Whatcott v. Saskatchewan Human Rights Commission

Canadian Journalists for Free Expression (CJFE) Board Editorial

ANY LIMITATIONS ON OUR FREEDOM TO SPEAK INVOLVE FUNDAMENTAL principles and excite debate; two subjects in particular are sure to rouse those passions. The first is whether and how the fundamental freedom of expression is to be balanced with the protection of racial and other groups from discriminatory or hateful speech. The second is the legitimacy of human rights tribunals to prohibit or punish the press or other media for the content they choose to publish.

Both of these important issues are currently before the Supreme Court of Canada in the case of Whatcott v. Saskatchewan Human Rights Commission. This is why the CJFE Board will seek leave to intervene and make arguments to the Court. We do this despite the fact that CJFE does not support Bill Whatcott, nor his views, which, as an organization dedicated to human rights, we find erroneous and disturbing. Nevertheless, his case presents free speech advocates with an important opportunity to clarify the strength of our protections.

Bill Whatcott is a Christian activist who claims a religious obligation to speak out about his perception of the "evils" of same-sex sexual relations and to oppose the teaching of these subjects in schools and universities. He acknowledged that he published flyers, which certainly contained extreme, polemical and confrontational messages, including statements claiming homosexuals are "perverted" and "sodomites," and alleging that the consequences of same-sex sexual relations are "disease, death, abuse and ultimately eternal judgment" and "early death and morbidity of many children." Complaints were made against Whatcott under Section 14(1)(b) of the *Saskatchewan Human Rights Code*, which broadly prohibits publication in any form of any material

> …that exposes or tends to expose to hatred, ridicules, belittles or otherwise affronts the dignity of any person or class of persons on the basis of a prohibited ground.

The complaints were heard by the Saskatchewan Human Rights Tribunal, which found that Whatcott's publications violated Section 14(1)(b). On his appeal, a single judge of the Court of Queen's Bench for Saskatchewan agreed. Both the Tribunal and the Court found that Whatcott's flyers met the current legal "test" for hate speech, which was laid down by the Supreme Court in 1990 in Canada (Human Rights Commission) v. Taylor. That case had established that as long as the speech in issue met that test, a human rights code provision would be justified in sanctioning and prohibiting it. As a result, the Tribunal and the Court of Queen's Bench held they did not need to consider further whether the application of Section 14(1)(b) to prohibit or sanction his conduct would infringe the constitutional guarantee of freedom of expression in Section 2(b) of the *Canadian Charter of Rights and Freedoms*.

However, on further appeal by Whatcott, a three-judge panel of the Court of Appeal for Saskatchewan, applying the very same legal test, came to the opposite conclusion. The Court of Appeal held that since Whatcott's publications did not meet the Taylor test, he had not infringed Section 14(1)(b) of the *Saskatchewan Code*. As a result, the Court of Appeal also did not need to consider whether Section 14(1)(b) is a valid limit on free expression.

I do not agree with what you have to say, but I'll defend to the death your right to say it.

— VOLTAIRE

This is not the first case to highlight the inconsistent results obtained when applying the Taylor test. Our review of the case law from various tribunals and courts since 1990 shows the decisions are fact-specific and unpredictable.

On its facts, Taylor itself was a comparatively straightforward case of hate speech. John Ross Taylor distributed cards advertising a telephone service that, when contacted, played recorded messages that were blatantly anti-Semitic. He did not claim any particular religious mission or purpose in doing so, nor did he seek to engage any broader discussion of public policy. The *Canadian Human Rights Code*, Section 13(1), was considerably narrower than the Saskatchewan provision, and simply prohibited publishing "any matter that is likely to expose a person or persons to hatred or contempt" by reason of race, religion or other ground of discrimination.

Nevertheless, the Supreme Court's decision was badly divided. A bare majority of four judges to three upheld the validity of the

PORTRAIT OF VOLTAIRE BY CATHERINE LUSURIER

provision, by reading into it a qualifying "test." The majority held that the free expression guarantee in Section 2(b) of the *Charter* would only be satisfied by requiring that, before anyone is found to have infringed the prohibition, their message must display

> …extreme ill-will and an emotion which allows for no "redeeming qualities" in the person to whom it is directed, … [or] unusually strong and deep-felt emotions of detestation, calumny and vilification.

This is the Taylor test that has produced such inconsistent and unpredictable results in the lower courts and tribunals, in Whatcott and other cases. Given the language of the test, this is hardly surprising. We suggest that the language in Taylor is inherently subjective and open to interpretation. What one person, tribunal member or judge considers "extreme" or "unusual" in any given context may be, and obviously is, very different from another. The vague and amorphous definition of prohibited speech has a chilling effect on the media and the public at large. Will a journalist reporting the facts of the debated communication be vulnerable to censorship or complaint? Is a parent, teacher or same-sex advocate liable merely because he or she tried to discuss, let alone protest, the message? Will the media's recital of the controversial campaign and its message—the news itself—constitute a publication of hate speech, and attract a complaint under the *Code*? And what of opinion writers, editorialists and columnists who want to explore the boundaries of the debate—will they risk being hauled before a tribunal? If the courts have not agreed on these rules, newsrooms cannot, either. The result, of course, is a chill on free expression, striking at the very heart of our ability—and need, in a democratic society—to explore controversial matters. After all, free speech requires little protection when there is broad consensus; it is precisely when there is dispute and controversy that strong protections are required. CJFE, for example, rejects and deplores Whatcott's misguided opinions about same-sex relations, but our freedom to do so is related to his freedom to speak,

The vague and amorphous definition of prohibited speech has a chilling effect on the media and the public at large.

however wrongly. The best response to offensive speech is not less speech but more speech. It is in this open arena that truth can triumph over ignorance.

The Whatcott case also illustrates other serious harms created by the vagueness of the Taylor test. For example, it seems fairly obvious that Section 14(1)(b) of the *Saskatchewan Human Rights Code* on its face is overly broad and invalid, even by the Taylor standard, to the extent that it purports to prohibit speech that is not hateful but nevertheless "ridicules, belittles or otherwise affronts the dignity of any person or class of persons." Yet, as noted above, neither the Tribunal and the Court of Queen's Bench that found the Taylor test was met, nor the Court of Appeal that found it was not, need to go on to consider the validity of these words in Section 14(1)(b). The Tribunal and the Court find Whatcott guilty of breaching the valid aspects of Section 14(1)(b), and the Court of Appeal finding the opposite, simply dismisses this particular complaint. So the words remain on the statute books, as supposedly valid

The best response to offensive speech is not less speech but more speech. It is in this open arena that truth can triumph over ignorance.

limits on the freedom of any of us to express ourselves, or to refute the messages of our opponents. Consider, for instance, the puzzling censorship required to avoid language that ridicules, belittles or "otherwise affronts the dignity" of anyone of any class. Again, the result surely is a potentially sweeping and unjustifiable stranglehold on legitimate, non-hateful speech.

At a more practical level, the fact that this type of complaint can be pursued privately, before a tribunal with the power to award costs and damages, creates even more problems. A large number of hate speech complaints across Canada have been pursued by a single individual. The appearance created is unfortunate: that a personal sensitivity, zeal or agenda, rather than the public interest, may be driving some of these prosecutions. This only further undermines the legitimacy of such a limit on the fundamental freedom of expression.

In our view, if the prohibition and prosecution of hate speech is ever legitimate, it can only be in the context of Section 319 and related provisions of the *Canadian Criminal Code*. In that context, the prosecution is carried in the public interest by an independent Crown counsel, with no potential secondary gain through an award of costs or damages. The person accused enjoys the presumption of innocence and other procedural safeguards appropriate to a public prosecution. The prosecution must prove criminal intent beyond a reasonable doubt. Altogether, this ensures the entire proceeding is focused on the alleged harm caused by the speech in issue to the broader public interest.

The Supreme Court's decision to grant leave to appeal in Whatcott offers a unique opportunity to make these important arguments before the Court. In deciding to seek leave to intervene, the CJFE Board will not address the various assertions of freedom of religion or morality that engage other parties. In our view, as interesting as those issues are, they are inherently matters open to differing views in an ongoing public debate. CJFE will focus only on the freedom of expression, and the effects of this legislation on reporting in the public interest.

How Access to Information Fails Journalists

By Dana Lacey

IT STARTED WITH A ROUTINE ACCESS TO information (ATI) request in a B.C. courthouse. A government employee had been found with the personal information of 1,400 income assistance clients in his Victoria condo, and had subsequently been fired. *Victoria Times Colonist* reporters Rob Shaw and Lindsay Kines wanted a copy of the RCMP search warrant, a document that the Supreme Court of Canada had ruled nearly 30 years earlier should be easily accessible to the public. Their request was met with numerous roadblocks bordering on the bizarre: "Sorry, the courthouse staff say you can look at the warrant, but only the suspect or his lawyer get a copy," one court clerk told Kines. "By the way, are you the suspect? No?" It was enough to launch the two reporters—along with their colleague, courts reporter Louise Dickson—into an investigation in which they discovered that B.C.'s courts routinely and wrongly deny access to information that should be available to the public.

Unfortunately, the problem isn't isolated to the court system, or even to the province. Despite the promises laid out by the *Access to Information Act*, getting information out of any number of government bodies—whether they be municipal, provincial or federal—is neither straightforward nor timely. Here are some sobering stats:

44 Percentage of federal ATI requests not met within the required 30-day limit.

21.3 Percentage of requests that took more than 60 days to fulfill.

395 Average number of days to resolve an ATI complaint.

A recent report published by the journal *Government Information Quarterly* compared the effectiveness of freedom-of-information laws in five democracies. Canada ranked dead last thanks to its long delays and "outdated" policies: citizens cannot file requests online, and must mail in cheques to cover fees.

None of this is news to anyone who has ever filed an ATI request in Canada. What's alarming is that, faced with so many obstacles, fewer journalists are making requests. For the fiscal year 2009-10, only 10.5 per cent of ATI requests came from journalists—a 23 per cent drop from the previous year. Meanwhile, ATI requests from business rose 14 per cent during the same period. So, what gives? Why aren't journalists taking advantage of this tool?

"Going through the process is not for the faint of heart," writes David McKie, the CBC investigative journalist who crunched the Treasury Board numbers to find those facts. "But neither is being a journalist facing a federal government bent on spin and obfuscation and a bureaucracy that is justifiably scared, and many times forbidden from talking to journalists. So let's all get cracking. There's too much at stake for journalists to be on the wrong side of a downward trend."

