Free Expression in Canada

A PEN International briefing

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Summary

Canada is generally regarded as one of the freest countries in the world, with a strong record of defending human rights.[i] Constitutional, legislative, and institutional provisions protect human rights in the country. The Canadian Charter of Rights and Freedoms (1982) entrenches in the constitution political and civil liberties such as the right to free expression, freedom of the press, freedom of association and peaceful assembly. The Canadian court system is generally considered to be independent, professional, balanced, and open to freedom of expression issues. The Canadian constitution enables courts to strike down laws that are inconsistent with any of its provisions, including the rights and freedoms protected by the Charter. Rights and freedoms are also protected by human rights legislation at the federal, provincial and territorial levels. These pieces of legislation create human rights commissions and tribunals that investigate complaints of discrimination. Various levels of the Canadian government have also created ombudsman positions, public officials who investigate complaints about government services and promote access to these services. Internationally, Canada is party to a number of international human rights conventions and implements these domestically through legislation, policy, and programs at all levels of government.

Although Canada has a strong legal and institutional framework for the protection of human rights, there are several areas in which the right to freedom of expression has become less secure.

The briefing provides a brief overview of current free expression issues in Canada, focusing on:

1. Critiques of government
2. Freedom of assembly and government responses to peaceful protest
3. Access to information
4. Anti-terror legislation, security, and surveillance
5. Defamation, protection of confidential sources, media ownership, blasphemy, and hate speech
6. Linguistic rights

The briefing draws attention to an erosion of the right to free speech in Canada in recent years - a process that, while gradual, is destabilizing its foundation and leaving fewer Canadians confident in exercising their right to free speech. Nevertheless, these negative changes are not irreversible, and can be corrected through appropriate policies, legislation and funding choices.

This briefing has been prepared by PEN International as an overview of the state of free expression in Canada for delegates and others in advance of the 81st PEN International Congress to be held in Quebec City, October 13-16, 2015. The scope of this note is limited to free expression issues. Delegates may refer to the UNHRC's Concluding Observations on the Sixth Periodic Report on Canada (July 2015) for more on current human rights issues in Canada. This note has been compiled with research from PEN Canada and PEN Quebec

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Introduction

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This note will provide a brief overview of current free expression issues in Canada, focusing on:

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8. Freedom of assembly and government responses to peaceful protest
9. Access to information
10. Anti-terror legislation, security, and surveillance
11. Defamation, protection of confidential sources, media ownership, blasphemy, and hate speech
12. Linguistic rights

1. Critiques of government

Generally, Canadians are free to criticize their local and federal governments. However, since 2006, the federal government has taken steps that have made it more difficult for civil society and public sector employees to critique and/or publicly contradict government policy, legislation, and action. This has had serious consequences for public discourse in Canada.

1.1 Audits of Canadian charities

Since 2012, the Canadian federal government has allocated C$13 million to the Canada Revenue Agency (CRA) to ensure that charities spend no more than 10 per cent of their resources on “political activity”.[iii] Interpreted broadly, the current definition of political activity could mean any critique of government policy or political

candidate.[iv] Since then, the CRA has audited 60 charities for political activity. The first wave focussed on environmental charities (several of whom were vocally critical of the tar sands and pipeline development), but others have included social justice and international human rights organizations, one of which was PEN Canada.

The CRA has refused to provide meaningful information about why these 60 charities were chosen from the more than 100,000 active charities in Canada. Coupled with its vague and easily misinterpreted definition of "political activity" the CRA's actions have caused widespread uncertainty as to whether the audits are being used to silence dissent and they have caused a chill on expression in the charitable sector.[v]

Many charities have chosen to err on the side of caution, engaging in fewer activities that may be deemed "political" in order to avoid the risk of being audited and potentially losing the charitable status that allows them to issue tax receipts to donors. None of the 60 political activity audits conducted since 2012 has resulted in the revocation of charitable status, but the prospect of a time-consuming and resource intensive audit and the potential loss of charitable status are deterrent enough.[vi]

The CRA has taken steps to improve transparency. Its Charities Update Program, introduced in 2013, provides annual statistics on political audits, information about how charities engage in political activities, and the outcome of the audits. The CRA has also released a series of webinars and a political activity assessment tool to help charities determine whether they are engaged in political activity. These are helpful initiatives, but until the CRA clearly identifies how charities are chosen for audits and updates its definition of political activity, many charities will remain wary of critiquing government policy.

