce, CCLA’s Freedom of Expression Project Director Noa Mendelsohn Aviv argued that the criteria for denying tax credits should be clear and specific, and should not limit basic freedoms any more than necessary. Moreover, such criteria should not be left to “ministerial whim”. Mendelsohn Aviv went on to emphasize that the Bill should state that in order to revoke an income tax credit because of a film’s content, the Minister should have to apply to court and prove – and a court would have to find – that, if prosecuted, the film would lead to a criminal conviction because of its content.

The Supreme Court of Canada heard arguments in a case involving the exclusion of improperly obtained evidence.

Donahue Grant was stopped by police officers because they believed the young man looked “suspicious”. A uniformed officer stood in front of Grant and told him to keep his hands out, while plain-clothed officers stood behind him. When asked whether he had “anything on him that he shouldn’t”, Grant admitted that he was carrying a small amount of marijuana and a loaded revolver. He was arrested and charged with five firearms offences. At issue in the case, was whether the encounter amounted to a detention and search contrary to the Charter.

Intervening before the Court, CCLA Special Counsel, Queen’s University professor Don Stuart argued that the central consideration for excluding improperly obtained evidence should be “the seriousness of the Charter breach rather than the reliability of the evidence, or the seriousness of the offence.” [R. v. Grant]

CCLA called for the creation of an independent agency to investigate RCMP conduct that results in death or serious injury.

In a recent communiqué to the RCMP Complaints Commission, CCLA called for the creation of an independent agency to investigate RCMP conduct that results in death or serious injury. Currently, such incidents are investigated by the RCMP itself, raising the perception of investigative bias. Events, such as the recent RCMP shooting death of Ian Bush in British Columbia, have brought increased media attention to this issue, resulting in a formal request to CCLA for its comments.

CCLA’s 10 recommendations touched upon a wide range of issues, including the appropriate powers for a new independent agency and the obligations of officers being investigated.

Apart from Ontario’s Special Investigations Unit, no such system exists in any other Canadian jurisdiction. The Commissioner has not yet responded.
COMPLAINT WITHDRAWN re DANISH CARTOONS

In February of 2008, Alberta Islamic Leader, Syed Soharwardy, withdrew the complaint he had filed 2 years earlier against Ezra Levant’s Western Standard for its having published the controversial Danish cartoons dealing with the prophet Mohammed. According to an editorial in the Calgary Herald, the complainant explained that, when he filed his complaint, “he didn’t fully appreciate what free speech rights meant to people in this country. Now, having listened to Canadian Civil Liberties Association General Counsel Alan Borovoy on his recent visit to Calgary, and some close friends, he says he gets it.”

Toward the end of January, Borovoy and CCLA Free Speech Director Noa Mendelsohn Aviv spoke at a number of public events in that province organized by the Sheldon Chumir Foundation for Ethics in Leadership, questioning the legal limits of offensive speech. Their visit included participation in a public panel and a meeting with members of the Calgary Herald editorial board. Borovoy also addressed a public meeting at the University of Alberta in Edmonton.

ANTI-GAY LETTER VIOLATES LAW – ALBERTA TRIBUNAL

A human rights panel in Alberta found that a homophobic letter to the editor violated that province’s human rights law. In that letter, fundamentalist pastor Stephen Boissoin, had linked homosexuality with “all manner of wickedness.” The law targets statements “likely to expose” persons to “hatred or contempt” on the basis of their race, religion, ethnicity, and sexual orientation, among other grounds. According to the panel, “the eradication of hate speech, is paramount to the freedom [the respondents] should have to speak their views.”

MACLEAN’S HUMAN RIGHTS COMPLAINT DISMISSED IN ONTARIO: ONE DOWN, TWO TO GO

In late April, the Ontario Human Rights Commission dismissed a complaint that had been filed against Maclean’s magazine for its publication of a highly controversial article by international columnist Mark Steyn. Among other things, Steyn had written that, while not all Muslims are terrorists, “enough of them are hot for Jihad to provide an impressive support network”.

Unlike the federal and B.C. human rights laws, under which additional complaints were also filed against the magazine, the Ontario law does not contain a provision targeting statements “likely to expose” persons to “hatred or contempt” on the basis of grounds such as religion and ethnicity. The Ontario commission dismissed the complaint, noting its lack of jurisdiction in the circumstances, but it also issued a statement strongly critical of the impugned article. At this point, the complaints will be dealt with under the federal and B.C. human rights laws.

