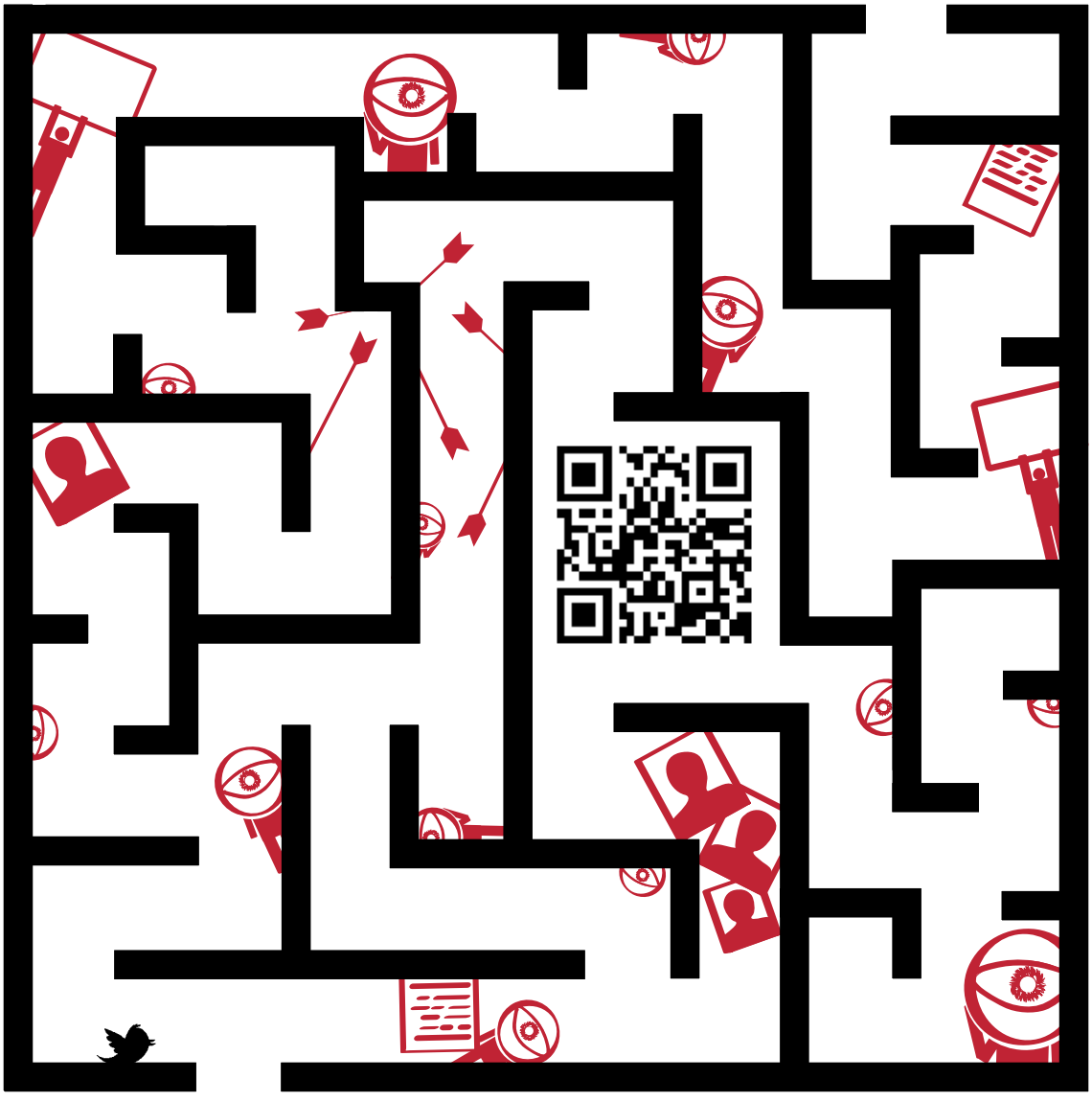
2011–2012

CJFE's Review of Free Expression in Canada



CJFE CANADIAN JOURNALISTS FOR FREE EXPRESSION

OH, HOW THE MIGHTY FALL. ONCE A LEADER IN ACCESS TO INFORMATION, PEACEKEEPING, HUMAN RIGHTS AND MORE, CANADA'S GLOBAL STOCK HAS PLUMMETED IN RECENT YEARS.

This *Review* begins, as always, with a Report Card that grades key issues, institutions and governmental departments in terms of how their actions have affected freedom of expression and access to information between May 2011 and May 2012. This year we've assessed Canadian scientists' freedom of expression, federal protection of digital rights and Internet access, federal access to information, the Supreme Court, media ownership and ourselves—the Canadian public.

When we began talking about this *Review*, we knew we wanted to highlight a major issue with a series of articles. There were plenty of options to choose from, but we ultimately settled on the one topic that is both urgent and has an impact on your daily life: the Internet.

Think about it: When was the last time you went a whole day without accessing the Internet? No email, no Skype, no gaming, no online shopping, no Facebook, Twitter or Instagram, no news websites or blogs, no checking the weather with that app. Can you even recall the last time you went totally Net-free?

Our series on free expression and the Internet (beginning on p. 18) examines the complex relationship between the Internet, its users and free expression, access to information, legislation and court decisions. Lawyer Peter Jacobsen explains a recent court decision about hyperlinking and libel (p. 18); lawyer and researcher Michael Geist explores the implications of Bill C-30, the "Lawful Access" bill that will allow law enforcement to look in on what you're doing online (p. 19); journalist-turned-lawyer Danielle Stone explores issues in online anonymity (p. 22); and the Citizen Lab's Ron Deibert takes a detailed look at the global cyber threat landscape (p. 26). Plus we take a look at an online collaborative journalism venture (p. 25).

Of course, free expression on the Internet is but one area of concern for CJFE.

Delays, refusals and redactions continue to block access to information at the federal government level. While slight improvements were made since our last *Review* went to press, journalists and others report that gaining access to information that should be available to the public remains a struggle (p. 11–15).

Federally funded scientists continue to be muzzled by the Canadian government, and, as Kathryn O'Hara explains in "Silenced Scientists" (p. 8), science writers' groups and other organizations are fighting back. They are joining forces to push for better access to scientists so that the public can know about research findings, which are key in shaping public policy and allowing the public to more accurately assess the validity of what policy-makers are telling them.

The federal government was also in hot water over the question of whether politics played a part in funding cuts for non-governmental organizations, which created a chill on free expression throughout civil society. Grant Buckler takes a look back at some of the key examples, connecting dots and bringing some clarity to this very murky issue (p. 16).

We also put the spotlight on whistleblowers in this *Review*. As CJFE President Arnold Amber reveals, Canadian whistleblowers expose serious issues at great personal and professional expense, with no legal protection for private sector employees and ineffective protections for public sector workers (p. 30).

As always, we include an appendix of notable free-expression-related court decisions from the past year (p. 36); these cases involve libel, defamation and access to information.

This *Review of Free Expression in Canada* will launch on May 3, World Press Freedom Day. Each day, CJFE works to defend the rights of journalists, freedom of expression and access to information here in Canada and around the world. We invite you to join us in these efforts.

Sincerely,

The Editors

JOIN CJFE

Being involved with CJFE is not restricted to journalists; membership is open to all who believe in the right to free expression.

To become a member, get involved in other ways or see what we're up to, email us at cjfe@cjfe.org or visit **CJFE.ORG**.

"No matter how independent we may be in our individual work, we are all linked in a profession that strives to expose the truth, and unravel the intricacies of what is happening around us. And though difficult enough, at times, in our own country, it is next to impossible in others, without the help of organizations such as CJFE."

— Anna Maria Tremonti, host of CBC's The Current *and CJFE Board member*

EDITORIAL DIRECTOR
Leslie de Freitas

MANAGING EDITOR
Cara Smusiak

ART DIRECTOR
Gigi Lau

COPY EDITOR
Lyndsie Bourgon

CONTRIBUTERS
Arnold Amber
Dean Beeby
Grant Buckler
Ron Deibert
Michael Geist
Peter Jacobsen
Amy Johnson
Paul Knox
Susan Mohammad
Sophie Nicholls
Kathryn O'Hara
Danielle Stone
Paula Todd
Laura Tribe

INFOGRAPHIC DESIGNER
Mark Tang

PHOTO EDITOR
David Lee

LAWYER
Peter Jacobsen

ADDITIONAL THANKS
Bob Carty
John Norris
Paul Saguil
Phil Tunley
Canadian Committee for World Press Freedom (CCWPF)
Annie Game

We are grateful to the Canadian Commission for UNESCO and to the Globe and Mail *for their support of this* Review.

CANADIAN COMMISSION FOR UNESCO
COMMISSION CANADIENNE POUR L'UNESCO
www.unesco.ca

THE GLOBE AND MAIL

We are also grateful to Transcontinental for printing this Review.

tc TRANSCONTINENTAL

CJFE CANADIAN JOURNALISTS FOR FREE EXPRESSION

WHO WE ARE

CJFE is an independent Canadian organization that works to protect journalists, freedom of expression and access to information in Canada and around the world. We are active participants and builders of the global free expression community. In 2011, CJFE celebrated its 30th year.

JOIN CJFE and help us defend freedom of expression and press freedom in Canada and around the world.

@canadaCJFE

facebook.com/canadacjfe

cjfecanada

SOME OF OUR PROGRAMS INCLUDE

THE INTERNATIONAL FREEDOM OF EXPRESSION EXCHANGE (IFEX)

CJFE currently manages IFEX, a global network that monitors, promotes and defends freedom of expression. IFEX has more than 90 member organizations in over 60 countries, including CJFE in Canada. The network publishes daily alerts from around the world, while also collaborating on strategies to address specific freedom of expression issues.

JOURNALISTS IN DISTRESS FUND

CJFE provides humanitarian assistance to journalists who have been attacked or threatened because of their work. We also co-ordinate an email group of 18 international organizations that provide distress assistance to writers and journalists, to share information and speed up response time. Grants are provided to help journalists and their families acquire medical attention, travel to safety, and receive legal assistance. To date, CJFE has provided more than $200,000 in funding.

SCOTIABANK/CJFE JOURNALISM FELLOWSHIP

In 2009, CJFE partnered with Scotiabank and Massey College to create a Fellowship in order to promote dialogue and explore journalism and free expression issues in the Americas. The Fellowship is open to journalists from South America, Central America, Mexico and the Caribbean. The 2011–2012 Fellow is Luis Horacio Nájera, a veteran journalist from Mexico who reported on the trafficking of drugs, people and weapons, until fears for his life and his family's safety forced him to seek asylum in Canada.

SOME OF OUR ACTIVITIES INCLUDE

CJFE GALA: A NIGHT TO HONOUR COURAGEOUS REPORTING

Our annual gala, held in Toronto, serves as a forum to recognize the brave work of journalists and free expression advocates from Canada and around the world. More than 500 people attended the 14th annual CJFE Gala, held at The Fairmont Royal York in Toronto on Nov. 24, 2011, and hosted by Anna Maria Tremonti, host of CBC Radio One's *The Current*. Among those honoured were Yemeni veteran journalist Khaled al-Hammadi, Egyptian citizen journalist Mohamed Abdelfattah, Canadian journalist Ron Haggart and Canadian scientists and whistleblowers Dr. Shiv Chopra, Dr. Margaret Haydon and Dr. Gérard Lambert. This year's Gala will be held Dec. 5, 2012.

INTERNATIONAL DAY TO END IMPUNITY

Marked on November 23, the first annual International Day to End Impunity was held in 2011. This day recognizes individuals who have been killed for exercising their freedom of expression, including Canada's own Tara Singh Hayer, and whose killers have never been brought to justice.

WORLD PRESS FREEDOM DAY

Each year on May 3, World Press Freedom Day serves as a reminder of the importance of press freedom, and the critical role of freedom of expression. CJFE holds an event each year to mark this day.

The Manitoba Press Council served as the provincial watchdog agency over journalistic ethics for **27** years before ceasing operations in January 2012.

ADVOCACY WORK IN CANADA

Canadians are comparatively lucky: battles for freedom of expression in this country are more often fought with words in courtrooms than with bullets and tear gas on the streets. Nevertheless, Canadians' vital free expression rights have been challenged repeatedly in Canada.

CJFE intervenes in legal cases that we hope will lead to the creation of better laws to protect freedom of expression across the country. These include cases of access to information, defamation and libel, hate speech, police impersonating journalists and protection of sources. In 2010–2011, CJFE intervened in two particularly important cases: Crookes v. Newton (issue of hyperlinks and defamation) and Saskatchewan Human Rights Commission v. William Whatcott (issue of ambiguity and application of hate speech law).

CJFE.ORG

PROTEST LETTERS

CJFE responds to critical events affecting free expression, such as attacks on journalists, threats to bloggers, or when limiting legislation or challenges to existing legal protections are proposed, by writing to the relevant authorities. All of our protest letters are posted online, along with the tools necessary for you to compose your own.

FEATURE ARTICLES

CJFE's articles provide context and analysis on critical free expression issues both in Canada and around the world. A great resource for understanding complex matters, our articles continue to address free expression issues as they arise.

EVENTS

In addition to our annual Gala, CJFE organizes and participates in conferences, film screenings, panel discussions and other events throughout the year. All of our events can be found on the CJFE website. Some of our events include:

- Presentation of *High Tech, Low Life*, a documentary that profiles two of China's first citizen journalists and captures the fearlessness of a new digital generation, at the 2012 Hot Docs Festival on May 3—World Press Freedom Day.
- *Access Denied*, a panel discussion on access to information.
- *Reporting on the Arab Spring*, a panel discussion.
- 2011 McLuhan Lecture: *In Perpetual Peril: The Culture and Practice of Community Journalism in the Philippines,* with Carolyn Arguillas.

PARTNERSHIP WITH JUNIPER PARK

CJFE is fortunate to have the pro bono support of a creative group of professionals from the award-winning ad agency Juniper Park. Their strategies and designs have informed everything from communication vehicles and branding to very successful campaigns such as the IFEX-led initiative, the International Day to End Impunity, and CJFE's marking of World Press Freedom Day. This dynamic partnership has grown over the years and has contributed to raising the profile of CJFE and strengthening Canadians' awareness of free expression issues.

6 organizations, CJFE included, co-signed an open letter to Prime Minister Stephen Harper calling for an end to the strategic silencing of federal scientists.

CJFE'S REPORT CARD 2011–2012: CONNECTED DISCONNECT

We have never been more connected. The Internet has blown open the doors of communication and access to information, and Canadians rank highest in the world in online engagement. Yet our freedom of information and free expression track record is nose-diving, threatening the very connections we've come to rely on.

Access to information at the federal level continues to be marred by secrecy and delays. While there were some very small improvements this year, the government is largely continuing its stonewalling tactics in hopes that journalists and other interested parties will simply give up and move on to something else.

The same could be said for the muzzling of scientists. In perhaps its most openly brash act of control, the government has continued to prevent federally funded scientists from speaking with the media about their research, even after the findings are published and available to the public. This undermines public understanding of issues, limits debate and runs roughshod over the rights of the scientists, as individuals, to speak freely.

Even the Internet—a game-changing tool when it comes to free expression—is facing challenges. We are in the midst of sweeping changes in the way information is shared and controlled. Understanding these issues is vital to developing a strong position against policies that curtail free expression in the cyber sphere.

Here is CJFE's assessment of the key issues and major institutions.

ACCESS TO INFORMATION AND THE FEDERAL GOVERNMENT: F

On the heels of last year's shameful F- grade, we've given the federal government just the slightest bump up due to some marginal improvements in access to information. In the past year, the number of federal ATI requests was up by just less than 1 per cent, and the number of requests denied for security reasons was slightly down; nevertheless, the number of ATI requests denied on security grounds has tripled since 2002–2003. It's certainly no surprise that Canada remains at the mid-to-low end of the international spectrum when it comes to our right to information. *For more on access to information, see page 11.*

FEDERAL SCIENTISTS' FREEDOM OF EXPRESSION: F

Canada's control over the communications of federally funded scientists is an extreme example of a federal fixation on controlling the message that is bad for our country and its citizens. After the policy was adopted in 2007, climate change science coverage in the media plummeted by 80 per cent, drastically reducing information available to Canadians. Perhaps the most puzzling of restrictions, some scientists have been told they are not allowed to discuss their research even when it has been published in peer-reviewed journals. Recent efforts to bring this situation to the attention of the public, spearheaded by the Canadian Science Writers' Association, have elicited support from journalists, scientists and the general public, both at home and abroad. Meanwhile, Peter Kent, minister of the environment, has simply dismissed concerns about the issue. As a former award-winning journalist, Kent should know better. *For more on the muzzling of scientists, see page 8.*

THE SUPREME COURT: B+

The Supreme Court of Canada ruled that emergency wiretapping by police without a warrant is unconstitutional—but gave the government 12 months to redraft the provision, so stay tuned. In Crookes v. Newton, the Court upheld a lower court's ruling that hyperlinking is not the same as publication in alleged cases of libel, and noted the potential chilling effect on the Internet had the decision gone the other way. Both decisions were welcomed by free expression advocates, but a Supreme Court decision barring access to records held in cabinet ministers' offices did bring down the overall grade. *For more on the legal cases that are shaping free expression in Canada, see the Appendix, starting on page 36.*

MEDIA OWNERSHIP: 

It seems every time the dust settles from one massive media buy, another is announced. Over the past year alone, BCE Inc. purchased Astral Media (pending approval), including its 84 licensed radio stations; Transcontinental Inc. scooped up Quebecor World's Canadian assets, as well as *Le Canada Français* (the oldest weekly newspaper in Quebec) and 10 other Quebec weeklies; and Rogers Communications Inc. bought Saskatchewan Communications Network, a Regina-based TV station. As media concentration grows more pervasive, the number of people deciding what constitutes information the public needs to know shrinks, as does our access to varied ideas and opinions, essential to a healthy democracy. *For diagram of media ownership in Canada, see p. 28.*

THE CANADIAN PUBLIC : 

While it seems free expression is tested at every turn, Canadians have been actively exercising and protecting this right, making their voices and opinions heard—whether through commenting on media websites, blogging, tweeting or participating in online petitions via sites such as openmedia.ca (which ran a forceful campaign against usage-based billing for Internet services). Canadians have also been taking advantage of new opportunities to collaborate with media: OpenFile, based on a model where the public pitches story ideas that journalists then develop, expanded into several new markets in the past year. (*For more on openfile.ca, see p. 25.*) And while Canadian Occupy protests were small in comparison to some south of the border, people across Canada added their voices to a global protest against greed and irresponsibility in the financial sector. But it's not all sunny skies. Our performance when it comes to the cornerstone of free expression—voting—has been lackluster. In fact, voter turnout for the 41st General Election, held May 2, 2011, was a dismal 61 per cent. Could the potential to vote on the Internet in the future help turn this around?