In July 2015, the United Nations Human Rights Committee, which oversees states' implementation of the International Covenant on Civil and Political Rights, released its Concluding Observations Report in which it expressed concern for the advocacy chill felt by a broad sector of civil society. It recommended that the state take steps to ensure that limits to advocacy do not place unnecessary restrictions on civil society organizations registered as charities that defend human rights.

1.2 Muzzling the public sector

Codes of conduct and communication policies for federal public servants have become increasingly restrictive in Canada. Critics argue that the changes are designed to prevent the public release of information that contradicts government policy.[vii] The federal government's 2006 Communications Policy introduced restrictions on how and when public sector employees can communicate with the media, and it required multiple levels of authorization before such communications could take place.

The new policy has had far-reaching effects. In 2010, a Natural Resources Canada scientist was required to get approval from the office of the Natural Resources Minister prior to speaking with the media about research into a flood that occurred in Northern Canada 13,000 years ago. The request was approved only after the reporters' deadlines had passed.[viii] In other cases, the slow pace of the new bureaucratic approval system has forced journalists to approach non-Canadian scientists for timely comment on scientific and environmental developments in Canada.[ix] Leaked documents from Environment Canada showed an 80 per cent decrease in media coverage of climate change science after the policy was implemented.[x]

A 2013 survey of Canadian federal scientists conducted by the Professional Institute of the Public Service in Canada found that 90 per cent of scientists could not speak openly to the media, and 86 per cent felt they would face retaliation from their employer if they spoke out on a policy they felt affected Canadians.[xi] The federal government has repeatedly denied that they are interfering in the rights of public scientists.[xii] Similarly, the Code of Conduct for Library and Archives Canada (LAC), introduced in 2013, specifies that only "authorized spokespersons" can respond to inquiries about the LAC's policy positions. Employees must also obtain permission from managers for "high risk" activities such as teaching at colleges or universities, or attending and speaking at conferences.[xiii] These policies undermine transparency, block access to scientific information, and make it difficult for Canadians to assess the impacts of policy decisions.

2. Freedom of assembly and government responses to peaceful protests

Although Section 2b of the Canadian Charter of Rights and Freedoms guarantees the freedom to assemble peacefully, several incidents indicate that the freedom to protest in public is not being adequately protected.

During the 2010 G20 summit in Toronto, police forces used kettling (a form of containment in a defined area), rubber bullets, and mass arrests to subdue protestors with no oversight mechanisms by the relevant government agencies. Five years on, despite numerous credible accounts of police violence, only one police officer has been charged with the use of excessive force during these arrests.[xiv] Similarly, in 2012, police forces in Montreal used tear gas, excessive force, and mass arrests to quell crowds of student protesters.[xv] There were also reports of excessive force being used by police officers during demonstrations by aboriginal and environmental groups.[xvi] In July 2015 the UN Human Rights Committee expressed concern about the excessive use of force by law enforcement officers during mass arrests in the context of protests at the federal and provincial levels, with particular reference to indigenous land-related protests, G-20 protests in 2010, and the student protests in Quebec in 2012. It also expressed concern that complaints about excessive force were not always promptly investigated and that the sanctions imposed were of a lenient nature. It recommended that Canada strengthen its efforts to ensure that all allegations of ill treatment and excessive use of force by the police are promptly and impartially investigated by strong independent oversight bodies with adequate resources at all levels, and that those responsible for such violations are prosecuted and punished with appropriate penalties.[xvii]

The federal government has also taken steps to keep records of those involved in public protest. In 2014, the federal Government Operations Centre (GOC) - the body that coordinates the federal response to national emergencies - requested that all federal departments help compile comprehensive lists of "all known demonstrations which will occur either in your geographical area or that may touch on your mandate."[xviii] Intelligence specialists argue that this blanket surveillance of Canadians is in breach of the Charter of Rights and Freedoms. The categorical monitoring of peaceful protests suggests that the government considers them a threat to public safety.

