Rogue Elephants and Press Freedom
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Seventh Annual Kesterton Lecture
School of Journalism and Communication

Carleton University Feb. 6, 2006 (CJFE)

Good evening Ladies and Gentlemen.

It is a great honour to deliver the Kesterton lecture.

It is more than five years since the unthinkable events of 9/11, five years since Canadians, Americans and citizens of many other countries entrusted their governments, police and security agencies with extraordinary new powers in an effort to make the public feel safe against terrorism.

The Canadian Criminal Code was pronounced inadequate for that mission. Law enforcement and intelligence agencies called for more power and resources. Legislators were told that existing law against murder, kidnapping, hijacking, bombing and other violence was not up to the job.

Legislators were persuaded that terrorists were no ordinary criminals but were criminals who should be singled out by their motivation - political, religious or ideological. Courts would be allowed to consider the use of a name, word, symbol or other representation that identifies or is associated with a terrorist group. If that would make Arab and Muslim minorities the prime targets of such new powers as preventive arrest and investigative hearings, the majority in Parliament decided, so be it.

In a crisis atmosphere, a new law enforcement culture was spawned. In the words of then Justice Minister Irwin Cotler, the Anti-Terrorist Act was not only to prosecute and punish, but to detect and deter.

Fear and anxiety at the time dwarfed warnings about the threat to civil liberties and the erosion of due process contained in the new measures and in the new culture. And the Canadian government sought to quickly comply with its global obligations, notably an urgent United Nations Security Council resolution. The resolution obliged UN states to enact specific anti-terrorist offences in domestic law and to help disable the financial, communication and other networks linking al-Qaeda sympathizers around the world.

Widespread public trust that Canadian authorities had done the right thing began to wane less than two years later amid a cry for truth about the handling of the case of Maher Arar. More and more people began wondering to what extent Canadian officials were involved in what happened to Mr. Arar -- the now infamous American procedure called 'extraordinary rendition' … a kind of state-authorized kidnapping designed to circumvent normal laws of deportation and extradition and prohibitions against torture.

Mr. Arar had vanished during a stopover at JFK airport in New York in the Fall of 2002. He had been subjected to "extraordinary rendition" to Syria. When the facts began to emerge, it seemed inconceivable, even fantastic. Surely Canadian officials were not involved, if there was any truth to it.

However, neither Mr. Arar's family, nor any other members of the Canadian public, got a straight answer. Suspicions deepened.

It was against that backdrop that the RCMP raided my home and office on the cold winter morning of Jan. 21, 2004. This was more than three months after Mr. Arar returned home to tell of torture and the

anguish of enduring a year in a grave-like prison cell in Syria.

The spectacle of the RCMP raids proved the last straw for many Canadians.

Canadians had been promised protection from the threat of terrorist violence inspired by the frightening figure of Osama Bin Laden and here were 20 RCMP taking time to root through a white, middle-aged, middle class journalist's computers, notebooks and, yes, underwear drawer, for clues to the sources of a newspaper story about the Arar case.

There had been many leaks to journalists aimed at discrediting Mr. Arar. My story was a feature intended to put the leaks in context and to explain why the then Liberal government was resisting demands for a public inquiry to get to the bottom of his case. There was speculation that rogue elements of the RCMP had passed information about Mr. Arar to the Americans. Some RCMP made that into a joke, referring to rogue elephants. It was no joke to Mr. Arar.

The RCMP searches prompted so much media outrage and public outcry that the government was forced within a week to succumb to months of pressure to call an inquiry into the Arar affair. The inquiry is expected to report its findings this spring.

The raids, involving a dozen RCMP at my tiny downtown home, and another eight at my Ottawa Citizen office, were heavy-handed. They appeared intended to intimidate the media and chill their sources. This was at a time when people were hungry for more, not less, information about how the state was handling terrorism. People wanted to know especially if Canadian authorities were complicit, whether by bungling or on purpose, in U.S. officials sending an innocent man to a country with a track record of torture.