FEDERAL PROTECTION OF DIGITAL RIGHTS AND INTERNET ACCESS: 

Bill C-30 is at the heart of our concerns over free expression online in Canada. Bill C-30 would allow law enforcement access to Internet subscriber information; the potential for observation and the lack of privacy would have a chilling effect on all uses of the Internet. And Internet access is apparently no longer a priority. Industry Canada has completely cut federal funding for the Community Access Program, which provides low-cost or free Internet access via libraries and community centres, meaning fewer Canadians will have access to the Internet—vital for both access to information and free expression. Combined with the fact that Canada seems to be missing the boat altogether when it comes to playing a role in international Internet governance policy, there is certainly cause for concern. *For more on free expression and the Internet, see articles beginning p. 18.*

While it's our role to highlight causes for concern, we also wish to recognize individuals and organizations for their contributions in advancing free expression rights:

- The Canadian Science Writers' Association, for its sustained efforts to inform the public of the muzzling of scientists.
- The Canadian Newspaper Association, for its singular and essential work on Access to Information.
- Dan Burnett, lead counsel, and Robert Anderson and Ludmilla Herbst, for their pro bono work and representing the media coalition in the Crookes v. Newton case.
- Phil Tunley, lead counsel, and Paul Jonathan Saguil, for their pro bono work and representing CJFE in the Whatcott v. Saskatchewan Human Rights Commission case.
- The provincial and territorial information and privacy commissioners, who voiced strong objections to the proposed Bill C-30 which, if passed, would allow police to obtain personal information from Internet service providers without a warrant.
- The Canadian Centre for Law and Democracy, for their work in right to information, both gobally and in Canada.

We have never been more connected, more able to share information and ideas, than we are today. Safeguarding this connection against new policies and uses of technology that could have a chilling effect are key to protecting free speech—whether it's online, in parliament, in our workplaces or in our homes.

SILENCED SCIENTISTS

Federal communications policy bars scientists from talking to the media about their research, making it much more difficult to share key findings with the public

By Kathryn O'Hara

It is no secret that Prime Minister Stephen Harper has introduced to government a level of control and a lack of transparency that continues to dismay his critics and concerned Canadians. The control is part of a broader *modus operandi* that disregards parliamentary rules of fair play (with no apparent consequences), and curtails journalists' relationships with ministerial staff and senior level bureaucrats. This may be putting a dent in our democracy, but the real damage may lie ahead.

For years, scientists' research and advice has informed policy and regulations in matters of the environment, health, food safety, our fisheries and oceans and our natural resources, but these scientists are now largely ignored—or worse, muzzled—by the government.

A few years ago, during an informal phone conversation with a former government advisor, I asked how scientists are perceived on the Hill. The advisor quipped that there is a special place in hell reserved for government scientists.

Scientists, with their penchant for embracing uncertainty and insistence on data, can be pesky. Scientific evidence is not always useful for political agendas. But the taxpayers fund federal scientists to protect the public interest and weigh in on the evidence side of prudent decision-making.

To this end, journalists used to be able to talk to scientists in government departments about their research, especially when it was newsworthy research published in peer-reviewed journals. Accessibility was the norm. The thrust of the government communications framework was to encourage scientists to talk about their research in a timely fashion, and make it understandable to the public.

This spirit of openness suffered a blow in 2007, when an executive policy for communications from Environment Canada called for centralized control, pre-approved media lines and limits on scientists' ability to talk to media about published research. One of the stated aims of this new central command was to prevent any "surprises" to the minister or senior bureaucrats.

When this new direction for Environment Canada came to the attention of senior science reporter Margaret Munro, she shared it with other scientists and wrote about it for Postmedia News. The "one department, one

TIMELINE

2008

FEBRUARY Canwest News Service publishes documents from Environment Canada outlining the new communication policy: "We should have one department, one voice." Federal scientists are required to refer all media requests to Ottawa, and to use media lines approved by headquarters. According to the journal *Nature*, the new policy demonstrates a "manifest disregard for science."

OCTOBER Eighty-five Canadian scientists call for Canada's political parties to end the "politicization" and "mistreatment" of science.

2010

MARCH Climate Action Network Canada publishes a document from Environment Canada that says the tightened communication is associated with an 80 per cent decline in climate change stories in the Canadian media.

JUNE The Canadian Association of Journalists denounces the federal government's restrictive communications strategy and apparent interference in the access to information system.

SEPTEMBER Postmedia News (formerly Canwest News Service) reports on a departmental minister withholding permission to a federal scientist from talking about his published research on an Arctic flood that happened 13,000 years ago.

OCTOBER The Professional Institute of the Public Service of Canada launches publicscience.ca to advocate for support of science and to underline the importance of science for the public good.

SHADES OF GREY

Timely access to scientific experts for the media is just one part of the issue. The government has also cut the budget for grey literature—the publications between a press release and an academic publication, written for a general audience without a science background to help inform decision-making. "In the last six years, the government has managed to largely eliminate the grey literature at Environment Canada," says Dr. Thomas J. Duck, an atmospheric scientist at Dalhousie University in Halifax. "We are dealing with significant environmental problems and the public needs to be properly informed by the leading scientific experts if we are to hold our government accountable."

voice" policy meant delays in accessing scientists for interviews, and excessive oversight from media officers who crafted responses that served a political agenda; their role had shifted from facilitator to gatekeeper.

The Canadian Science Writers' Association (CSWA) and the Society of Environmental Journalists met with senior bureaucrats to discuss their concerns, as a follow-up to a well-attended panel discussion with government officials at the CSWA annual conference in 2010. With no real recognition on the government's part that a problem existed, little changed.

Before the 2011 federal election, the CSWA wrote an open letter to the party leaders that referred to numerous instances when journalists did not have timely access to government scientists, and asked what each party would do to improve the situation, to "free scientists to talk to journalists." Only the Conservative Party of Canada failed to respond.

A year has passed since Canadians elected a majority government. There have been minor improvements in the access to some scientists, but mindful of deadlines, fewer journalists try to speak with them—and fewer scientists have any incentive to speak with journalists.

Case in point: When a study about an unprecedented hole in the ozone layer above the Arctic was published in the journal *Nature* in October 2011, Environment Canada told the media that co-author Dr. David Tarasick was not available for comment. Dr. Thomas J. Duck, an atmospheric scientist and physicist at Dalhousie University in Halifax, took calls from reporters instead. "The fact that Dr. Tarasick wasn't able to speak was really troubling. In the House of Commons, the government maintained that Dr. Tarasick wasn't being muzzled while at the same time they were sending out emails to reporters saying that he wasn't available. It was—I'm trying to find Parliamentary language here—very dishonest," Dr. Duck said.

Dr. Tarasick later told Postmedia News: "I'm available when media relations says I'm available. I have to go through them." Clearly, this is not good enough.

In February 2012, a panel discussion at the Annual Meeting of the American Association for the Advancement of Science in Vancouver ignited three weeks of media coverage, both national and international, on the ability of Canada's

2011

APRIL The Canadian Press reveals the muzzling of a Canadian scientist who co-wrote a report on toxic chemicals that were released in the Arctic.

JULY Postmedia News reports on documents showing that the Department of Fisheries and Oceans stopped researcher Dr. Kristi Miller from giving interviews on her study of Fraser River sockeye salmon. Her study was published in the journal *Science*.

AUGUST Dr. Kristi Miller tells the commission studying the Pacific salmon fisheries that the department told her not to speak to the media until she testified.

OCTOBER A study published in *Nature* shows there's an unprecedented hole in the ozone above the Arctic. Dr. David Tarasick, an Environment Canada researcher who worked on the study, is not allowed to give interviews.

2012

FEBRUARY Journalists, science communicators and the federal public service union call for an open science communication policy in Canada at the American Association for the Advancement of Science Annual Meeting in Vancouver. Absent from the "Unmuzzling Federal Scientists: how to reopen the discourse" panel, were representatives from the federal government and the senior bureaucracy, though several were invited to participate.

2012

APRIL In an article in the *Ottawa Citizen*, science reporter Tom Spears reveals that while it took him just 15 minutes to talk to a scientist at NASA about a joint study with Canada's National Research Council (NRC), his request to speak with an NRC scientist was denied. Spears' article offers a fascinating glimpse into the current bureaucracy by including internal emails involving 11 different people at NRC who followed his request, correspondence obtained after the fact through an ATI request.

federal government scientists to speak with journalists about their published research in a timely fashion.

In the United States, the Union of Concerned Scientists systematically approached a similar problem under George W. Bush's administration, and crafted evidence-based guidelines for government communication of science. The essence of that document is contained in the new guidelines from the U.S. National Oceanographic and Atmospheric Agency (NOAA). This new policy has certainly raised the bar. It states that scientists are free to speak to journalists, no exceptions. They are free to have a media officer present, should they so choose, and scientists can express their personal opinions provided they are clear the opinion is not departmentally sanctioned. Indeed, change is possible; openness and transparency can be realized. Canadian scientists and journalists need to spread the word and push for a similar policy.

We may also need to re-examine how government science works in our democracy, and how best to protect its value. Fisheries scientist Dr. Jeffrey Hutchings touched on this issue in a paper he co-authored 15 years ago in the aftermath of the cod fisheries crisis under the Liberal government ("Is scientific inquiry compatible with government information control?" published in the *Canadian Journal of Fisheries and Aquatic Sciences*), concluding: "There is a clear and immediate need for Canadians to examine very seriously the role of bureaucrats and politicians in the management of Canada's natural resources." The authors recommended a separate scientific body that could operate at arm's-length outside the government ministry. That obviously hasn't happened, and possibly never will. But it is all the more reason to make sure scientific integrity is not compromised in a closed system that doesn't allow for the checks and balances that come with transparency and the free flow of information.

Canadian taxpayers expect the government to craft policies that will protect our health and our environment and ensure our resources are safeguarded for generations to come. Journalists need access to experts for information that supports or reveals evidence to the contrary. We also need to tell stories in which science shines a light on our daily lives. Many of these issues are not the least controversial. But even if they turn out to be, that is the chance our politicians take when they talk about accountability.

We need to work to make sure that we build a case for transparency and accessibility. To do so, we need to gather more evidence, document existing communications policies and examine the language we use. We also need to find funds to research the links between a Canadian electorate that is science-aware and strong journalistic practice in advancing evidence-based policymaking. Now that the international media has picked up our message, we need to convince the public and the current government that muzzling scientists is irresponsible, regressive, dishonest and, ultimately, a mug's game.

Kathryn O'Hara is an associate professor of journalism at Carleton University where she holds the CTV Chair in Science Broadcast Journalism.

"Why aren't there people inside going on strike over this? The answer is the way that pressure is applied and scientific issues are manipulated are often subtle to the inexperienced or unaware scientific employee of government."

—DR. MICHELE BRILL-EDWARDS, a Health Canada whistleblower who resigned over industry interference and political manipulation during the drug approvals process in the 1990s

"In general, [the American Association for the Advancement of Science] expects open and transparent science communication, other than when national security is involved. If, in fact, scientists are being muzzled anywhere in the world, that is unacceptable and not in the public's best interests. The purpose of science is the betterment of humankind and we can't do that job if our findings will be distorted or suppressed."

—ALAN I. LESHNER, CEO American Association for the Advancement of Science

"Canadians have the right to learn more about the science they support and to have unfettered access to the expertise of publicly funded scientists."

—From an OPEN LETTER to Prime Minister Stephen Harper, co-signed by the Association des communicateurs scientifiques du Québec (ACS), the Association science et bien commun (ASBC), the Canadian Science Writers' Association (CSWA), the Professional Institute of the Public Service of Canada (PIPSC), the World Federation of Science Journalists (WFSJ), and CJFE

"For research results to change policy, government scientists need direct access to the public in order to explain the policy implications of their work through the news media. Without that, it would be tempting for governments to ignore research results that do not suit them."

—BBC News science correspondent PALLAB GHOSH, in a column about the Canadian government's muzzling of scientists

DELAY, REDACT, REFUSE, REPEAT

GOVERNMENTS CONTINUE TO GIVE JOURNALISTS AND OTHER INFORMATION REQUESTORS THE RUNAROUND

By Paul Knox, with reporting contributed by Paula Todd

We live in amazing times. Each day's news brings fresh evidence of the exhilarating, liberating power of information. Never have so many billions of people enjoyed access to such a vast range of ideas, facts and statistics, and the creations of their fellow human beings.

Dramatic events repeatedly underscore the importance of freedom of expression combined with access to information and the tools for communicating it. Dictatorial regimes topple in North Africa. Official wrongdoing is exposed in dozens of countries. A forlorn English teenager intent on taking his own life is rescued after someone in Canada acts on his cybercry for help.

What a contrast to the attitude of Canadian governments. For them, the information revolution isn't something to be celebrated. For far too many politicians and officials, it's apparently a serious threat.

Across the country, governments are finding new ways to stop Canadians from uncovering public records and telling one another about them. They're subjecting Access to Information (ATI) and Freedom of Information (FOI) requests to extensive delays, and claiming a growing number of exemptions from disclosure. (ATI is the term used for the federal and some provincial systems; FOI is used in others.) Reporters face special obstacles designed to keep them from shining a light in dark official corners. Says Kevin Donovan, a longtime investigative reporter with the *Toronto Star:* "We are in the hands of government agencies who use fee estimates, legislated time delays, and often simple refusal to respond, to delay release of information."

Just before he left office last fall, former Alberta Information and Privacy Commissioner Frank Work blasted his government for creating 38 separate legislative overrides to block requests for information. The practice could turn the province's FOI law into "a piece of Swiss cheese," he said. Federal Information Commissioner Suzanne Legault was more measured in her 2010–2011 annual report—but her message was clear. "The exercise of discretion in determining which information to disclose has been skewed toward greater protection of information," Legault wrote. She added that the number of ATI exemptions claimed every year on national security grounds has tripled since 2002–2003.

The picture is not entirely gloomy. Every year, industry group Newspapers Canada conducts an FOI audit, sending identical requests to several governments, and comparing the responses. Its 2011 report praised Saskatchewan municipalities for their speedy no-hassle release of contract documents. But in Winnipeg, the same kinds of documents are kept secret—and there were few other bright spots. "Something that was supposed to be a right to information has become a right to enter into a long, convoluted process," says Fred Vallance-Jones, the audit's author and a professor of journalism at the University of King's College in Halifax.

Compared to the rest of the world, Canada is looking increasingly shabby on ATI/FOI. U.S.-based news agency Associated Press filed requests last year for data on terrorism charges and convictions in 105 countries that have FOI laws. Canada asked for a 200-day extension, whereas Turkey supplied the information in seven days, India within a month and Mexico within two months.

Despite the obstacles, courageous reporters who carry a torch for fact-based journalism and meticulous research are refusing to give up. Federal access requests by the news media totaled 5,234 in the year ending March 31, 2011—a 41 per cent increase over 2009–2010.

One of those requests was filed by the *Winnipeg Free-Press* in the spring of 2010. In April 2010, reporter Helen Fallding asked Health Canada for a study examining the link between proof water quality and a deadly H1N1 flu outbreak at the St. Theresa Point First Nation in northern Manitoba. Reporter Mary Agnes Welch soon took over the story from Fallding, and it took 20 months and a complaint to Legault's office to get Health Canada to surrender the document. Despite extensive blacked-out passages, its conclusions were clearly so disturbing that the *Free-Press* made Welch's report the top story in its Dec. 15, 2011 edition. Even then, Health Canada refused to allow the study's author to be interviewed. These days, Welch isn't filing ATI requests at the rate she used to—dealing with the stalling and roadblocks has become too

LEFT: Suzanne Legault, federal Information Commissioner

time-consuming. "It should be a routine part of our day, and it's not," she says.

