Submission to the 30th Session of the Universal Periodic Review on the State of Freedom of Expression in Canada

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Introduction

1. Canada is generally regarded as one of the freest countries in the world, with a strong record of defending human rights.[1] Constitutional, legislative, and institutional provisions protect human rights in the country.
2. The Canadian Charter of Rights and Freedoms entrenches in the constitution political and civil liberties such as the right to free expression, freedom of the press, freedom of association and peaceful assembly.
3. The Canadian court system is generally considered to be independent, professional, balanced, and open to freedom of expression issues. The Canadian constitution enables courts to strike down laws that are inconsistent with any of its provisions, including the rights and freedoms protected by the Charter. Rights and freedoms are also protected by human rights legislation at the federal, provincial and territorial levels. These pieces of legislation create human rights commissions and tribunals that investigate complaints of discrimination.
4. Various levels of the Canadian government have also created ombudsman positions, public officials who investigate complaints about government services and promote access to these services. Internationally, Canada is party to a number of international human rights conventions and implements these domestically through legislation, policy, and programs at all levels of government.
5. Although Canada has a strong legal and institutional framework for the protection of human rights, Canada has recently fallen from 18th to 22nd place in Reporters Without Borders' 2017 World Press Freedom Index. Only two years ago, Canada was ranked in the top 10, making it one of the best countries in the world for journalists to operate.
6. There are several areas in which the right to freedom of expression could be strengthened.

A. Criminal Libel Offenses

7. Three libel offenses are currently criminalized in Canada.
8. **Defamatory Libel:** The offense of defamatory libel is outlined in s. 300 and s. 301 of the *Criminal Code*. In 2012, the United Nations Commission on Human Rights ruled that the criminalization of defamation violates Article 19 of the International Covenant on Civil and Political Rights.[2] In Canada, defamation is still considered a criminal offence and is punishable by up to five years in prison, though criminal charges for defamatory libel are rare and almost all libel cases are pursued in civil court.

[1] Freedom House. (2015). *Freedom in the World: Canada*. Retrieved from https://freedomhouse.org/report/freedom-world/2015/canada#.VeYgZdNVhBd

[2] Frank LaRue. "Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression", April 17, 2013. http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.40_EN.pdf, 15.

9. **Blasphemous Libel:** In Canada, s. 296 of the *Criminal Code* establishes blasphemy as an indictable offence punishable by a prison sentence of up to two years.[3] The criminal law provides a saving provision, that no person may be convicted of this offence for expressing in good faith or attempting to establish by argument used in good faith an opinion on a religious subject. No one has been prosecuted under the law since 1936.[4] Bill C-51, currently under consideration, proposes to repeal s. 296, as one of many antiquated, unconstitutional, and redundant laws that remain on the books.

10. **Seditious Libel:** Seditious libel is outlined in s. 59(2) of the *Criminal Code*. Last used in 1951, one argument for retaining seditious libel is that it might be required to prosecute incitement to violence. However, the *Criminal Code* already has adequate provision against these concerns.

Recommendation to the Government of Canada:

- Repeal all criminal libel provisions contained in the *Criminal Code*

B. Civil Defamation & Anti-SLAPP legislation

11. As in many countries, Canada's civil defamation laws make it possible for powerful actors to launch strategic lawsuits against public participation (SLAPP suits), frivolous claims undertaken by wealthy and powerful parties to stifle criticism of their activities. Leveraging the disparity in resources between them and the defendant, resourceful plaintiffs – such as resource companies and land developers –silence unfavourable discourse, even where their cases have no merit. In effect, SLAPP lawsuits redirect critics' efforts away from their public statements and towards building a defence and, as a result, suppress, block, and censor political engagement.

12. The Quebec legislature amended the *Code of Civil Procedure* in 2009 to include Anti-SLAPP rules. The Ontario legislature followed suit in 2015 by enacting the *Protection of Public Participation Act*[5], in addition to protections that exist within the *Rules of Civil Procedure*.[6] Only Ontario and Quebec have enacted anti-SLAPP legislation.

13. In other parts of Canada SLAPP suits deter free speech because of the high costs associated with litigation. This has a chilling effect on the legitimate criticism of the corporate sector and other powerful actors across the country.

