

### Canada: When the fight for freedom of expression is not enough to defend the freedom of the press

#### Executive summary

The distinction between freedom of expression and freedom of the press is becoming increasingly relevant in a context such as that of Canada. While there is a consolidated democracy and functioning checks and balances, new challenges to journalism arise in a world where digital platforms gain greater economic power and influence on the public, mainstream media are declining and have less impact, and historically marginalized groups, such as native peoples, defend their territorial, political, and cultural interests.

#### Introduction

Upon reviewing the status of freedom of expression and the press, we must bear in mind that the political and administrative organization of Canada is different from that of Latin American countries. The first thing to factor in is that the body that has the most impact on the electronic media and telecommunications industry is the Canadian Radio-television and Telecommunications Commission (CRTC), which acts as an administrative court independently from the other branches of government. Although it is part of the government of Canada, since its decisions have a federal scope, its actions are not influenced by any other administrative authority.

The legislative branch (parliament) is the body that approves the federal budget, which mainly affects the funding of the two major public broadcasting conglomerates: Canadian Broadcasting Corporation (CBC) and Radio-Canada. By means of budget allocation, the government (i.e., who controls the parliamentary majority or can achieve a majority vote in what is known as a minority government) has some leverage over the policies of these public media conglomerates; but their respective programming and editorial policies are independent from who holds the Executive.

The Judiciary in Canada also has an impact on the issue of freedom of expression, especially in cases of defamation or instigation to hate and, on certain occasions, regarding access to or protection of sources of information. These matters are heard both in federal and provincial courts, which further complicates discerning their role in issues relating to freedom of expression and the press.

The Canadian constitutional framework and the influence of federal and provincial authorities on these issues should also be taken into consideration. Each province has its own parliament and passes laws that potentially have an impact on issues of freedom of expression and freedom of the press. For example, there has recently been a debate

taking place in Quebec about a law that seeks to ban public officials from wearing religious symbols.

From a constitutional point of view, freedom of expression is enshrined in the Canadian Charter of Rights and Freedoms. However, it is a right that is subject to restrictions as provided for by the law within the framework of a free and democratic society, especially as it relates to the prevention of hate propaganda, defamation, discrimination, and other matters. As it can be noted, it is not an absolute right as set forth in the U.S. Constitution.

Finally, there are entities that, albeit not governmental, have an impact on freedom of expression issues. Among them, we may include the Conseil de Presse du Québec ([Quebec Press Council] only in that province) or the Canadian Broadcast Standards Council (which gathers private radio stations), in a capacity of courts of honor (tribunaux d'honneur) as well as in hearing public complaints regarding editorial policies and conduct of journalists.

The period covered in this report is marked by the federal election held on October 21, 2019, which changed the correlation of political forces in Canada. Prime Minister Justin Trudeau (Liberal Party) was able to form a minority government, that is, without an absolute majority in parliament. Therefore, from that moment on, he needed the votes or abstention from other parties to pass laws and advance his policies, especially the New Democratic Party (NDP, center-left) and the pro-sovereignty Bloc Québécois (Quebecer Bloc).

The 2019 election campaign itself showed some important trends regarding freedom of expression and citizen participation, especially in view of the influence of social media, as we will see below.

In recent years, Canada has also witnessed fluctuations in freedom of the press rankings. As we will further review below, these fluctuations are regarding access to official information sources and court actions on issues related to the protection of the anonymity of journalists' sources, which have sometimes resulted in rulings for the protection of that right of newsmen.

In general, it can be stated that Canada is a country where freedoms of expression and the press are upheld. Some recent challenges have to do with the growing influence of social media, the economic decline of the mainstream press, the concentration of media ownership, and the funding of the public broadcasting ecosystem, as we will detail herein.

## **Analysis of results**

### **Overall rating**

Canada has an overall Free Speech Index of 71.4 out of 100, thereby placing it as a country with low restrictions on the free exchange of information and ideas. However, this does not mean that Canadian society is not facing problems that are common to other societies with consolidated democracies. As Gazendam *et al* (2020) have pointed out, "The Canadian news media is facing an existential threat that, unlike fake news or the rise of social media — or indeed the shuttering of entire publications — is flying under the radar. The conflation of freedom of expression and freedom of the press, while seemingly innocuous, is imperilling the very existence of our news media".

The authors of the above piece emphasize that the press plays an important role that cannot be protected by the right to freedom of expression alone, especially in these times of crisis (Gazendam *et al*, 2020). They point to several landmark precedents, in which journalists' access to the places of events has been restricted, such as during the protests against the construction of the gas pipeline passing through the territory of the Wet'suwet native people, where the Royal Canadian Mounted Police (RCMP) implemented a "media exclusion" zone.