In some jurisdictions, bureaucrats create special hurdles for journalists and others who are likely to publicize information (as opposed to businesses or individuals requesting personal data). The Newspapers Canada audit found that in Ontario, requests from reporters, watchdog groups, academics and opposition politicians were far more likely than others to take longer to process, be denied in full or in part, or be abandoned. Such requests are often channelled into Ontario's contentious issues management system, designed to flag potential public-relations problems. At the federal level, they may be referred to the Privy Council Office, ostensibly because the requested material might be the subject of confidential cabinet discussions.

At the *Star,* Donovan successfully used FOI laws to investigate reports of abuses in nursing homes, children's aid societies and group homes for the developmentally challenged. But officials initially sought to charge the newspaper tens of thousands of dollars in search fees. The *Star* eventually got the fees reduced, but it had to pay the money up front while it argued that the information was of public interest and therefore qualified for exemption. "Access precedents do not exist," Donovan observes. "The journalist must fight the same battle each time."

Journalists can smooth the process by working with information commissioners and access co-ordinators, who are generally well-meaning. "Where there is the will, access works," Suzanne Craig, integrity commissioner with the city of Vaughan, Ont., told a conference on press freedom at Toronto's Ryerson University in March 2012. But she added that this will is often lacking in high circles.

"SOMETHING THAT WAS SUPPOSED TO BE A RIGHT TO INFORMATION HAS BECOME A RIGHT TO ENTER INTO A LONG, CONVOLUTED PROCESS."

Donovan believes Canada should adopt the practice, common in the United States, of making disclosure the rule instead of the exception. "What is needed is an American-style set of access laws where certain information is automatically released in 10 days," he says. Others call for information commissioners to be given the power to order the release of documents, as permitted in some provincial laws. "If they don't have the power to do their jobs I don't know how it can work," Vallance-Jones says.

Many believe governments need to overhaul their management of information, setting higher standards for retention and storage—which in turn would make it easier to release it routinely to the public. (Some data was supplied to the Newspapers Canada researchers as unreadable image files or on antiquated paper printouts.) In January 2012, after federal Treasury Board President Tony Clement disclosed plans for an "open government partnership initiative," federal and provincial information commissioners responded by calling for significant improvements to records management and a national system for declassifying information.

All Canadians, not just journalists, enjoy the rights conferred by ATI and FOI laws. We are also guaranteed "freedom of thought, belief, opinion and expression" by the *Charter of Rights and Freedoms*. As was written in last year's *Review*: "Freedom of expression and access to information are joined at the hip; the more we know about our world, the broader our range of ideas and creative expression will be."

At best, Canada's ATI and FOI laws need to be strengthened. At worst, if their credibility is steadily eroded, they will fall into disuse. Use it or lose it? As Linden McIntyre of the CBC's *the fifth estate* told the Ryerson conference: "You have to take ownership of the things you're free to do."

Paul Knox teaches journalism at Ryerson University. During several decades in the news business he has been a reporter, editor, columnist, broadcaster and foreign correspondent. He served on CJFE's board of directors from 2000 to 2006.

2011 GLOBAL RIGHT-TO-INFORMATION (RTI) RATING

RANKINGS INDICATE CANADA'S ACCESS TO INFORMATION LAWS ARE OUTDATED

By Laura Tribe

Despite being an open democracy, Canada has ranked nothing more than average in an international survey of access to information.

In 2011, Canada ranked 40th in the world's first Global Right to Information Rating. Published by the Halifax-based Centre for Law and Democracy, in partnership with Access Info Europe, the rating ranks the 89 countries in the world that have right to information laws based on the actual access to information the legal framework provides.

Canada shared its 40th place spot with Estonia and Montenegro, and scored only marginally higher than the overall average, with a total of 85 out of a possible 150 points.

Holding Canada back is the *Access to Information Act*, which has not been updated since it was created in 1983. A number of the countries that scored higher than Canada have recently overhauled their access to information (ATI) legislation, making their legal framework far more up to date than ours.

With particularly low scores in the Scope (13 out of a possible 30) and Exceptions and Refusals categories (11 out of 30), it is clear that although some government information is openly available to Canadians, a significant amount is not. When it comes to our legal structures, Canada's ATI laws leave much to be desired.

Access problems don't stop with the law. The National Freedom of Information Audit 2011, administered by Newspapers Canada, highlights additional problems within access to information systems' actual operations.

Surveying federal, provincial and municipal governments, the audit revealed that wait times for ATI requests frequently take longer than the standard 30-day response period. Additionally, the audit found inconsistencies in the types and amounts of information released.

Laura Tribe is CJFE's web and social media editor.

CANADA'S 2011 RTI RATING BREAKDOWN:

RIGHT OF ACCESS
★★★☆☆☆

SCOPE
★★★★★★★★★★★★★☆☆☆☆☆☆☆☆☆☆☆☆☆☆

APPEALS
★★★★★★★★★★★★★★★★★★★★★★★★☆☆☆☆☆☆

REQUESTING PROCEDURES
★★★★★★★★★★★★★★★★★★★★★★★★☆☆☆☆☆☆

SANCTIONS AND PROTECTIONS
★★★★★★☆☆

EXCEPTIONS AND REFUSALS
★★★★★★★★★★★★☆☆☆☆☆☆☆☆☆☆☆☆☆☆

PROMOTIONAL MEASURES
★★★★★★★★★★★★★★★☆

"The right of access to information is a foundation for citizen participation, good governance, public administration efficiency, accountability and efforts to combat corruption, media and investigative journalism, human development, social inclusion, and the realization of other socio-economic and civil-political rights."

—The Atlanta Declaration and Plan of Action for the Advancement of the Right of Access to Information
(February 2008)

88% of provincial access to information requests in B.C. are not responded to within 30 days.

WHEN ATI WORKS

By Susan Mohammad

DOCUMENTS OBTAINED THROUGH REPORTERS' ACCESS TO INFORMATION (ATI) REQUESTS OFTEN PRODUCE EYE-POPPING REVELATIONS OF MISMANAGEMENT, OVER-SPENDING AND DUBIOUS PRACTICES—DESPITE THE STALLING AND SECRET PRO-CEDURES THAT MAR CANADA'S ATI SYSTEM. WITHOUT ATI, CANADIANS WOULD NOT HAVE LEARNED ABOUT CRITICAL ISSUES REGARDING OUR HEALTH, PRIVACY, SECURITY AND HOW OUR TAX DOLLARS ARE SPENT. FOR EXAMPLE:

- Taxpayers footed a $16,000 bill to fly Defence Minister Peter MacKay from an exclusive Newfoundland fishing lodge to a nearby airport in a Cormorant helicopter while he was on vacation. MacKay was also caught inappropriately using military personnel for political purposes when emails revealed that his office ordered military staff to investigate politicians who had criticized him for taking the 30-minute ride.

- The RCMP began spying on socialist trailblazer Tommy Douglas in 1936, three years earlier than previously known. For more than four decades, the RCMP's security branch followed the first national NDP leader and former Saskatchewan premier by monitoring his speeches, analyzing his writing and eavesdropping on his private conversations because of his links to the peace movement, and for associating with Communist Party members.

- When the Canada Science and Technology Museum was planning their exhibition, "Energy: Power to Choose," they sought out sponsors, including those in the oil industry, and gave these sponsors a seat at the table as the exhibition's content was debated. The Imperial Oil Foundation and Encana Corp. are among the major sponsors of this exhibition, which paints a rosy picture of the oilsands.

- Health Canada officials advised the federal government to list chrysotile (a form of asbestos that has been linked to cancer and respiratory disease) as a hazardous material under the UN's Rotterdam Convention. The government ignored the advice, and derailed international efforts to add the known carcinogen to the list of hazardous substances.

- Federal bureaucrats ordered references to the "Government of Canada" to be replaced with "Harper Government" in communications copy in an attempt to politically brand the public service.

- More than 700 CBC employees earn at least $100,000 each year. We know this because the CBC was forced to publicize certain financial records after the Federal Court of Appeal ruled in favour of its competitor, Quebecor, which had submitted hundreds of ignored ATI requests over the CBC's spending habits. The Crown corporation fought to keep the records private, arguing that their journalistic, creative and programming activities constitute an *Access to Information Act* exemption.

- Civil servants participated in a government-staged re-affirmation citizenship ceremony for "new Canadians" at the Toronto studios of Sun News Network. Documents showed federal bureaucrats and Sun News employees organized a ceremony separate from other scheduled Citizenship Week events, and ultimately agreed to include civil servants when a last-minute call for new Canadians garnered a low turnout.

An efficient ATI system is about our right to freedom of expression. Article 19 of the *Universal Declaration of Human Rights* may guarantee us all the right to "seek, receive and impart information and ideas through any media and regardless of frontiers," but too often governments inhibit this in practice by placing unreasonable restrictions on it. Ultimately, transparency and ATI go hand-in-hand when measuring a healthy democracy. When ATI works, it empowers Canadians to hold decision-makers accountable for the actions that impact our day-to-day lives.

Susan Mohammad is a Toronto writer and broadcast journalist who has written for Maclean's, The Atlantic, Canadian Business *and the* Ottawa Citizen.

By Dean Beeby

I began using the *Access to Information Act* as a young journalist during the golden age of freedom of information (FOI) in Canada, the period just after the bill became federal law in 1983. All of us were neophytes then, both the requestors and the bureaucrats. No one really knew where the loopholes in the legislation were, and no one really understood the consequences of flouting the law. The bureaucrats and politicians were largely on their best behaviour. The number of requests filed each year was small. The inboxes were manageable.

The Mulroney years were bountiful, despite frustrations. The virgin field of FOI produced a bumper crop of stories about government waste and hypocrisy. A couple of my own books could not have been written without successful access requests. Journalists would never acknowledge it at the time, but those were the salad days. The courts were supportive, and the information commissioner was a crusader in our corner.

Things changed in the mid-1990s. The Chrétien program cuts of 1995 cleared out the clerical ranks, and left the government's document-filing systems in chaos. Bureaucrats and politicians became more obstinate about releasing embarrassing information after it became clear there were no serious penalties for impeding access—no one was ever jailed or fined. And the information commissioner, it turned out, had only moral suasion to offer in most cases. Still, requestors became more educated and aggressive. Both sides were still reasonably matched in the tug-of-war over documents. The sponsorship scandal was evidence that great FOI-based stories were still within reach. Call it the silver age of FOI in Canada.

In 1998, the number of *Access to Information Act* requests spiked as new political forces shook up Canadian public affairs. The *National Post* was founded that year, and gave itself a strong FOI mandate. The Reform Party of Canada also became the official Opposition in 1997 and, using its new parliamentary resources, soon took better advantage of the *Act*. The result was a sharper, better-informed opposition and press, bringing more depth to public debate.

The Reform Party became the Canadian Alliance in 2000, then was folded into the Conservative Party of Canada in 2003, which went on to form the government in 2006. The party had become familiar with the *Access to Information Act*—especially its loopholes—during its years in opposition. Once in government, Tory officials quickly exploited the weaknesses of the *Act*. Cabinet documents are largely excluded from the reach of the *Act*—and so the definition of cabinet confidences was soon stretched to include a broad swath of material that once was readily accessible. Time-consuming consultations with other government departments are permitted under the *Act*, and suddenly requests were subject to lengthy consultations. In the meantime, the information commissioner's office, once an FOI beacon, lost its fervour. Junior staff replaced aggressive veterans, and the commissioner championed high-profile cases but allowed too many requestors' complaints to grow stale from neglect. The age of lead had arrived. Canada, once a global FOI leader, had become an international laggard.

The future of FOI is bleak under a government that pays lip service to openness, and tries to distract with the Open Government initiative, which pushes databases but steadfastly refuses to allow citizens to pull information. Fee increases seem inevitable. The challenge now is to build an FOI coalition, including businesses and journalists, that by the next election in 2015 will clamour for an access-to-information regime designed for citizens rather than governments.

Dean Beeby, deputy bureau chief in Ottawa for The Canadian Press, is a frequent user of FOI systems and has conducted FOI seminars for the CBC, the CAJ and others.

It takes an average of **395** days to resolve an ATI complaint in Canada.

FREEZING OUT CIVIL SOCIETY

IS THE CANADIAN GOVERNMENT DELIBERATELY WITHHOLDING FUNDS FROM DISSENTING CIVIL SOCIETY ORGANIZATIONS? MAYBE, MAYBE NOT. BUT EVEN THE PERCEPTION PLACES A CHILL ON FREE EXPRESSION

By Grant Buckler

The story broke on Jan. 24, 2012: A former employee of ForestEthics, an organization opposed to the Enbridge Northern Gateway oil pipeline from Alberta's oilsands to the British Columbia coast, said the federal government had threatened Tides Canada with loss of funding if it continued supporting ForestEthics.

Andrew Frank, who said he was told about the threats by his supervisor at ForestEthics and by Tides Canada's energy initiative director, also said ForestEthics had fired him the previous day (Jan. 23), when he announced his intention to take the story public.

The accusations might have had less impact if not for comments by Joe Oliver, natural resources minister, in an open letter released by his department two weeks earlier. Referring to environmental groups opposing the pipeline as "radical," Oliver attacked them for receiving some of their funding from international special interest groups, and said the environmentalists "threaten to hijack our regulatory system to achieve their radical ideological agenda." Oliver went on to suggest that the environmental review process for the pipeline might need to be shortened and changed.

Did the federal government really threaten Tides Canada with repercussions if it continued to fund ForestEthics? We don't know. But this is by no means the first episode that suggests that disagreeing publicly with this government's agenda can cost civil society organizations dearly.

Late in 2009, the federal government cut off funding to Kairos: Canadian Ecumenical Justice Initiatives (also called Kairos Canada and Kairos), a coalition of churches and religious organizations that had received money from the Canadian International Development Agency (CIDA) for 35 years. The clumsy way the deed was done ensured it received more media attention than it might have otherwise: Bev Oda, minister of international co-operation, inserted the word "not" into a recommendation that Kairos' funding be continued—but she did so after Margaret Biggs, president of CIDA, and other senior CIDA officials, had signed a positive recommendation. Then, Jason Kenney, minister of citizenship, immigration and multiculturalism, accused Kairos of anti-Semitism in a speech at the Global Forum for Combating Anti-Semitism. "We have articulated and implemented a zero-tolerance approach to anti-Semitism," he said. "What does this mean? It means that we eliminated the government funding relationship with organizations … who promote hatred, in particular anti-Semitism. We have defunded organizations, most recently like Kairos."

Toronto-based Kairos is backed by 11 respected religious groups. Though the organization has criticized the Israeli government's treatment of Palestinians in the West Bank and Gaza, it has also explicitly stated that it does not support a general boycott or economic sanctions against Israel, and favours a two-state solution in the Middle East.

John Lewis, Kairos' program co-ordinator for international human rights and Middle East partnerships, says he doesn't know why Kairos lost its funding, only that CIDA's evaluation of Kairos' funding proposal was positive.

In March 2009, the federal government named University of Toronto professor Aurel Braun chair of the board of Rights & Democracy, a human rights agency set up in 1988 by the Brian Mulroney government. Braun and other directors, all appointed around the same time, soon came into conflict with Rémy Beauregard, named president of Rights & Democracy in 2008. Tensions mounted over grants to B'Tselem, an Israeli human rights group, and partner organizations Al Haq and Al Mezan. Braun accused the three organizations of being linked to extremists; Beauregard disagreed.

The conflict led to allegations of mismanagement, and a negative performance review of Beauregard that was sent to government officials without Beauregard being allowed to see it. After an acrimonious board meeting in January 2010, Beauregard died of a heart attack. Soon after, Rights & Democracy staff demanded the three directors' resignations. An audit of the organization by consulting firm Deloitte did not support allegations of mismanagement.

Nonetheless, in early April 2012 the government announced it would shut

down Rights & Democracy. Though it was founded as an arms-length organization, its functions will be moved into the Department of Foreign Affairs and International Trade.

In June 2010, the Standing Committee on Foreign Affairs and International Development wrote a report on the situation, stating that: "It is abundantly clear to the Committee that a significant factor underlying the dispute between certain members of the Board and Mr. Beauregard and the organization were differing views on the current dispute in the Middle East."

The Canadian Council for International Co-operation (CCIC), an umbrella group for Canadian NGOs, received CIDA funding for 40 years until the summer of 2010. The loss of CIDA funding eliminated 70 per cent of CCIC's budget and forced it to lay off 17 of its 25 employees.

The federal government has not said why CIDA declined to continue CCIC's funding. The group, however, had spoken out against a government plan to freeze foreign aid spending after 2010, and against Kairos' defunding. Gerry Barr, then president of CCIC, was quoted in a Canwest News Service report as saying: "It really is hard not to see the prospect of defunding as anything other than an example of efforts at political chill."

CCIC also focuses on policy and advocacy, notes Julia Sanchez, now its president and CEO, and "this government has been very clear about its total lack of interest in funding policy advocacy-oriented organizations." The government wants civil society to stick to delivering services, she says.

There are other examples. Alternatives, a Quebec-based social justice group that opposed the war in Afghanistan and the Israeli blockade of Gaza, lost its CIDA funding in 2009. In 2010, the New Brunswick Coalition for Pay Equity lost its funding from Status of Women Canada, the budget of which had been cut by the federal government in tandem with a change in funding criteria that excluded advocacy groups. In 2009, Canadian Policy Research Networks, a 15-year-old non-profit socio-economic policy research group, closed after losing its federal funding.

Voices-Voix, a non-partisan coalition of organizations founded in 2010, documents these and other cases on its website, *voices-voix.ca*.

