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Short Reflections | Read time: 10 minutes

Reflecting on Freedom of Expression in Canada



About Justice Centre *Short Reflections*

Everyone can spare ten minutes to think about the *Canadian Charter of Rights and Freedoms*. In these easy-to-read and exploratory reflections, the Justice Centre investigates how legal and social developments are impacting your ability to exercise your rights and freedoms in Canada. Spend some time with the Justice Centre, thinking about our country and where it is going.

Introduction

“Everyone has the...freedom of thought, belief,
opinion and expression, including freedom of the press and other media of communication.”

– *Canadian Charter of Rights and Freedoms*¹

In this short reflection, we consider institutional, legal, and social pressures on the enjoyment of freedom of expression in Canada. On Canadian campuses, powerful actors appear to be silencing “controversial” perspectives and creating conditions that undermine the possibility of genuine inquiry. Meanwhile, Canadian elected and unelected officials are passing laws that would grant authorities extraordinary powers to regulate and censor

¹ *Canadian Charter of Rights and Freedoms*, s 2, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

online content and broadcasting. And, across Canada and the world, a culture of dialogue and disagreement has been replaced by a culture of cancelling and intolerance. In certain cases, this culture is being reinforced by the Canadian legal system.

The Canadian campus

The conditions that are necessary to facilitate and foster academic freedom (and, more generally, freedom of expression) have largely been eroded on Canadian post-secondary campuses today. Internal pressures have transformed these once “marketplaces of ideas” into forums for the exchange of orthodox ideas and perspectives only. What are these pressures, and how did this occur?

One study by Eric Kaufmann of Birkbeck College of the University of London on the political affiliations of professors in Canada, the US, and the UK suggests that some ideas and perspective may not even be passing the “hiring phase” on post-secondary campuses. Kaufmann found that 73 percent of surveyed academics identified as “left wing” but that only four percent identified as “right wing”.² It could be that more liberals than conservatives applied to positions in the surveyed departments. However, Kaufmann also found that 60 percent of the academics who did identify as conservative reported experiencing a “hostile environment” toward their beliefs in their departments, whereas only nine percent of liberals experienced such an environment toward their beliefs.³ Further, it was found that 45 percent of liberal academics would not support the hiring of candidates who had supported a former US president.⁴ It appears, then, that the surveyed colleges and universities suffer from “an absence of viewpoint diversity”. An absence of dissenting and divergent views, and intolerance towards those who do voice dissent with

² Eric Kaufmann, “Academic freedom in crisis: Punishment, political discrimination, and self-censorship,” Center for the Study of Partisanship and Ideology, March 1, 2021, <https://cspicenter.org/reports/academicfreedom/>.

³ Kaufmann.

⁴ Kaufmann.

prevailing orthodoxies, has created an academic environment that stifles the pursuit of knowledge and understanding instead of fostering it.

Of course, it is *not* problematic that some perspectives are not (or do not happen to be) always represented within academic departments; after all, not every department can include perfect “perspective diversity”. It *is* problematic that certain perspectives appear to be prohibited from entering or remaining within academic departments. Indeed, as attitudes toward conservative academic contributions become increasingly hostile, many conservative academics are quietly quitting academia altogether, and the conservative students who might have taken their places are selecting occupations that do not discriminate against them for their political or ethical perspectives (or for occupations where political or ethical perspectives are not considered relevant to evaluations of job performance or suitability). And why should they not depart academia? When the evaluation of academic merit encompasses both the perceived merit of the academic contribution *and the perceived merit of the person from whom the contribution arose*, why should we wonder that conservatives are departing academia for professions in which the distinction between personal beliefs and professional contributions is protected?

Academic departments are not the only bodies exerting pressure on academic freedom. Censorial post-secondary administrations and student unions are implementing policies that (a) do not adequately protect freedom of expression or (b) are not adequately enforced when that freedom is unreasonably limited. When freedoms are limited, administrations all too often render decisions that accommodate the sensitivities of vocal groups instead of preserving a culture of open and unthreatened inquiry. This pressure is not simply exerted from above, however. Student unions contribute to censorial academic environments by cancelling so-called “controversial” guest speakers, faculty, or students, or by granting a platform only to those whose contributions are not incompatible with entrenched orthodoxies.