3. Access to information

Canada's Access to Information Act (ATIA) was widely heralded as a breakthrough in transparency when it was introduced in 1982. Since then, there have been only minor amendments to the legislation despite the increasing digitization of data, the advent of the Internet, and calls for reform from two of Canada's information commissioners. As a result, Canada currently fails to meet a number of international access to information standards.[xix]

The Right to Information Rating ranks Canada's access to information system 59th out of 102 countries that have such laws, based on: right of access, scope, requesting procedures, exceptions, appeals, sanctions, and promotional measures.[xx]

Canada's access to information framework falls short in a number of areas. First, the Supreme Court has recognized only a limited constitutional right to information when access "is shown to be a necessary precondition of meaningful expression, does not encroach on protected privileges, and is compatible with the function of the institution concerned."[xxi] This falls short of international standards, which recognize a freestanding right to information, subject to very limited exceptions.

Second, exceptions in the Access to Information Act are overbroad, limiting the scope of information that public authorities are obliged to disclose. Disclosure is also limited by restrictions contained in other pieces of legislation.[xxii] Contrary to better international practice, only a few of the exceptions are subject to an override, so that information is required to be released where this in the overall public interest. Information Commissioner Suzanne Legault noted that in 2013-2014, only 21 per cent of requests resulted in the release of information compared to 40 per cent in 1999-2000.[xxiii]

The Act is also too lenient with respect to extensions to the 30-day deadline for responding to requests, which are not subject to an overall limit. Newspaper Canada's National Freedom of Information Audit found that on average in 2013, federal government departments took 52 days to process requests for information, with 59 per cent of all requests taking longer than 30 days.

There are further problems with the access to information system. The scope of the Act is unduly limited with the Cabinet, legislature, and judiciary all falling outside its bounds.[xxiv] The Act gives discretion to public bodies to levy excessive fees before requesters can access documents, based on claims of administrative costs. Moreover, the responsiveness and accountability issues are exacerbated by the fact that the office of Canada's information commissioner does not have binding order powers, as against better international practice; it can only make recommendations. It also lacks the legislative authority to undertake promotional activities, including raising awareness of the right to information, leaving Canadians relatively uninformed about this fundamental freedom.[xxv]

4. Anti-terror legislation, security, and surveillance

Overreaching surveillance programs and vaguely-worded anti-terror legislation have also eroded the right to free expression in Canada.

4.1 Anti-terror legislation

Bill C-51, which introduced the most radical changes to Canada's national security legislation since 2001, came into force in June 2015. Several of Bill C-51's provisions diminish the right to free expression.

First, the new law makes it a criminal offence to "encourage" or "promote" others to carry out terrorist acts, which has the effect of criminalizing speech that may have no connection to acts of violence. Under the law, people can be found guilty regardless of whether the terrorist acts are actually carried out, and regardless of whether the speaker actually intends for a terrorist act to be committed. Critics point out that the bill's vague language, including the term "terrorism in general", gives too much discretion to the police and security agencies, and potentially creates a chill on free speech.

The new Anti-Terrorism Act also allows the Canadian Security Intelligence Service to take measures to reduce threats to the "security of Canada"— which is broadly defined to include threats to critical infrastructure and economic stability. This threat reduction power could permit authorities to interfere with non-violent public protests, including environmental groups protesting against pipelines, separatist protests in Quebec, and others. Some critics argue that the bill disproportionately affects Canada's aboriginal population as resource development across the country has lead to numerous clashes between aboriginal activists and law enforcement.[xxvi]

Finally, the legislation establishes new powers that allow the police to seize or delete "terrorist propaganda" — defined as "any writing, sign, visible representation or audio recording that advocates or promotes the commission of terrorism offences in general." This could include a wide range of materials, given the broad definition of "terrorism in general" and it applies to both online and offline content. Once a judge deems material terrorist propaganda, law enforcement agencies could use their new powers to approach computer administrators directly to remove online content.[xxvii] Some critics have raised concerns about the provisions in the new law that allow border service agents to seize "terrorist propaganda".[xxviii]

There has been popular opposition to the bill, which was the subject of several petitions and rallies before it became law. After it passed in June 2015, the Canadian Civil Liberties Association and the Canadian Journalists for Free Expression initiated a Charter Challenge against key sections of the bill, including the provision that criminalizes the promotion of terrorist offences.

