ACT
FOR
FREEDOM

Au nom de la liberté

Canadian Civil Liberties Association
Because:

The freedom of no one is safe unless the freedom of everyone is safe.
Pour la défense de nos droits et libertés.
WHY WE MUST ACT

The Canadian Civil Liberties Association is a national organization that was constituted in 1964 to promote respect for fundamental human rights and civil liberties. Our work aims to defend and ensure the protection and full exercise of rights and liberties.

L’Association canadienne des libertés civiles est un organisme qui vise à défendre et à promouvoir la reconnaissance des droits et libertés. L’association intervient dans les débats publics, soumet des rapports de recherche, organise des conférences et des campagnes, évalue les politiques et actions gouvernementales et agit devant les tribunaux lorsque cela est nécessaire.

Since the mid 1960s, the Canadian Civil Liberties Association (CCLA) has been a leader in protecting fundamental freedoms. It aims at preventing abuse of power in all its forms. Over the years, the CCLA has spoken out on hundreds of issues, from film censorship to the rights of welfare recipients not to be harassed by government officials, from forced religious teaching in the schools to the rights of political groups to demonstrate in the streets.

The CCLA is active on national security issues such as the protection against torture and the respect for international human rights law. In its public safety portfolio, the CCLA works to ensure adequate police accountability, fairness in the criminal law process and the continued respect for the presumption of innocence. Throughout its history, the CCLA has acted in defence of freedom of expression, even and indeed particularly, for unpopular ideas. It has intervened for the protection of religious minorities, for freedom of the press and for freedom of association. Finally, the CCLA has also been at the forefront of the battle against discrimination.

Freedom requires vigilance. Practicing the habits of democracy by asking questions, demanding answers, speaking out, taking action, the CCLA is committed to sustaining a vibrant culture of human rights, civil liberties and democracy.
Welcome to the inaugural edition of our new CCLA publication, Act for Freedom. Our aspiration is that this annual review will highlight some of the most important civil liberties issues that have demanded the attention of Canadians during the previous twelve months. As this first issue reveals, notwithstanding the progress made on many fronts over the years, the basic principles of civil liberties continue to be challenged and undermined by recurrent problems and new developments in both the public and private sectors. This first number offers perspectives on issues relating to freedom of religion, freedom of expression, freedom of the press, police powers and national security among others. We hope that the contents will serve as a reminder of our constant need to reflect upon and deepen our appreciation of the value conflicts inherent in these issues. We are very grateful to our contributors for sharing their thoughts with us and with our readers. We encourage them and you to continue to join us in this important work in the year ahead.

John D. McCamus, Chair
Board of Directors

Over the years, the balancing between freedoms and societal interests varies: the calibration between security interests and privacy, between police accountability and efficiency, between freedom of expression and protection of reputations changes. At times, it is necessary to sit back and take stock of what has happened. This is the purpose of Act For Freedom. It is designed to provide space for reflection on the trends that we see in our work at the Canadian Civil Liberties Association and Education Trust.

Dans ce premier numéro, les questions de liberté de la presse, droit de la preuve, imputabilité des pouvoirs policiers, prévention de la torture et égalité raciale sont discutées. Il ne s’agit que d’un petit échantillonnage des questions que soulèvent la responsabilité de protéger les libertés civiles et les droits de la personne. Il nous faut toujours réarticuler les valeurs que nous cherchons à protéger et Au nom de la liberté vise à présenter l’état de nos réflexions sur ces enjeux.

We invite your comments on the work of CCLA–CCLET.

Agir maintenant pour préserver les libertés de demain ….Because Freedom is not a spectator sport.

Nathalie Des Rosiers
General Counsel – Avocate générale
A Cree woman I’ve known for many years up in Moosonee has been in such anguish for the last year that I fear for her life. This anguish, this word, can’t begin to describe her tortured suffering. She lives every day walking through what most of us would consider our worst nightmare. A year ago, her seventeen-year-old son, while at a house party full of friends, walked from the kitchen, where he’d found a short indoor extension cord, through the crowded living room, to the bedroom, and eventually into a closet. There, he wrapped the end of the cord around his neck, and, leaving a foot or two, he tied the other around the clothes rod. This thin young man, pimples on his chin and black hair he wore short and spiky, knelt so that his full weight took up all slack. In this way, he slowly strangled himself to death.

If you have the fortitude, think about that for a minute. He could have stopped at any time; he could have simply stood up to take the pressure off. Possibly he did once or twice or three times when the fear of what awaited overcame him, when the happy noise of his friends in the rooms next door drifted in, muffled. But eventually, with unbelievable will, with a drive he’d never exhibited in his young life before, he managed this gruesome act of self-destruction.

As I’ve mentioned, this Cree woman, his mother, my friend, lives in anguish now. Her fifteen-year-old daughter did, as well. She was close to her brother and went through most all of the stages of grief: disbelief, anger, a stabbing sadness. But she wasn’t able to make it to the last stage: acceptance. Five months after her brother was found hanged at the party, my Cree friend found her daughter hanged, this time in her own closet at home, and this time actually kneeling, leaning slightly forward as if in deep prayer.

How does a mother go on after that? This Cree woman, my friend, she’s from a tiny, isolated James Bay reserve named Kashechewan, one hundred and sixty kilometers as the bush plane flies north of Moosonee. Kashechewan is like a hundred other northern Canadian reserves. But unlike most, Kashechewan made the papers a handful of years ago when more than twenty youth attempted suicide in a single month. I remember reading about it on page five of the Globe and Mail and not being surprised. I’d lived and taught up there. The reserve’s reputation preceded it.

People in Moosonee warned me each time when I was to travel to Kash and spend a few days, a week, teaching adult community members reading and writing skills. These people said, “Be careful. It’s a dangerous place. It’s a rough reserve. A lot of people up there are crazy.” No warnings ever—and strangely, I might add—more specific than that. What I found were a lot of amazing people who became dear friends. And I found a sadness difficult to define, lingering just below the surface of day-to-day living. My Cree friend, now the mother of two dead children, she’d left Kashechewan to live in Moosonee years ago, which to her mind was moving to a big town, in part to escape that insidious sadness of her reserve.

She didn’t know then what she knows now, that this sadness I speak of, this hurting, isn’t only isolated in Kash. This hurting has spread across the northern reserves and heavily Indian communities of Canada. It spreads more easily than H1N1, and it’s been infecting northern communities for many years. It’s deadlier than any epidemic since the smallpox and tuberculosis eras.

The oldest son of one of my dearest friends in the world, he’s made something of himself. He’s a young Moose Cree man with a brand new wife and a brand new career as an OPP officer. On my last visit to Moosonee, he told me something that continues to devastate me, that sounds unbelievable it is so brutal. Over a six-month period recently, there were at least a hundred suicide attempts among teens in Moosonee, and many others in the neighbouring reserve of Moose Factory. At last count, eight youths in Moosonee have been “successful.” They’ve hanged themselves in closets, sometimes in trees behind the high school. It appears a death cult is taking root. More than one hundred attempts. Eight suicides. In a community of 2,500. Yes, it appears to be a death cult.
If this statistic darkened non-Indian towns across, say, British Columbia or Manitoba or Prince Edward Island, if this epidemic struck one of our communities, it would be national news, the media frenzy so saturated that Canadians would suffer empathy burnout within months. My quick google search—suicide rates on Canadian reserves—pulls 36,000 results in 0.28 seconds. Within minutes, I can learn that since at least the year 2000, many experts have declared that the northern reserves of our country are the suicide capitals of the world. Statistics on these pages, I think, quickly stun then numb us. And the reasons why our aboriginal youth are strangling themselves in closets, are shooting themselves in the head, are drowning themselves in icy rivers? A few more minutes of keyboard tapping on google and it becomes so obvious: miserable socio-economic conditions, psycho-biological tendencies, the post-traumatic stress of a culture’s destruction.

And what can even begin to stem the tide of brutal loss? The one and only family services center in Moosonee, Payukotayno, which serves all of the 14,000 Cree of the Ontario side of James Bay, almost had to close its doors in December of 2009, not long after my good friend’s children’s suicides. That was due to a severe lack of government funding. It’s expensive to try and furnish these services in such remote areas. The experts agree, though, that it’s vital. I’ve been told of 14 youth suicides on the west coast of James Bay in 2009. One in a thousand committed suicide last year. The Canadian average, I’m told, is one in 100,000. Suicide rates on the west coast of James Bay are 100 times higher than the Canadian average in 2009. And the only family services facility for the west coast of James Bay came within inches of closing its doors last year for a lack of funding.

What I know in that part of me that can’t be hurt is this: the tension of the fast-moving river through your paddle, the radiant heat in the moose’s ribcage as you reach your arm to cut out its heart, the sound of Canada geese honking as they stretch their necks for the south, the tug of the pickerel as it takes your hook, the sickening grind of the outboard’s prop as it touches submerged river rock, it’s these simple experiences that contain medicine strong enough to start some healing.

Sometimes I catch myself dreaming about my Cree friend’s two dead children. In my dream they’re still alive, and they’re out in the bush, paddling the Moose River together, sun on their shoulders and good power in their stroke. They’re paddling north, I think, home to Moosonee. And although I can’t see her, I know that their mother stands on the shore by town, waiting patiently for them to come into sight.

Joseph Boyden

Canadian author and recipient of numerous awards for his debut novel, Three Day Road. Winner of the 2008 Scotiabank Giller Prize for Through Black Spruce. Joseph Boyden is a member of the CCLA Board of Directors.
SUPREME COURT RECOGNIZES “RESPONSIBLE COMMUNICATION”

Last winter, the Canadian Civil Liberties Association, represented by Torys LLP, intervened in two appeals before the Supreme Court of Canada that have forever changed the law of defamation in Canada.

In the companion cases of Grant v. Torstar Corp. and Quan v. Cusson, released on December 22, 2009, the Supreme Court of Canada has affirmed a new defence to a charge of defamation where the defendant communicated responsibly on a matter of public interest. This is a very significant change to the law of defamation in Canada which previously required that in most cases to escape a finding of defamation based on reported facts, a defendant would have to be able to prove that each fact was true. The new defence expands the boundaries of free speech and was described by the Globe and Mail as “a historic turn for Canadian media.” Not only was this a historic turn for Canadian media, but thanks to the arguments advanced by the CCLA as the only non-media intervener before the Court, it was a historic turn for all individuals who communicate with the world on matters of public interest and do so responsibly.

The facts in the two cases were very different. One involved an OPP officer who sued the Ottawa Citizen for defamation arising from articles about his going to New York City in the immediate aftermath of September 11, 2001, and claiming to be an RCMP officer who was assigned to assist. The other was a case against the Toronto Star by a high-profile Northern Ontario businessman for articles that questioned the impact of the plaintiff’s political connections with the then-conservative Ontario government on an environmental review that the government was conducting on his application to put a private golf course on a lake in northern Ontario. In both cases the issue became whether the defendants should be entitled to rely on the “public interest responsible journalism defence” which had become the law in the UK, but had not yet been adopted by the Supreme Court of Canada.

In the Cusson and Grant decisions, the Supreme Court accepted the argument that it was time for the Canadian common law of defamation to recognize a new defence of “responsible communication” on matters of public interest where the defendant can show that it acted diligently in trying to verify the allegations at issue, having regard to all the relevant circumstances. In describing the defence as one of responsible “communication” rather than the previously coined responsible “journalism,” the Court expressly adopted the formulation of the defence that was put forward by the CCLA and accepted that the defence ought not to be limited to the traditional media, but rather should extend to all individuals who publish information in the public interest and act responsibly in doing so.

The Court set out a two-part test for this defence: first, the trial judge should determine whether the communication was in the public interest, and second, the jury should determine whether it was “responsible,” on the basis of a number of different factors. Justice Abella alone dissented on the latter point, and would have left the entire matter to the trial judge. The manner in which Canadian courts interpret and apply this new defence to the cases that come before them remains to be seen but for now, this is a huge victory for freedom of speech across the nation.

Jennifer Conroy and Patricia Jackson

Jennifer Conroy is an associate with the firm of Torys LLP. Patricia Jackson is a partner in the Torys firm and a member of the CCLA Board of Directors. They acted on behalf of CCLA in the Cusson and Grant cases.

*The two decisions can be found online at the following links:
A THEORY OF NEWSGATHERING?

FREEDOM OF THE PRESS

AT THE SUPREME COURT

A distinctive cluster of appeals has made its way to the Supreme Court of Canada in the last year or so. These cases raise a variety of issues under section 2(b) of the Charter, and while some relate specifically to freedom of expression, others present important questions about freedom of the press and the media. There are no less than six cases in a group which asks the Court to consider how newsgathering promotes the accountability and transparency of parliamentary government in Canada. Democratic self-government is indisputably at the core of section 2(b)’s underlying values, and newsgathering is likewise a core element of a free and vital press. For freedom of the press to have meaning, the newsgathering function must remain free from interference by the state.

Two of the appeals, Grant v. Torstar Corp. and Cusson v. Quan, concerned the law of defamation, and resulted in the creation of a new defence which is styled “public interest responsible communication”. When it introduced this defence, the Court acknowledged that Canada was out of step with other common law jurisdictions, and that the focus on “truth” in defamation law placed a burden on newsgathering which was unacceptable under the Charter. While Grant and Cusson mark a major step forward in the law of defamation, the next question is whether these decisions signal a willingness to enhance the status of newsgathering in other settings.

