



## **Submission to the 16<sup>th</sup> Session of the Universal Periodic Review on the State of Freedom of Expression in Canada**

**October 2012**

BC Freedom of Information and Privacy Association (FIPA)  
#103 - 1093 West Broadway  
Vancouver, BC, V6H 1E2, Canada  
fipa@fipa.bc.ca  
+1 604 739-978  
<http://fipa.bc.ca>

Centre for Law and Democracy (CLD)  
39 Chartwell Lane  
Halifax, N.S., B3M 3S7, Canada  
info@law-democracy.org  
+1 902 431-3688  
[www.law-democracy.org](http://www.law-democracy.org)

Canadian Journalists for Free Expression (CJFE)  
555 Richmond St W. Suite 1101  
Toronto, Ont., M5V 3B1, Canada  
cjfe@cjfe.org  
+1 416 515-9622  
[www.cjfe.org](http://www.cjfe.org)

Lawyer's Rights Watch Canada (LRWC)  
3220 West 13th Avenue  
Vancouver, BC, V6K 2V5, Canada  
lrwc@portal.ca  
+1-604 738-0338  
[www.lrwc.org](http://www.lrwc.org)

PEN Canada  
24 Ryerson Ave., Suite 301  
Toronto ON M5T 2P3, Canada  
queries@pencanada.ca  
+1 416 703-8448  
<http://pencanada.ca>

## Introduction

[1] Internationally, Canada is generally regarded as a healthy and well-functioning democracy, with a strong record on human rights. To a large extent, this reputation is well deserved. For the most part, Canada's constitution, legislative structure, judiciary and governmental structures offer effective mechanisms for recognising and protecting fundamental human rights.

[2] Nonetheless, there are important areas where Canada's legal framework fails to give full effect to internationally protected human rights. This Submission to the Universal Periodic Review – by the BC Freedom of Information and Privacy Association, Canadian Journalists for Free Expression, Centre for Law and Democracy, Lawyers' Rights Watch Canada and Pen Canada – deals with the right to freedom of expression, outlining the main challenges to the actualisation of this human right in Canada, and providing recommendations for improvement.<sup>1</sup>

### 1. Protecting Confidential Sources

[3] Journalists and others who disseminate information and ideas to the public play a critical role in a democratic society, and their freedom to work effectively is vital to maintaining government accountability and an informed citizenry. Often, their work involves the cultivation of confidential sources of information. From Watergate to Wikileaks, many of the most significant stories of the past century have been rooted in leaks by sources whose cooperation depended on an ability to keep their identity a secret. However, the standard of confidentiality afforded to sources under Canadian law is inadequate to guarantee their anonymity effectively, which undermines journalists' ability to obtain information and then to pass it onto the public.

[4] Canada has no statutory rules protecting confidential sources of information. As a result, the law in this area has been set through judicial interpretation, the leading case being *R. v. National Post*.<sup>2</sup> In Canada, important confidential relationships, such as that between a solicitor and client, are protected by a class privilege. Although the Supreme Court of Canada in *National Post* noted the importance of confidentiality in the practice of journalism, it refused to recognise a class privilege for confidential sources of information. Instead, the Court ruled that source confidentiality must be determined on a case-by-case basis by applying a generalised test (the Wigmore criteria). This requires the judge to consider four factors: 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. The same test is used to determine whether confidentiality applies to conversations with a priest or a school guidance counsellor.

[5] Parts (3) and (4) of this test provide for a balancing test, based on general assessments of the public interest, something which is impossible to define or predict, and which depends on how each court happens to assess the myriad considerations which may be relevant in any particular case. This results in inherent uncertainty for those seeking to provide assurances of confidentiality to their sources. As a result, sources can never have a true sense of the likelihood that their identity

---

<sup>1</sup> For more information about this Submission please contact Toby Mendel, Centre for Law and Democracy, [toby@law-democracy.org](mailto:toby@law-democracy.org), +1 902 431-3688. We would like to thank Katie Sammon, Nicole Slaunwhite, Maha Al-Aswad and Ahrum Lee for assisting us with research on this Submission.