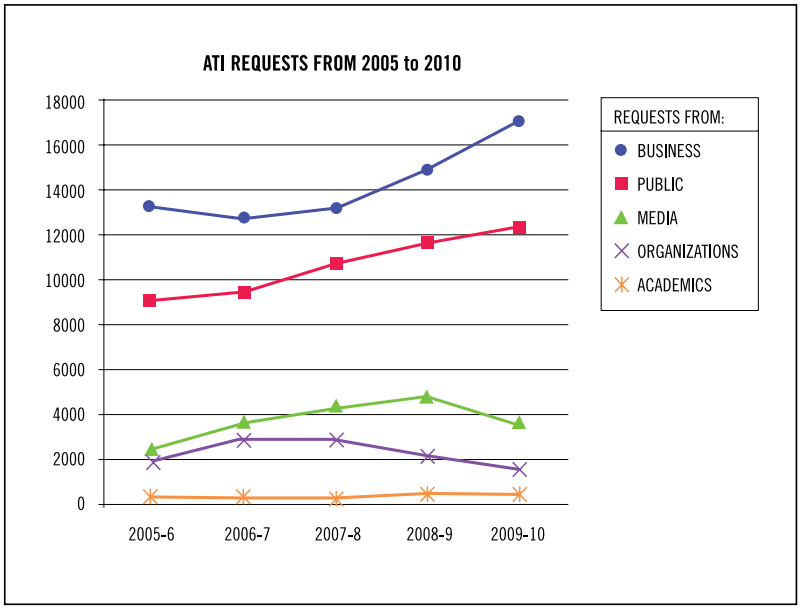
ATI plays an important role in public service journalism. The *Toronto Star* uses the *Act* often to break stories, although investigations editor Kevin Donovan notes that it can be difficult to convince journalists to take advantage of it. For one, it can be expensive, and the delays are beyond frustrating (while some documents are retrieved fairly quickly, the *Star* has waited more than two years for others to be released).

Journalist Stephen Spencer Davis filed an ATI request for documents about previous incidents at a Toronto apartment building that had been gutted by fire. The OpenFile.ca reporter was drawn to the story after he found this quote from a resident who had ignored the blaze: "They always have fires. Everyone just ignores them." After sifting through the reports, Davis realized that "the difference between reading a press release and reading internal documents was like the difference between someone's schoolwork and their diary. They were the opposite of polished: there were reports of slip-ups and unheeded warnings, things no one would ever tell a reporter wielding a notebook and a tape recorder."

PHOTO: C.J. BURTON

The *Access to Information Act* was enacted under Pierre Trudeau's leadership in 1983, in part as a result of an RCMP scandal. Overseen by the Office of the Information Commissioner (OIC)—launched the same year—the *Act* stipulates what information can be requested and how long it should take to receive it. Its most obvious flaw is what critics have dubbed the "Mack Truck clause," named for the transport-truck-sized holes in the legislation that exempt cabinet documents including, among other things, discussion papers containing background explanations, analyses of problems and policy options, communications between ministers, and draft legislation. That loophole has not been corrected over the 30 years of the *Act*'s life.

Soon after launching the ATI process, the government also created a searchable database, the Coordination of Access to Information Requests System (CAIRS). It was an extremely useful tool for journalists. If an ATI request had been returned to any individual requester, the government was obliged to provide a copy of all the response documents to any other citizen. By 2008, millions of documents were available through CAIRS, with 35,000 more available each year. Then, on April 1, 2008, the government stopped updating CAIRS because, Prime Minister Stephen Harper explained, it was "deemed expensive." Ironically, departments could now be wasting money duplicating searches already done at taxpayers' expense. (For historical searches,



Reprinted with permission from David McKie, CBC.

McKie maintains the CAIRS system up to its 2008 shutdown. See http-server.carleton.ca/~dmckie/CAIRS/CAIRS.htm.)

Any progress Canada has made toward transparency—such as extending the *Act* to cover more institutions, including the CBC and Canada Post—has been overshadowed by Harper's ongoing efforts to keep information behind closed doors. Journalists have long complained about his parental and tight-lipped treatment of the press. Blocking ATI requests has become a matter of course. When Stephen Maher of Halifax's *Chronicle-Herald* sent repeated requests for information to the PMO, he was told to "stop bothering them."

In a February 2010 feature for *The Walrus*, Gil Shochat writes, "One tactic in particular—delay, delay, and delay—has created such a massive logjam of requests that it threatens to crash the entire access system." Say, for instance, an office receives a request it deems sensitive. The request is slapped with an "amber light" tag and is sent on down the rabbit hole, where it may take months to resurface—long past any reasonable journalistic deadline. Shochat notes that amber lights are given to nearly half of an office's requests. The Public Policy Forum blames the government's general rule: "When in doubt, cross out." The Canadian Newspaper Association reports, "Media requests are about twice as likely to get the tougher treatment as requests overall."

Some federal departments have even started converting data into images before releasing it; a photo of data is a lot more complicated to import into a spreadsheet or database.

Complaints about the request process are also backed up; the OIC can take as long as two years to resolve a grievance. Furthermore, it is largely a dog without bite, and while more than one commissioner has recommended policy changes, the requests have been largely ignored.

So what about that 23 per cent decline in journalists making requests? "What makes matters worse," McKie writes, "is we don't seem to be cultivating a new generation of journalists who use the [*Act*]. Few schools of journalism in Canada teach their students how to file requests, which means that the new recruits filling newsrooms across the country lack the reflex of demanding records that help challenge claims that politicians make on matters such as job creation or the need to be tough on crime."

Recently, five government departments, half a dozen agencies and one Crown corporation (the CBC), have begun posting lists of completed requests online. Citizens can request a copy of the documentation, though the lists are incomplete and sometimes quite dated. But McKie advises Canadians to hold their applause—the technology to post this information has been around for a decade, but only a small fraction of the 250 institutions under the *Act* have opted to take advantage of it. And a handful of institution-specific lists (not a single, centralized, searchable database) doesn't come close to replacing CAIRS.

There is a simple way journalists can champion a better system: use it. Those *Times Colonist* reporters turned their frustrating experiences into an award-winning series, published in February 2010, which has since had a direct impact on provincial policy. As a result, B.C. Attorney General Mike de Jong scrapped a $6 online court registry search fee and promised to revise aging court access policies so that they have a "presumption in favour of releasing information." Let's not sit around hoping that presumption spreads—get cracking.

Dana Lacey (danalacey.wordpress.com) is a Toronto writer and photographer.

Access NOT to Information

THE DECLINE OF ACCESS IN 2010-11

By Bob Carty

UNDER THE HARPER GOVERNMENT, IT'S NEVER been harder to pry information essential to a functioning democracy out of the federal bureaucracy. And time and again, the main reasons for the debasement of Canadians' right to freedom of information are considerations of political damage or embarrassment that information can do to those in power. CJFE observed several alarming trends in access to information over the past year.

A CULTURE OF CONCEALMENT

The year under review began with a case that may be just the tip of an iceberg of political interference.

The Canadian Press's Dean Beeby reported on Feb. 7, 2010, that a federal cabinet minister's aide had killed the release of sensitive material—an action for which he had no legal authority. Under the *Access to Information Act*, Beeby asked for information on the extensive real estate portfolio of Public Works and Government Services Canada. His request was tagged as

sensitive and handed to Sebastien Togneri, a political aide to then-minister of Public Works, Christian Paradis. The department's officers decided it had no legal basis to withhold the information and ordered 137 pages to be released to Beeby. At the last minute, Togneri sent an urgent email to a senior Access official to "unrelease it"—and there was a rush to the mailroom to stop the file from being delivered to media hands. Four months later, Beeby received only a fraction of the information, and it was heavily redacted.

The case came under investigation by Suzanne Legault, head of the Office of the Information Commissioner (OIC). She found that there was evidence of a political vetting machine at Public Works and recommended that the case be referred to the RCMP. The *Act* forbids anyone to "direct, propose, counsel or cause any person" to conceal a record, with a maximum penalty of $10,000 and two years in jail (Legault says that to the best of her knowledge, no criminal charges have ever been laid for violations of the *Act*). Togneri resigned in October.

The commissioner is also looking into similar allegations of political interference in the access process at Foreign Affairs, National Defence and Public Works. While there is some evidence that the previous Liberal government also operated a system to politically "vet" ATI requests, it appears the Harper government created a system-wide culture of violating freedom of information rights.

ACCESS WAIT TIMES GETTING WORSE

Legault monitors the ATI performance of federal institutions in her annual and special reports to Parliament. In an April 2010 document called *Out of Time*, Legault reported a "constant decline" year over year in government obligations to meet the 30-day limit for response required by law. Delays in response are the "Achilles' heel" of ATI, Legault warned, and the public's right to government information is "at risk of being totally obliterated…."

Of the 24 government departments and institutions surveyed for the OIC report card, more than half were operating below average in terms of refusals, delays and poor information management. The Privy Council Office, directly under Prime Minister Stephen Harper's leadership, got a "D" for having the second-worst timelines; it was taking, on average, 157 days to complete a request. Five institutions scored a failing grade, among them the departments of Natural Resources, Heritage, and Environment, along with Correctional Service Canada and the Canadian International Development Agency (CIDA). Foreign Affairs and International Trade Canada (DFAIT) performed so badly it earned a "red alert"—a grade below failure.

The commissioner also warned about new trends behind the increases in ATI delays. The time taken for extensions is getting longer each year, and there is a pre-occupying practice of consulting other government departments. When the Harper government was elected (2006), there were 1,330 requests that each required more than 30 days of consultation with one or more departments. That number doubled over the next four years—and that's just one way to delay the release of information. "There are literally 500 ways of saying no," according to ATI activist Ken Rubin. He asserts that when it comes to sensitive issues like Afghanistan or climate change, Ottawa has perfected the ability to generate black holes—nothing escapes.

It's important to note, however, that the OIC does see improvement in government departments, and some—like Justice, and Citizenship and Immigration—do an outstanding job at access largely due to leadership and a culture of disclosure.

In March 2010, the OIC also produced a report card on eight institutions and Crown corporations just recently brought under the requirements of the *Act*. Several, like the National Arts Centre and Atomic Energy of Canada, are performing very well. But, for a second year in a row, Legault lambasted the CBC for long delays and a high rate of refusal. The CBC responded that it has been bombarded by hundreds of ATI requests submitted by a media competitor, Quebecor Media, owner of QMI Agency and Sun Media. The requester wants information such as audits from the last three Olympics and a copy of all records on the costs of running the contest to find the new *Hockey Night in Canada* song. The CBC contends it does not have to release such information because it has an exemption for journalistic and programming material. The requestor argues the information is about general administration, not about journalism. It is a complex discussion, deciding where this line should be drawn. For its part, the OIC wants the right to review the relevant documents to assess whether the exemption is being applied properly; currently, that assessment is made by the CBC. The issue is making its way through the courts.