The raids provoked alarm and condemnation from coast to coast. Citizen editor Scott Anderson branded this a black, black day in Canada. Members of Parliament in all parties were taken aback.

Conservative Peter MacKay, a former Crown prosecutor, said the raids were dangerous and disturbing. "Hells Angels' headquarters didn't garner that type of police invasion." He called for a statement from the RCMP commissioner "absolving Ms. O'Neill of any criminal activity. Stephen Harper said "Unless the journalist in question is building bombs in her basement, then this is the police overstepping their authority." Vic Toews said I could not get a fair trial, that the criminal law should not be used to intimidate public servants.

Grant Hill didn't run this time but I can't resist recalling his conclusion that the anti-terrorist law had been consciously misused. "Juliet O'Neill did not have explosives strapped to her body, which is the kind of thing those laws are going after."

Michael Ignatieff, now a potential contender for the Liberal leadership, said he "could see no public interest justification for this." "Unless the press is free to publish democracy simply can't function."

NDP leader Jack Layton has called repeatedly for repeal of the law under which the search warrants were issued.

Margaret Atwood, Canada's literary queen, was giving the annual Kesterton lecture the evening after the raids. Thank goodness for her. I had to smile when I heard her quip: "Upon hearing of the RCMP raid, I rushed home and put a note in my underwear drawer: Do not go here, you will only be disappointed.' If only I'd thought of that before letting the RCMP in that morning.

The section of the Anti-Terrorist law that was cited by the RCMP in their search warrants is Section 4 of the Security of Information Act. That section dates back to 1939. MPs have admitted they glossed over that section, ignored it, in their rush to join the so-called war on terror. The Security of Information Act used to be called the Official Secrets Act. Section 4 criminalizes the communication,

receipt and possession of classified information.

This law has been called Canada's ultimate censorship weapon. The maximum punishment is 14 years in prison. That, by the way, exceeds the ten-year maximum in the law against contributing to terrorism. It is such a draconian law that it has rarely been used and politicians never bothered to examine it closely all those years. 1939 was long before TV, let alone the Internet. That was the era of U-boats and telegraphed messages; Bin Laden wasn't born yet. Until the RCMP raids it was primarily an arcane law of mere historic interest from the Soviet spy scandals of the 1940s, conjuring images of Igor Gouzenko with a paper bag over his head.

The raids served as a wakeup call: are Canadian journalists no longer free to do their work without worry that police are breathing down their necks? That freedom, freedom of the press, is a fundamental principle anchored in the Canadian Constitution, in section 2(b) of the Charter of Rights and Freedoms. This is not just lawyer talk, the stuff of courtrooms and archives. To me, the Charter is a living document. I've taken to calling it "a living room document," because it is in their living rooms, in their kitchens, in their homes that Canadians read their newspapers or listen to the news on TV and radio.

Reading, watching or listening to the news … everyday activities that add to the richness of our lives, increase accountability, keep us connected to our own communities and to people in all corners of the globe.

The question is, shouldn't we able to take these everyday activities for granted? Since the RCMP raids I, for one, have not taken them for granted. In the two years since then I have been in a courtroom more than a dozen times, with Ottawa Citizen editors Scott Anderson and Drew Gragg, and a legal team led by Rick Dearden and David Paciocco, in an effort to reassert what we should be able to take for granted in a country like Canada: freedom of the press.

That principle is not only grounded in the constitution but in legal principle and practice: when issuing a search warrant on a journalist, a judge or justice of the peace must take press freedom into account.

When applying for the warrant, the police are obligated to give the judge enough information to be able to fairly calculate the public interest …. enough information to weigh the competing interests of the press and the police. The judge must ensure that a balance is struck - a balance between the interests of the state in investigating crimes and the right to privacy of the media while gathering and disseminating news.

