



June 17, 2008

BY ELECTRONIC MAIL

London Public Library Board
251 Dundas Street
London, Ontario N6A 6H9

Dear Sirs and Mesdames:

Re: Filtering of Internet Content in the London Public Library

The Canadian Internet Policy and Public Interest Clinic (CIPPIC) is a legal clinic based at the University of Ottawa. Since the fall of 2003, CIPPIC has been engaged in research and advocacy on a number of issues involving law and technology from a public interest perspective. Our mission is to fill voids in public policy debates on technology law issues, ensure balance in policy and law-making processes, and provide legal assistance to under-represented organizations and individuals on matters involving the intersection of law and technology. Copyright law reform has been a focus of our study and advocacy throughout our existence.

We have become aware of the London Public Library's (the "Library") project to filter internet content in its public-access internet terminals. We write out of concern that, in its zeal to provide a safe environment for library patrons, the Board has imposed an impermissibly restrictive approach to the filtering of the internet that violates the Canadian Constitution's protection of freedom of expression as enshrined in s. 2(b) of the *Charter of Rights and Freedoms*.¹

In this letter, we offer our views on the constitutionality of the London Public Library's efforts to filter the communications of Library patrons. In Part I, we will briefly discuss the importance and role of freedom of expression within Canada's Constitution and situate public libraries within that framework. In Part II, we will describe our understanding of the Library's filtering practices. In Part III, we will provide you with our analysis of the constitutionality of those efforts. We will conclude with some comments about how the Library might go forward with its mission of providing a safe environment for library patrons while at the same time respecting the constitutional rights of Library patrons and fulfilling the Libraries' traditional mandate to serve the public.

Part I Freedom of Expression and Libraries

Section 2(b) of the *Canadian Charter of Rights and Freedoms* guarantees to everyone the

¹ *Canadian Charter of Rights and Freedoms*, s. 2(b), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c.11, [hereinafter *Charter of Rights and Freedoms* or *Charter*].

fundamental freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication. Freedom of expression fulfils several core values fundamental to democratic nations such as Canada:

- (1) Freedom of expression promotes the free flow of ideas essential to political democracy and democratic institutions and limits the ability of the state to subvert other rights and freedoms.
- (2) Freedom of expression promotes a marketplace of ideas, which includes, but is not limited to, the search for truth.
- (3) Freedom of expression is intrinsically valuable as part of the self-actualization of speakers and listeners.²

Freedom of expression guarantees more than merely speech: it privileges *communication* – the interests of both the conveyer and recipient of expression. The Supreme Court has accordingly employed s. 2(b) to strike down state regulation of expression that “denies or restricts access of consumers to information that is necessary or relevant.”³

The Supreme Court of Canada places enormous value on freedom of expression. As the Court noted in an early *Charter* case, “Freedom of expression is one of the fundamental concepts that has formed the basis for the historical development of the political, social and educational institutions of western society.”⁴ Situated in the library, patrons’ use of library resources and services to access information constitute activity targeted by the *Charter’s* guarantee of freedom of expression.

The mandate of public libraries lies at the core of the values freedom of expression protects. The Canadian Library Association’s *Statement on Intellectual Freedom* states that:

It is the responsibility of libraries to guarantee and facilitate access to all expressions of knowledge and intellectual activity, including those which some elements of society may consider to be unconventional, unpopular or unacceptable. To this end, libraries shall acquire and make available the widest variety of materials.⁵

Public libraries thus provide the public with access to information and are an essential part of any literate community. Public libraries’ historical and modern function is to provide patrons with means of accessing information in an environment free of scrutiny and criticism and to do so under conditions that offer anonymity to patrons who so desire it when searching for sensitive information. A public library serves as a historical and modern symbol for a marketplace of ideas, where the public can have free access to a variety of materials. The mandate of a public library therefore rests close to the core values enshrined in our constitutional protection of freedom of expression.

² *R. v. Keegstra*, [1990] 3 S.C.R. 697.

³ *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232 at 247.

⁴ *Retail, Wholesale and Department Store Union, Local 580 et al. v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573 at 583.

⁵ Canadian Library Association, *Position Statement on Intellectual Freedom*, November 18, 1985, <http://www.cla.ca/AM/Template.cfm?Section=Position_Statements&Template=/CM/ContentDisplay.cfm&ContentID=3047>.