CCLA Special Counsel Josh Paterson [of Vancouver’s Fiorillo Glavin Gordon law firm] had argued that the statute should be interpreted to apply only to those public statements that facilitate unlawful discrimination. Thus, he argued, the law would ban employment ads restricting applications from homosexuals. But, according to CCLA, the law should not be read so as to limit expressions of opinion [R. v. Boissoin]
TOP COURT UPHOLDS MANDATORY MINIMUM SENTENCES

The Supreme Court recently upheld the constitutionality of mandatory minimum sentences. In the midst of a custodial altercation with a prisoner he had arrested, Michael Ferguson, an Alberta Mountie, shot and killed his captive. Ferguson was subsequently convicted of manslaughter using a gun, an offence requiring a mandatory 4 year sentence.

At the Supreme Court, CCLA special counsel Andrew Lokan (of Paliare Roland) argued that mandatory minimum sentences amount to cruel and unusual punishment, and should be struck down. Alternatively, he argued that a constitutional exemption could be read into the provisions of the Criminal Code so as to allow for judicial discretion in exceptional circumstances. CCLA took no position with respect to the specific facts of the Ferguson case.

But the court found that Ferguson’s sentence was not “grossly disproportionate” and therefore was not cruel and unusual punishment. Despite holding that the Charter was not breached, the Court ruled that the remedy of a constitutional exemption was, in any event, not available.

CCLA will continue to oppose mandatory minimums on the basis that they can produce unfair outcomes, while doing little to deter crime. [R. v. Ferguson]

LATIMER GRANTED DAY PAROLE

In early 2008, the appeal division of the National Parole Board reversed the Board’s earlier decision that denied Robert Latimer’s request for day parole. The Saskatchewan farmer had drawn a life jail sentence (no parole for 10 years) for ending the life of his severely disabled 12-year-old daughter. Pointing out the judicial finding that “compassion” and “love” had motivated Latimer’s action, CCLA had called for remedial action from the federal government. At that time, the group’s General Counsel Alan Borovoy challenged the Parole Board for noting that Latimer had not evinced “any commitment or motivation for change”. This triggered the CCLA rebuke that the role of this tribunal “is not to brainwash the prisoners but rather to assess whether they would pose a risk to the safety of society”.

Following the publicity surrounding such criticisms of the Board’s decision, Latimer retained a lawyer and, this time, succeeded in obtaining day parole. While welcoming this decision, CCLA is urging total clemency.

CCLA is proud to announce that Adam Wheeler, former high school co-op student and current part-time employee in our offices, has received a Canadian Millennium Scholarship National Award of Excellence. Adam has also been awarded an Ontario Medal for Young Volunteers, one of ten young people in the province to be so honoured.
CCLA PRESSES TORONTO POLICE BOARD ON DISCLOSING INFORMATION

In a December 2007 letter to the Toronto Police Services Board, CCLA’s Freedom of Expression Director, Noa Mendelsohn Aviv, called for the disclosure of information sought by the Toronto Star since 2003. In the interests of privacy, the Board was asked to replace the name of each person in the police database with a unique, randomly-generated number. The Board refused, arguing that this would require the creation of a record; the Board simply had to produce existing records.

The Information and Privacy Commissioner agreed with the Star but, on appeal, the Divisional Court reversed the decision. Ms Mendelsohn Aviv argued that, in view of the enormous power of the police, the public interest would be better served if the police board discontinued the litigation and instead coughed up the information; “The effort needed to produce the requested information would be fairly minimal in comparison to the compelling public interest in receiving it.”

In the meantime, CCLA has retained Wendy Matheson of the Tory firm to apply for leave to intervene in the Ontario Court of Appeal, where the case is currently heading. [Rankin v. Toronto Police Services Board]

CCLA also welcomes Caitlin Smith to a new position in Fundraising and Membership Development. Ms Smith will be helping to ensure that CCLA and CCLET move into the future on a sound and well-funded basis.