4.2 Surveillance

In 2013, the UN Special Rapporteur on the right to freedom of opinion and expression wrote that interference in individuals' privacy can limit the "free development and exchange of ideas."[xxix] Surveillance in Canada has

become commonplace, and recent revelations have shown that Canadians and others are being surveilled under numerous programs with little oversight or transparency. Canada's Communications Security Establishment (CSE) is reviewed only by the Office of the CSE Commissioner, and is otherwise monitored by no court or Parliamentary committee, nor is there judicial oversight over its powers.

Absence of oversight has allowed the CSE to mine communications for metadata, share information with other governments and monitor the downloads of millions of Internet users around the world. Since September 2001, the CSE has monitored the communications of Canadians to identify potential security threats.[xxx] The government's metadata surveillance program, though targeting foreign communications, enables the CSE to capture and analyze "metadata" from every phone conversation and Internet-based activity undertaken by Canadians. Although it does not allow the CSE to eavesdrop directly on these communications, it generates data that reveals significant amounts of personal information and can be misused by Canadian law enforcement agencies, particularly given that the CSE is subject to no judicial oversight. The CSE is however, permitted to "eavesdrop directly" on any communication undertaken by a Canadian as long as there is a foreign nexus.[xxxi] The program was renewed by ministerial directive in 2011, despite concerns raised in 2008 by the then CSE Commissioner that "characteristics of contemporary communications technology mean that the interception of communications by CSEC runs the inherent risk of acquiring the private communications of Canadians."

This lack of oversight has also allowed law enforcement agencies to request information directly from Internet Service Providers (ISPs) without a warrant.[xxxii] In 2014, Canada's Privacy Commissioner Chantal Bernier revealed that ISPs have disclosed a significant amount of information to the federal government and urged them to be more transparent about these disclosures.[xxxiii] In June of the same year, the Supreme Court of Canada barred ISPs from providing law enforcement agencies with the personal information of customers without a warrant.[xxxiv] The court emphasized the importance of the right to privacy and the need for police to obtain a warrant for information except in mitigating circumstances.[xxxv]

In 2014, documents retrieved by US whistleblower Edward Snowden revealed that the CSE used information from free wireless Internet services in major Canadian airports to track wireless devices of passengers for days after they left the terminal.[xxxvi] The documents also confirmed the existence of an information-sharing agreement between CSE and the United States' National Security Agency (NSA) that enables both agencies to circumvent laws that prohibit them from spying on their own citizens by sharing, without warrants, information each has gathered on the other country's citizens.[xxxvii]

Most recently in January 2015, documents from the Snowden leak showed CSE monitoring uploads and downloads of millions of Internet users across the globe. Codenamed "LEVITATION", the operation analyzes records of up to 15 million downloads every day.[xxxviii] The CSE can search for specific IP addresses using tools from Britain's GCHQ, track users' online activity, and sometimes link the IP address to a specific Facebook or Google profile. Of the 15 million records collected daily, approximately 350 records are deemed "interesting".[xxxix]

In January 2014, US President Barack Obama publicly announced reforms to the NSA in response to the Snowden revelations. By contrast, the Canadian government has made no attempt to increase CSE's transparency and accountability. Instead it continues to insist that the CSE does not target Canadians, and that it is prohibited from doing so by law. In fact Bill C-51 grants the CSE significant new powers and allows it to access information collected by other government agencies, including the Canada Revenue Agency and Health Canada.

5. Defamation, protection of confidential sources, media ownership, blasphemy, and hate speech

5.1 Defamation

In 2012, the United Nations Commission on Human Rights ruled that the criminalization of defamation violates Article 19 of the International Covenant on Civil and Political Rights.[xl] In Canada, defamation is still considered a criminal offence and is punishable by up to five years in prison, though criminal charges for defamatory libel are rare and almost all libel cases are pursued in civil court.