One of the many services public libraries offer is internet access. This service has enormous practical value: many patrons come to the library for the purpose of doing research online, and many others have no other means of accessing the internet. Some patrons enjoy internet access elsewhere but use the library's resources due to the personal nature of the information they seek, and the safe harbour the library provides for such research.

Part II: Internet Filtering in the London Public Library

At its May 2007 meeting, the London Public Library Board voted to adopt the Internet Policy Review Project, the purpose of which was to review the balance of filtered and unfiltered computers in the Library to determine an appropriate balance of filtered and unfiltered machines.⁶ This report indicated that the Library has received “negative comments on an infrequent but regular basis”⁷ from patrons (“customers”)⁸ regarding the viewing of sexually explicit or extremely violent images by other patrons.

The report also states that the London Public Library is striving for an environment that is inviting and welcoming, where everyone can feel comfortable, and one in which the Library does not restrict access to information that is valuable for their patrons, including information on both sides of controversial issues that may not be of a popular viewpoint or opinion.⁹

As stated on the London Public Library's website:

This project is not about restricting intellectual freedom. It is about reducing the risk of unintentional exposure of customers to images, on computer screens in the library, that are not appropriate in a public space, specifically images that are violent or sexually explicit in nature, without compromising access to information such as consumer health or sexual education resources. It is very important to the Library that we provide a welcoming space and positive experience for our customers, while ensuring they have access to the information they need.¹⁰

The Library maintains that unfiltered access will still be available at every branch, with a minimum of one unfiltered workstation in all community branches and a minimum of six unfiltered workstations at the Central location.¹¹ The filtering software used by the Library is provided by Netsweeper, and allows the Library to select filter criteria. The Library has chosen to filter extreme violence and sexually explicit images.¹² The Library does not control the content of the criteria at even a general level: the Library can choose to block categories of content, but has no say in whether any particular content is slotted within a particular category, and has no ability to scrutinize or adjust the categorization process.

⁶ Anne Becker, “Internet Policy Project Plan” (Report Presented to the London Public Library Public Session, 16 May, 2007) <http://www.londonpubliclibrary.ca/files/u3/aboutmylibrary/boardreports/may2007/Internet_Policy.pdf> [Becker].

⁷ *Ibid.*

⁸ It is telling that the Library chooses to characterize patrons as “customers”, language that simultaneously devalues the Library's mandate while stripping patrons of characteristics located at the core of values inherent in Canada's constitutional protection of freedom of expression.

⁹ Becker, note 6 above.

¹⁰ London Public Library, Internet Filtering Pilot Project Update <<http://www.londonpubliclibrary.ca/node/353>>.

¹¹ *Ibid.*

¹² London Public Library, Internet Filtering Pilot Project Information Release <<http://www.londonpubliclibrary.ca/node/353>>.

If a patron wishes to visit a particular site that is blocked by the filter, they are invited to submit the URL to Library staff, who will submit it for consideration by Netsweeper. Netsweeper will decide within a few business days whether to unblock the site.¹³

Part III: Constitutional Analysis

Canada's Constitution provides for fundamental rights and freedoms that the state may not infringe unless such infringement is justifiable, under s. 1 of the *Charter*, as demonstrably justifiable in a free and democratic society. The Constitution is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.¹⁴ Our analysis thus must answer two questions:

- (1) Does the Library's filtering of patron internet access infringe s. 2(b)'s guarantee of freedom of expression?
- (2) If so, is that infringement "saved" under s. 1?

(1) *Does the Library's filtering project violate the right of freedom of expression?*

Section 2(b) protects not only the speaker, but also privileges the communication itself. This includes the right to access and receive information from others. As noted in the *Canadian Encyclopaedic Digest*, "the Constitution protects the right to receive expressive material as much as it does the right to create it. Section 2(b) protects listeners as well as speakers".¹⁵ The internet is commonly accepted as the largest database of information available; it serves as an international forum for expression, a method to access information, and a platform for sharing ideas. The globalisation of the internet has made many communications that would otherwise have been impossible become common practice. By limiting access to the information provided on the internet, the Library is indeed limiting free speech.