THE SHRINKING OF INFORMATION

Declining government performance can also be found in the annual statistics for ATI requests compiled by the Treasury Board's *Infosource* bulletin. One of the indicators is how often all the information requested is released—or, conversely, how much is redacted or refused. In 1999-2000, the federal ATI system disclosed all requested information 40.6 per cent of the time. By the time the Liberals went down to defeat to Harper's Conservatives in 2006, that rate had already dropped to 28.4 per cent. But then it plummeted by almost half—in 2009-10, requesters got everything they asked for in only 15 per cent of cases.

Elsewhere in the world, others are doing better: in 2008, 60 per cent of all freedom of information requests made in the U.K. and 43 per cent of all FOIA requests filed in the U.S. yielded full disclosure.

REFUSING TO RELEASE INFORMATION

This *Review* is being published at the end of an election campaign required after the Harper government was held in contempt of Parliament in part for refusing to provide information about the costs of programs such as its law-and-order legislation and corporate tax cuts. This, too, is a freedom of information issue. The government does not deny it has this information—just that it is a "cabinet confidence." The Parliamentary Budget Office confirms that this information exists, it is part of the expenditure management system that costs out new programs. So, the government is again refusing to release important information to Parliament and the public—which appears to be a case of contempt not only for Canada's democracy but also the Conservatives' own promises to make government more open, transparent and accountable.

Bob Carty is a CJFE Board member.

Canadian Journalists Abroad

UPDATE: KHADIJA ABDUL QAHAAR

Khadija Abdul Qahaar is a freelance journalist from West Vancouver who was kidnapped by the Taliban in November 2008 while travelling in Northern Waziristan, Pakistan. She was abducted with two companions, her driver Zar Muhammad and translator Salman Khan, both of whom were released after eight months in captivity.

In early 2009, Qahaar's kidnappers threatened to behead her. They demanded US $2 million in ransom and the release of their associates, but the deadlines came and went. Glen Cooper, a long-time friend of Qahaar's who was involved in negotiations to free her, last heard from her in August 2009.

In November 2010, the newspaper *Indian Express* reported that she had "died following prolonged illness," citing unnamed sources. According to Khan, Qahaar, who is also known as Beverly Giesbrecht, suffered from hepatitis and was mentally prepared for her death. Cooper has said that she was ill even before the kidnapping. Rahimullah Yusufzai, an editor of the *News International* in Peshawar and a negotiator for her release, told the *Globe and Mail* that she sounded desperate and seriously ill in her final video messages. He presumes that she is dead.

When CJFE contacted Foreign Affairs and International Trade Canada in March 2011, it would not comment on whether Qahaar is still alive. Spokesperson Priya Sinha said, "we continue to pursue all appropriate channels, including with Pakistani authorities, in seeking information with regard to Ms. Giesbrecht."

Khadija Abdul Qahaar, also known as Beverly Giesbrecht

PHOTOS OF QAHAAR AND CASTONGUAY, CBC

Qahaar is a 53-year-old former media and web professional turned journalist. She converted to Islam soon after the Sept. 11 attacks and set up the website *Jihad Unspun* to present uncensored reports on the American war on terror. In the summer of 2008, she moved to Pakistan, where she established contact with Taliban leaders. She obtained a visa in Canada based on letters from Al Jazeera, but it is unclear whether she had an assignment when she was kidnapped.

JOURNALISTS ATTACKED IN EGYPT

During the two weeks of peaceful protests that led to the ouster of former Egyptian president Hosni Mubarak in February 2011, journalists were assaulted and harassed by pro-Mubarak supporters. Canadian journalists were among the victims.

On Feb. 2, CBC News cameraman Sylvain Castonguay was brutally attacked until his colleague, Jean-François Lépine, got soldiers to intervene. The *Globe and Mail*'s Sonia Verma and Patrick Martin were detained for three hours on Feb. 3. The CBC, CTV News and Quebec-based television network TVA also had their cameras and audio equipment confiscated by the authorities.

Al Jazeera, Al Arabiya, ABC News, BBC, CNN, France 2, Le Soir, the *New York Times* and the *Washington Post* were also targeted.

Sylvain Castonguay in Egypt, 2011

Hossein Derakhshan and his girlfriend, Sandrine

CANADIAN-IRANIAN JOURNALIST STILL IMPRISONED IN IRAN

Canadian-Iranian journalist and blogger Hossein Derakhshan remains in prison after he was arrested in November 2008 during a trip to Iran to visit his family. Charged with spreading propaganda against the regime, insulting religious leaders and cooperating with hostile states, he was sentenced in September 2010 to 19½ years in prison and banned from political and media activities for five years. Derakhshan's lawyer has appealed and is awaiting a ruling from the court.

Known as the "Blogfather of Iran" for popularizing blogging in the country after he published a guide on blogging in Farsi, Derakhshan started blogging soon after moving to Toronto from Tehran in 2000. He is a controversial figure, as he was a reformist before supporting the current government under President Mahmoud Ahmadinejad.

The International Campaign for Human Rights in Iran, based in New York, has reported that Derakhshan has spent almost 10 months in solitary confinement and was tortured to force a confession. He was briefly released for two days in December 2010 on an unprecedented US $1.5-million bail.

CROSS-CANADA FREE EXPRESSION REPORTS

Compiled by Dan Blackwell, Anna Chen, Erin DeCoste and Jen Wilson

YUKON

NEWSPAPER SUES ANOTHER MEDIA OUTLET TO DISCLOSE SOURCE

CBC journalist Nancy Thomson's fears about having to disclose her sources were allayed when she came to an agreement with *Yukon News* in March 2011. Both parties are keeping details of the settlement confidential. A doctor is suing the newspaper for defamation related to an editorial it published in 2004 about Thomson's investigative report on the spike in drug abuse in Watson Lake, Yukon. *Yukon News* said it needed Thomson's sources to defend itself, prompting what may have been the first case of one media outlet suing another over journalist-source confidentiality.

FREE EXPRESSION RESTORED AFTER 2010 VANCOUVER GAMES

In 2007, the Canadian government passed Bill C-47: *The Olympic and Paralympic Marks Act*, giving organizers exclusive rights over the use of its trademarks and words associated with the Games. The following words were copyrighted by organizers and sponsors between Dec. 17, 2007, and Dec. 31, 2010:

GAMES • 2010 • TENTH • MEDALS
VANCOUVER • 21ST • WINTER • GOLD
SPONSOR • WHISTLER

Intended to prevent exploitative ambush marketing by non-sponsors, the Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games (VANOC) estimates it handled more than 3,200 cases related to the *Act*, most of which were resolved without publicity.

BRITISH COLUMBIA

COURT FILE ACCESS IMPROVED

New access policies released in February 2011 by B.C. courts made all documents under publication bans available to the public, with the onus on the individual or media outlet not to publish. These changes emerged after an investigation by Victoria-based *Times Colonist* raised concerns about inconsistent access practices and an outdated policy that authorized withholding of entire files when a ban protects a name or selected information.

COURT APPEAL TO KEEP SOURCE CONFIDENTIAL

The *Province* is appealing a December 2010 ruling by the Supreme Court of B.C. that ordered its reporter, Elaine O'Connor, to reveal the source who gave her a report in 2007 alleging Liberal party MP Blair Wilson violated *Canada Elections Act* rules. Wilson was asked to resign from the party after the newspaper published an article about him in October 2007. He is suing for defamation.

ALBERTA

NEO-NAZISM IN CALGARY

The leader of neo-Nazi group Blood and Honour, Kyle McKee, was sentenced to 60 days in jail in March 2011 for what the Crown prosecutor called "racist motivated threats" against communist and anti-racist activist Jason Devine. McKee made threats alluding to an attack on Devine at his home in November 2010, for which no charges have been laid. Calgary has the highest hate crimes rate in the country.

SASKATCHEWAN

DISSOLVING HUMAN RIGHTS TRIBUNALS

The justice minister of Saskatchewan announced in April 2010 that the provincial government was in discussions with the province's Human Rights Commission in regards to dissolving the Human Rights Tribunal. Cases would instead go before the Court of Queen's Bench. An NDP justice critic believes the government is reacting to previous tribunal rulings not in its favour. Concerns have also been raised about individuals having to pay legal fees to defend their rights in court.

PHOTO: AMY SEPT

MANITOBA

92.9 KICK FM LOSES CONTROVERSIAL HOST

A controversial radio host in Winnipeg was silenced when "The Great Canadian Talk Show" was cancelled from Red River College's 92.9 Kick FM in November 2010. Host Marty Gold and his listeners maintain that this is a free speech issue, and claim that the college was pressured to cancel the show by the *Winnipeg Free Press*—a publication that Gold has criticized on several occasions. The college claims the cancellation was part of a wider restructuring process.

CRIMINAL LIBEL COMPLAINT AGAINST CBC JOURNALISTS

In April 2011, fashion titan Peter Nygård took an unprecedented step in filing a criminal libel complaint against three CBC journalists. Criminal libel is a rarely used section of the *Criminal Code*—if found guilty, the accused faces a possible prison sentence, whereas in civil libel cases the plaintiff sues for damages. Nygård claims there is an international conspiracy to discredit him and alleges the journalists defamed him in a documentary broadcast that depicted him as an abusive boss. The CBC's lawyer is seeking to have the case dismissed on ground of being frivolous, claiming Nygård is seeking immunity from the public eye.

NUNAVUT

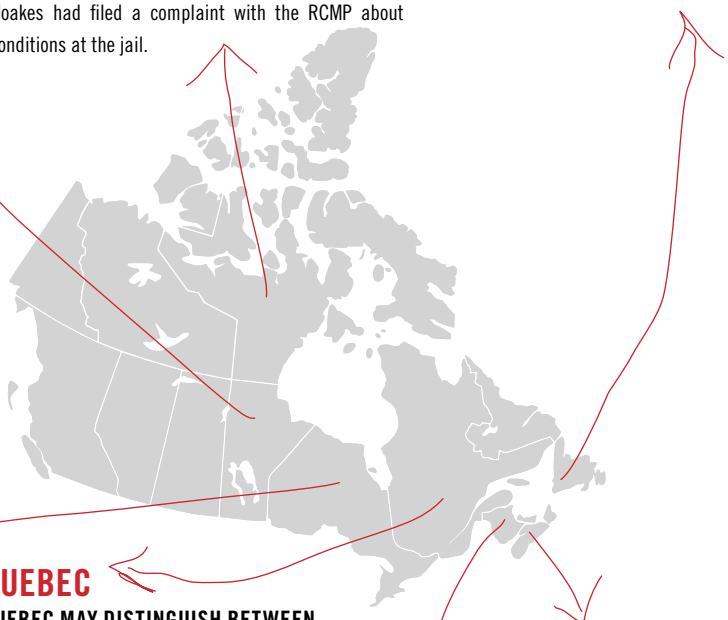
WHISTLEBLOWING FIRE MARSHAL DISMISSED

Tony Noakes Jr., Nunavut's former fire marshal, was dismissed by the Government of Nunavut just before his one-year probation period ended. Noakes informed reporters that he had been told he would be fired after raising questions about the safety of several buildings, including the Baffin Correctional Centre. Built to hold 48 inmates, the centre held a record 102 inmates in May 2010. The same month, days before his dismissal, Noakes had filed a complaint with the RCMP about conditions at the jail.