14. The UN Guiding Principles on business and human rights establishes that States are bound to create a legal and regulatory framework that ensures that private companies cannot limit human rights.[7] Moreover, States must honour their obligations under

[3] Criminal Code of Canada. July 23, 2015. para 296, http://laws-lois.justice.gc.ca/eng/acts/c-46/page-161.html#h-89.
[4] Joyce Arthur. "Time to Repeal Canada's Blasphemy Law", Rabble, March 6, 2015. http://rabble.ca/columnists/2015/03/time-to-repeal-canadas-blasphemy-law.
[5] *Code of Civil Procedure*, CQLR c C-25.01.
[6] Rules of Civil Procedure, RRO 1990, Reg 194. See r. 2.1 on general powers to stay or dismiss vexatious proceedings, r. 25.11 on striking out pleading if, *inter* alia, frivolous, vexatious, or an abuse of process, r. 56.01 on security for costs if proceeding is deemed frivolous or vexatious, etc.
[7] See the UN Guiding Principles On Business And Human Rights, available at: http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

International Covenant on Civil and Political Rights[8] to enforce or enact legislation that allows everyone to have the right to hold opinions without interference.[9]

15. Anti-SLAPP legislation should aim to elevate the protection of freedom of expression in public as a matter of priority. Some jurisdictions place the onus on defendants to satisfy the judge that the proceeding arises from an expression that relates to a matter of public interest. This is too onerous.

Recommendation:

- All Canadian provinces should pass anti-SLAPP legislation which:
  - requires a low threshold to establish a case for dismissal;
  - empowers judges to make findings of abuse of process by their own initiatives in relation to SLAPP;
  - provides courts with flexible remedies;
  - allows courts to lift the corporate veil and order damages against directors; and
  - awards costs on a substantial indemnity basis if the action is dismissed.

C. Mistreatment of journalists

16. A number of incidents suggest that some police are not adequately trained in terms of their obligation to respect freedom of expression, particularly in the context of demonstrations.

17. On May 16, 2017, freelance photographer David Ritchie was arrested and Global News videographer Jeremy Cohn was detained by Hamilton Police Services while reporting from the scene of a traffic accident.[10] Ritchie is being charged with resisting and obstructing police. Multiple eyewitness reports reference an extreme use of force by police in tackling Ritchie and Cohn to the ground; some of these accounts have been supported and endorsed by onsite paramedics and various paramedics associations. A video posted online showed a handcuffed Ritchie kneeling on the ground while being aggressively handled by an officer. All accounts indicate that the journalists did not cross a police line at the scene before they were detained. It remains unclear what led Hamilton Police Service (HPS) officers to believe that forcefully detaining two working journalists was a necessary or correct course of action.

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[8] *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47 (**ICCPR**).

[9] ICCPR art. 2, s. 1-2, and art. 19, s. 1

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

[10] 2 journalists arrested by Hamilton police while reporting news, CP24, 16 May 2017. http://www.cp24.com/news/2-journalists-arrested-by-hamilton-police-while-reporting-news-1.3417075

18. There were also numerous reports of police deleting journalists' photographs at the G-20 demonstrations in Toronto in 2010, where journalists were attacked, and arrested.[11] Similar reports have emerged from Montreal,[12] where there have been multiple well-documented cases of journalists from both independent and mainstream media outlets being targeted for arrest, assault or detention by police during their coverage of protests.[13] Journalists have reportedly been "told to stop filming and in some cases roughed up by police".[14]

19. Kevin Metcalf, a freelance journalist and communications coordinator for Canadian Journalists for Free Expression, was filming at a demonstration on May 6, 2017 in Nathan Phillips Square when he was physically assaulted and threatened with death by right-wing extremists.[15] CJFE expressed concern at the lack of response by officers present.[16]

20. On August 20, 2017 a journalist and cameraman working for Global News were allegedly assaulted while covering an anti-far-right protest in Quebec City.[17] Global News journalist Mike Armstrong stated that the assailant was from a "a violent faction of anti-racists."

21. These instances, from multiple Canadian jurisdictions, suggest that more needs to be done to train police on identifying and respecting the rights of those reporting on demonstrations. Law enforcement must also prioritize the identification and charging of perpetrators of assault on journalists. While some of these abuses have been recognised by courts, proper remedial action has yet to be taken.

Recommendations to the Government of Canada:

- Train all public officials and officers who plan and provide policing services at demonstrations on the importance of respecting and on how to respect international standards regarding freedom of expression, and specifically freedom of the media.
- Ensure that law enforcement prioritizes the identification and charging of perpetrators of assault on journalists.