<sup>2</sup> *R. v. National Post*, 2010 SCC 16, [2010] 1 SCR 477.

will be protected, which is crucial to the source coming forward in the first place. As the Court itself recognised in the *National Post* case: “[T]he bottom line is that no journalist can give a source a total assurance of confidentiality. All such arrangements necessarily carry an element of risk that the source’s identity will eventually be revealed.”<sup>3</sup>

[6] This approach reflects a general reluctance on the part of Common Law countries to extend the sort of strong protection to source confidentiality that is required by international law, and is provided in many civil law countries. In particular, it fails to take into account the importance of looking beyond the circumstances of a particular case, to the wider need to give sources the confidence they need to come forward in the first place. It may be contrasted with the approach taken by the Council of Europe, which places strict conditions on overcoming the right of journalists to protect their confidential sources, which is considered to be legitimate only where reasonable alternative measures to locate the information do not exist or have been exhausted, an overriding need for disclosure has been identified, and the circumstances are of a sufficiently vital and serious nature to warrant forced exposure of the source.<sup>4</sup> This is not a balancing test, but a recognition of the overriding importance to freedom of expression of protecting sources.

[7] Instead of relying on the vague and uncertain public interest standard of the Wigmore criteria, Canada should enact legislation which establishes a strong presumption in favour of protection of sources, consistent with constitutional guarantees of freedom of expression, which is not based on ensuring a balance with other interests but which allows for source disclosure only where this is necessary. The legislation should also set out clearly the limited overriding interests that may defeat this. For example, section 10 of the United Kingdom Contempt of Court Act, 1981, states:

No court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, the source of information contained in a publication for which he is responsible, unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime.

[8] This should be accompanied by other limitations on overriding the presumption, including that the information cannot be found by reasonable alternative measures and that the issue is sufficiently vital to warrant overriding a fundamental human right.

#### **Recommendation:**

- Canada should enact legislation creating a strong presumption in favour of protection of sources, listing limited grounds for overcoming this presumption, along with other protections against this.

## **2. Mistreatment of Journalists**

[9] A number of incidents suggest that some police are not adequately trained in terms of their obligation to respect freedom of expression, in particular in the context of demonstrations. A notable example is the case of Charles LeBlanc, a well-known blogger who was arrested and

<sup>3</sup> *Ibid.*, para. 69. See also *Globe and Mail v. Canada (Attorney General)*, 2010 SCC 41 (CanLII), [2010] 2 SCR 592.

<sup>4</sup> Recommendation No. R (2000) 7 of the Committee of Ministers of the Council of Europe to member states on the right of journalists not to disclose their sources of information, 8 March 2000, Principle 3. See also *Goodwin v. United Kingdom*, 27 March 1996, Application No. 17488/90 (European Court of Human Rights).

charged with obstruction of justice in June of 2006 while covering demonstrations in Saint John, New Brunswick. The charges were eventually dismissed when the Court found that there had been no evidence to suggest that Mr. LeBlanc had been connected to the demonstrators. The Court also found that police had illegally searched Mr. LeBlanc's camera and deleted all photos of the demonstration.<sup>5</sup>

[10] There were also numerous reports of police deleting journalists' photographs at the G-20 demonstrations in Toronto, where journalists were also attacked, and arrested.<sup>6</sup> Similar reports have emerged from Montreal,<sup>7</sup> where journalists have reportedly been "told to stop filming and in some cases roughed up by police".<sup>8</sup>

[11] These instances, from multiple Canadian jurisdictions, suggest that more needs to be done to train police on identifying and respecting the rights of those reporting on demonstrations. Deleting journalists' photos is a flagrant breach of the right to freedom of expression. It not only deprives the public of information on a matter of public interest, but may also destroy vital evidence surrounding police conduct. While some of these abuses have been recognised by courts, proper remedial action has not been taken.

#### **Recommendation:**

- All public officials and officers who plan and provide policing services at demonstrations should be trained properly on the importance of respecting and how to respect international standards regarding freedom of expression, and specifically freedom of the media, during demonstrations.

### **3. Defamation**

[12] Canada still treats defamation as a criminal offence, punishable by up to five years imprisonment.<sup>9</sup> This is a violation of international standards of freedom of expression, which hold that defamation should be considered a civil matter, and that under no circumstances should custodial sentences apply to cases of defamation. According to a September 2011 General Comment by the UN Human Rights Committee:

States parties should consider the decriminalization of defamation and, in any case, the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty.<sup>10</sup>

[13] Criminal defamation laws violate international guarantees of the right to freedom of expression by penalising defamatory speech more harshly than necessary to protect reputations. Defamation is essentially a dispute between two private individuals and, if a person believes that

---

<sup>5</sup> *R. v. LeBlanc*, 2006 NBPC 37, [2006] N.B.J. No. 514, A.N.-B. no 514, 311 N.B.R. (2d) 224, 72 W.C.B. (2d) 49.