Two other appeals, yet undecided, present newsgathering issues in the context of information obtained by a journalist in exchange for a promise to protect the identity of a confidential source. These cases, R. v. National Post and Globe & Mail v. Canada (Attorney General), invite the Court to consider whether the common law Wigmore test – which determines the availability of a privilege – must be constitutionalized to give newsgathering the protection that is required by section 2(b) of the Charter.

Both cases raise prickly issues about how the balancing should be done; the proceedings in National Post arose under the criminal law and involve an allegedly forged bank document, which casts doubt on the integrity of former Prime Minister Jean Chrétien, and came into the possession of a reporter so that those doubts could be brought to light. Meanwhile, the Globe & Mail appeal is rooted in civil proceedings which were initiated by the federal government after the Quebec Sponsorship Scandal. In this instance, the question is whether the Globe reporter’s confidential source should be protected in circumstances where the defendant seeks access to the informant to determine whether a limitations defence can be pleaded. Both cases are enormously important for two reasons: first, the Court will have to decide how to handle the journalist’s privilege under the Charter; and, second, it will also have to explain how the interest in protecting newsgathering access to sources of information – and avoiding the chill factor – will be measured against the competing interests in a court order which will violate a promise of confidentiality.

In addition, the Court also reserved decision in the fall of 2009 in two important publication ban appeals. Again, the cases arise in different settings; one is criminal and the other, civil. In R. v. White and Toronto Newspapers v. Canada (Attorney General), the question is whether a Criminal Code provision making a publication ban mandatory in bail proceedings, at the request of the Crown or the defence, is unconstitutional. The other is the second part of the Globe & Mail privilege appeal. There, the question is whether it is improper and inappropriate for a judge to impose a publication ban, without conducting an inquiry under section 1 of the Charter to determine whether the requirements of the Dagenais test have been met. Each will test the Court’s commitment to the open court principle; under the existing jurisprudence, limits on this principle must meet a strict standard of justification under section 1. From that perspective, any retreat from that approach, in either case, will be seen as a setback.

Together, this unusual group of cases gives the Court a rare opportunity to establish a strong theory of newsgathering under the Charter. It can be difficult to predict what the Court might do. Even so, following Grant and Cusson the mood is one of cautious optimism for court-watchers awaiting the Court’s decisions.

Jamie Cameron
Professor of Law, Osgoode Hall Law School, member of the CCLA Board of Directors.
Professor Cameron was part of the team that represented CCLA in both R. v. National Post and Globe and Mail v. Canada.
KHADR À LA COUR SUPRÊME: COMMENT ARRIVER AU BON RÉSULTAT À L’AIDE D’UN RAISONNEMENT VALABLE*

Plusieurs membres de la famille d’Omar Khadr ont à un moment ou à un autre embrassé une forme d’idéologie jihadiste et anti-américaine. M. Khadr lui-même a combattu les Américains en Afghanistan. Il avait à peine 16 ans lorsqu’il a été capturé et envoyé à la prison de Guantanamo Bay, où il est incarcéré depuis plus de 7 ans. Il détient la citoyenneté canadienne. Ses avocats soutiennent que la Charte canadienne des droits et libertés exige que le gouvernement canadien demande formellement au gouvernement américain de le retourner au Canada. Ils affirment que ses droits à liberté et à la sécurité de la personne ont été violés par le gouvernement canadien. La Cour fédérale et la Cour fédérale d’appel (à 2 juges contre 1) ont opiné et ont ordonné au gouvernement de demander son transfert. Le gouvernement a toutefois porté ces décisions en appel et la Cour suprême a entendu la cause le 13 novembre 2009.

Ceux d’entre nous jouissant d’une sensibilité morale minimale ont eu tendance à penser que de laisser M. Khadr pourrir à Guantanamo frise l’ignominie et que le gouvernement canadien (sous les libéraux et les conservateurs) aurait dû demander son retour depuis longtemps déjà. Cependant, la question à laquelle la Cour suprême est confrontée ne se résume pas seulement à déterminer si le comportement du gouvernement est moralement acceptable ou non. Il s’agit plutôt de déterminer si, sur la base de la Charte canadienne, les tribunaux peuvent imposer au gouvernement l’obligation juridique de demander le transfert de M. Khadr aux Américains. Les tribunaux le peuvent-ils? Peut-être. Toutefois, si c’est le cas, afin de maximiser la clarté et la cohérence de leur décision, il serait préférable que les juges de la Cour suprême arrivent à ce résultat en s’appuyant sur un raisonnement moins boiteux que celui des tribunaux d’instances inférieures.

La Charte ne s’applique qu’aux actes du gouvernement canadien. Elle ne peut évidemment pas s’appliquer aux actes du gouvernement américain. Il faut donc que les avocats de M. Khadr démontrent que c’est le gouvernement canadien qui a violé ses droits constitutionnels. Or, qu’a fait le gouvernement canadien exactement? Il a profité de l’incarcération de M. Khadr afin de l’interroger et d’obtenir des renseignements. Il a ensuite transmis ces renseignements aux autorités américaines. D’autre part, il a été démontré qu’avant de l’interroger le gouvernement canadien était bien au courant du fait que M. Khadr était assujetti à des traitements sévères susceptibles de constituer des formes de torture.

Cela étant, la question cruciale est: un tel comportement de la part des autorités canadiennes constitue-t-il une violation des droits de M. Khadr à la liberté et à la sécurité de sa personne? Encore une fois, peut-être. Il est indéniable que les autorités américaines ont violé (entre autres) ces mêmes droits. Mais il est plus difficile de conclure que les autorités canadiennes en ont fait autant en interrogeant M. Khadr et en transmettant des renseignements. Si je profite du fait qu’un étranger vous a attaché à un poteau et tabassé afin de vous soutirer votre portefeuille, ai-je du coup violé votre liberté ou votre sécurité personnelle? C’est fort possible. Ce qui est clair, c’est que le gouvernement canadien a profité des violations des autorités américaines, ce qui en soi n’est pas très reluisant. Cela étant, il pourrait y avoir problème si le gouvernement canadien utilisait éventuellement l’information obtenue au sein de procédures domestiques visant à porter atteinte aux droits de
M. Khadr (par exemple, des procédures criminelles). Les tribunaux pourraient alors empêcher le gouvernement d’utiliser une information recueillie de façon si douteuse. Quoi qu’il en soit, même si ces interrogatoires constituaient des violations des droits de M. Khadr, la réparation appropriée ne serait sûrement pas d’ordonner au gouvernement de demander son rapatriement, comme l’ont fait les tribunaux d’instances inférieures. La réparation appropriée serait plutôt d’interdire au gouvernement canadien de le comporter ainsi à l’avenir et de l’empêcher d’utiliser l’information recueillie.

Ce sont là peut-être de mauvaises nouvelles pour les avocats de M. Khadr. Mais il en est peut-être de meilleures: en effet, ils peuvent encore mettre de l’avant un argument de Charte qui permettrait à la Cour suprême de forcer le gouvernement à demander le rapatriement de M. Khadr. Cet argument implique cependant qu’une majorité de juges de la Cour suprême osent s’aventurer là où ils ne se sont jamais aventurés auparavant, en reconnaissant enfin que les droits à la liberté et à la sécurité de la personne peuvent être violés à travers l’inaction du gouvernement et non seulement à travers ses actions positives. La Cour doit donc accepter que c’est en ne faisant rien —en ne demandant pas le rapatriement de M. Khadr alors qu’il sait que ses droits sont en péril à Guantánamo— que le gouvernement se trouve en violation de la Charte. Et comme l’ancienne juge de la Cour suprême Louise Arbour le démontrait sans aucune équivoque en 2002 dans des motifs dissidents, il n’est aucun obstacle (textuel, institutionnel ou autre) insurmontable à l’imposition au gouvernement d’obligations positives de protéger la liberté et la sécurité des individus. Une fois cet argument accepté, alors la réparation appropriée devient une ordonnance à l’effet que le gouvernement se conforme à ses obligations constitutionnelles en faisant une demande de transfert. En somme, il me semble que c’est cet argument que la Cour devrait examiner si elle veut arriver à ce résultat à l’aide d’un raisonnement valable. Reste à voir si ses juges auront l’audace de l’adopter.

Charles-Maxime Panaccio
Professeur adjoint, Faculté de droit, Université d’Ottawa, section de droit civil.
*Cet article a été rédigé avant l’audition du 13 novembre et publié dans le Devoir.

An English translation of this article can be found at www.ccla.org.
Khadr
le 13 novembre 2009

Assise bien sagement sur le banc un peu inconfortable de la salle d’audience de la Cour suprême, j’écoute attentivement les plaidoiries. Comme d’habitude dans les affaires entendues par la Cour, les arguments s’enfilent, interrompus à l’occasion par des questions pointues ou plus ouvertes, qui laissent tous les observateurs songeurs quant à l’issue de cette triste histoire. L’atmosphère est fébrile: serait-il possible qu’il y ait enfin un dénouement à un destin si tragique?


Ottawa, 2009. L’audience se poursuit et les argumentaires se superposent. Il y a plusieurs récits qui sont contés, plusieurs scénarios qui s’entrecoupent, parce que l’histoire d’Omar Khadr est criblée de tant d’irrégularités qu’il est difficile de cibler celle qui saura constituer le point tournant, le coup massue qui fera déboulonner l’immuable fin de non-recevoir qu’ont reçue toutes les tentatives de rapatrier Omar Khadr.

Se dessine bien sûr l’impressionnant récit d’Omar Khadr et la Convention sur les droits de l’enfant. Les États-Unis n’ont pas ratifié la Convention mais le Canada y est partie – et les agents du Service de renseignement canadien savaient que les conditions de détention d’Omar Khadr et celles de son interrogation contrevenaient aux prescriptions de la Convention. Ne devrait-il pas y avoir des conséquences à la violation flagrante des droits d’un enfant?


Plus prosaïque, intervient la chronique d’Omar Khadr et la révision judiciaire de décisions administratives mal motivées. L’argument se présente ainsi: la décision du premier ministre de juillet 2009 de refuser de demander le rapatriement n’a pas pris en compte toutes les dimensions du problème – c’est donc une décision qui doit être révisée par les tribunaux. Même en conférant la plus grande déference au premier ministre, sa décision doit être retournée au décideur qui doit réévaluer le dossier. Il n’y a rien d’extraordinaire ici, c’est une revue judiciaire d’une décision administrative, ni plus ni moins.

Un autre portrait un peu plus dramatique se dessine, Omar Khadr et l’imputabilité des services de renseignement. La proposition avancée est qu’il doit y avoir un remède pour assurer l’imputabilité des services de renseignement: ce sont eux qui ont interrogé le jeune Khadr sachant qu’il n’était pas représenté, eux qui ont transmis ces renseignements aux autorités américaines qui les utilisent pour maintenir Khadr en détention et éventuellement l’envoyer devant une commission militaire. C’est ce lien entre les agissements du gouvernement canadien et la situation de Khadr qui entraîne la violation du droit constitutionnel canadien. Il faut donc un remède canadien pour cette violation.

Les représentants du gouvernement tentent de refroidir les ardeurs: Omar Khadr et les limites du pouvoir judiciaire. Omar Khadr est en pays étranger et non sur le territoire canadien, rappellent-ils. Depuis toujours, les gouvernements jouissent d’une discrétion complète en matière de relations internationales: ce n’est absolument pas la place des tribunaux de s’y immiscer, ils n’ont aucune expertise.
en la matière et ne connaissent pas les ramifications de leurs décisions en termes de représailles économiques, politiques, diplomatiques. Se profile le spectre du géant américain en colère … mais tout le monde sait que d’autres pays ont récupéré leurs ressortissants de Guantanamo sans aucune conséquence néfaste. Néanmoins, la crainte d’outrepasser ses pouvoirs semble planer au-dessus du tribunal.

Vivement se profile une contre argumentation, il n’y a pas d’immunité absolue dans les relations diplomatiques. Il n’y en a pas dans les causes d’extradition où les tribunaux exigent souvent des garanties de non-imposition de la peine capitale. Ne sommes-nous pas dans une situation analogue dans laquelle le droit constitutionnel canadien exige que soient prises certaines mesures dans le domaine des relations diplomatiques? Exiger d’un pays que la peine de mort ne soit pas imposée est une critique voilée du système juridique de l’autre pays et une incursion dans le domaine des relations diplomatiques. N’en est-il pas de même de la demande de rapatriement d’un ressortissant dont les droits en vertu du droit international ont été brimés? En somme, c’est la thèse Omar Khadr et le respect du droit international. Elle s’articule autour du principe qu’il n’y aura pas d’effectivité du droit international tant et aussi longtemps que les autorités gouvernementales ne sont pas contraintes de le respecter dans le cadre de relations bipartites. Les gouvernements peuvent décider de ne pas signer ni de ratifier des traités internationaux mais une fois que des traités conclus, ils sont liés. Ne s’agit-il pas là de la meilleure façon de faire progresser le droit international et de faciliter la mise en œuvre de valeurs universelles comme l’élimination de la torture et le respect des droits de procédure les plus élémentaires?