NEWFOUNDLAND & LABRADOR

STRENGTHENING WHISTLEBLOWER PROTECTION

In March 2011, St. John's city councillors were informed that the city's legal department was analyzing a draft bylaw that would give more protection to whistleblowers. The bylaw is meant to improve the city's policy and strengthen existing protections. Councillor Danny Breen said the change was not driven by a specific event. The new bylaw will be voted on in council.



ONTARIO

PROTESTER ARRESTED AT POLICE FUNERAL

In January 2011, a lone protester stood with a sign at the funeral procession for Sgt. Ryan Russell in Toronto. The sign read "Soldiers Die, Electricians Die and People Die" on one side, and "No Police State" on the other. The protester, Eric Brazau, says he was handcuffed and taken away by police after someone tripped him. The police stated Brazau was arrested for breaching the peace and because of an altercation with a bystander. He was released without charges a few hours later.

SECURITY CONCERNS HINDER FREE SPEECH AT ACADEMIC INSTITUTIONS

A speech by conservative American lawyer and writer Ann Coulter at the University of Ottawa was cancelled in March 2010 due to alleged security concerns, including fears for her safety. Earlier, Coulter had also received a private and polite letter from the provost of the university, which highlighted Canadian hate speech legislation. Security concerns also hindered events involving controversial figures Norman Finklestein and Christie Blatchford at other Ontario academic institutions in 2010.

QUEBEC

QUEBEC MAY DISTINGUISH BETWEEN PROFESSIONAL AND AMATEUR JOURNALISTS

Quebec's culture minister commissioned a study on strategies to strengthen the province's media, which was released in February 2011. Among the 51 recommendations was mandatory membership to the Quebec Press Council for all news organizations, creating a body to accredit professional journalists and demanding language testing for those seeking accreditation. The accreditation would create a distinction between professional journalists and amateurs. The report did not suggest what criteria would be used.

UNION TESTS QUEBEC'S ANTI-SLAPP LEGISLATION

Le Journal de Montréal's workers' union (STIJM) filed an anti-SLAPP petition (strategic lawsuit against public participation) against the journal's owner, Quebecor, in December 2010. Quebec's anti-SLAPP legislation challenges lawsuits that are intended to intimidate and silence critics with the cost of legal defence. Quebecor sought $125,000 in compensation for defamatory statements allegedly made by a member of the union. Quebec is the only province with this type of legislation in place.

NOVA SCOTIA

NEW BILL RESTRICTS INTERVIEWS ABOUT PATIENT CARE

Nova Scotia's strict new Bill 89 could slap journalists with a $10,000 fine or six months in jail for simply asking about a patient's health care. Created to protect patient confidentiality, the law requires explicit consent before any inquiry can be made. In a critical assessment submitted to the Nova Scotia Legislative Assembly in December 2010, University of King's College journalism professor Fred Vallance-Jones said the bill could hinder media investigations into matters of public interest.

NEW BRUNSWICK

LIBELLOUS COMMENTS ONLINE

In June 2010, a provincial judge ordered the Moncton daily *Times & Transcript* to disclose the identity of an individual whose online comments were deemed potentially libellous. The newspaper had refused to reveal the identity of the anonymous poster. This decision appears to be part of a growing trend of judges ordering newspapers to reveal anonymous posters in defamation cases.

Whistleblower Protection Still in Its Infancy in Canada

By M. Philip Tunley

WHISTLEBLOWERS ARE IMPORTANT TO FREE *expression. Why? They reveal information about corruption, illegalities and unethical behaviour that political parties and governments want to keep secret—information that a democracy needs. Whistleblowers are also critical sources for journalists, sources that will dry up unless the whistleblower and the journalist's right to shield sources are protected.*

Canada is a notoriously tough place for whistleblowers, and despite minor improvements, the country generally lived down to its reputation in 2010.

The case of Sean Bruyea, a retired Canadian intelligence official, highlighted the trend. Bruyea had returned from service in the Gulf War of 1991-92 with a diagnosis of post-traumatic stress disorder. His battle with Veterans Affairs began simply as passionate advocacy on behalf of Canada's veterans, and as a vocal critic of the department's *New Veterans Charter* initiative, both in the media and before Parliament. Unfortunately, the more successful his advocacy campaign, the more Bruyea found himself subjected to significant retaliation by officials at Veterans Affairs. His personal battle with the department expanded to include separate legal claims for damages against three officials and the Government, after he learned that officials involved in his medical care were linking his advocacy to his condition, and were providing information about his medical treatment and status to policy officials responsible for responding to his campaign.

That case settled abruptly in November 2010 after a sustained media uproar following a report by federal Privacy Commissioner Jennifer Stoddart. She described as "alarming" her findings that sensitive medical information about Bruyea was repeatedly shared with officials "who had no legitimate need to see it." Her report also confirmed that, since at least 2005, Bruyea and other veterans advocates had become the target of a concerted campaign by officials at Veteran Affairs, which included tactics such as withholding payment of

Retired Capt. Sean Bruyea at a news conference in Ottawa, 2006.

medical travel claims to discourage their advocacy. In this case Bruyea was vindicated—he received a formal apology from the minister of Veterans Affairs.

The Bruyea case is particularly interesting because the primary senior "whistleblower" protection official at the federal level, Christiane Ouimet, then the public sector integrity commissioner, had earlier refused to investigate his case, claiming she was not convinced the conduct he was reporting amounted to "wrongdoing" within her legislative mandate. Apparently, a distinction could be drawn between direct wrongdoing in the administration of government affairs, and collateral wrongdoing by officials seeking to discourage legitimate public advocacy and criticism about how public policy and administration are carried out. Obviously, from a free expression point of view, this is a distinction without a difference.

However, within a month, the credibility of the entire federal whistleblower protection system suffered another blow when the auditor general reported that Ouimet had engaged in inappropriate conduct towards her own staff. That conduct included berating, marginalizing and intimidating staff, and in one case involved retaliatory disclosure of personal information about a staff member who had blown the whistle on Ouimet's own conduct. The auditor general's report also found that Ouimet was failing to properly perform her mandated functions, including reluctance to investigate complaints of wrongdoing in federal government administration, and decisions to close investigations that were not supported by the evidence on file.

To put these events in context, it must be recognized that Canada's efforts to protect whistleblowers are still in their infancy. It was only in 1985 that the Supreme Court of Canada recognized the "whistleblower" defence in public sector staff grievances. However, the Court appeared to limit the defence to cases in which an employee was disciplined or fired after reporting that the government was engaged in illegal acts or in policies that jeopardized the life, health or safety of the public. Subsequent efforts by lower courts to suggest that the *Charter*'s freedom of expression guarantee might broaden the availability of the defence and make it available "wherever the public interest is served" have met with little success pending reconsideration by the Supreme Court of Canada.

In another notorious example of official retaliation against whistleblowing employees, Dr. Shiv Chopra and other Health Canada physicians were fired in 2004 after complaining of being subjected to pressure to approve veterinary drugs without adequate evidence of safety. The Federal Court of Canada set aside a decision by federal integrity authorities dismissing Chopra's complaint, but only on the narrow procedural ground that the authorities failed to conduct the investigation in accordance with their mandate, and failed to investigate and analyze many of the issues and concerns raised. However, Chopra and the other complainants were not reinstated.

A decision of the Supreme Court in 2005 may have signalled a somewhat more generous and sympathetic approach to the interpretation of whistleblower protection laws. It concerned the interpretation of a Saskatchewan statute that prohibited any employer from retaliating against any employee who reports conduct amounting to an offence to any "lawful authority." Linda Merk, a bookkeeper employed by a

PHOTO: THE CANADIAN PRESS/TOM HANSON

Former integrity commissioner Christiane Ouimet on Parliament Hill in Ottawa, March 10, 2011.

PHOTO: THE CANADIAN PRESS/FRED CHARTRAND

labour union local, reported financial abuse by local union officials to the international union. The Supreme Court overturned lower court decisions that would have restricted the term "lawful authority" to public enforcement agencies, upheld Merk's subsequent dismissal, and dismissed charges against the local union officials responsible. The Court held instead that, given the remedial purposes of the provision and its labour law context, the term "lawful authority" should include reporting "up the ladder" within the employer organization, to those who exercise the private law authority to remedy the abuses in issue. The Court noted that, even in a private employment context, the focus on conduct giving rise to an offence provides a sufficient "public interest focus" to support such a remedial, purposeful interpretation.

Yet, the Supreme Court has since turned down several opportunities to revisit the scope of public sector integrity laws, notably in the 2006 case refusing leave to hear an appeal by former RCMP officer Robert Read. Within months thereafter, an independent report found the RCMP's management "horribly broken" in relation to the treatment of RCMP officers who, in an unrelated instance, blew the whistle on the force's pension fund scandal, and in relation to the subsequent delay of and interference with investigations into those allegations.

However, as is noted elsewhere in this review in more detail, in 2010 the Court took further steps to recognize and extend whistleblower protection in the context of two important decisions about journalist source protection. First, in the *National Post* decision, the Court went beyond the simple law enforcement rationale, and located whistleblower protection squarely within the context of the *Charter* guarantee of freedom of expression and the broader public interest, when it stated:

> It is in the context of the *public* right to knowledge about matters of public interest that the legal position of the confidential source or whistleblower must be located. The public has an interest in effective law enforcement. The public also has an interest in being informed about matters of importance that may only see the light of day through the cooperation of sources who will not speak except on condition of confidentiality.

Even more directly, in the *Globe and Mail* decision, the Court recognized the importance of not subjecting journalists to the same legal constraints and obligations that apply to their sources. For example, the sources may owe duties of loyalty and confidentiality to their employers. Those legal duties and constraints are very largely responsible for the slow and uneven development of direct legal protection for whistleblowers, even when expressly legislated. However, in the context of journalists' source protection, citing U.S. authority, the Court stated:

> Moreover, there are sound policy reasons for not automatically subjecting journalists to the legal constraints and obligations imposed on their sources. The fact of the matter is that, in order to bring to light stories of broader public importance, sources willing to act as whistleblowers and bring these stories forward may often be required to breach legal obligations in the process. … [I]t would also be a dramatic interference with the work and operations of the news media to require a journalist, at the risk of having a publication ban imposed, to ensure that the source is not providing the information in breach of any legal obligations. A journalist is under no obligation to act as legal adviser to his or her sources of information.