<sup>6</sup> Politicol, "2010 Toronto G-20 Scathing Report of Police Misconduct", Politicol News, 16 May 2012. Available at: <http://www.politicalnews.com/2010-toronto-g-20-scathing-report-of-police-misconduct/>.

<sup>7</sup> Jonathan Montpetit, "Montreal police accused of political profiling", *Montreal Gazette*, 11 June 2012. Available at: <http://www.montrealgazette.com/news/Montreal+police+accused+political+profiling/6765681/story.html>.

<sup>8</sup> Grant Buckler, "Police Mistreatment of Journalists Reported in Montreal", The Canadian Journalism Project, 15 June 2012. Available at: <http://j-source.ca/article/police-mistreatment-journalists-reported-montreal>.

<sup>9</sup> Criminal Code, R.S.C. 1985, c. C-46, ss. 299-304.

<sup>10</sup> General Comment No. 34, 12 September 2011, CCPR/C/GC/34, para. 47.

their reputation has been harmed, the civil law can provide an adequate remedy for this. Many democracies – including East Timor, Georgia, Ghana, Sri Lanka, the United Kingdom and the United States – have rescinded their criminal defamation laws, while others have done away with the possibility of imprisonment for defamation. There is no evidence to suggest that these actions have led to an increase in the publication of defamatory material in those jurisdictions.

[14] Recent Canadian criminal defamation cases illustrate another problem, namely that they tend to involve comments relating to police officers. For example, Charles Leblanc of New Brunswick, the blogger noted above, was arrested over comments made about the local police force on his blog.<sup>11</sup> More recently, in August 2012 the RCMP executed a search warrant based on a criminal defamation charge against a blogger in British Columbia who had in the past been sharply critical of the police.<sup>12</sup> Although the facts of the case have yet to emerge fully, it appears to involve criticism of the police. In the leading Canadian case on criminal defamation, *R v. Lucas*, a case in which the Supreme Court of Canada held criminal defamation to be constitutional, the defendant was convicted after accusing a police officer of complicity in the sexual assault of a child.<sup>13</sup> The officer in that case deserved a legal remedy against the unfounded allegations, but there is no reason to suggest that the civil defamation rules which other Canadians use to protect their reputations would not have provided sufficient protection in this case.

[15] The police represent a powerful social institution, which should be subject to legitimate criticism in a healthy democracy. Cases of criminal defamation involving criticism of the police represent something of a conflict of interest since the police, as the maligned party, are ill equipped to serve as impartial investigators.

[16] Canada's civil defamation laws are also problematic inasmuch as they fail to provide a remedy against powerful actors abusing the system by launching strategic lawsuits against public participation (known as SLAPP suits). SLAPP suits are frivolous claims that are launched, generally by well-funded parties, to stifle legitimate criticism of their activities through the deterrent exerted via high legal costs associated with litigation, even if one is successful. Better practice in this area is to enact anti-SLAPP legislation, which allows defendants in defamation lawsuits to seek a fast-track dismissal of the claim and costs. The only Canadian jurisdiction with an anti-SLAPP law is Quebec.

[17] An emerging problem with Canada's defamation framework is the increasing quantum of settlements being awarded to corporate plaintiffs. Traditionally, Canadian courts have been reluctant to award more than nominal damages to corporations suing in defamation, unless they can show clear financial injury. This makes sense since, in the absence of evidence of actual financial loss, corporations do not need any vindication beyond the decision itself. Canadian courts have recognised a clear distinction between the reputation (and feelings) of a person and that of an organisation.<sup>14</sup> However, in recent years there has been a move away from this understanding,

---

<sup>11</sup> CBC News, "Fredericton chief welcomes review of blogger case", Canadian Broadcasting Corporation, 7 May 2012. Available at: <http://www.cbc.ca/news/canada/new-brunswick/story/2012/05/07/nb-charles-leblanc-blogger-libel.html>.

<sup>12</sup> See <http://bccla.org/news/2012/08/bccla-to-apply-to-unseal-rcmp-defamation-search-warrant/>.

<sup>13</sup> *R. v. Lucas*, [1998] 1 S.C.R. 439.

