

“... the freedom of speech may be taken away—and, dumb and silent we may be led, like sheep, to the slaughter.” *GEORGE WASHINGTON*

CJFE’s Report Card 2010-11: Like Sheep to the Slaughter

IN THE FIRST EDITION OF THIS REPORT LAST year, we observed that 2009 had brought “more fodder for comment on free expression issues than we have seen in decades.” While 2010 may not have been as remarkable, it couldn’t exactly be called anticlimactic either.

Government secrecy worsened in 2010. As our article “How access to information fails journalists” (p. 24) explains, it has never been harder to pry information essential to a functioning democracy out of the government bureaucracies. The past year may come to be known as the one in which evidence first appeared at the federal level of a systematic machine for politicization of the denial of information to Parliament and the electorate.

The Supreme Court, while not as active on free expression issues as last year, made important rulings on journalists’ right to protect their sources and on the openness of the court system. Some of these rulings were disappointing, but the Court’s recognition of a right to protect confidential sources, at least on a case-by-case basis, is somewhat encouraging.

But it was a single one-time event that placed the blackest mark next to 2010 on the freedom of expression calendar. The G20 Summit in Toronto produced a very disturbing list of violations of the rights of journalists as well as others. In case there was any doubt, this in itself is enough evidence that protecting freedom of expression right here in Canada requires constant vigilance.

Here for the second year is our assessment of the important issues and how some of our major institutions have performed.

ACCESS TO INFORMATION AND THE FEDERAL GOVERNMENT:

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We gave the federal government a failing grade in this area last year and now face the dilemma of how to recognize the fact that its record has worsened. Delays in the release of information continue to lengthen. What is released is even less complete than before. More than half of the federal institutions surveyed for their performance on access to information ranked below average and five failed outright. The governing party was ruled in contempt of Parliament for failing to produce information about major spending programs. Once a leader in access to information, Canada now ranks dead last among five leading democracies. After an investigation sparked by a Public Works bureaucrat’s move to “unrelease” information, Information Commissioner Suzanne Legault found evidence of political interference in the handling of ATI requests at Public Works and raised concerns about similar vetting at other departments. All of which may explain why journalists seem to be using the access system less often than in the past.

INFORMATION COMMISSIONER SUZANNE LEGAULT:

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The Office of the Information Commissioner continues to suffer from a weak access law desperately in need of reform, and from the commissioner’s lack of power to force disclosures and ensure that public interests override the government’s culture of secrecy. Nonetheless, Suzanne Legault is a promoter of open government who shows a willingness to push the boundaries of her limited powers to produce greater access. She has significantly reduced her office’s backlog of complaints. Her reports on the failings of the access to information system are clear and forthright. And she has forcefully explored cases of political interference in the ATI process and referred these to the RCMP for criminal investigation. The government needs more arm’s-length watchdogs like her.

PROTECTION FOR WHISTLEBLOWERS:

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It was an international story—that of WikiLeaks—that drew attention to the role of whistleblowers this year. Events in Canada were less dramatic, and the news here was largely bad. Veteran Sean Bruyey spoke out against provisions of a *New Veterans Charter* and was rewarded by having government officials share details of his mental-health history widely. The Public Sector Integrity Commissioner, whose role is to investigate allegations of wrongdoing and protect civil-service whistleblowers, resigned after being found to have been doing almost nothing to protect whistleblowers. The story is not all bad. The Supreme Court of Canada ruled that whistleblower protection is part and parcel of the *Charter’s* guarantee of freedom of expression, and extended a bit more protection to journalists who rely on whistleblowers as sources. Public understanding of the whistleblower’s role seems to be growing. There is still room for improvement.

THE SUPREME COURT OF CANADA AND PROTECTION OF SOURCES:



The past year brought significant decisions on journalists' right to protect their sources. Disappointingly, the Supreme Court forced *National Post* reporter Andrew McIntosh to hand over to police a document—allegedly forged—linking former prime minister Jean Chrétien with a loan to a business in his constituency. But even in that decision the Court stated that a right to protect sources can exist where the media can show it is in the public interest. That was reinforced in a later case involving *Globe and Mail* reporter Daniel Leblanc, and the Court referred Leblanc's case back to Quebec Superior Court with guidelines on how to resolve it—guidelines that reinforce the role of principles known as the Wigmore Criteria in cases concerning protection of sources. The right of reporters to protect their sources is still not as clear in Canada as we would like it to be, but recent developments are somewhat encouraging.

THE G20 SUMMIT, SECURITY FORCES AND THE FEDERAL GOVERNMENT:



Reports elsewhere have pointed out a frighteningly long list of problems at the G20 Summit held in Toronto in June. The Ontario Ombudsman called it a moment of infamy involving “the most massive compromise of civil liberties in Canadian history.” Freedom of expression was among the victims. The Orwellian concept of creating a “freedom of expression zone” during the summit set the tone for a long list of violations of that freedom, from refusal to recognize legitimate journalistic credentials to detention of journalists without due process or cause. Three reports have already condemned events at the summit. One of these came from the federal Standing Committee on Public Safety and National Security, which found significant human rights violations and called for a judicial inquiry. Conservative members of the committee dissented, calling the summit an “unmitigated success.” Perhaps that depends on your priorities: if they include freedom of expression and assembly, it was not a success but an abject failure.

OPEN COURTS AND PUBLICATION BANS:



The Supreme Court of Canada refused to overturn the rule making publication bans mandatory for bail hearings. Notably, the Court did not use the danger of tainting the jury pool to justify the ruling, so that its position seems to apply even to cases not involving a jury. This was disappointing. So were its rulings on two Quebec cases, upholding the right of judges to limit the use of cameras and recording equipment in courthouses (not just in the courtroom but anywhere in the building) and banning the broadcast of video-recorded statements made to police before charges were laid. On the other hand, the Ontario Court of Appeal ruled in favour of the CBC in a case involving the network's access to exhibits in the case of Ashley Smith, a young woman who died in a correctional institution in 2007.

Finally, as we did in the first edition of this *Review*, we would like to recognize the contributions of other individuals or organizations who have helped advance free expression rights:

Peter Milliken, the retiring Speaker of the House of Commons, for a thoughtful, judicious and wise ruling that found the Harper government in contempt of Parliament for failing to release information on the cost of major new programs.

The Citizen Lab at the University of Toronto's Munk School of Global Affairs was in the news for its role in documenting a cyber-espionage network that affected 1,294 computers in 103 countries. Its work also includes documenting Internet censorship around the world and developing the Psiphon software for circumventing censorship.

George Washington's ominous warning about the dangers of taking away free speech became one of the inspirations for an unequivocal legal standard for America's protection of free expression rights. Canada's history is different, but there is equal passion for vigilance for these rights in the words of one of our founding fathers. Defending his newspaper in court, Joseph Howe begged his jurors “to leave an unshackled press as a legacy to your children.” 🍁