As the judge ruled in my case, the police should not walk into a justice of the peace office and bandy about 'broad, ominous and intimidating' terms like terrorism and endangerment of national security …. to get the justice of the peace to hastily seal up from public view the grounds on which the warrant is requested.

Fortunately, Citizen lawyers fought successfully to get most of that warrant information unsealed. This was one of several court rulings we have won so far. The judge said the RCMP did not adequately justify their broad claims of secrecy on national security and other grounds.

It was not easy to get that victory. And it's expensive. We were back and forth in court many times, fighting for disclosure word by word, paragraph by paragraph.

The location of an RCMP building, clearly marked 'RCMP' to passersby, was blacked out from an RCMP affidavit. The address was rendered secret from the public on grounds of national security.

When he cross-examined RCMP officer Daniel Quirion, the author of the affidavit, our lawyer David Pacaccio asked whether the building was marked 'RCMP' on the outside.
"Yes it is," Quirion replied.
"So there's a sign designating this as an RCMP building that is available to those who drive by the

building to read, sir?"
"Yes."
"Yet it's your position that releasing the location of that building to the public jeopardizes national security?"
"Exactly," he replied. "And it would also jeopardize possibly the ongoing investigation being carried out at this time."

This struck me as so ludicrous it would be funny, if it wasn't part of the disturbing events that remain very much alive as I speak to you this evening. The threat of prosecution still hangs over my head. It is little comfort when friends and family, colleagues, even people in the know, say it is unlikely I will be prosecuted. The fact is we are still in court trying to get the search warrants quashed. The RCMP continues to say I am subject of an ongoing investigation. Parliament has not repealed Section 4 of the Security of Information Act. The threat of prosecution has not been withdrawn.

There have been occasions when it would have been appropriate, I think, for the RCMP and the Crown attorneys to get off our backs. One was when then Prime Minister Paul Martin said at a news conference that Canada is not a police state and Juliet O'Neill is 'clearly not a criminal.' Another was when then justice minister Cotler ordered a parliamentary review of Section 4 of the Security of Information Act, with a view to modernizing and clarifying the legislation. He said Parliament should be "addressing the issues of public security on the one hand and protecting fundamental rights of Canadians on the other, including in particular freedom of the press."

Despite these strong signals, the RCMP and the Crown have pressed on at taxpayer's expense.

In the courtroom we are trying to get the search warrants quashed, to get Section 4 struck down as unconstitutional and to get my seized notebooks, tapes and other tools of my trade back where they belong. Even if the incoming justice minister refuses to sign off on eventual prosecution, I have to say that the Crown and the RCMP's continued defence of the indefensible and the continued threat of prosecution, is a punishment in itself --- a punishment for simply doing my job.

Freedom of the press is not an absolute right; no more than any other right is absolute. And journalists are not above the law. We make no such claims. However, journalists should not be treated as an arm of law enforcement. Nor should they be made targets of police action to save a government or government agency from embarrassment. Both of these things have been happening in Canada.

Police have seized video tapes from news rooms to identify protesters they want to arrest. They have subpoenaed reporters to testify against suspects. They recently ordered reporter Bill Dunphy to hand over four years of notes. They put investigative journalist Andrew McIntosh, then at the National Post, through three years of hell trying to get a plain brown envelope he had received …to check for fingerprints and for the DNA of the saliva on the stamp - all apparently for the sake of saving former Prime Minister Jean Chretien from embarrassment in a conflict-of-interest story.

And in my case . . . they tailed me around town, sifted through my garbage, read my e-mails and conducted searches that smacked of a drug bust, rifling through my most intimate possessions, reading personal letters and private documents, rooting through my bookshelves and backs of closets, even through my kitchen junk drawers and under my quilt.

Never once before all that did any RCMP officer ever pick up the phone to say they wanted to discuss the Arar story with me. Nor did they do the usual thing when police want something at a newspaper - go to the newspaper's main office with a warrant and talk to the editor in chief and deal through the newspaper's lawyer.