In a February 2012 report on the new competitive funding mechanism that CIDA introduced in 2010, CCIC warned of a "chill on advocacy activities as a result of the widely shared perception that CIDA looks unfavourably on organizations that do policy and advocacy work, especially in areas that are controversial for the current government or when advocacy efforts are critical of current policies."

In the latest federal budget, the government allocated $8 million to the Canada Revenue Agency to tighten the rules governing political activity by organizations with charitable status and to step up enforcement. The budget also hints at restrictions on international funding for Canadian charities.

Has the Canadian government moved into a new era of using funding to pressure civil society groups that disagree with its positions? Many people think so. "I know for a fact there is a chill," says Darren Shore, communications co-ordinator at Voices-Voix. But Shore doesn't put all the blame on the present government. "This issue is not about any particular government or party," he says.

Roch Tassé, co-ordinator of the International Civil Liberties Monitoring Group in Ottawa, sees a marked difference between this government and past ones. "I've been working in the NGO world for most of my career," he says. "This is unprecedented."

Some might argue that when you accept funding from any source, you open the door to their influence on your activities. This is why some organizations, like Amnesty International, avoid government funding.

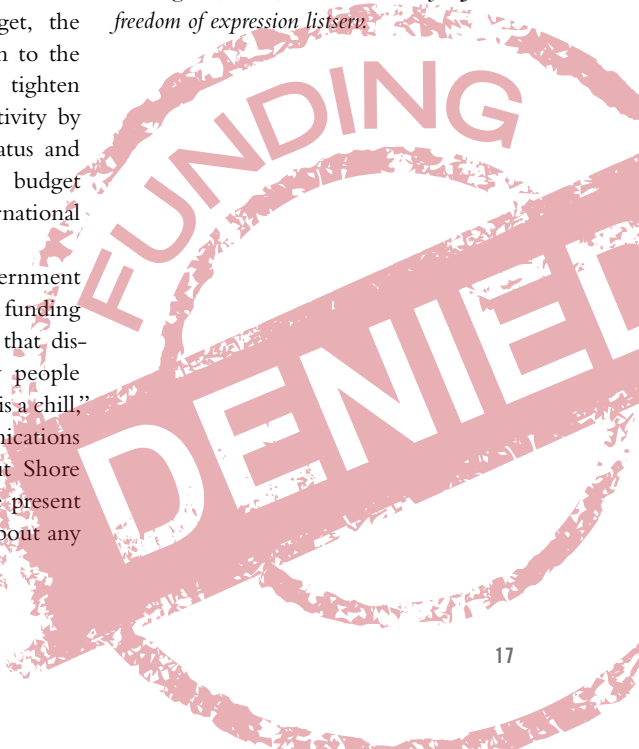
Is Ottawa merely focusing its dollars on causes the government believes Canadians support? If so, perhaps the government has too narrow a view of what Canadians believe in.

Withholding public funds from civil society organizations at odds with government positions is not the exact equivalent of imprisoning dissidents or closing down newspapers, but it certainly doesn't suggest a belief in the value of free and open discussion.

"There's a direct correlation between freedom of expression and democracy," Shore says. Organizations afraid of losing funding aren't likely to say publicly what they know the government doesn't want to hear. You may or may not call that censorship, but can you call it healthy?

"SOME MIGHT ARGUE THAT WHEN YOU ACCEPT FUNDING FROM ANY SOURCE, YOU OPEN THE DOOR TO THEIR INFLUENCE ON YOUR ACTIVITIES"

Grant Buckler is a freelance journalist based in Kingston, Ont., and moderator of CJFE's freedom of expression listserv.



LINKS AND LIBEL

Why hyperlinking is not publishing, and why that matters: implications of the 2011 Crookes v. Newton decision

By Peter Jacobsen

Crookes v. Newton had the potential to set the publishing world on its ear, and so it was one of those rare Canadian cases that had the international legal community buzzing in anticipation. The issue was whether the act of creating a hyperlink to defamatory material constituted publication, thus making the person who created the hyperlink liable in damages along with the person responsible for the defamatory website the link leads to.

The implications were enormous. Had the Supreme Court of Canada (SCC) found the hyperlinker liable in the circumstances, it would have imposed an enormous burden on authors to vet every hyperlinked reference to ensure it was free of defamatory material.

Not surprisingly, the SCC found that merely hyperlinking to defamatory material is not publication, and, in and of itself, does not constitute defamation. However, the case is not without its subtleties.

What is interesting is that while the majority held that individuals could not be found liable for repeating the defamatory words, two of the judges (including the chief justice) thought it necessary to dissent, in part to make the point that referring to the contents of a hyperlink with approval could be defamatory. Thus, just because the Court found that hyperlinking did not constitute publication, this does not mean that all hyperlinking is legally acceptable.

They also made the point that a defamatory meaning will be discerned from "all the circumstances of the case, including any reasonable implications the words may bear, the context in which the words are used, the audience to whom they were published and the manner in which they were presented."

The Court was clear that it was only dealing with those hyperlinks that require the user to click the hyperlink to access the information—called "shallow" or "deep" hyperlinks in the trade. It left to another day the dilemma caused by emerging technology where "automatic hyperlinks" display the information with virtually no actions taken by the user. The question will be whether inserting "automatic hyperlinks" constitutes publication.

As it stands, simply inserting a hyperlink into "a publication," will not constitute a defamatory publication, but may be seen as defamatory if the author cites the contents of the hyperlink with approval and states, for example, that it contains true fact. For example, if the author of an article provides a hyperlink to a defamatory article that alleges someone is dishonest, and the author writes "go to this site to read the truth," the author may be found to have "published" a defamatory statement and be held liable in defamation. Consequently, care should be taken when an author goes so far as to refer to a hyperlinked material as telling the truth, expressing a correct opinion about someone or citing the hyperlink with approval.

In short, the Court has cleared up the simple question but has yet to deal with its more complex next-generation offspring.

Peter Jacobsen is a CJFE Board member and a founding partner of Bersenas Jacobsen Chouest Thomson Blackburn LLP, a firm that practices, among other things, media law and defamation law (for both plaintiffs and defendants) and provides advice on public interest media related issues.

ABOVE: Editorial cartoon by Jugoslav Vlahovic, courtesy of the International Editorial Cartoon Competition of the Canadian Committee for World Press Freedom (CCWPF).

THE PRICE OF PEEKING

Lawful access sends signal Canada is open for 'Big Brother Inc.' business

By Michael Geist

Last year, Privacy International—one of the world's leading privacy organizations—released the results of a multi-year investigation into the shadowy world of the commercial surveillance industry. Dubbed "Big Brother Inc.," the investigation placed the spotlight on more than 100 companies that specialize in covert surveillance technologies, which are typically sold to governments and law enforcement agencies.

Governments in Asia and the Middle East have provided a ready market for technologies that can monitor Internet activities and create a chilling effect on freedom of expression. But Canada is not innocent in this regard. New online surveillance legislation, Bill C-30, features provisions that appear to open the door to using such tools.

The Privacy International investigation revealed that surveillance companies commonly promote virtually unlimited monitoring capabilities to governments and police agencies. For example, Italian-based Innova offers "solutions for the interception of any kind of protocols and IP-based communication, such as web browsing, email and web-mails, social networks, peer to peer communication, chat and videochat." Endace Accelerated, a New Zealand-based company, promotes the "power to see all for Government," and the U.K.-based Gamma Group offers "turnkey lawful interception projects" that include SMS interception, speech identifying tools and data retention.

In all, the investigation reveals how online surveillance has become a massive global industry—one that makes it easy for law enforcement agencies to implement surveillance capabilities, and send a disturbing message that online expression can be tracked and monitored.

Some Canadian companies, including B.C.-based Vineyard Networks, that specialize in deep packet inspection of Internet traffic for lawful interception purposes were included in the report. Deep packet inspection allows Internet service providers (ISPs) and other network providers to look at parts of messages and transmissions over a network; it's often used to keep networks secure, but has also been used to infer the habits of consumers. Yet more important than the existing Canadian surveillance industry is the potential market in Canada for surveillance technologies.

Most of the attention on proposed Canadian Internet surveillance legislation has focused on the mandatory disclosure of Internet and telephone subscriber information without court oversight. But just as troubling is the plan to create a massive new surveillance infrastructure, which has enormous free speech and privacy implications.

Bill C-30 requires ISPs to acquire the ability to engage in multiple simultaneous interceptions, and gives law enforcement agencies and officials the power to audit their surveillance capabilities. Should it take effect, the Bill would create a new regulatory environment for ISPs, requiring them to submit a report describing their equipment and surveillance infrastructure within months of the law taking effect. Moreover, they would actively work with law enforcement agencies to test their facilities for interception purposes, and even provide the name of employees involved in interceptions to allow for possible RCMP background checks.

In addition to the surveillance requirements, the Bill would also give the government the power to install its own equipment directly onto private Internet provider networks. Section 14(4) states: "The Minister may provide the telecommunications service provider with any equipment or other thing that the Minister considers the service provider needs to comply with an order made under this section."

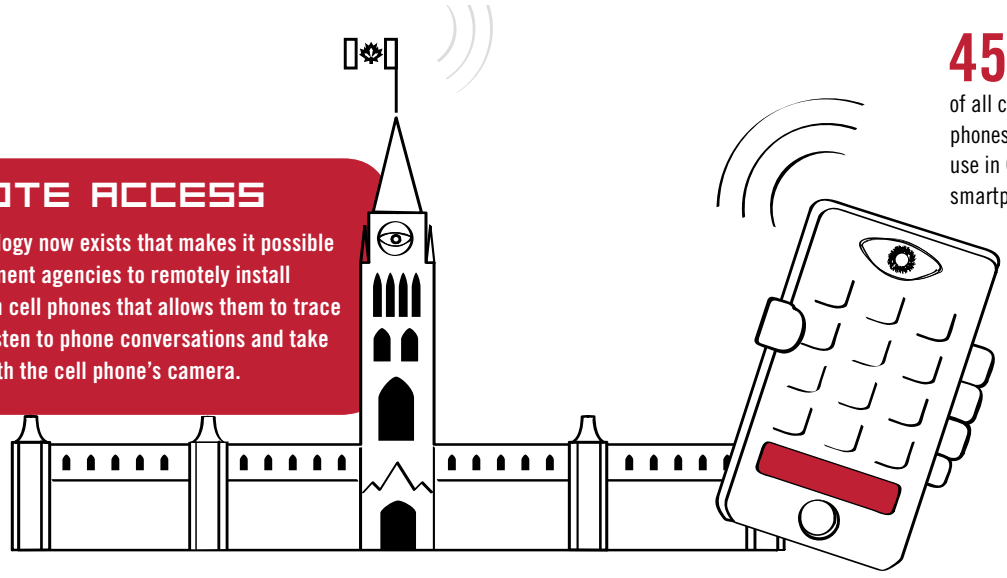
This amounts to giving government the power to decide what specific surveillance equipment must be installed on private ISP and telecom networks.

With ongoing doubts about the ability of Canadian ISPs to pay the multimillion-dollar costs associated with new surveillance equipment (and some speculation the government is prepared to provide tens of millions of dollars in assistance), the government may ultimately shift toward a model in which it buys the surveillance equipment and uses Section 14(4) to require the Internet providers to install it. If that is what the government has in mind, Bill C-30 will soon look like a giant Canadian "open for business" sign to Big Brother Inc., placing freedom of expression at risk.

Michael Geist holds the Canada Research Chair in Internet and E-commerce Law at the University of Ottawa, Faculty of Law. He can reached at mgeist@uottawa.ca or online at michaelgeist.ca.

CYBER NATION

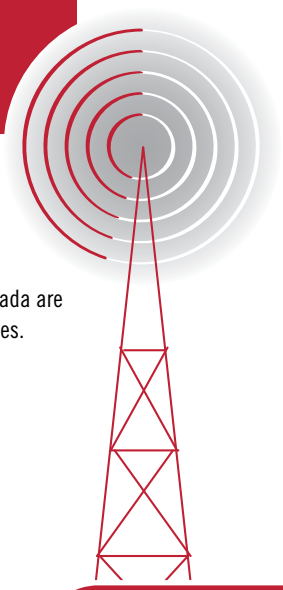
We use the Internet every day, and Canadians are among the most engaged Internet users in the world. But do you really know what's going on behind the scenes?



REMOTE ACCESS

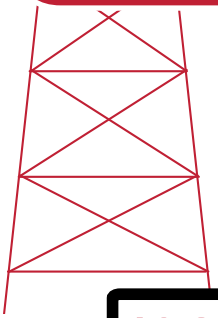
The technology now exists that makes it possible for government agencies to remotely install software on cell phones that allows them to trace location, listen to phone conversations and take pictures with the cell phone's camera.

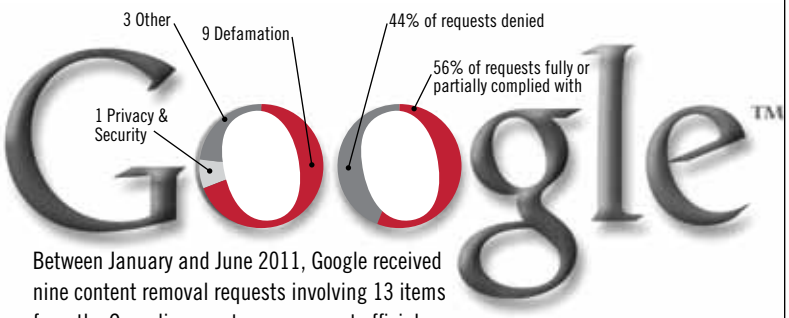
45% of all cell phones in use in Canada are smartphones.



SWEEPING

In February 2011, BC Ferr abortion content on its Wi block on sites with any se

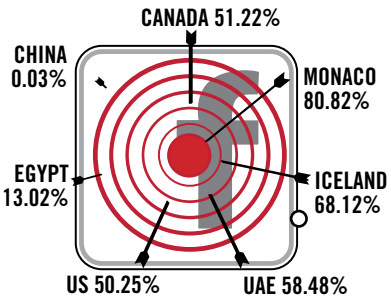




Between January and June 2011, Google received nine content removal requests involving 13 items from the Canadian courts, government officials and/or law enforcement.

FACEBOOK FEVER

Penetration in select countries



130,0

People have who OpenMedia's peti stop Bill C-30.

1,295

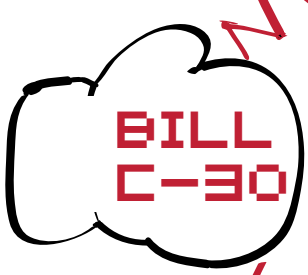
HOSTS INFECTED BY SPYWARE ORIGINATING IN CHINA

Uncovered by Toronto-based Citizen Lab

The interdisciplinary laboratory based at the Munk School of Global Affairs at the University of Toronto found that the hosts were spread across 103 countries and that 30% of infected hosts were considered "high-value" targets: foreign affairs ministries, embassies, international organizations, NGOs and media.

79%

of Canadian households had access to the Internet in 2010. However, among households with an income of $30,000 or less, only 54% did.



The proposed *Investigating and Preventing Criminal Electronic Communications Act* (also known as the *Protecting Children from Internet Predators Act*) would require ISPs to release subscriber info if police request it—NO WARRANT WOULD BE REQUIRED.

40,000

The number of new proxy URIs (uniform resource identifiers) blocked daily by Guelph, Ont.-based Netsweeper. Proxies allow Internet users to get around walls that block content.

NETSWEEPER

One of the leading providers of "Internet content filtering and web threat management solutions," Netsweeper helps governments and companies block access to web content.

FIGHTING BACK

Ottawa-headquartered Psiphon develops technologies that circumvent content filtering/blocking. The company also has research facilities at the University of Toronto and other sites in Toronto.

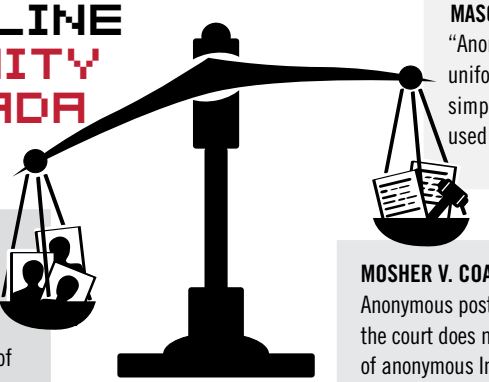
CENSORSHIP

ies blocked any site with sex ed or -Fi network as part of a sweeping xual content.

300,000

The number of comments made by readers each month on CBC.ca. About 90% of these comments are made on CBCNews.ca.

LEGAL PROTECTION FOR ONLINE ANONYMITY IN CANADA



MASON V. DOE:
"Anonymity should not be uniformly expected or ensured simply because the Internet is used as the communication tool."

WARMAN V. WILKINS FOURNIER:
"The removal of an individual's right to remain anonymous may constitute an unjustified breech of freedom of expression."

MOSHER V. COAST PUBLISHING LTD.:
Anonymous posters were identified "because the court does not condone the conduct of anonymous Internet users who make defamatory comments."