One might wonder how these environments came to be in a country where strong legal protections for freedom of expression exist (at least on paper). While freedom of expression is guaranteed under the *Canadian Charter of Rights and Freedoms*, this freedom has been qualified and even marginalized over the course of decades by academics and politicians and, sometimes, courts. It is often reiterated by politicians (who wish to further erode freedom of expression) that the freedom is not unlimited and does not extend to speech acts described in the Criminal Code as advocating genocide, inciting hatred that would likely lead to a breach of peace, and promoting hatred willfully.⁵ With this, we are well familiar. One may be accused of “reading proficiency” for stating that freedom of expression is not unlimited. One should be accused of “extreme cleverness” for thinking that speech acts that are merely *hated* by those in power are thereby *hateful* (i.e., *criminal*) speech acts.

Nonetheless, the blame for censorial campus environments cannot be attributed only to those in power. Across the country, there is an impoverishment of democratic spirit. Too few students are engaged in holding to account their elected representatives. Student union executives and councils often exert enormous pressures on the exercise of freedom of expression, and yet voter turnout at student union elections is incredibly low and has been for years. According to one analysis of voter turnout at the University of Toronto Student Union executive elections of 2019, only 4.2 percent of the more than 70,000 undergraduates⁶ voted in the election.⁷ Across the country, student union and association executives are elected by an insignificant number of the students they represent both within and beyond their organizations, and yet these unions are thereby granted authority to speak on behalf of *all* students and to implement policies which service unrepresentative

⁵ Julian Walker, “Hate speech and freedom of expression: Legal boundaries in Canada,” Parliamentary Information and Research Service, June 29, 2018, https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/201825E.

⁶ “Enrolment report,” Planning and Budget Office, University of Toronto, February 8, 2021, <https://planningandbudget.utoronto.ca/wp-content/uploads/2021/06/Enrolment-Report-2020-21-FINAL.pdf>.

⁷ Hannah Carty, “Participation in student government elections at U of T among lowest in Canada,” *The Varsity*, November 10, 2019, <https://thevarsity.ca/2019/11/10/participation-in-student-government-elections-at-u-of-t-among-lowest-in-canada/>.

ideologies, policies, and events. One cannot speak from behind a muzzle; one ought to speak up before being muzzled.

Monopolies on orthodoxy, dialogue, and the right to dissent undermine the conditions of successful inquiry. Scientific progress, for instance, is the prize of difficult inquiry—marked with disagreement and questioning and alternative hypotheses. Dogma and established orthodoxy inhibit the search for truth—they stifle inquiry and prevent advancement. Truths and facts will be discovered only where a symposium of voices (and these—sometimes false or problematic) have been entertained and permitted. How immodest it is to think that the truth can be discovered or protected by eliminating (actively or otherwise) whatever voices do not contribute to orthodox or familiar harmonies.

Online Censorship

For some time, the internet was a haven for free expression and autonomy. However, governments, corporations, and social media platforms quickly learned how to actively limit online expression and how to create conditions that have quieting effects on expression. Threats to the enjoyment of online freedom of expression have come from various quarters, including Bill C-36 and Bill C-11.

One attempt to limit online expression arose on November 3, 2020, when Minister of Canadian Heritage Steven Guilbeault proposed *An Act to amend the Broadcasting Act and to make related and consequential amendments to other Acts*. It was later re-introduced as the *Online Streaming Act*, which passed in the House of Commons on June 21, 2022, and which passed with amendments in the Senate on February 2, 2023.⁸

Canadian citizens and content creators were quick to realize that the language of the Bill would extend to the Canadian Radio-television and Telecommunications Commission (CRTC) additional powers to control broadcasting and online content in

⁸ Government of Canada, “Online Streaming Act,” Accessed February 13, 2023, <https://www.canada.ca/en/canadian-heritage/services/modernization-broadcasting-act.html>.

Canada. The Act would equip the CRTC to place any monetizable audio or audio-visual online content (e.g., Netflix, Spotify, or YouTube channels) within the scope of its regulatory powers.⁹ According to University of Ottawa law professor Michael Geist, "The potential scope for regulation is virtually limitless, since any audio-visual service anywhere with Canadian subscribers or users is caught by the rules."¹⁰ Among other things, the language of the Bill would allow the CRTC to compel online platforms to feature Canadian content and to implement search algorithms that make Canadian content more discoverable.

