The 2009 Free Expression Review

An annual report on the health of free expression in Canada

PUBLISHED BY

CANADIAN JOURNALISTS FOR FREE EXPRESSION
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CJFE

WHAT IS CJFE

CANADIAN JOURNALISTS FOR FREE EXPRESSION

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CJFE boldly champions the free expression rights of journalists and media workers around the world. In Canada, we monitor, defend and promote free expression and access to information. We encourage and support individuals and groups to be vigilant in the protection of their own and others' free expression rights. We are active participants and builders of the global free expression community.

WHAT DO WE DO?

- CJFE manages the world's largest free expression network, IFEX, issuing 2500 alerts a year and mobilizing media workers and civil society globally on free speech issues
- We educate and advocate on free expression issues through public events, publications and our annual awards banquet
- We are active participants in international campaigns to promote free expression and to protect journalists in danger
- At home we intervene, with other free speech groups and media outlets, in court cases to create better laws protecting expression
- Through out Journalists in Distress Fund we help protect the lives of journalists by providing emergency support when they are threatened or forced into exile

PLEASE JOIN US! BECOME A CJFE MEMBER OR SUPPORT OUR ONGOING WORK.

555 Richmond St. W, Suite 1101, PO Box 407
Toronto, ON, M5V 3B1
Tel (416) 515-9622; fax: (416) 515-7879
Email: cjfe@cjfe.org web: www.cjfe.org

IFEX

INTERNATIONAL FREEDOM OF EXPRESSION EXCHANGE

IFEX

IFEX is a dynamic global network that monitors, promotes and defends freedom of expression worldwide. Created in 1992 in Montréal, IFEX now numbers 88 independent member organizations in over 60 countries.

IFEX'S PROGRAM WORK FOCUSES ON:

- Circulating information to raise awareness – through daily Alerts, weekly IFEX Communiqué newsletter, free expression headlines Digest and website (www.ifex.org)
- Building regional capacity – providing advice, training, financial and technical support to assist members to work strategically to defend and promote free expression within regions
- Facilitating campaigns and advocacy – both urgent and long-term actions that target abuses in a particular country or issues such as defamation laws, Internet censorship and impunity
- Building a vibrant free expression community – by organizing forums, providing targeted organizational development grants, and through research and analysis on key issues

The IFEX Clearing House, based in Toronto, Canada, runs the day to day operations of the network and is managed by founding member organization Canadian Journalists for Free Expression (CJFE).

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Bob Carty
EDITORIAL DIRECTOR

Gigi Lau
ART DIRECTOR

Jaclyn Law
COPY EDITOR

WRITERS
Arnold Amber
Erin DeCoste
Bob Carty
Terry Gould
Peter Jacobsen
Paul Knox
Julie Payne
Kelly Toughill
Phil Tunley

RESEARCHERS
Alexander Besant
Grant Buckler
John Norris

ADDITIONAL THANKS
Graeme Smith
Jagdish Grewal
Canadian Committee for World Press Freedom (CCWPF)
The Canadian Press

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SHINING LIGHT [redacted] INTO DARK CORNERS

We have just gone through a remarkable year for free expression issues in Canada. From the groundbreaking decisions of the Supreme Court of Canada to the vigorous stonewalling of the federal government on freedom to information, to the harsh economic realities visited upon us by the financial meltdown, 2009 provided more fodder for comment on free expression issues than we have seen in decades.

This is one of the reasons we at Canadian Journalists for Free Expression (CJFE) decided to launch our first annual Review of Free Expression.

In 2009, the Supreme Court considered an impressive eight cases dealing with critical free expression issues such as defamation, the protection of sources, and access to information. Controversial issues such as hate speech dominated the airwaves and headlines while also being addressed in various human rights tribunals. A Canadian journalist was killed abroad trying to bring home information about a war in which our country is engaged. And at home, at least two leaders of the ethnic press were victims of direct attacks.

We hope this review will become an annual reference document for examining developments in free expression in Canada and for comparing ourselves with other countries. So it is fitting that we begin the inaugural edition with an assessment of some of the most important issues and how some of our major institutions have performed.

> "Our liberty is strengthened when journalists are free to pursue truth, shine light into dark corners and assist the process of holding governments accountable."
>
> **PRIME MINISTER STEPHEN HARPER, ADDRESSING THE NATIONAL ETHNIC PRESS AND MEDIA COUNCIL OF CANADA (NEPMCC), NOV. 21, 2009**

DEFAMATION AND THE SUPREME COURT OF CANADA: A

The Court met all our expectations in establishing the defence of "responsible communications" (see "Freedom of Expression on Trial: 2009," page 6), bringing Canada up to the standard of other nations. However, lofty statements from the Supreme Court do not, in and of themselves, advance the cause of free expression. We are eager to see how lower-court judges and juries will apply the responsible communication defence. In 2010, the Supreme Court is expected to rule on other vital cases concerning access to information and the protection of sources. We hope they sustain the level of achievement we saw in 2009.

PUBLICATION BANS AND COURTS OF APPEAL: B+

When cases eventually come to them, the appeal courts usually get it right. In 2009, all the cases we reviewed (see "Case list," page 32) were decided in favour of more open courtrooms.

PUBLICATION BANS AND TRIAL COURTS: C–

The experience at the trial level is not as positive. While there are trial judges who are informed and sensitive to the concept of transparency, far too often the lower courts exhibit a stubborn dependence on a knee-jerk use of publication bans, sealing orders, and in camera proceedings. The appeal courts have set out clear guidelines in this area, but they are honoured more in the breach than the observance. We have a long way to go before lower-court judges understand how important it is to allow the media to do their job as the eyes and ears of the public in the "open" justice system.

ACCESS TO INFORMATION AND THE FEDERAL GOVERNMENT: 

Here, the only assessment can be a failing grade. We remain bedevilled by the antics of those federal entities that invoke national security at the drop of a hat to restrict the dissemination of vital information to journalists and, in turn, the public. Perhaps this attitude is best exemplified by a recent exchange between a federal government lawyer and the Military Police Complaints Commission, in which the lawyer not only challenged the commission's right to obtain certain government documents on detainee transfers but went so far as to indicate that he was not at liberty to discuss when those documents might be available. Add to this the countless delays and roadblocks put in the way of access to information (see "Information on a (short) leash," page 18) and we are left wondering how the prime minister could praise the media's attempt to hold government accountable while abandoning his own promises of access reforms so loudly trumpeted on the campaign trail.

ATTACKS ON THE PRESS AND IMPUNITY: 

Free expression is only of value if it can be safely exercised, which makes recent attacks against the ethnic press so disturbing. The failure, for more than 11 years, to bring anyone to justice for the murder of Tara Singh Hayer, the publisher and founder of the *Indo-Canadian Times*, earns an **F** grade for the institutions involved in investigating this crime.

HATE SPEECH AND THE CANADIAN HUMAN RIGHTS COMMISSION: 

Any restriction on speech has to have a clear social benefit, and so we recognize the Canadian Human Rights Commission for its decision in the Lemire case to deem the hate speech provision of the Canadian Human Rights Code to be unconstitutional.

And while it has been a troubling year on many free speech fronts, there are some others deserving our recognition:

- The Information Commissioner of Canada for keeping the government's feet to the fire in difficult circumstances.

- Major media outlets that, in a year of recession, spent tens of thousands of dollars arguing important cases in all levels of court. More often than not, these arguments are based on principle, and the considerable cost of bringing these applications could have been avoided by a more cynical, short-sighted cost-benefit approach.

- The Canadian Radio-television and Telecommunications Commission (CRTC) for its licensing of Al Jazeera English, which has expanded the diversity of voices Canadians can access.

We are all practitioners of free expression. We all benefit from transparency and openness, and the right to shine light into dark places. It is incumbent on all of us to remain vigilant and vocal on free expression issues. After all, freedom of expression is the only guarantee that all of the other freedoms Canadians enjoy will be maintained.

We hope this annual review will not only provide a periodic evaluation of freedom of expression issues in Canada but also stimulate debate on a subject that lies at the very heart of our democratic tradition.

"FREEDOM OF EXPRESSION IS **THE ONLY GUARANTEE** THAT ALL OF THE OTHER FREEDOMS CANADIANS ENJOY WILL BE MAINTAINED"

FREEDOM OF EXPRESSION [redacted] ON TRIAL: [redacted] 2009

by TERRY GOULD and BOB CARTY

PHOTO BY PEREGRINE981

The Supreme Court of Canada

For most of recorded history, people with power have had freedom of expression and people without power could only whisper. Countless millions went to their deaths or rotted in dungeons for criticizing kings, bishops or generals. Power determined who could speak, and silence was enforced by the sword.

Three hundred years ago, a more enlightened sensibility began to permeate western societies. It arose out of a practical realization that if you endlessly did away with those who offended you, at some point their allies would gather in numbers and do away with you. One novel way to avoid such an outcome was to pass laws that gave everyone the equal right to free expression. Motivated by simple self-protection, men of reason came to understand that guaranteeing free expression to others guaranteed free expression to themselves.

A sweeping enunciation of this guarantee was affirmed in 1791, with the passage of the First Amendment to the U.S. Constitution. Considered by some to be a "gold standard," the First Amendment unequivocally forbids government to pass any law that abridges freedom of speech or the press. Federal laws have, in fact, stepped back a bit from that blanket proscription, making it illegal to call for the violent overthrow of the government, but civil libertarians in the United States have successfully countered numerous attempts to curtail free expression with the question: "Which part of 'make no law' don't you understand?"[1] In the U.S., all ideas, no matter how hateful to some, may be freely published and accepted or rejected by the people.

In comparison, in Canada we have what might be called a "silver standard" guarantee of free speech. Section 2 of the Charter of Rights and Freedoms spells out our "fundamental freedoms," among them "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication." But Section 2 is preceded by Section 1, which is a qualification of those rights: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

Thus, unlike the First Amendment, Section 1 permits legislatures to make laws, and courts and human rights councils to issue decisions, that place "reasonable limits" on freedom of expression. Over the years, when it came to protecting identifiable minorities against "hate speech," and individuals against defamation, government

[1] For a summary of the many struggles in the U.S. to live up to the wording of the First Amendment, see the ACLU's briefing paper on freedom of expression.

bodies leaned in favour of limiting free speech—an inclination some free expression advocates assessed as being *un*reasonable. The result for journalists, Eric Baum of Osgoode Hall Law School wrote at the beginning of 2009, is "a veritable 'chill' on journalistic activity."

The year 2009 was a period in which journalists sought to warm that chill. Defamation rulings and hate speech laws became the subjects of high-profile court cases, with Canadian journalists and writers on one side and, on the other, citizens and minority groups aggrieved by their reporting. Meanwhile, journalists fought an ongoing battle with the courts over publication bans and the public's right to know what goes on in our supposedly "open" justice system.

FREEDOM OF EXPRESSION AND DEFAMATION LAW

Most journalists act as witnesses. Their job is to be where some newsworthy event is occurring and report what they witness to those who can't be there personally. That's why we label those involved in the production of news "the media." The media are in the middle, between the action and the public. Journalists who report what they physically witness rarely get into trouble in Canada.

Some journalists, however, view the act of witnessing a little differently. For investigative journalists, the act of witnessing doesn't always occur when something takes place in front of their eyes. In fact, in the vast majority of cases, the acts that investigative journalists "witness" are purposely hidden by the actors, and are often never seen. By and large, what investigative journalists do is investigate the newsworthy acts of people who do not want their acts to be discovered.

Prior to 2009, the defamation rulings in Canadian courts made it risky for investigative journalists to publish their stories if they could not prove in court every allegation made by their sources. For example, say a journalist received a phone call from a consumer claiming that a health food product manufactured by a local company had made him ill. The journalist would see if she could find other consumers who had swallowed the product and become ill. She might talk to employees of the company, and if they complained about the owner's lax practices regarding the product's safety, she would know she had a big public-interest story. She would then contact the company's owner to get his side.

At that point, if this were in the United States, the journalist wouldn't think twice about publishing the damning claims of consumers and company employees. In order to successfully sue for defamation in the United States, the company owner would have to prove that the journalist had shown reckless disregard for the truth (she had purposely concocted a lie) and had a malicious motive for publishing the story (the journalist had a personal vendetta against the company owner).

Until recently in Canada, however, a scrupulously honest, non-malicious journalist would have stood a good chance of losing a lawsuit lodged by the company owner if she were unable to come up with "court-standard" proof backing the claims of her sources. She could offer a "duty and interest" defence stating that she'd had a responsibility to warn the public about a danger it had an interest in knowing, but that defence has not been reliable in Canada[2]. And if her sources had been mistaken about a couple of facts, even if those facts did not detract from the overall credibility of the story, or if she'd inserted a derogatory remark about the company that gave cause for an argument of malice, she would also likely lose the lawsuit. As Eric Baum pointed out in January 2009, previous Supreme Court of Canada decisions have made it clear that "the courts do not recognize defendant newspapers as having a duty to report matters of public interest to the world at large." Media outlets could "neither escape liability by proving a lack of intention to defame, nor by proving that reasonable care had been taken to ascertain truthfulness."