Les argumentations se poursuivent et bientôt se sera la fin. Il y a trop d’injustices dans cette affaire. Et évidemment au cœur de toutes ces tergiversations, de ces réticences théoriques et pratiques et de ces précisions jurisprudentielles, se trouve paralysé un jeune homme de 22 ans emprisonné sans procès depuis l’âge de 15 ans.

Nathalie Des Rosiers
Avocate générale, Association canadienne des libertés civiles

An English translation of this article can be found at www.ccla.org.

Le 29 janvier 2010,
la Cour suprême a rendu sa décision dans l’affaire Khadr, soulignant la violation continue des droits de Monsieur Khadr garantis par la Charte canadienne des droits et libertés en raison des interrogatoires menés par les agents du Service canadien du renseignement de sécurité. La Cour a également conclu que le remède de la demande de rapatriement était un remède approprié pour la violation des droits de M. Khadr. Cependant, la Cour a considéré qu’il n’était pas en son pouvoir d’ordonner au gouvernement canadien de demander le rapatriement: c’était au gouvernement de décider quel remède était approprié.

L’ACLC a écrit au premier ministre Harper lui demandant de demander le rapatriement de M. Khadr afin de mettre fin à la violation continue de ses droits. Le gouvernement Canadien n’a pas demandé le rapatriement de M. Khadr mais simplement que les preuves obtenues en violation de la Charte canadienne ne soient pas utilisées par les autorités américaines.
Alan Borovoy on Pornography

On child pornography, there appears to be a tug of war between the federal government and the Supreme Court. The latest tug is a Conservative government bill that would force internet service providers to notify the police whenever there is reason to believe their service has been implicated in child porn. This threatens to weaken the already fragile safeguards required by the Court.

A duty to report on child pornography is different from other comparable duties. Child porn is much less readily identifiable than, say, gunshot wounds. The definition of porn is so broad that it covers mere descriptions and depictions of sexual activity involving juveniles, even fictional ones. Unavoidably, therefore, legitimate material could easily be caught. After all art and literature must be able to portray evil as well as virtue.

For this reason, the Supreme Court has promulgated several safeguards. Unfortunately, they haven’t much helped.

In its 2001 judgment upholding the constitutionality of the law’s ban on child porn, the Supreme Court particularly noted that, as the law was then, “writings are caught only where they actively advocate or counsel” sexual interactions involving young people. Yet the last Liberal government secured an amendment thereafter, making mere written descriptions unlawful.

Even lower courts may be ignoring Supreme Court declarations. In 2001, the Supreme Court carved out special exceptions, including “private materials created by ... individual[s] exclusively for [them]elves ...” It would be unconstitutional, said the Court, for the law to cover such material.

Nevertheless, a lower court recently jailed an Ottawa man simply for possessing stories he himself had written about sex involving teened girls. The accused man reportedly made no attempt to distribute the material and an assessment found him to be a low risk to hurt real children. Since this law prescribes a minimum sentence, the judge jailed the accused for 14 days. Inexplicably, the prosecutors had proposed a sentence of 3–4 months.

In 2001, the Supreme Court also stipulated that the statutory defences “should be interpreted liberally”. But only months later, a British Columbia court denied the defence of “educational purpose” to the children’s sex education book, Show Me. Indeed, the B.C. judge labelled the book, “thinly disguised child pornography”.

Yet, 25 years earlier, an Ontario court had excused the same book from a charge of obscenity. On the basis of expert testimony, the book was then held to be educational. This Ontario court finding makes the B.C. judgment appear at odds with the Supreme Court admonition to interpret the law liberally.

The very breadth of the child porn prohibition invites such confusion. The job of limiting the scope of the law has been left largely to certain defences. But these defences – artistic merit, educational and medical purposes – have always reeked of subjectivity.

Despite them, a young artist was charged, in the mid 1990s, with having created child pornography, even though his work emanated entirely from his imagination. Around then, customs officials confiscated the manuscript of a novel, even though it was written by a psychologist reportedly to illuminate the behavior of pedophiles. Somewhat earlier, customs officials seized a film on male masturbation, even though the film was headed for the University of Manitoba Medical School.

In these cases as with Show Me and numerous others, the authorities ultimately failed. This does not mean that the defences worked adequately. The affected parties – despite the legitimacy of their activity – still had to face the ordeal of clashes with authority.

In 2005, the then government secured further amendments that will likely compound this subjectivity. The defences now require a “legitimate purpose”. Nowhere, however, is the word “legitimate” defined. Those handling material with such sexual content can only speculate about the acceptability of their purposes.
Moreover, impugned material must now also be devoid of “an undue risk of harm to persons under ... 18.” What in the world would qualify as an “undue” risk? In any event, it is impossible to demonstrate that danger is impossible.

A fair system of criminal law requires that we know, in advance, whether our behaviour will be punishable. But those handling material about youthful sexuality could often be without a clue. Thus, even if the Supreme Court ultimately overturns these government initiatives, the costs could be enormous. To protect themselves, internet service providers will be tempted to over-report, thereby increasing all of the foregoing risks to legitimate art, literature, and educational efforts.

It would help for the child porn law to focus instead on material whose creation involved the unlawful abuse of real children. If this happened, there would be no need for the subjective defences. No such defences should be able to rescue material that is – or is even held out to be – the product of an unlawful abuse.

What would be lost? On one theory, mere depictions and descriptions encourage imitation. But where, then, would censorship stop? Did exposure to the Bible encourage the Jonestown suicides? Does exposure to the television news encourage “copy cat” crimes? While the Bible and TV news obviously have redeeming merit, so do many works that have been stigmatized as “child porn.”

On another theory, mere depictions and descriptions help the pedophile to lower the resistance of his prey. They help make his sexual aspirations appear normal. Apparently, however, pedophiles use many things, even candy, to persuade – or bribe – their targets. It’s neither possible nor desirable to sanitize our society of everything that could help the pedophile.

Moreover, even if the law removed all these depictions and descriptions, why would anyone feel safer? After all, pedophiles are very likely to remain pedophiles, no matter what the law of child porn says.

A. Alan Borovoy
General Counsel Emeritus
Canadian Civil Liberties Association

This article was previously published in the Toronto Star.
CRIMINAL JUSTICE LAW REFORM: STEALING A PAGE FROM THE AMERICAN PLAYBOOK

Criminal justice law reform is a major component of the Federal Government’s current legislative agenda. Unfortunately, instead of basing reforms on criminological research or the advice of experts, our current Government, by its own admission, is far more interested in what ordinary Canadians think about the criminal justice system.

Canadians increasingly fear crime. They see the criminal justice system as broken. For the majority, the mollycoddling of criminals is to blame; placing too much emphasis on protecting the rights of suspects and accused persons and not enough on safeguarding victims and empowering police. The judiciary invariably features in this narrative, attracting strong criticism for taking a kid-glove approach, especially on questions of bail and sentencing. Widespread anxiety about crime and criminals explains why being tough-on-crime is such a powerful political tool.

Our current Government understands this. It has taken a page from the playbook of American politicians who, for over a generation, ever since Barry Goldwater first announced a “War on Crime” in his 1964 campaign for the presidency, have carefully exploited criminal justice for political ends. The results of the American experiment are well known; the United States now incarcerates more people, per capita, than any other country in the world. At the same time, its homicide rate remains the highest of any G7 country. Remarkably, just as the tide has begun to shift in the U.S., with many states beginning to repeal the mandatory minimum sentences that fed the growth in incarceration, our current Government remains committed to bringing these same failed policies to Canada.

Prior to the prorogation of Parliament, the Government had introduced a torrent of headline-grabbing legislation that fosters its tough-on-crime image. The various amendments that mark this punitive turn in Canadian criminal justice policy fall into four general categories:

• expanding police powers;
• creating more crimes;
• tightening the rules governing bail;
• increasing the chances that those convicted of crimes will go to jail and that those who do will serve longer sentences.

The net result will undoubtedly be a further rise in Canada’s already burgeoning prison population. Recognizing this, the Government recently doubled the budget for prison construction and maintenance.

Reviewing all the details of the Government’s tough-on-crime policies is not possible in this short article. Nevertheless, a few of these reforms deserve special mention because they raise significant civil liberties concerns.

When it comes to the expansion of police powers, the privacy of Canadians is threatened by legislation that the Government claims necessary for police to combat cybercrime, in particular child pornography. To that end, the Government had introduced legislation (Bills C-46 & C-47) that would substantially erode the privacy Canadians enjoy when they go online. In particular, Bill C-47, as it was presented, required that Internet Service Providers and cell phone companies, in response to a demand by specially designated police officers, furnish information to police regarding their customers, including an individual’s name, address, telephone number, email address, Internet Protocol (IP) address, etc. Not only does this specially designated police officer not require a warrant, he or she does not even have to reasonably suspect that access to the information is necessary to investigate a crime. If a bill similarly drafted was reintroduced and became law, constitutional challenges under s. 8 of the Charter are likely.

The Government’s efforts to tighten access to bail are similarly troubling. Recent amendments to the Criminal Code have served to reverse the burden in bail hearings where an accused person is alleged to have perpetrated a violent crime with a firearm, is charged with importing or trafficking a firearm or is charged with a firearms offence while subject to a weapons prohibition. Placing
the burden on the person charged with a crime to establish why they should be released pending trial is not our usual approach to bail.

Ordinarily, the Crown bears the burden of showing why bail should be denied. This is in keeping with s. 11(e) of the Charter, which guarantees the right “not to be denied bail without just cause.” The Supreme Court of Canada has instructed that “just cause” will exist where two preconditions are met: 1) bail is denied only in a narrow set of circumstances; and 2) the denial of bail is necessary to promote the proper functioning of the bail system and is not undertaken for any purpose extraneous to the bail system. In light of these considerations, the Supreme Court previously upheld a reversal of the burden for those charged with drug trafficking. The Court reasoned that such accused are more likely to have a profit incentive for continuing to offend if released and are more likely to have the resources and criminal connections to abscond. In other words, reversing the burden in cases of accused drug traffickers is directly connected to valid bail considerations.

One is hard pressed to see the parallel for those charged with firearms offences. Frankly, these amendments appear to be driven by punitive considerations, a desire to get those charged with serious gun crimes off the street sooner rather than later. Reversing the burden in bail hearings based on that sort of reasoning turns the presumption of innocence on its head. Given this, constitutional challenges are no doubt on the horizon.

In addition to creating a number of unnecessary new crimes (street racing being one of many such examples; given that such conduct has long been prosecutable as dangerous driving), the Government has also been busy making a number of troubling changes to Canada’s sentencing laws.

It has moved to expand the list of mandatory minimum sentences for a wide assortment of crimes. Most recently, for example, it proposed a mandatory minimum sentence of 2 years imprisonment for those convicted of fraud where the amount involved exceeds $1 million (Bill C-52). In addition, in 2008, the Government amended the Criminal Code, providing for escalating mandatory minimum sentences for a number of firearms offences. For example, if the Crown proceeds by indictment, an individual caught with a loaded unregistered firearm now faces a minimum 3 year sentence for a first offence, and a minimum 5 year sentence for subsequent offences.

In addition, the Government has proposed further restrictions on the use of conditional sentences (i.e. house arrest), foreclosing the availability of such sentences for a number of offences, including theft over $5,000 and drug trafficking. In other words, conditional sentences will be off the table even for certain non-violent offenders.

Finally, the Government recently amended the Criminal Code, restricting the ability of judges when passing sentence to credit offenders for time spent in pre-trial custody. The practice was developed by judges, who cited two reasons for it: 1) the deplorable conditions that exist in many of our provincial remand facilities; and 2) unlike with sentences served post conviction, the period spent in pre-trial custody is not subject to remission through parole. The recent amendments foreclose judges from giving enhanced credit for time spent in pre-trial custody except if the circumstances justify it. Even then, however, the law imposes a strict limit on the amount of credit that can be given (1.5 days for every 1 day in pre-trial custody).

An impossibly burdensome standard for invoking the prohibition found in s. 12 of the Charter on cruel and unusual punishment probably means that each of these changes to Canada’s sentencing laws is likely to survive constitutional challenge.

It is important to remember, however, that just because a law is constitutional doesn’t mean that it is sound from a public policy standpoint. Going forward, civil libertarians must recognize that the fight against tough-on-crime measures will often be lost if we only become engaged with these issues in the courts.

There are two ways to win the struggle against the War on Crime. First, we can simply wait; the experience in the United States demonstrates that at a certain point the politicians and the electorate will tire of a costly war that never delivers a decisive victory. Of course, for civil libertarians, this simply isn’t a realistic option. The human cost of allowing misguided policies to come to full fruition is simply too great.

The second option is education. Widespread misconceptions that make tough-on-crime policies so popular must be met head-on. The impact on public perceptions of our criminal justice system from American crime dramas, sensationalistic crime reporting, and political rhetoric must be countered with
facts. Unfortunately, too many believe that what they see on Law and Order fairly reflects what happens in Canadian courtrooms.