This ruling, combined with the Court's broader protection of the identity of journalists' confidential sources, greatly strengthens the role of the press in whistleblower protection.

On balance, then, 2010 can be seen as a year of small steps forward against the relatively unsympathetic legal status quo in Canada, in both direct and indirect protection of whistleblowers. First, the strong media support surrounding Bruyea's case, and the response it created, demonstrate a significant shift in public perceptions of these issues, and resulting political sensitivities. Second, the Supreme Court's recognition of a unique role for journalists, including their ability to protect confidential sources in appropriate circumstances, strengthens their role as an alternative, extra-governmental watchdog.

Both developments will undoubtedly increase the pressures on public integrity authorities at both the federal and provincial levels to do a better job. However, both should also help to broaden the kinds of "wrongdoing" for which these protections are available. The analysis must move beyond its current focus on the sanctity of an employee's duties of loyalty and confidentiality, and the resulting need to establish government involvement in illegal acts or in policies that jeopardized the life, health or safety of the public to override those interests. That focus properly caused diplomat Richard Colvin to disclaim the title of "whistleblower" altogether, and to point out that his terms of employment included the obligation to respond to a summons to testify about the Afghan detainee issue before a House of Commons committee when it was served on him. In other words, from Colvin's perspective, employment in a public position includes an element of public accountability.

Similarly, from a free expression perspective, it is surely essential that our entire scheme of whistleblower protection laws be extended to include a broader range of conduct that, to paraphrase the Supreme Court, the public has an important interest in being informed about, and which may only see the light of day when sources are able to speak confidentially and without fear of retaliation.

Lawyer Philip Tunley is a member of CJFE's Board of Directors.

FREEDOM OF EXPRESSION ON TRIAL 2010-11

By Peter Jacobsen and Paula Todd

Journalism is one of the few professions in which even the tools of the job are difficult to acquire and keep. Whether thwarted by defensive politicians, secretive corporations, restrictive courts or terrified sources, many journalists know that trying to inform the public is a constant battle. A few court rulings in 2010 will make that task a little harder and a little easier, depending on your story and your field.

PROTECTION OF THE JOURNALIST-SOURCE PRIVILEGE

One crucial resource is the confidential source, without whom many of the most important stories in the world would never have been told. That's why reporters shuddered when the RCMP obtained an order requiring *National Post* reporter Andrew McIntosh to turn over a document he'd been given that ostensibly implicated then-prime minister Jean Chrétien in a financial conflict of interest. In the course of its deliberations, the Supreme Court of Canada (SCC) established that the *Charter of Rights and Freedoms* does not provide a blanket right to protect sources. Rather, under common-law privilege, they applied the criteria for a case-by-case privilege for confidential sources of journalists, known as the Wigmore Criteria. The following must be present: the communication was made explicitly in exchange for a promise of confidentiality; the confidentiality was a pre-condition to the disclosure; the relationship between the journalist and source was diligently, deliberately and consciously fostered in the public good; and the public interest served by protecting the identity of the source outweighs the public interest in getting the truth.

The Court ruled against journalist privilege in this case (as they found the fourth criterion was unmet) and required what turned out to be an allegedly forged document handed over. It should be noted that in this case the Court said the document was vital to the investigation of a serious crime and as such trumped the public interest in preserving the sanctity of the journalist-source relationship. On the other hand, this was the first time that the Supreme Court had carefully examined the role of confidential sources and explicitly acknowledged that the media does have a right to protect confidential sources where it can meet the Wigmore Criteria. That privilege was extended later to non-criminal cases and to the law of Quebec after the *Globe and Mail* appealed a lower court order forcing journalist Daniel Leblanc to reveal a confidential source in the Liberal government's sponsorship scandal. The Superior Court of Quebec had denied privilege and imposed a publication ban.

However, eventually, the SCC ruled that the Wigmore Criteria as set out in R. v. National Post had not been properly considered or applied. The SCC allowed the appeal, sent the case back to the trial judge and rescinded the ban.

IMPORTANCE OF THE OPEN COURT PRINCIPLE

Being able to protect a confidential source is just one of the tools journalists need to uncover the news. Being able to report on court proceedings and gather information pertaining to court proceedings are also key components of both an open justice system and a responsible press. Roadblocks, however, continue to arise. Mandatory publication bans on bail hearings fly in the face both of a transparent justice system and a judge's discretion. In 2010, Toronto Star Newspapers Ltd. and others argued that a mandatory ban (when requested) on what occurs in the course of bail hearings is an unjustifiable violation of freedom of expression.

The Court majority held that the limit on freedom of expression is justified, as the mandatory ban assists in safeguarding the right to a fair trial by protecting the jury pool from media reports of information that has not been challenged by the defence, and saves the accused from the delay and expense of seeking a publication ban in an additional hearing. But the mandatory nature of the ban also prevents the media and others from even challenging the advisability of such silencing on a case-by-case basis. Typically there may be a public interest in doing so in high-profile and important cases. Curiously, the SCC did not follow the Ontario Court of Appeal's lead in ruling that where the trial is by judge alone, the mandatory ban is not justified because there is no need to protect the jury pool.

Daniel Leblanc addresses the media in Ottawa, Oct. 22, 2010.

PHOTO: > THE CANADIAN PRESS/PAWEL DWULIT

There are other ways, too, of discouraging the media from asserting its right to report on the workings of the justice system. The *Toronto Star*, for instance, was ordered last year to pay more than $93,000 in court costs to Greg Fraleigh, who had sought a ban to prevent publication of allegations his ex-wife made about him in an earlier court action.

After the *Star* lost the court battle protesting the publication ban, the Court found that Fraleigh was protecting his interests only, not advancing them, while the newspaper couldn't deny there was some benefit to sales, and so the *Star* was ordered to pay legal costs.

As the *Star* argued during the case, this decision potentially discourages the media from intervening on behalf of an open court. Yet, it is the media and interveners such as CJFE who are the gatekeepers of freedom of expression, continuously taking their fight to the court in order to keep the public informed.

Even the usual activities and physical presence of journalists in the courthouses continues to be controversial. In 2011, the SCC approved the Quebec Superior Court's new limits on the use of cameras and recorders, confining journalists to limited locations and prohibiting them from broadcasting official audio court proceedings. The SCC acknowledged this limited free expression, but decided that full access would have

an adverse effect on the serenity of hearings, on truth-finding and on the privacy of participants, including witnesses, in the justice system. Yet, prohibiting the media from moving and working freely in a public courthouse arguably prevents them from being the unfettered eyes and ears of those citizens unable to be physically present in "open" court. Furthermore, while this rule was meant to protect witnesses from a court-perceived "media harassment," it is overly broad in that it restricts the media's access to the legal counsel arguing the very cases on which they are attempting to accurately report. Protecting lawyers from questions from the media by restricting where in the public area of a courthouse they can be interviewed is unnecessary and unjustified.

The illogic of allowing a citizen the right to see and hear everything in open court so long as they are physically present, yet denying other citizens the same right (via broadcast) if they cannot afford the time or money to make the trip (or find a seat in the courtroom, for that matter) persists. Even the Aboriginal Peoples Television Network—with the support of First Nations Child and Family Caring Society of Canada and the Assembly of First Nations, parties to the hearing—couldn't convince the Canadian Human Rights Tribunal to broadcast a crucial hearing into child welfare funding for First Nations children. On behalf of the respondents, the attorney general of Canada argued that filming may have negative consequences for those testifying, including intimidation, and that the media's opportunity to attend, take notes and report on the hearing was sufficient to protect the public's interest. The Tribunal agreed, despite arguments that First Nations people rely on the tradition of oral information sharing, and that some interested parties could not afford to be present to hear and see all of the hearing, relying instead on the abbreviated media reports.

Arguably, the public's ability to be informed is only as good as the media's access to information and its ability to relay it. Every obstacle is tantamount to censorship—whether that is curtailing the use of cameras or secreting court evidence from media/public view. The CBC, for example, had to go to the Ontario Court of Appeal to win the right to access and copy court exhibits in a preliminary hearing after Ashley Smith died in custody at the Grand Valley Institution for Women.

The Correctional Service of Canada argued that the CBC should not have been granted any access to the exhibits. The Court upheld the right of media to access exhibits used in court decisions and did not find there was precedent to prevent the media from copying the exhibits. When an exhibit is introduced to a court without restrictions, the entire exhibit becomes a part of the record in the case. As important, the Court reiterated that there is nothing in law that permits a judge to impose his or her opinion about what does and does not need to be broadcast to the public.

THE RIGHT TO KNOW WHAT YOUR GOVERNMENT IS DOING

Nor is it up to the government to automatically assume its desire to keep information confidential is the deciding factor. In Canada (Attorney General) v. Almalki, the federal attorney general cited national security as justification for withholding information from three men, who were allegedly tortured in the Middle East due to misinformation supplied by Canadian officials. The Federal Court had to determine: a) whether the information was relevant to the court proceedings; b) whether it had been demonstrated that disclosure of the information would cause injury; and, c) where injury had been established, whether the public interest in disclosure outweighed the public interest in non-disclosure.

The Court found that the document contained information relevant to the proceedings and that the attorney general did not sufficiently demonstrate that the harmful effects of providing the information outweighed the need for disclosure. Accordingly, the Court cautiously ordered the information be released in summary form only and with the exclusion of names of foreign officials to prevent harm. (The attorney general of Canada has appealed the decision in Almalki to the Federal Court of Appeal.)

This ruling reinforces the notion that public interest in disclosure can outweigh a government agency's desire to keep information confidential. It demonstrates that claims of national security will not go unquestioned, and that without sufficient evidence, the claims will be dismissed. Access to information is one means of promoting a transparent and accountable government.

For journalists, freedom of expression is more than a cherished *Charter* right—it is an essential tool of the workplace, along with the related necessaries of an open court system and access to information. These are the fundamentals journalists need to keep the public informed in accordance with their constitutionally protected right to freedom of expression.

This year, the judiciary has produced uneven results: some well-reasoned decisions, but the lack of nuance in the free expression cases is sometimes disturbing, as it results in unnecessary limits to freedom of expression. For instance, at the very least, the justification for maintaining mandatory bail hearing bans in cases heard by judge alone is very thin because in these cases there is no possibility of a tainted jury pool. Yet the Supreme Court of Canada did so. Similarly, there is no reason for the Court to uphold the geographic restrictions on interviewing legal counsel within Quebec courthouses—literally limiting journalists to designated areas in a public courthouse.