All that changed on Dec. 22, when the Supreme Court extended the boundaries of freedom of expression by handing down a decision in two lawsuits that created a new legal defence against defamation that was in line with what was allowed in some other Commonwealth countries.

PHOTO BY PEREGRINE981

Statue of "Truth", The Supreme Court of Canada

[2] See Freedom of Expression and Protection of Reputation: The Canadian Story, Jacobsen and Lee, October 2009.

Called the defence of "responsible communication," it gave greater protection to journalists, writers and bloggers who fairly and responsibly cover stories "on a matter of public interest," even if every statement cannot later be proved true. Though still not as protective as the American model, the defence allows Canadian journalists to escape liability if they can show they diligently attempted to prove the facts.

In one lawsuit before the high court that began eight years ago, the *Ottawa Citizen* reported allegations that an Ontario Provincial Police constable named Danno Cusson had misrepresented himself to New York authorities in the weeks after the Sept. 11, 2001, terrorist attacks against the World Trade Center. The *Citizen* reported that Cusson had arrived in the city and claimed to be an RCMP officer, telling authorities that he and his pet German shepherd were part of a trained sniffer-dog team. In fact, the dog had had no formal training in search and rescue, and that led to criticism from the New York authorities and Cusson's superiors at the OPP. Cusson sued the *Citizen*, claiming that 12 of 29 facts in its story had libelled him. The *Citizen* asserted that the paper had reported the statements of its sources accurately, but the court agreed with Cusson and awarded him $100,000. The *Citizen* appealed, and the case wound its way to the Supreme Court, where it was heard alongside another defamation case.

That second case had originally been launched by an Ontario developer named Peter Grant over a 2001 article in the *Toronto Star.* Grant, a friend and supporter of the premier of Ontario at the time, Mike Harris, had applied to expand a private golf course on lakeside property in cottage country. When the *Star* looked into the story, local residents told the paper's reporter they believed that Grant was using his political influence to gain permission for his application, with one resident suggesting that the application was already a "done deal." The newspaper contacted Grant for his side, but he declined to comment. After publication, Grant sued, claiming the story was based on innuendo and was defamatory. The court found in Grant's favour and awarded him $1.475 million, one of the largest amounts ever granted in a media defamation case. The decision was overturned at the Ontario Court of Appeal, and Grant then took it to the Supreme Court.

Writing for the unanimous court on both of these cases, Chief Justice Beverley McLachlin found that "Freewheeling debate on matters of public interest is to be encouraged and must not be thwarted

Editorial Cartoon by Riber Hansson. Courtesy of the International Editorial Cartoon Competition of the Canadian Committee for World Press Freedom (CCWPF)

by 'overly solicitous regard for personal reputation'." The court's decision specifically addressed an issue that had caused fear in the hearts of Canadian investigative journalists whenever they'd published or aired an exposé: the narrowness of their possible defence under traditional rulings regarding defamation law. The law of defamation in Canada, McLachlin said, should be changed because it did not lend enough weight to the free expression guarantees in the Charter when it came to reporting on stories that had "public interest." To offer "greater protection," she said, the defamation law should allow journalists to report statements that are "reliable and important to public debate."

Media outlets across the country applauded the decision. They no longer had to prove every statement they reported was true, only that they had diligently *sought* the truth. Reliable sources for a story might be mistaken, but that did not mean the journalist was guilty of defamation if he or she responsibly tried to verify the truth of the statement, or (in the court's expansive ruling) if "the defamatory statement's public interest lay in the fact that *it was made rather than its truth*." (emphasis added) The two newspapers being sued could now use the expanded defence in retrials of their cases.

FREEDOM OF EXPRESSION AND THE HUMAN RIGHTS ACT

If, at the end of 2009, Canadian journalists had a stronger defence against accusations of defamation, they still had to consider Canadian laws that placed limits on expression when that expression was suspected of exposing a person or group to hatred or contempt because of religion, race, ethnicity or sexual orientation. The problem for journalists and writers in Canada was that there were two sets of laws applying to "hate speech," one clearly defined under provisions of the Criminal Code, and one more diffuse under the Human Rights Act.

The "hate speech" provisions of the Criminal Code and the Human Rights Act are often conflated in the public mind, but they are, in fact, two different areas of Canadian law. The Criminal Code deals with hate speech adjudicated in a court of law in cases where speech is alleged to be intended to lead to violence. The Human Rights Act deals with hate speech adjudicated by a tribunal of civilians based on a complaint that the speech is intended to lead to discrimination.

Non-criminal complaints about speech brought before federal and provincial human rights tribunals set up by the Human Rights Act have, not surprisingly, been the source of a vigorous debate over how to balance the constitutionally guaranteed right to freedom of expression in Section 2 of the Charter, and the provision in Section 1 that allows for "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." What is the difference between criminal hate speech and non-criminal discriminatory, offensive speech, and what constitutes "reasonable limits" to each?

In the Criminal Code, the limits are clear, as is the burden of proof. In order to convict a person under Criminal Code Sections 318-320, the government must prove beyond a reasonable doubt that the charged person *intended* to advocate genocide (318), publicly incite hatred against an identifiable group that will likely lead to violence (319), or incite terrorism (320). Section 13 of the Human Rights Act, on the other hand, is an anti-discrimination law, and suspected offences of speech are judged not on whether they are meant to incite violence but on whether they are meant to incite feelings of hatred or contempt that lead to discrimination—a considerably broader definition of an offence, and one that some free speech advocates feel is unreasonable, particularly under the rules that human rights tribunals operate.

Under the Human Rights Act, a person or group that feels they are the aggrieved object of the published statement in non-criminal cases can seek relief before provincial or federal human rights commissions, which have the power to pass them on to a tribunal for adjudication. The tribunals are quasi-judicial, with as many as 15 civilian appointees hearing a case without a judge. The tribunals do not follow the rigorous procedures of a court regarding evidence, yet they can (and do) impose hefty fines on defendants who

DEFAMATION LAW SHOULD ALLOW JOURNALISTS TO REPORT STATEMENTS THAT ARE "RELIABLE AND IMPORTANT TO PUBLIC DEBATE."

Editorial Cartoon by John Farmer. Courtesy of the International Editorial Cartoon Competition of the Canadian Committee for World Press Freedom (CCWPF)

lose their cases. Even if one wins one's case, legal fees for defending oneself before a human rights tribunal can run into the tens of thousands of dollars, which they did in the case of *Maclean's* columnist Mark Steyn between 2007 and 2008.

Maclean's had published Steyn's "The New World Order," a summative excerpt from his bestselling book, America Alone: The End of the World as We Know It, which examined the possibility of an Islamicized Europe. The Canadian Islamic Congress claimed the excerpt was Islamophobic, exposing Muslims to hatred and contempt, and registered complaints with multiple human rights commissions. The case was dismissed by the Canadian Human Rights Commission (CHRC) and the Ontario Human Rights Commission after *Maclean's* submitted a brief of defence to each. But the British Columbia Human Rights Commission deemed the case worth adjudicating and held public tribunal hearings. In late 2008, the tribunal ruled that while the book excerpt might be considered offensive by some, "the complainants have not met their burden of demonstrating that the Article rises to the level of detestation, calumny and vilification."

This ruling set the bar high for charges of promoting hatred, but it did not eliminate that bar. Journalists and writers were still left wondering where exactly the legal line stood between expression that was permissible if it did not incite violence and expression that was impermissible because someone would complain it incited "detestation, calumny and vilification." Did writers have to weigh their expression in anticipation of the opinion of a board of government appointees? How many of these provincial and federal boards would they have to stand before and defend themselves? In the words of the Canadian Book and Periodicals Council, "the threat of bureaucratic censure—through fines, gag orders and legal costs—encourages writers and others to censor themselves when commenting on controversial public issues."

In 2009, the boundaries were clarified somewhat, at least when it came to the Internet. A complaint had been lodged before the CHRC against Marc Lemire, a webmaster who hosted a right-wing site that contained an electronic bulletin board with postings that mocked Jews, Italians, blacks, homosexuals and other groups. The CHRC heard the case before its tribunal, where Lemire directly challenged the constitutionality of Section 13 of the Canadian Human Rights Act.

In September 2009, the tribunal ruled Section 13 was indeed inconsistent with the Charter of Rights and Freedoms, given that the Human Rights Act was originally intended to be "remedial, preventative and conciliatory in nature," rather than prosecutorial—less a means to punish and hand out penalties for speech than to discourage discrimination in housing and employment. The decision, however, was not binding beyond the Lemire case and, at this writing, is awaiting review in Federal Court.

According to Prof. Richard Moon, a Windsor law professor the CHRC had hired to write a report about the role of Section 13 in the Human Rights Act, the section should be repealed entirely by Parliament. In the age of the Internet, Moon said, "any attempt to exclude all racial or other prejudice from the public discourse would require extraordinary intervention by the state."

The Canadian Civil Liberties Association, an intervener in the Lemire case, also argued that Section 13 should go: the Criminal Code prohibitions against hate speech, they said, are the appropriate means "to deal with those who willfully promote hatred leading to imminent violence."

We believe that when the statements of racists do not promote violence, the best way to deal with those statements is to forcefully and publicly denounce them. In other words, the answer to hateful or offensive speech that is not intended to incite violence is more speech, not censorship. We hope that a ruling from the Federal Court finding Section 13 unconstitutional will clear up the confusion between hate speech that is criminal and speech that may be offensive, distasteful, repugnant and discriminatory—but which can be countered by more speech.

FREEDOM OF EXPRESSION AND COURT PUBLICATION BANS

Another continuing headache in 2009 for journalists, and for free speech, was to be found in our country's judicial culture and the issue of publication bans. Public trials are guaranteed by Section 12(d) of the Charter of Rights and Freedoms. In the court system, the media's function is to act as the eyes and ears of the public. Citizens who cannot attend court proceedings are informed about the law and the people involved—victims, defendants, police officers, lawyers and judges—by the reporters who attend. Public scrutiny of our courtrooms is the best protection for the effective operation of our justice system. Journalists help guard against courtroom abuses through publicity. That is why public trials are guaranteed in the Charter.

On the other hand, publication bans are often used by judges to prevent the identification of the victim or the accused, or to ensure for the accused the right to a fair trial by an impartial jury, or when testimony given in a bail hearing, preliminary hearing or a voir dire might prejudice a jury. Those are arguably legitimate reasons for limited publication bans. But sealing portions of a court file or excluding the media affects the public's right to know what is going on. And so the issue of publication bans is a balancing act of competing rights, and too often there is an imbalance in favour of bans.

On this front, 2009 contained some good news and some bad news. The good news was that in cases brought forward by media outlets appealing a judge's publication bans, the courts hearing the appeals in the majority of cases agreed with the media that the court system should be more open (see list of 2009 court cases). These decisions should be a signal to judges to use publication bans more sparingly. But here's the bad news—trial judges still resort too frequently to publication bans.

Repeatedly, trial judges order a ban regardless of the precedent set by previous appeal judgments that lean in favour of the interests of public education and engagement in the legal system. Censorship in our courts has been easily imposed even when, time and again, judges have been overruled after the media have appealed their publication bans, based on an argument for more openness. After a ban is established and it is brought before a court of appeal, the appeal court usually decides in favour of openness, but by then, quite often, the trial has ended.

The prevalence of publication bans and their attendant impediments to the public's access to court proceedings remain a concern to free expression advocates. In 2009, a number of appeal court decisions, at various levels, have moved the yardstick in favour of open courts. But there is a huge task ahead in the education of the judges who preside over courtrooms.

Guaranteeing the rights to free expression and to an open society guarantees those rights to everyone. We cannot have a free and open society when we deny others the right to say what they want to say merely because we don't like their ideas. That is precisely the moment when freedom of expression is tested. Throughout history, whenever free speech has been unreasonably limited by some, the tables have been turned, and those who limited free speech found their own speech unreasonably limited.

WE CANNOT HAVE A FREE AND OPEN SOCIETY WHEN WE DENY OTHERS THE RIGHT TO SAY WHAT THEY WANT TO SAY MERELY BECAUSE WE DON'T LIKE THEIR IDEAS.

There were other important issues considered by Canadian courts in 2009. In particular several high-profile cases concerned the rights of journalists to protect confidential sources. Other cases explored the tension between privacy rights and freedom of expression rights.

A list of the major court cases considered in 2009, at various judicial levels, is to be found in the Appendix (page 32) to this review along with summaries and links to original documents and news coverage.

Terry Gould is an investigative journalist and the author of Murder Without Borders: Dying for the Story in the World's Most Dangerous Places (2009).

Bob Carty is a CBC radio producer and a CJFE board member.

ATTACKS ON [redacted]

THE [redacted] ETHNIC PRESS

Editorial Cartoon by Mohammed Al-Adwani. Courtesy of the International Editorial Cartoon Competition of the Canadian Committee for World Press Freedom (CCWPF)

It is awkward to create a hierarchy among various kinds of free expression violations. But in the global human rights community, it is generally agreed that the most serious violations are those directly against the person of a journalist or communicator. A physical attack, a verbal threat, or an assault on a journalist's home or workplace, or on a media outlet can be devastating. These actions can end journalism careers and close publications. They are primary causes of self-censorship. And they deprive the public of information that could be vital to their lives and welfare. Sometimes they are the harbingers of worse violence to come—perhaps even murder.