In limiting access to certain websites through filtering, the Library's practices have the effect of limiting patron access to many kinds of expression that are protected by the *Charter*. First, even pornography is protected speech. Filtration of pornography carries with it obvious *Charter* implications. Second, Netsweeper's filtering system is necessarily overbroad. It categorizes websites by domain names, an approach that will sweep all content of a site aside where any sub-page of the site triggers the censor. Accordingly, news sites that do not flinch at publishing images that include nudity, or that address matters of sexuality, will trigger the censor. The purpose and effect of the Library's filtering practices is thus to restrict expressive activity. Accordingly, the London Public Library is burdening expression that is protected by section 2(b), and, unless saved by s. 1, the Library's current implementation of its filtering policy is unconstitutional.

(2) *Is the Library's filtering project justifiable under s. 1 of the Charter as a reasonable limit on freedom of expression?*

Once a form of expression has been identified as protected by section 2(b), it follows to determine whether the limit on that speech is reasonable, and can be demonstrably justified in a

¹³ London Public Library, *Internet Policy Review: Filtering, Customer Relations Tools* (30 May, 2007).

¹⁴ *Constitution Act, 1982*, s. 52(1), being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11.

¹⁵ *Canadian Encyclopedic Digest*, Constitutional Law §475 (WL).

free and democratic society pursuant to section 1 of the *Charter*. Section 1 provides as follows:

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.¹⁶

To survive s. 1 scrutiny, impugned state action must satisfy two inquiries:

- (1) Is the measure “prescribed by law”?
- (2) Does the measure satisfy the *Oakes* test, which assesses the importance of the government objective and proportionality of the means chosen to advance that objective?

We’ll address each inquiry in turn.

(a) *Prescribed by Law*

The first step in this analysis is to determine whether the limitations of the *Copyright Act* are “prescribed by law.”¹⁷ This principle requires a limitation on a *Charter* right to be clearly enacted by a law that is accessible to the public, and sufficiently precise to (a) enable people to regulate their conduct by it and (b) provide guidance to those who apply the law. A court may strike down as void any law that is vague or that does not provide an intelligible standard.

The London Public Library’s filtering system categorizes internet content and empowers the Library to select specific categories for filtration. The Library’s filtering system relies upon a third party to classify and categorize internet content. The main substantive issues concern (a) the mechanics of how the Netsweeper software arrives at a classification, and (b) the extent to which the Library understands and controls such categorization. If a webpage falls within a category that the Library has prohibited (*i.e.*, category 23, corresponding to “pornography”), the page is blocked. Netsweeper claims the information about the algorithm is proprietary. The Library has claimed it lacks “custody/control” of such information, or in the alternative that Netsweeper’s classification practices are confidential third party information, the end result of either alternative being that the Library is unable to disclose that information under section 10 of the *Municipal Freedom of Information and Protection of Privacy Act*. The Library is unable to describe control the manner by which specific content is or is not classified as “pornography” and accordingly filtered. From a constitutional perspective, this is extremely problematic.

By outsourcing the filtering standards to a third party, the London Public Library violates the “prescribed by law” principle. Outsourcing in this manner does not provide fair notice to citizens about the standards by which the Library regulates access to internet content, nor does it provide a provision of checks on discretionary enforcement. The Library’s practice of outsourcing classification of expression violates the two core values that the “prescribed by law” principle upholds: the Library’s filtering standards are both so inaccessible to the public and vague – the Library is unable to state or exercise control over the standard – as to be unintelligible. In a similar case in the United States, the court determined that the library “cannot avoid its constitutional obligation by contracting out its decision-making to a private entity.”¹⁸

¹⁶ *Charter of Rights and Freedoms*, note 1 above, s. 1.

¹⁷ See *R. v. Therens*, [1985] 1 S.C.R. 927; *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69.

¹⁸ *Mainstream Loudoun v. Board of Trustees of the Loudoun County Library*, 2 F. Supp. 2d 783 (E.D. Va. 1998)

This issue is all the more serious when one considers that open source filters are available that permit scrutiny of the means by which expression is categorized and subsequently filtered.

(b) *Oakes Test*

To satisfy the s. 1 test, an impugned provision must be “reasonably and demonstrably justified.” In *R. v. Oakes*, the Supreme Court laid out a four prong test to assess state action against the requirements of s. 1.¹⁹

- (1) Does the measure advance a sufficiently important objective?
- (2) Is the measure proportional to that objective, in that:
 - a. the measure is rationally connected to the objective,
 - b. the measure impairs Charter rights minimally, and
 - c. there is proportionality between the objective and its deleterious effects?

