

Canadian Freedom of Expression in 2015-2016 – Some Highlights
Global Freedom of Expression @ Columbia University
Paul Schabas, Blake, Cassels & Graydon LLP, Toronto
April, 2016

I. Introduction

In Canada, the last 12 months have seen the enactment of federal legislation criminalizing terrorist speech, anti-SLAPP legislation in Ontario, and significant decisions expanding privacy law and jurisdiction over internet search engines. The Law Commission of Ontario has recently launched a comprehensive review of defamation law, and last month the federal Privacy Commissioner issued a discussion paper on Online Reputation, plainly raising whether the “right to be forgotten” should become part of Canadian law.

II. Anti-Terrorist Speech Legislation – Bill C-51 (2015, Federal)

In January 2015, following the shooting of two soldiers on Parliament Hill in Ottawa, the federal government passed a new anti-terrorism law, Bill C-51,¹ which introduced an offence that, while not as broad as the United Kingdom and French-style glorification offences, may still be characterized as a sweeping “speech crime”.² The new offence punishes anyone “who, by communicating statements, knowingly advocates or promotes the commission of terrorism offences in general” while knowing or being reckless that “any of those offences may be committed, as a result of such communication.”³ Anyone convicted of the offence is liable to imprisonment for up to five years. Bill C-51 also contains provisions allowing court-ordered deletion of material from the Internet that “counsels the commission of a terrorism offence.”⁴

There has been significant academic criticism about the implications of these provisions with respect to freedom of expression and other *Charter*⁵ rights.⁶ Specifically, in a compelling article, Forcese and Roach contend that the glorification and anti-terror speech offences that exist in European law – those reflected in Bill C-51 – are “ill-suited to Canada’s social and legal environment.”⁷ They argue that the new “terrorism speech” crime is “overly sweeping”: “the government and much of the current debate about Bill C-51 has radically underestimated the extent to which [other] criminal and terrorist

¹ Bill C-51, *An act to enact the Security of Canada Information Sharing Act and the Secure Air Travel Act, to amend the Criminal Code, the Canadian Security Intelligence Service Act and the Immigration and Refugee Protection Act and to make related and consequential amendments to other Acts*, 2nd Sess, 41st Parl, 2015, cl 16 (assented to 18 June 2015), SC 2015, c 20.

² Craig Forcese & Kent Roach, “Criminalizing Terrorist Babble: Canada’s Dubious New Terrorist Speech Crime” (2015) 53:1 Alberta L Rev 35 at 42.

³ See amendments to *Criminal Code*, RSC 1985, c C-46, s. 83.221(1).

⁴ *Ibid*, s. 83.222(1), (8).

⁵ *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. Section 2(b) of the *Charter* protects “freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication”.

⁶ David Schneiderman, “What Lessons Have We Learned about Speech in the Aftermath of the Paris Attacks?” in Edward M Iacobucci & Stephen J Toope, eds, *After the Paris Attacks: Responses in Canada, Europe and around the Globe* (Toronto: University of Toronto Press, 2015) 159 at 159-66.

⁷ Forcese & Roach, “Criminalizing Terrorist Babble”, *supra* note 2 at 37.

offences in Canada could apply to terrorist-related speech.”⁸ As such, it may be difficult to justify the new offences as a “reasonable limit” on freedom of expression under section 1 of the *Charter*.⁹ Forcese and Roach note that “the effectiveness of incarceration as a de-radicalization tool is unclear from the empirical research”.¹⁰ They propose a number of possible alternative responses to terrorism that do not require glorification and anti-terror speech offences but address the underlying concerns, including “hiding” extremist content online, engaging in “network analysis” (in order to identify recruiters), and “demand minimizing” (propagating counter-narratives and building trust in democratic institutions).¹¹

Further, glorification crimes may restrict speech space to the point where only the “free speech core” - speech that raises no concerns - remains protected. As Canada has less invasive criminal speech laws, such as incitement and promoting hatred against identifiable groups, , to now include ideological speech, apologia, and even radicalized boasting, is troubling. However, these laws have yet to be enforced, and so it is not clear what impact they will have.¹²