Usually when we talk about direct, violent attacks against journalists, we are talking about countries far away. It doesn't seem like a homegrown issue. Yet only 11 years ago, Tara Singh Hayer, the publisher of the *Indo-Canadian Times*, was assassinated in British Columbia—with no one yet brought to justice for his murder (see page 13).

While threats against the media can happen anywhere, there are some noticeable tensions in Canada's ethnic media, a community that is more extensive and vibrant than most Canadians appreciate. The first black Canadian presses were established in the 1850s. Today, Canada has 14 full-service radio stations offering programming for various ethnic groups, and more than 60 stations that have ethnic programming in their schedules. There are more than 250 ethnic newspapers, representing more than 40 cultures, including seven non-English dailies. Three multicultural television stations program in multiple languages, five operate ethnic specialty and pay-television services, and 44 are licensed to provide digital specialty services.

When they and their free expression rights are attacked, these stories need to be heard.

Canadian Journalists for Free Expression (CJFE) is the manager of a global network of free expression organizations called IFEX (see page 2). And we send out more than 2,500 alerts a year about attacks against free expression. In the past year, these included two that originated in Canada.

ATTACK ON SIKH EDITOR OF *CANADIAN PUNJABI POST* IN BRAMPTON, ONT.

On Oct. 23, 2009, Jagdish Grewal finished the last touches on his editorial for *Canadian Punjabi Post* in Brampton, Ont. It was 11:40 pm and Grewal, 42, headed out to the parking lot to drive home in his van. Before he could start the engine, three men, masked and dressed all in black, rushed to his vehicle. One had a gun; another, a steel pipe.

Before Grewal could get away, his assailants smashed his window, put the gun to his head, opened the door, dragged him to the ground and began kicking and beating him. The assailants, one of whom Grewal identified as a Sikh by a beard protruding from his mask, began dragging him towards their own van. It looked like a kidnapping attempt.

At that point, one of Grewal's employees, leaving to go home, came upon the scene. The attackers let Grewal go even while shouting, in Punjabi, "Kill him, kill him."

Grewal is the founder and publisher/editor of the Brampton-based *Canadian Punjabi Post*, and also hosts the daily radio show *Khabarsar*. Grewal believes the attackers may have been pro-separatist Sikhs who disagree with his moderate politics. He does not support violence by Sikh militants. He has received threats in the past because of his high profile in the Toronto Sikh community. Grewal has been receiving threatening phone calls since criticizing Sikh journalist Jarnial Singh during a radio interview three weeks before the attack.

Grewal says that he no longer works outside his home late at night. Although the police have not found his attackers, he has heard that the investigation continues. And he feels concern about the growing unrest within his community.

CJFE:
http://cjfe.org/releases/2009/26102009bramptonattack.html

CBC Radio, The Current:
http://castroller.com/podcasts/TheCurrent/1287069

The *National Post*:
http://www.nationalpost.com/story.html?id=2152085

VANDALIZATION OF *UTHAYAN* IN SCARBOROUGH, ONT.

On Feb. 21, 2010, *Uthayan*, a newspaper read widely by the local Tamil community, was vandalized. The attackers appeared intent on intimidating people connected to the paper who had met with the Sri Lankan president, an action that was unpopular in the Tamil community.

The attack was accompanied by a threatening phone call to the editor of the newspaper, Logan Logendralingam. The unidentified caller said, "Okay, your friends went to Colombo and met the president of Sri Lanka—the enemy of Tamils who killed 40,000 innocent people. Go to your office: there is a message for you."

Jagdish Grewal

The "message" Longendralingam found upon arriving was that his office's front window had been smashed in.

Logendralingam spoke to CJFE after the attack and said that he will continue to publish as before. He is also hopeful that the police investigation will track down the perpetrators and that they will be brought to justice.

This is not the first time there have been violent attacks on individuals and media property in the Tamil community. In the 1990s, there were vicious assaults that caused newspapers deemed to be critical of the Liberation Tigers of Tamil Eelam (LTTE) to be closed down. In 1993, Tamil journalist D.B.S. Jeyaraj was badly beaten, resulting in a broken leg and head injuries. In another case, distributors of the weekly newspaper *Thayagam* were targeted.

CJFE:
http://cjfe.org/releases/2010/23022010uthayan.html

CBC News:
http://www.cbc.ca/canada/toronto/story/2010/02/22/toronto-tamil-newspaper.html

TARA SINGH HAYER: UNSOLVED MURDER

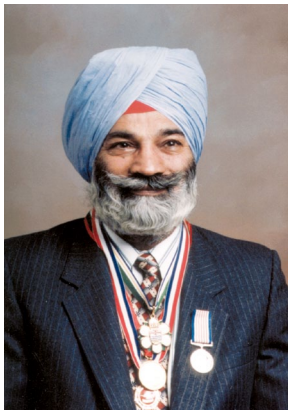

PHOTO COURTESY OF *INDO-CANADIAN TIMES*

Tara Singh Hayer

It has been more than 11 years since Tara Singh Hayer, the 62-year-old publisher of the *Indo-Canadian Times*, was gunned down at his Surrey, B.C., home. Despite numerous investigations over the years, no one has ever been charged with his murder.

Hayer was almost certainly killed because of his investigative work on the 1985 Air India case, the deadliest incident of aviation terrorism in Canadian history. His assassination was not the first time Hayer paid a steep price for his dedication to the truth. An attempt on his life 10 years earlier left him partially paralyzed and using a wheelchair.

Hayer's unsolved murder not only removed a rational and moderate voice within his community but also blemishes Canada's reputation by allowing those who kill journalists to do so with impunity.

Through the years, police and other officials have indicated that their investigations are continuing and, at some times, even suggested that the case would soon be solved. There have also been news stories that have identified a number of suspects in the case. But still the authorities have not taken the case to court.

In 1999, CJFE named one of its press freedom awards for Tara Singh Hayer. It is given to Canadian journalists who have shown great courage in the course of doing their work.

UNDERMINING TRUST: POLICE IMPERSONATING JOURNALISTS

by KELLY TOUGHILL

Canada is one of the few Western democracies that allow agents of the state to pose as journalists at will. The practice has sparked riots in Europe and strict federal regulations in the United States. Even the CIA has rules about when its agents can pretend to be reporters, but no rules exist in Canada.

Canadian police have arrested suspects after luring them into false interviews by pretending to be reporters. They have posed as reporters to capture protests on film. They have pretended to conduct news interviews to gather information in investigations.

During the standoff at Ipperwash that gave rise to the police shooting of Dudley George, and again during the Mohawk Day of Action blockade of the railway tracks between Toronto and Kingston, members of the Ontario Provincial Police posed as journalists in order to get closer to protesters.

Canadians should be very troubled by this ruse, for it threatens one of our fundamental freedoms.

Police impersonation of journalists destroys public trust in the profession of journalism, making it impossible for journalists to report some stories of vital public interest. It also creates risks for journalists, who can now be mistaken for police in places where police are not welcome or willing to go.

There are stories of vital public interest that will go unreported if sources can no longer tell the difference between reporters and police. Take the case of the Mount Cashel Orphanage. It is no coincidence that the crimes of pedophile priests at the Newfoundland orphanage were first revealed in the press and only then investigated by police.

Many adults who suffered child abuse are deeply distrustful of authority and have a compulsion to retain control over their own lives. These twin instincts work against any inclination to cooperate with the criminal justice system. This is why there is such a strong pattern of past child abuse being first revealed in the press, and then being investigated by police.

Any reporter who has covered these stories knows that the victims are extremely anxious about whether their tale will be relayed to police, and whether they will retain control over the ability to officially report–or not–the abuse. Any blurring of the line between reporters and police would leave these stories untold.

The Mount Cashel story was the first significant revelation of pedophilia in the Catholic Church. Those stories, reported 20 years ago, have led to an international debate over one of the most powerful institutions on the planet. It is easy to see how the Mount Cashel stories served not just Canadian society but the global public good.

It is not just victims of child abuse who must be able to trust reporters. Journalists pursue stories of vital public interest by dealing with people from many different types of closed societies. Aboriginal activists, sex-trade workers and most marginalized groups are generally reluctant to speak with police. And it is in those closed societies that journalists often find the stories that we most need to hear.

Sometimes journalists must knowingly deal with criminals to get stories of vital public interest. Journalists cannot write effective stories about the problem of drug abuse in Canada without speaking with someone who is addicted to drugs. But drug users will not detail the horrors of that life if they suspect they are speaking with police, who may turn around and arrest them for their honesty.

PHOTO BY THE CANADIAN PRESS/MOE DOIRON

Two aboriginal protesters man a barricade near the entrance to Ipperwash Provincial Park, near Ipperwash Beach, Ont., on Sept. 7, 1995.

"POLICE IMPERSONATION OF JOURNALISTS DESTROYS PUBLIC TRUST IN THE PROFESSION OF JOURNALISM"

Sometimes it is not just trust that is at stake, but basic safety.

There are several cases around the world in which reporters have been killed because they were mistaken for police by the wrong people at the wrong time.

A classic definition of public service journalism is to "give voice to the voiceless." Without the ability to have relationships of trust with the most marginalized in society, the press cannot serve that function. If police continue to pose as reporters, that trust will erode and we will lose the ability as Canadians to learn about stories such as the child abuse that occurred at the Mount Cashel Orphanage.

It is for these reasons that Canadian Journalists for Free Expression (CJFE) is challenging the practice of police impersonating journalists as a fundamental threat to free expression in Canada.

Kelly Toughill is a journalist and associate professor at the School of Journalism, University of King's College.

CJFE TO COURT OVER POLICE PRETENDING TO BE REPORTERS

by PHIL TUNLEY

CJFE, supported by other media and free expression groups, is preparing a court application against the Ontario government to end the practice of police impersonating journalists. The application seeks a declaration from the court that the practice violates the freedom of expression guaranteed by Section 2(b) of the Canadian Charter of Rights and Freedoms.

The case will highlight recent Ontario examples of police officers impersonating journalists to infiltrate Aboriginal protest activities, first at the Ipperwash standoff in 2004, and then again during the Mohawk blockade of rail lines at Deseronto during the 2007 Aboriginal Day of Action. These examples illustrate how the practice violates the freedom of expression of journalists by undermining public trust in the profession of journalism and by creating a heightened risk of physical harm to journalists trying to cover these important stories. In this way, when police impersonate journalists, they interfere with news gathering, which is an essential part of the freedom of expression guaranteed by Section 2(b), CJFE will argue.

In addition, the case will show how the practice impairs access to the media by marginalized groups and individuals who most need such access to express their concerns and points of view. The practice also impairs their right to remain silent in the face of criminal investigations.

Court action is a last resort, made necessary by recent failures by ministers and police officials to follow through on the need to review and curtail the practice by legislation. It seeks to bring Canadian practice into line with that in other jurisdictions such as the United States.

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

8

NUMBER OF CASES INVOLVING FREEDOM OF EXPRESSION CONSIDERED BY THE SUPREME COURT OF CANADA IN 2009[1]

15

MONTHS CANADIAN JOURNALIST AMANDA LINDHOUT WAS HELD AFTER BEING KIDNAPPED IN SOMALIA ON AUG. 23, 2008[2]

LENGTH OF TIME CANADIAN JOURNALIST MAZIAR BAHARI WAS DETAINED AND TORTURED IN AN IRANIAN PRISON[3]

118 DAYS **12** HOURS **54** MINUTES

43

PERCENTAGE OF FEDERAL ACCESS TO INFORMATION REQUESTS THAT WERE NOT MET IN THE REQUIRED 30-DAY TIME LIMIT[4]

23

PERCENTAGE OF REQUESTS FOR WHICH IT TOOK MORE THAN 60 DAYS TO GET A RESPONSE[5]

CJFE'S FREEDOM OF EXPRESSION INDEX 2009

4

NUMBER OF AMERICAN JOURNALISTS DETAINED BY CANADIAN BORDER AUTHORITIES AND QUESTIONED WHETHER THEY WERE COMING HERE TO CRITICIZE THE OLYMPICS[10]

NUMBER OF CAMPAIGN PROMISES MADE BY STEPHEN HARPER IN 2006 TO REFORM ACCESS TO INFORMATION[8]

8

PROMISES KEPT[9]

1

PARTIALLY

3

MILLION

NUMBER OF RURAL CANADIANS WITHOUT RELIABLE ACCESS TO BROADBAND INTERNET[6]

AVERAGE NUMBER OF DAYS TO RESOLVE A FEDERAL ACCESS TO INFORMATION COMPLAINT[7]

395

NUMBER OF DIRECT VIOLENT ATTACKS AGAINST CANADIAN MEDIA OUTLETS THAT WERE REPORTED[11]

2

SOURCES: 1-3, 10-11, CJFE; 4-5, TREASURY BOARD INFO SOURCE; 6, THE *GLOBE AND MAIL*; 7, OFFICE OF THE INFORMATION COMMISSIONER; 8-9, *FALLING BEHIND: CANADA'S ACCESS TO INFORMATION ACT IN THE WORLD CONTEXT* BY STANLEY TROMP.