When it comes to criminal justice issues, many see the Charter as a source of technicalities that criminal defence lawyers exploit and that liberal judges are all too happy to seize upon in order to slam the police, exclude evidence and allow the guilty to escape justice. Anyone close to the Canadian criminal justice system knows that such an account is pure fiction.

In reality, relative to their colleagues on television, the judiciary in Canada is rather conservative. They are understandably reluctant to grant bail to individuals who are shown to pose a substantial risk to public safety if released. In addition, under our discretionary approach to the exclusion of unconstitutional evidence, minor or technical violations of the Charter rarely lead to the exclusion of evidence. Canadian judges are sympathetic to the difficult job performed by our police officers and are rarely enthusiastic about excluding evidence against a factually guilty accused. Canadians need to know all of this.

In addition, Canadians should be continually reminded that crime is actually down. For example, in 2006, the latest year for which we have statistics, the crime rate was the lowest it has been in 25 years. This decline is across the board, with Statistics Canada reporting a downward trend even for violent crimes. For example, the rate of violent victimization, including sexual assault, robbery, and simple assaults reduced slightly over the five-year period from 1999 to 2004. In other words, the perception that crime is out of control is simply fiction.

Finally, Canadians need to become more informed about the long-term implications of pursuing tough-on-crime policies. In that respect, the experience in the United States provides a great deal of teaching material on the economic and human costs of this misguided approach.

With education, Canadians will be equipped to see through the empty symbolism of these punitive policies. It is only when tough-on-crime policies no longer garner votes that the War on Crime in Canada will come to a decisive end. Hopefully, then, we can finally begin the process of recognizing and redressing the true causes of crime. In the meantime, civil libertarians in Canada have their work cut out for them.

James Stribopoulos
Associate Professor, Osgoode Hall Law School

The impact on public perceptions of our criminal justice system from American crime dramas, sensationalistic crime reporting, and political rhetoric must be countered with facts. Unfortunately, too many believe that what they see on Law and Order fairly reflects what happens in Canadian courtrooms.
EXCLUSION OF EVIDENCE FOR CHARTER VIOLATIONS

The judgments of the Supreme Court in R. v. Grant, handed down after having been on reserve for 15 months, and in the companion case of R. v. Harrison, are bellweather rulings on the approach to the remedy of exclusion of evidence under section 24(2) of the Canadian Charter of Rights and Freedom.

In Grant a 6–1 majority asserted a discretionary approach with revised criteria and emphasis. In a joint judgment Chief Justice Beverley McLachlin and Justice Louise Charron (Binnie, LeBel, Fish and Abella JJ. concurring) settled on the following revised template:

When faced with an application for exclusion under s. 24(2), a court must assess and balance the effect of admitting the evidence on society’s confidence in the justice system having regard to: (1) the seriousness of the Charter-infringing state conduct (admission may send the message the justice system condones serious state misconduct), (2) the impact of the breach on the Charter-protected interests of the accused (admission may send the message that individual rights count for little), and (3) society’s interest in the adjudication of the case on its merits. The court’s role on a s. 24(2) application is to balance the assessments under each of these lines of inquiry to determine whether, considering all the circumstances, admission of the evidence would bring the administration of justice into disrepute.

The Court expressly abandoned its previously entrenched Collins/Stillman approach that conscripted evidence affected the fairness of trial and had generally to be excluded while the exclusion of non-conscripted depended on consideration of all the factors. Much of the voluminous prior jurisprudence on section 24(2) over the past 27 years relating to the meaning and consequences of conscripting the accused in violation of the Charter is now of little moment.

In Harrison, the Court held that a vehicle search in reckless violation of established Charter standards for a vehicle stop and search had to result in the exclusion of no less than 37 kilos of cocaine. In Grant the Court did not exclude the evidence of a gun found in violation on established limits on investigative detention powers to stop, question and search a young black man on the street. Uncertainty in lower court jurisprudence tipped the balance in favour of admission. However the Court expressly indicated that exclusion should result in the future where police act in careless disregard of Charter standards for investigative detention. A clear trend emerged in September and October of 2009 in several decisions of the Ontario Court of Justice to follow this dictum of rigid rules that places special emphasis on the factor of seriousness of the breach rather than the seriousness of the offence or the reliability of the evidence. The same criteria are to be applied to all cases of Charter breach.

In adopting this approach the Court adopted the central and distinctive positions argued by the CCLA as intervenor in R. v. Grant. It will therefore come as no surprise that the CCLA is of the view that the Court has adopted a more sensible, carefully balanced and distinctive approach to the exclusion of unconstitutionally obtained evidence of which Canadians should be proud.

Whether there will be more or less exclusion in future will likely only become evident after several years of applying Grant. The Court has clearly decided that evidence can no longer be excluded simply because it was conscripted – which may well result in less exclusion in breathalyser cases, for example. However favouring exclusion is the Court’s important rulings that the seriousness of Charter violation is the first consideration and that the same analysis is to be applied whatever the seriousness of the offence. This is made especially clear by Chief Justice McLachlin speaking for the 6–1 majority in R. v. Harrison:

[Allowing] the seriousness of the offence and the reliability of the evidence to overwhelm the s. 24(2) analysis “would deprive those charged with serious crimes of the protection of the individual freedoms afforded to all Canadians under the Charter and, in effect, declare that in the administration of the criminal law ‘the ends justify the means’”(para. 150). Charter protections must be construed so as to apply to everyone, even those alleged to have committed the most serious criminal offences. [The] ... trial judge seemed to imply that where the evidence is reliable and the charge is serious, admission will always be the result. As Grant makes clear, this is not the law.

In Harrison the Court held that a vehicle search in reckless violation of established Charter standards for a vehicle stop and search had to result in the exclusion of no less than 37 kilos of cocaine. In Grant the Court did not exclude the evidence of a gun found in violation on established limits on investigative detention powers to stop, question and search a young black man on the street. Uncertainty in lower court jurisprudence tipped the balance in favour of admission. However the Court expressly indicated that exclusion should result in the future where police act in careless disregard of Charter standards for investigative detention. A clear trend emerged in September and October of 2009 in several decisions of the Ontario Court of Justice to follow this dictum
and exclude drugs found in stops without reasonable suspicion. This should act as a welcome limit on aggressive street policing in Toronto and elsewhere against vulnerable groups such as persons of colour and youth.

As our courts apply the revised discretionary approach to section 24(2) required by R. v. Grant it is interesting and instructive to compare recent developments with the exclusionary rule in the United States Supreme Court. The biggest blow against the exclusionary rule in the United States to date came in January in U.S. v. Herring. Chief Justice Roberts, writing for a 5–4 majority, confirmed that in the United States exclusion is not a necessary consequence of a Fourth Amendment violation and that the benefits of deterrence must outweigh the costs of letting guilty and possibly dangerous defendants go free. The Court held that:

To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. ..[The] exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence.

The standard for exclusion had not been reached, the majority ruled, in this case of State carelessness. The accused had been arrested on a warrant because county officials had negligently not updated computer records to show that the warrant had actually been rescinded.

In marked contrast the Supreme Court of Canada in Grant has embraced what Justice Ginsberg dissenting in Herring described as the more “majestic” rationale of the remedy of exclusion: to preserve the rule of law and the integrity of the justice system. Our Supreme Court sees deterrence as merely a happy windfall of exclusion.

Canada now has a much stronger remedy of exclusion of unconstitutionally obtained evidence than the United States. There is certainly no impossible burden of establishing that exclusion in the case at hand will in fact deter police in the future. Our Supreme Court in Grant held that intentional or reckless disregard of Charter rights should normally lead to exclusion. It also held, as the CCLA argued in Grant, that ignorance of Charter standards must not be rewarded or encouraged and negligence cannot be equated with police good faith. The Supreme Court of the United States is now clearly far more tolerant of unconstitutional law enforcement in drawing the line only at gross, systemic or recurrent negligence.

The CCLA has long spoken out against the inadequacies of the alternative remedies against police abuse of civil suits and laying complaints. As the CCLA argued in Grant they have proved to be a poor and low visibility response to systemic problems of police abuse or ignorance of their powers under an entrenched Charter. Police are rarely, if ever, disciplined for Charter breaches that uncover evidence of criminality. Civil litigation is expensive, uncertain in outcome, and, if successful, likely to be subject to confidentiality agreements. Civil litigation is also highly unlikely where the plaintiff is in prison.

Thankfully our Supreme Court in Grant and Harrison has accepted the argument that there must be a strong remedy of exclusion for serious Charter breaches however serious the crime and however strong the evidence of guilt. The Supreme Court, mindful of its role as guardian of our Constitution, has given our criminal justice system a welcome and important remedy to balance the overwhelming trend to law and order politics and expediency.

Donald Stuart
Professor, Faculty of Law, Queen’s University
Professor Stuart represented CCLA in R. v. Grant.
SUPREME COURT OF CANADA PLACES CROWN PROSECUTORS ABOVE THE LAW AGAIN?

On November 6, 2009, the Supreme Court of Canada released its decision in *Miazga v. Kvello Estate*. In its decision, the unanimous Court departs from the law on the tort of malicious prosecution which it laid down 20 years ago in the case of Nurse Susan Nelles. In *Nelles*, the Court had held that equality under the law demands that Crown prosecutors cannot be immune from malicious prosecution lawsuits and that the same test must apply to Crown prosecutors as applies to private prosecutors. In *Miazga*, the Court has now carved out a special test for suing Crown prosecutors for malicious prosecution, virtually reinstating the immunity it rejected in *Nelles*.

This was a significant opportunity for our highest court to confirm and clarify the responsibility of government agents in the criminal justice system, recognizing the devastating impact that the transgression of public duties can have on wrongfully targeted individuals. The Court recently emphasized the importance of such principles in its unprecedented decision to allow suits against police officers for negligent investigation. Unfortunately, the *Miazga* decision appears to backtrack on the ability to hold public officials accountable.

**Background**

The malicious prosecution action was brought by two sets of foster families in Saskatchewan after sexual assault charges were stayed against them. The charges were numerous and were founded almost entirely on wildly bizarre and disturbing allegations by three foster children, including allegations of satanic rituals and human sacrifice. The criminal case had been labelled by the media as the "Scandal of the Century". The financial, emotional and reputational harm caused to the plaintiffs by the criminal prosecution was widely acknowledged. One of them committed suicide. All charges against the plaintiffs were eventually dropped, as the children's allegations were ultimately found to be almost entirely incredible. The children also ultimately recanted their allegations.

At the malicious prosecution trial, the plaintiffs succeeded against one of the two Crown prosecutors who prosecuted the case (Matthew Miazga), among others. Mr. Miazga appealed to the Saskatchewan Court of Appeal and lost. He then appealed to the Supreme Court of Canada.

**SCC Cloaks Crown Prosecutors with Effective Immunity**

The Court granted Mr. Miazga’s appeal by apparently backtracking on the original Nelles test in the following main ways:

1) removing the requirement that the Crown prosecutor form an honest professional belief that guilt could be proven based on the evidence;
2) requiring that the plaintiff identify the particular personal animus or corrupt motive that fuelled the Crown prosecutor’s actions; and
3) precluding an inference of malice based on the absence of reasonable and probable cause.

The overall test for the tort of malicious prosecution has four parts. The plaintiff must establish that the prosecution was:

1) initiated by the defendant prosecutor;
2) terminated in favour of the plaintiff;
3) undertaken without reasonable and probable cause; and
4) motivated by malice or a primary purpose other than that of carrying the law into effect.
The Court has now practically ensured that parts 3 and 4 need not be met in relation to Crown prosecutors. Under part 3, the Court ruled that as long as a reasonable person could believe that the accused could have been found guilty, there is objective reasonable and probable cause and the suit against the Crown prosecutor must fail, even if this Crown prosecutor did not believe the person was probably guilty. This has the perverse effect that, in such circumstances, a Crown prosecutor could in fact be motivated by racial, political or other forms of bias, but the wrongfully prosecuted person would still have no recourse.

As for establishing malice under part 4, the Court appears to have resiled from the broad definition of malice that it adopted in Nelles. It has now ruled that a plaintiff must prove that “the prosecutor willfully perverted or abused the office of the Attorney General or the process of criminal justice” and that this cannot be inferred from a finding of absence of professional belief in reasonable and probable cause alone. According to the Court, this (heightened) standard is necessary since “a conclusion that a prosecutor lacked a subjective belief in sufficient cause but proceeded anyways is equally consistent with non-actionable conduct as with an improper purpose.” This statement is remarkable, particularly when viewed against the Court’s repeated rulings that Crown prosecutors are “ministers of justice” whose role is to assess the evidence and prosecute only in the interest of justice and that their role is not to seek a conviction.

Now that the lower court decisions in Miazga have been overturned, there have been only two cases in Canada in more than 20 years in which plaintiffs have successfully sued Crown prosecutors for malicious prosecution. As long as the heightened Miazga test applies, regrettably, these may be the last two successful claims in Canadian legal history. Crown prosecutors appear to have been effectively returned to their special seats above the law.

Bradley Berg, Shashu Clacken and Charles Dobson

*Bradley Berg is a partner with the Blakes law firm. Shashu Clacken and Charles Dobson are associates at the same firm. Blakes represented CCLA in the Miazga appeal.*
DEMAND / A / answers
THE RCMP AND TERRORISM: HAVE WE COME FULL CIRCLE?