(i) *Sufficiently Important Objective*

The first prong of the *Oakes* test asks whether the impugned law has a sufficiently important objective. It has been previously determined in *Irwin Toy Ltd. v. Québec (Attorney General)*²⁰ that the protection of children is indeed an important objective. Other court cases have upheld the aversion of hate speech and the prevention of harm caused by obscenity to be legitimate objectives.²¹ These points are not contested here. However, the London Public Library has not stated any of these topics in their objective. Rather, the Library’s statement reads:

This project will... Improve the environment for our customers in our libraries, by minimizing the possibility of accidental exposure to visual images from the Internet or public computer screens that are not appropriate in a general public setting”.²²

The objective of the filtering policy is to “improve the environment” of the Library, and not to prevent any harm. The stated standard meriting filtering under this policy is one of “appropriateness”. In practice, this has been further reduced to content categorized by a third party as “pornography”. The Library does not contend that there is a grave and serious danger involved in not filtering the internet – the risk is of “accidental exposure”. Rather, the Library proposes filtering as a way to create a more hospitable environment.

Taken literally, it is difficult to accept this objective as sufficiently important to justify a violation of a *Charter* right. This objective is a clear form of censorship, whereby the Library bars access to certain information wanted by some patrons in favour of a more pleasant “environment”. At face value, this objective undermines the very function of the Library as a community’s primary vehicle of access to knowledge. Understood more liberally than stated by the Library, however, this objective could be understood as a commitment to maintain an environment that facilitates access to knowledge.

p.19 (QL) [*Mainstream Loudoun*].

¹⁹ *R. v. Oakes*, [1986] 1 S.C.R. 103.

²⁰ *Irwin Toy Ltd. v. A.-G. Quebec*, [1989] 1 S.C.R. 927.

²¹ See Keegstra, note 2 above (in respect of hate speech), and *R. v. Butler*, [1992] 1 S.C.R. 452 (in respect of obscenity).

²² Becker, note 6 above.

As this discussion suggests, the Library could benefit from re-examination of its objectives in filtering internet content in light of its fundamental mission. A library is not a bookstore, home to only pleasing and unobjectionable whimsy. A library facilitates access to knowledge. Objectives that censor speech without reference to that core mission will inevitably face constitutional scrutiny. Nonetheless, we are satisfied that the Library's objectives (understood generously) in filtering internet content meet this branch of the *Oakes* test.

(ii) Proportionality: Rational Connection

The second prong of the *Oakes* test asks whether the law is rationally connected to the objective. This inquiry requires evidence of an actual ongoing problem that the regulation attempts to correct. In the present case, the Library states that it has received "negative comments on an infrequent but regular basis from customers"²³ regarding patrons viewing inappropriate material on the internet. The lack of evidence of this problem is troubling: how frequently do problems arise? Are problems restricted to the children's section, or do they arise throughout the Library? Do they occur in every branch, or only particular branches? While it is troubling that the Library advanced this solution in the absence of reliable evidence of the existence and scope of a problem, we will assume for the purposes of this analysis that the Library could produce such evidence given time. That the Library has failed to document "incidents" prior to implementing a filtering a system is deeply troubling.

(iii) Proportionality: Minimal Impairment

The third prong of the *Oakes* test requires that the state use the least drastic means possible to accomplish an objective that otherwise infringes a *Charter* right. Recall, the Library's objective in filtering the internet is to "[improve] the environment" of the Library by eliminating "accidental exposure" of patrons to "inappropriate" content. There are several options by which the Library could meet this objective. Options include the installation of privacy screens, the use of a filter that can be turned off by the user, the monitoring of computer use by library staff, etc. Space planning is another avenue by which the Library could have reduced its burden on expressive rights. Currently, the small number of terminals that offer unfiltered internet access does not meet the needs of the public for unfiltered access. Patrons require the option for unfiltered access in a manner that does not brand the patron as viewing "inappropriate" content.

Instead of relying on one of these less intrusive methods, the Library has imposed a policy which drastically limits the right to free speech. Such a serious infringement cannot be upheld while there are less drastic means available.