III. Anti-SLAPP Legislation – Protection of Public Participation Act, 2015 (Ontario)

In November 2015, Ontario passed the *Protection of Public Participation Act, 2015*¹³, the purpose of which is “to encourage individuals to express themselves on matters of public interest; to promote broad participation in debates on matters of public interest; to discourage the use of litigation as a means of unduly limiting expression on matters of public interest; and to reduce the risk that participation by the public in debates on matters of public interest will be hampered by fear of legal action.”¹⁴ “Expression” is defined broadly, in line with the Canadian jurisprudence, to mean “any communication...”¹⁵

The new provisions allow a judge, on a motion by a person against whom a proceeding is brought, to dismiss the proceeding if the judge is satisfied that the proceeding arises from an expression by the person that relates to a matter of public interest.¹⁶ The burden then shifts to the respondent (plaintiff) to persuade a judge that there are grounds to believe that the proceeding has substantial merit, the moving party has no valid defence in the proceeding, and the harm suffered by the responding party is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting the expression.¹⁷

⁸ *Ibid.*

⁹ Section 1 of the *Charter* provides that all rights and freedoms are “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”.

¹⁰ *Ibid* at 45.

¹¹ *Ibid* at 45-48.

¹² *Ibid* at 49. See also Schutten & Haigh, “*Whatcott* and Hate Speech” (2015) 34:1 Nat J Const L 1 at 9-15, where the authors provide a compelling defence of political expression as essential to democratic discourse.

¹³ See Bill 52, *An Act to amend the Courts of Justice Act, the Libel and Slander Act and the Statutory Powers Procedure Act in order to protect expression on matters of public interest*, 1st Sess, 41st Leg (assented to on 3 November 2015). SO 2015, c 23.

¹⁴ *Ibid*, s. 137.1(1).

¹⁵ *Ibid*, s. 137.1(2).

¹⁶ *Ibid*, s. 137.1(3) (emphasis added).

¹⁷ *Ibid*, s. 137.1(4).

Ontario joins Quebec (a civil law province), which has had an anti-SLAPP law since 2009.¹⁸ British Columbia had one briefly in 2001, but it was quickly repealed.¹⁹ The Ontario law has been a long time coming, following repeated complaints about the need for a mechanism to strike out unmeritorious libel actions at an early stage – as now exists in *England's Defamation Act 2013*, which contains a requirement of “serious harm”. Even in the absence of such legislation, however, courts have used special costs awards to deter lawsuits brought for the purpose of stifling public debate²⁰ but it is expected that the Ontario law will provide a strong additional tool to prevent and strike out such abusive actions.

IV. Privacy

Until recently, Canadian privacy law was quite sparse and undeveloped, limited to statutes protecting personal data gathered by businesses and employers²¹, and restrictions on access to information. There is no explicit right to privacy in the *Canadian Charter of Rights and Freedoms*, although some provinces have passed laws protecting, or at least recognizing, a right of privacy – notably Quebec and British Columbia. However, aside from a small number of anomalous decisions, the development of a privacy tort has not occurred in Canadian common law. But this is now changing.

In 2012, the Ontario Court of Appeal recognized, for the first time in Canada, the tort of “intrusion upon seclusion”:²² “One who intentionally intrudes, physically or otherwise, upon the seclusion of another or his private affairs or concerns...if the invasion would be highly offensive to a reasonable person.”²³ That case arose in the context of a bank employee reviewing personal bank records of her husband’s ex-wife. But *Jones v. Tsige* has laid a foundation for the expansion of privacy torts in Canada and, because of the context in which some of these cases has arisen, there is concern that this will support adoption of a “right to be forgotten principle” in Canada.

In *Jane Doe 464533 v. D. (N.)*,²⁴ the Ontario Superior Court of Justice signalled a further expansion of privacy through the recognition, for the first time, of the tort of “public disclosure of embarrassing private facts”,²⁵ the second of the “four-tort catalogue” delineated by Prosser in his seminal 1960 article.²⁶ Adopting language from the *Restatement (Second) of Torts*, the court defined the new tort as publicizing a matter concerning the private life of another, “if the matter publicized or the act of the publication would be highly offensive to a reasonable person and is not of legitimate concern to the public.”²⁷ Private matters protected by the tort could include sexual relationships, family quarrels, or

¹⁸ *Code of Civil Procedure*, CQLR, c. C-25.01, Arts. 51-55.

¹⁹ SBC 2001, c 19.

²⁰ *Scory v. Krannitz*, 2011 BCSC 1344. *Morris v. Johnson*, 2012 ONSC 5824.

²¹ *Personal Information and Protection of Electronic Documents Act (“PIPEDA”)*, S.C. 2000, c. 5.