If journalists are to do their work as effectively, efficiently and accurately as possible, our courts need to apply the least restrictive alternative doctrine with more rigour in the next year. Interfering with free speech should be a last resort.

There were other important issues considered by the Canadian courts in 2010 and early 2011, such as defamation, hate speech and publication bans. A list of the major court cases at various judicial levels begins on page 34. It includes summaries and links to original documents and news coverage.

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Prepared by Jen Wilson

2010

SUPREME COURT OF CANADA

SUPREME COURT OF CANADA

R. V. NATIONAL POST, MAY 7, 2010

Journalist-source confidentiality

In 2001, the RCMP obtained an order for a document that had been given to journalist Andrew McIntosh, then with the *National Post*. The document was alleged to be a forgery, and was provided on the condition of confidentiality. If genuine, the document would have implicated then-prime minister Jean Chrétien in a conflict of interest regarding a bank loan. The *National Post* argued that journalists have a right to protect confidential sources. The reviewing judge found only a speculative possibility that the document would provide evidence to identify the forger and set aside the order. This decision was overturned by the Ontario Court of Appeal, and the case was brought before the Supreme Court.

In the course of its deliberations, the Supreme Court established that the *Charter of Rights and Freedoms* does not provide a blanket right to protect sources. Rather, under common-law privilege, they applied the criteria for a case-by-case privilege for confidential sources of journalists, known as the Wigmore Criteria. The following must be present: the communication was made explicitly in exchange for a promise of confidentiality; the confidentiality was a precondition to the disclosure; the relationship between the journalist and source was diligently, deliberately and consciously fostered in the public good; and the public interest served by protecting the identity of the source outweighs the public interest in getting the truth.

The majority of the Court ruled that in this case, the fourth criterion was not met and that the *National Post* must hand over the document to the RCMP.

While the Court ruled against journalist privileges in this case, it is the first time that the Supreme Court has explicitly acknowledged that the media does have a right to protect confidential sources; however, the right is not absolute and requires case-by-case rulings on whether the Wigmore Criteria are met. The burden of proof falls on the media party rather than on the Crown.

COURT DECISION:
scc.lexum.org/en/2010/2010scc16/2010scc16.html
THE WIGMORE CRITERIA:
www.sfu.ca/~palys/Wigmore.html
CBC ARTICLE:
cbc.ca/news/politics/inside-politics-blog/2010/10/behind-the-numbers-the-scoc-and-daniel-leblanc.html

SUPREME COURT OF CANADA

TORONTO STAR NEWSPAPERS LTD. V. CANADA, JUNE 10, 2010

Publication ban

This case examined the question of whether mandatory publication bans on bail hearings are a justifiable infringement of freedom of expression. Section 517 of the *Criminal Code* requires a justice of the peace to order a publication ban applying to evidence and information produced at a bail hearing, if the accused applies for one. A number of media organizations challenged the mandatory aspect of the ban, arguing that it is an unjustifiable violation of freedom of expression.

The media are not prevented from publishing the identity of the accused, commenting on the facts and the alleged offence, or reporting on the outcome of the application, including conditions attached to the accused's release. However, additional evidence and information have to be withheld until the ban ends, either at the end of the trial or when the accused is discharged after a preliminary trial.

The Court majority held that the limit Section 517 places on freedom of expression is justified, as the ban assists in safeguarding the right to a fair trial. Without a mandatory ban, the accused would have the additional burden of a publication ban hearing, causing delays and using additional resources. However, the dissenting judge argued that Section 517 was an unjustified infringement, as the mandatory nature interferes with the open court principle. As the media would likely only contest bans on high-profile cases, the majority of court cases would not face opposition in implementing publication bans.

By maintaining the implementation of publication bans, the Court is keeping limitations on the openness of the judicial system. The mandatory nature discourages deliberation on whether each ban is justifiable with the need to protect the accused outweighing the public's interest. As the dissenting judge in the ruling indicated, the media would only take interest in publication bans on high-profile cases that are of interest to the public.

COURT DECISION:
canlii.org/en/ca/scc/doc/2010/2010scc21/2010scc2

SUPREME COURT OF CANADA

ONTARIO (PUBLIC SAFETY AND SECURITY) V. CRIMINAL LAWYERS' ASSOCIATION, JUNE 17, 2010

Freedom of information

During a murder trial, the judge found instances of abusive conduct by state officials. The Ontario Provincial Police investigated and exonerated the police of misconduct without explanation. The Criminal Lawyers' Association (CLA) requested, under the *Ontario Freedom of Information and Protection of Privacy Act (FIPPA)*, disclosure of records relating to the investigation. The minister of public safety and security refused without explanation to disclose the records, citing exemptions under *FIPPA*—Section 14 for law enforcement records, and Section 19 for solicitor-client privileged records. Some exemptions can be overruled when there is compelling public interest, but not these sections. The CLA appealed to the information and privacy commissioner, who held the decision without reviewing the minister's exercise of discretion. The CLA then appealed this decision, arguing that it was unconstitutional that some *FIPPA* exemptions were not subject to potential public interest overrides. The Court of Appeal allowed the CLA's appeal, concluding that the exemption scheme violated the *Charter*, and the case was brought before the Supreme Court.

The Court determined that the exemptions were not in breach of the *Charter*, as the minister has discretion to disclose the documents and is not required to withhold them. In making a decision, the minister is required to consider the public interest. The Court held that while documents protected by Section 19 should be exempt from disclosure, those protected by Section 14 should be returned to the commissioner for reconsideration. The Court was concerned that the commissioner did not take into account his discretion to allow for disclosure, that no reasons were given for the decision, and that no parts of the document were disclosed.

The fact that the minister was never obligated to disclose his rationale for refusing to release the document is a cause for concern. If a government representative is denying access to information, full disclosure is necessary to ensure that exemptions in *FIPPA* are used appropriately and only when absolutely necessary. This was the first time the Court recognized that in some instances, freedom of expression protects access to government documents.

COURT DECISION:
canlii.org/en/ca/scc/doc/2010/2010scc23/2010scc23.pdf
SUMMARY FROM THE CENTRE FOR CONSTITUTIONAL STUDIES:
law.ualberta.ca/centres/ccs/rulings/Ontario_vCLA.php
ONTARIO FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT:
e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90f31_e.htm

SUPREME COURT OF CANADA

GLOBE AND MAIL V. CANADA (ATTORNEY GENERAL), OCT. 22, 2010

Journalist-source privilege

The *Globe and Mail* appealed a decision made by the Superior Court of Quebec in 2009, which compelled journalist Daniel Leblanc to provide testimony that would reveal a confidential source. The appeal related to the Liberal government's sponsorship scandal, in which a respondent in those proceedings is attempting to determine the identity of Leblanc's source. The *Globe and Mail* argued that journalist-source privilege should be protected, and also protested the implementation of a publication ban. The Superior Court of Quebec did not acknowledge the privilege, and imposed the publication ban without notice or formal submissions from either party involved. The appeals were denied by the Court of Appeal for Quebec and came before the Supreme Court of Canada.

The Supreme Court found that the previous ruling had not adequately considered the Wigmore Criteria in determining whether there was a case for journalist-source privilege. As set out in R. v. National Post, 2010, four criteria must be met in order to grant the privilege. The Court found that the previous ruling had not properly weighed whether the greater good was source confidentiality or public interest in the truth. The Court found that the *Globe and Mail* has grounds to appeal, and also quashed the publication ban, stating that it was implemented without proper procedure.

The Wigmore Criteria, established in common law for the rest of the country, had not previously applied in Quebec. Journalists from Quebec are now provided with the same form of protection that their colleagues across the country have access to.

COURT DECISION:
canlii.org/en/ca/scc/doc/2010/2010scc41/2010scc41.pdf
GLOBE AND MAIL ARTICLE:
theglobeandmail.com/news/politics/supreme-court-bolsters-protection-of-medias-confidential-sources/article1768576/page2/

CANADIAN HUMAN RIGHTS TRIBUNAL

CANADIAN HUMAN RIGHTS TRIBUNAL

FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA V. CANADA (MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT), MAY 28, 2010

Media access to courts

In anticipation of the Canadian Human Rights Tribunal ruling on a complaint with the Canadian Human Rights Commission regarding child welfare funding for First Nations children, the Aboriginal Peoples Television Network made an application to film and broadcast the hearing. The network argued that denying the application would violate Section 2(b) of the *Charter of Rights and Freedoms*. The complainants, First Nations Child and Family Caring Society of Canada and the Assembly of First Nations, supported the application, adding that First Nations peoples on reserves across the country had an interest in the case, and that broadcasting the events would be consistent with the tradition of sharing knowledge orally. The respondents, represented by the attorney general of Canada, opposed the application, stating that filming may affect those testifying and that the ability of the media to attend, take notes and report on the hearing ensured the public's interest in open court proceedings.

The Tribunal found that denying camera access did not infringe on Section 2(b) of the *Charter* as it did not prevent the network from reporting, with limitations only on the method of reporting. The Tribunal conceded that the network could film and broadcast only the opening ceremony of the hearing on the merits of the case; beyond that, the network could not make audio or video recordings of the hearings.

This interpretation of freedom of expression places limitations on the methods by which journalists can report. While it remains important that judges ensure the integrity of their courts is not undermined, access to information through various forms of media is a concern. As the appellant indicated, interested parties were unable to attend the hearing for geographic and socioeconomic reasons, severely limiting their ability to participate in a hearing open to the public.

TRIBUNAL DECISION:
canlii.org/en/ca/chrt/doc/2010/2010chrt16/2010chrt16.pdf

FEDERAL COURT

FEDERAL COURT

CANADA (ATTORNEY GENERAL) V. ALMALKI, NOV. 8, 2010

Access to information

The attorney general of Canada appeared before the Federal Court, making a case to withhold information from the respondents, citing national security. The respondents included three men who were allegedly tortured in the Middle East because of incorrect information supplied by Canadian officials. The document in question had been unintentionally released to counsel for the respondents, who declined to return it upon request and sought an order for the disclosure of all the information the attorney general was withholding. In order to address the attorney general's request, the Court had to determine: a) whether the information was relevant to the court proceedings; b) whether it had been demonstrated that disclosure of the information would cause injury; and, c) where injury had been established, whether the public interest in disclosure outweighed the public interest in non-disclosure.