[11] Politicol, "2010 Toronto G-20 Scathing Report of Police Misconduct", Politicol News, 16 May 2012. Available at: http://www.politicolnews.com/2010-toronto-g-20-scathing-report-of-police-misconduct/.
[12] Jonathan Montpetit, "Montreal police accused of political profiling", Montreal Gazette, 11 June 2012. Available at: http://www.montrealgazette.com/news/Montreal+police+accused+political+profiling/6765681/story.html.
[13] Concern regarding the brutality of Montréal police against journalists, CJFE, 24 June, 2015. http://www.cjfe.org/concern_regarding_the_brutality_of_montr_al_police_against_journalists
[14] Grant Buckler, "Police Mistreatment of Journalists Reported in Montreal", The Canadian Journalism Project, 15 June 2012. Available at: http://j-source.ca/article/police-mistreatment-journalists-reported-montreal.
[15] Alleged assault of journalist at anti-M-103 rally sparks concerns about police response. http://www.cbc.ca/news/canada/toronto/journalist-assault-free-speech-rally-1.4145239
[16] CJFE: Statement on the assault of an employee by right wing extremists, CJFE, 9 May 2017. http://www.cjfe.org/cjfe_statement_on_the_assault_of_an_employee_by_right_wing_extremists
[17] CJFE deeply concerned by assault on Global News journalists at Quebec City protests, CJFE, 21 August 2017. http://www.cjfe.org/cjfe_deeply_concerned_by_assault_on_global_news_journalists_in_quebec_city

D. Access to information

22. The Access to Information Act (ATIA)[18], now nearly 35 years old, is in desperate need of major reforms to reduce delays and provide for an effective right to access information held by public authorities. This challenge calls for bold and thorough reforms to the ATIA to align it with international standards and better practice in other countries. Canada is ranked 49th out of 111 countries on the RTI Rating, a global methodology for assessing the strength of a country's legal framework for the right to information.[19]

23. There are a number of issues with the Canadian legislative framework for RTI. First, The right to information is only weakly recognised as a human right in Canada. In Criminal Lawyers' Association v. Ontario (Public Safety and Security),[20] decided in 2010, the Supreme Court of Canada did recognise a limited constitutional right to information, based on the right to freedom of expression. But this applied only where access "is shown to be a necessary precondition of meaningful expression, does not encroach on protected privileges, and is compatible with the function of the institution concerned."[21] This falls well short of international standards, which recognise a freestanding right to information, subject only to limited exceptions.

24. Second, Canada's ATIA also contains a significantly overbroad regime of exceptions, limiting the scope of information that public authorities are obliged to disclose. This is a real weakness in the legislation and the area where the law did worst on the RTI rating, scoring just 12 out of a possible 30 points.

25. Third, there are lax rules regarding the timelines for responding to requests. Although ATIA requires a response within 30 days, it is very lenient in terms of permitting extensions. Just one-quarter of requests to federal government departments, agencies and Crown corporations were answered within the 30-day limit, according to an independent audit by News Media Canada.[22] Delays in responding of up to two-and-a-half years have been reported.[23]

26. There are further problems with the access to information system. The scope of the Act is unduly limited with the Cabinet, legislature, and judiciary all falling outside its bounds.[24] The Act gives discretion to public bodies to levy excessive fees before requesters can access documents, based on claims of administrative costs. Moreover, the responsiveness and accountability issues are exacerbated by the fact that the office of Canada's information commissioner does not have binding order powers, as against better international practice; it can only make recommendations. It also lacks the legislative authority to undertake promotional activities, including raising awareness of

[18] Access to Information Act, R.S.C. 1985 c. A-1.
[19] Centre for Law and Democracy, Canadian RTI Rating. Available at http://www.rti-rating.org/view_country/?country_name=Canada.
[20] Ontario (Public Safety and Security) v. Criminal Lawyers' Association, 2010 SCC 23, [2010] 1 S.C.R. 815.
[21] Ibid., para. 5.
[22] 2017 National Freedom of Information Audit, News Media Canada. https://nmc-mic.ca/wp-content/uploads/2017/09/2017-National-Freedom-of-Information-Audit_final2.pdf
[23] Gloria Galloway, "Pattern of delay: Ottawa's Kafkaesque information denial" The Globe and Mail, 3 February 2010. Available at: http://www.theglobeandmail.com/news/politics/pattern-of-delay-ottawas-kafkaesque-information- denial/article4305090/.
[24] Toby Mendel. "The Human Right Canadians are Way Behind On", October 14, 2012. http://www.huffingtonpost.ca/toby-mendel/access-to-information-canada_b_1964197.html.

the right to information, leaving Canadians relatively uninformed about this fundamental freedom.[25]

27. In 2015, the Office of the Information Commissioner of Canada released *Striking the Right Balance for Transparency–Recommendations to modernize* the *Access to Information Act*, a report outlining recommendations that together form a comprehensive answer to the current crisis, and provide a detailed roadmap to fixing the flawed system.