Gazendam *et al* (2020) also cite as examples several cases filed with different (provincial and federal) courts nationwide, one in which reporters claimed the right to enter a courthouse while proceedings were in progress, as well as another matter of a journalist who filed an appeal seeking to avoid the disclosure of documents obtained from a confidential government source.

As recalled in their article, in 2018, a concurring opinion by four justices to the Supreme Court of Canada posited that it was time for freedom of the press to be recognized and protected as a right other than free speech. The justices stated that "the generous protections designed to facilitate the healthy functioning of our democracy," provided for in the Canadian Charter of Rights and Freedoms, "are incomplete" if merely restricted to an individual realm, and that "strong, independent and responsible press ensures that the public's opinions about its democratic choices are based on accurate and reliable information. This is not a democratic luxury—there can be no democracy without it" (as quoted by Gazendam *et al*, 2020).

Notwithstanding, the rulings in the last two cases ordered to disclose documents obtained confidentially in service of suppression of crime.

## **Environments**

### **Executive**

The executive branch in Canada is formed by the cabinet of ministers headed by the prime minister. The Executive is accountable to the federal parliament, so it requires a

majority vote of its members to pass laws, implement its policies, and stay in power. The moment it loses the confidence of the parliament, that is, the defeat of a motion of confidence, leads to the dissolution of the parliament and the call for a new election.

When assessed under the Chapultepec Index, the Canadian Executive exerts a moderate influence (4.11) on freedom of expression and the press. As we mentioned in the introduction, the government that resulted from the October 2019 election is in the minority, and depends on agreements with other opposition parties so that it can implement its policies. In this regard, it is a more diminished executive branch and more subject to parliamentary control.

The previous parliament (2018-2019) increased funding for CBC and Radio-Canada public broadcasting ecosystem by 0.5% (CBC, 2019). This is in line with a recent trend by the Liberal Party government to increase public funding for the national broadcasting system, in a departure from the Conservative Party government, which cut funding for the public media system.

However, some observers of freedom of expression and the press think that "The biggest problem in Canada is a negative attitude towards being open, a lack of political will to really open up government and to embrace the benefits that that brings," as Centre for Law and Democracy Executive Director Toby Mendel told CTV News (Bogart, 2020).

## **Legislative**

As mentioned above, the executive and legislative branches in a parliamentary system like that of Canada act in a fairly coordinated manner, since the survival of government depends on maintaining a parliamentary majority as is the case when there is a minority government.

The legislature also exercises checking powers over the policies of the executive through its various parliamentary committees.

The Chapultepec Index shows that the influence of the Legislative is moderate (4.04). However, this does not mean that via legislation – such as approval of funds for the public media system – or other policies – such as tax exemptions for certain media outlets – the parliament does not have some direct or indirect influence on freedom of expression or that of the press.

On the other hand, parliament passed what is called a "shield law" to protect journalists who do not wish to reveal their confidential sources in cases being litigated before the Supreme Court (Bogart, 2020). Nevertheless, as we will see below, this has not been guaranteed at other levels of the judiciary.

## **Judicial**

Although the influence of the judicial environment on the Chapultepec Index appears to be moderate (4.01), it is probably from this branch that the most controversy has arisen regarding the defense of freedom of expression and the press. This does not mean that the judicial branch – both federal and provincial – plays an obstructive role with respect to freedoms, but rather that it is the branch where matters affecting the work of journalists and the media are brought and settled.

The case of Radio-Canada journalist Marie-Maude Denis, who refused to reveal confidential sources in a probe into political corruption, stands out. The Supreme Court of Canada found for the journalist, and ruled that, without the protection of sources, she could not be judged fairly and equitably (Denoncourt, 2020).

Also noted is the case of the VICE magazine journalist who was ordered by the Ontario Superior Court of Justice to produce to law enforcement his private communications with a source suspected of terrorism (Bogart, 2020).

## **The realms**

### **Realm A**

The overall indicator for this realm (informed citizens free to express themselves) has a relatively high score (16.2 out of 23). The most recent survey by Ryerson University's Social Media Lab shows that the majority of Canadian adults (94%) have an account on at least one social media platform, which has implications for public policy makers and those who want to know how Canadians connect to platforms, according to Anatolly Gruzd, one of the report's authors (Social Media Lab, 2020).

As the authors of the report indicate (Gruzd & Mai, 2020), social media are becoming increasingly important at a time when people must keep their physical distance because of COVID-19, and the public is using digital media more. Does this mean that people are better informed? Another study showed how social media became sources of misinformation and disinformation during the 2019 election campaign, especially fake stories about Prime Minister Justin Trudeau, which provoked reactions on the mainstream media (Dubois & Owen, 2020). It is also noted that the "quality" of opinion on social media is marked by what it calls "digital toxicity" associated with negative expressions that can have damaging effects on Canadian democracy (Dubois & Owen, 2020).

