



**Canadian Media Guild**

**La Guilde canadienne des médias**

CWA/SCA CANADA

**Do No Harm:**

**Why Parliament should vote down Bill C-461**

A submission by the Canadian Media Guild

To the Standing Committee on Access to Information, Privacy and Ethics

Friday May 17 2013

Bill C-461 should be voted down by Parliament. As a supposed attempt to improve transparency and accountability it is ill-conceived, unclear, incomplete and potentially harmful to the freedom of expression rights and the competitive position of the biggest news organization in Canada.

### **The Canadian Media Guild and the Right to Information:**

The Canadian Media Guild represents 6,000 journalists and other media workers at ten media outlets across Canada. We are the largest bargaining unit at CBC/Radio-Canada.

We share the concerns of many Canadians about transparency and access to government information. In fact, we participated in consultations prior to the creation of the original Access to Information law. We support comprehensive reform of the Access to Information Act (ATIA) – reforms promised by the governing party in 2006 but never delivered – in order to bring us into the digital age and restore Canada’s former leadership in this field. We fully agree that CBC’s corporate information and information about general administration should be available in a timely fashion to the public. But we absolutely disagree with removing the exclusion of information and documents related to CBC’s journalistic and creative programming that is enshrined in the current Access to Information law.

### **A Hidden Agenda**

We are concerned that the impetus behind Bill C-461 is to strengthen the hand of the CBC’s media competitors and to weaken the Corporation’s journalistic integrity and ability to protect its confidential sources.

If the supporters of this bill really want the Access to Information system to work better - and we would agree that this is desperately needed - then they should bring forward a comprehensive package for reforming the Act, with careful consideration for how it intersects with the Privacy and Broadcasting acts. For example, the House of Commons and the Senate should be put under the act as they are in most modern freedom to information laws and in other parliamentary democracies. The Cabinet should not enjoy a blanket exclusion. Nor should AECL. The Information Commissioner should receive order-making powers. Exemptions should be reduced. This would be valuable work for this Standing Committee to undertake. But Bill C-461 does none of this.

If one of the objectives of C-461 is to achieve greater transparency about the salaries paid to employees of Crown Corporations, of which the CBC is only one, as well as those of government departments and agencies, then it should address that directly and comprehensively, naming all the departments, corporations and agencies involved and thoroughly examining the relevant privacy issues. It is not appropriate to support C-461

simply on the basis that it might, indirectly, lead to the release of salary information across the public service. In fact, as a public broadcaster - whose mandate under the Broadcasting Act must be considered and whose inherent free expression rights must be respected - the CBC requires special treatment relative to other government-funded bodies.

Bill C-461 cannot be salvaged, even by extensive amendments. The government and Parliament have no place in the newsrooms of the country. Bill C-461's turns an outright exclusion for CBC journalism into an exemption based on an injury test that could be fought by each applicant in court. This would place conditions on CBC's journalism that exist for no other news organization in Canada. This is an affront to the principle of freedom of the media. Some have argued that such demands of the CBC would be unconstitutional.<sup>1</sup> Bill C-461 moves further away from what is really needed: additional measures to ensure CBC's independence from the government and powerful interests.

### **The Bill Does Not Clarify - It Is Not Needed**

In the years immediately after the CBC was put under the Access to Information Act in 2007, the corporation admittedly experienced serious problems in responding to access requests in a timely fashion. That problem has been rectified, as exemplified by the "A" grade recently awarded to the CBC in the most recent report card by the Information Commissioner of Canada.

When we last appeared before the committee in October 2011 on the issue of the CBC and Access to Information, the CBC was in federal court with the Information Commissioner to clarify section 68.1 of the Access to Information Act (ATIA). We noted then that it was a curious time to study CBC and Access to Information, before the federal court had an opportunity to weigh in. Now, Bill C-461 is before Parliament as though the Federal Court of Appeal had not spoken in November of 2011, clarifying the meaning of that section.

Because of the Federal Court and the Federal Court of Appeal decisions, there is no longer any lack of clarity about section 68.1 of the ATIA. The proof is that since the ruling the CBC is resolving complaints, without problems or difficulties, with the Office of the Information

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<sup>1</sup>Trudel, Pierre et France Abran, "The Constitutional Obligation to Finance the CBC in a Way Consistent with Editorial Freedom", [1996] 7 *National Journal of Constitutional Law*, 43-91.  
<https://depot.erudit.org/bitstream/002693dd/1/0070.pdf>

Commissioner at the pace that her office can accommodate. The current legislation is now working. The wording in the act has been clarified by several years of deliberations by the courts. To introduce C-461 is to wipe out these years of deliberation and introduce changes that are, once again, vague and unclear. We are convinced that should this bill pass, it will be subject to additional and unnecessary court procedures – all at Canadians’ expense.

