

# PALESTINIAN HUMAN RIGHTS ISSUES IN CANADA: A LEGAL & TACTICAL GUIDE



JUNE 2021



**Just Peace Advocates**  
**Mouvement Pour Une Paix Juste**

## ABOUT

Just Peace Advocates is a Canadian, independent organization promoting the human rights of the Palestinian people and those that stand in solidarity for the human rights of the Palestinian people. Its vision is to provide a civil society voice focused on governmental, institutional, and societal accountability to the rule of law, and the standards of international human rights and humanitarian law for the rights of Palestinian people.

The work of Just Peace Advocates is accomplished through research, monitoring, education, communications, advocacy, programs, and service provision.

## DISCLAIMER

This guide is meant to provide basic information on legal issues that Palestinian rights activists may face, and tips on how to navigate them. It provides some generally applicable information and some campus-specific information for student activists. Any legal information in this resource is intended for general educational purposes and is **NOT a substitute for legal advice** – federal and provincial laws differ, laws may change, and the application of all laws depends on the specific facts of a case. Make sure to consult with a lawyer before relying on any information you find here.

For legal advice on your campaign or about a specific issue you are facing, or to report incidents of repression of your activism, please email [info@justpeaceadvocates.ca](mailto:info@justpeaceadvocates.ca).

We are also glad to provide workshops or schedule meetings to discuss your particular needs, whenever possible.

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Just Peace Advocates thanks Palestine Legal for allowing us to have access to their existing resources and giving us permission to update them to the applicable Canadian legal context. For more information about Palestine Legal, see [palestinelegal.org](http://palestinelegal.org).

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Please send questions and corrections to [info@justpeaceadvocates.ca](mailto:info@justpeaceadvocates.ca).

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### PREPARE

**Plan your activities in advance** to ensure that you have the necessary permits and authorizations from local and/or campus authorities, that you understand what regulations may apply, and that you're prepared for possible backlash, with supporters lined up to back you, a media strategy, and any necessary legal advice in advance, when possible.

### THINK

**Consider the potential legal implications** of your activities, including possible civil or criminal sanctions. Review this guide for information about issues that might arise in your activism, and contact us with questions.

### RECORD

**Create a record of incidents** that you believe target your speech activities — such as attempts to repress your speech by government, university officials, private groups, etc. Record details, such as date, time, location, witness names and contact information, law enforcement names and badge numbers, what was said/done, pictures and other evidence. Confirm in writing any understanding reached in in-person meetings by emailing and asking for a response. Make notes while the event is fresh in your mind. Record all incidents, including those big and small.

### FOCUS

**Focus on your activism!** Media work, public actions, advocacy campaigns, and legislative work are most effective in getting your message out. Legal action is a last resort in most cases.

### GET SUPPORT

**Contact us** when you or your group needs legal or advocacy support, and to report incidents. We may be able to provide you with additional resources and connect you with organizational support or other lawyers in your area who understand the political and legal issues, if necessary, email [info@justpeaceadvocates.ca](mailto:info@justpeaceadvocates.ca).



# FREE SPEECH RIGHTS

## FREEDOM OF EXPRESSION UNDER THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

**FREEDOM OF EXPRESSION IS THE RIGHT TO SPEAK, TO DISSENT, TO EXPRESS YOURSELF, AND TO LISTEN TO THE EXPRESSION OF OTHERS. IT IS A FOUNDATIONAL RIGHT OF ANY DEMOCRATIC SOCIETY.**

**Section 2(b)** of the *Canadian Charter of Rights and Freedoms* guarantees “freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.” The right to free expression is subject to **any reasonable limits** that may be justified in a free and democratic society, as is prescribed by **s. 1 of the Charter**.

Section 2(b) protections apply to all individuals in Canada regardless of citizenship or immigration status. The *Charter* applies to government action and therefore s. 2(b) limits how *government* actors can restrict your expression. Like all other *Charter* rights, it generally does not apply to private actors unless they are controlled by a government body or are performing a government action or function of some sort.