The strongest justification for filtering internet content involves the protection of children. Note that this is not the objective advanced by the Library (which involves most protection of children against harm, but "improving the environment" of the Library); however, even on this stronger justification for filtering, the principle of minimal impairment requires a more flexible approach to filtering than that adopted by the Library. The Canadian Library Association's *Statement on Internet Access* encourages libraries "to offer internet with the fewest possible restrictions," and "to safeguard the long-standing relationship of trust between libraries and children, their parents and guardians, in developing Internet use policies and practices, acknowledging the rights and

²³ *Ibid.*

responsibilities of parents and guardians.”²⁴ The CLA maintains that “the best and most reliable filter is a child’s parent or guardian”. On this view, responsibility for shielding children from viewing inappropriate content on the internet rests with the parent, not with the Library, and certainly not with other adult patrons.

(iv) Proportionality: Disproportionate Effects

The fourth and final prong of the *Oakes* test considers is the proportionality of effects of the regulation. There must be proportionality between the effects of the measures which are responsible for limiting the *Charter* right, and the objective which has been identified as of sufficient importance. This requires a balancing of the objective sought by the law against the infringement of the *Charter*, and the question is then whether the infringement is too high a price to pay for the benefit of the law.

By attempting to shield patrons from the possibility of viewing “inappropriate” content, and given the reality that Netsweeper overblocks, the Library in fact blocks adults from accessing information of their choice. Given the other options available to the Library, the Library’s practices have a disproportionately severe effect on the Library community. The court in *Mainstream Loudoun*, and American case addressing similar issues (but focusing on protecting minors, not maintaining a pleasant “environment”), determined that:

It has long been a matter of settled law that restricting what adults may read to a level appropriate for minors is a violation of the free speech guaranteed by the First Amendment and the Due Process Clause of the Fourteenth Amendment.²⁵

The decision to filter the internet content at the London Public Library has a disproportionately severe effect on adult patrons who come to the Library to seek information online, and for that reason it cannot be upheld.

Quite apart from the problems associated with filtering content appropriately classified as “pornography” but nonetheless desired by a patron (consider a student preparing a terms paper on erotica in fan fiction, or accessing serious literature or commentary on art involving nudity) is the problem of overblocking. Netsweeper filters not only obscene material unprotected by section 2(b), and erotic images that nonetheless enjoy protection under s. 2(b), but also protected speech that occurs on sites inappropriately categorized as belonging to a restricted category. Netsweeper’s “all or nothing” approach also restricts access to protected speech that simply occurs on a website, a portion of which has been appropriately categorized and blocked by the Library.

Conclusions

Our review of the London Public Library’s internet filtering practices suggests that the Library has rushed internet filtering into service without due consideration of the role of a library within a community and the ends a library serves. We recommend:

²⁴ Canadian Library Association, *Position Statement on Internet Access* (February, 2000) <http://www.cla.ca/AM/Template.cfm?Section=Position_Statements&Template=/CM/ContentDisplay.cfm&ContentID=3048>.

²⁵ *Mainstream Loudoun*, note 18 above.

- that the Library re-examine its objectives in filtering patron access to the internet, and refocus those objectives on avoiding foreseeable harms;
- that the Library re-examine its role within the community. A public library that denigrates patrons as “customers” devalues its own place in the community and will inevitably misperceive its role in facilitating access to knowledge and enabling intellectual activity among the citizens it serves; and
- undertake a public consultation and review of alternatives to its current filtering practices. In our analysis, the Library’s current practices do not come close to meeting the Constitution’s requirements that state action minimally impair *Charter* rights. In particular, the Library should consider:
 - increasing the proportion of terminals offering unfiltered internet access;
 - ensuring that unfiltered terminals are free of any social stigma which might otherwise deter patrons from using unfiltered workstations;
 - accommodating patron anonymity when requesting to use unfiltered workstations;
 - accommodating patron anonymity in requesting that re-categorization of any particular web resource;
 - undertaking a review of options for layout to enhance the Library “environment” while respecting patron rights;
 - switching to an open source filter that permits scrutiny of filter categorization;
 - offering adult patrons choice when using the internet to turn the filter on or off; and
 - employing privacy screens and carrels can be used to limit what can be seen by other patrons.

These suggestions are only a sampling of some of the options available to the Library to meet its constitutional obligations.

* * *

We thank you for the opportunity to provide you with these comments. We hope you find them helpful in your deliberations over the future of filtering of internet content in the London Public Library.

Yours truly,

A handwritten signature in black ink that reads "David Fewer". The signature is written in a cursive style with a large, prominent 'D' and 'F'.

David Fewer
Staff Counsel
CIPPIC