<sup>14</sup> See *Bennett v. Sun Publishing Co. Ltd.* (1972), 29 D.L.R. (3d) 423 (B.C.S.C.) and *Johnson v. Jolliffe*, [1981] B.C.J.No. 2157 (S.C.).

with general damage awards for corporate plaintiffs reaching hundreds of thousands of dollars.<sup>15</sup> Although the defendants in these cases have generally been organisations rather than individuals, these moves are nonetheless troubling and could exert a chilling effect on legitimate criticism of corporations in Canada, particularly given the lack of anti-SLAPP legislation. It is by now well-established that States are bound to create a legal and regulatory framework that ensures that private companies cannot limit human rights.<sup>16</sup>

#### **Recommendations:**

- Sections 299-304 of the Criminal Code, which criminalise defamation, should be repealed.
- All Canadian provinces should pass anti-SLAPP legislation.
- Corporations should only be able to recover actual financial losses in defamation cases.

#### **4. The Right to Information**

[18] When Canada adopted its federal Access to Information Act (ATIA)<sup>17</sup> in 1982, it was among the early countries to do so, and was considered to be something of a world leader in this area. Thirty years later, global standards on the right to information (RTI) have advanced dramatically, while the situation in Canada has stagnated, with only minor amendments to the law since it was first adopted. A comparative assessment of all national RTI laws by the Centre for Law and Democracy (CLD) and Access Info Europe (AIE) places Canada in a very poor 55<sup>th</sup> place.<sup>18</sup>

[19] There are a number of specific problems with the Canadian legislative framework for RTI. One is ATIA's lax rules regarding the timelines for responding to requests. Although ATIA requires a response within 30 days, it is very lenient in terms of permitting extensions. The National Freedom of Information Audit for 2009-2010 found that only 50% of federal agencies responded to access requests within the 30-day timeframe required by the ATIA.<sup>19</sup> A 2011 study by the Canadian Journalists for Free Expression (CJFE) found that only 56% of access requests were processed within the 30-day time period and that the average length of time for a decision on a request was 395 days.<sup>20</sup> Delays in responding of up to two-and-a-half years have been reported.<sup>21</sup> Canada's Information Commissioner has recommended that, after a certain point, extensions

<sup>15</sup> See *WeGo Kayaking Ltd. v. Sewid*, [2007] B.C.J. No. 56 (S.C.), *A.T.U. v. I.C.T.U.*, [1997] A.J. No. 191 (Q.B.), *Hiltz and Seamone v. Nova Scotia (Attorney General)*, [1999] N.S.J. No. 47 (C.A.).

<sup>16</sup> See the UN Guiding Principles On Business And Human Rights, available at: [http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf).

<sup>17</sup> Access to Information Act, R.S.C. 1985 c. A-1.

<sup>18</sup> Centre for Law and Democracy, Canadian RTI Rating. Available at <http://www.law-democracy.org/live/global-rti-rating/canadian-rti-rating/>. See Canadian Access to Information Legislation Scoresheets, Available at <http://www.law-democracy.org/live/wp-content/uploads/2012/08/Chart2.pdf>.

<sup>19</sup> Canadian Newspaper Association, *National Freedom of Information Audit 2009-2010* (2010), p. 10. Available at: <http://www.newspaperscanada.ca/system/files/CNA%20FOI%20Audit%202010%20efinal.pdf>.

<sup>20</sup> Canadian Journalists for Free Expression. *Review of Free Expression in Canada 2010/2011*. May 10, 2011. pp. 24-26. Available at: <http://www.cjfe.org/resources/features/review-free-expression-canada-2011>.

<sup>21</sup> Gloria Galloway, "Pattern of delay: Ottawa's Kafkaesque information denial" *The Globe and Mail*, 3 February 2010. Available at: <http://www.theglobeandmail.com/news/politics/pattern-of-delay-ottawas-kafkaesque-information-denial/article4305090/>.

should have to be approved by the Commissioner.<sup>22</sup> Further delay is occasioned by the fact that ATIA does not impose any time limits on the processing of appeals against refusals to grant access. The Information Commissioner has also recommended that this problem be addressed.<sup>23</sup>

[20] Canada's ATIA also fails to impose clear limits on the cost of accessing information, leading to excessive charges being demanded. A request by the 2009-2010 Audit to the Canadian Broadcasting Corporation was returned with a cost estimate of \$20,825, and several other requests were returned with cost estimates of thousands of dollars.<sup>24</sup> The Canadian government also appears to fundamentally misunderstand the appropriate role of fees. In 2011, it proposed a hike in access fees "in order to control demand."<sup>25</sup> In other words, the government was proposing to increase fees as a means of discouraging citizens from exercising a fundamental human right.

