

CJFE's Report Card 2013-14

Some lost, some won: Canada faces many battles for free expression

IT'S BEEN FIVE YEARS since CJFE launched the annual *Review of Free Expression in Canada*. Now is a good time for reflection on how things have changed—or stayed the same. One of our reasons for launching the *Review* was a noticeable spike in free expression issues. Five years ago, the courts were awash in cases dealing with defamation charges against reporters, the protection of confidential sources and hate speech. Meanwhile, the access to information system appeared to be entering an era of deepening decay, and the Internet seemed like it could become both friend and foe of free speech.

Five years on, freedom of expression is still very much part of the national debate, and it has increasingly become a touchstone in assessing the health of Canadian democracy. A number of concerns are unchanged from 2008-09: the courts remain an important front for freedom of expression, with decisions good, bad and mixed; the federal access to information system is still in crisis; would-be whistleblowers still lack the protections to encourage more of them to come forward; and debates continue over digital rights, Internet access and media business models. Equally, earlier worries about government and corporate use of new technologies for surveillance of citizens have escalated to become a chorus of alarm bells.

Adding to these troubling issues, the government has gone beyond censoring “sensitive” information; now, there’s a growing “verbal culture” in Ottawa that avoids the creation of communications records that could be used to hold officials accountable. This, combined with the destruction of government documents, the disposal of archives and the shuttering of whole libraries, is leading to a “disappearance of history,” where information critical to informed public debate is failing to see the light of day because it has been purged—or worse, it wasn’t recorded in the first place.

After five years, we remain convinced of the need for the *Review*, and of the urgency with which we must fight the free expression struggle.

Once again, we begin our annual review of the state of free expression in Canada with our Report Card—a shorthand assessment of Canadian institutions and their impact on the most important free speech issues in the country.

F ACCESS TO INFORMATION

The federal access to information (ATI) system continues to be a source of bad news and a bad grade. Recently released performance statistics for 2012-13, when corrected for the distortion created by one unrepresentative

department, show that delays beyond the 30-day time limit still affect almost 45 per cent of requests, while more than 80 per cent of responses are partially or mostly censored. Staffing and budget cuts are crippling the ATI capacity of some departments (for example, see the RCMP case below). There has been a significant increase in complaints about delays and a 51 per cent increase in complaints about missing records in 2012-13. Missing records may be the result of the destruction of, failure to preserve or failure to create records concerning government deliberations and decision-making. Without major reform of the Access to Information Act and a new law requiring the creation of records, Canadians may witness the disappearance of a significant part of our history.

For more information, see “Access Denied!” on page 24.

I THE RCMP: I(NCOMPLETE)

Access to information complaints against the RCMP tripled between 2011 and 2013. The RCMP understaffed its ATI office so badly that it could not even acknowledge the receipt of requests, let alone respond to them, within the 30 days required by law. The information commissioner couldn’t start investigating the delays because the requests didn’t even have file numbers to identify them. One request, submitted in September 2012, received a response seven months later, in April 2013, with this explanation: “We cannot give you a time frame for when your request will be completed at this time, but it is approximately half way thru [sic] the process.” The RCMP is working with the information commissioner to correct these problems, but has taken little action so far.

F GOVERNMENT TRANSPARENCY IN TRANS-PACIFIC PARTNERSHIP NEGOTIATIONS

Canada joined the Trans-Pacific Partnership (TPP) agreement in 2012 even though it meant agreeing to all the terms previously negotiated, without actually knowing what they are. A draft of the Intellectual Property Chapter, leaked in October 2013, highlighted just how damaging this secret trade agreement could be to free expression. One of the most concerning provisions would require Internet service providers to act as copyright monitors, monitoring and filtering users’ content and Internet access. Canada would have to change its legal framework to align with that of the U.S., which could require amending regulations for patents, copyright and fair use, with severe implications for the freedom to publish and access information.

For more on this topic, see Adam Kingsmith’s article, “Digital Freedoms in Danger,” on page 9.

A WHISTLEBLOWERS: EDGAR SCHMIDT AND SYLVIE THERRIEN

Despite a lack of protections, brave Canadians in the civil service do come forward and blow the whistle at great personal risk. The two most recent examples are Sylvie Therrien, who worked on employment insurance cases in Vancouver, and Edgar Schmidt, a lawyer in the Justice Department in Ottawa. Both are granted a top grade for the personal and professional sacrifices they have made.