28. Meanwhile, the government's proposed ATIA reform, Bill C-58, fails to address the most serious weaknesses of the system, including the vastly overbroad regime of exceptions, the broad discretion of public authorities to delay in responding to requests, the absence of any duty for public authorities to document important decision making processes, and the limited scope of coverage of the Act. In some areas, it even weakens the current rules.

Recommendation to the Government of Canada:

- Wholly adopt the recommendations outlined in the Information Commissioner's 2015 report *Striking the Right Balance for Transparency*.[26]

E. Whistleblower Protection

29. During its ten years of operation, Canada's federal whistleblower protection system has been largely ineffective, uncovering little wrongdoing (mostly of a relatively minor nature) and failing completely to protect whistleblowers.

30. This conclusion flows from various sources: detailed analyses of the law conducted after the legislation was passed (which predicted that it would fail); the experience of whistleblowers attempting to use the system; the limited results achieved (as reported by officials in annual reports); and the testimony obtained by a parliamentary committee that conducted an in-depth review of the whistleblowing system in 2017.

31. An in-depth analysis[27] of the federal whistleblowing system by the Centre for Free Expression at Ryerson University showed the following:

32. **The system has been completely ineffective in protecting whistleblowers.** In ten years of operation, not a single whistleblower has completed the process to obtain compensation from the Tribunal created for this purpose, and no-one has been sanctioned by the Tribunal for taking reprisals.

[25] Ibid.
[26] Striking the Right Balance for Transparency: Recommendations to modernize the Access to Information Act, Office of the Information Commissioner of Canada. http://www.oic-ci.gc.ca/telechargements-downloads/userfiles/files/eng/reports-publications/Special-reports/Modernization2015/OIC_14-418_Modernization%20Report.pdf
[27] What's Wrong with Canada's Federal Whistleblowing System, Centre for Free Expression, Ryerson Univeristy https://cfe.ryerson.ca/sites/default/files/whats_wrong_with_the_psdpa_0.pdf

33. **The system has been largely ineffective in exposing government misconduct.** Only a handful of cases of wrongdoing have been found, and all have been relatively minor. Based on substantial international research, in a workplace of this size, complexity and importance, dramatically more cases and ones of a much more serious nature should have been revealed.

34. **The system is not trusted by public servants**. A recent survey in one major department found that more than half of employees would be reluctant to report wrongdoing for fear of a negative impact on their careers. Although repeatedly promised, there has been no survey of whistleblowers who have actually tried to use the system. Those who have approached whistleblowing NGOs consistently report mistreatment at the hands of the agencies that are supposed to be protecting them.

35. **The system is considered deeply flawed by international experts.** Experts from four other jurisdictions were called to give testimony to the Parliamentary committee during its 2017 review of the current federal whistleblower protection system. Those who had examined the Canadian legislation and felt able to comment on it were harshly critical, using terms like 'toothless' and 'tortuous'.

Recommendation to the Government of Canada:

- Implement in full the recommendations of the Parliamentary committee report[28]. The following are among the most essential:
  - Reverse the burden of proof so that the employer must demonstrate before the Public Servants Disclosure Protection Tribunal that no reprisals were taken against the whistleblower for having made a disclosure.
  - Enable whistleblowers who suffer reprisals to directly address the Tribunal without requiring their case first validated by the Public Sector Integrity Commissioner;
  - Explicitly mandate managers and supervisors in federal departments and agencies with a duty to protect and support whistleblowers.

F. Anti-terror legislation & Surveillance

36. In 2015, Canada enacted its most significant overhaul of national security legislation in over a decade with the *Anti-Terrorism Act, 2015* (2015 ATA). This legislation created a new speech offence in the *Criminal Code* based on advocating or promoting terrorism offences "in general"; established provisions for seizure and deletion of "terrorist propaganda"; and introduced an information sharing regime based on an expansive conception of "activities that undermine the security of Canada".