[21] Canada's ATIA also contains a significantly overbroad regime of exceptions, a real weakness in the legislation, given that it is the exceptions that define the scope of what information officials may refuse to provide to requesters. This was the area where the law did worst on the CLD/AIE rating, scoring just 11 out of a possible 30 points, or 37%.

[22] The right to information is also only weakly recognised as a human right in Canada. In *Criminal Lawyers' Association v. Ontario (Public Safety and Security)*,<sup>26</sup> decided in 2010, the Supreme Court of Canada did recognise a limited constitutional right to information, based on the right to freedom of expression. But this applied only where 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."<sup>27</sup> This falls well short of international standards, which recognise a freestanding right to information, subject only to limited exceptions.

[23] The government has so far refused to take any action to remedy any of these problems. On 1 October 2012, the Information Commissioner of Canada launched consultations on how to improve the federal Act.

#### **Recommendations:**

- Canada should undertake broad consultations with all relevant stakeholders with a view to significantly reforming the Access to Information Act to bring it into line with international standards.
- Public authorities in Canada should improve their compliance with the spirit of the Act, particularly in relation to discretionary issues such as extending timelines, the imposition of fees and the application of exceptions.

<sup>22</sup> Office of the Information Commissioner of Canada, "Strengthening the Access to Information Act to Meet Today's Imperatives" (Presentation to The Standing Committee on Access to Information, Privacy and Ethics, 2009), Recommendation 9. Available at: [http://www.oic-ci.gc.ca/eng/pa-ap-atia\\_reform\\_2009-march\\_2009-strengthening\\_the\\_access\\_to\\_information\\_act\\_to\\_meet\\_todays\\_imperatives.aspx](http://www.oic-ci.gc.ca/eng/pa-ap-atia_reform_2009-march_2009-strengthening_the_access_to_information_act_to_meet_todays_imperatives.aspx).

<sup>23</sup> *Ibid.*, Recommendation 10.

<sup>24</sup> See *National Freedom of Information Audit 2009-2010*, note 19.

<sup>25</sup> Dean Beeby, "Feds eye access-to-information fee hike to 'control-demand'", *The Globe and Mail*, 13 March 2011. Available at: <http://www.theglobeandmail.com/news/politics/feds-eye-access-to-information-fee-hike-to-control-demand/article571747/>.

<sup>26</sup> *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815.

<sup>27</sup> *Ibid.*, para. 5.

- Canada should recognise a freestanding constitutional right to information.

## 5. Whistleblower Protection

[24] Canada's system for whistleblower protection is not as strong as it should be, and there is evidence that senior officials are failing to respect the spirit of its provisions. An illustrative example of this is the cases of three Health Canada researchers, Dr. Gérard Lambert, Dr. Shiv Chopra and Dr. Margaret Haydon, who were dismissed for insubordination after going public with concerns about the safety of drugs that Health Canada had approved.<sup>28</sup> These cases are still being reviewed and at least one of the three has been vindicated for wrongful dismissal.

[25] Another example of problems with public interest disclosures in Canada is the case of Richard Colvin, a senior diplomat posted to Afghanistan, who repeatedly raised concerns about the potential for torture of prisoners the Canadian military handed over to Afghan authorities. He repeatedly expressed his concerns to his superiors but failed to get any satisfactory response in terms of addressing the continuing problem. When reports of the complicity in torture came to light, the Military Police Complaints Commission launched an inquiry, and subpoenaed 22 public servants to testify. Even after receiving letters from the Department of Justice, only Colvin, from among the 22, agreed to appear. Upon providing his testimony, Colvin became the subject of a barrage of personal and professional attacks, most notably from Canadian Defence Minister Peter MacKay.<sup>29</sup> The fact that nearly all of the public servants declined to testify suggests there may be inappropriate government pressure on officials or a fear of reprisals, and the attacks that Colvin was subjected to after testifying corroborate this.

[26] There is legal protection against reprisals for whistleblowing in Canada in the form of the Public Servants Disclosure Protection Act.<sup>30</sup> However, the law has several shortcomings.<sup>31</sup> Canada's Armed Forces and the Canadian Security Intelligence Service (CSIS), the country's intelligence apparatus, are both entirely excluded from the ambit of the Act. Members of the national police force, the Royal Canadian Mounted Police (RCMP), are barred from submitting complaints to the Public Sector Integrity Commissioner (PSIC), an oversight organ under the law, until they have exhausted internal mechanisms for review, despite the fact that the RCMP's internal review mechanisms have been reported as being used to punish whistleblowers.