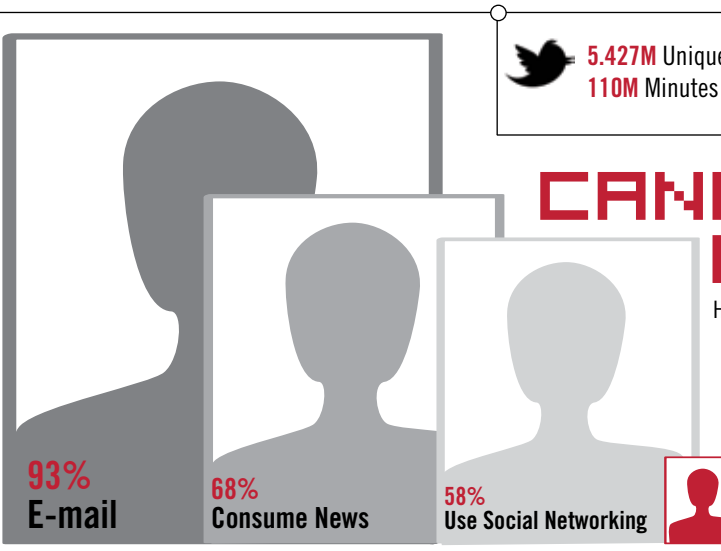
00+
signed
ition to

The cost to put the infrastructure in place to comply with this is estimated in the billions, with speculation that the government may need to provide tens of millions of dollars in subsidies to ISPs.

5.427M Unique visitors in Canada
110M Minutes Canadians spent on Twitter.com

CANADIANS ONLINE

How are we using the Internet at home?



93% E-mail
68% Consume News
58% Use Social Networking
19% Contribute content/participate in discussion groups (e.g., blogging, message boards, posting images)

INFOGRAPHIC by Mark Tang mark@workmark.ca

ANONYMOUS IN THE INTERNET AGE

Think you're protected under a cloak of anonymity when you're online? Think again

By Danielle Stone

It was supposed to be a momentous day for Google. In June 2011, the world's No. 1 Internet search engine unveiled its new social networking site, Google Plus, to the world. Google's vice-president of products praised the new website for allowing users to control how they communicate information, and to whom, on the web.

But Google faced the wrath of Internet users, who tried to sign up to use the site anonymously. Google forbade participation in Google Plus with anything but "the name you commonly go by in the real world"—this in a cyber world where many people choose to use pseudonyms to remain anonymous.

Internet outrage ensued. Message boards, online news articles, status updates and tweets criticized Google Plus's identity rules. In response, Google Chairman Eric Schmidt told journalist Andy Carvin of National Public Radio, "there are people who do really, really evil and wrong things on the Internet, and it would be useful if we had strong identity so we could weed them out."

While this wasn't the first time a website developer or host has taken a stand against anonymous users and comments on the Internet, the divide between those for and against Internet anonymity seems to have intensified recently. Over the last year and a half in Canada, the debate over anonymous commenting has extended beyond the offices of web hosts and anonymous bloggers' websites to the House of Commons and Canadian courtrooms.

In late 2010, former Charlottetown MP Shawn Murphy blasted local websites, including those of CBC News and Charlottetown's *The Guardian*, for allowing anonymous comments on their sites.

"I am actually shocked at some of the anonymous comments that are posted online," Murphy said in a news release after noticing several local organizations and religious groups were the target of disparaging online comments. "Some are hateful, many times untrue and potentially defamatory…I think if you're going to make a comment, you have to be prepared to put your name behind it."

More recently, in January 2012, Associate Minister of National Defence Julian Fantino warned that anonymous use of the Internet "has not escaped the attention of the criminal element, who have quickly adapted to make use of the Web for committing fraud, producing and distributing child pornography and much more."

The following month, Minister of Public Safety Vic Toews introduced Bill C-30, the *Investigating and Preventing Criminal Electronic Communications Act*, commonly referred to by its short title, the *Protecting Children from Internet Predators Act*. If enacted, it would force Internet service providers (ISPs) to support investigations and give the police access to a customer's private data without a warrant. In exceptional circumstances, "any police officer" could request customer information from an ISP, bypassing the courts and identifying the "anonymous" Internet poster.

Toews told the House of Commons that the legislation "is necessary in order to stop the proliferation of child pornography on the Internet," and to prevent individuals from committing illegal acts behind a cloak of anonymity.

Eva Galperin, an activist with the Electronic Frontier Foundation, which advocates for online anonymity around the world, says there's a cost to this sort of policy. "It's very easy to scare people by saying 'people are doing bad things on the Internet,'" Galperin says. "They say, 'Think of the children.' But…to use broader, more draconian tools [such as Bill C-30] would come at an enormous cost to free speech."

For Galperin and other proponents of online anonymity, recent efforts to eliminate online obscurity are ominous. Restricting the ability to speak anonymously on the Internet will affect the most marginalized members of society, Galperin argues.

Remember the Arab Spring? The ability to post anonymous comments on the Internet helped activists organize the movement without fear of being tar-

Canadian company Netsweeper categorizes **5 billion** URLs in order to provide clients with Internet filtering software.

geted by government supporters. In particular, protests organized and discussed via Facebook played a key role in the overthrow of the Egyptian government.

Closer to home, Galperin says anonymity allows would-be whistleblowers to deliver important messages without facing harassment, embarrassment or other repercussions at work and in their communities.

For example, in 2011 and 2012, the CBC broadcast a series of reports on sex abuse scandals within Scouts Canada. Rachel Nixon, director of digital media for CBC News, says the ability to comment anonymously on the CBC's website allowed people who were either victims of the abuse, or otherwise involved with Scouts Canada, to reach out to others. Their comments also helped the CBC advance the story.

"Our view around anonymous commenting is that it really allows people to share their experiences without fear of retribution," Nixon says. "There are a number of difficult stories that we cover on a daily basis … We hear all the time from people who would be very unlikely to share their opinions if they were forced to give their real name. So we see that there is significant value not only in allowing people to express themselves but also in giving further context to the stories that we cover."

Galperin suggests that if individuals can no longer rely on Internet anonymity in such circumstances, they will stop reaching out altogether.

Proponents of online anonymity also point to the necessary divide between personal and professional lives. For instance, there are aspects of yourself that you show to your friends, but not your employer. In the cyber world, an employer or client can search your name and see every comment you've ever made online, and where your personal interests lie. The ability to speak out personally, but anonymously, without jeopardizing professional affiliations or other relationships, is crucial.

This is not a debate affecting but a few individuals. Anonymous comments make up a large portion of expression on the Internet.

In January 2012, a study by Disqus, a company providing global comment platforms to website owners, suggested that people who use pseudonyms participate in greater numbers on message boards and make higher quality comments than those who use real names. The study evaluated half a billion comments made by more than 70 million users on the Disqus comment platform. However, it should be noted that Disqus does have an interest in website owners allowing anonymous comments; it competes with Facebook, which also offers a message board platform, but requires the use of real names.

Part of the difficulty in this debate is that while we have historically revered anonymous speech (countless authors have written under pseudonyms, for example), online anonymity is by no means a guaranteed component of free expression in Canada.

In the United States, the courts have confirmed that anonymous speech is a cornerstone of the *Bill of Rights* and the *First Amendment*. Courts have protected anonymous speech because "the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry," because "it is an honorable tradition of advocacy and of dissent," and because "anonymity is a shield from the tyranny of the majority" (McIntyre v. Ohio Elections Commission, 1995, United States Supreme Court).

In Canada, however, the courts have been less generous. In Harper v. Canada (2001), the court had to decide whether certain provisions of the *Canada Elections Act* violated Section 2(b) of the *Charter*. One of the considered provisions requires a third party to identify itself when it places election advertising. The plaintiff, Stephen Harper, argued that this requirement deprived third parties of the privacy that underlies freedom of expression, and that it deterred third parties from exercising that freedom. Justice Cairns, of the Alberta Court of Queen's Bench, suggested that while Harper had not provided any Canadian authority for the proposition that anonymous speech is protected by Section 2(b) of the *Charter*, and while the proposition did not apply to the specific expression at issue in this case, "this argument should not be foreclosed upon" in the future.

In the case of Warman v. Wilkins Fournier (2010), the Ontario Superior Court of Justice went so far as to support American courts, and the proposition that "the removal of an individual's right to remain anonymous may constitute an unjustified breach of freedom of expression." However, the Supreme Court of Canada has never officially granted *Charter* protection to anonymous speech.

While there may not yet be a solid *Charter* right to anonymous speech,

ABOVE: Editorial cartoon by Liza França, courtesy of the International Editorial Cartoon Competition of the Canadian Committee for World Press Freedom (CCWPF).

Canadian Internet users spend **17%** of their time on social networking sites.

there are general freedom of expression and privacy rights. So finding out the real identity of an anonymous commenter is not easy. A complainant has to go to the website host to obtain the IP address of the anonymous commenter. The complainant then has to take that IP address to the website owner's ISP to obtain billing information (real identity information) for the associated user. It's an arduous process, and many web hosts implement policies where they refuse to turn over identifying information without a court order to avoid being sued by the anonymous commenter for invasion of privacy. As a result, people wanting to find out the identity of an anonymous Internet user have to launch a lawsuit and obtain a court order. Law enforcement officers investigating criminal activity need to obtain a warrant for the information.

This, understandably, places a high burden on Canadian courts. In 2010 the Ontario Divisional Court confirmed in Warman v. Wilkins Fournier that courts must balance the interests of those harmed by anonymous Internet comments with the freedom of expression and privacy interests of anonymous posters. In the 2011 case of Crookes v. Newton, the Supreme Court of Canada further confirmed that "the Internet's capacity to disseminate information has been described by this Court as 'one of the great innovations of the information age' whose 'use should be facilitated rather than discouraged.'" (For more on Crookes v. Newton, see page 18.)

As a result, there have recently been cases where Canadian courts have refused to order the disclosure of an anonymous Internet user's identity.

In 2011, former Aurora, Ont., mayor Phyllis Morris filed a lawsuit for defamation against a group of anonymous individuals who wrote critical comments about her on auroracitizen.ca. At the time, Morris was running for re-election in the small Ontario city. She claimed the statements falsely made her the subject of "ridicule, hatred and contempt." But in order to have her day in court, Morris had to be able to name the individuals who had harmed her. So she brought a motion to the Court to compel the website moderators, their lawyer and the web host to reveal the identities of the anonymous speakers. The Court refused to order the disclosure of the information. In denying the request, Justice Carole Brown, of the Ontario Superior Court of Justice, relied on earlier case law to conclude that while the right to free expression does not confer a license to ruin reputations, there must be a robust standard before the court will order the disclosure of a person's identity. Justice Brown confirmed that before being entitled to obtain identifying information, a plaintiff has to prove a *prima facie* case of defamation against the anonymous speaker—in other words, it has to appear that the plaintiff has been defamed. In this case, because Morris had not established a *prima facie* case of defamation, the Court found disclosure of the Internet users' names "clearly does not outweigh the legitimate interests in freedom of expression and the right to privacy of the persons sought to be identified."

But there are also cases where the courts have ordered the disclosure of an anonymous user's name. For example, there's the August 2010 case of Mosher v. Coast Publishing Ltd., in which a Nova Scotia court ordered weekly newspaper *The Coast,* and Google, to provide information about the identities of several anonymous users who had posted critical comments on *The Coast*'s website about Halifax's fire chief and deputy fire chief. In her ruling, Justice M. Heather Robertson explained that she was granting the chief and deputy chief's application "because the court does not condone the conduct of anonymous Internet users who make defamatory comments." Then in Manson v. Doe, Ontario Justice J. Pepall held that "anonymity should not be uniformly expected or ensured simply because the Internet is used as the defamatory communication tool."

As Bill C-30 makes its way through the House of Commons and Canadian courts try to balance the rights of individuals in the cyber world, anonymous users are unsure of their privacy rights, and web hosts, ISPs and others who have a part in the publishing of a website are left to deal with the issue on a day-to-day basis.

Some websites, such as cbc.ca (which relaunched its Internet platform in 2011) have decided to continue allowing anonymous comments on their sites, but they set strict user terms and policies prohibiting incivility and warning users that illegal activity will not be tolerated.

Website publishers, to avoid being associated with incivility or illegal activity, have taken measures to eliminate the ability to post anonymous comments. For example, in September 2011, the *San Diego Union-Tribune* implemented new rules requiring all users to post comments using their Facebook account; Facebook requires users to provide their real names. (While many users ignore this rule, they run the risk of being caught by Facebook's random checks.)

But Google Plus changed their tune.

In October 2011, Google announced that it was revising its "real names" policy to allow pseudonyms on the site. It may have been a business decision, ensuring increased use of the platform. Or perhaps Google decided to support all forms of expression on the Internet. Either way, Yonatan Zunger, chief architect of Google Plus said, "We thought… that people would behave very differently when they were and weren't going by their real names. After watching the system for a while, we realized that this was not, in fact, the case. And in particular, bastards are still bastards under their own names."

Danielle Stone is an associate at Blaney McMurtry LLP, practicing defamation and privacy law. Prior to becoming a lawyer, she was an investigative journalist.

1 billion: The total number of mobile broadband subscriptions worldwide in 2011.

COLLABORATIVE EFFORTS

Online news site OpenFile gives readers a stake in determining what is news

By Sophie Nicholls

In an age where tweets make headlines, Facebook users become sources and reader comments lead to news stories, the practice of journalism has been transformed. Increasingly, the media are reaching out to the general public for their input, and publishing or broadcasting their tweets, photos and videos. But OpenFile (openfile.ca), an interactive community news site, takes collaboration to the next level.

OpenFile is the brainchild of veteran broadcast journalist Wilf Dinnick. Launched almost two years ago in Toronto, OpenFile now operates out of Vancouver, Calgary, Toronto, Ottawa, Montreal and Halifax (in late 2011, publishing was paused in Hamilton and Waterloo, as audiences were not increasing as quickly as desired). Pushing the boundaries of mainstream journalism trends, OpenFile allows for an alternative point of view expressed from the ground up. The driving concept behind the site is that news should be "community-powered." Individuals email story ideas on issues they deem important, and trained journalists investigate and write the stories that make the cut.

"The referral has become much more important than search," explains Dinnick, emphasizing how story ideas these days are often generated by the public rather than journalists themselves. "There's going to be someone there before a reporter is, we have to accept that… but they don't apply the rigours of journalism. That's where we provide a service. We start creating the valuable content."

OpenFile's editors sift through the story pitches, distinguishing between the promising "files" and the dead-ends much like a news editor would at a daily newspaper. However, an additional level of communication is involved: the editor must communicate not only with the assigned journalist, but also with the individual who suggested the story. According to Toronto editor Chantal Braganza, this can be tricky when an idea is rejected—particularly if it's propagating a specific agenda—or if the published story does not meet the contributor's expectations.

Communicating with readers "is an extra step you have to take," Braganza says, admitting it adds to her workload. "But I think the readers appreciate it. It's absolutely worth it."

According to Braganza, story idea rejections are typically communicated via email, but there are times when the contributor wants a more detailed explanation from the editor. An editor may also discuss a potential story idea further, to unravel an interesting angle or focus. Once the story is published online, the reporter is also available to offer insight, feedback and explanations if the contributor is unhappy with the result. Readers are also welcome to comment on stories.

"Collaborative journalism absolutely enhances free expression," says Danny Greenberg, a reader who recently pitched an article exploring the standard of Montreal's EMS service. "I wanted to know about cardiac survival rates for patients treated in the field by Montreal EMTs. Without OpenFile, I wouldn't even begin to know where to start…. And yet, I as a citizen should have access to this simple statistic. The collaborative efforts of readers (i.e., citizens who have a right to know) and reporters (i.e., those who have the tools to get to the information) lead to more people having more information.**"**

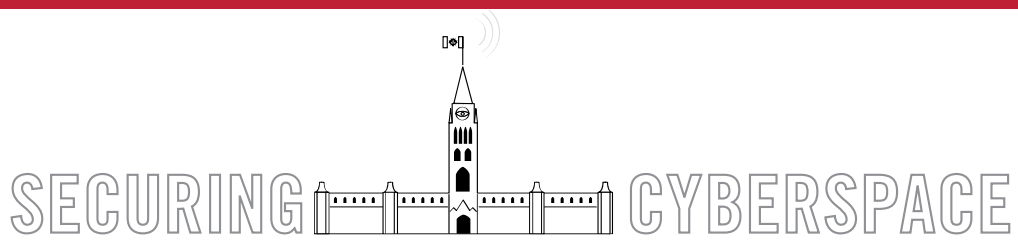
With all this collaboration, how does a news source like OpenFile ensure that traditional journalism standards such as objectivity, transparency and accountability are adhered to? Dinnick explains that OpenFile's roster of more than 400 freelance journalists practice their craft as any good journalist should. The reporting process is just as rigorous, determining what the real story is and using an adequate number of sources to present different points of view. It's a process that took about a year to develop.

So, what does the future hold for collaborative journalism ventures like OpenFile? Though Canada's larger media outlets are not all on board, OpenFile has made some headway with partnerships. In 2010, it collaborated with Postmedia News, sharing coverage of the federal election. Dinnick hopes these partnerships continue to grow and eventually become the norm within the industry. OpenFile is currently in discussions about their next partnership.

Overall, collaborative journalism opens up the discussion forum, allowing citizens to engage in the process and to have their concerns better reflected. Stories covered are cultivated not just with the reader in mind, but with the reader involved. For the practice to expand, media outlets must think outside the box and relinquish their proprietorship over generating news content. With this, a new avenue for freedom of expression is born, increasing the free flow of ideas and information. Citizens are empowered to contribute, rather than simply accept what they receive.