Instead, they put on that big show, with armed guards at my office and crime tape across the door. They cornered me in my house, fanned out to every room, and threatened me with prosecution for a crime

that I did not know existed at the time and that the Canadian Newspaper Association has urged Parliament to remove from the books.

Even Mr. Cotler, in an earlier era when he was on the executive of the Canadian Civil Liberties Association, said it is wrong to criminalize unauthorized disclosure of government information unless "there is a reasonable expectation of serious injury to the physical safety and defence of Canada."

In her most recent rulings in our case, Justice Lynn Ratushny ordered the RCMP to disclose information that we believe may shed light on their motivations for the searches. This was a significant ruling, providing disclosure before charges are laid in the case of a journalist. These disclosures may help us in arguing the search and seizures were unreasonable and violated press freedom. And they speak to an important point: if reporters are not allowed to access the information that will allow them to argue that press freedom has been violated until after the police have looked at the seized material, it is too late. The confidentiality of the journalist's work is compromised forever. Making the arguments afterward is simply too late.

The Official Secrets Act was used only once before against a journalist - Peter Worthington of the Toronto Sun - more than 25 years ago and the case was thrown out. The judge said information is not secret simply because it's stamped secret; information already in the public domain is not secret. The judge also said the law was vague and overbroad and likely a violation of civil rights. These are comments which have been echoed by a royal commission into the RCMP, the Law Reform Commission and other experts time and again since then - even before the Charter was enacted - … comments we are citing in our court case to try to get the search warrants quashed and Section 4 struck down.

The importance of the case is underlined by the list of interveners: the Canadian Civil Liberties Association, the Globe and Mail, the Toronto Star, CBC and CTV. And I must emphasize that no single journalist I know could fight this case alone. Even if I mortgaged my little house, with its 15 minutes of fame, I could not afford it. The Citizen and CanWest have poured hundreds of thousands of dollars - more than $500,000 - into asserting the rights of the media and consumers of news. Freedom of the press is not just for reporters and newspaper owners and TV networks; freedom of the press guards the public right to know.

I have little doubt how Wilf Kesterton would have described this chapter in Canadian journalism history. He chronicled the famous court case of 19th century journalist Joseph Howe, the man who became known as the father of press freedom in Canada. Mr. Kesterton noted that in making truth a defence against a libel charge, Mr. Howe "...succeeded in demonstrating the libertarian principle that government is the servant and not the master of the people."

I will take this opportunity to share some of the lessons I learned the hard way about the rights of citizens and journalists if the police turn up at their door, as they did mine. Although I have to admit I'm not sure what to say about taking a shower before answering the door. That's what I did, hoping they would think I wasn't home and would go away. Not only did they know I was home, one of them recorded the exact time - 812 am - that I peered through the slats of my bedroom blinds to see my driveway full of and blocked by shiny dark cars. I knew they were police: who else other than cops or cabinet ministers drive perfectly clean vehicles with no salt on them in the dead of winter?

First, a newsroom should have a protocol on what to do if the police come with a search warrant seeking information. The Citizen had such a protocol, hanging on our executive editor's bulletin board. I had never seen it. In any case, the protocol did not cover the case of police going to a reporter's home or a satellite bureau. Still, we did have a protocol and it gave us guidance.

The main aim of a protocol should be to do whatever you can do within the limits of the law to protect

the confidentiality of your work material. The key element is to get the police to seal whatever they are taking, so that they cannot review it until after legal arguments about the validity of the search.

In my case they took documents and files, copies of my computer hard drives, contact lists, date books, tapes and note books. They are all literally sealed in big plastic baggies and they're in custody of the court, locked in a vault. Investigators are not allowed to examine the material until a judge agrees they can. That is at the heart of our case - to get my material back, with its confidentiality protected.

The search warrant should list exactly what the police can look for and what they can seize. The judge who issues the search warrant is supposed to craft conditions to minimize the intrusion on freedom of the press, so the reporter should check for conditions when they read the warrant. If the conditions are not being followed, make a note of it for later. There were no special conditions relating to freedom of the press in the warrants used in my case and that is one of our arguments in the court case.