As in many countries, Canada's civil defamation laws make it possible for powerful actors to launch strategic lawsuits against public participation (SLAPP suits), frivolous claims undertaken by wealthy and powerful parties to stifle criticism of their activities. Proposed anti-SLAPP legislation has now received second reading in Ontario's legislature, but Quebec is the only province that has enacted anti-SLAPP legislation. In other parts of Canada SLAPP suits deter free speech because of the high costs associated with litigation. This has a chilling effect on the legitimate criticism of the corporate sector and other powerful actors across the country.

Until 2009, there were four common defences used in a defamation lawsuit: truth or justification, absolute privilege, qualified privilege, and fair comment.[xli] Then, in a landmark ruling, the Supreme Court of Canada (SCC) established a responsible journalism defence to the tort of defamation.[xlii] The public interest responsible communication defence affords journalists the right to speak on issues of public interest, provided they exercise a reasonable level of responsibility in verifying potentially defamatory facts. Unlike the other defences to defamation, responsible communication recognizes the importance of journalism in the public interest and allows journalists to report on allegations, even if they prove ultimately not to be true as long as the news was urgent, serious and of public importance, the journalist used reliable sources, and sufficient efforts were made to report on the other side of the story.[xliii]

5.2 Protection of confidential sources

Currently, the standard of confidentiality afforded to journalists under Canadian law is not high enough to keep sources confidential. Particularly in matters of public interest, confidential sources play an important role in providing journalists with information that is otherwise inaccessible.[xliv] Law in this area is set by judicial interpretation rather than legislation and is therefore decided on a case-by-case basis. In 2010, the Supreme Court of Canada determined that journalists do not have a constitutional right to protect sources, nor are they shielded by a class privilege. Instead the SCC established a four-factor test to determine source confidentiality: 1) whether the relevant conversations originated in confidence; 2) whether confidentiality is essential to the parties' relationship; 3) whether the relationship is beneficial to the community; and 4) whether the injury caused by identifying the source would outweigh the benefits of maintaining anonymity.[xlv] Consequently, journalists cannot provide sources with total assurance that their identity will remain confidential.[xlvi]

5.3 Media ownership

Media ownership in Canada is concentrated in the hands of five corporations: Bell Canada, Shaw, Rogers, Quebecor Media, and Telus. The resulting lack of diversity often reduces public access to a wide variety of opinions on matters of public interest. In June 2006, a Senate study of Canada's news media identified the primary impacts of concentrated media ownership as a series of cost-cutting measures, centralization, and a lack of diversity in perspectives.[xlvii]

Cost-cutting measures taken in the wake of media acquisitions has led to the closing of news bureaus on the provincial, national, and international levels.[xlviii] The closures have meant that news coverage often lacks local context, making it harder for the public to engage in important issues. Media agencies have also shuttered foreign news bureaus. The senate report refers to one submission that argues that such coverage helps ensure that Canadian agencies cannot behave abroad "with a unanimity that taxpayers would never tolerate at home" and the resultant lack of accountability has affected the quality of public debate.[xlix]

The centralization of Canadian media groups on large metropolises is another consequence of concentrated media ownership. Submissions made to the senate committee suggest that centralization makes Canadian news sources less diverse and less attuned to the needs of many Canadians.[l]

5.4 Blasphemy

In Canada, blasphemous libel remains an indictable offence, punishable by up to two years in prison.[li] The criminal law provides a saving provision, that no person may be convicted of this offence for expressing in good faith or attempting to establish by argument used in good faith an opinion on a religious subject. No one has been prosecuted under the law since 1936[lii] but although it is essentially defunct some critics argue that it should be removed from the Criminal Code to remove the taint of hypocrisy from Canada's human rights criticism of countries where blasphemy or apostasy is commonly used to silence dissent.