INFORMATION ON A (SHORT) LEASH: ACCESS TO INFORMATION 2009

PHOTO BY GRAEME SMITH FOR THE *GLOBE AND MAIL*

In Kandahar, Afghanistan, prisoners accused of involvement with the Taliban often end up inside the national-security wing of Sarpoza prison. The Canadian military's transfer of detainees to Afghan authorities has been at the centre of a tug-of-war over Access to Information.

2009 WAS A YEAR OF STRUGGLE BETWEEN A GOVERNMENT WITH A LOT OF SECRETS AND A PUBLIC THAT JUST WANTED THE FACTS. CJFE REPORTS ON THE YEAR-LONG BATTLE OVER CANADA'S ACCESS TO INFORMATION ACT AND THE HISTORY THAT LED TO THE CONFLICT.

by TERRY GOULD and BOB CARTY

"Secret" and "information" are two words that governments spend a lot of time struggling to keep pressed together. The adjective and noun have a very unstable relationship, and are constantly threatening to spring apart. By definition, keeping knowledge "hidden from others" is not a concept that fits well with the "process of informing." Democratic governments are particularly strained in making the words fit because all the information a government possesses is paid for with public money, and it is the public from whom the information is kept secret.

Over the years, public pressure caused 75 governments throughout the world to yield to a section of the Universal Declaration of Human Rights that guarantees the right of citizens to seek information (see box). Today, from Mexico to South Africa, freedom of information laws make it possible for ordinary people to apply for the timely release of government information and, in theory, get what they are after. Sometimes the intent of the law is fulfilled; other times it is evaded when governments use bureaucratic excuses for unreasonable delay; too often it is foiled by governments claiming their prerogative to declare information secret—usually on the grounds of "national security."

Canada enacted its version of a freedom of information law in 1982, under the Liberal government of Prime Minister Pierre Trudeau. Yet there was a flaw in the conception of the legislation that was evident in its name: it was not called a freedom of information law but the Access to Information Act (ATIA). "Free" means "unfettered," while "access" means "an approach," and so the Access to Information Act guaranteed a procedure rather than a right. It stipulated how Canadians could apply for government information and set a 30-day time limit for a response, but it also circumscribed what information was available by excluding all cabinet documents and dozens of government agencies and Crown corporations. ATIA may have established an Information Commissioner to ensure the procedures in the Act were followed, but it also declared that the commissioner could not compel the government to release information that the government decided should be kept secret—for a variety of government-friendly reasons spelled out in the Act.

These restrictions on the ATIA's power to reveal a government's secrets were a great relief to many federal bureaucrats and cabinet members. If you're a mistake-prone bureaucrat, a single Access to Information (ATI) request has the potential to end your career, and if you're a member of the ruling party, a series of well-targeted requests can expose a web of lies that ensnares your whole government.

Not surprisingly, for the next two decades, many politicians and officials serving the governments of both Liberals and Conservatives used the ATIA to hide, not provide, information. Some employed the old standby: the requested information was secret because it was subject to national security laws. Others denied requests based on the claim that supplying the information would compromise the privacy of third parties. Excuses for delays were legion, ranging from the need to consult other departments to the inability to find data—or even to find the time to find the data.

All these stalling tactics became too much for John Reid, the information commissioner from 1998 to 2006. In 2000, Reid issued a blistering attack on the Liberal government of Prime Minister Jean Chrétien for attacking his office, threatening his staff, and creating huge backlogs in access requests. In subsequent reports, Reid accused the government of destroying documents to prevent their release and trying to intimidate people who had legally requested information. At the time, journalists were seeking the release of hidden files related to what would become known as the "sponsorship scandal." In that case, partly because of a coast-to-coast demand for information on the alleged scandal, the documents were released. Rampant Liberal cronyism and kickbacks were exposed, and the Liberals paid the price in the 2006 election, losing to the Conservatives under Stephen Harper.

In the run-up to that election, Harper had made eight noble promises to fix the ATIA's most glaring deficiencies. Among the reforms he promised to enact if he won the election were amendments of the ATIA so that all exemptions would be subject to a "general public interest override," and to invest the commissioner with the power to order the release of government information based on that override. In Harper's first two years in office, however, he not only failed to keep his promises but moved his government in the direction of more secrecy. The number of stalled or refused ATI requests increased, as did wait times for final responses on requests, which in some cases arrived 270 days after filing. Robert Marleau, the new information commissioner, gave Harper's Privy Council Office—the top bureaucratic council—an "F" on disclosure for the period of 2007 to 2008. For both those years, the Canadian Association of Journalists bestowed on Harper its satiric Code of Silence Award. To journalists, the deliberations of government institutions began to seem almost conspiratorial as bureaucrats avoided ATI requests by holding their meetings without taking minutes, giving a new meaning to the phrase "nothing to hide." Even information once freely available was not so free anymore. Prior to Harper's election, every successful ATI request had been recorded in an open database. In mid-2008, Harper shut down the database, citing cost concerns. Researchers and the media now had to wait weeks or months for government bureaucrats to inform them that the documents requested had already been released.

As 2009 opened, the stage was set for a great struggle between a government that wanted to hold the words "secret information" together and a public that felt it had paid for the right to pry them apart. The year would be dominated by a battle to get access to secret files documenting the government's knowledge of the torture of prisoners by Afghan authorities after Canadian soldiers had handed them over, but there were other battles on life-and-death issues. Each of them factored into the 2009 war for the public's right to information that the government felt should be kept secret.

ON THE MINDS OF MANY REPORTERS at the beginning of the year were the deaths of 20 Canadians the previous summer in a listeriosis outbreak caused by contaminated meat. Was the free market-oriented Harper government's push for a more lenient meat-inspection system among the possible causes for the food poisoning? Just after the wave of fatalities, reporters filed multiple ATI requests, seeking documents that would illuminate "crucial exchanges" between politicians during the crisis. Four months later, the Privy Council Office replied that they did not have the records requested. Then a spokesperson explained that, because the information was recorded in handwritten notes, the information was not subject to release. New year 2009 arrived with no information made public, and as concern about the safety of Canadian meat mounted in the information vacuum, Prime Minister Harper appointed an "independent investigator," who was actually serving him on another advisory committee. Her report, released almost eight months later, cited the government's lack of focus on food safety as a contributor to the deaths, but the delay and timing of the report seemed to serve two purposes for the recalcitrant government: the public furor over the deaths had abated, and the report's release during the height of the 2009 summer vacation season ensured it was little noticed.

Government stalling on information requests was the main thesis of the Canadian Newspaper Association's (CNA)

annual audit of ATI compliance for all levels of government. Released at the beginning of the year, the report made for some ironical reading. At the time, reporters at the CBC were complaining about their unfulfilled ATI requests for documents on the listeriosis deaths, but the national public broadcaster itself earned a grade of "D" on ATI compliance, in line with the worst marks of federal institutions that the CNA studied. The CBC had "imposed a six-month time extension on top of the normal 30-day deadline to reply to a request for the salary ranges and classifications of its top employees." Indeed, the CBC provided no response at all to the CNA's request for its policy on employees talking to the media. It appeared that the CBC was a good candidate for the Canadian Association of Journalists' next Code of Silence Award.

At the end of February, the information commissioner grimly reported to Parliament that public respect for the ATIA was deteriorating. Federal agencies that had a vast impact on the nation's safety and welfare had failed to comply with ATI time limits for responding to requests for information, with some taking an average of four months to acknowledge receipt of the requests. The worst offenders were Health Canada, Public Works, the RCMP, Canada Border Services, Foreign Affairs and the Department of National Defence.

At the time the commissioner reported to Parliament, National Defence and Foreign Affairs were at the heart of a growing clamour by the media for the release of documents on what was being termed "the Afghan file." A year and a half earlier, the chief of the defence staff, Gen. Rick Hillier, had halted the release of documents relating to the treatment of detainees captured in Afghanistan, claiming that disclosure of the information could endanger Canadian troops. As evidence mounted that Canadian-transferred detainees had been tortured in Afghan prisons, the government's refusal of ATI requests for the Afghan file moved to the centre of discussions about government secrecy.

Then came a setback in the fight to open the Afghan file, as well as in the broader struggle to separate public information from the grip of the government's claims to secrecy. In April, a Federal Court upheld the government's right to restrict information if the government felt the information would harm its conduct of international affairs. The case had been launched by University of Ottawa professor Amir Attaran, who had received a heavily redacted response to his ATI request for the Department of Foreign Affairs' annual human rights reports on Afghanistan for the years 2001 to 2006. To Attaran, there should have been no reason for the government to censor its reports. The U.S. State Department openly published on the Internet its often scathing annual reports on Afghanistan's human rights record. Nevertheless, the court's decision stated that, in Canada, the government's "negative references or criticisms of Afghan political, security and police authorities would undermine…relationships and become a hurdle for the Canadian government's representatives on the ground in Afghanistan."

Just how difficult it had become to

PHOTO BY GRAEME SMITH FOR THE *GLOBE AND MAIL*

Shackled by the feet, many inmates arrive at Sarpoza prison suffering from injuries sustained in custody of the NDS, the Afghan secret police. The chains usually come off within a few days or weeks.

breach the rising walls of government secrecy became evident in June, when the Office of the Information Commissioner (OIC) released a report on complaints about delays and denials of information in the previous fiscal year. There were 2,513 complaints on file, up by 61 per cent from the last annual report. Over half of the complaints, 56 per cent, were filed against six of the 241 federal entities under the ATIA. Among them were the usual suspects: the Department of National Defence, Foreign Affairs, the CBC, the Privy Council Office and the RCMP, plus the Canada Revenue Agency. The average time to resolve a complaint was 13 months, although two-thirds of all complaints were found by the OIC to have had merit. A frequent technique for delaying requests for information was to mark them as "amber light"—sensitive—which sent them disappearing down a well of bureaucratic review. Naturally, the bottom of that well had filled with probing "amber light" requests from reporters, opposition MPs, academics and lawyers.

The release of the OIC report coincided with the issuing of proposals for reform of the ATIA based on a months-long study by the House of Commons Standing Committee on Access to Information. The parliamentary committee recommended that people who make requests under the ATIA should have direct recourse to the Federal Court if their access were refused; that the information commissioner should be given more power to force the government to make timely disclosure of information; and that cabinet documents should be made subject to access requests. The Harper government took the proposals under advisement, and then sat on them for months. The Conservatives had their hands full on the Afghan file.

Since March 2008, the independent Military Police Complaints Commission had been investigating complaints by Amnesty International and the BC Civil Liberties Association that Canadian Forces had transferred detainees to Afghan authorities notwithstanding alleged evidence that there was a probability they would be tortured. All through the summer of 2009, the Harper government fought to keep a government official from testifying before the commission. The official was Richard Colvin, an intelligence officer and diplomat who had worked in Afghanistan in 2006 and 2007. Colvin was willing to reveal to the commission his knowledge of what the military and his overseers at the Department of Foreign Affairs had known concerning the likelihood that prisoners handed over to Afghan authorities might be tortured.

PHOTO COURTESY OF UNIVERSITY OF OTTAWA

Amir Attaran

In October, Colvin's lawyer accused the Department of Justice of actively discouraging his client from co-operating with the hearings. That same month, the Harper government rejected the three main recommendations of the House of Commons Standing Committee on Access to Information.

A month later, on Nov. 24, Colvin testified before the Military Police Complaints Commission, stating that Ottawa had ignored and tried to suppress his warnings that prisoners transferred to Afghan jails in 2006 and early 2007 were likely tortured. A week later, the government finally acceded to Access to Information requests by the media and released the thousands of pages of heavily blacked-out documents that it had handed over to the independent inquiry. Even though the inquiry's investigators had received the highest level of national security clearance, they too had not been permitted to see the government's secrets.

For the next month, the festivities of the 2009 Christmas season were drowned out by editorials calling for the full text of the blacked-out documents. All of Harper's 2006 campaign promises about reform of the ATIA now seemed hollow—a conclusion given weight in the new year when a Canadian Press ATI request for Department of Public Works documents on the ministry's real estate portfolio was approved for release, and then, on the day in February it was to be handed over, "unreleased" by the minister's parliamentary affairs director. Later, a Tory insider would report that it was "standard operating procedure" for ministerial or political staff to intercede when documents were about to be released, paring them down as much as possible—a potential violation of federal law: "This is inexcusable political interference in the right of Canadians to know what their own government is doing," said journalism professor Kelly Toughill. "The case exposes how poorly our freedom of information laws are functioning."

POLITICIANS ARE BY DEFINITION "of the people," and are therefore as prone as average citizens to making embarrassing mistakes, and just as averse to having their mistakes exposed. But there is a difference between a politician and an average citizen. Because politicians are invested with a lot of power, their mistakes can have disastrous consequences for millions of Canadians. Even if a politician is not a thief or a scoundrel,

or responsible for a disaster, his or her colleagues in Parliament may occasionally be secretly involved in tawdry behaviour. Access to Information requests that probe the ruling government's suspected mistakes, corruption or scandalous activities often threaten the whole clubhouse. That is why they are resisted so vigorously, even by politicians who sincerely believe that government should be an open enterprise.