Sophie Nicholls is a Toronto-based journalist working as a copy editor with Metro News International. She is currently an intern at CJFE.

OpenFile opperates in **6** cities: Vancouver, Calgary, Toronto, Ottawa, Montreal and Halifax.



Canada needs to set an example for global Internet security

By Ron Deibert

Another day, another announcement of hacker exploits. Only this time, the perpetrator is not Anonymous or LulzSec, or any of their hacker sympathizers. A group calling itself the Syrian Electronic Army (SEA) posted email credentials, including usernames and passwords, of Al Jazeera journalists, as well as a series of emails that pertained to bias in reports of the revolution in Syria. The SEA boasted about it on their Arabic Facebook page, and went so far as to publish on Internet forums what they claim are the private correspondences of a Syrian Al Jazeera anchorwoman complaining of the apparent biased coverage she was pressured to adopt at the network.

Encountering episodes such as these is unfortunately all too common in the day-to-day routine of the Citizen Lab, an advanced research and development laboratory working at the intersection of digital security and human rights at the University of Toronto. Although based in Canada, the Citizen Lab monitors global cyberspace using a combination of technical and in-country field research methods. Working with groups in Asia, the Middle East, Africa and Latin America, we document targeted cyber attacks on human rights groups, and monitor censorship and surveillance practices and technologies, all with an eye towards protecting and preserving cyberspace as a medium for free expression, association and access to information.

Canadians may find the SEA's invasion of private email correspondences between Al Jazeera reporters distant from their daily lives. How is an obscure hacking attack amidst a far-away civil war in the Arab world connected to Canada? In fact, the connections are not so remote. What we do here in Canada can have important consequences for what goes on abroad. Canadian approaches to cyber security help set standards that other countries follow. When we raise the bar, it puts a spotlight on those who fall below it. Alternatively, when we set low standards at home, we legitimize actions that work at cross-purposes to our core values.

The SEA is a curious hybrid, and a model of the new type of "active defense" that is emerging among autocratic regimes. Not formally linked to the government of Syria, but receiving its tacit support, the SEA undertakes information operations in support of the regime—but does so at an arm's-length, so as to provide the government with a degree of plausible deniability. Its methods are not technically complex by any measure; indeed, they are among the run-of-the-mill techniques widely employed in the world of cyber crime. The SEA defaces and spams websites of adversaries of Assad, but also targets groups that appear to have dubious relevance to Syria, and look more like convenient targets of opportunity. For example, the SEA once defaced the website of an obscure town council in the United Kingdom.

But Syrian active defense in cyberspace is evolving: the regime's methods are showing signs of climbing up the ladder of sophistication. Recently, CNN profiled a malicious software program that was hidden in images that had circulated among Syrian diaspora and pro-democracy activities. Researchers who analyzed the malware determined that the Trojan horse, which connected back to command and control computers based in Syria, was an open-source remote access tool that the Syrians had commandeered for their purposes. Those infected by the Trojan horse would have their computers fully exposed to the attackers, who would then be able to remotely monitor every communication and map their social networks through email and other contacts. Whereas prior defacement and spam attacks had the imprecision of a sledgehammer, the Trojan horse attack is more like a carefully calibrated set of pliers. Targeted attacks such as these are especially dangerous because they could expose dissidents' private correspondences, and even location, leading to arrest, assault or murder.

Around the world, pro-regime hacking attacks on opposition groups are becoming widespread and a growing menace. China's adversaries have been the most frequently targeted for the longest period of time. They are the most well-known, in part because so many other high profile targets—including major corporations and U.S. government agencies—have fallen victim to Chinese-based cyber espionage attacks. The research our group helped to undertake in the *Tracking Ghostnet* and *Shadows in the Cloud* reports, which began with evaluations of targeted threats against the offices of the Dalai Lama and Tibetan Government-in-exile, revealed dozens of government ministries, foreign affairs departments and international organizations that had also been victimized by the same perpetrators. It is noteworthy that in both of our reports we could make no direct connection to the Chinese government itself—there was no "smoking gun." Many observers believe China tacitly

condones the vast cyber criminal underworld as a kind of convenient malaise from which it strategically benefits.

China is not alone in this respect. Over the years, our research has documented denial of service and hacking attacks, information operations and other computer network exploitation against human rights and opposition groups originating from shadowy underground groups whose operations coincidentally benefit entrenched authorities in places like Russia, Kyrgyzstan, Belarus and Burma. Perhaps the most aggressive of these is associated with Iran. In the wake of the 2009 "Green Movement" that sprouted in and around Iran, a group calling itself the Iranian Cyber Army emerged and began menacing Green Movement sympathizers at home and abroad. As with the SEA, the Iranian Cyber Army defaces websites and anonymously spams forums with threatening messages, creating a climate of fear and suspicion within the Green Movement. Recently, quite sophisticated attacks on the certificate authority systems that secure Internet traffic were undertaken by an individual claiming to be connected to the Iranian Cyber Army. As with other governments of its ilk, the Iranian regime has tacitly condoned the activities of the Iranian Cyber Army, even going so far as to applaud its efforts, while also keeping one step removed from formal endorsement and incorporation.

Quasi-national cyber armies like these are spreading for at least two reasons. First, the tools to engage in cyber attacks and exploitation have become widely available and increasingly easy to use as the ecosystem of cyber crime diversifies and expands worldwide without check. Today, botnets (a large number of compromised computers) that can be used to bring down virtually any website with a denial of service attack can be rented from open websites—and some even offer real-time customer service support. Trojan horses and other so-called "Zero Day" exploits can be purchased from underground forums. We have entered the age of do-it-yourself information operations. As recent actions by Anonymous have shown, just about anyone with a grievance can marshal an attack on nearly any target of their choosing. With enough crowd support, these can be devastating and effective.

A second factor, which reinforces and builds upon the first, is the growing pressures on governments and their armed forces to develop cyber warfare capabilities. While cyber warfare threats are often exaggerated to justify massive defense contracts, there is an undeniable arms race occurring and a process of militarization unfolding. Governments around the world now see cyber security as an urgent priority, and their armed forces are stepping up to the challenge. However, not all of them will follow the same playbook. While the United States and other western countries build official "cyber commands," employing uniformed personnel with clearly defined missions, the world's corrupt, autocratic and authoritarian regimes will likely continue to exploit the cyber criminal underground. These regimes will also target a different adversary, reflecting their own unique perception of what constitutes a threat to regime stability: opposition groups, independent media, bloggers and journalists, and the vast networks of civil society groups pressing for openness, democracy and accountability.

For many years, global civil society networks saw the Internet and other new media only as powerful fuel for their cause. They have gradually come to learn that these media can be controlled in ways that limit access to information and freedom of speech for citizens living behind national firewalls. Now there is another, more ominous, cause for concern: cyberspace is becoming a dangerously weaponized and insecure environment within which to operate. It is now a domain through which global civil society networks can be entrapped, harassed and exploited, as much as they can be empowered.

Reversing these trends will not be easy, and will require a multi-pronged strategy among civil society networks, the private sector and liberal democratic governments. Distributed research and monitoring networks that lift the lid on cyberspace and track and analyze the growing threats to rights and openness are critical, as are information sharing coalitions that point to best practices and secure technologies. For liberal democratic governments, the growing militarization of cyberspace has to be seen in more than the narrow terms of the threat to national security, but also as a disease that is gradually undermining the gains that have been made in rights and networking over the past decade. These risks underscore the importance of building global coalitions of governments to protect and preserve cyberspace as an open commons governed by multiple stakeholders at an international level, and also the importance of creating a regulatory environment and a system of incentives to encourage responsible private sector behaviour, particularly when it comes to market opportunities that violate human rights.

Viewed from this broad perspective, the counterproductive impacts of short-sighted domestic policies are put in stark relief: Who are we in western liberal democratic countries to criticize the Iranian Revolutionary Guard for compelling mobile operators to share private conversations of dissidents and activists, when we are about to pass a law that authorizes massive electronic surveillance without judicial oversight? On what basis can we condemn the Syrian Electronic Army or other quasi-state hacker groups for infiltrating the computers of opposition groups when Canadian companies openly market offensive computer network attack products and services in Las Vegas-style trade shows? Protecting and preserving cyberspace as a secure and open commons has to begin at home.

Ron Deibert is director of the Citizen Lab and Canada Centre for Global Security Studies at the Munk School of Global Affairs, University of Toronto.

CONTROLLING INTERESTS

BELL CANADA ENTERPRISES (BCE)

RADIO
C-FAX 1070
580 CFRA
AM 800
107.3 KOOL FM
104.5 CHUM FM
ENERGY 99.7 FM
98.3 FLY FM
C 100 FM
103.5 QMFM
104.9 JRFM
MAJIC 100 FM
94.5 The BEAT FM
93.5 FLOW FM
101.3 The Bounce
KOOL 101.5
93.9 The River
98.9 The Drive
105.3 Kool FM
AM 580
K FUN 99.5
FAB 94.3
Country 105
TEAM Radio, 1040
TEAM Radio, 1410
TEAM Radio, 1210
TSN Radio 990
TSN Radio 1050
TSN Radio 1290

NEWSPAPERS/MAGAZINES
15% OWNERSHIP OF:
The Globe and Mail
Report on Business
Canadian University Report
Real Estate Collection

TELEVISION
CTV
CTV2
CTV News Channel
BNN
CP24
MuchMusic
MTV Canada
MuchLOUD
MuchMore
MuchMoreRetro
MuchVIBE
Juicebox
MTV2 Canada
TSN
TSN2
RDS
RDS2
RDSINFO
NHL Network Canada
ESPN Classic
Fashion Television
Bravo!
Book Television
Discovery Channel
Discovery Science
Discovery World HD
ID (Investigation Discovery)
SC (Science Channel)
Animal Planet
The Comedy Network
Comedy Gold
E!
Space

ASTRAL MEDIA

TELEVISION
SE (Super Écran)
Cine Pop
TMN
HBO Canada
MPix
Family
Disney Junior
Viewer's Choice
Vie
CanalD
Series+
Télé
Historia
Vrak
Disney XD
MP (Musique Plus)
Musimax
TeleToon
TeleToon Retro
CFTK-TV (TERRACE, B.C.)
CJDC-TV (DAWSOM CREEK, B.C.)

RADIO
EZ Rock
Sun FM
AM 1150
Virgin Radio
AM 650
SHORE 104.3 FM
CJAY 92 FM
Classic Country AM 1060
CJFW FM
TEAM 1260
100.3 The Bear
QX 104
HOT 103
101.1 The Farm
KX 96
Big Dog 92.7
102.3 The Bear
101.5 The Bear
BX 93
Funny 1410
NewsTalk 1290
NewsTalk 610
102.9 K-Lite
820 CHAM
Oldies 1150
Star 96
890 CJDC
NRJ
Rouge FM
97.7 HTZ FM
boom FM
Bear 106.9
CJAD 800 AM
CHOM 97.7
MAX 104.9
K 93 FM
Big Dog 100.9
99.5 Cat Country
Capital FM 106.9
KHJ
FOX 105.3
CJ 104

CORUS ENTERTAINMENT

RADIO
The Peak 95.1
B101
Chay today 93.1
AM 770
Country 105
Q 107
CJSS 101.9
Variety 104.5
92.5 JOE FM
AM 630
CISN Country 103.9
News 880 AM
1460 CJOY
Magic 106.1
AM 900
Vinyl 95.3
Y108
FM 96
CKWS 104.3
107.5 Dave FM
91.5 The Beat
More 103.9
AM 980
FM 96
103.1 Fresh FM
99.1 Fresh FM
The Wolf 101.5
100.5 KRUZ
102.1 The Edge
AM 640
Q107
99.3 FOX
AM 730
CKNW AM 980
Classic Rock 101
CJOB 68
Power 97

TELEVISION
ABC Spark
Channel 12 (DURHAM, ONT.)
CHEX Peterborough
CKWS
CMT (Canada)
Cosmopolitan TV
DUSK
Encore Avenue
HBO Canada
Movie Central
Nickelodeon (Canada)
OWN
Sundance Channel (Canada)
Teletoon
Teletoon Retro
Telelatino
Treehouse
W Movies
W Network
YTV

SHAW

TELEVISION
Global TV
Action
BBC Canada
Dejaview
DIY Network Canada
Global Reality Channel
HGTV
Food Network Canada
History Television
IFC
Movietime
Mystery
National Geographic
Showcase
Showcase Diva
Slice
TV Tropolis
Twist TV

"SOCIETIES NEED TO HAVE ACCESS TO A DIVERSITY OF MEDIA AND A PLURALITY OF POINTS OF VIEW. AND THIS WHY WE ALWAYS CHALLENGE AND CONFRONT THE IDEA OF HUGE CONGLOMERATES OF MEDIA OR OF MONOPOLIES AND OLIGOPOLIES—THAT, I THINK, VIOLATES THE RIGHTS OF THE POPULATION."

—FRANK LA RUE, SPECIAL RAPPORTEUR ON
FREEDOM OF EXPRESSION FOR THE UNITED NATIONS

ROGERS

RADIO

660 AM
Country (93.3, 107.1)
JACK FM
Lite 95.9
Mountain FM 106.5
Mountain FM (107.1)
Sonic (102.9, 107.5, 104.9, 94.5)
ROCK (105.3, 106, 97.7, 97.9)
FAN 960
The River 107.7
World FM (101.7)
91.7 The Bounce
star 98.3
The Ocean 98.5
News 1130 (1310, 95.7, 570, 680)
92.1 CITI FM
102.3 Clear FM
Lite 92.9
600 CKAT
98.1 CHFI
CHEZ 106
96.7 CHYM
EZ Rock (99.3, 100.5, 105.3)
K-Rock 105.7
105.3 Kiss
Kiss 92.5
Kix 93.5
Kix 106.7
Q 104 (104.3 FM)
Q 92
SN 590 The FAN
102 FOX
Y 101
102.3 BOB FM

TELEVISION

Citytv (TORONTO, VANCOUVER, WINNIPEG, CALGARY, EDMONTON)
OMNI (CALGARY, EDMONTON, VANCOUVER)
OMNI.1
OMNI.2
The Biography Channel
Sportsnet
G4 Tech TV
The Shopping Channel
Rogers TV
OLN

MAGAZINES

Advisor's Edge
Advisor's Edge Report
Assurance
Avantages
Baby & Toddler
Benefits Canada
Bout de Chou
Business Research Services
Canadian Business
Canadian Capital
Canadian Corporate Counsel Association
Canadian Directory of Shopping Centres
Canadian Grocer
Canadian Healthcare Manager
Canadian Insurance Top Broker
Canadian Investment Review
CARDonline
Chatelaine
Châtelaine
Connected
Connected For Business
Conseiller
Cosmetics
Cosmétiques
Directory of Restaurant & Fast Food Chains
Directory of Retail Chains
Drugstore Canada
Enfants Quebec
Flare
HELLO!
L'actualité
L'actualité pharmaceutique
L'actualité médicale
LouLou
LOULOU
Maclean's
Marketing
Monday Report on
Retailers & Shopping Centre News
MoneySense
National
Pharmacy Practice
Poupon
PROFIT
Québec Pharmacie
Sportsnet
The Medical Post
The National List of Advertisers
Today's Parent

QUEBECOR

NEWSPAPERS (SUN MEDIA CORPORATION)

Le Journal de Montréal
Le Journal de Québec
Calgary Sun
Edmonton Sun
Ottawa Sun
Toronto Sun
Winnipeg Sun
24 Hours (TORONTO, CALGARY, VANCOUVER, EDMONTON)
24 heures (MONTRÉAL, OTTAWA)
Barrie Examiner
Belleville Intelligencer
Brantford Expositor
Chatham Daily News
Cobourg Daily News
Cornwall Standard-Freeholder
Fort McMurray Today
Kingston Whig-Standard
Niagara Falls Review
North Bay Nugget
Orillia Packet & Times
Owen Sound Sun Times
Pembroke Daily Observer
Peterborough Examiner
Port Hope Evening Guide
Sarnia Observer
Sault Star
Simcoe Reformer
St. Catharines Standard
St. Thomas Times-Journal
Stratford Beacon Herald
Sudbury Star
Timmins Daily Press
The Daily Herald Tribune (GRAND PRAIRIE, ALTA.)
The Daily Graphic (PORTAGE LA PRAIRIE, MAN.)
The Daily Miner and News
The Recorder and Times
Welland Tribune
Woodstock Sentinel Review
+259 WEEKLY TITLES

TELEVISION

TVA
LCN
Sun TV
Argent
Prise 2
Yoopa +

MAGAZINES

Dernière Heure
Magazine Animal
7 jours
tv hebdo
Le Lundi
Échos vedettes
star système
Star Inc.
Clin d'oeil
filles
fa
Cool!
decoration chez soi
clodine
Rénovation bricolage
Les idées de ma maison
Côté jardins
espace parents
Moi & Cie
femme plus
TV 7 jours

TRANSCONTINENTAL

NEWSPAPERS

Journal Métro
Amherst Daily News
Cape Breton Post
The News (NEW GLASGOW, N.S.)
Truro Daily News
The St. John's Telegram
The Western Star (CORNER BROOK, NFLD.)
Journal Pioneer
The Charlottetown Guardian
Moose Jaw Times Herald
Prince Albert Daily Herald
+110 WEEKLY, BI-WEEKLY AND MONTHLY TITLES

MAGAZINES

A+
Les Affaires
Bel Âge Magazine
Condo Direct
Coup de Pouce
Canadian Gardening
Canadian Living
Décormag
Elle Québec
Elle Canada
Finance et Investissement
Fleurs, Plantes et Jardins
Good Times
The Hockey News Magazine
Investment Executive
Le Journal Bel Âge
Journal Constructo
Magazine Voir Vert
Magazine les 100 Leaders de la Construction
Maison d'aujourd'hui
Maison Direct
More
Premium, l'intelligence en affaires
Québec Vert
Style at Home
Vancouver Magazine
Vita
Western Living

OUT ON A LIMB

Canadian whistleblowers face great obstacles with little or no legal protection—just for doing the right thing

By Arnold Amber

When it comes to the protection of whistleblowers, Canada ranks near the bottom of western democracies that have taken up the issue.