Furthermore, we maintain that the current exclusion in section 68.1 of the ATIA is appropriate and warranted. The Parliamentary Secretary to the Minister of Justice has admitted that “there is no doubt that an exclusion offers the highest level of protection for information<sup>2</sup>.” He suggests his government would like to reserve it for the protection of confidential sources. We note, however, that an exclusion is the preferred way that the United Kingdom, Ireland and Australia protect all of the journalistic, creative and programming activities of their public broadcasters. We believe Canada deserves no less: the maintenance of the current, high level of protection offered by an exclusion for all of the CBC’s journalistic, creative and programming activity.

### **Protecting Confidential Sources**

When we discuss the issue of confidential sources, the reputation of journalists and their media outlets depends on their ability to keep up their end of the bargain. Up to now, under the ATIA, the courts have recognized that the CBC has an absolute right to exclude information about confidential sources. Supreme Court of Canada decisions have also strengthened the right of journalists to protect their sources in non-ATIA cases. By making it possible for ATI and Privacy Act applicants to get a hold of CBC journalists’ notebooks and other documents in court, Bill C-461 would make impossible to guarantee confidentiality to sources. CBC’s journalism, and thus a great deal of information available to Canadians, would be damaged by making potential sources and whistleblowers understandably reluctant to come forward for fear their names would come out in court.

The Parliamentary Secretary to the Minister of Justice, Mr. Robert Goguen has stated: “it is the government's belief that information that would reveal the identity of confidential journalistic sources should continue to be excluded from the act.” He went on to note that the ability of the media to protect the identity of confidential sources is “a pillar of journalism.”<sup>3</sup>

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<sup>2</sup> House of Commons Debates, #229 - 41<sup>st</sup> Parliament, Ottawa, March 26, 2013.  
<http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=6065804>

<sup>3</sup> Ibid.

On this the government appears to be echoing the position of Canadian Journalists for Free Expression (CJFE) who similarly wonder, if C-461 is passed, “what whistleblower would approach a CBC reporter? How could CBC journalists in good faith promise to protect their **sources**? How could the CBC conduct investigative journalism and hold those in power to account?<sup>4</sup>”

We agree with the government’s assessment that the current wording of C-461 “would not allow the CBC to provide its confidential journalistic sources with an ironclad guarantee of continued anonymity.” However, the solution is not to amend C-461 so that the CBC can better protect its confidential sources. Once again, this is simply not necessary. The Federal Court of Appeal explained in 2011 that the current exclusion, section 68.1, is clear: “the exclusion for journalistic sources ... is absolute.”<sup>5</sup> In fact, the logic of amending C-461 in this way is simply a means of rescuing the bill from certain legal challenges. As will be apparent below, there are so many other reasons why C-461 should not be passed that unneeded amendments should not be used as a strategy to keep it alive.

### **Broader protection for the operational details of journalism and the CBC’s competitive position in the marketplace**

Journalists jealously guard their sources, but also their notebooks, their emails, their research materials and their investigative strategies. In order to safeguard the integrity of the CBC’s journalism we are not just talking about protecting sources. It is the whole process of making journalism that must be protected: the identification of stories; the collection of information and evidence; the assembling, analyzing and selection of material; the production of reports and documentaries; their presentation, broadcast or data-streaming; and finally the evaluation of the whole process. There are many operational details, personnel issues and budgetary outlays directly related to such a journalistic, creative and programming process. Bill C-461 offers no absolute protection for this set of elements, even when their disclosure could seriously harm the reputation and functioning of CBC journalism.

Part of the problem is that the bill’s proposed exemption requires the CBC to prove harm would be done to its journalistic, creative or programming “independence.” The term “independence” in the bill is far from clear and adequate. By one dictionary definition of the word independence (“not relying on others for livelihood”) the CBC is clearly not

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<sup>4</sup> *Review of Free Expression in Canada 2012-2013*, Canadian Journalists for Free Expression, Toronto, May 3, 2013, p.24. <http://cjfe.org/2013review>

<sup>5</sup> <http://decisions.fca-caf.gc.ca/en/2011/2011fca326/2011fca326.html>

independent since it is substantially funded by the government. Therefore the change would put the onus on CBC to prove harm to an unclear notion of independence; the applicant doesn't need to prove anything about their need to know and why that need trumps the public interest. This is a radical change to the balance of interests that went into the creation of the Act.