[27] It remains unclear whether the PSIC or the Treasury Board Secretariat holds overall responsibility for ensuring that the Act is properly implemented. As an independent oversight body, the former is clearly more appropriate for this role. However, the PSIC lacks several important powers including the following: it has no power to initiate investigations on a proactive basis; it cannot investigate officials who have resigned or retired; and it has very limited

---

<sup>28</sup> CBC News, "1 of 3 Health Canada 'whistleblowers' reinstated", Canadian Broadcasting Corporation, 8 August 2011. Available at: <http://www.cbc.ca/news/politics/story/2011/08/08/pol-whistleblowers.html>.

<sup>29</sup> CBC News, "Ex-diplomats decry government's attack on Colvin", Canadian Broadcasting Corporation, 8 December 2009. Available at: <http://www.cbc.ca/news/canada/story/2009/12/08/colvin-ambassador-afghanistan.html>.

<sup>30</sup> Public Servants Disclosure Protection Act, S.C. 2005, c. 46.

<sup>31</sup> FAIR (Federal Accountability Initiative for Reform), "What's Wrong With Canada's Federal Whistleblower Legislation" (9 April 2012). Available at: [http://fairwhistleblower.ca/files/fair/docs/psdpa/whats\\_wrong\\_with\\_the\\_psdpa.pdf](http://fairwhistleblower.ca/files/fair/docs/psdpa/whats_wrong_with_the_psdpa.pdf).

sanctions powers, and cannot order corrective action, sanction wrongdoers or apply injunctions to stop ongoing misconduct.<sup>32</sup> As a result, the system contains almost no mechanisms for correction.

#### **Recommendations:**

- The scope of the Public Servants Disclosure Protection Act should be expanded to cover the entire public sector, including the RCMP, armed forces and CSIS.
- The law should clarify that it is PSIC that has oversight of the Act, and the PSIC should be given the power to initiate investigations, to investigate officials who have retired or resigned in relation to their conduct when they were officials, and to order appropriate corrective action, including sanctioning wrongdoers, recommending criminal proceedings and applying injunctions to stop ongoing misconduct.
- Senior government officials should respect the spirit of the Act and the importance of whistleblowers to meaningful accountability, and should refrain from launching politically motivated attacks on those who come forward.

## **6. Access to the Internet**

[28] Access to the Internet is vital for the practical exercise of freedom of expression in the modern world. Although, as a wealthy country, Canada has relatively high overall rates of connectivity, Internet access is far from universal. Canada's size and low population density make it expensive to extend Internet access to all Canadians. There is evidence that Canada's First Nations communities are particularly underserved. In 2007, the rate of broadband access in urban and small towns in Canada was 64%, while 50% of remote communities had some sort of broadband access.<sup>33</sup> The same study found that the rate of connectivity in remote First Nations communities was only 17% and that many of these communities only had dial-up, rather than broadband, Internet.

[29] Given the history of discrimination and economic depression endured by Canada's First Nations peoples, these numbers are disturbing. The Internet is a major engine for economic development, and a potentially powerful tool to support economic activities in remote First Nations communities. Canada should devote adequate resources to fostering the spread of Internet access among rural First Nations peoples. This should include both funding for physical infrastructure and training and education to foster computer literacy and interest in Internet access.

[30] Although Canada's approach to Internet regulation has been fairly progressive thus far, there are troubling signs of an impending crackdown on online freedoms. In particular, Bill C-30, commonly known as the Protecting Children from Internet Predators Act, threatens to drastically increase the government's online surveillance powers by forcing Internet service providers to retain enormous amounts of data on their users and to grant police access to this information without a warrant. The Internet's value as an open medium for the sharing of opinions and ideas is importantly rooted in users' confidence in their anonymity. Measures that would erode privacy, like Bill C-30, have the potential to undermine the quality and character of the Internet. Bill C-30

---

<sup>32</sup> *Ibid.*

<sup>33</sup> Composite Learning Index, "Learning to be: Access to Broadband Internet" (2010). Available at: <http://www.cli-ica.ca/en/about/about-cli/indicators/be-internet.aspx>.

attracted widespread protest when it was tabled and although the federal government's initial reaction was to label opponents as supporters of child pornographers,<sup>34</sup> Bill C-30 was subsequently recalled to committee for redrafting.