We are deficient when it comes to a strong legal framework and the development and administration of protection protocols in corporations and government. There is also an extremely aggressive pushback by companies, governments and others against whistleblowers when their institutions are accused of wrongdoing.

When asked why Canada has such a meagre record of whistleblowers successfully taking on private corporations, David Hutton, executive director of Federal Accountability Initiative for Reform (FAIR), this country's pre-eminent whistleblowers organization, answers quite bluntly: "Because they have all been smashed down by their employers with threats about their jobs or lawsuits if they go public."

In fact, there is no direct legal protection in Canada for whistleblowers working in the private sector. (See last year's *Review* for "Whistleblower Protection Still in its Infancy in Canada" by Phillip Tunley for a rundown of the legal situation in this country.)

While Canada still fumbles with protection rights, the first law in the United States to protect those we now call whistleblowers in the federal civil service was passed way back in 1863. The law protected them from wrongful dismissal, and even provided a percentage of the money recovered or damages won by the government. Since then, federal and state governments have passed a number of other laws which have expanded protection in both the public and private sectors. The British only got around to passing legislation in 1998, but it includes a provision that provides whistleblowers with protection against victimization and dismissal.

In 2007, Canada finally passed its *Public Servants Disclosure Protection Act*, which established a procedure for the disclosure of wrongdoing in the federal public sector, including the protection of whistleblowers. But the *Public Service Modernization Act* made things worse for federal employees, because it prohibits present or former civil servants from suing the federal government because of issues once they become whistleblowers. (See fairwhistleblower.ca for an analysis of the shortcomings of the *PSDP Act*.)

To make matters worse, along came Christiane Ouimet. A longtime bureaucrat, Ouimet was appointed the first federal public sector integrity commissioner by the Conservative government in 2007, and was responsible for the administration of the newly passed whistleblower protection law.

But the watchdog became the hound dog three years later when Sheila Fraser, then Canada's celebrated auditor general, began an investigation into Ouimet's performance. Ouimet immediately resigned, and Fraser later issued a damning report, disclosing that Ouimet had intimidated employee whistleblowers and engaged in "retaliatory actions."

The investigation also found that during Ouimet's tenure, only five investigations were launched into the 228 complaints filed concerning alleged wrongdoing, and not even one instance of wrongdoing was deemed to have occurred. Lastly, it showed that 19 out of 22 of Ouimet's staff had left in the previous year, and that complaints from some of them triggered the investigation. (It was later reported that Ouimet received $500,000 in severance for her 25 years of service in the federal civil service.)

PHOTO: REUTERS

ABOVE: Allan Cutler

Despite these dismal conditions, a number of Canadians have taken the challenge to raise issues of wrongdoing, first internally with their employers, and when that did not change anything, by going public. The FAIR website details cases involving more than 30 whistleblowers; their targets include abuse in federal, provincial and city governments, the RCMP and local police departments, the Canadian Armed Forces and other institutions including a hospital and a union. Here, from FAIR, are five prominent examples.

JOANNA GUALTIERI

Gualtieri's saga began in the early 1990s when she complained about waste and extravagance in the purchase of high-end accomodations for Canadian diplomats posted abroad. Among the examples of waste she chronicled was a multimillion-dollar mansion in Tokyo that was allowed to stand empty for three to four years while the diplomat who was to occupy it received hundreds of thousands of dollars a year to rent a luxury apartment, also in Tokyo. She also claimed that million-dollar condos in Tokyo were used to house the ambassador's butler and chef, a violation of the rules.

Following her reports, Gualtieri claimed foreign affairs brass began a pattern of harassment that eventually

forced her to go on medical leave. In 1998, she filed a $30-million lawsuit against the federal government, claiming department officials emotionally abused and ostracized her.

The case dragged on for 10 years at various court levels before Gualtieri and the government reached an undisclosed settlement. During those years, Gualtieri took other action as well—she founded FAIR (Federal Accountability Initiative for Reform) the activist organization that works to protect whistleblowers who protect the public interest.

ALLAN CUTLER

Cutler became a key whistleblower in the sponsorship scandal, and a prominent witness in the Gomery inquiry.

A procurement officer with Public Works Department in Ottawa, Cutler refused to go along with improper procurement practices, and as a result suffered retaliation from management over the course of many years. He lodged a complaint with his superiors, which prompted a departmental audit of the advertising and public opinion division.

During the sponsorship investigation, Cutler tabled an inch-thick document that contained meticulous notes, memos and his own diary detailing how the rules were being broken. It can be argued that Cutler's testimony was a key factor in the downfall of the Liberal government in the 2006 federal election.

THE 'HEALTH CANADA THREE'

In 1998, three Health Canada scientists in the Veterinary Drugs Directorate of Health Canada, Dr. Shiv Chopra, Dr. Margaret Haydon and Dr. Gérard Lambert, blew the whistle on the drug approval process for bovine growth hormone. They said human health concerns were being ignored due to pressure from drug company lobbyists. After years of dispute with Health Canada, all three were fired in 2004.

In 2011, Dr. Lambert was reinstated by the Public Service Labour Relations Board. The cases for the others are being appealed to Canada's Federal Court. The three were awarded the first CJFE Integrity Award last year.

PHOTO: SALMAN AGHVAMI

ABOVE: Dr. Shiv Chopra

DR. NANCY OLIVIERI

In 1998, Dr. Olivieri, a scientist at the Hospital for Sick Children in Toronto and clinical professor at the University of Toronto, discovered evidence suggesting that a drug she was testing might be life threatening. Apotex Inc., which partly funded her research, insisted that she should not publish her findings, and threatened legal action if she were to inform the patients in the trials. The University refused to intervene in spite of its responsibilities for public health and for scientific integrity.

After six years of legal proceedings and independent investigations that supported Dr. Olivieri's findings, she reached a settlement with Apotex in 2004, which included a substantial payment to her. However, the company refused to pay, claiming that Olivieri had violated the terms of the settlement by "disparaging" the company or its drug.

After another four years of litigation, Apotex was ordered by the Ontario Superior Court to pay up. In response, the company launched a new lawsuit against Dr. Olivieri. As of publication, this latest lawsuit has not been settled.

RICHARD COLVIN

Although he does not like being referred to as a whistleblower, and says he was only doing his job, diplomat Richard Colvin faced a most ferocious attack when speaking against government wrongdoing. His opposition: Prime Minister Stephen Harper, Defence Minister Peter MacKay, their cabinet, their parliamentary caucus and the Conservative Party of Canada.

Colvin was a senior diplomat in Afghanistan in 2006–2007. He repeatedly raised concerns about the potential for torture of prisoners the Canadian military handed over to Afghan authorities. He sent

PHOTO: CANADIAN PRESS

ABOVE: Richard Colvin

memos to 79 government officials, including those in the Foreign Affairs and National Defence departments. When no action was taken, Colvin went to the Military Police Complaints Commission. Although 22 public servants were subpoenaed to testify, only Colvin did so after the Department of Justice lawyers sent letters to them.

Meanwhile, the issue boiled over on the political level: the minority Conservative government kept insisting that there had been no torture, no cover-up and the Canadian military had done no wrong, but the other parties eventually forced a House of Commons committee meeting.

Colvin told the committee that all detainees transferred by Canadians to Afghan prisons were likely tortured, and many of the prisoners were innocent. He derided the policies of Canada's Armed Forces, which did not monitor their conditions, took days, weeks or months to notify the Red Cross, and kept poor records. Colvin said that for Afghan intelligence interrogators in Kandahar, torture was "a standard operating procedure."

Government ministers responded immediately to Colvin's testimony with an all-out attack on his credibility. Then Defence Minister Peter McKay told reporters Colvin's evidence "was not credible…. what we're talking about here is not only hearsay, we're talking about basing much of his evidence on what the Taliban have been specifically instructed to lie about if captured." During the continuing political uproar Prime Minister Harper prorogued Parliament for two months to deflect attention from the issue.

Arnold Amber was a longtime executive producer with CBC Television. He was a union representative involved in an early federal government consultation on the drafting of whistleblower legislation.

TRUTH AND CONSEQUENCES

Blowing the whistle is risky business

By Arnold Amber

CJFE launched a new award last year to honour Canadians who, at great personal and professional risk, report wrongdoing in their workplaces. Called the CJFE Integrity Award, it recognizes whistleblowers who have attempted to correct behavior in the public or private sectors. In creating the award, CJFE believes that whistleblowing is a right of free expression, and affirms its belief that there should be greater protection for whistleblowers in Canadian law and practice.

Whistleblowing is generally undertaken by those who combine an extraordinary sense of conscience and determination with a desire to make society better and safer. What most Canadians do not know is how difficult it is, and how great the risks are. People who are brave enough to go public about misdeeds in the workplace are often attacked by their employers and branded ratfinks, squealers, snitches or disloyal traitors—or worse. Alan Levy, an associate professor at Brandon University, in Brandon, Man., who has done considerable research on whistleblowers in Canada, estimates that nearly all end up losing their jobs—either because they are hounded out or actually fired.

There are many definitions of what whistleblowers do, but the common elements are that they have inside information of wrongdoing or negligence involving corruption, misconduct, illegal or unethical activity or other actions that can adversely affect the public's well-being, or the strength of a country's democratic processes.

Whistleblowers, particularly in the United States, have taken on government and corporations in famous cases that have changed public policy, protected the public from harm, or led to the arrests of senior executives of major corporations:

- DANIEL ELLSBERG gave the Pentagon Papers, about the Vietnam War, to *The New York Times*, which contributed to the erosion of public support for the war and changed U.S. policy.
- JEFFREY WIGAND spilled the beans about the nicotine his tobacco company was putting into cigarettes to addict smokers. It ignited the debate that led to stronger non-smoking regulations in many parts of the world.
- CYNTHIA COOPER AND SHERRON WATKINS exposed financial illegalities at WorldCom and Enron, respectively, two giant enterprises that eventually went bankrupt. Their information led to lengthy prison terms for senior executives.

Despite the fame some whistleblowers have gained, nearly everyone who takes the path less travelled faces vicious and unrelenting opposition from their employers—whether government, corporate or another type of institution. Most whistleblowers are censured, defamed, disciplined, sometimes fired and, in extreme cases, sued by those trying to cover up the wrongdoing that had been done.

Becoming a whistleblower is like competing in a marathon, not a sprint. A whistleblower's first obligation is to make the complaint within the organization where they work; only if this process does not address the wrongdoing will they then have protection when they go public.

In many cases, the harassment and ensuing arbitration or court cases result in stress, mental pressure, anguish and anxiety for the whistleblowers. And nothing moves quickly. In Canada, for example, it took 18 years for the charges by Joanna Gualtieri against the Foreign Affairs department to be settled, while Dr. Nancy Olivieri of Toronto is in year 14 of her fight with a drug company.

Whistleblowers are needed because they know more about what is going on where they work than anybody else. They know when and how corporations are cutting corners in quality and safety, when proper procedures are not being followed in government dealings, and so on.

But the problems for whistleblowers are usually very difficult. The Federal Accountability Initiative for Reform (FAIR), a Canadian support organization whose mandate is "Protecting whistleblowers who protect the public interest," says that it's only after whistleblowers go public that they discover "it's not just their immediate boss or a colleague that they are up against, but perhaps an entire department, perhaps an entire government, desperate to avoid bad publicity."

Many whistleblowers say they originally brought their concerns to their immediate superiors or other senior managers because they believed that doing so was part of their job. Their first motivation was to stop the wrongdoing, and they went public only when they became convinced their employers had no intention of fixing the problem.

Now, probably more than ever, we need whistleblowers. Over the past few years nearly all levels of government have changed how they keep an eye on industries. Monitoring has been replaced with a self-regulation system where the companies themselves are required to do the inspections and report the results back to government. In many cases, there is no independent evaluation in sectors ranging from aviation to food, water quality to rail traffic, and on and on. The inadequacy of the situation was vividly exposed earlier this year when the federal auditor general blasted Transport Canada because 70 per cent of Canadian aviation companies were not inspected last year. In his report Michael Ferguson said: "Transport Canada is not adequately managing the risks associated with its civil aviation oversight."

The battle to improve whistleblower protection is reminiscent of the struggle years ago to promote other human rights, such as racial equality and sexual orientation. That means a need for more education in the public realm, and direct and sustained pressure on politicians to pass better laws and commit to effective enforcement (not lip service) in the public sector. Moreover, protection for whistleblowers must be extended to the private sector. These changes will be an uphill battle, but one that is definitely worth taking on to create a better and safer Canada.

CROSS-CANADA FREE EXPRESSION REPORTS

Compiled by Amy Johnson

BRITISH COLUMBIA

CAMPAIGN SIGNS REMOVED

The British Columbia Civil Liberties Association (BCCLA) called attention to "draconian" actions by municipal officials in Vancouver and Chilliwack during the Harmonized Sales Tax referendum campaign. Reports released by the BCCLA in June 2011 claimed that officials from both municipalities had been removing political signs from public spaces such as boulevards.

ALBERTA

MLA THREATENS FUNDING CUT FOR SCHOOL BOARD

Conservative MLA Hector Goudreau invoked strategic intimidation tactics in a letter to an Alberta school board in February 2012, by threatening to delay or cancel funding for a new school if the board expressed any views critical of the provincial government. Betty Turpin, superintendent for the Holy Family Catholic Regional Division (HFCRD) school board, had written to the MLA's office about potential funding for a dilapidated school in her division, and the HFCRD sent a video to provincial authorities revealing the extent of the deterioration. The school board chair believes their requests were interpreted as criticism. After Goudreau's threatening letter garnered negative response, he resigned as head of a cabinet policy committee on community development in early March.

SASKATCHEWAN

MP WINS DEFAMATION LAWSUIT

Saskatoon MP Maurice Vellacott won a defamation lawsuit in February 2012 related to a suggestive question posed by George Laliberte during the call-in portion of a televised elections debate in 2006. Laliberte called from the Liberal campaign office and asked Vellacott if he had sexually assaulted a secretary at a specific church. Vellacott denied the sexual assault and association with the church in question. This is a unique case of a defendant's question, rather than statement, being deemed defamatory.

MANITOBA

REMOVAL OF SIGNS IN CLASSROOMS

The Border Land School Division of southwestern Manitoba mandated the removal of "Ally" signage advocating support of a safe space for youth of various sexual orientations from classrooms of an Altona elementary school. In March 2011, parent complaints led to the decision to take down the signs, and debate over the infringement on open academic dialogue and freedom of expression on the basis of discriminatory viewpoints has ensued.

MANITOBA PRESS COUNCIL SHUTS DOWN

The Manitoba Press Council ceased operations on Jan. 1, 2012, after its remaining newspaper participants pulled their subsidies, eliminating the organization's funding. The organization functioned as a watchdog over journalistic ethics for 27 years. Its closure marks another year of decline in support for such accountability organizations.

ONTARIO

INFORMATION AND PRIVACY COMMISSIONER OPPOSES BILL C-30

Ontario Information and Privacy Commissioner Ann Cavoukian has been vocal in her opposition to the Conservative government's draft of Bill C-30, the *Protecting Children from Internet Predators Act*. In an editorial for the *National Post*, Cavoukian called the Bill, which would permit any police officer to acquire the personal information of a client from their Internet service provider without a warrant, "a system of expanded surveillance," and Cavoukian emphasized, if enacted, Bill C-30 would "substantially diminish the privacy of Ontarians and Canadians as whole." For more on Bill C-30, see page 19.

SUN NEWS TV INTERVIEW: AN EXERCISE IN FREE EXPRESSION?

The Canadian Broadcast Standards Council ruled in February 2012 that Sun News Network host Krista Erickson's interview with interpretive dancer Margie Gillis did not violate the group's ethics code or hinder the interviewee's right to respond. The interview garnered more than 6,500 complaints regarding the host's treatment of her guest on the program in June 2011, which featured Erickson mimicking interpretive dance, verbally berating Gillis and criticizing the Canada Council for the Arts' funding of Gillis' dance foundation. The interview was vindicated by the Council's decision that Erickson was entitled to "determine the course of the interview, and raise topics the interviewee might not have anticipated," and that the guest was offered the chance to leave, which she refused.