If the warrant does not order the material sealed, get a lawyer to intervene as fast as possible. When notified the search was underway, our lawyers called the Crown counsel and he immediately advised the RCMP to seal the material. The RCMP followed that advice. It's unlikely police will refuse; it would show bad faith.

During a search, the police have the authority to look only in the place where they can reasonably expect to find the identified material. As lawyer David Paciocco says: "They cannot search for a stolen piano in an underwear drawer, but they can search for stolen underwear in a piano bench." Again, if they are going beyond their authority, a note should be made of it.

When the RCMP came to my door I knew they should have a search warrant, should read me my rights and let me call a lawyer. I too watch Law and Order. But I suddenly wished I knew more detail. Did I have to let them into the house or could I ask them to come back later? Did I have to help them in their search? Could they start a search before I spoke to a lawyer? Did they have to wait until a lawyer arrived? If I remained silent, would this somehow be held against me?

What happened is the lead officer showed me his RCMP ID through the window. I let them in, three of them at first. The others came in later. I wanted to call a lawyer right away but they asked me to wait until they had served the search warrant on me and read me my rights … both of which, as you can imagine, seemed to take an eternity.

They read the search warrant aloud, with their tape recorder turned on. I read along on my copy. They read my rights to consult counsel and to legal aid. Then I called a lawyer and an editor immediately.

A practical tip is to keep cell and home phone numbers of lawyers and editors in your purse or wallet or somewhere handy at all times. I only had office numbers and had to leave voice messages and wait for lawyers and editors to call me back. I didn't have to wait long, but it was still unsettling.

You do not have to physically help police conduct their search. I did not know that. They asked for the key to a filing cabinet and I gave it to them. The first thing they asked was to take them to my computer, so they could disable it. I took them to the computer. They wanted to ensure I was not purging material to another location. I was even a little embarrassed that I had a dialup modem - and it certainly wasn't connected. The RCMP techie had to check anyway. And she told me she had a dialup at home, too.

Technically, you can leave the scene of the search if you want to. You are not under detention when police are executing a search warrant. In my case, I did not want to leave my house full of strangers. I was asked to go away with an RCMP officer to his office to discuss sources and documents. I declined. I was not legally obligated to go with him. Nor was I under arrest, although I was sick with worry during the entire five hours that I would be arrested afterward because the warrants spelled out alleged

criminal offences and the officer told me he understood I was going to be charged.

If they try to stop you calling a lawyer they have to have a really good reason because at that point they are starting to detain you and they're interfering in your right to counsel. They may delay your phone call if they need to "secure the premises" like they do in drug cases where other people in the house may be swallowing or flushing evidence down the toilet.

If you are ever searched and refused the right to call a lawyer immediately, you should ask why and record the answer. Keep asking 'Can I call now?' every few minutes so there will be no question that you wanted to call. They must allow the call at the first reasonable opportunity.

The police are not obligated to wait until your lawyer comes to start their search. The search warrant gives them the legal authority to proceed beforehand. My lawyer, Wendy Wagner, arrived soon after the search began.

A golden rule is to say as little as possible. At first, I was afraid to say anything much at all and Mr. Paciocco told me later: "That was the right fear to have." I was more relaxed when Ms. Wagner arrived and trusted her to intervene, if necessary, when I was speaking to the officer. That officer was from the RCMP's truth verification section and of course I couldn't resist asking him about his Orwellian title. Truth verification is the RCMP term for lie detection.

Advice on remaining silent is: "Try to avoid discussion. It's very anti-social and as a journalist your natural tendencies are to engage people. And you might try to not make it adversarial, even though it is. But it's really dangerous." However, keep in mind that the police do not have a right to remain silent, so if you have the fortitude to question them without disclosing anything yourself, go ahead.