I intend to discuss how in many ways we have found ourselves facing many of the same public policy issues relative to the actions of the RCMP in the national security field that confronted Canadians and their elected representation in 1980.

The principle concern is whether members of the RCMP will comport themselves in a manner consistent with the expectations of Canadians. Contrary to what many Canadians may think, this issue was not addressed following the McDonald Commission of Inquiry. In 1984 Parliament created a civilian intelligence service under the direction of a Minister in the form of CSIS with its two review bodies. By virtue of the Security Offences Act, however, the RCMP retained its role as the primary police investigative body in respect of criminal activities arising from threats to the security of Canada.

Although Parliament clearly established the continuing role of the RCMP in the national security area, it at that time provided no independent external review of its activities. The police, at common law, are independent in respect of their investigative activities. They decide who they will investigate, when they will investigate and in respect of what offences they will investigate. This independence has been recognized by the courts and is frequently voiced by Ministers at both the provincial and federal levels. This principle protects Canadians from the prospect of the police becoming a coercive tool of the political power of the day. It also affords the police with significant freedom of action subject, we are assured by the police, to the ultimate supervision of the courts.

In contrast to CSIS which upon its creation in 1984 was to be reviewed by two independent bodies, each of which has access to all information but for Cabinet confidences, the RCMP did not have any external review until 1988 following the establishment of the Commission for Public Complaints Against the RCMP. For reasons unknown to me, the CPC’s review mandate was significantly weaker than that of SIRC or even of the offices of the Access to Information Commissioner, the Privacy Commissioner and the Auditor General, all of which existed prior to the creation of the CPC. One can only assume, since policy makers and legislative drafters like to copy existing models, that there was a deliberate intention to have a less robust model of review in respect of the RCMP. If this was the goal of the drafters, I can assure you that they were highly successful in that regard. Based upon my four plus years as Chairman of the CPC, I can with confidence say that little if any of the RCMP’s activities in their role as a national police force comes to the attention of the Commission.

The vast bulk of our work engages the RCMP in its contract role either as the provincial, territorial or municipal police force. The work of interprovincial or international organized crime or national security files appear infrequently. On the rare occasion when they do surface the failings of the CPC’s legislative mandate become readily apparent. The CPC in contrast to SIRC does not have access to all information that it considers relevant to its mandate. This weakness was highlighted in a decision in June 2005 by the Federal Court of Appeal Canada (RCMP Public Complaints Commission) v. Canada (Attorney General) which ruled that the RCMP could refuse to disclose certain classes of information.

In a Directive issued in February 2006, then Commissioner Zaccardelli outlined those classes of information which can be withheld. They include:

1) Section 37 of the Canada Evidence Act
   • Significant damage to ongoing investigations
   • Confidential human sources
   • Investigative techniques not known to the public
2) Solicitor/client privilege, litigation privilege
3) Other recognized privilege
4) Section 38 of the Canada Evidence Act
   • Risk of harm to national security
   • Risk of harm to national defence
   • Risk of harm to international relations
5) Other statutory prohibitions
6) Youth Criminal Justice Act

Some examples of other statutory prohibitions would include Part VI of the Criminal Code which criminalizes the unauthorized disclosure of intercepted communication and the provisions of the Witness Protection Act which criminalizes the disclosure of certain information.
What is good about the Commissioner’s Directive is that it, because of the Federal Court of Appeal ruling, requires RCMP members to acknowledge that they are withholding information and are required to identify the general grounds for doing so. One might today take some comfort in the belief that, so long as everyone follows this Directive, the Public Complaints Commission at least knows that there is something that it does not know. However, since the RCMP also believes it has the additional right to decide what is relevant to a particular complaint, I do not take too much comfort from the Commissioner’s Directive.

The weaknesses in the CPC’s legislative mandate, as they apply to national security, were less problematic in 1988 than today. The past 25 years, however, have seen a number of major changes that have significantly altered the landscape and have caused the RCMP to more vigorously re-engage in national security, particularly in relation to counter-terrorism. This re-engagement, in light of the legislature gaps, enlarges the size of the dark corner in which no light of scrutiny may shine.

Let us for a moment return to the world of 1980. We still lived in the cold war era; an era dominated by the two political and military giants of the day, the USA and USSR, and a cluster of non-aligned states that kept their heads down. CSIS in this period expended 80% of its collection and investigation resources on counter-intelligence operations with the balance spent on counter-subversion and relatively minor counter-terrorism activities. The threats of that era, although serious, had a more predictable nature to them. This was the era of expulsion of diplomats who conveniently confused espionage with diplomacy and there were the relatively rare but noteworthy acts of violence such as those directed against Turkish officials and their Embassy. Undesirables who were detected at our borders were denied entry and quickly sent on their way. There was the occasional terrorist supporter who managed to get into the country and obtained permanent resident status. These people tended to be individuals who engaged in support activities such as recruitment, collection of money and, in the odd case, procurement of equipment.

There was also the trend whereby formerly active terrorists sought to retire to the tranquility of Canada along with their family members. CSIS, using an array of administrative techniques, was able to effectively deal with these threats by disruption activity, such as the displacement of key individuals through deportation or extradition. The RCMP would investigate the occasional terrorist case relying upon traditional investigative methods. These cases generally focused on events that had manifested themselves as overt criminal acts, i.e. the attack on the Iranian Embassy and the assault of its Ambassador.

The ground started to shift in the mid to late 1980s and the changes continued to accelerate thereafter. It was the emergence of organizations with a domestic presence, global reach, organizational structure and long range plans that put pressure on the RCMP to enlarge its national security investigative capacity. This pressure became significant when terrorism evolved beyond the realm of sporadic individual acts of revenge to large scale public mayhem, such as we witnessed in Air India and the later day attacks in New York, London, Bali and Madrid to name but a few. It is doubtful that either CSIS or the RCMP would wish to bear the blame for a failure to effectively co-operate where such failure led to or contributed to the inability to successfully prosecute a terrorist related case. This reality I am sure encourages an early identification and handover of files from the intelligence silo to the criminal investigation silo.

In addition to the natural desire to act promptly in light of the severity of the terrorist threats, a number of significant events occurred post 9/11 that also altered the role of police in the national security area.

First there was the recognition that like any criminal enterprise, terrorism could only be addressed if one attacked all its constituent elements such as its leadership, facilitators and its financial base. Most importantly, the change in terrorist tactics from attacks on identifiable targets to mass murder also necessitates the earliest intervention possible. As well, the global reach of a terrorist organization either due to a sympathetic diaspora or relationships with allied terrorist groups called for new international partnership beyond the traditional policing community.

The Anti-Terrorism Act reflects this reality, according to the Department of Justice which states, that the Act improves Canada’s ability to investigate, detect and prevent terrorist activities at home and abroad. The Department of Justice suggests that the legislation enables Canada to take the necessary steps to deter and detect money laundering and to deny terrorists access to funding; that it allows Canada to work with the international community in the fight against terrorism; and that it recognizes the importance of prevention by creating offences that criminalize activities such as “participation” in a terrorist group: the type of activities that take place before a more dangerous terrorist event can occur.
More specifically:
  • Terrorist activity was defined
  • Expanded jurisdiction was granted to investigate and prosecute such activity
  • Power was granted to identify terrorist entities – some 41 have been listed to date
  • General intent offences were created in respect of activities that supported terrorism such as the providing or collecting of property for certain terrorist activities

Beyond these legislative initiatives the government in 2003 reorganized its key enforcement partners into the portfolio of Public Safety Canada. The inclusion of Canadian Border Services Agencies with the enforcement arm of customs and immigration, along with CSIS and the RCMP, provides the core for national security enforcement under the general direction of a single minister and, in theory, should provide the synergy and range of tools required to detect and prevent terrorist activity.

CSIS, though a weakening of its traditional tools for addressing the terrorist threat coupled with a series of, from its perspective, adverse judicial rulings, has been driven towards a more quasi-criminal law model. At the same time, the police by virtue of the emphasis on detection and deterrence and a focus on the underlying activities of facilitating terrorism have been driven more heavily into the intelligence gathering mode. In some cases the demarcation of activity as being either a criminal or a national security threat has become significantly blurred.

By way of illustration, there was a police investigation in North Carolina which dealt with a group of individuals who were involved in illegal cigarette smuggling. During the investigation, it became known that these individuals also happened to be members of Hezbollah. Intelligence indicated that they were going to use the proceeds of their criminal activity to acquire night vision goggles in Canada for export to assist fellow members of their terrorist group. This case is a good illustration of the difficulty of compartmentalizing activities into one silo or the other. In this instance traditional criminal activity was the enabler for terrorism and a terrorism goal was the ultimate motive for the traditional crime.

With respect to the RCMP I see three forces at play:
  1) The importation of criminal law principles into the national security area such as a more demanding evidentiary retention and disclosure
obligation imposed upon CSIS which has weakened its traditional tools of dealing with terrorist threats;
2) An enhanced police focus on the early detection and prevention of terrorist activity both direct and indirect; and
3) The increasing prevalence and serious harm occasioned by terrorist activity, all of which combine to re-engage the RCMP more deeply on the national security front.

Unfortunately there are certain constants in the counter-terrorism sphere that apply equally to CSIS and the RCMP.

The RCMP like CSIS will need to use information obtained from its international partners.

- That information will be accompanied by non-disclosure caveats
- The disclosure of that information absent consent of the third party will damage future information sharing relationships
- Such third party consent to disclosure is rarely granted.

Failure to provide the information will deny the individual a fair trial which in turn will lead to a judicial stay of proceedings.

The reluctance of the police to provide full disclosure to the defence is a reality that occurs with some regularity in respect of complex organized crime files. The police know at the early stages of an investigation that there is information that cannot be disclosed, hence a prosecution may not ensue.

Accordingly, just because the police are involved in the investigation of a terrorist related criminal activity does not mean that criminal charges will be laid and the supervision of the court engaged. The discretion to proceed with criminal charge belongs to the police. Their overriding obligation is to keep the peace. That obligation can be satisfied though an investigation that leads to the detection, disruption, deterrence or frustration of the terrorist activity. It does not have to result in the laying of criminal charges.

Have we seen the RCMP employ disruption tactics in the past? Remember the infamous barn burning episode of the 1970s wherein the RCMP burned a barn to prevent a meeting between the FLQ and the American Black Panthers. That activity along with other questionable disruptive tactics employed by the RCMP led to the McDonald Commission and the creation of a civilian national security agency. With the significant re-engagement of the RCMP in counter-terrorism investigation are we likely to see a return of those practices?

A National Post article dated November 10, 2009 references an RCMP 2008–2009 fiscal performance report that was tabled in Parliament. It detailed suspected national security related criminal acts. Assistant Commissioner Paulson with reference to the report said “Prosecutions are by far the preferred path (but) it is just not always possible.” He talked about disruption tactics such as search and seizure. He specifically referenced the raid on the Toronto and Montreal offices of the World Tamil Movement and the seizure of property and bank accounts as well as the arrest and extraditions of three Tamil supporters to the U.S. Commissioner Elliott in the same article is quoted as saying that “disrupting credible and imminent threats without significant evidence to justify criminal charges is sometimes necessary.” Yet he boldly states that “law enforcement and criminal prosecutions will be the new paradigm of national security in democratic nations the world over.”

It is clear, I would submit, that the RCMP has run into the same obstacles that confronted CSIS, that it has deployed similar disruption tactics and that it will, I believe, in the future see itself using the criminal prosecution route for a minority of its investigations.

There has, however, been a significant tool made available to the police that must be considered when discussing such disruption tactics. In that regard I would draw your attention to section 25.1 of the Criminal Code. That section was proclaimed on February 1, 2002 as part of the government’s organized crime package. It provides a limited justification at law for acts and omissions that would otherwise be criminal offences when committed by designated law enforcement officers (and those acting under their direction) while investigating an offence under federal law, enforcing a federal law, or investigating criminal activity. The new reality is that the RCMP in 2009 in order to detect, investigate and disrupt terrorist activity could do the very activity that helped give rise to the McDonald Commission and the creation of a civilian national security organization. Since December 2001, the RCMP is authorized in law to burn the barn.

We seem to have, as noted in the title of this article, come full circle. Not only is the RCMP back in the national security business in a significant way but it does so unencumbered by the oversight/review regime that was put in place in respect of CSIS.
We find ourselves as Canadians confronted with a situation wherein the
RCMP in response to a serious public threat has become increasingly involved
in the investigation of terrorist activities. Such involvement will require them to
employ the full range of tactics previously employed by CSIS which includes
surveillance, monitoring, clandestine interception of communications and covert
searches and disruption tactics to name just a few. As noted in the comments by
Assistant Commissioner Paulson and Commissioner Elliott, not all of these will
lead to prosecution and supervision by the court. I would venture to say that the
vast majority will not. Even more tellingly few people would even become aware
that they were or are the subject of an RCMP counter-terrorism investigation.
You cannot complain about that which you do not know.