Openness should, in fact, be the ethical foundation of government. It is not something that citizens should have to *ask* of government; it should be the *culture* of government. The proactive disclosure of government information must be the rule; the requirement to navigate obstacle-strewn ATI procedures should be the exception.

And those procedures must be reformed. Today, in at least a dozen ways, the Act fails to meet international standards of freedom of information laws. In some areas, our law doesn't even match those of countries like Mexico, Pakistan and India. And there remain more than 100 quasi-government bodies not covered by the Act.[1]

CJFE believes that Canadians should appeal to our politicians' best intentions and demand that the Access to Information Act be reformed in general accord with Prime Minister's Stephen Harper's own 2006 campaign promises. Here are our recommendations for Mr. Harper's government:

- Give the information commissioner the power to order the release of government information;
- expand the coverage of the ATIA to all Crown corporations, officers of Parliament, foundations, and organizations that spend taxpayers' money or perform public functions;
- subject the exclusion of cabinet confidences to review by the information commissioner and oblige public officials to create the records necessary to document their actions and decisions;
- provide a general public interest override for all exemptions so that the public interest is put before the secrecy of the government;
- ensure that all exemptions from the disclosure of government information are justified only on the basis of the harm or injury that would result from disclosure rather than blanket exemption rules; and, finally,
- ensure that the disclosure requirements of the ATIA cannot be circumvented by secrecy provisions in other federal acts, except in those cases where the information commissioner finds that the requested documents are truly vital to national security or the privacy of personal information.

PHOTO BY TED BURACAS

Stephen Harper, giving his victory speech after the 2006 election (the campaign when he promised reform of Access to Information).

In short, Mr. Harper, make the Access to Information Act a *freedom* of information act. Give us our free right to our *own* information, paid for with our taxes and accumulated by bureaucrats and politicians whom we have hired to serve us and not their own interests.

In the end, freedom of information will benefit you, Mr. Harper. As *Globe and Mail* columnist John Ibbitson recently wrote, where there is an information vacuum, "a miasma of rumour infects the political atmosphere. Suddenly, everything ends in 'gate.'"

Terry Gould is an investigative journalist and the author of Murder Without Borders: Dying for the Story in the World's Most Dangerous Places (2009).

Bob Carty is a CBC radio producer and a CJFE board member.

With research by Grant Buckler.

[1] Canada's 28-year-old Access to Information Act was once considered a shining example in its promise to give the public access to public information. No longer, according to an analysis by Stanley Tromp.

WHEN ACCESS TO INFORMATION WORKS

It is tempting to give up on Canada's Access to Information (ATI) system. But despite its problems, for the persistent reporter ATI still exposes news-breaking stories, from the "sponsorship scandal" to the Afghan detainee debate. Without ATI, Canadians would not know about critical issues. For example:

- A suspected carcinogen, banned in pesticides, is still available in some brands of children's shampoo used to treat children's lice.
- Explosives used in military training exercises–from World War II bombs to anti-tank mortars–are possibly scattered across 25 native reserves.
- RCMP officers used their Taser weapons at least 5,000 times from 2002 to 2008. ATI information released after 15 months led the CBC to conduct tests that found 10 per cent of the weapons were either defective or discharged significantly more electricity than claimed. A review of 563 cases showed that 79 per cent of those zapped by Tasers were not brandishing a weapon.
- One hundred and forty-six Canadians were charged with child-sex offences overseas from 1993 to 2007. Only one Canadian ha been convicted in Canada under laws against child-sex tourism.
- More than 3,000 Canadian seniors died in 2005 from adverse drug reactions, many of them preventable. Children are dying from the side-effects of powerful psychotropic drugs only tested on middle-aged adults. These and other findings emerged after a five-year fight by the CBC to obtain Health Canada's large database of adverse drug reaction reports.

See Stanley Tromp's "Notable Canadian News Stories Based on ATIA requests."

Note: Since the Harper government shut down the federal database of ATI requests that had been released, some of that information has been maintained by David McKie an investigative reporter at the CBC, and Michael Geist, a professor at the University of Ottawa.

NEW ACCESS AUDIT COMING SOON

The Canadian Newspaper Association will release its annual study on freedom of information in mid-May.

Conducted in collaboration with the School of Journalism at the University of King's College in Halifax, the study assesses responses to Access to Information requests at all levels of government—federal, provincial and municipal—and this year adds an examination of Canada's major universities.

The study's author, Fred Vallance-Jones from King's College, says the ATI system is in an appalling state. "I hear stories of 210-day extensions and officials saying 'that's all we can do.' I have never seen the constellation of evidence so strong that there is a big problem. The Access regime is in crisis."

See the CNA report on May 13, 2010: http://www.cna-acj.ca/en/public-affairs/freedom-information

WHY ACCESS TO INFORMATION IS IMPORTANT TO THOSE WHO CARE ABOUT FREE SPEECH

The 1948 Universal Declaration of Human Rights (Article 19) guarantees us the right "to seek, receive and impart information and ideas through any media and regardless of frontiers."

Inherent in the right to freedom of expression, therefore, is the right to seek information upon which that expression is to be based. Governments can guarantee free expression as a fundamental right but still severely restrict it in practice if they place unreasonable limits on access to information. Without the right to information, there can be little reasoned expression.

Government is obliged to provide access to information it holds, an obligation heightened by the fact that its information was created using taxpayer resources for the benefit of good and democratic governance.

To promise freedom of expression without guaranteeing freedom of information would deny expression in practice.

"...access to information is a foundation for citizen participation, good governance, public administration efficiency, accountability and efforts to combat corruption, media and investigative journalism, human development, social inclusion, and the realization of other socio-economic and civil-political rights." – The Atlanta Declaration

UNESCO and World Press Freedom Day (WPFD)
The theme for WPFD 2010 is Freedom of Information: The Right to Know. You can find resources on UNESCO's website including discussion papers and resources on access to information: http://tinyurl.com/2dthe5g

OLYMPICS WATCH: FREE SPEECH AND THE GAMES

by JULIE PAYNE and ERIN DECOSTE

The 2010 Olympics, held from Feb. 12 to 28, 2010, put a spotlight on the city of Vancouver, and at the same time on the issues of security, space for public protest, and government limits to free speech.

CJFE conducted an **Olympics Watch** of the Games and recorded a number of disturbing incidents and trends related to free expression. Before and during the Games, a billion dollars was reportedly spent on security. Too many officials, at all levels of government, appeared all too ready to deny speech, protest and assembly rights in order to generate a rosy glow on the Games.

Most worrisome was the temporary detention and interrogation of four American journalists and their colleagues, travelling to Canada at the time of the Olympics. Canada Border Services Agency (CBSA) seemed to be obsessed with determining if these Americans were going to say anything critical about the Olympics.

The BC Civil Liberties Association (BCCLA) trained hundreds of legal observers to monitor security measures and demonstrations during the Olympics in order to safeguard the right to demonstrate, and to deter arbitrary or excessive policing. The association recorded (a) a massive escalation in CBSA patrols looking for foreign nationals; (b) issues with the RCMP failing to adequately identify themselves with badge numbers; and (c) the deployment of military grade semi-automatic weaponry for the first time at a Canadian demonstration. Here are the major incidents in CJFE's files:

INTERFERENCE WITH AND DETENTION OF JOURNALISTS

On December 18, 2009, two *Toronto Sun* journalists were pushed and assaulted while covering the Olympic torch relay in Newmarket, Ont. Photographer Ian Robertson required treatment for an apparent head injury after security officers wearing Olympic uniforms shoved him to the ground.

On November 25, 2009, U.S. journalist Amy Goodman, the host of the syndicated television and radio program *Democracy Now!*, was stopped at the B.C.-Washington state border on her way to Vancouver. She and two colleagues were interrogated for 90 minutes about whether or not they were planning to criticize the Olympics during the visit. Goodman says she told them she was visiting to promote a new book about health care, the war in Afghanistan, climate change and other issues. But Canada Border Services kept asking if she would be criticizing the Olympics during her stay.

Goodman's vehicle was searched during the incident. Officials ultimately allowed her to enter Canada but returned her passport with a document demanding that she leave the country within 48 hours. Ironically, the incident generated more negative coverage of Vancouver's Olympics than anything Goodman said while in Canada.

Amy Goodman

"I am deeply concerned that as a journalist I would be flagged and that the concern–the major concern–was the content of my speech," said Goodman.

American journalist Dawn Zuppelli was detained by CBSA on February 9, 2010, at the Vancouver airport where she was searched and questioned for more than an hour. Zuppelli was going to Vancouver to cover the Olympic protests. She received a warning that the Canadian government would be tracking her stay in Canada.

Journalist Martin Macias Jr., a contributor to *Vocalo*, an online news outlet and affiliate of Chicago Public Radio, was detained, interrogated and then put on a plane to Seattle by Canadian authorities on Feb. 6, 2010. He wanted to attend a press conference by the Olympic Resistance Network, a group critical of the Games.

"They wanted to know what I was going to do in Vancouver, who I was meeting with, who organized the conference, and what they looked like," said Macias, who was told to leave Canada voluntarily or he would face detention until trial a week later.

John Weston Osburn, a Salt Lake City freelance journalist associated with the news organization IndyMedia, was interrogated by CBSA near Vancouver on Feb. 10, 2010. He was turned away because of a past conviction for a misdemeanour. After being refused entry a second time, Osburn was detained and questioned by U.S. authorities.

ACCESS TO PUBLIC SPACE AND CENSORSHIP

A Vancouver city bylaw, passed in July 2009, gave police broad powers to seize anti-Olympic protest signs and banners. The bylaw declared that during the Games, "a person must not distribute any advertising material or install or carry any sign unless licensed to do so by the city." Under the bylaw, a person "cannot display any sign on a street unless it is a celebratory sign."

The BC Civil Liberties Association (BCCLA) threatened a lawsuit on free expression grounds. It withdrew the suit after the City of Vancouver amended the bylaw. The most contentious part of the bylaw, the section that banned signs in the downtown core that didn't celebrate the Olympics, was completely deleted.

Vancouver's transit police published a document that called for protestors of the Games to be reported to police. Transit police revised the publication after the BCCLA complained.

A group of about 25 anti-Olympic protestors was detained by a larger contingent of riot police in downtown Vancouver on the evening of Feb. 13, 2010. The protestors were on their way to the Vancouver jail to stand vigil for protestors arrested earlier. The group was released in fewer than 10 minutes with no arrests made.

The City of Vancouver used its anti-graffiti bylaw to order an art gallery to take down a work of art that depicted five rings, four with unhappy faces. The gallery owner and artist view the city's actions as an attempt to stifle anti-Olympic sentiments.

The BCCLA spoke out against Olympic organizers crowding an area designated for free speech with pro-Olympic displays. The BCCLA said this made large demonstrations nearly impossible.

LOOKING AHEAD

LONDON 2012

Britain has passed a new law that allows officers and Olympic officials to enter homes and shops near official venues to confiscate any protest material. (*Daily Mail*)

SOCHI 2014

Journalists and human rights defenders face attacks and governmental control in Sochi by the pro-Kremlin government. During the bid for the Games, local media were pressured to ignore environmental concerns and protests by residents facing evictions to make room for the Olympics. Dissident journalists are often hit with libel fines for reporting on controversial stories.

Julie Payne is the CJFE Manager.
Erin DeCoste is a Humber College Journalism Student.

"TOO MANY OFFICIALS, AT ALL LEVELS OF GOVERNMENT, APPEARED ALL TOO READY TO DENY SPEECH, PROTEST AND ASSEMBLY RIGHTS IN ORDER TO GENERATE A ROSY GLOW ON THE GAMES."

Editorial Cartoon by Serik Kulmeshkenov. Courtesy of the International Editorial Cartoon Competition of the Canadian Committee for World Press Freedom (CCWPF)

WILL [redacted] FREE SPEECH [redacted] GET [redacted] CAUGHT IN THE [redacted] WEB?

by PAUL KNOX

AN INFORMATION REVOLUTION IS SWEEPING ACROSS CANADA

More of us can find out more facts, on more subjects, more quickly than at any time in the country's history. We have access to greater diversity of voices, both Canadian and international, than ever before.

Thanks to digital technology and the rapid extension of wired and wireless networks, we have unprecedented power to share information and expound our views. Our ability to communicate en masse no longer depends exclusively on access to commercial or public media. Once we had mail, telegraph and telephone; now we have dozens of ways to combine text, sound and images and send them instantly. We listen to each other's music, watch each other's videos, advertise our wares, tout our hobbies and causes, and exchange everything from ideas to recipes at whirling speed.

What a boon for freedom of expression! In theory, this freedom helps maximize the ability of human beings to realize their full potential. That's why it's promoted as a basic human right. In digital communications technology, we have a concrete example of how this works: when people are given a practical tool for self-realization, they rush to exploit it. By the billions, they are using and shaping this vastly expanded capacity for free expression beyond anything that Milton or Mill might have contemplated.