The Chapultepec Index also reveals that Canada-based survey respondents believe that all three environments exert a moderate to strong influence on the public's ability to express their opinions and stay informed, with a score ranging from 5.88 to 6 with regard to information flow. Additionally, the environments also show a strong influence when it comes to the public's right to free expression: a score ranging from 6.25 in the legislative environment, stemming from its authority to enact laws and check the Executive; 5.5 in the judicial environment (the authority to go to court); and 4.75 in the executive

environment – the most moderate of the three, in reason of its rather tempered influence on government once elected.

## **Realm B**

A relatively low restriction on the exercise of journalism is shown by the Chapultepec Index (7.4 out of 10). Respondents revealed that the influence of all three environments on this realm is moderate (from 3.28 to 4.22), which probably reflects an increasing loss of power of "old order" mainstream media, with a less valued social role of journalists. In this regard, Professor Bernier (2017) notes, with respect to the emergence of social media and citizen journalism, that "to the old media order, which is strongly organized and institutionalized, a new order, or a disorder, is added. Circumstances, as well as the personality, interests, and competence of citizens can make it an effective and democratic accountability mechanism".

However, in University of Ottawa professor Bertrand Labasse's musings (2020), what quality of information are we talking about, when an inconsequential YouTube video gets millions of clicks, but World Bank reports are barely consulted by a couple hundred people, works by recipients of the Nobel Prize for literature are not the most translated in the world, or people prefer opinions of so-called "influencers" to information fact-checked by professional journalists.

## **Realm C**

This realm, which refers to violence and impunity, appears to be underrated. Its overall score is 24.2 out of 42, and the influence of the three environments on it is 3 points (moderate). Although we do not have all the elements to be able to draw a conclusion, we believe that recent events associated with prosecution involving access to information sources (see section on the judicial environment) and even restrictions by the RCMP on access to the location where news is unfolding (for example, gas pipelines or land in dispute with native communities), may have contributed to a perception of greater violence and impunity against reporters. In fact, subrealm protective (5.6 out of 10) and subrealm impunity (3.6 out of 17) have very low scores for a context such as that of Canada. It can be stated that these sub-realms may be overrated due to negative perceptions on these events. On the other hand, subrealm persecution achieved a high score (15 out of 15), which shows the mobilization of journalists and society in defense of their rights.

## **Realm D**

The realm regarding control over the media is well rated in a democratic country like Canada, with functioning checks and balances, and in which the rights of freedom of

expression and the press are generally respected, with the exceptions or situations we have mentioned above.

The perception of Canada-based respondents is that there is virtually no direct (15.2 out of 16) or indirect (8.4 out of 9) control over the media in the country. However, when assessing the role of the government environments regarding control over the media, the three branches (Executive, Legislative, and Judiciary) are perceived to exert a strong influence for direct control, and a slight influence for indirect control. How should these indicators be interpreted? One possible view is that the executive, legislative, and judicial environments potentially have the capability to influence the media, but refrain from doing so because of the checks and balances and the rule of law prevailing in the country. It could also be argued that the fact that the Liberal government – both a majority in its first term and in its current minority nature – has increased the budgets of the public media ecosystem may be part of a relatively positive perception, especially since CBC and Radio-Canada keep editorial policies independent of the executive, judicial, or legislative branches. In contrast, indirect influence is much less likely, as the same legal guarantees and human rights limit the action of the branches of government in this regard.

## Conclusions

Although Canada has a consolidated democracy that guarantees freedom of expression, this does not always translate into the protection of that of the press, namely, the freedom of journalists to access and protect their sources, to access the location where news is unfolding, and to exercise their profession under economic and institutional guarantees, in a context of declining mainstream media and rising social media.

As in other countries, the public is taking an increasingly active role in gathering, processing, and disseminating information. Nevertheless, this is not a guarantee of fair and balanced information. Access to social media also results in the dissemination of emotionally charged opinions that sometimes spread "digital toxicity" possibly causing greater polarization, confrontation, and weakening of democratic behavior.

Recent instances of prosecution affecting the respect for the confidentiality of sources, restrictions on access to locations where news is unfolding, and the overall decline of the news media sector, to the benefit of digital platforms, represent important challenges for the defense of freedom of the press in Canada. Defending this right is fundamental to democracy and to upholding the freedom of expression of all citizens, especially historically marginalized groups such as native peoples.

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