#### **Recommendations:**

- The government should allocate adequate resources to expand Internet access and use among rural First Nations communities.
- Bill C-30 should be scrapped or amended to require warrants for any online surveillance conducted by police, in line with rules for surveillance of other forms of communication.

## **7. Restrictions on Freedom of Assembly**

[31] The actions of officials and police officers during protests in recent years have called into question the strength of Canada's commitment to freedom of assembly. The official response to two recent major protest events is illustrative of this emerging problem.

[32] The first of these protest events was in response to the 2010 G-20 Summit in Toronto. This was preceded by the passage, days prior to the Summit, of the Public Works Protection Act (PWPA), which expanded police powers to quell any potential demonstrations by designating the summit's security perimeter a "public work". This gave police the authority to require individuals within five meters of the fence to show identification and to subject them to a search.<sup>35</sup> The new law was not properly communicated to the public or adequately explained to police officers, resulting in police actions that went beyond even the expanded powers provided for by the legislation. Police tactics during the Summit were broadly criticised for mass and indiscriminate arrests,<sup>36</sup> numerous instances of the use of excessive force,<sup>37</sup> and the widespread use of the controversial tactic of kettling.<sup>38</sup>

[33] As a result of the furore surrounding police actions during the G-20 protests, the Office of the Independent Police Review Director conducted a thorough review of the events, which ultimately

---

<sup>34</sup> Ivor Tossell, "Toews's 'child pornographers' gaffe aside, Bill C-30 has real dangers", *The Globe and Mail*, 21 February 2012. Available at: <http://www.theglobeandmail.com/news/technology/digital-culture/ivor-tossell/toews-gaffes-aside-bill-c-30-has-real-dangers/article2344551/>. The full text of the proposed bill can be found at: <http://parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=5380965>.

<sup>35</sup> Canadian Civil Liberties Association, "A Breach of the Peace: A Preliminary Report of Observations During the 2010 G20 Summit" (9 June 2010), p. 9. Available at: <http://ccla.org/wordpress/wp-content/uploads/2010/06/CCLA-Report-A-Breach-of-the-Peace-Preliminary-report-updated-July-8.pdf>.

<sup>36</sup> CBC News, "G20 'rights violations' require public inquiry: report", Canadian Broadcasting Corporation, 28 February 2011. Available at: <http://www.cbc.ca/news/canada/toronto/story/2011/02/28/g20-report-inquiry-toronto.html>.

<sup>37</sup> Dave Seglins, "G20 charges coming against Toronto police commanders", Canadian Broadcasting Corporation, 17 May 2012. Available at: <http://www.cbc.ca/news/canada/toronto/story/2012/05/17/g20-police-charges.html>.

<sup>38</sup> Kettling refers to the boxing-in of hundreds of protesters by police. Protesters were kept outside in the rain for hours. See CBC News, "G20 report clears RCMP but raises questions over 'kettling'", Canadian Broadcasting Corporation, 14 May 2012. Available at: <http://www.cbc.ca/news/canada/toronto/story/2012/05/13/pol-rcmp-watchdog-report-g8-g20-toronto-2010.html>.

led to charges being filed against several officers and commanders.<sup>39</sup> The Ontario government is in the process of replacing the PWPA with legislation that is less prone to abuse.<sup>40</sup>

[34] Although corrective action was taken in the aftermath of the G-20 protests, it is troubling that the same tactics and attitudes re-emerged in the suppression of the 2012 protests in Montreal, Quebec against proposed increases in tuition fees for university students. For example, although the Toronto Police and the Royal Canadian Mounted Police promised to discontinue the practice of kettling in the aftermath of the G-20 protests, Montreal police repeatedly used kettling during the student tuition protests. Another parallel is that Quebec's National Assembly responded to the protesters by passing extremely problematic legislation in the form of Bill 78.<sup>41</sup> Bill 78 imposes heavy restrictions on where and how protesters may demonstrate, and contains severe penalties for breaches. Under Bill 78, demonstrations of more than 50 people must provide written notice to police eight hours in advance, with details of itinerary, time, duration and route. Police are granted the right to demand changes in the interest of the maintenance of order and public security, including relocation or rescheduling,<sup>42</sup> making spontaneous gatherings impossible and severely hindering the right to protest peacefully.