[28]Strengthening The Protection Of The Public Interest Within The Public Servants Disclosure Protection Act Report of the Standing Committee on Government Operations and Estimates
http://www.ourcommons.ca/Content/Committee/421/OGGO/Reports/RP9055222/oggorp09/oggorp09-e.pdf

37. The 2015 ATA created the offence of advocating or promoting terrorism, which would criminalize speech that "advocates or promotes the commission of terrorism offences in general". There is no requirement that the speaker intend for a terrorist offence to be committed. Nor is there a requirement that a terrorism offence be committed as a result of the prohibited speech. The mere expression of sentiment is sufficient to trigger liability for the offence. Meanwhile, the term "terrorism offences in general" is not defined in the *Criminal Code*, and has the potential to encompass activities well beyond the already broad range of conduct captured in the definition of "terrorist activity" set out in s. 83.01 of the *Criminal Code*. As a result, the scope of speech potentially captured by this offence is breathtakingly broad.

38. The 2015 ATA also permitted deletion orders and customs seizures of "terrorist propaganda", defined to include "any writing, sign, visible representation or audio recording that advocates for or promotes the commission of terrorism offences in general." This power of seizure and censorship does not rely on any requirement that the material actually relate to actual or threatened violence, and again relies on an undefined notion of "terrorism offences in general."

39. These provisions have the capacity to chill legitimate discourse around terrorism and political violence in artistic expression, academic debate, policy engagement, and public discussion.

40. In 2017, the Government of Canada proposed amendments to the 2015 ATA in Bill C-59 which, among other things, would eliminate the offence of advocating or promoting terrorism offences in general. Rather, it will be replaced with the offence of "counselling another person to commit a terrorism act". Prohibiting the counseling and inciting of others to commit a criminal offence has generally been considered a reasonable limitation on expression. Bill C-59 also seeks to amend the definition of "terrorist propaganda" to reflect this new counselling offence. As of this writing, Bill C-59 remains under consideration by Parliament.

Recommendation to the Government of Canada:

- Adopt the provisions in Bill C-59 repealing the advocating or promoting terrorism offence and amending the definition of "terrorist propaganda".

G. Research confidentiality

41. Research undertaken by academics, government scientists and others is the foundation for evidence-based policy and law.

42. Many socially important issues cannot be studied without being able to ensure confidentiality to research subjects whose knowledge is vital but who could be personally harmed were their identity or information that could be used to identify them not kept secret. This is commonly the case in health research and in criminology, but applies in many other areas as well.

43. Canada has no general statutory rules protecting research confidentiality. Until the decision of the Quebec Superior Court in 2014 in *Parent c. R*[29], there was no judicial interpretation that offered even the possibility of case-by-case protection for research confidentiality.

44. While *Parent c. R* sets a precedent that allows researchers to seek protection on a case-by-case basis, researchers have no assurance that courts will protect their research participants' confidentiality at the time they must promise confidentiality in order to undertake the research. Any decision is made after the fact in circumstances that may or may not be predictable.

45. Case-by-case claims that identifiable information should be kept confidential are adjudicated in court by applying the Wigmore criteria. This legal test requires a judge to consider four factors: 1) whether the relevant conversations originated in confidence; 2) whether confidentiality is essential to the parties' relationship; 3) whether the relationship is beneficial to the community; and 4) whether the injury caused by identifying the research subject outweighs the harm that would be done to the court's search for truth if the information remained confidential.

46. Statute-based protections provide a far better alternative. They would allow researchers to refuse to disclose names or other identifying characteristics of research subjects in response to legal demands. Proposed research would be evaluated before it is undertaken to determine if it meets research and ethical requirements for statue-based protection. If it does, the protection would be provided.

47. Currently in Canada only Statistics Canada research information enjoys statutory protection — a court cannot compel its disclosure. A variety of statute-based protections are offered in other countries.

Recommendation to the Government of Canada:

- In conjunction with the Tri-Council Agencies – Canadian Institutes of Health Research (CIHR), Natural Sciences and Engineering Research Council of Canada (NSERC) and Social Sciences and Humanities Research Council (SSHRC), set up a task force to develop statute-based protection for confidentiality of research undertaken in Canada by Canadian-based researchers.

H. Protection of confidential sources

48. The standard of confidentiality afforded to journalistic sources under Canadian law is inadequate to guarantee their anonymity effectively, which undermines journalists' ability to obtain information and then to pass it onto the public.