One might wonder, "What is so bad about Canadian content or allowing the CRTC to regulate it and promote it?" The reality is that serious problems arise from the way in which the Bill would allow the CRTC enormous powers to promote, regulate, and censor that content. These are problems of bias and selection and the conditions of open inquiry, and each has the potential to adversely impact the enjoyment of freedom of expression and autonomy in Canada.

The first problem is about bias and selection, and it affects the Canadian consumer. To grant an unrepresentative and inevitably biased commission (the CRTC) the power to determine for all Canadians what counts as "Canadian content" is to limit the ability of Canadians to make that determination themselves. Although the Bill does not permit the CRTC to remove "non-Canadian" content from online platforms, it does permit them to compel online platforms to implement search algorithms that effectively hide "non-Canadian" content from being discovered. As the saying goes, "The best place to hide something is on the second page of Google," and one might wonder whether a biased and unrepresentative commission is positioned to determine what kind of information should be hidden on "the second page". A related problem is about what might be called "the conditions of open inquiry" or about the ability of Canadians to learn and explore online

⁹ Government of Canada.

¹⁰ Michael Geist, "Not ready for prime time: Why Bill C-11 leaves the door open to CRTC regulation of user generated content," February 3, 2022, <https://www.michaelgeist.ca/2022/02/not-ready-for-prime-time/>.

without artificial constraints on their learning experience. Canadians use online platforms to learn about the world, and Bill C-11 would allow the CRTC to effectively narrow the scope of the content that can be discovered by Canadian inquirers. As the world shifts toward online learning, it is important that governments not be equipped to determine what counts as “appropriate” objects of learning and inquiry. It strikes of paternalism for a government to think that their citizens need help determining what content will satisfy their interests or needs.

Finally, the regulatory powers granted to the CRTC by Bill C-11 would incentivize Canadian online content creators to publish content that is likely to be deemed “sufficiently Canadian” (or “worthy of discovery”) and to remain quiet about any content that would otherwise be hidden by online search algorithms. The writer is reminded of the Gulag prison guard who inquires of his mathematician prisoner, “What is two plus two?” After some thought, the mathematician responds, “What would you like it to be?” Bill C-11 will likely have a chilling or quieting effect on autonomy and freedom of expression in Canada, where online content creators will be motivated to anticipate the selection criteria of the CRTC but not to produce genuinely valuable content for its own sake.

The effects of Bill C-11 may not be immediately and obviously pernicious. Governments will not betray to their citizens the full extent of the powers granted to them by the Bill all at once. Instead, Canadians will become slowly accustomed to a narrowing of what they see, learn, and create until what is left for the online consumer is nothing more than a selection of the finest provincialisms.

Cancel Culture

The problem of *cancel culture* is one we have encountered already on the Canadian campus, but it extends well beyond there. In Vancouver, nurse Amy Hamm was investigated by the British Columbia College of Nurses and Midwives for publicly endorsing

the author J.K. Rowling.¹¹ In Ontario, psychologist and academic Jordan Peterson is being compelled to complete mandatory social media training in order to maintain his professional standing with the College of Psychologists of Ontario.¹² In Ottawa, hundreds of peaceful Canadian protesters were disbanded and cancelled, in a sense, when the federal government invoked *The Emergencies Act* in February, 2022. There are many other examples. The scope of persons and objects that are cancellable is significant: people and organizations but also papers, songs, shows, columns, research programs, holidays, histories, and words.

What motivates cancel culture? From another perspective, how is it that “cancelling” is a cultural phenomenon and not just “something that happens on occasion”? How is it that ours is a culture *marked* by cancelling?

Normally, when groups band together to cancel some person or object, they do not do so on the basis that those persons or objects are thought to be *unlawful*. Further, reparations for cancellations rarely fall within the scope of the power of the courts precisely because injuries caused by cancellations are not regarded to be legal injuries. That cancel culture often occurs beyond the scope of the law (or without regard for how the law ought to be applied) is somewhat odd. Indeed, cited justifications for cancel culture are often bewildering and fuzzy, and this is probably because cancel culture is rarely informed by what the law of Canada says about freedom of expression. Whatever justifications are provided generally appeal to nebulous principles of preventing social harms or of promoting social justice.