The Court found that the document contained information relevant to the proceedings, aside from administrative details. The attorney general did not sufficiently demonstrate harmful effects of the documents being disclosed, and the Court ordered for the document to be released. In order to prevent potential harm, the Court allowed for the document to be released as a summary, which would exclude names of foreign officials and agencies.

This ruling reinforces that public interest in disclosure can outweigh a government agency's desire to keep information confidential. It demonstrates that claims of national security will not go unquestioned, and that without sufficient evidence, the claims will be dismissed. Access to information is one means of promoting a transparent and accountable government.

COURT SUMMARY:
canlii.org/en/ca/fct/doc/2010/2010fc1106/2010fc1106.pdf
ARTICLE FROM THE *OTTAWA CITIZEN*:
oppenheimer.mcgill.ca/Judge-lifts-veil-on-national

PROVINCIAL COURTS

ALBERTA

COURT OF QUEEN'S BENCH OF ALBERTA

PRIDGEN V. UNIVERSITY OF CALGARY, OCT. 12, 2010

Freedom of expression

Two brothers attending the University of Calgary, Keith and Steven Pridgen, were disciplined for non-academic misconduct after posting negative comments about a professor on Facebook. Both were instructed by their dean to write letters of apology, and K. Pridgen was also placed on probation. The brothers appealed to the university's General Faculties Council Review Committee, which sided with the dean. The appeal was then brought before the Court, with the brothers arguing that their right to free expression was infringed upon.

The university argued that the *Charter of Rights and Freedoms* did not apply, as the school is a private body and its agreements with students are private law. However, the Court determined that the university acts as an agent of the provincial government in providing education services and that the *Charter* does apply in disciplinary proceedings. The Court found that the Pridgens' right to free expression was infringed upon by the disciplinary measures, and rejected the argument that criticism of a professor must be restricted in order to maintain an appropriate learning environment.

This decision demonstrated that Facebook and similar online forms of social media provide a forum for communication that should not be censored unless statements go beyond the protection of the *Charter*. As no charges of defamation or hate speech were brought against the brothers, their negative comments fell within their right to free expression.

COURT DECISION:
canlii.org/en/ab/abqb/doc/2010/2010abqb644/2010abqb644.pdf
ARTICLE FROM THE CBC:
cbc.ca/news/canada/calgary/story/2010/06/11/calgary-facebook-student-court-pridgen-uofc-university.html

Steven Pridgen (left) and Keith Pridgen

PHOTO: CBC

MANITOBA

COURT OF QUEEN'S BENCH OF MANITOBA

DIRECTOR OF CHILD AND FAMILY SERVICES V. D.M.P. ET AL., FEB. 11, 2010

Freedom of expression

In March 2008, a seven-year-old girl arrived at school with racist writing and drawings on her body. An abuse worker with Child and Family Services spoke with her and learned that her mother had made the markings, which included a swastika and the words "White Pride." When the abuse worker asked if the girl understood the meaning of the markings, the girl explained that her mother and stepfather had taught her that "black people should die."

As the case went before the Court to determine custody, the stepfather's arguments for custody included that the apprehension of his two children went against the *Charter of Rights and Freedoms*. He argued that it was an infringement on the right to free expression, as the markings on the girl were expressions of his belief of white supremacy.

In response to this, the Court found that using the child's body as a canvas did not fall under Section 2(b) of the *Charter*. A child does not have the legal capacity to consent to racist remarks being written on his or her body. In deliberating the facts of the case, which went beyond concerns of the markings on the child, the Court ruled in favour of the children being put in the custody of Child and Family Services.

COURT DECISION:
canlii.org/en/mb/mbqb/doc/2010/2010mbqb32/2010mbqb32.pdf
ARTICLE FROM THE *TORONTO STAR*:
thestar.com/news/canada/article/764233--court-approves-foster-care-for-children-taught-racist-beliefs

ONTARIO

ONTARIO COURT OF APPEAL

R. V. KATIGBAK, JUNE 8, 2010

Freedom of expression

Over the course of seven years, Robert Katigbak amassed 628 images and 30 video clips of child pornography, which he has admitted to in court. As an explanation, he stated that he had collected the material to use in an art project that would present the issue of child exploitation and pornography from the perspective of the exploited child. The art exhibit never happened, which Katigbak claimed was due to a lack of funding. In his original trial, Katigbak successfully argued that his actions fell under an exemption in the *Criminal Code*, Section 163.1(6), where an individual is not guilty of possessing child pornography if there is "a legitimate purpose related to the administration of justice or to science, medicine, education or art," and there is no undue risk of harm to minors. The Crown appealed this decision.

The Court of Appeal deliberated the competing values of protection of children and freedom of expression, which Section 163.1(6) is meant to create a balance for. In its considerations, the Court came to the conclusion that the trial judge had erred in placing too much emphasis on freedom of expression outside of the context of possession of child pornography. The Court overruled the decision and allowed the Crown's appeal, registering a conviction.

COURT DECISION:
canlii.org/en/on/onca/doc/2010/2010onca411/2010onca411.pdf

ONTARIO SUPERIOR COURT OF JUSTICE

CANADIAN CIVIL LIBERTIES ASSOCIATION V. TORONTO POLICE SERVICE, JUNE 25, 2010

Freedom of expression

In the buildup to the G20 Summit and the protests it would bring, the Canadian Civil Liberties Association (CCLA) took an active interest in the Ontario Provincial Police (OPP) and Toronto Police Service's (TPS) recently acquired long-range acoustical devices (LRADs). LRADs can be used as a powerful loudspeaker or on an alert function that emits high-decibel, narrow-frequency sound waves. The CCLA sought injunctions to limit the use of LRADs in general and at the G20 Summit. They voiced concern that the use of LRADs against demonstrators during the summit would have a chilling effect and infringe on freedoms of expression and association.

The Court determined that the OPP had stricter guidelines in place, and dismissed the request for injunctions; however, the Court also found that with the operating procedures of the TPS, there was a real likelihood that demonstrators would suffer from hearing damage. The Court granted the motion against the TPS in part, ordering it to refrain from using the alert function for land-based public safety applications. The Court provided that the injunction would be dropped if the TPS adopted the distance and volume limitations used in the OPP's standard operating procedures.

The CCLA welcomed the ruling, although it found the fact that it was only able to discuss the matter in a court setting to be unacceptable. The TPS had been unresponsive to earlier attempts by the CCLA to discuss the use of LRADs. Since then, the TPS's policies have been revised multiple times in order to address public safety, and it is no longer solely relying on the manufacturer's manual for information.

COURT DECISION:
canlii.org/en/on/onsc/doc/2010/2010onsc3525/2010onsc3525.pdf
ARTICLE BY CCLA:
ccla.org/2010/06/25/ccla-welcomes-court-ruling-further-restricting-lrad-use/

ONTARIO SUPERIOR COURT OF JUSTICE

FRALEIGH V. GREAT-WEST LIFE ET AL., SEPT. 7, 2010

Court fees

In what the Court referred to as a "David and Goliath situation," the *Toronto Star* was ordered to pay the court fees of Greg Fraleigh after it lost a court battle protesting a publication ban. Fraleigh was a non-party to a previous court action involving his ex-wife. He became aware that the *Star* intended to publish allegations made by his ex-wife, which included references to Fraleigh and his health. Fraleigh sought and was awarded a publication ban, then sought indemnity costs.

The *Star* argued that it intervened to protect the public's right to open court proceedings, and imposed costs would have a chilling effect on the media. It stated that if the media did not challenge these types of orders, no one would. The Court acknowledged that the *Star* may have been acting to preserve freedom of the press and open court proceedings, but commented that the *Star* could not deny there was some potential economic benefit from the sale of newspapers.

The Court found that Fraleigh was seeking to protect his interests only, not to advance them. The *Star* was ordered to cover Fraleigh's total court costs, which amounted to more than $93,000.

As the *Star* argued during the case, this has the potential to put a chill on media intervening with publication bans and similar orders. The media can be seen as gatekeepers of freedom of expression, in that they are continuously taking their fight to the court in order to fulfil their purpose of keeping the public informed.

COURT DECISION:
canlii.org/en/on/onsc/doc/2010/2010onsc4637/2010onsc4637.pdf

ONTARIO COURT OF APPEAL

R. V. CANADIAN BROADCASTING CORPORATION, NOV. 11, 2010

Access to court documents

Following the 2007 death of Ashley Smith while she was in custody at the Grand Valley Institution for Women, four correctional officers were charged with criminal negligence causing death. During the preliminary inquiry, certain exhibits were introduced as evidence, including video recordings. After the Crown decided not to continue with the charges, all documents were released to the coroner for an inquest. The Canadian Broadcasting Corporation (CBC) sought access to the videos as part of an investigative documentary on Smith's life; however, it was only granted partial access. As some of the videos were not played in full during the inquiry, the CBC was entitled to view and copy what was shown, but only to view (not copy) the portions of videos that had not been played.

The CBC appealed the limitations placed on its rights to access and copy the exhibits. The Correctional Service of Canada (CSC) issued a cross-appeal, arguing that the CBC should not have been granted any access to the exhibits. The Court upheld the right of media to access exhibits used in court decisions and did not find there was precedence to deny media from copying the exhibits. When an exhibit is introduced to a court without restrictions, the entire exhibit becomes a part of the record in the case. Additionally, the Court indicated that there is nothing in law that permits a judge to impose his or her opinion about what does and does not need to be broadcasted to the general public. The Court granted the CBC's appeal, and dismissed the CSC's cross-appeal.

Additionally, Smith's mother had already given the CBC permission for the documentary, reducing concerns about restricting the information distributed to the public. By ruling in favour of the CBC, the Court upheld the right of media to access court exhibits and maintain open court policies to the benefit of the public's interest.

COURT DECISION:
canlii.org/en/on/onca/doc/2010/2010onca726/2010onca726.pdf
ARTICLE BY CCLA:
ccla.org/rightswatch/?p=1949

ONTARIO COURT OF APPEAL

R. V. KHAWAJA, DEC. 17, 2010

Freedom of expression

In 2008, Mohammad Momin Khawaja was the first person to be sentenced under Canada's *Anti-terrorism Act*. Convicted on charges related to terrorism, Khawaja went before the Ontario Court of Appeal. One of his arguments was that the federal government's definition of "terrorist activities" violated his *Charter* rights, including the rights to freedom of religion and freedom of expression. "Terrorist activities" had been defined to include acts that are committed "in whole or in part for a political, religious or ideological purpose, objective or cause." Khawaja argued that this definition would have a chilling effect on those who would express beliefs similar to those held by individuals associated with "terrorist activity."

The Court found the argument of a "chilling effect" to be speculative, as the appellant did not provide evidence to support it. The Court stated that violent activities, even when they are meant to convey a meaning, are excluded from protection under Section 2(b) of the *Charter*.