²² *Jones v. Tsige*, 2012 ONCA 32.

²³ See *ibid* at para. 70. See also S.D. Warren & L.D. Brandeis, “The Right to Privacy” (1890) 4:5 Harv LR 193.

²⁴ 2016 ONSC 541.

²⁵ *Ibid* at para. 36.

²⁶ See William L. Prosser, “Privacy” (1960) 48:3 Cal L Rev 383. The first is intrusion upon seclusion, and the third and fourth torts are “publicity which places the plaintiff in a false light in the public eye” and “appropriation, for the defendant’s advantage, of the plaintiff’s name or likeness”.

²⁷ *Jane Doe*, *supra* at para. 46.

humiliating illnesses.²⁸ The facts disclosed must be private facts – facts not generally known – and the disclosure must be to the public at large – not merely to a small group.²⁹ The court noted that private information “may be more and more rare” in the Internet age, but it is “no less worthy of protection.”³⁰ In this case, the distribution of a sexually explicit video of the female plaintiff without her authorization was found to be “highly offensive” and without legitimate public interest, and was therefore sufficient to establish the cause of action and for an award of C\$100,000 in total damages.³¹

In *Niemala v. Malamas*,³² the British Columbia Supreme Court considered whether snippets from a Google search violated the claimant’s right to privacy under the BC Privacy Act. While the Court held that the case was properly a matter for defamation law, rather than invasion of privacy, the assertion of privacy claims is growing.

V. Search Engines, Jurisdiction and the Right to be Forgotten

Of further interest in *Niemala* is the holding, relying on the Supreme Court of Canada’s well-known hyperlink case (*Crookes v. Newton*)³³, that Google is not a “publisher” when simply being used as a search engine. The Court agreed that Google is a “passive instrument and not a publisher of snippets”.³⁴

However, the British Columbia judge who favoured Google in *Niemala*, took a different approach in ordering an injunction against Google directing it to delist certain websites of the defendants to an action involving alleged disclosure of trade secrets and infringing trademarks³⁵. Although not a party to the action, the BC Supreme Court and Court of Appeal (the highest court in the province) supported a mandatory injunction against Google in *Equustek Solutions Inc. v. Jack*.³⁶

The Court held that it had jurisdiction to make the order against Google in the United States – even though it has no physical presence in British Columbia – because the court had jurisdiction over the underlying action and because Google sells advertising to British Columbia clients. Contrary to *Niemala*, in this context the Court stated that Google’s search websites are “not passive information sites”.³⁷ The BCCA went on to elaborate on Google’s presence in the jurisdiction, responding to submissions of overreaching, as follows:

[54] While Google does not have servers or offices in the Province and does not have resident staff here, I agree with the chambers judge’s conclusion that key parts of Google’s business are carried on here. The judge concentrated on the advertising aspects of Google’s

²⁸ Ryder Gilliland & Thomas Lipton, *Blakes Bulletin*, “Ontario Court Recognizes New Privacy Tort ‘Publication of Embarrassing Private Facts’” (28 January 2016).

²⁹ *Ibid.*

³⁰ *Jane Doe, supra* at para. 44.

³¹ *Ibid* at paras. 47-48, 69.

³² 2015 BCSC 1024.

³³ 2011 SCC 47.

³⁴ *Niemala, supra*, at para. 107.

³⁵ *Ibid* at para. 17.

³⁶ 2015 BCCA 265, aff’g 2014 BCSC 1063. An application for leave to appeal to the SCC was filed on September 10, 2015 and submitted on January 19, 2016; leave to appeal was granted on February 18, 2016.

³⁷ *Ibid* at para. 52, quoting para. 48 of BCSC

business in making her findings. In my view, it can also be said that the gathering of information through proprietary web crawler software (“Googlebot”) takes place in British Columbia. This active process of obtaining data that resides in the Province or is the property of individuals in British Columbia is a key part of Google’s business.

[55] Google says that even if it is concluded that it carries on business in British Columbia, the injunction was not properly granted, because it did not relate to the specific business activities that Google carries on in the Province. In my view, the business carried on in British Columbia is an integral part of Google’s overall operations. Its success as a search engine depends on collecting data from websites throughout the world (including British Columbia) and providing search results (accompanied by targeted advertising) throughout the world (including British Columbia). The business conducted in British Columbia, in short, is the same business as is targeted by the injunction.