49. Late in 2016, Montréal police admitted that they had monitored the communications and movements of La Presse journalist Patrick Lagacé for the sole purpose of discovering the identities of his confidential sources for stories he had written about

[29] Parent c. R., 2014 QCCS 132

internal problems in the Montréal police force.[30] It was also revealed that Québec's provincial police force had obtained warrants to track the phone calls of at least seven other journalists.[31] That year it was also revealed that the RCMP tailed reporters in Ottawa, and police seized a reporter's laptop in Montreal.[32] VICE News national security reporter Ben Makuch is facing potential jail time after the Ontario Court of Appeal upheld an RCMP production order demanding his notes from a conversation he had with a suspected ISIS militant.[33] VICE is now seeking leave to appeal to the Supreme Court of Canada.

50. As the time of this submission Canada has no statutory rules protecting confidential sources of information, though a bill before Parliament is due to be voted on imminently which would give greater legal protection to confidential sources. Bill S-231 would amend the Canada Evidence Act to protect the confidentiality of journalistic sources.[34] It would allow journalists to not disclose information, or a document that identifies or is likely to identify a journalistic source, unless the information or document cannot be obtained by any other reasonable means *and* the public interest in the administration of justice outweighs the public interest in preserving the confidentiality of the journalistic source.

51. Currently the law in this area has been set through judicial interpretation, the leading case being R. v. National Post.[35] In Canada, important confidential relationships, such as that between a solicitor and client, are protected by a class privilege. Although the Supreme Court of Canada in National Post noted the importance of confidentiality in the practice of journalism, it refused to recognise a class privilege for confidential sources of information. Instead, the Court ruled that source confidentiality must be determined on a case-by-case basis by applying a generalised test (the Wigmore criteria).

Recommendation to the Government of Canada:

- Enact a press shield creating a strong presumption in favour of protection of sources.
- Develop a curriculum for police, judges and crown attorneys about media law and free expression issues, particularly legal rules surrounding police surveillance of journalists.
- Issue new rules making warrants targeting journalists harder to obtain, including requiring police to seek approval from a chief Crown prosecutor before obtaining a warrant that targets a journalist.

[30] Montreal police monitored iPhone of La Presse journalist Patrick Lagacé; The Star. October 31, 2016. http://montrealgazette.com/news/local-news/montreal-police-monitored-iphone-of-la-presse-journalist-patrick-lagace
[31] The Guardian. November 3, 2016. Quebec scandal of spying on journalists widens to national broadcaster. https://www.theguardian.com/media/2016/nov/03/quebec-scandal-of-spying-on-journalists-widens-to-national-broadcaster
[32] Journal de Montréal says it will fight police attempt to search reporter's computer; Le Journal de Montréal. September 21, 2016 http://montrealgazette.com/news/local-news/newspaper-says-it-will-fight-police-attempt-to-search-reporters-computer?preview_id=879056
[33] Ontario Superior Court of Justice. R. v. Vice Media Canada inc. March 1, 2016.
[34] S-231, An Act to amend the Canada Evidence Act and the Criminal Code (protection of journalistic sources). https://www.parl.ca/LegisInfo/BillDetails.aspx?billId=8616168&Language=E
[35] R. v. National Post, 2010 SCC 16, [2010] 1 SCR 477

I. Restrictions on freedom of assembly

52. Freedom of peaceful assembly is enshrined in international law as a fundamental freedom. Although Section 2b of the Canadian Charter of Rights and Freedoms also guarantees the freedom to assemble peacefully, several incidents indicate that this freedom not being adequately protected.

53. During the 2010 G20 summit in Toronto, police forces used kettling (a form of containment in a defined area), rubber bullets, and mass arrests to subdue protestors with no oversight mechanisms by the relevant government agencies. Seven years on, despite numerous credible accounts of police violence, only one police officer has been charged with the use of excessive force during these arrests, and only one senior officer has faced charges of police misconduct.[36] Both officers were convicted in 2015, but both the defendants and the complainants have appealed the decisions[37]. The appeal hearing in the case of the former is scheduled to be heard on the day of this submission, and the decision on appeal in the case of the latter is expected in November 2017.