To calm myself during the search, I took notes, jotted down times, and eventually turned my tape recorder on. I needed to do something familiar and went on automatic pilot as a reporter. Notes and tape can also come in handy later because the manner in which a search is carried out has to be appropriate and there are also legal doctrines about the motives of the police and the way they treat individuals. Keeping a record can be helpful to your legal team.

Depending on the situation, you might want someone to alert the media what's happening. Most people want to stay out of the news when police swoop down on them. Lawyers are paid big bucks to hush these things up. Not in my case.

When word of the RCMP raids spread, journalists camped out in my yard. The sight of my colleagues when I looked out the window gave me comfort and courage. I was not isolated; the RCMP in my house listened to the news on CBC radio about what they were doing as they were doing it.

It struck me how fortunate I was to have Citizen lawyers to call upon and media to ensure nothing could happen without witnesses and instant reports. Think of the people who are not so fortunate, who fear the knock on the door, who fear saying anything, who fear saying nothing, who fear that in either case they may be branded terrorists and will never get their normal lives back.

I likened the search to a slow-motion robbery. It remains vivid in my memory. The court process is emotionally draining. And I still don't enjoy my work the way I once did. I am not as relaxed as I was for all the years I've reported from Ottawa and in postings for Canadian Press in Washington, and for Southam News in Moscow and London.

A silver lining is that events like this give me an opportunity to thank those who make it their business to guard freedom of the press. It's one thing to have freedoms and rights inscribed on paper. It's another to breathe life into them, to exercise them and to push back when they are threatened. In Canada, at least, I believe that because of the court rulings we have won so far and because of the public outcry, the chances are much lower that it will happen again.

And I hope that now that you've heard some practical advice on what to do if the police come to your doorstep, you will never have to use it. However, we should not have to rely on hope alone. Before the election, Parliament embarked on the review of Section 4. This is unfinished business.

The Canadian Newspaper Association urged MPs to scrap this law, to exempt media. Even those who argue the necessity of a secrets law say the law is too broad, the classification system too loose, that safeguards against abuse must be established.

Tony Campbell, a veteran of nine government departments and agencies whose last seven years were spent in intelligence analysis, told the Commons justice subcommittee that the existing wording of the secrets classification system is inappropriate. "There are actually words to define the difference between "top secret" and "secret" and "confidential," he said. "The problem is that the documents themselves will tend to have an escalation: what should be confidential will be called secret, and what should be called secret will be called top secret-that kind of situation. That would need to be addressed. Tighten the system for protecting your information, but have safeguards, and change some of the existing practices, which tend to abuse that particular protection."

Professor Craig Forcese of the University of Ottawa law faculty recommended MPs repeal section 4 and replace it with an extremely careful and narrow law. National security secrets are described by a confusing array of terms across the statute books, he said. There is Section 4. There are longstanding national security exemptions to disclosure in Access law and under the Canada Evidence Act. Altogether, he said, they "create an incoherent information law regime deeply inconsistent with the very democratic society these provisions are supposed to protect. They are so ill-integrated, incoherent, and overbroad that they may allow government to side-step embarrassment and mask incompetence, all in the name of national security."

The professor told the Justice committee members that we "should always design statutes that accord substantial--and rather scary-- powers to the government with the worst possible government in mind, not the best possible government in mind." If you are going to accord powers to the government, "keep in mind the worst possible government."

Mr. Cotler and the Justice Department raised many questions about the law too …to whom it should apply, what sort of information really needs protection, what kind of harm would need to be caused for an offence, whether there should be a public interest defence. And are special defences required for the press and other media?

If the terrible inadequacies of this law are so apparent to the very people who are charged with its drafting, enforcement and prosecution in the courts, the obvious question is how they can continue to spend taxpayer funds hounding me, the Ottawa Citizen and CanWest. We are proud to defend freedom of the press. We must all defend it. But it's been two years now and half a million dollars. Enough is enough.

Thank You.