Who then can provide either ministers, Parliament or the Canadian public
with assurances that these activities are being carried out in a manner consistent
with the expectations of Canadians? I have pointed out in each of my Annual
Reports the growing public trust deficit in respect to the activities undertaken
by the RCMP. We have recommended legislative steps to address this reality.
The RCMP has recognized the need for enhanced external review in respect
of its investigation of deaths or serious injury occasioned by the actions of its
members. With the O’Connor Inquiry findings and recommendations, in respect
of the RCMP’s investigation of Maher Arar, still fresh in the mind of Canadians
how much faith do you believe the Canadian public has that there will not be a
repeat of this type of occurrence? How much damage would a repeat of the Arar
events do to the reputation of the RCMP? Could it recover from such an event?

I believe that it is time to put in place an enhanced review regime in respect
of all RCMP activities including its investigation of terrorist activities. Central
to such enhanced powers is access to all information but for Cabinet confidences
and the power to self-initiate reviews of RCMP programs, operational policies and
training as well as the conduct of members in the performance of their duties. Fail-
ure to address the adequacy of review powers whilst allowing the RCMP, as noted
by the Commissioner in a recent speech “to Close the Loop on National Security
through Law Enforcement” will merely invite déjà vu all over again.

Paul Kennedy
Paul Kennedy was the Chair of the Commission for Public Complaints against the
RCMP until December 2009. This paper was initially delivered as an address to the
University of Ottawa Roundtable on Security and Intelligence November 24, 2009.
PARLONS

EN
LA LUTTE CONTRE LA DISCRIMINATION DEMANDE DES STRATÉGIES MULTIPLES ET PRO-ACTIVES.

Extraits du mémoire de l’ACLC au Comité parlementaire étudiant l’antisémitisme

« La lutte contre la discrimination demande un système juridique accessible. »

Le droit à l’égalité est un droit fondamental et primordial dans la société canadienne. Il est inscrit dans la Charte canadienne des droits et libertés, ainsi que dans les diverses lois provinciales et fédérales sur les droits de la personne. Le gouvernement canadien, la société civile et les Canadiens devraient être extrêmement préoccupés des allégations de préjugés croissants à l’égard d’un groupe identifiable qu’il soit juif, arabe, musulman ou autochtone.

La discrimination se manifeste sous diverses formes, et il ne peut pas y avoir de solution unique pour lutter contre ses différentes manifestations. On peut refuser à des personnes un emploi, des logements ou des services. On peut pas leur accorder de promotion. On peut les accuser injustement de crime ou les poursuivre sans raison. On peut leur faire payer trop cher pour des services. Les personnes discriminées peuvent être froidement accueillies par des agents d’assurance, des propriétaires de restaurants ou des vendeurs sur eBay, et elles peuvent être victimes de diffamation, d’infractions contre les biens ou d’attaques violentes. La discrimination s’intériorise et empêche les gens de se plaindre, de répondre, d’argumenter, de s’exprimer, de poursuivre, de participer à des élections ou d’être un membre actif de la société. (…)

Comme la discrimination a des effets si puissants et généralisés, il faut que le système judiciaire dans son ensemble soit juste et adéquat. Il faut que les politiques en matière d’emploi soient équitables, que les mesures de protection des consommateurs soient efficaces, que les pouvoirs publics soient imputables, que les tribunaux soient impartiaux et que des systèmes de protection des victimes soient en place. En effet, seules de solides institutions démocratiques juridiques, sociales et culturelles peuvent assurer que toutes les formes invisibles de discrimination disparaissent.

L’ACLC soutient que l’accès à la justice continue d’être un problème important pour les gens victimes de discrimination. Des mesures d’appui aux méthodes de règlement des différends, à l’aide juridique, aux programmes et aux organisations qui facilitent l’accès aux tribunaux et aux contestations judiciaires devraient faire partie d’une solution efficace contre la discrimination.

Le renforcement de la culture des droits de la personne

Les tribunaux et les commissions des droits de la personne sont des outils essentiels de la lutte contre la discrimination. Récemment, un grand nombre de personnes ont critiqué très vivement ces organismes, ce qui a entraîné plusieurs demandes pour leur abolition. L’ACLC est une farouche défenseur des dispositions antidiscriminatoires des lois sur les droits de la personne. Elle préconise un appui continu pour les commissions des droits de la personne. Les tribunaux et les commissions des droits de la personne de l’ensemble du pays s’efforcent de sensibiliser le public et d’enquêter sur les allégations de discrimination dans le secteur privé. Ce travail est nécessaire pour lutter contre la discrimination. Des améliorations peuvent être apportées afin d’accroître l’efficacité du système des droits de la personne. Cela ne signifie pas qu’il faut supprimer le système au complet. En effet, la promotion d’une culture vibrante et robuste des droits de la personne nécessite des fonds supplémentaires surtout en période d’instabilité internationale et de lutte contre le terrorisme pendant laquelle de nouvelles formes de discrimination émergent. Rappelons-nous de l’internement des Canadiens d’origine japonaise pendant la deuxième guerre mondiale et réfléchissons sur notre tendance à voir l’« ennemi » dans les visages de nos compatriotes de travail ou de nos voisins.

L’ACLC soutient que les commissions des droits de la personne ont un rôle à jouer dans la lutte contre la discrimination. Bien qu’elle ne soutienne pas l’inclusion d’interdictions relatives aux discours haineux dans les lois sur les
droits de la personne, l’ACLC est fermement en faveur de l’utilisation du mandat d’éducation des commissions des droits de la personne pour répondre à ces discours remplis de préjugés. Les Canadiens et la société civile canadienne devraient pouvoir critiquer ouvertement et vivement les discours qu’ils considèrent comme discriminatoires. Favoriser une culture de respect des droits de la personne et une culture de discours contradictoires demande une éducation, une sensibilisation et une prise de conscience accrue. Les commissions des droits de la personne sont des formateurs indispensables à cet égard. On devrait les encourager à se servir de leur mandat d’éducation de manières variées et créatives.

L’appui à des recherches et des données statistiques crédibles

Les statistiques policières ne donnent pas toujours une image exacte du nombre de crimes haineux et les actes non criminels de discrimination ne sont pas enregistrés, il nous faut compléter ces données par des enquêtes plus approfondies.

L’ACLC continue de préconiser une liberté d’expression permettant à tous de s’exprimer: la liberté d’expression protège même les personnes dont le message est bigot et dégoutant. De violer ou de limiter la liberté d’expression n’est pas servir la lutte contre la discrimination: les violations de la liberté d’expression se font souvent au détriment des personnes vulnérables, impopulaires et discriminées. Davantage que les puissants, les personnes victimes de discrimination ont besoin d’une protection entière de la liberté d’expression.

The English version of this text is on the website: www.ccla.org.
ACT NOW
The last number of years has seen the Supreme Court of Canada grappling with questions of religious freedom to an unprecedented extent. As has been the case for centuries in the development of the western legal tradition, the interaction of religion and the rule of law has again emerged as a crucible for debates about fundamental social values and the shape and limits of civil liberties. We have seen the Court wrestle with the meaning of secularism, struggle to define religion for the purposes of s. 2(a) of the Charter, and work to navigate the turbulent waters that are stirred by conflicts between religious freedoms and other Charter rights. The jurisprudence in this area has become suddenly and exceedingly rich, the cases disclosing as much about the beliefs, values, and assumptions that inform the Canadian legal system as they do about the religious communities that they affect. In the midst of this rich body of law, the Supreme Court’s decision in A.C. v. Manitoba (Director of Child and Family Services), subtly but, I suggest, powerfully expresses the often-unspoken reality that lies at the heart of what is just so difficult about religious liberties in a modern liberal democracy.

A.C. is another case in a line of decisions addressing the ability of Jehovah’s Witnesses to refuse medically necessary blood transfusions on the basis of their religious convictions. The law had become clear at both ends of the spectrum – adults have the freedom to choose whether to receive such transfusions but parents may not impose their religiously-based views on infants where their decisions would imperil the child’s life. A.C. forced the Supreme Court to address the fraught middle-ground: what ought the law to say about the right of minors who fully appreciate the nature and consequences of the proposed treatment – children who would be regarded as “mature minors” at common law – to refuse such treatment on religious grounds? The case concerned A.C. who, at the time of treatment, was nearly 15 years old and suffering from complications arising from Crohn’s disease. She had completed an advance medical directive indicating that she not receive blood transfusions under any circumstances, a decision informed by her religious convictions. The Manitoba legislation established that children of 16 years or older were entitled to make their own treatment decisions, subject only to a court being satisfied that they could not understand or appreciate the information and consequences surrounding the illness and treatment. In necessary cases, children under the age of 16, by contrast, were subject to court ordered medical treatment governed by a best interests of the child test. Having refused treatment, a position supported by her parents, A.C. was apprehended as a child in need of protection and was ultimately given three units of blood pursuant to a court order. In deciding to authorize the treatment, Kaufman J. proceeded on the assumption that A.C. had capacity but concluded that this was irrelevant to the best interests of the child test.

On appeal, A.C. and her parents argued that the legislative scheme created a presumption of incapacity for children under 16 years of age, a presumption that unjustifiably infringed A.C.’s right under section 2(a), 7 and 15(1) of the Charter of Rights. Justice Abella, writing for a majority of the Court, found no breach. She did so on the basis that a proper analysis of the best interests of the child must take into account the child’s views and choices to a degree commensurate with that child’s maturity. Justice Abella reasoned that, in this setting, the best interest test should be conceived of as “an evolutionary compendium of considerations that give increased strength to increased maturity.” Interpreted in this way, she found no breach of the Charter. Children under the age of 16 have an opportunity to demonstrate their maturity and to have their wishes and perspectives – including their religious views – taken into account by the judge applying the best interests test. Justice Binnie’s lone dissent was, in its essence, analytically simple: respecting the autonomy and liberty of a minor with capacity to make medical decisions requires more than simply requiring a judge to take his or her view into account – it requires actually allowing that child to make the decision. Accordingly, Justice Binnie would have found the Manitoba legislation unjustifiably breached ss. 2(a) and 7 (and perhaps s. 15(1)).
A.C. cements a feature of the Court’s contemporary treatment of religious rights. Despite the vigorous dissent on the constitutional result, Justices Abella and Binnie are unified in their approach to understanding religion as, in essence, a matter of choice. Both judgments are replete with references to the importance of respecting autonomy and choice, as are so many of the Court’s recent decisions. As I have explored elsewhere in my writing, the reality is much more complex and unruly. Choice is no doubt an important aspect to many people’s religious lives. Yet, as suggested by its inclusion among the other listed grounds in s. 15(1), religion is or can also be a matter of personal identity and community belonging. The law’s strong bias, however, is to understand religion as something chosen – an expression of autonomy. Both the majority and the dissent in A.C. evidence Canadian constitutional law’s very particular and very powerful tendency to turn matters of religious freedom and equality into issues centrally about choice.

Yet even within this particular framework of understanding religion as a matter of autonomy and choice, A.C. says something deeply important about what is at the heart of the durable, difficult matter of addressing religious liberties and equality in contemporary Canadian society. Whether one agrees with his conclusion on the merits of the case or not, Justice Binnie’s dissenting judgment is essential reading; it is a bold, honest and insightful look into what is so often really at stake in cases involving religious difference. For Binnie J., the difficulty of the case boils down to a simple, intractable fact: that A.C. “claims the right to make a choice that most of us would think is a serious mistake”. He explains that “[i]ndividuals who do not subscribe to the beliefs of Jehovah’s Witnesses find it difficult to understand their objection to the potentially lifesaving effects of a blood transfusion” and says that it is therefore understandable that judges will work to give priority to protecting life. “Yet strong as is society’s belief in the sanctity of life, it is equally fundamental that every competent individual is entitled to autonomy to choose or not to choose medical treatment except as that autonomy may be limited or prescribed within the framework of the Constitution.” “The Charter,” Justice Binnie explains, “is not just about the freedom to make what most members of society would regard as the wise and correct choice.”

The constitutional protection of religious freedom and equality reflects a commitment to the imperative of having a margin of moral appreciation in society. This is a commitment with deep roots in our political and philosophical histories. However, when faced with the actual substance and content of this moral diversity one is jarred from the comfortable realm of the abstract and forced to confront the reality that to actually afford this margin might mean accommodating and deferring to commitments and practices that are not simply unfamiliar, but views that one sees as simply, and sometimes disastrously, wrong. Faced with these lifestyles, practices, choices, and beliefs, one becomes aware of how rich the mainstream culture of the rule of law really is with assumptions about what is reasonable, what is a good life, and what is tolerable. In cases like A.C., the demand to be faithful to these collective commitments collides with the aspiration to respect true difference. In such cases, there is no comfortable way out. This is the heart of the difficulty surrounding religious freedom and equality in Canadian law and it is the terrain on which the courts must operate. Many cases concerning religion do not present such a deep conflict between the assumptions that deeply inform the law and the central beliefs and practices of a religious individual or community; many cases, however, will. A.C., and Justice Binnie’s dissent in particular, serves as a powerful reminder of this ethical conundrum at the core of the constitutional protection of religion.