54. Similarly, in 2012, police forces in Montreal used tear gas, excessive force, and mass arrests to quell crowds of student protesters.[38] There were also reports of excessive force being used by police officers during demonstrations by aboriginal and environmental groups.[39]

55. In July 2015 the UN Human Rights Committee expressed concern about the excessive use of force by law enforcement officers during mass arrests in the context of protests at the federal and provincial levels, with particular reference to indigenous land-related protests, G-20 protests in 2010, and the student protests in Quebec in 2012. It also expressed concern that complaints about excessive force were not always promptly investigated and that the sanctions imposed were of a lenient nature. It recommended that Canada strengthen its efforts to ensure that all allegations of ill treatment and excessive use of force by the police are promptly and impartially investigated by strong independent oversight bodies with adequate resources at all levels, and that those responsible for such violations are prosecuted and punished with appropriate penalties.[40]

56. The federal government has also taken steps to keep records of those involved in public protest. In 2014, the federal Government Operations Centre (GOC) - the body that coordinates the federal response to national emergencies - requested that all federal departments help compile comprehensive lists of "all known demonstrations which will occur either in your geographical area or that may touch on your mandate."[41] Intelligence specialists argue that this blanket surveillance of Canadians is in breach of

[36] Alysha Hasham. " No Jail for Toronto Police Officer Convicted of G20 Assault", The Star, January 29, 2015, http://www.thestar.com/news/crime/2015/01/29/no-jail-for-toronto-police-officer-convicted-of-g20-assault.html.
[37] https://www.thestar.com/news/crime/2017/04/04/toronto-cop-wants-guilty-verdicts-overturned-in-g20-kettling-case.html
[38] Canadian Civil Liberties Association. "Take Back the Streets", October 2013, https://ccla.org/cclanewsite/wp-content/uploads/2015/02/Take-Back-the-Streets-Full-Report-English.pdf, 16.
[39] Sukanya Pillai, Brenda McPhail. "Canadian Civil LIberties Association: Report to the UN Human Rights Committee", June 2015. https://ccla.org/cclanewsite/wp-content/uploads/2015/07/CCLA-UN-Report.pdf.
[40] United Nations Human Rights Committee. "Concluding Observations on the Sixth Periodic Report on Canada", July 2015. http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G15/179/99/PDF/G1517999.pdf?OpenElement
[41] Canadian Civil Liberties Association. "Take Back the Streets", October 2013, https://ccla.org/cclanewsite/wp-content/uploads/2015/02/Take-Back-the-Streets-Full-Report-English.pdf, 22.

the Charter of Rights and Freedoms. The categorical monitoring of peaceful protests suggests that the government considers them a threat to public safety.

57. The Security of Canada Information Sharing Act, enacted as part of an omnibus anti-terrorism bill in 2015, created a framework for information sharing between Canadian government agencies in order to "protect Canada against activities that undermine the security of Canada." The definition of "security" and the scope of activities that might "undermine the security of Canada" are so broad that national security legal scholars Kent Roach and Craig Forcese have observed that such an understanding of "security" is "wildly overbroad" and "unprecedented" in Canadian law.[42]

58. While the Act does explicitly exclude "all advocacy, protest, dissent, and artistic expression" from the definition of "activity that undermines the security of Canada", legislatively enshrining such an expansive conception of security may nonetheless result in expressive chill.

Recommendations to the Government of Canada:

- Narrow the definition of "security" and scope of "activities that might undermine the security of Canada" under the Security of Canada Information Sharing Act.

Conclusion

1. The right to free expression in Canada is protected by constitutional, legislative, and institutional provisions, and is further cemented by years of jurisprudence and public debate. However, free expression challenges exist that, if not addressed, could erode its international reputation.
2. This submission outlines a number of recommendations that, if implemented, would significantly strengthen the right to free expression in Canada. Many detailed measures have already been identified and now need to be implemented, such as those in the Information Commissioner's 2015 report on Canada's Access to Information System, and in the Parliamentary Committee's report on *Public Servants Disclosure Protection Act.* Legal remedies, including removing criminal libel provisions from the *Criminal Code*, adopting Anti-SLAPP legislation across all provinces and territories, and enacting a press shield favouring the confidentiality of journalistic sources are also important foundational changes. Training officers and other authorities on the right to free expression and on how to enforce it is essential to ensuring that free expression is protected in practice.
3. If Canada wishes to remain a country where freedom of expression is protected, it must prioritize it, beginning with implementing these recommendations.

[42] Kent Roach and Craig Forcese, Bill C-51 Background #3: Sharing Information and Lost Lessons from the Maher Arar Experience (February 16, 2015) at 7.