But every new technology comes bundled with threats as well as opportunities, and no tool is independent of human society, its power inequalities and its disagreements. The

flash and instant wish fulfillment offered by the Internet and associated applications mask factors that constrain their potential as technologies of freedom. In some ways, the digital revolution actually threatens to diminish Canadians' access to knowledge about our country. These are sobering concerns for defenders of the right to free expression, since our ability to exercise this right depends on our access to both the means of expression and the information we need to formulate our thoughts.

What are these constraints and concerns?

First of all, millions of Canadians lack the ability to connect to the Internet because they live in no-access areas, can't afford connections or lack the requisite literacy or computer skills. (Rural residents without access to reliable broadband alone number almost three million.) If the playing field for free expression is the Internet, they are sidelined spectators.

Second, although the Internet may appear to be equal-access territory, it is highly susceptible to domination by commercial interests and surveillance by government authorities.

Network owners limit access by "throttling" or "traffic shaping" to ensure favourable terms for their own content. While the Canadian Radio-television and Telecommunications Commission has placed some limits on this practice, concerns about differential access remain. Moreover, new laws may force Internet service providers to make customer data available to law-enforcement authorities on demand. In the words of Internet law expert Michael Geist, "ISPs are quietly being deputized as law-enforcement assistants."

Third, the digital revolution is disrupting the terms under which news is gathered and disseminated. Audiences and advertisers are deserting traditional news media for new platforms in the seductive online environment. Many of these news websites, forums and blogs are innovative, lively and controversial, offering a wide range of commentary and a high degree of interaction to their followers. User-generated content, social-media tools and crowdsourcing (collaborative information-gathering) allow these platforms to disseminate large quantities of disparate data from citizens. But most lack the resources to organize the data or engage in rigorous fact-gathering and painstaking investigation using sophisticated, often costly techniques. For the most part, they don't carry out computer-assisted investigative reporting or consistently follow the deliberations and actions of government bodies, much less provide comprehensive coverage of international affairs.

Meanwhile, the news organizations that traditionally did this work are suffering. In the face of declining revenue, employers have cut staff and scaled back on other costs while trying to establish themselves as go-to news sites on the World Wide Web. Canada has not seen the closing of newspapers or job losses proportionate to those in the United States. Nevertheless, the quality of editing has suffered, and in all but a few cases, metropolitan daily print and electronic media are unable to mount the kind of groundbreaking investigations with potential political implications for which they were formerly known. Reporters, visual journalists and editors continue to strive in Canada's mainstream newsrooms to provide the information Canadians need to make informed decisions about current affairs. But no one knows how the configuration of the country's news platforms will evolve, and in the meantime, employers and investors appear reluctant to make substantial commitments to news-gathering and investigation.

The threat posed to freedom of expression by government surveillance, or by a regulated network provider that restricts access to protect its commercial interests, is fairly clear. Similarly, unless governments work to maximize the access of all Canadians to communications technologies as they become standard, an unhealthy differential in the right to freedom of expression will develop.

The implications for freedom of expression posed by developments in the news media are more complex. The rights and interests of owners, public authorities, news workers and audiences often conflict. But clearly our capacity for free expression will be enhanced if commercial and public media can harness the new technologies to revitalize journalism, while reconfiguring themselves on a sustainable financial footing. The same will be true if new and alternative media develop and sustain a reputation for truth-telling and fact-gathering. The better our news media–both legacy and upstart–the better situated we will all be to develop and share our ideas and opinions, our science and our art.

What can we do to make sure the promise of the digital revolution is not betrayed?

In terms of infrastructure, the touchstone is this: the broadest access to networks, the narrowest restrictions on content and activity. Governments and regulatory agencies must work to ensure that all Canadians can connect to the Internet, at a minimum by expanding public networks and access points such as libraries and community centres. Surveillance must have a clear court-authorized purpose. Unless there is a clear violation of the Criminal Code, content-nannying should be out of bounds. Advocates of free expression should oppose unfair restrictions on traffic across publicly regulated networks.

Finally, Canadians who care about free expression should support the journalists whose work helps make it possible. Read, watch, listen and respond carefully. Support news media–commercial, public or non-profit–that break stories, carry out investigations and hold public officials to account. Support those that use the power of the Internet and social networking not just to attract eyeballs to advertising, but to expand public information-sharing and political engagement. Support arm's-length public broadcasting; it is vital in a large, sparsely populated land.

Generations of human-rights advocates have worked hard to defend freedom of expression in Canada and widen the space for public debate. The challenge posed by the digital revolution is to make sure free expression is not only protected but nurtured. Healthy news media–of all kinds–will provide the nutrients it needs to flourish.

Paul Knox is chair of the School of Journalism at Ryerson University and a former foreign correspondent, editor and columnist at the Globe and Mail.

[redacted] CANADIAN [redacted] JOURNALISTS ABROAD [redacted]

by JULIE PAYNE

IT IS USUALLY NOT US.

The overwhelming majority of journalists who die on the front lines of reporting are journalists living and working in their own country. They are Filipinos, Mexicans, Colombians and Iraqis—reporters who work and die at home.

We who visit as foreign correspondents or as "parachute reporters" do not usually feel so threatened. We have fixers and translators, the training in how to report in conflict situations, and the deep pockets of major media outlets. We have our embassies and consulates looking out for us. We have the knowledge that if we are assaulted, our attackers will be scorched in the international press. And so we feel a kind of shield around us, keeping us safe. It is usually our local colleagues, not us, who feel the brunt of repression against the press in overseas conflicts.

But not always.

In some situations, foreign journalists **are** being targeted—for their political value or for their ransom value or for just doing their job. In 2009, a number of Canadian journalists were subjected to atrocious attacks on their person and, as a result, on the right to freedom of expression.

There is no perfect protection against those who would kidnap, assault or kill a foreign journalist. Training is always important—and that requires the commitment of media corporations to their staff and freelancers. A government committed to defending its citizens abroad, including when they are journalists, is also critical.

Whatever the circumstances, CJFE asserts that we should always respond in solidarity. It is why one of our most important programs assists journalists in distress.

While remembering Michelle Lang (see sidebar), we also want to record cases of Canadians at risk abroad that were monitored by CJFE in 2009:

Amanda Lindhout

AMANDA LINDHOUT

On Nov. 25, 2009, Canadian journalist Amanda Lindhout and her Australian colleague, Nigel Brennan, were released after being held hostage in Somalia.

The journalists were kidnapped in Somalia on Aug. 23, 2008, along with a Somali journalist and translator named Abdifatah Elmi (who was released in January 2010). During the hellish 15 months that followed, Lindhout was held in solitary confinement with no light or windows, with very little food, in deplorable conditions. She was subjected to beatings and torture.

Lindhout grew up in Red Deer, Alta., and had been travelling for some years, working as a freelance journalist. At the time of the kidnapping, she had been researching a story on internally displaced people in Somalia.

Throughout the kidnapping, there were calls for the Canadian government to take a more active role in securing the release of the journalists. It appears that the kidnapping was finally resolved after the journalists' parents paid the kidnappers a substantial ransom. The Canadian government arranged for transportation for Lindhout to first go to Nairobi for medical treatment and then to Canada.

This case raised issues of what role the Canadian government should or should not play when a Canadian citizen is kidnapped, and also provoked heated discussions about the responsibility of journalists to protect themselves, including obtaining conflict zone training.

KHADIJA ABDUL QAHAAR

Khadija Abdul Qahaar, formerly known as Beverly Giesbrecht, was kidnapped in November 2008 in North Waziristan, part of the tribal regions of Pakistan.

Qahaar is a controversial though not well-known figure. She converted to Islam after the attacks on Sept. 11 and created a website called Jihad Unspun to present uncensored reporting on the war on terror. Before that, Qahaar had worked for several media publications and in web development. Jihad Unspun has been described by the media as "vehemently anti-American."

Qahaar left her home in West Vancouver, B.C., to go to Pakistan in April 2007. Friends back home heard from her in October 2008, when she appealed for funds to help her obtain an exit visa. She was apparently concerned about her safety amidst growing violence in the region.

But Qahaar never made it out. At some point in November, she was kidnapped along with her translator and driver, who was later released. On March 20, 2009, *the Globe and Mail* posted a video of her,

recorded near the Afghan-Pakistani border, begging for her life and saying that she would be beheaded by the Taliban unless a ransom was paid.

Little has been heard about Qahaar since then, but it is believed she is still alive.

HOSSEIN DERAKHSHAN

Derakhshan, known online as "Hoder," is known as the "blogfather" in Iran for his pioneering work in the country's blogging movement. Born in Tehran, Iran, Derakhshan moved to Canada in 2000 and lived here for several years; he most recently lived in England before returning to Iran in 2008.

Derakhshan, who holds both Canadian and Iranian citizenships, has travelled on at least two occasions to Israel on his Canadian passport; Iranians are forbidden to travel to Israel. And indeed it was suspected that his travel to Israel might be at the heart of his current troubles—that he was arrested on suspicion of espionage for Israel. However, more than a year after Derakhshan disappeared into the shadowy world of Iranian prisons, there are still no official charges against him.

There have been corroborated reports that Derakhshan has been tortured while in prison, and has spent much of his time in solitary confinement. It is believed he is now being held in the infamous Evin Prison in Tehran, where another Canadian-Iranian journalist, Zahra Kazemi, was tortured and killed in 2003.

Adding to Derakhshan's troubles, he has not received the same kind of public support seen for more sympathetic figures such as fellow Canadian-Iranian journalist

REMEMBERING MICHELLE LANG by ARNOLD AMBER

The danger of covering the Canadian Army in Afghanistan was tragically illustrated at the end of 2009 when Michelle Lang, a reporter for the *Calgary Herald* and Canwest News Service, was killed along with four soldiers when the armoured vehicle they were travelling in struck a roadside bomb.

The death of the 34-year-old award-winning journalist startled and saddened Canadians, particularly members of the media. It was the first death of a Canadian journalist in a battle situation in more than 20 years. Lang had been in Afghanistan for only a couple of weeks and was stationed at NATO's massive Kandahar base. Her death came on her first foray off the base and "outside the wire," as she told her editors before leaving, to witness the front-line stories of the Afghan people.

"I'm travelling to the provincial reconstruction team for about one week. Hopefully, this will produce some interesting stories on the civilian-reconstruction side, as well as some military ones," she emailed an editor two days before her death on Dec. 30.

Lang was a health reporter at the *Calgary Herald* and won the National Newspaper Award for beat reporting in 2008. Her work covered all aspects of Alberta's health care system and the problems with the provincial government's restructuring plan. Her stories have been credited with being instrumental in having the government provide coverage for expensive new drugs that fight colon and brain cancer.

At her funeral, *Herald* editor-in-chief Lorne Motley said that Michelle was socially responsible and wanted to make a difference – afflict the comfortable and comfort the afflicted. "She wanted to tell the stories not being told, and that led her to put up her hand to go to Afghanistan."

Tributes also poured in from people who knew her at the *Herald* and at the other newspapers where she had worked. "She was a really great person. To be a good journalist and great person is not always an easy thing to do. And she did both," said Bruce Johnstone, her former editor at the *Leader-Post* in Regina.

But even more loudly heard were expressions of admiration for Michelle on a personal level. Hundreds of letters and notes of condolence flowed in from all parts of Canada. A vivacious and outgoing personality, she made groups of friends during her days as an English student at Simon Fraser University and in her short but very successful professional career.

Michelle had become engaged shortly before her assignment to Afghanistan and was going to be married in the summer of 2010.

In memory of her life, the Michelle Lang Fellowship in Journalism was recently established. Each year, it will provide a recent Canadian university graduate with up to $10,000 to finance a major news project that would "address the goals Michelle aspired to in her daily journalism: telling stories that have gone unreported or unnoticed on topics of social significance."

For details about The Michelle Lang Fellowship in Journalism, please email michellelangfellowship@canwest.com.

Arnold Amber is the President of CJFE.

PHOTO BY MP GARY LUNN

Michelle Lang on Christmas Day in Afghanistan, 2009.

PHOTO BY NIKAHANG KOWSAR

Maziar Bahari interviewed by Martin Regg Cohn at a CJFE event in March 2010.

Maziar Bahari or American journalist Roxana Saberi. Derakhshan is seen as a polarizing figure, distrusted by many in the Iranian diaspora, especially in recent years when he started to very publicly endorse Ahmedinejad's regime. However, many feel that nothing he could have done justifies being left to suffer in prison without charges and with no access to justice.

MAZIAR BAHARI

Maziar Bahari is a Canadian-Iranian playwright, documentary filmmaker and journalist working as the Iran correspondent for the U.S.-based magazine *Newsweek*.

During the June 2009 Iranian election protests, Bahari was arrested without charge and detained. He was coerced into a televised confession in which he acknowledged western journalists as spies. Bahari was held in solitary confinement in Evin Prison, where he was interrogated daily. After 118 days in jail, Bahari was released on bail on Oct. 20, 2009. His arrest and detention were reported around the world, and the international community rallied around him and worked for his release.

Bahari believes that he was arrested by the intelligence division of the Islamic Revolutionary Guard Corps to demonstrate their power to various factions in the Iranian government. Bahari has thanked the Canadian government for its part in securing his release.