Benjamin L. Berger
Associate Professor
Faculty of Law, University of Victoria
THE FUTURE OF FREEDOM OF RELIGION AFTER ALBERTA V. HUTTERIAN BRETHREN

Canadians are justly proud of their rich multicultural tradition. Canada’s society and its sense of identity are sufficiently strong to offer a welcoming multiculturalism as a viable alternative to America’s more assimilationist melting pot. And, until recently, the Supreme Court of Canada had been a big part of this success. The Court has earned a strong reputation for jealously guarding freedom of religion in a way that distinguished Canadian law internationally as a model for the possibilities of successful religious toleration.

The Court earned this reputation by staking out bold positions on sometimes controversial issues. In 2004, the Court permitted Orthodox Jews to place succahs on their balconies in a luxury apartment building in Montreal during the Jewish religious festival of Succot, over the objections of other tenants who alleged that the succahs posed a fire hazard (Syndicat Northcrest v. Amselem). And in 2006, the Court allowed Sikh schoolchildren to carry kirpans (symbolic religious daggers) to school, contrary to a school board’s “no weapons” policy and the wishes of many other parents who feared the proliferation of other weapons in schools (Multani v. Commission scolaire Marguerite-Bourgeoys). In each case, the Court sided with freedom of religion over what it found to be the unsubstantiated safety concerns of the majority.

A few short years later, in 2009, the Supreme Court seemed to retreat. In Alberta v. Hutterian Brethren of Wilson Colony, a closely divided Court sided with concerns about identity theft rather than the rights of religious minorities, by ruling that Alberta could infringe the freedom of religion of a colony of Hutterites by requiring photographs on all drivers’ licenses in order to reduce the risk of identity theft. The Alberta Hutterites, who believe that photographs are prohibited by the Bible, live communally and need a few drivers within their community in order to obtain essential medical services (for children and diabetics on the Colony), for community firefighting by volunteer firefighters, and for commercial activity to sustain their community.

Interestingly, before imposing the new mandatory photo requirement Alberta had been able to accommodate the Hutterites for almost thirty years, from 1974 to 2003, by exceptionally allowing for non-photo licenses. Only 250 or so of these non-photo licenses had been issued, out of approximately 2.5 million licenses issued in the province, so the accommodation was very manageable. Nevertheless, in 2003, Alberta decided to eliminate the religious exemption altogether to ensure that its new digital photo database had absolutely no gaps.

A 4-3 majority of the Supreme Court found that Alberta was justified in doing this, even though the new measures infringed the Hutterites’ freedom of religion. Chief Justice McLachlin found that benefits of the universal photo requirement outweighed the negative impacts on the Hutterites’ freedom of religion, because the Hutterites didn’t have to drive themselves and could hire private drivers or use commercial transportation. The Chief Justice accepted that this alternative would “impose some financial cost on the community,” but said that it would “not rise to the level of seriously affecting the claimants’ right to pursue their religion”.

In dissent, Abella J. found that the universal photo rule completely extinguished the Hutterites’ right of freedom of religion, since Alberta had insisted on the photo and had not offered any other options. She also found that excluding 250 Hutterites from Alberta’s digital photo database would not materially undermine its integrity, because over 700,000 unlicensed Albertans were already excluded, and thus were also at risk of identity theft. On the other side of the ledger, Abella J. accepted that the mandatory photo requirement threatened the Hutterites’ community existence because they unquestionably needed a few of their community members to drive. LeBel J. noted more bluntly that the majority’s approach involved “belittling” the impact on the photo rule on the Hutterites’ religious beliefs and practices, “by asking them to rely on taxi drivers and truck rental services to operate their farms and preserve their way of life”.

74 Canadian Civil Liberties Association

75 Canadian Civil Liberties Association
There are some serious difficulties with the majority’s analysis. First, the majority effectively ignored important uncontradicted evidence in the case showing that the Hutterites needed drivers within their midst as a matter of community survival. An affidavit from a Hutterian elder stated unequivocally that “[w]ithout being able to drive, we cannot maintain our communal way of life … The position of [Alberta] is tearing apart the fabric of our existence”. The majority brushed this evidence aside by observing that the Hutterites had not proven that the cost of hiring private drivers was prohibitive. But the onus under s. 1 is on government, not on the Charter claimant. The Hutterites didn’t have to justify the infringement – this onus was on the Alberta government.

Second, it was somewhat fanciful for the majority to suggest that the Hutterites should hire private drivers or rely on commercial transportation. Does the Supreme Court really expect the Hutterites to hire taxis in rural Alberta whenever there is a fire on the colony or if they urgently need to take their children to hospital?

Third, and even more troublingly, the majority seems to have imported a means test in s. 1 of the Charter. The Court suggested that the outcome might have been different had the cost of hiring private drivers been “prohibitive”. But whether a cost is “prohibitive” depends on one’s means, which raises the question of whether there is now one standard of justification for the rich and another for the poor. Surely Canadians wanting to exercise their profoundly fundamental right to freedom of religion need not take a vow of poverty.

While Hutterian Brethren is thus a deeply troubling decision, both in the result and in how the majority reached it, for pragmatic civil libertarians with an eye to the future the key question is surely whether it heralds a change in the Court’s direction. There is reason to be cautiously optimistic that it does not. By purporting to decide the case largely on the evidence and the weighing the deleterious and salutary effects, the majority has significantly diluted the ruling’s precedential value. In a future case, both the evidence and the weighing of effects will inevitably be different. Having decided to tailor a rule to fit this case and perhaps it alone, the Supreme Court has thus left open the possibility of reverting to its more robust jurisprudence of religious toleration.

Mahmud Jamal
Partner, Osler, Hoskin & Harcourt. Mr. Jamal is a member of the CCLA Board of Directors and represented CCLA in Alberta v. Hutterian Brethren at the Supreme Court of Canada.

The Supreme Court has left open the possibility of reverting to its more robust jurisprudence of religious toleration.
CCLET’s programs, Teaching Civil Liberties and Civil Liberties in the Schools provide interactive workshops for teachers, teacher-candidates and students across Ontario.

CCLET believes that well-prepared teachers are the key to keeping Canada’s citizens engaged in the habits of democracy. When young people learn about their rights and freedoms they are more likely to fight injustice using democratic tools such as freedom of speech, freedom of association and the right to peaceful assembly. These programs are supported by a generous grant from the Law Foundation of Ontario. Here are some of the reactions of the participants.

TEACHING CIVIL LIBERTIES

“Amazing questions and a great way to engage this class. I had never heard the opinions of some of my classmates before.”
Teacher-candidate
OISE/University of Toronto
Toronto, Ontario

“Really enjoyed the presentation and will use it again. I also find that the earlier it can be incorporated into a course, the better because it sets such a wonderful foundation for the complex issues that we engage with in the course – and it gets people fired up, which is what I love.”
Professor
Faculty of Education
Trent University
Peterborough, Ontario

“The style of presentation and … emphasis on intellectual engagement and a critical discourse … gave my students the reason and event to explicitly locate their professional stance on these methodological (historical inquiry) and pedagogical/moral (teaching) issues. …[The] insistence that they do not reach consensus … allowed these pre-service teachers to start explicitly encountering their fear of “offending” anyone through their teaching of controversial issues (and there are very few topics in History or issues in Social Studies that are not controversial or politically loaded). Finally, this class presentation forced the pre-service teachers to examine their ethical/political stances as history teachers rather than reverting to endless relativism and wishy-washy attempts at consensus.”
Professor
Faculty of Education
Lakehead University
Thunder Bay, Ontario
CIVIL LIBERTIES IN THE SCHOOLS

“Thought-provoking questions were presented and kept the students engaged and thinking. A great supplement to the curriculum!”

Teacher
Riverside Secondary School
Windsor, Ontario

From a participant in CCLET’s Annual Fundamental Freedoms Conference for High School Students

“In my final year of high school I needed five OAC credits to graduate, and complete the requirements to enter Computer Engineering at the University of Waterloo. Needing a social science credit, I added OAC Politics only because it fit my schedule and gave me a first period spare. One day, the teacher told me about a one-day conference on civil liberties that she’d heard about [CCLET holds annual Fundamental Freedom conferences for high school students with the Toronto District School Board.] She had heard great things about this organization, the Canadian Civil Liberties Association, and thought we would get a lot out of the event. I only remember the chance to skip class for a day and head downtown!

I had no idea what was in store. The speakers, the discussions, and the wonderful speech by Mr. Alan Borovoy at the end of the event are with me still. At that moment, the CCLA seriously worsened the confusion I felt about my future.

But it was a good kind of confusion, one that excited me about a completely new set of possibilities. Two degrees in political science later, I recall that semester as a tipping point in my life. That course allowed me to step back and really think about what I wanted out of life. Last year I had the fortune of running into Mr. Borovoy again, and I told him how much the CCLA event and his speech affected me. How did it change me, he asked. I recounted for him that I was heading into engineering after high school, but decided, in part because of that day, to pursue a career in politics instead. With his characteristic charm he jokingly apologised for ruining my life. I told him whatever the opposite of “ruining” was, that’s what he did for me.”

Waqas Iqbal was a senior intern at the Ontario legislature in 2008-2009. He has applied to law school for the Fall 2010 term.
Canadian Civil Liberties Association
ASSOCIATION CANADIENNE DES LIBERTÉS CIVILES

BOARD OF DIRECTORS
CONSEIL D’ADMINISTRATION

PRESIDENT/
PRÉSIDENTE NATIONALE
Marsha Hanen

CHAIR/PRÉSIDENT DU CONSEIL
John D. Macamus

VICE-PRESIDENTS/
VICE-PRÉSIDENTS
Jamie Cameron
Susan Cooper
Gisèle Côté-Harper, Q.C.
Marlys Edvardh
Edward L. Greenspan, Q.C.
Patricia Jackson
Delia Opekokew
The Hon. Howard Pawley
Kenneth P. Swan
Dr. Joseph Wong

SECRETARY/SECRÉTAIRE
Sydney Goldenberg

TREASURER/TRÉSORIÈRE
Elaine Slater

Frank Addario
The Hon. Warren Allmand, Q.C.
Bromley Armstrong
The Hon. Ronald Atkey, Q.C.
Frédéric Bachand
Joseph Boydén
The Hon. Edward Broadbent
Leah Casselman

The Hon. Saul Cherniack, Q.C.
Dominique Clément
Jane Cobden
Michael Conner
Dr. Debby Copes
David Cronenberg
Fernand Daoust
Peter Desbarats
Brian A. F. Edy
Susan Eng
Mel Finkelstein
Robert Fulford
Vicki Gabereau
The Hon. Constance R. Glube, Q.C.
Katherine Govier
Louis Greenspan
Hussein Hamdani
Shirley Heap
Harish Jain
Mahmud Jamal
Janet Keeping
Joy Kogawa
Anne La Forest
Cyril Levitt
Andrew Lokan
A. Wayne MacKay
Ken Mandzuk
Jon Oliver
Penelope Rowe
Paul Schabas
Marvin Schiff
David Schneiderman
Walter Thompson
The Very Rev. Lois Wilson
PAST PRESIDENTS
PRÉSIDENTS ANCIENS
The Hon. J. Keiller Mackay (1888–1970)
John Nelligan, Q.C.
Harry W. Arthur
The Hon. Walter Tarnopolisky (1932–1993)
Walter Pitman
Sybil Shack (1911–2004)
The Hon. Allan Blakeney, Q.C.

CCLA STAFF/EMPLOYÉS
GENERAL COUNSEL/AVOCATE GÉNÉRALE
Nathalie Des Rosiers
DIRECTOR, FUNDAMENTAL FREEDOMS PROJECT/DIRECTRICE, LIBERTÉS FUNDAMENTALES
Noa Mendelsohn Aviv

ACTING DIRECTOR, FREEDOM OF EXPRESSION PROJECT/DIRECTRICE INTERIM, LIBERTÉ D’EXPRESSION
Abby Deshman

DIRECTOR, NATIONAL SECURITY PROJECT/DIRECTRICE, SÉCURITÉ NATIONALE
Sukanya Pillay

COORDINATOR, FUNDRAISING/COORDINATRICE, LEVÉE DE FONDS
Caiflin Smith

ADMINISTRATIVE ASSISTANT/ASSISTANTE ADMINISTRATIVE
Anne Lee

GENERAL COUNSEL EMERITUS/AVOCAT GÉNÉRAL ÉMÉRITÉ
A. Alan Borovoy

2009 GIFTS
*indicates contribution to Canadian Civil Liberties Education Trust only

$10,000 AND UP
Alan & Judy Broadbent*
Beverly Chernos
Fasken Martineau DuMoulin LLP
Greenusan Partners*
The Law Foundation of Ontario
Oder Hoskin Harcourt LLP*
Sheldon Chumir Foundation for Ethics in Leadership*
Bob & Joan Shetler
Torys LLP*
Anonymous

$5,000 – $9,999
Blake, Cassels & Graydon LLP*
Canadian Auto Workers
Epstein Cole LLP*
Brian H Greenspan*
Ontario Federation of Labour*
Paliare Roland LLP*
Sir Joseph Flavelle Foundation*
Elaine Slater*
Sutts, Strosberg LLP*

$1,000 – $4,999
Ben & Hilda Katz Charitable Foundation*
Ernest Benz
Borden Ladner Gervais LLP*
Patrick Bowyer*
Canadian Bar Association/Ontario Bar Association*
David P Chernos
Dr. Debby A Copes
Criminal Lawyers’ Association*
Davies Ward Phillips & Vineberg LLP*
Nathalie Des Rosiers*
R. G. Des Dixon
Dundee Corp*
Robert & Ellen Eisenberg