[56] Google raises the specter of it being subjected to restrictive orders from courts in all parts of the world, each concerned with its own domestic law. I agree with the chambers judge that it is the world-wide nature of Google’s business and not any defect in the law that gives rise to that possibility. As well, however, the threat of multi-jurisdictional control over Google’s operations is, in my opinion, overstated. Courts must, in exercising their powers, consider many factors other than territorial competence and the existence of *in personam* jurisdiction over the parties. Courts must exercise considerable restraint in granting remedies that have international ramifications. I turn, then, to consider the nature of that restraint.

The Court also addressed the concern about comity:

[91] I have already noted that this case exhibits a sufficient real and substantial connection to British Columbia to be properly within the jurisdiction of this Province’s courts. From a comity perspective, the question must be whether, in taking jurisdiction over this matter, British Columbia courts have failed to pay due respect to the right of other courts or nations. The only comity concern that has been articulated in this case is the concern that the order made by the trial judge could interfere with freedom of expression in other countries. The importance of freedom of expression should not be underestimated. As the Canadian Civil Liberties Association has said in its factum:

A nation’s treatment of freedom of expression is a core part of its self-determination, rooted in the nation’s historical and social context, and the ways in which its constitutional values (whether written or unwritten), norms and legal system have evolved.

[92] For that reason, courts should be very cautious in making orders that might place limits on expression in another country. Where there is a realistic possibility that an order with extraterritorial effect may offend another state’s core values, the order should not be made.

[93] In the case before us, there is no realistic assertion that the judge’s order will offend the sensibilities of any other nation. It has not been suggested that the order prohibiting the defendants from advertising wares that violate the intellectual property rights of the plaintiffs offends the core values of any nation. The order made against Google is a very limited ancillary order designed to ensure that the plaintiffs’ core rights are respected.

[94] I note, as well, that the order in this case is an interlocutory one, and one that can be varied by the court. In the unlikely event that any jurisdiction finds the order offensive to its core values, an application could be made to the court to modify the order so as to avoid the problem.

The reactions against the decision have been fierce and frequent. One commentator refers to the ruling as “dangerous” and states that “[n]o single country should have veto power over Internet speech.”³⁸ Others have described it as “disastrous” given its “implications for Canadian business abroad.”³⁹ Even more optimistic reactions have affirmed the need to consider freedom of expression: “The initial position should be that any prior restraint of speech...offends free speech principles.”⁴⁰ There are similar concerns about practical effectiveness of such orders.⁴¹

The Supreme Court of Canada has granted leave to appeal in *Equustek*, so it will be a case to watch for next year.

The reach of the injunction in *Equustek* also raises concerns if a “right to be forgotten” is developed in Canada. Recently, the federal Privacy Commissioner issued a Discussion Paper on Online Reputation⁴² which squarely raises whether the European “right to be forgotten” principle should become part of Canadian law. The Law Commission of Ontario may also consider this in its recently commenced review of defamation law.⁴³ High-profile cases on cyber-bullying, revenge porn and concerns about the loss of “practical obscurity” are all being cited in support of more robust control over personal data. The battle looms.

³⁸ Vera Ranieri, “Canadian Court Affirms Global Takedown Order to Google” (12 June 2015), *Electronic Frontier Foundation*, online: <<https://www.eff.org/deeplinks/2015/06/canadian-court-affirms-global-takedown-order-google>>.

³⁹ Julius Melnitzer, “B.C. Ruling on Jurisdiction over Google ‘Disastrous’” (22 June 2015), *Law Times*, online: <http://www.lawtimesnews.com/201506224763/headline-news/b-c-ruling-on-jurisdiction-over-google-disastrous?utm_medium=Email&utm_campaign=CLNewswire_20150622&utm_source=Act-On%20Software&>.

⁴⁰ Emily Laidlaw, “Worldwide Delisting from Google Search Results: The Significance of *Equustek Solutions Inc. v. Google Inc.* (25 June 2015), *ABlawg.ca*, online: <http://ablawg.ca/wp-content/uploads/2015/06/Blog_EL_Equustek_June2015.pdf> at 4.

⁴¹ H. David Edinger, “How Far Can a Court Reach Across the Internet?” (2014), online: <http://www.singleton.com/~media/Files/Publications/Across%20the%20Internet_EDINGER_FALL2014.ashx> at 7.

⁴² Available at www.priv.gc.ca.

⁴³ See www.lco-cdo.org.