The very existence of cancel culture betrays a cultural hostility toward otherwise legal but “controversial” viewpoints. (Of course, a viewpoint may be “controversial” because it incenses some group *without* being controversial by any other standard.) Cancel

¹¹ Justice Centre, “Nurse being investigated by College of Nurses for her gender-critical views,” July 10, 2021, <https://www.jccf.ca/nurse-being-investigated-by-college-of-nurses-for-her-gender-critical-views/>.

¹² Jonathan Bradley, “Jordan Peterson says Ontario psychologist regulator requesting he do social media course,” *Western Standard*, January 3, 2023, https://www.westernstandard.news/news/jordan-peterson-says-ontario-psychologist-regulator-requesting-he-do-social-media-course/article_f5e7aef4-8b9f-11ed-9106-675e956ec934.html.

culture represents an attack on the very notion of *the public sphere* as the proper space for the competition and adjudication of incompatible viewpoints. The creation of such spaces (notable examples of which include the parliaments of Canada and the UK, where elected members are legally protected from being penalized or “cancelled” for the lawful exercise of their freedom of expression) was a remarkable historical development. That development might not have occurred at all, *and it could be reversed altogether*. The groundwork for such a reversal is occurring across Canada, although its impacts have not yet been felt by the law or by our parliamentary institutions. “Controversial” viewpoints are being driven from public spaces into private forums where the threat of public and humiliating cancellations does not exist. This, of course, just leads to the establishment of “echo chambers”, where viewpoints survive unchallenged and where membership is earned by quiet subscription to the views and guidelines of the group. Intolerance in public, intolerance in private!

As the well-known saying goes, "All silencing of discussion is an assumption of infallibility".¹³ It could be that those who *cancel* are convinced of their own infallibility or of the fallibility of the cancelled viewpoint. Or, perhaps the reason is more sinister than this. It could be that the very existence of cancel culture is symptomatic of an acknowledged fragility of entrenched mainstream narratives. Perhaps there is little confidence that those narratives could withstand serious or sustained objection or scrutiny. Are mainstream narratives untrue or insufficiently true? Or, is it that the truthfulness of narratives is thought by *cancellers* to be less significant than the merits of the social outcomes those narratives might produce? Does truthfulness matter, or is it even an interesting feature of narratives? Perhaps cancellers are afraid that the truth will be discovered, or perhaps (and this is much more sinister) cancellers dismiss truths as so many red herrings and irrelevancies. The thought might be: *the narrative is untrue, but who cares? Stones are irrational, but neither do we expect them to be otherwise.*

¹³ John Stuart Mill, *On Liberty*, 1859, chapter 2, p. 1.

On the other hand, perhaps the gatekeepers of entrenched narratives place little trust in the discernment of their adherents and have adopted a tactic of insulating them from the bewilderment and tracklessness that often accompanies public disagreement and debate. This is rather paternalistic. When people or objects are cancelled, it is presumed that their messages are false or harmful and that their falseness or harmfulness must be eradicated before they can be publicly contemplated. Forbid that the public be permitted to discern those falsehoods themselves!

All kinds of social harms will occur beyond the scope and application of the law. Canadians must decide which harms are worth enduring. Occasionally, speakers and protestors and books and films will espouse false and harmful ideas. We could eliminate that possibility altogether. We could pre-emptively cancel any idea of which we suspect falseness or harmfulness. In doing so, perhaps we will expose ourselves to a more destructive but less detectable harm: the erosion of freedom of expression in Canada and of the confidence that truth needs no protection.

Human Rights Tribunals

Ordinary Canadians are not the only ones responsible for placing unreasonable limitations on the freedom of expression in Canada. Human Rights Tribunals sometime render decisions that are unconstitutional and have dampening effects on expressive freedoms.