TEACHING CIVIL LIBERTIES: WHAT THE INSTRUCTORS ARE SAYING

An education professor said the following to CCLA’s Education Director, Danielle McLaughlin, “The comments that some students ... made serve to confirm the importance of the Canadian Civil Liberties Association [Education Trust]. The topics and methods of presentation were engaging to the students. For some, it was perhaps the first time that they were encouraged to consider ... their decision making in relation to civil liberties. I would be delighted to have this program a part of my course syllabus in the years to come.”

When CCLET engages teacher candidates, it leaves a lasting impression. Don’t you wish that your teachers had included concepts and principles of civil liberties in their programs? Thanks to CCLET’s Teaching Civil Liberties project, funded by a generous grant from the Law Foundation of Ontario, many teachers are now doing just that.

In faculties of education, education conferences, and hundreds of schoolrooms, discussions about important civil liberties issues are preparing the young citizens of Canada to understand democratic values.

East York Collegiate Institute law teachers Louise Celap and Christina Rajabalan with CCLET’s Danielle McLaughlin (centre)
The CCLA National Board consists of the following:

1. Those elected by the membership for a two-year period - President, 12 Vice-Presidents, Secretary, Treasurer, and 35 Directors. The following are those who were last elected to fill these positions; in the case of those who are marked with an asterisk, their terms of office will expire this summer.


2. All Past Presidents - the living persons in this category are John Nelligan, Q.C., Harry W. Arthurs, Walter Pitman, and Allan Blakeney

3. Two representatives from each affiliated chapter -- the method of selection and term of office are determined by the chapter itself. Following are the present incumbents in this category: NOVA SCOTIA - Jane Cobden, Walter Thompson; SAINT JOHN - Eric Teed; FREDERICTON - Jon V. Oliver; HAMILTON - Louis Greenspan; MANITOBA - Michael Connor, Ken Mandzuik, ALBERTA - Brian A. F. Edy

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In order to fill the positions now open for election by the national membership, a National Nominating Committee was established by Board resolution. The members of the Committee are as follows: Jane Cobden (Nova Scotia), Jon Oliver (Fredericton), Marvin Schiff (Toronto), Louis Greenspan (Hamilton), Ken Mandzuik (Manitoba), Brian A. F. Edy (Alberta), and former CCLA Presidents John Nelligan, Harry Arthurs, Walter Pitman, and Allan Blakeney. The National Nominating Committee recommends the following candidates for the positions which are now open on the Board:

   Vice-Presidents – Jamie Cameron, Osgoode Hall law professor; Susan Cooper, Nunavut lawyer; Gisele Côté-Harper, faculty of law, University of Quebec; Marlys Edwardh, criminal lawyer; John McCamus, Osgoode Hall law professor, Chair, Legal Aid Ontario; Howard Pawley, former Premier of Manitoba; Dr. Joseph Wong, founding President, Chinese Canadian Council on Race Relations

   Secretary, Sydney Goldenberg, former Counsel to Ontario Human Rights Commission

   Treasurer, Elaine Slater, former US civil rights activist

   Board of Directors – Frank Addario, criminal lawyer; Bromley Armstrong, former Chair, Jamaican Canadian Association; Ronald Atkey, former Chair, Security Intelligence Review Committee; Edward Broadbent, former leader, New Democratic Party of Canada; Dr. Debby Copes, member, Medical Reform Group; David Cronenberg, filmmaker; Hussein Hamdani, lawyer, Muslim-Jewish Dialogue of Hamilton; Shirley Heafey, former Chief Commissioner, Commission for Complaints Against the RCMP; Harish Jain, former member, Canadian Human Rights Commission; Mahmud Jamal, Special Counsel to CCLA in the kirpan case; Joy Kogawa, novelist; Anne La Forest, former Dean, University of New Brunswick law faculty; Cyril Levitt, former Chair Sociology Department, McMaster University; Penelope Rowe, Executive Director, Community Service Council of Newfoundland and Labrador; and David Schneiderman, professor, University of Toronto Faculty of Law.

   Additional nominations may be made of members in good standing if they are signed by the candidate and 2 nominators, also members in good standing, and received at the CCLA office no later than Friday, 20 June 2008, 12:00 noon EDT. Additional nominations should be accompanied by short biographical notes on the candidate.
 Appearing in the Supreme Court of Canada during April, CCLA Special Counsel Christopher Wayland and Alexi Wood (McCarthy Tétrault) effectively told the judges that, even during a relatively short investigative detention, there is no need to choose between all of the safeguards required in an arrest situation or none of them. In the case at issue, the Ontario Court of Appeal appears to have allowed police officers to detain people for investigative purposes without informing them that they are being detained and without advising them of their right to silence or to counsel.