[35] A newly elected government in Quebec vowed to amend Bill 78 as soon as it came to power in September 2012 and the Bill has been challenged in the Superior Court of Quebec. However, these two cases illustrate a potentially disturbing pattern whereby robust (but largely peaceful) protest movements are suppressed by the passage of temporary, but human rights abusive, legislation. The repeal of Bill 78 and the PWPA will be hollow victories if similarly abusive temporary legislation is passed the next time a major protest movement breaks out.

[36] International actors have criticised Canada for restricting freedom of assembly. On 18 June 2012, United Nations High Commissioner for Human Rights, Navi Pillay, stated she was 'disappointed' with Bill 78 in a speech before the Human Rights Council.<sup>43</sup> In 2006, the Human Rights Committee, in their Concluding Observations on Canada, expressed concern about large-scale arrests during demonstrations in Montreal, and said Canada "should ensure that the right of persons to peacefully participate in social protests is respected, and ensure that only those committing criminal offences during demonstrations are arrested..."<sup>44</sup>

#### **Recommendations:**

- The PWPA and Bill 78 should be repealed immediately and all charges laid under

<sup>39</sup> Zach Dubinsky and Dave Seglins, "G20 'kettling' commander among 45 officers to be charged", Canadian Broadcasting Corporation, 18 May 2012. Available at: <http://www.cbc.ca/news/canada/toronto/story/2012/05/17/g20-officers-discipline.html>.

<sup>40</sup> "Ontario Introduces New Act To Protect Critical Facilities", Government of Ontario, 22 February 2012. Available at: <http://news.ontario.ca/mcscs/en/2012/02/ontario-introduces-new-act-to-protect-critical-facilities.html>.

<sup>41</sup> Louis-Philippe Lampron, "Bill 78 of Quebec – significant restrictions on fundamental rights of citizens in the wake of a student conflict", The Laws of Rule. Available at: <http://www.lawsofrule.net/quebecs-bill-78/>.

<sup>42</sup> Judy Feng, "Legal Perspectives on Bill 78 – Quebec's "Emergency Law" to Quell Student Protests", Centre For Constitutional Studies, 4 June 2012. Available at: <http://www.law.ualberta.ca/centres/ccs/news/?id=371>.

<sup>43</sup> CBC News, "Ottawa defends Quebec Bill 78 against UN critique", Canadian Broadcasting Corporation, 18 Jun 2012. Available at: <http://www.cbc.ca/news/canada/montreal/story/2012/06/18/un-bill78-alarming.html>.

<sup>44</sup> Concluding Observations of the Human Rights Committee, Canada, U.N. Doc. CCPR/C/CAN/CO/5 (2006). 85<sup>th</sup> session, para. 20. Available at: <http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/CCPR.C.CAN.CO.5.En?OpenDocument>.

these laws should be withdrawn.

- All governments in Canada should refrain from passing legislation that is unduly restrictive of freedom of assembly contrary to international and constitutional standards and which, in particular, goes beyond the least restrictive effective measures required to safeguard public order.
- Training of police and other relevant officials should be enhanced so that those responsible for planning and implementing policing services during demonstrations know and understand the implications of the right to protest, as protected by international and constitutional guarantees of the rights to freedom of assembly and expression.
- Police across Canada should discontinue the practice of kettling.

## **Conclusion**

[37] Canadians have a long tradition of respect for human rights, undergirded by constitutional protection of civil and political rights through the Canadian Charter of Rights and Freedoms. Nonetheless, this Submission details significant shortcomings in Canada's law and policy regarding freedom of expression. These include areas where Canada's political leaders have failed to act, such as the protection of journalists' sources, and the lack of access to the Internet among First Nations' communities, and areas where Canada's legislation falls short of the protection required by international human rights standards, such as the criminal defamation laws, the right to information, whistleblower protection and the recent restrictions on freedom of assembly. In yet other cases, in particular policing of demonstrations, State actors have actively breached human rights guarantees.

[38] The relative strength of Canadian democracy and respect for human rights is not a reason to gloss over the problems highlighted in this Submission. On the contrary, the strength of Canada's democracy makes it all the more imperative that these failures to respect international guarantees should not be tolerated. Complacency is arguably at the root of Canada's poor record on the right to information, with 54 countries in the world now having stronger legal frameworks for RTI than Canada. Although investigations into human rights issues in Canada will not uncover widespread torture or extra-judicial detention, they do reveal a worrying trend of stagnation, at best, and in many cases, regression on fundamental freedoms. Vigilance and accountability, including internationally, are necessary to reverse this.