After his release, Bahari left Iran to rejoin his wife in time for the birth of their first daughter in London, England. Since then, he has travelled back and forth between the U.K., Canada and the U.S. in order to campaign, with a coalition of free expression organizations (Our Society Will Be a Free Society), for the release of the other journalists and writers who remain in prison in Iran.

But that activity may have endangered his family. Bahari informed CJFE in mid-April that family members living in Iran had received a threatening phone call from a man who identified himself as an Iranian court official. The caller said that Maziar "shouldn't think we don't have access to him because he is not in Iran. The situation is getting dangerous now. Anything can happen."

PHOTO BY MILAD AVAZBEIGI

Iran Protests, June 2009.

Yes, I'll join CJFE and help defend the rights of journalists around the world!

Enclosed is my membership fee of ❑ **$75** or my membership + donation of **$** _____

- I would prefer to make a donation of **$** _____
- I would prefer to make a monthly donation of ❑ **$10** ❑ **$20** ❑ Other **$** _____ which will include my membership fee

❑ My cheque made payable to CIFET (Canadian International Freedom of Expression Trust) is enclosed.

PLEASE CHARGE MY CREDIT CARD

❑ VISA ❑ MASTERCARD

Number: Expiry Date:

Signature:

Name:

Address:

Phone:

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Receipts for tax purposes will be issued for any contribution of $10 or more.

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APPENDIX: MAJOR COURT DECISIONS 2009

prepared by ALEXANDER BESANT

SUPREME COURT DECISIONS

SUPREME COURT OF CANADA
QUAN V. CUSSON, DEC. 22, 2009
Defamation

In 2001, the *Ottawa Citizen* reported allegations that former RCMP officer Cusson had misrepresented himself and his dog as a trained RCMP "sniffer-dog" team when they went to the World Trade Center site in the weeks after the Sept. 11 attacks in New York City. Cusson sued for libel and won the case against the *Ottawa Citizen* in 2006. The newspaper was ordered to pay Mr. Cusson $100,000. The newspaper appealed to the Ontario Court of Appeal, which concluded that there indeed should be a defence of "responsible journalism," but said that because the *Citizen* hadn't presented it, the award to Mr. Cusson stood. The case was taken to the Supreme Court of Canada, which subsequently overturned the lower court's ruling based on a new concept of "responsible communication in matters of public importance."

This was a groundbreaking decision that widened the protection of journalists from defamation lawsuits when writing on issues of public importance. It provides an important new defence, available to the media and other communicators even if the commentary or statements of fact in the publication are defamatory, provided the author(s) acted responsibly in preparing the publication to attempt to verify any potentially defamatory material. This new defence was introduced following similar rulings taking place in the United Kingdom, Australia and New Zealand, and brings Canadian libel law more in line with these and other common-law jurisdictions.

Supreme Court decision:
http://csc.lexum.umontreal.ca/en/2009/2009scc62/2009scc62.html

CJFE
http://www.cjfe.org/releases/2009/22122009defamation.html

The *Globe and Mail*:
http://www.theglobeandmail.com/news/opinions/supreme-court-enables-productive-debate-in-canada/article1409374/actions.jsp

Osgoode Hall, *The Court*:
http://www.thecourt.ca/2009/01/20/cusson-v-quan-the-responsible-journalism-defence/

SUPREME COURT OF CANADA
GRANT V. TORSTAR, DEC. 22, 2009
Defamation

In 2001, the *Toronto Star* published a story concerning the proposed development of a golf course on land owned by Peter Grant. The stories contained comments by local residents critical of Grant, alleging that he was using his political influence to gain permission to build the golf course—one resident suggesting that it was a "done deal." The newspaper contacted Mr. Grant for comment, but he declined. The *Toronto Star* published the article, and Mr. Grant sued for libel. A jury decided against the *Toronto Star*, awarding $1.475 million in damages to Grant. On Nov. 28, 2008, the Ontario Court of Appeal overturned the jury verdict. Mr. Grant re-appealed to the Supreme Court to have the jury verdict reinstated. As in Quan v. Cusson, the Supreme Court ruled that the law of defamation should include the recognition of a defence of responsible communication.

Supreme Court decision:
http://scc.lexum.umontreal.ca/en/2009/2009scc61/2009scc61.html

CJFE/Brian Rogers memo:
http://www.cjfe.org/releases/2009/23122009defamationmemo.html

Canadian Civil Liberties Association:
http://telegraphjournal.canadaeast.com/search/article/653269

CBC News:
http://www.cbc.ca/canada/ottawa/story/2009/12/22/supreme-court-libel-responsible-journalism-citizen-star.html

SUPREME COURT OF CANADA
NATIONAL POST ET AL. V. HER MAJESTY THE QUEEN

(appeal heard May 22, 2009; decision on reserve)
Protection of sources

The Andrew McIntosh/*National Post* case had been before the courts since 2002, when the RCMP tried to seize a leaked bank document that suggested that former prime minister Jean Chrétien personally benefited from a loan to a Shawinigan hotel he once owned. The document came from a source that *National Post* writer Andrew McIntosh had promised to protect, but police insisted that they needed to test it for fingerprints and traces of DNA in order to establish its authenticity. McIntosh refused, stating that his source would be compromised by handing over the document.

The case went to the Ontario Superior Court, which ruled in favour of McIntosh. Ontario's Court of Appeal agreed that the protection of journalists' sources should be formally recognized as a privilege, protected by Section 2(b) of the Canadian Charter of Rights and Freedoms. However, the court also agreed that the privilege could not prevail in the circumstances of this case, where the police had satisfied the court that the document was likely evidence of the commission of the crime of forgery, and the interest of justice required that it be made available to the police for further testing. The *National Post* and Mr. McIntosh appealed to the Supreme Court, which has so far reserved its decision.

This decision could significantly alter the legal means available to journalists to protect confidential sources. The case has already determined that confidential media sources are covered by privilege, and protected under Section 2(b) of the Charter of Rights and Freedoms, and that determination has not been appealed.

Supreme Court factum:
http://www.scc-csc.gc.ca/factums-memoires/32601/FM020_Respondent_Her-Majesty-The-Queen.pdf

Ad IDEM summary:
http://www.adidem.org/R._v._National_Post

National Post editorial:
http://www.nationalpost.com/m/story.html?id=835847

SUPREME COURT OF CANADA
GLOBE AND MAIL V. ATTORNEY GENERAL OF CANADA (GROUPE POLYGONE CASE)

(appeal heard Oct. 21, 2009; decision on reserve)
Protection of sources

This case is related to the so-called "Adscam" scandal that took place over the early 2000s, involving kickbacks given to Liberal organizers and the Liberal Party of Canada itself. The case was broken by the *Globe and Mail*'s Daniel Leblanc, who was subsequently ordered by the Quebec Superior Court to answer questions about his source, "Ma Chouette," under oath by lawyers from Groupe Polygone (a group involved in the scandal). The *Globe and Mail* filed an appeal with the Supreme Court of Canada on the grounds that it violated the right to freedom of expression, which is protected by the Charter of Rights and Freedoms. The Supreme Court heard the case in October 2009 but has reserved its judgment so far.

The decision could have a significant impact on a journalist's ability to protect confidential sources. The case has also called into question Canada's lack of so-called "shield laws" protecting journalists who want to keep their sources confidential. Federal shield law legislation is pending in the United States and exists in many individual states. Canada has no such legislation.

Supreme Court factum:
http://www.scc-csc.gc.ca/case-dossier/cms-sgd/sum-som-eng.aspx?cas=33114

Ryerson Review of Journalism:
http://www.journalism.ryerson.ca/m4207/

King's Review of Journalism article on confidential sources with reference to *Globe and Mail* case:
http://kjr.kingsjournalism.com/?p=1484

SUPREME COURT OF CANADA
GREATER VANCOUVER TRANSPORTATION AUTHORITY V. CANADIAN FEDERATION OF STUDENTS, JULY 10, 2009

Publication ban

The case arose from two ads placed on city buses, the first by a students' union urging students to vote in an upcoming election, and the second by a teachers' union noting difficult working conditions for teachers. The Greater Vancouver Transportation Authority decided to pull the ads, claiming that they either caused offence or harboured a political bias. The BC Court of Appeal disagreed with the transportation authority, as did the Supreme Court of Canada, declaring the transportation authority's decision unconstitutional.

The ruling by the Supreme Court in favour of the Canadian Federation of Students further clarifies the rights of political advertising in public. By taking away the advertising, transportation authorities—which are government entities—are not "minimally" impairing freedom of expression as they are required to do by law, but rather withholding that right altogether.

Supreme Court decision:
http://www.canlii.org/en/ca/scc/doc/2009/2009scc31/2009scc31.pdf

BC Civil Liberties Association factum:
http://www.bccla.org/othercontent/09Transit_argument.pdf

Osgoode Hall, *The Court*:
http://www.thecourt.ca/2009/07/17/greater-vancouver-and-justice-fishs/

SUPREME COURT OF CANADA
THE CRIMINAL LAWYERS' ASSOCIATION V. ONTARIO (PUBLIC SAFETY AND SECURITY)

(appeal heard Dec. 11, 2008; decision under reserve)
Freedom of information

The Criminal Lawyers' Association sought information on the apparent discrepancy between the scathing rebuke of police and Crown conduct in a judgment of the Superior Court of Justice and a subsequent internal police report that seemed to justify that same conduct. The association filed a Freedom of Information (Ontario) request for the internal report and related documents, but the Ontario government refused to provide any records, citing statutory exemptions. The association argued that the exemptions did not apply, or if they did, the resulting restrictions on the right of access violated Section 2(b) of the charter. A majority of Ontario Court of Appeal justices agreed with the association and ordered that a copy of the records be provided. The Ontario government then appealed that decision.

The case is of critical importance; it raises the question of whether there is any constitutional right to information from government. The fact that the court has reserved judgment for more than a year may be due to the complexity of the issue, and suggests it is receiving very careful consideration.

Osgoode Hall, *The Court*:
http://www.thecourt.ca/2008/12/16/criminal-lawyers-association-freedom-of-expression-and-the-disclosure-of-information-by-government/

Ontario Court of Appeal decision:
http://www.ontariocourts.on.ca/decisions/search/en/OntarioCourts-Search_VOpenFile.cfm?serverFilePath=D%3A\Users\Ontario%20Courts\www\decisions\2007\may\2007ONCA0392.htm

SUPREME COURT OF CANADA
R. V. WHITE AND R. VS. TORONTO STAR (PENDING)
Publication ban

In November 2009, a variety of media outlets and their lawyers appeared before the Supreme Court to challenge Section 517 of the Criminal Code, which provides that a sweeping publication ban of the evidence, submissions and reasons given in a bail hearing must be granted by the court if requested by the accused, and may be granted if requested by the Crown attorney.

Two appeals were heard together by the Supreme Court—one from Alberta (which had upheld the provision) and the other from Ontario (which, with a slight modification, also upheld the provision).

In the Alberta case, when a judge released accused wife-killer Michael White on bail, the decision angered and shocked Edmontonians. Media outlets were prohibited from publishing why the judge granted bail for some time because Section 517 provides for the publication ban in a bail hearing to remain in effect until the trial is over.

The challenge to the law in the Ontario case arose from prosecution of the so-called "Toronto 18," a group of individuals who had been arrested and charged in June 2006 with terrorism-related offences. A publication ban was ordered over the evidence, submissions and reasons given in their bail hearings.

Media lawyers argued that such publication bans were an unjustifiable limit on free speech and freedom of the press. The Ontario Court of Appeal (by a 3-2 majority) had largely upheld the provision as constitutional. The majority held that the legislation was a justifiable limit on free expression, but restricted the application of the provision to the circumstance where the accused has elected trial by jury, as opposed to trial by judge alone.

In its decision, the Supreme Court will have to seek out a balance between the rights of the press and the right of accused persons to a fair trial.

Supreme Court summary:
http://www.scc-csc.gc.ca/case-dossier/cms-sgd/sum-som-eng.aspx?cas=33085

Toronto Star:
http://www.thestar.com/news/canada/article/726629--supreme-court-urged-to-end-bail-hearing-cone-of-silence

Osgoode Hall, *The Court*:
http://www.thecourt.ca/2009/11/17/the-constitutionality-of-publication-bans/

SUPREME COURT OF CANADA
THE INFORMATION COMMISSIONER V. THE PRIME MINISTER ET AL. (TO BE HEARD IN 2010)
Freedom of information

This pending appeal to the Supreme Court arises from two decisions of the Federal Court of Appeal concerning multiple requests under the ATIA for copies of daily agendas, meeting schedules, meeting notes and itineraries of former prime minister Jean Chrétien and/or two of his ministers for the time period of January 1994 through to 1999.