According to Wayland and Wood, such a situation can create too great a risk of abuse. But the CCLA counsel also acknowledged that, during the shorter life of an investigative detention, the normal safeguards might be somewhat abbreviated. They therefore urged a compromise position that preserved some of the usual custodial rights, while accommodating the need for something less elaborate. The court has reserved judgment. [R. v. Suberu]

CCLA URGES SPECIAL SAFEGUARDS DURING “INVESTIGATIVE DETENTIONS”

The Supreme Court of Canada has ruled that a man must compensate his ex-wife because he refused, for 15 years, to grant her a religious divorce, despite having originally undertaken to do so. This refusal, according to the ex-wife, forced her to remain religiously married to her ex-husband, barred from remarrying in her faith, and affected her ability to have children.

While the Quebec Court of Appeal had refused to enforce the ex-husband’s obligation because of its religious character, CCLA offered the high court a different approach. CCLA argued that the court could enforce such an undertaking as long as the court need not determine matters of religious doctrine; it asked the court to consider the harm caused to this woman and to women in her community; and it contended that while compensation may be appropriate, more intrusive or coercive measures (such as contempt or specific performance) probably would not be. CCLA was represented by Special Counsel Andrew Lokan of the Paliare, Roland law firm. [Bruker v. Markowitz]
A recent decision of the Ontario Court of Appeal could well diminish the protections afforded by Canada’s Charter of Rights and Freedoms. Under the facts of the case, a police officer intercepted a driver and proceeded to search his car – without having any prior reasonable basis to suspect any misconduct. The result of this police breach of the Charter was the discovery and seizure of some 77 pounds of cocaine. The driver was subsequently charged with the possession of an illicit drug for the purpose of trafficking.

A key issue in the resulting trial concerned the admissibility into evidence of the seized cocaine. The judges held that, even though they considered the officer’s conduct to be “extremely serious,” they would not keep the cocaine out of court.

Under the Canadian Charter, improperly obtained evidence is not automatically excluded. In Canada, such evidence is to be excluded if its admission “would bring the administration of justice into disrepute.”

According to the judges in this case, the actions of the officer, as bad as they were, “pale in comparison to the criminality involved in the possession for the purpose of distribution of 77 pounds of cocaine.”

The judges effectively ruled that the exclusion of the tainted evidence would be unacceptable to the public. I can’t imagine, however, a situation in which the public would not prefer a result that helped to convict a suspected criminal. When, then, would the courts exclude the fruits of an unlawful search? Perhaps in a case of failing to obtain a dog license.

For the sake of the Charter’s viability, therefore, the courts should ask themselves a different question: not what outcome the public would prefer, but what would earn its respect. Of necessity, such an analysis cannot stress the short-term result in any particular case. It must focus on the long-term impact of many cases.

The downside of the Court’s current approach is that, over time, the public will become accustomed to the spectacle of police misconduct unaccompanied by any sanctions. Such an outcome will create public cynicism about the integrity of our justice system. Surely, that would bring the administration of justice into disrepute.

The current controversy reminds me of the public debates that preceded the adoption of the Charter. Certain opponents of the exclusionary rule for tainted evidence argued that the proper response to police misconduct is not the exclusion of the evidence; it’s the sanctioning of the officers. Those of us who favoured an exclusionary rule for Canada considered this argument to be disingenuous. There is no way, we contended, that police forces would sanction an officer whose misconduct helped to nail a suspect they wanted to get.

But, even at this late stage, I’m inclined to call the other side’s bluff. If, by the time a case gets to trial, the delinquent police officers have been charged or disciplined, perhaps the courts might consider this to be one of the factors in favour of admitting the tainted evidence. By contrast, if no such action has been taken, the courts should lean in the opposite direction. At the very least, such an approach would help to produce conspicuous sanctions for police wrong-doing.

I won’t pretend that this idea is devoid of problems. But given the court’s regrettable decision, it is clear that something must be done to enforce the rights that are supposed to be protected by our Charter.