The *Broadcasting Act* expects the CBC to enjoy editorial freedom from Parliament and the government. But, for example, could a private mining corporation argue that the CBC's "independence" is not injured by the release of information about a rival mining company? Bill C-461 does not adequately protect the editorial freedom, journalistic integrity and operational independence of the CBC.

And that is what is needed for the CBC to carry out its mandate to deliver public service journalism. The corporation was set up with the expectation that it would compete independently in the media marketplace. But it loses the ability to fulfill that mandate if operational details relating to journalistic, creative or programming activities are disclosed while the same information is protected for private media firms. In the interest of fairness and ability to compete in the media marketplace, the CBC must have some protection over such information. Otherwise, in the interest of a level playing field, all other media outlets should be required to release the same kind of information.

As Professor Pierre Trudel, a long-time observer of the CBC and access legislation, explains: "from the moment it was decided that the CBC is part of the broadcasting system, it became important to ask whether we were willing to force all broadcasting companies to subject themselves to the Access to Information Act. If that isn't the case, we will have to go back to the exclusion."<sup>6</sup>

We agree with the analysis of Canadian Journalists for Free Expression (CJFE) that Bill C-461 jeopardizes the CBC's ability to accomplish its mandate:

To carry out that mandate, CBC journalists must be able to conduct research and prepare programs without pressure to disclose the results prematurely or surrender operational details. The corporation must be able to acquire broadcasting rights and creative content without being required to disclose negotiating positions or strategy. In this respect, arm's-length public

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<sup>6</sup> Evidence, House of Commons Standing Committee on Access to Information, Privacy and Ethics, October 25, 2011, by Pierre Trudel. <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=5194388&Language=E&Mode=1>

broadcasters differ from government departments. That is why other parliamentary democracies protect these broadcasters with exclusions.<sup>7</sup>

## **Privacy Issues**

At least as concerning are the changes in C-461 to the Privacy Act as they would totally undermine journalism involving investigations on individuals. We are not at all clear on the motivation for removing CBC's right to exclude information collected for the purposes of journalism from the Privacy Act. The effect, however, would be to allow deep-pocketed targets of CBC News investigations to tie CBC up in court trying to get at whatever information the journalists have on them even before a report is broadcast.

Does Parliament really want to hand mobsters, tax evaders and corporate fraudsters – to name just a few groups of people recently targeted by CBC/Radio-Canada probes – the tools to shut down journalistic investigations and identify the sources?

Again, no other news organization in Canada would be subject to such rules.

## **Conclusion and Summary**

Investigative journalism is an expensive enterprise, requiring a significant investment of time, money and other resources. It is a natural fit for a public broadcaster, whose primary mandate is to serve the public and not provide a return to investors. However, under the failing conditions described above, and in the context of ongoing budget cuts, the CBC decision-makers might rightfully step back from committing resources to this crucial public service

We have demonstrated that Bill C-461 stands to do more harm than good for Canadians' access to information by hobbling the largest news organization in the country, CBC/Radio-Canada.

- The status quo, which is an exclusion from ATIA for CBC's journalistic and creative activities, is the best protection. An exemption opens the door to disclosure that could do damage to CBC journalism.

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<sup>7</sup> *Bill C-461 threatens CBC journalistic integrity and protection of sources*, Canadian Journalists for Free Expression, Toronto, March 21, 2013. <http://cjfe.org/bill-c461>

- While the existing law is now clear, Bill C-461 introduces new ambiguities and legal problems that would tie up precious public resources in the courts for years to come for no good reason. In the meantime, CBC/Radio-Canada would be unable to provide ironclad protection to its journalistic and information sources.

This bill, even with amendments is dangerous. That's why we fervently hope that Bill C-461 goes no further.

By passing the bill, Parliament would send the message that it wants to make CBC/Radio-Canada's journalistic activities less viable and harm Canadians' access to information. The public broadcaster and news organizations in general have a significant influence on the national conversation. Does this government really want to be remembered for clamping down on information flow in this country?

*The Canadian Media Guild represents 6,000 journalists, hosts, producers, technicians, videographers, editors, librarians, programmers, sales reps, administrative staff and freelancers. We believe that a quality media system that serves all Canadians is built on organizations that treat workers fairly.*

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