Nancy Fairman*
Fraser Milner Casgrain LLP*
Gowling Lafleur Henderson LLP*
Green & Chercover*
John Heddle
Patricia D S Jackson
The Kahanoff Foundation*
Koskie Minsky LLP*
The Law Society of Upper Canada*
Lax O’Sullivan Scott LLP*
Lenczner Slagt Royce Smith Griffin LLP*
Lerners LLP*
Dr Errol Lewars
Robert P & Shauna Makazoff*
John D McCamus
McCarty Tetraull LLP*
Myra Merkur*
Miller Thomson LLP*
Ron Ness
Paul & Nancy Nickle*
Ontario Public Service Employees Union
Dr. Christopher Parfitt
Oscar Rogers Family Foundation through The Toronto Community Foundation*
Dr. Patricia A Rae
Edward J Richardson
Beatrice Riddell*
Frank Rothe
Sack Goldblatt Mitchell LLP*
Stanley Segel
Owen B Shime, Q.C.*
The Sisters of St. Joseph of the Diocese of London, Ontario*
Lorne Slotnick
Kenneth P Swan
Torstar Corporation*
WeirFoulds LLP*
Workers Health & Safety Centre
Samuel & Rose Levy Charitable Foundation
Kenneth Sanderson
Beth Sheehan
Gordon Simon
Rev. Hans Skoutajian
Ronald G. Sligh
Dr. Robert F. Smider
Farhan Syed
Patrick Taylor
Dr. & Mrs. Elmer & Audrey Tory
Carl Turkstra
Gerald Vise
Visitation Province Inc., Congregation de Notre Dame
Karolyn Waterston
Marc Zwelling
Anonymous

Samuel & Rose Levy Charitable Foundation
Kenneth Sanderson
Beth Sheehan
Gordon Simon
Rev. Hans Skoutajian
Ronald G. Sligh
Dr. Robert F. Smider
Farhan Syed
Patrick Taylor
Dr. & Mrs. Elmer & Audrey Tory
Carl Turkstra
Gerald Vise
Visitation Province Inc., Congregation de Notre Dame
Karolyn Waterston
Marc Zwelling
Anonymous

William Dean
Alceo DeAnna
Dr. David J. Beaudin
Dean Becker
Paul Bennett
Esther & Paul Berman
Rabbi Arthur Bielföld
Ron Bischler
Huguette Blanco
Andrew Bland
Robert Block
Joan M. Boggs
Harald Bohne
Borovoy Family Foundation
G. Mavis Boyd
Joyce Bradley
Helen & Andrew Brink
Edward Broadbelt
J. A. Brook
Bryant Brown
Margaret B. Brown
Mark David Roy Brown
Robert Brownstone
Georgina Brunette
Jimm Burgess
James A. Burke
Dr. Theodore Busheikin
Philip Butterfield
Paul Calarco
Hugh Cameron
Douglas Campbell
Canadian Jewish Congress
Canadian Union of Public Employees
Brian R. Carr
John Carter
Leah Casselman
Dr. Ann Cavoukian
Bryan Cawley
Ernest Chadler
C. B. Chapman
Olive Chester
Jean Christie
Peter Ciuciuara
Dawn Clarke
Elizabeth A. Cockburn
Charles & Joy Cohen

Thomas Cohen
Erna Collins
Paul Copeland
Irwin Cotler
Carolynne Coulson
Norman I. Cowan
Lois Cox
Mark Crapelle
Bryan Crawford
Anna & Graydon Cresswell
David Crombie
Adele & Christopher Crowder
Raphael Curnew
Eveland Currie
Mary Lou & Bert Curtis
Sylvia Davis
Charles Davison

Joyce Abbott
Pamela Ackerman
Donald Altman
Arnold & Phyllis Amber
Eleanor L. Anderson
Fred Anderson
Fred Anderson
Philip Anisman
G. P. Anthony
Bromley L. Armstrong
Margaret Armstrong
David Askew
Sandra Atlin
Margaret Atwood
Carolyn & Denis Bailey
Richard Bain
Dave Baker
Helen M. Baker
Eunice Baldwin
Eric & Peggy Balkind
The Rev. Leslie Ball
Julia Bas
Thomas E. Bates
Donald Bayne
Cynthia Baxter
Susan Baxter

$150 – $499

Joyce Abbott
Pamela Ackerman
Donald Altman
Arnold & Phyllis Amber
Eleanor L. Anderson
Fred Anderson
Philip Anisman
G. P. Anthony
Bromley L. Armstrong
Margaret Armstrong
David Askew
Sandra Atlin
Margaret Atwood
Carolyn & Denis Bailey
Richard Bain
Dave Baker
Helen M. Baker
Eunice Baldwin
Eric & Peggy Balkind
The Rev. Leslie Ball
Julia Bas
Thomas E. Bates
Donald Bayne
Cynthia Baxter
Susan Baxter

$500 – $999

Frank Addario
Harry W. Arthurs
Ann H. Atkinson
Avie Bennett
Allan Blakeney, Q.C.
Joseph A. Boyden
Lars Brink
Canadian Labour Congress
Jamie Cameron
Helenanne Carey
Earl A. Cherniak, Q.C.
Helen Cole
David Cronenberg
F. Devito
Donald J. Dodds
David Elkins
Dr. Dianne Fahselt
Guy Ferland
Vicki Gabereau
Bernard Green
Edward L. Greenspan, Q.C.
Peter Hogg, Q.C.
John M. Johnson
Mary & Laurence Jones
Audrey J. Kenny
Joy Kogawa
Kevin Leicht
Charles & Daphne Maurer
Jennifer Mauro
Betty McIntosh
Malcolm G. McLeod
Mel MacDonald
Margaret Motz
National Union of Public
& General Employees
Richard C. Payne
Gerry Pelletier
Marlyn L. Pilkington
Cecil Rabinovich
Lorne Richmond
Dr. & Mrs. Donald & Carolyn Rosenthal
Jay Rosenzweig
Murray & Roda Rubin

$500 – $999

Frank Addario
Harry W. Arthurs
Ann H. Atkinson
Avie Bennett
Allan Blakeney, Q.C.
Joseph A. Boyden
Lars Brink
Canadian Labour Congress
Jamie Cameron
Helenanne Carey
Earl A. Cherniak, Q.C.
Helen Cole
David Cronenberg
F. Devito
Donald J. Dodds
David Elkins
Dr. Dianne Fahselt
Guy Ferland
Vicki Gabereau
Bernard Green
Edward L. Greenspan, Q.C.
Peter Hogg, Q.C.
John M. Johnson
Mary & Laurence Jones
Audrey J. Kenny
Joy Kogawa
Kevin Leicht
Charles & Daphne Maurer
Jennifer Mauro
Betty McIntosh
Malcolm G. McLeod
Mel MacDonald
Margaret Motz
National Union of Public
& General Employees
Richard C. Payne
Gerry Pelletier
Marlyn L. Pilkington
Cecil Rabinovich
Lorne Richmond
Dr. & Mrs. Donald & Carolyn Rosenthal
Jay Rosenzweig
Murray & Roda Rubin
James Estes
David Estrin
Geoffrey T Evans
H. D. Ewanchook
Ruth Fawcett
Peter Ferguson
Dr. Robert Ferrie
Jeff Finger
Mr. and Mrs. Mel Finkelstein
Anne Fitpatrick
Catherine Flanagan
Mildred Flanagan
Wayne B. Fletcher
Robert Florida
Richard Fraser
Jill Frayne
Sheila & David Freeman
John Foxall
Stephen V. Fram
Robert Fulford
Robert Fulton
Patricia Fyfe
Libby & David Garshowitz
Gary & Patrick Gibson
John W. Gill
Jeanette M Gillezeau
Donna Gitt
Ron & Anne Golden
Diana Goldborough
Joseph & Gail Goldenberg
Sydney Goldenberg
Fran & Bernie Goldman
D Goldstick
James & Linda Graham
Leonard Graham
Louis Greenspan
Mary Grey
Pamela Margaret Grigg
Catherine Groh & John Tyler
Sherrard Grauer
Randy Guilliver
Kit Myrtle Gunner
Karl Haab
Darryl Gurney
Dr. E. Kassel
Terry Kaufman
Barbara Kay
Marta Kedziorek
Anthony Keith
Russell Kemp
J. C. Kent
Donald & Mildred Kerr
Dennis & Evelyn Kershaw
Ash & Derry Khan
Dr. C. King
Julian Kitchen
Martin & Suzanne Klein
M. A. Knutt
Christine M Knowles
Carol & Arnd Koechlin
Steve Koerner
Martin Kuhn
Joel Kumove & Sheila Goldgrab
Henry Labatte
Marion Lane
Barb Landau
Allan Lawrence
Martin Landmann
Gerald Lock
Dr. Rod Ledwich
Carole Anne & J Clarke Leith
Harvey Levenstein
Michael Levin
Victor Levin
Eleanor Levine
Cyrl Levitt
Arthur & Olive Lionel
Sidney B Linden
K. Lippold & S Wolinetz
Gay Lokash
Margaret J. Lunam
Harry G. Lumsden
Ian Lumsden
Ross Lynden
Colin & June Macauley
Ellen M. Macdonald
Patricia Macdonald
Col George MacDougall
Anne Mackay
Harry MacKay
Cortlandt MacKenzie
Peter & Jackie MacKinnon
Alan MacPherson
Jay MacPherson
Lois Magee
Sylvia Mangalam
Michael Marrus
George Malloch
Marlys Edwardh Barristers
Professional Corporation
W. Steven Martin
Marshall Matson
Marshamite Ltd.
Darko & Marijana Matovic
Stephen McCammon
David & Inez McCamus
Philip McGettigan
Mike McIvor
Dorothy McLaughlin
Dr. Hooley McLaughlin
Donald McLeod
Noel McNaughton
Jim L. McMillan
Lola Mehlenger
Dr. K. V. Meier
Rosemary Meier
Froim Meukur
Lorne Merkur
Joan Mesley
Marty & Eleanor Meslin
Philip A McCall
Bob & Dolores Miller
Christiane Millet-Alexis
Francis H. Mitchell
Roger Mitchell & Valerie Dennison
Karen Mock
Keith Moles
Gunnar Mollerstedt
Heather More
Anne & Ray Morris
Barrie M. Morrison
Desmond Morton
Willard Mullins
Dr. Keith Neufeld
Saul Nosanchuk
Mary O’Donoghue
Kristin Olson
Ontario Secondary School Teachers’ Federation
Delia Opekowek
E M. Orsten
Richard Packowski
James E. Patterson
Roy Parry
Bruce Pearce
D. Perlmutter
Willard Piepenburg
Deirdre Pearson
Gerry Pelletier
D. Perlmutter
Brayton Polka
Bella Pommar
K. Popert
Lawrence Pushee
Ali Rahnema
T. Murray Rankin
Bevan Ratcliffe
Ed Reed
Albert Resnick
Paul Reinhardt
Howard Rice
John H. Rogers
J. P. Richards
Franklin T Richmond
Ted Richmond
Ian R. Robertson
Tom Robinson & Erna Paris
Judith Rogers
David Rose
Dr. Terry Rosen
R. Rosenberg
Dr. & Mrs. Aser Rothstein
Dr. William W. Rozeboom
Pearl Rubinoff
Raymond Saint-Laurent
Carla Salvador
David Saunders
Marvin Schiff
Stanley Schiff
Daniel Schwartzenberg
Anthony Scott
David Schneiderman
Anne Schrecker
Ouida Seung
Jack Shapiro
Muriel Sibley
Miriam & Evan Simpson
Joan Sinclair
O. F. G. Sitwell
Judith Skinner
Benjamin & Adele Smillie
Crawford Smith
Jean Smith & John P Valleeau
Susan Smith
Robert Sommerhalder
Andrew Spears
David Spring
Dr. A. Macs Stalker
Allan D. Staufer
Graham Stewart
James Stones
Allan Strader
Clifford F Strachan
James Striopoulos
Jos Storm
Barbara & Sam Stupp
John Swaigen
Ms. Carol J Swallow
Dr. Maria Sziraki
Barbara & John Taylor
Frank Testin
Brent Vickar
Dusty Vineberg-Solomon
Lisa Volkov
Edward H Walker
Elizabeth Walker
Jim Walker
Anthony Waterman
John Watson
Leslie Webb
Douglas Wellwood
Mervyn Wenzel
Dale Wharton
Harvey White
Kevin Whitaker
Art Wiebe & Janice McKeen
Lynn R. Williams
Ted Williams
Nan & Rod Williamson
Gary Wilson
Murray Wilson
Stanley L. Winer
Morris Wolfe
Sylvia Wormald
Donna Wuschke
Edward H Walker
Paul Yee
Louise & Burle Yolles
Mario Zanetti
Frederick & Joyce Zemans
Dr. Wolfgang Zenker
Helen Zinkargue
Wayne Zuzanski

A further list of donors can be found on our website www.ccla.org
CONCEPT & DESIGN
Soapbox Design Communications Inc.

PRINTING
Somerset Graphics