5.5 Hate speech legislation

Canada has the obligation under international law to legislate against hate speech that 'constitutes incitement to discrimination, hostility or violence'.[liii] Canada's hate speech laws include provisions in the Criminal Code and in human rights legislation at the provincial level. Criminal hate speech cases are rarely prosecuted because they have a high burden of proof and a number of admissible defences.[liv] However, human rights hate speech laws offer fewer defences, making it far more difficult for respondents to fight such complaints. Several commentators argue that this makes hate speech provisions in the Human Rights Act a blunt instrument for censorship.[lv]

In 2009, the Canadian Human Rights Tribunal ruled that section 13 of the Canadian Human Rights Act, which prohibited the communication of "any matter that is likely to expose a person or persons to hatred or contempt", violated the Charter of Rights and Freedoms. A 1998 amendment to the act had allowed the Canadian Human Rights Commission to fine offenders up to C$10,000 and award damages up to C$20,000. The tribunal ruled the section unconstitutional on the grounds that the monetary penalty nullified the remedial intent of the act.[lvi]

In June 2014, though the Federal Court of Appeal had ruled a few months earlier that it did not violate free expression, the federal government repealed section 13.[lvii] This was met by criticism from human rights lawyers and the Canadian Bar Association that argued that the repeal would allow hate speech to proliferate on the Internet.[lviii] Although the repeal signals a move towards curbing the use of hate speech provisions as a censorship mechanism, judicial interpretation and provincial human rights legislation still makes it possible for hate speech charges to be used to silence controversial speech.

6. Linguistic rights

6.1 Minority language rights

At the federal level, Canada protects minority language rights in the Constitution, the Charter of Rights and Freedoms, and legislation such as the Official Languages Act. In Canada, these rights apply to those of the "English or French linguistic minority population of the province in which they reside."[lix] Under Section 16 of the Canadian Charter both languages have been granted equal status, rights, and privileges. The education rights granted in Section 23 also play an important role in protecting minority linguistic rights by ensuring that children are able to attend schools that provide instruction in their native tongue.

The inclusion of these provisions in the Charter, entrenched in the Constitution Act (1982) offers a basic standard of protection across the country regardless of provincial legislation but breaches to these rights are permissible under section of 1 of the Charter, which states that these rights are subject to "reasonable limits" as prescribed by law. Provinces can enact legislation that promotes a particular language, as Quebec has done with its language laws. [lx] Although this legislation protects unique cultural patrimony, some critics argue that they also impinge on minority language rights.

6.2 Indigenous language rights

Indigenous languages are in decline in Canada and many are considered endangered.[lxi] According to the 2011 National Household Survey, only 17 per cent of respondents that identified as Aboriginal were able to conduct a conversation in an Aboriginal language, down four per cent from 2006.[lxii]

There are no legal provisions made for Indigenous language rights in Canada in the Constitution, Charter, or any other pieces of federal legislation and Indigenous languages are not recognized as 'founding languages.' Actions taken to preserve Indigenous languages are localized and rely on communities to design and implement projects, often with inadequate funding.

While the federal government has not passed legislation that grants Indigenous organizations the right to educate children in their own language, it has given them greater control of schools on reserves. This falls short of creating an enforceable right for Indigenous groups, does not provide off-reserve Indigenous peoples with

access to their language, and does not create an imperative for the federal government to fund education in these languages. [lxiii]

In 1998, the federal government introduced the Aboriginal Language Initiative, a program to address the decline of Indigenous languages in Canada. The initiative funds community projects that support the "preservation and revitalization of Aboriginal languages," but only at a community level.[lxiv] Since 2012, the Canadian government has cut C$60 million worth of funding to aboriginal organizations which has made it more difficult for groups to advocate for themselves and provide services to the communities they serve.[lxv] Moreover, since 2010, the federal Aboriginal Affairs department has not delivered C$1 billion in promised social spending.[lxvi] This has all-encompassing effects on aboriginal communities in areas such as education, social welfare, and infrastructure.

7. Conclusion

The right to free expression in Canada is protected by constitutional, legislative, and institutional provisions, and is further cemented by years of jurisprudence and public debate. There have also been a few key advances in free speech, including the repeal of the hate speech provision in the Canadian Human Rights Act and the introduction of the responsible journalism defence to charges of defamation. However, on the whole and in recent years, Canada has seen an erosion of the right to free speech - a process that, while gradual, is destabilizing its foundation and leaving fewer Canadians confident in exercising their right to free speech.

But the change is not irreversible. The policies, legislation, and funding choices outlined in this note can be corrected. Canada has strong and independent courts and the example of its younger, freer self after which to model the change. Countries trying to establish democratic institutions used to look to Canada as an example; it would not be difficult for the country to regain this position.

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