What are human rights tribunals? In 1977, the Parliament of Canada passed the *Canadian Human Rights Act* to the principle that

...all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity or expression, marital status, family status, genetic characteristics, disability or conviction for

an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.¹⁴

Canadian Human Rights Tribunals were established under the authority of the *Canadian Human Rights Act* to decide whether persons or organizations have engaged in discriminatory practices.¹⁵ They are quasi-judicial bodies, which means that they have powers and procedures similar to courts of law but are less formal than the courts and have a narrower scope, dealing only with cases of discrimination as defined under the *Act*.¹⁶⁻¹⁷

Some actions or speech acts that are *not* discriminatory have been deemed discriminatory by tribunals. For instance, the human rights tribunal of Quebec ordered comedian Mike Ward to pay J r my Gabriel and his mother \$42,000 as compensation for a joke about Gabriel that was determined by the tribunal to be discriminatory and an interference to his ability to safeguard his dignity in 2016.¹⁸ Comedians and public intellectuals across the country were rightly concerned that this decision would establish a precedent of intolerance toward controversial instances of expression.¹⁹

This decision was later overturned by the Supreme Court in 2021, when it was determined that there exists no right not to be offended in Canada and that a discriminatory interference with the rights of Gabriel did not occur.²⁰ This case demonstrates that human rights tribunals are sometimes fallible in the identification of

¹⁴ Government of Canada, "Canadian Human Rights Act (R.S.C., 1985, c. H-6)," Accessed February 13, 2022, <https://laws-lois.justice.gc.ca/eng/acts/h-6/>.

¹⁵ Canadian Human Rights Tribunal, "Welcome to the Canadian Human Rights Tribunal," Accessed February 13, 2022, <https://www.chrt-tcdp.gc.ca/index-en.html>.

¹⁶ Canadian Human Rights Tribunal.

¹⁷ There is disagreement as to *whether* human rights tribunals are *the appropriate way* to protect individuals and organizations against discrimination in Canada. There is no disagreement that the Canadian Human Rights Tribunal is a legitimate part of our judicial system, even if its legitimacy is contested.

¹⁸ Jonathan Montpetit, "Mike Ward's human rights tribunal decision, explained," *CBC*, July 21, 2016, <https://www.cbc.ca/news/canada/montreal/mike-ward-comedian-human-rights-tribunal-1.3689465>.

¹⁹ In another case, a punitive award of \$20,000 in extra costs was levied after a target of a human rights complaint refused to use female pronouns to describe a biological male complainant— see *Oger v. Whatcott (No. 7)*, 2019 BCHRT 58 <https://www.canlii.org/en/bc/bchrt/doc/2019/2019bchrt58/2019bchrt58.html?searchUrlHash=AAAAAQAJIndoYXRjb3R0LiAicHJvbm91bnMilG9nZXIgljIwLDAwMCIAAAAAAQ&resultIndex=1>

²⁰ Julian Walker, "Freedom of expression: Recent jurisprudence," Hill Notes, November 17, 2022, <https://hillnotes.ca/2022/11/17/freedom-of-expression-recent-jurisprudence/>.

instances of discrimination; sometimes, tribunals will render decisions that are wrong and that illegitimately dampen expressive freedoms. This case might also suggest that tribunals with a narrow mandate (i.e., to determine whether individuals or organizations have engaged in discriminatory practices) may not be equipped or even motivated to fairly adjudicate between claims that engage (a) the right not to be discriminated against and (b) other rights and freedoms, including the protected freedom of expression.

Conclusion

Renewed vigilance and public spirit will be needed if Canadians are to enjoy freedom of expression in Canada. This hard-earned freedom has been quietly and systematically eradicated in institutions of higher learning, online, in bookstores and comedy clubs, professional associations and businesses, and even on the very slopes of Ottawa's Parliament Hill. A muzzle is being drawn over the Canadian mouth, and Canadians must renew their dedication to the public sphere *as forum for debate* if they are to slip its bonds.

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About the Justice Centre for Constitutional Freedoms

Founded in 2010, the Justice Centre is a Canadian registered charity committed to defending the constitutional freedoms of all Canadians through litigation and education. Our vision is to realize “[a] free society where governments uphold human dignity by respecting fundamental rights and freedoms, and where Canadians can realize their potential and fulfil their aspirations”.