QUÉBEC

JOURNALIST ORGANIZATION FIGHTS FOR ATI

La Fédération professionnelle des journalistes du Québec (FPJQ), a non-governmental organization of journalists that defends freedom of the press and the public's right to information, have been notably vocal about access to information (ATI) issues this past year. The FPJQ recently joined a coalition of media outlets in the campaign to protect journalists' right to defend themselves before the Commission d'accès à l'information, after Hydro-Québec recently called attention to an article from provincial bar legislation that could deny it. The FPJQ has also published alerts on their website about the silencing of federal scientists, and called upon its members to submit ATI experiences in a survey that would demand more transparency and accountability to the system in Québec and at the federal level.

JOURNALIST'S HOME RAIDED BY POLICE

In February 2012, officers from the Sûreté du Québec (SQ), Quebec's provincial police force, invaded the home of journalist Éric-Yvan Lemay in response to his coverage of confidential medical files he had encountered in the open at four hospitals in the greater Montréal area. Police officers confiscated the journalist's computer and clothing items he wore during his investigations at the hospitals, and they took photographs of his hands. Condemnation by groups including Paris-based Reporters sans frontières, the FPJQ, CJFE and the Canadian Association of Journalists followed. The SQ dropped the criminal charges nearly a month after the initial raid.

NEW BRUNSWICK

BLOGGER ARRESTED AND CHARGED WITH CRIMINAL LIBEL

In January 2012, the Fredericton Police Force executed a warrant to search the home and seize computer equipment of local blogger Charles LeBlanc. The search came in response to a series of critical posts he wrote regarding the municipal police, including allegedly libelling a Fredericton police officer. The Canadian Civil Liberties Association sent Fredericton Police Chief Barry McKnight a letter regarding their concern over the possible infringements the case makes on LeBlanc's right to free expression. LeBlanc is currently facing criminal libel charges in court.

NOVA SCOTIA

COALITION FORMED TO IMPROVE ACCESS TO INFORMATION

In July 2011, former Nova Scotia Information Commissioner Darce Fardy formed the province's Right to Know Coalition (RTKC) as an effort on the part of journalists and former government workers to vie for improvement of provincial freedom of information legislation. Fardy, who has witnessed the increasing struggles of navigating the legislation from both ends since his time in office, is currently leading the RTKC in drafting an appeal to Nova Scotia's current information commissioner, with a list of recommendations on how to improve upon and facilitate the common use of the legislation.

BILL TABLED TO PROMOTE ARTISTS' FREE EXPRESSION

Nova Scotia Communities, Culture and Heritage Minister David Wilson introduced the Status of the Artist legislation, defining support for the arts and culture sector, on March 30, 2012. The new legislation seeks to emphasize the province's commitment to artists' freedom of expression rights in its promotion of their "fair treatment" and financial support for various modes of expression. This legislation was developed from the province's five-point plan to improve support for arts and culture, released in February 2011.

Voter turnout was a dismal **61%** in the 41st General Election on May 2, 2011.

PRINCE EDWARD ISLAND

PAPER RUNS NAMES, SALARIES OF GOVERNMENT AGENTS

In a gesture towards transparency and accountability, Prince Edward Island's *Eastern Graphic* newspaper ran a list of the salaries and job titles of P.E.I. employees from three federal government agencies. The move was intended to protest the fact that P.E.I. is the only province in which freedom of information legislation prohibits the release of the salary data of its provincial employees. The story, which ran the week of March 26, 2012, garnered mixed feedback: While some bureaucrats were displeased with the exposure and non-federal employees "staggered at the salaries," many government officials supported the transparency and the poignancy of such a piece before the federal budget was announced in early April.

TOP MARKS IN NATIONAL FOI AUDIT

Prince Edward Island's capital city received the highest municipal ranking in Newspapers Canada's National Audit of Freedom of Information 2011, by fully releasing information requested within 10 days on average. Charlottetown was also praised by Newspapers Canada for fully releasing information that doesn't necessarily fall under access to information law. Moreover, the city's Queen Elizabeth Hospital complied with requests for senior officials' credit card records, releasing all desired information in less than 30 days.

NEWFOUNDLAND

WHISTLEBLOWER PROTECTION ENTRENCHED IN ST JOHN'S

St. John's City Council passed a new bylaw in February 2012 aimed at the legal protection of city workers who report misconduct. The bylaw had been undergoing drafting and revisions for more than two years before a recent whistleblower complaint over improper spending at a city depot pushed the issue to the top of the city's agenda. The motion is considered a movement towards accountability, and encourages employees to express their dissent and concerns freely and legally.

YUKON

YUKON MOVING TO LIMIT PROTESTERS IN PUBLIC SPACES

In June 2011, a group of Yukon protesters organized a campsite at the territory's legislature in order to draw attention to a study revealing the Yukon's rates of homelessness. The Yukon government issued eviction notices to the protesters in late November 2011, ordering the individuals off the peaceful protest site, with the threat of forced removal after 48 hours. Since that time, MLAs in the territory have begun preparing to amend the *Financial Administration Act* to allow officials the right to create new rules to restrict the use of public space, and further abilities to fine and remove those who disobey.

NUNAVUT

NATIVE-LANGUAGE PROGRAM FOR TEENS

In September 2011, the Inuit Broadcasting Corporation introduced its fourth original program titled *Qanurli? What Now?*, a television show directed at Inuit adolescents with the purpose of providing a voice for, and local representation of, "the everyday life of Inuit youth." *Qanurli? What Now?* combines a series of local youth discussions, on topics such as local modes of expressing and exploring Inuit culture, with satirical comedy segments, and is filmed in Inuktitut with English subtitles. The second season begins this fall.

NORTHWEST TERRITORIES

BUREAUCRAT WHISTLEBLOWER ASKED TO RESIGN

Bill Turner, a policy adviser at the NWT Business Development Investment Corporation (BDIC), was asked to resign from his part-time security post at the legislative assembly after leaking emails to the media. Turner, who was pursuing an affirmative action grievance against the BDIC regarding their hiring policy for out-of-region First Nations workers, discovered printed copies of MLA Daryl Dolynny's emails in the open while on duty at the legislative assembly. In these emails, Dolynny allegedly offered to testify for the BDIC that Turner had been responsible for an earlier information leak, in exchange for the dismissal of charges Dolynny was facing relating to an unpaid loan guarantee. After Turner leaked Dolynny's emails, he was asked by N.W.T. labour relations to halt communications with the media, and the manager of security at the legislative assembly asked him to submit his resignation.

In the 2012 budget, the federal government cut the CBC's funding by **$115 million** over three years.

LEGALLY SPEAKING

By Paula Todd

It's been a year of push and pull on the free speech frontier, with Canadian courts making it both easier and a little tougher for journalists to do what they do best—find out things, and tell other people.

In Québec, the media couldn't win the right to broadcast official recordings of court proceedings. Nor could journalists there loosen the rules that keep them tethered to specific locations in courthouse corridors.

A Montréal shock jock honed the test for "group defamation," while partisan bloggers were given greater latitude thanks to the immediacy of their medium. A Nova Scotia teenager shocked by a fake and sexually offensive Facebook page will have to wait a few more months until the Supreme Court of Canada considers whether she can sue for defamation anonymously. And in Ottawa, the dusty RCMP and Canadian Security Intelligence Service spy records of Tommy Douglas, the "father" of universal health care, were finally hauled into the light.

Paula Todd is journalist, lawyer and member of the Board of CJFE.

SUPREME COURT OF CANADA

CANADIAN BROADCASTING CORP V. CANADA (ATTORNEY GENERAL), 2011

In a bid to make court proceedings more public, the CBC, Groupe TVA, *La Presse* and the Fédération professionnelle des journalistes du Québec brought a Section 2(b) freedom of the press *Charter* challenge against the Québec government's "decorum" policy and the Rules of Practice, which prohibit broadcast of official court recordings and limit journalists from filming, taking photographs or interviewing at certain spots in court hallways. But while the Supreme Court of Canada acknowledged such rules violate the media's *Charter* rights, it ruled the limits were reasonable for the serenity of the administration of justice (Oakes test). Increased press access might generate anxiety. There were, however, two brighter notes: The case affirmed the media's constitutional right to cover the courts, which should help journalists in other provinces where cameras are banned altogether. And since cameras inside courtrooms weren't addressed, the issue is still in play. As the Court stated: "Although the primary purpose of a courthouse is to serve as a place to conduct trials and other judicial proceedings, the presence of journalists in the public areas of courthouses has historically been—and still is—authorized. When journalists conduct themselves appropriately, their presence enhances the values underlying s.2(b), namely democratic discourse, self-fulfillment and truth finding."

COURT DECISION: canlii.org/en/ca/scc/doc/2011/2011scc2/2011scc2.html

SUPREME COURT OF CANADA

CANADIAN BROADCASTING CORP V. THE QUEEN, 2011

News outlets that want to show viewers court exhibits—a critical component of cases—sometimes bump up against protective officials. Now, the highest court has confirmed there is a distinction between broadcasting court proceedings and broadcasting the exhibits themselves. For exhibits, the onus is on the party seeking restrictions to justify limitations (Dagenais/Mentuck test). The Court also increased circumstances to consider, including the vulnerability of the intellectually disabled accused, his acquittal and any taint to a co-accused's trial. Radio-Canada and TVA were ultimately prohibited from broadcasting the accused's police interview exhibit because other developments in the case rendered the original access argument moot.

COURT DECISION: canlii.org/en/ca/scc/doc/2011/2011scc3/2011scc3.html

SUPREME COURT OF CANADA

CROOKES V. NEWTON, 2011

In October, the Supreme Court of Canada's decision stating that merely "hyperlinking"—inserting automatic prompts to material available elsewhere online—does not constitute a republication of the defamatory material itself, was met with a national sigh of relief. But hyperlinking can lead to liability if a defamatory statement is cited with approval. That could be considered publishing, and opens up the possibility of a defamation suit. For more on the nuances of this decision, see p. 18.

COURT DECISION: canlii.org/en/ca/scc/doc/2011/2011scc47/2011scc47.html

SUPREME COURT OF CANADA

BOU MALHAB V. DIFFUSION MÉTROMÉDIA CMR INC., 2011

After a Montréal shock jock, apparently upset over taxi service, ranted on air about the linguistic skills, civility, hygiene and driving abilities—or lack thereof—of certain cabbies, Bou Malhab filed an action for group defamation on behalf of "[e]very person who had a taxi driver's licence in the region of the Island of Montréal on November 17, 1998…and whose mother tongue is Arabic or Creole." Yet, in a 6–1 ruling, the Supreme Court of Canada pointed out that indignation alone is not proof of defamation, which must be "assessed objectively, from the perspective of an ordinary person." Plus, the more sweeping the generalizations made by a known "polemicist," the less likely individual harm can occur to a single individual. "Here, an ordinary person would not have believed that the wrongful, scornful and racist comments made…damaged the reputation of each member of the group of taxi drivers working in Montréal whose mother tongue is Arabic or Creole." The Court didn't rule out individual injury within a group, but proscribed a judicial checklist to consider: size and nature of the group; plaintiff's relationship with the group; target of the defamation; seriousness of the allegations; plausibility or likelihood of acceptance of the comments; and any other "extrinsic factors."

COURT DECISION: canlii.org/en/ca/scc/doc/2011/2011scc9/2011scc9.html

PHOTO: CANADIAN PRESS

ABOVE: Former shock jock André Arthur

SUPREME COURT OF CANADA

CANADA (INFORMATION COMMISSIONER) V. CANADA (MINISTER OF NATIONAL DEFENCE), 2011

Ten years after the initial requests under the *Access to Information Act*, this appeal pulled together four applications by the Information Commissioner of Canada for judicial review of refusals to disclose records (including emails) within the offices of then Prime Minister Jean Chrétien, then Minister of Defence Art Eggleton and then Minister of Transport David Collenette, as well as portions of the Prime Minister's materials in the possession of the RCMP and Privy Council Office. The applications judge refused disclosure on the first three applications, but ordered it on the fourth. The Federal Court of Appeal overturned his decision on the fourth application only. Then, the Supreme Court of Canada dismissed all appeals and the records remain off-limits to the public. This is, in part, because most of the requested material originated from or was maintained by exempt staff or offices and is not within reach of access to information law. As for the Prime Minister, he is not an "officer" of the Privy Council Office and his records and emails aren't accessible under information laws.

COURT DECISION: canlii.org/en/ca/scc/doc/2011/2011scc25/2011scc25.html

PHOTO: CANADIAN PRESS

NOVA SCOTIA COURT OF APPEAL

A.B. V. BRAGG COMMUNICATIONS INC., 2011

Special personal circumstances were raised in the ongoing case of A.B. v. Bragg Communications Inc. (an Internet service provider). A 15-year-old girl discovered a Facebook page had been created using her photograph, a slightly altered name and "humiliating" sexual details. Through her litigation guardian, the teen was granted an order requiring Bragg to identify the people behind a particular IP address. She failed, however, to convince either the trial judge or the Nova Scotia Court of Appeal to approve a pseudonym and a partial press ban to prevent the public from learning the exact information in the offensive cyber ruse. As the Court stated: "Defamation is a claim that one's reputation has been lowered in the eyes of the public. To initiate an action for defamation, one must present oneself and the alleged defamatory statements before a jury and in open court." Possibly anticipating an appeal to the Supreme Court of Canada—which has granted leave to hear the case—the lower Court added: "Should she be successful, one might expect that she will be lauded for her courage in defending her good name and rooting out on-line bullies who lurk in the bushes, behind a nameless IP address." But given the intervenors in the Supreme Court case, including anti-bullying groups and the Privacy Commissioner of Canada, that conclusion will be vigorously debated.

COURT DECISION: canlii.ca/en/ns/nsca/doc/2011/2011nsca26/2011nsca26.html

ONTARIO SUPERIOR COURT OF JUSTICE

BAGLOW V. SMITH, 2011

All levels of courts are grappling with the new cyber jurisdiction—reappraising laws made when words and images couldn't fly around the world in a nanosecond. In Baglow v. Smith, the court noted there's more latitude for insults and heated rhetoric online because, as with live debates, the opportunity to rebut the slurs exists almost simultaneously. The Court concluded: "A statement is not derogatory when made in a context that provides an opportunity to challenge the comment and the rules of the debate anticipate a rejoinder, unless the statement is wholly outside the scope of the debate or otherwise so outrageous as to prevent meaningful argument from continuing."

COURT DECISION: canlii.org/en/on/onsc/doc/2011/2011onsc5131/2011onsc5131.html

FEDERAL COURT

BRONSKILL V. CANADA (MINISTER OF CANADIAN HERITAGE), 2011

In 2005, investigative reporter Jim Bronskill began his arduous journey to uncover the RCMP and the Canadian Security Intelligence Service's (CSIS) dossier on Tommy Clement Douglas, a Canadian politician often referred to as the father of universal health care. Douglas had died more than 20 years earlier. Applying under the *Access to Information Act* (*AITA*), Bronskill traced the summary of surveillance and suspicion to Library and Archives Canada (LAC). But LAC consulted CSIS and refused to disclose certain portions, relying on the international affairs and defence exemption (*ATIA*, Section 15). Clashes with the information commissioner and court officials finally culminated last year when Federal Court Judge Simon Noel shut down the paper chase. Ruling that LAC had been unreasonable and inconsistent (not to mention disingenuous, troubling and worrisome), he ordered it to make a new decision—one that carefully followed the Court's reasons, spirit and precedents.

COURT DECISION: canlii.ca/en/ca/fct/doc/2011/2011fc983/2011fc983.html

FEDERAL COURT

ATTARAN V. CANADA (MINISTER OF NATIONAL DEFENCE), 2011

Canadian law professor Amir Attaran applied under the *Access to Information Act* to see Department of National Defence (DND) photographs of detainees being transferred by Canadian Forces to the Afghanistan Ministry of Defence. Three of those photos allegedly showed a detainee with facial injuries. The DND refused to remove or redact "personal information" from the pictures and therefore wouldn't let Attaran see them. When the information commissioner later held that the DND's refusal was justified, Attaran also applied for judicial review. The Federal Court examined the photographs and said it was satisfied that the edits required to prevent potential disclosure of personal information would be so extensive as to render the images meaningless. The Court said the decision wasn't about balancing competing interests, but rather required an approach to severance that prevents error or risk of disclosure of one's identity. This approach, the Court said, is consistent with the general treatment of personal information under the *Act*, which is to be protected unless it falls within a recognized privacy exception. Attaran's revised request—to see only the hairdos of the detainees—was also refused.

COURT DECISION: canlii.org/en/ca/fct/doc/2011/2011fc664/2011fc664.html

FEDERAL COURT OF APPEALS

ATTARAN V. CANADA (MINISTER OF FOREIGN AFFAIRS), 2011

Canadian law professor Amir Attaran's quest to see Department of Foreign Affairs reports on human rights in Afghanistan gained momentum after the Supreme Court of Canada refused to hear the case. The Ottawa freedom of information proponent first became embroiled in the tussle when he was offered only heavily redacted (censored) annual foreign affairs reports from 2002 through 2006. He then sought the assistance of the information commissioner and the Federal Court, but wound up at the Federal Court of Appeal, where he was granted more access to the documents. The Court ruled Attaran didn't have the burden of proving the minister failed to exercise discretion over the file—because that was the very file he couldn't see. The burden of proof was on the minister to establish that the discretion was exercised in a reasonable manner. The government sought leave to appeal that decision, which the Supreme Court of Canada denied.

COURT DECISION: canlii.org/en/ca/fca/doc/2011/2011fca182/2011fca182.html

PHOTO: CANADIAN PRESS

ABOVE: Amir Attaran

CJFE.ORG