F FEDERAL AND PROVINCIAL GOVERNMENTS' WHISTLEBLOWER PROTECTION

Little has been done across Canada in the past year to develop a more active whistleblower system or to protect those who speak out in the public interest. Major revisions needed include putting teeth in provincial and federal whistleblower legislation and providing real protection for whistleblowers.

Unlike the United Kingdom, the United States and Australia, Canada is alone in lacking specific legislation that provides whistleblowers with real job security. The limited legislation that covers government employees is essentially powerless, and there’s no protection anywhere in Canada for the private sector. As a result, whistleblowers in Canada almost always face dismissal.

For more on this topic, see David Hutton’s article, “They Blew It,” on page 12.

B ANTI-SLAPP IN ONTARIO

If wealthy logging companies or developers want to silence their critics, it’s fairly easy for them to sue for defamation and bury their critics under mountains of paperwork, years of litigation and expensive legal bills—regardless of whether any libel or slander has actually occurred. These lawsuits are called “SLAPPs” (strategic law-

suits against public participation), and most Canadians, with the exception of Quebecers—who have had anti-SLAPP laws since 2009—have little protection against them. An initiative to change that in Ontario deserves a cautious B grade. The minority Wynne government has introduced Bill 83, which would make it more difficult to bring frivolous lawsuits against people speaking out on a matter of public interest. However, as of press time, the bill has yet to pass. All three parties have indicated support for Bill 83, but there’s no guarantee that support will stand, what with outside lobbying and the threat of an election. The fight to enact anti-SLAPP legislation is far from over.

For more about anti-SLAPP in Ontario, see Cara Zwibel’s article, “Anti-SLAPP Bill Stalled,” on page 22.

D CSEC AND THE OFFICE OF THE COMMUNICATIONS SECURITY ESTABLISHMENT COMMISSIONER

Leaks from former NSA contractor Edward Snowden suggest that Communications Security Establishment Canada (CSEC)—Canada’s version of the NSA—has secretly been collecting the same kinds of private information as its U.S. counterpart. The leaks show CSEC has been spying on Canadians through Wi-Fi connections at an “unnamed” airport, collecting data on businesses and politicians in Brazil, and allowing security agencies from other countries access to surveillance of Canadian citizens. Unfortunately, while the NSA has come under deep scrutiny in the U.S., and American politicians—including President Barack Obama—are being forced to speak out on the situation, the Canadian government is staying almost completely silent. Worse still, the independent commissioner who is supposed to hold CSEC accountable has been unable to determine what its agents are up to because of “incomplete” records, meaning the institution is essentially operating behind closed doors and without proper oversight. ☹

KUDOS & MUZZLES



Muzzles

■ **Department of Fisheries and Oceans, Department of Natural Resources, Environment Canada and Health Canada**

For closing federal libraries and destroying information critical to Canada’s environmental, natural resource and health care policies.

■ The Government of British Columbia

For allowing a culture in which government officials do not create any permanent records of their communications and, as a result, are failing to provide any information in a full 20 per cent of all access to information requests.



Kudos

■ **Doug Drever, civilian public affairs adviser for the**

Canadian Army For disobeying his bosses on ethical grounds. In January 2014, Drever refused to deny a CBC News reporter access to a sensitive email written by an army lieutenant-general—in which that lieutenant-general told his soldiers not to release information to the press without permission—and requested that senior army staff reassess its “ill-considered” decision.

■ **Ontario Superior Court** For efficiently processing the media’s

application to access information related to Toronto mayor Rob Ford from the Toronto Police investigation Project Brazen 2.

■ MP Brent Rathgeber

For killing his own private member’s bill, C-461. The bill had been altered by the government in such a way that it no longer reflected Rathgeber’s interest in the disclosure of government salaries. Instead, the bill would have weakened protections for the CBC’s journalistic and

programming activities. For more information about the life and death of Bill C-461, turn to page 16.

■ The Government of Newfoundland and Labrador

For launching an independent review of its access to information system and Bill 29. This legislation, passed in 2012, gutted access in the province by massively broadening exemptions to ATI requests and giving cabinet ministers the power to decline requests by declaring them frivolous or repetitive.