Additionally, the Court ruled that where the activities were not violent, they were contrary to and destructive of the underlying principles of the right to free expression. The definition of "terrorist activity" was upheld as the Court found the limitations this puts on freedom of expression were justified.

Drawing on Supreme Court of Canada jurisprudence, the Court has tried to identify underlying principles of the right to freedom of expression: the pursuit of truth, participation in the community, and individual self-fulfillment. The Court determined that Section 2(b) of the *Charter* offers protection for forms of expression that advance these principles. If this ruling were to become generally adopted by Canadian courts, it could pose a significant restriction on the right to freedom of expression.

COURT DECISION:
canlii.org/en/on/onca/doc/2010/2010onca862/2010onca862.pdf
ARTICLE FROM OSGOODE HALL LAW SCHOOL'S *THE COURT*:
thecourt.ca/2011/01/10/ontario-court-of-appeal-gets-tough-on-terror-with-canadas-first-terrorist/
THE *ANTI-TERRORISM ACT*:
justice.gc.ca/antiter/sheetfiche/terrordefp1-terreurdefp1-eng.asp

SASKATCHEWAN

COURT OF QUEEN'S BENCH FOR SASKATCHEWAN

SASKATCHEWAN (ATTORNEY GENERAL) V. THATCHER, MARCH 5, 2010

Prohibiting profits from recounting crime

Colin Thatcher was previously convicted of murdering his ex-wife, and was released on early parole after 22 years by the "faint hope" clause. Once on parole, Thatcher announced his intention to write a book maintaining his innocence. In response, the Government of Saskatchewan passed *The Profits of Criminal Notoriety Act*, which has a retroactive application and states that persons convicted of or charged with designated crimes are prevented from financially exploiting the notoriety of their crimes. Thatcher challenged that this infringed on his freedom of expression.

The Court found that Thatcher's rights and freedom of expression were not violated, and stated that he was not prevented from expression related to the crime, but from profiting from its notoriety. The Court upheld the legislation, and ordered Thatcher to provide the $5,000 payment he had received from his publisher, as well as forward additional earnings from the book, to the minister of finance.

This was the first time that the constitutional validity, interpretation and application of the *Act* had been brought before judicial scrutiny. While the Court stated it did not prevent expression related to the crime, it prohibited the ability to profit from the expression. As this was only the first challenge to the legislation, the *Act* may be brought under further scrutiny in the future.

COURT DECISION:
canlii.org/en/sk/skqb/doc/2010/2010skqb109/2010skqb109.pdf

COURT OF APPEAL FOR SASKATCHEWAN

WHATCOTT V. SASKATCHEWAN (HUMAN RIGHTS TRIBUNAL), FEB. 25, 2010

Hate speech

In 2001 and 2002, William Whatcott produced and distributed flyers that were found to contain derogatory references to homosexuals. The flyers also contained opinions on the public school system teaching sexual identity and concerns over solicitation of underage partners for same-sex activity. Whatcott was brought before the Saskatchewan Human Rights Tribunal and found to be in violation of *The Saskatchewan Human Rights Code*. The Tribunal found his flyers to violate Section 14 by exposing individuals to hatred, ridicule and belittlement, or otherwise affronting their dignity based on sexual orientation.

Whatcott's first attempt to appeal the decision before the Court of Queen's Bench was dismissed in 2007. Before the Court of Appeal, Whatcott maintained that while the language he used was blunt, he was exercising his right to freedom of expression and religion. He argued that characterizing his statements as discriminatory censored his speech and ended his participation in a public debate on a matter of public interest.

The Court stated that questions of sexual morality are questions intricately involved in public policy as well as individual autonomy, and therefore they are worthy of protection from chilling effects. Comments expressing disapproval of same-sex sexual conduct in relation to public policy or sexual morality do not warrant limitations. The Court allowed the appeal.

Whatcott's appeal, scheduled to go before the Supreme Court in October 2011, is controversial. While his statements were blunt and offensive to some, the question before the Court is only whether or not he breached the *Human Rights Code*. An unpopular opinion is not sufficient reason to infringe upon someone's right to freedom of expression.

COURT DECISION:
canlii.org/en/sk/skca/doc/2010/2010skca26/2010skca26.pdf

2011

SUPREME COURT OF CANADA

SUPREME COURT OF CANADA

CANADIAN BROADCASTING CORPORATION V. CANADA (ATTORNEY GENERAL), JAN. 18, 2011

Access to courts

The Superior Court of Quebec made changes to its rules of practice in 2004, limiting where journalists could use cameras and recorders within courthouses. Members of the media community (the CBC, Groupe TVA inc., La Presse Ltée and Fédération professionnelle des journalistes du Québec) argued before the Supreme Court that these limitations violated their right of freedom of the press. In response, the government maintained that filming, taking photos and conducting interviews in the public areas of courthouses, and broadcasting the official audio recordings of court proceedings, were not protected by the *Charter*. Due to the location of the activities, allowing them would have an adverse effect on the serenity of hearings, on truth-finding and on the privacy of participants in the justice system.

The Court found that the rules of practice did infringe upon freedom of expression, and noted the importance of subjecting such an infringement to close scrutiny; however, the Court also deliberated whether the infringement was justified. In order to be justified, the infringement had to be due to a pressing and substantial concern, and there had to be minimal interference with the right to free expression. The Court felt that there was sufficient evidence that without the limitations on journalists, there would be adverse consequences, particularly in protecting the privacy of witnesses.

It was determined by the Court that provisions had been made to infringe as little as possible on freedom of expression by providing designated areas where journalists could film, photograph and interview individuals. Regardless, the limitations were upheld and journalists' access to areas of the courthouse was reduced. The open court principle is an essential part of maintaining the public's confidence in, and the accountability of, the justice system. Journalists provide a vital link between court proceedings and the public, and any limitations placed on them affect the public's access to the judicial system.

COURT DECISION:
canlii.org/en/ca/scc/doc/2011/2011scc2/2011scc2.pdf
CBC ARTICLE:
cbc.ca/news/canada/story/2011/01/28/supreme-court-cameras.html
CCLA CASE SUMMARY:
ccla.org/2011/01/28/the-open-court-principle-can-be-limited-supreme-court-says/

PHOTO: COURTESY ARTUR PAWLOWSKI

Artur Pawlowski (right) was charged with violating City of Calgary bylaws.

SUPREME COURT OF CANADA

FARÈS BOU MALHAB V. DIFFUSION MÉTROMÉDIA CMR INC., FEB. 17, 2011

Defamation

In November 1998, radio show host André Arthur made on-air comments that accused the taxi industry in Montreal of being unclean, arrogant, incompetent, corrupt and ignorant of official languages. Arthur, who is known for his sensational remarks, made additional disparaging comments towards drivers who were Haitian and of Arab origin. Taxi driver Farès Bou Malhab brought a class action suit against Arthur on behalf of 1,100 taxi drivers, including himself, who identified as Haitian or of Arab origin. The trial judge found in favour of Bou Malhab, ordering that $220,000 be paid to a non-profit organization. Arthur appealed, and the Court of Appeal overturned that judgement.

The case was brought before the Supreme Court of Canada, where the balance between freedom of expression and the importance of restricting harmful speech was examined. In noting international trends regarding this balance, the Court identified an increasing concern about protecting freedom of expression, with the law of defamation changing accordingly. In clarifying the principles of civil liability for defamation, the Court outlined a three-step analysis: 1) whether a reasonable person would have made similar comments in the same context; 2) whether an ordinary person would believe the comments damaged the reputation of each group member, causing personal injury; and, 3) whether there is a connection between the comments and the personal injury.

The Court ruled that in the eyes of an ordinary person, the reputations of the drivers would remain intact. No one would reasonably believe that simply because a taxi driver is Haitian or of Arab origin, the driver would share the characteristics Arthur attributed to the group. While the Court found the comments to be both scornful and racist, there was not sufficient evidence that each member of the group had personally suffered damage to his or her reputation. The Court affirmed that no one is entitled to compensation "solely because he or she is a member of a group about which offensive comments have been made."

COURT DECISION:
canlii.org/en/ca/scc/doc/2011/2011scc9/2011scc9.pdf
TORONTO SUN ARTICLE:
torontosun.com/comment/columnists/alan_shanoff/2011/02/25/17412331.html

PROVINCIAL COURTS

ALBERTA

COURT OF QUEEN'S BENCH OF ALBERTA

R. V. PAWLOWSKI, FEB. 17, 2011

Freedom of expression

Artur Pawlowski, a member of the Street Church Ministries, was charged with five violations of City of Calgary bylaws. The charges related to placing materials on a street (including tables, signs and a large wooden cross) and the use of amplification in a public park without permits. Pawlowski was preaching when the violations occurred, and he argued that prohibiting his activities was an infringement of his rights to freedom of religion and freedom of expression. The trial judge found in his favour and acquitted Pawlowski of all charges. The City appealed, arguing that while the bylaws may infringe upon Pawlowski's freedom of expression, the infringement was justified.

The Court of Queen's Bench upheld the acquittal of charges relating to the first bylaw, relating to materials being placed on a street. It agreed with the trial judge's finding that the word "material" was vague. While the term is defined within the bylaw, it references items such as trash, gravel and building materials. The wording was vague enough to also encompass everyday items such as the sole of a shoe or a baby carriage, making the term overly broad and ineffective.

The acquittal of charges relating to the second bylaw was overturned, as the Court examined potential infringements on Pawlowski's freedoms of religion and expression. It determined that his freedom of religion had not been threatened, as the City was not impairing his right to preach, only prohibiting the use of an amplification system without a permit. While his freedom of religion had not been violated, the Court acknowledged that the trial judge and the City had previously agreed Pawlowski's freedom of expression had been infringed upon. The Court deliberated whether this infringement was justified, and determined that it was a minimal impairment to ensure the healthy environment that citizens of Calgary are entitled to. The bylaw does not prohibit public discourse but only limits volume. The Court allowed the appeal and imposed the $100 fine associated with the violation. Pawlowski intends to appeal the decision. The City of Calgary has spent more than $65,000 on the case, which it feels is justified in defending the constitutionality of its bylaws and in exploring the broader implications of balancing the rights of a group against the rights of the general public.

COURT DECISION:
canlii.org/en/ab/abqb/doc/2011/2011abqb93/2011abqb93.pdf
CALGARY HERALD ARTICLE:
calgaryherald.com/news/bylaw+battle+continues+with+Calgary+street+preacher/4357465/story.html
CBC ARTICLE:
cbc.ca/news/canada/calgary/story/2011/02/22/calgary-street-preacher-appeal-overturned.html

PHOTO: PAUL RUDKOWSKI