The issue went to the court after the Office of the Prime Minister (PMO refused to release the documents, arguing that they were excluded from the Act, a position supported by the then-privacy commissioner. The court denied access, relying on expert evidence and an interpretation suggesting that the Act was drafted on the basis of a "well-understood convention" that the PMO and ministers' offices are government institutions that are "separate from" the ministries, departments and other government institutions such as the Privy Council Office, despite the fact that they are also, by statute, the "heads" of those same institutions. In the result, while records of these institutions are subject to access under the Act, the PMO and ministers' offices are not. The decisions do permit access to records physically located in the PMO and ministers' offices that are "under the control" of the respective institutions, in that their content relates to a departmental matter and the institution could reasonably expect to receive a copy upon request. However, they nevertheless permit important documents about public affairs at the highest levels of government to be withheld from public access and scrutiny.

The case exposes a major gap in the Act and, theoretically, would allow documents to be kept secret by simply locating them in a minister's office.

Federal Court of Appeal decisions:
http://www.canlii.org/en/ca/fca/doc/2009/2009fca175/2009fca175.html

CBC News:
http://www.cbc.ca/politics/insidepolitics/2009/12/chretiens-agendas-make-the-supreme-courts-agenda.html

FEDERAL COURT DECISIONS

FEDERAL COURT OF CANADA
AMIR ATTARAN V. MINISTER OF FOREIGN AFFAIRS
Freedom of information

Amir Attaran, a professor of law and medicine at the University of Ottawa, requested country Human Rights Reports (2002-2007) on Afghanistan from the Department of Foreign Affairs and International Trade Canada in 2007 under Section 41 of the Access to Information Act. The department decided that 90 per cent of the reports could be released, with the remaining 10 per cent to remain classified, citing the possibility of harming Afghan-Canadian relations. Mr. Attaran applied to the court for greater access, citing similar reports publicly released by the U.S. The court dismissed his request. An appeal is pending.

The case relates to allegations of torture and abuse of Afghan prisoners captured by Canadian forces and subsequently handed over to local authorities. The case has also been cited by critics as fitting a pattern of inaction on the part of the courts regarding Canadian terrorism policy and on issues relating to the war in Afghanistan.

This kind of information is readily available on the site of the U.S. State Department, with multiple entries regarding torture:
http://www.state.gov/g/drl/rls/hrrpt/2009/sca/136084.htm

Federal Court decision:
http://decisions.fct-cf.gc.ca/en/2009/2009fc339/2009fc339.html

CJFE:
http://www.cjfe.org/releases/2009/05042009ati.html

HUMAN RIGHTS TRIBUNALS DECISIONS

CANADIAN HUMAN RIGHTS TRIBUNAL
WARMAN V. LEMIRE
Hate speech

In 2003, plaintiff Richard Warman, an Ottawa lawyer, filed a Section 13 complaint against Marc Lemire, a public figure known for his controversial right-wing views and connections with neo-Nazis, for controversial postings by users on his website. The Canadian Human Rights Commission (CHRC) found Mr. Lemire, as a webmaster, liable for the postings. In 2005, Mr. Lemire challenged the constitutionality of Sections 13 and 54 of the Canadian Human Rights Act as severely limiting freedom of speech and thought. During the proceedings before the Canadian Human Rights Commission and the Federal Court of Canada, the CHRC admitted that it uses aliases to monitor websites for hate speech.

In September 2009, the Canadian Human Rights Tribunal acquitted Mr. Lemire. It found that although one of the articles he had posted on his website did contravene the Canadian Human Rights Act, the Act's hate speech provisions (Section 13) were unconstitutional. The tribunal refused to apply the provisions. That decision is now being judicially reviewed in the Federal Court.

The ruling is a milestone because of the extent to which the CHRC can censor online content, and it furthermore calls into question whether the tribunal should be involved at all in policing content through Section 13 of the Canadian Human Rights Act.

Canadian Human Rights Tribunal decision:
http://chrt-tcdp.gc.ca/search/files/t1073_5405chrt26.pdf

Canadian Civil Liberties Association:
http://ccla.org/?p=4777

The *Globe and Mail*:
http://www.theglobeandmail.com/news/national/hate-speech-law-violates-charter-rights-tribunal-rules/article1273956/

PROVINCIAL COURT DECISIONS

QUEBEC SUPERIOR COURT
AUDETTE V. RADIO-CANADA AND GRAVEL, SEPT. 23, 2009
Privacy versus freedom of expression

Plaintiff Gilles Audette, political attaché to the president of a major Quebec union, was unknowingly recorded by union leader Ken Pereira after having expressly asked if he was being taped and having been assured that he was not. Mr. Pereira then provided the tape to a CBC reporter, who played the tapes during a documentary that exposed the union's ties to organized crime. Mr. Audette sued the CBC and sought a provisional order that the tape be turned over to him, claiming it violated his right to privacy, protected by the Civil Code of Quebec. He also asked for an injunction preventing the tape from being aired. A Quebec Superior Court judge held that the tapes were journalistic material belonging to the CBC and that nothing in the affidavit material before him indicated that CBC had come into possession of the tape using illegal means, or that the plaintiff's private life was at issue. He therefore denied the injunction.

The case reiterates the importance of weighing the public interest as a factor before instating a publication ban. It is also an important case in deciding whether a media organization can broadcast or publish remarks that were effectively "off the record."

Quebec Superior Court decision regarding injunction:
http://www.adidem.org/images/3/36/Audette_v_RadioCanada_and_Gravel_Que_SC_20090923.pdf

CBC News:
http://www.cbc.ca/canada/montreal/story/2009/09/23/quebec-ftq-hells.html

SUPREME COURT OF NOVA SCOTIA
MACDONNELL V. THE HALIFAX HERALD AND STEPHEN MAHAR
Publication ban

On Jan. 30, 2009, a conversation between Natural Resources Minister Lisa Raitt and her then-aide, Jasmine MacDonnell, was inadvertently recorded on Ms. MacDonnell's voice recorder. She later misplaced the recorder in the Ottawa Press Gallery, and it was found by an employee of the Halifax-based *Chronicle Herald*. Ms. MacDonnell asked the newspaper to hold on to the device until she could collect it. Five months later, when she hadn't retrieved the recorder, the newspaper listened to its contents.

The minister, who was in charge of the Chalk River reactor in the wake of a heavy water leak, and her aide discussed the isotope crisis as being "sexy," and Ms. Raitt went on to say she was looking forward to getting credit for fixing it, and that she doubted the skills of Health Minister Leona Aglukkaq.

Ms. MacDonnell sought an injunction to stop the recording from being published on the grounds that it breached her privacy. Her request was rejected on the grounds that it was not a privacy issue, but the judge went on to state that it would also likely have been rejected on the grounds of press freedom.

Nova Scotia does not have clear laws to protect privacy, leaving its definition to case-by-case rulings. This case is important as it further clarifies privacy laws in Nova Scotia, particularly when the public interest is at stake.

Supreme Court of Nova Scotia decision:
http://www.courts.ns.ca/decisions_recent/documents/2009nssc187.pdf

Toronto Star:
http://www.thestar.com/news/canada/article/647683

J-Source:
http://www.j-source.ca/english_new/detail.php?id=3969

ONTARIO SUPERIOR COURT OF JUSTICE
R. V. IMONA-RUSSELL, JAN. 8, 2009
Publication ban

A retired flight attendant contracted HIV after having repeated unprotected sex with William Imona-Russell. The victim said the defendant lied about his health, siphoned $9,000 from her bank account and threatened to kill her with a power drill.

In this case, heard before a judge alone, the Crown sought and obtained a publication ban on the identity of the victim. The defence requested a ban on the identity, age, ethnicity and HIV status of the accused and the fact that he also faced a murder charge in an unrelated trial that would go before a jury. The grounds for the publication ban were that the jury in the later trial would be tainted by media coverage of the sexual assault trial. The Ontario Superior Court judge denied this publication ban on the grounds that the media coverage of the accused's two criminal cases had been limited, and challenges for cause would protect the accused's fair trial rights and ensure an unbiased jury would be chosen for the murder trial.

The case further clarifies the law with regards to publication bans to protect the fairness of jury trials.

Ontario Superior Court decision:
http://www.adidem.org/images/2/28/R._v._Imona-Russel.pdf

Toronto Star:
http://www.thestar.com/news/gta/article/570593

BRITISH COLUMBIA COURT OF APPEAL
CROOKES V. NEWTON, JAN. 8, 2009
Publication ban

The case centred on whether providing a link to defamatory material can constitute "publication" of that material, after a website manager, Mr. Newton, posted hyperlinks to articles on a B.C. businessman. The businessman, Mr. Crookes, filed a lawsuit against Mr. Newton. All three BC Court of Appeal justices agreed "the mere fact Mr. Newton hyperlinked the impugned sites does not make him a publisher of the material found at the hyperlinked sites." Yet the justices also stated that a hyperlink could constitute "publication" of third-party content under some circumstances, if the facts "demonstrate that a particular hyperlink is an invitation or encouragement to view the impugned site, or adoption of all or a portion of its contents."

This case has implications for web publishers and their ability to link to third-party materials. Though this can be seen as a victory for Mr. Newton and web publishers, there remains the possibility that "encouraging" or "inviting" someone to view a third-party site could impugn website publishers and leave them liable to charges of defamation.

BC Court of Appeal decision:
http://canlii.org/en/bc/bcca/doc/2009/2009bcca392/2009bcca392.html

Ad IDEM :
http://www.adidem.org/Crookes_v._Newton

BRITISH COLUMBIA COURT OF APPEAL
R. V. BREEDEN, OCT. 27, 2009
Freedom of expression

Mr. Breeden had been terminated in 2000 from his job as a municipal firefighter, after which he became involved in several disputes that led him to believe there was corruption among unions and governments. Mr. Breeden then staked out a position at the courthouse, the foyer of a municipal hall, and the reception area of a fire station while wearing signboards suggesting corruption or misconduct by unions and governments. He was convicted under the Trespass Act, which provides that a person commits an offence if he fails to leave premises after being asked to do so, or re-enters premises after being asked to leave. At trial, it was held that Mr. Breeden's activities were not protected by Section 2(b) of the Charter of Rights and Freedoms because the locations of the protests were not "public forums." The trial judge concluded that it would be "anathema to the orderly conduct of the public business" to "require them to submit to indiscriminate use of their public areas for free expression of political or personal views." The BC Court of Appeal upheld the ruling, noting that the places where Mr. Breeden was protesting were not places for public debate and that the confined locations in which he protested precluded his rights under Section 2 of the Charter.

The decision in R. v. Breeden is noteworthy for the restrictive approach taken by the court when considering the typical use of government property to determine the extent of expression permitted in it by the public. It does not support a conclusion that expression by the public within government premises is not protected by the Charter in every instance; instead, permissible expression will be determined in large measure by the nature and historical use of the specific space in question and the manner in which the expression occurs.

Canadian Civil Liberties Association factum:
http://ccla.org/wordpress/wp-content/uploads/2009/05/2008-09-26-factum-final.pdf

BC Court of Appeal decision:
http://ccla.org/wordpress/wp-content/uploads/2009/11/2009-BCCA-463-R_-v_-Breeden.pdf

COURT OF QUEEN'S BENCH OF NEW BRUNSWICK
SAINT JOHN EMPLOYEE PENSION PLAN V. FERGUSON, APRIL 29, 2009
Protection of sources

A justice in the Court of Queen's Bench of New Brunswick denied a motion by a lawyer acting for 13 past and present members of Saint John's pension board to force the *Telegraph-Journal* newspaper to produce its correspondence with former councillor John Ferguson, whom the plaintiff board members are suing for defamation. The justice ruled that the correspondence the plaintiffs sought was irrelevant to their case, but his oral comments went further, stating that allowing the pension board to see the correspondence would interfere with freedom of the press protections in the province.

This was one of the first Charter rights cases in civil court in New Brunswick to address media freedoms.

Court of Queen's Bench of New Brunswick's decision:
http://www.adidem.org/images/4/4c/Saint_John_Pension_Plan_v_Ferguson,_Marks_3rd_pty.pdf

CBC News:
http://www.cbc.ca/canada/new-brunswick/story/2006/08/01/nb-pension.html

Telegraph-Journal editorial:
http://telegraphjournal.canadaeast.com/search/article/653269

COURT OF QUEEN'S BENCH OF ALBERTA
BOISSOIN V. LUND, DEC. 3, 2009
Defamation

Mr. Boissoin, a youth pastor and former leader of the Concerned Christian Coalition group, wrote an opinion piece in the Red Deer Advocate newspaper that was strongly critical of those in the gay rights movement. The Alberta Human Rights Panel found Mr. Boissoin in breach of the Alberta Human Rights, Multiculturalism and Citizenship Act, yet this ruling was struck down by the Queen's Bench of Alberta.

The ruling more narrowly defined Alberta's hate speech law, stating that "the prohibition on such speech only applied to hateful expression that itself signals an intention to engage in discriminatory behaviour, or seeks to persuade another person to do so in a way that is likely to bring about prohibited discrimination."

Court of Queen's Bench judgment:
http://ccla.org/wordpress/wp-content/uploads/2009/12/QB-Boissoin-judgment.pdf

Canadian Civil Liberties Association factum:
http://ccla.org/wordpress/wp-content/uploads/2009/12/DOCbrief.ccla_.PDF

Centre for Constitutional Studies at the University of Alberta summary:
http://www.law.ualberta.ca/centres/ccs/issues/Boissoin_v._Lund.php


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