The Supreme Court of Canada (SCC) has identified the following three broad principles and values that underlie the guarantee of freedom of expression in the *Charter*:

- (1) Seeking and attaining the truth;
- (2) Fostering and encouraging the participation in social and political decision-making; and
- (3) Cultivating individual self-fulfillment through expression.<sup>1</sup>

## WHAT IS “EXPRESSION”?

The SCC has defined expression extremely broadly. It has held that an activity is “expressive” if “**it attempts to convey meaning**”.<sup>2</sup> According to this definition, conduct such as wearing a t-shirt with a message, holding a banner, chanting at a protest, performing street theatre, as well as communication forms such as dance, music, writing, paintings, films, etc. would all be considered protected forms of expression.

“**Content neutrality**” is the governing principle of the Supreme Court’s definition of expression.<sup>3</sup> This means that, with few exceptions, the content of a statement cannot deprive it of the protection afforded to it by s. 2(b), no matter how offensive it may be.<sup>4</sup> Based on this expansive, content-neutral approach to expression, the Court has held that the right to freedom of expression encompasses communication for the purpose of prostitution<sup>5</sup>, the dissemination of hate propaganda<sup>6</sup>, the deliberate dissemination of falsehoods and defamatory libel<sup>7</sup>, and even child pornography.<sup>8</sup>

Violent expression is **NOT** protected by s. 2(b) of the *Charter*.<sup>9</sup> This includes, threats of violence, which are not protected expression pursuant to s. 2(b).<sup>10</sup>

<sup>1</sup> *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927 at 976; *Montréal (City) v 2952-1366 Québec Inc*, [2005] 3 SCR 141 at 74 [*Irwin Toy*].

<sup>2</sup> *Reference re ss. 193 and 195.1(1)(C) of the criminal code (Man.)*, [1990] 1 SCR 1123 at 1187 [*Prostitution Reference*].

<sup>3</sup> Peter Hogg, *Constitutional Law of Canada*, 5<sup>th</sup> Ed (Toronto: Thomson Reuters Canada, 2019) (loose-leaf revision), s. 43.

<sup>4</sup> *R. v Keegstra*, [1990] 3 SCR 697 at 828 *Keegstra*.

<sup>5</sup> *Prostitution Reference*, *supra*.

<sup>6</sup> *Keegstra*, *supra*.

<sup>7</sup> *R. v Lucas*, [1998] 1 SCR 439.

<sup>8</sup> *R. v Sharpe*, [2001] 1 SCR 45.

<sup>9</sup> *Irwin Toy*, *supra*, at 970; *Keegstra*, *supra*.

<sup>10</sup> *R. v Khawaja*, [2012] 3 SCR 555.

## REASONABLE LIMITS CLAUSE (S. 1 OF THE CHARTER)

*Charter* rights are not absolute and can be infringed if the courts determine that the infringement is reasonably justified. Section 1 of the *Charter* is often referred to as the “reasonable limits clause” because it can be used to justify a limitation on a person’s *Charter* rights. Once a *Charter* infringement has been found, the court will apply a balancing test to assess whether the government interests outweigh those of the individual claiming their *Charter* right has been violated. The test is referred to as the *Oakes* test after the case of *R v Oakes* (1986), in which the SCC interpreted the wording of s. 1 and established the basic legal framework for how s. 1 would apply to a case.<sup>11</sup>

The *Oakes* Test proceeds as follows:

1. There must be a *pressing and substantial objective* for the law or government action.
2. The means chosen to achieve the objective must be *proportional* to the burden on the rights of the claimant.
  - i. The objective must be *rationaly connected* to the limit on the *Charter* right.
  - ii. The limit must minimally impair the *Charter* right.
  - iii. There should be an overall balance or *proportionality* between the benefits of the limit and its deleterious effects.

Because of the wide breadth of s. 2(b), infringements of freedom of expression are often found at the section 1 stage of the legal analysis where the court must consider if a law is a reasonable limit on one’s freedom of speech.

## HATE PROPAGANDA AND HATE SPEECH

Hate propaganda is material that promotes hatred against minority groups. Hate speech is a term used to describe speech aimed at an individual or group that is offensive or even hateful and may have no value other than to disparage the person or group based on their identity, such as race, national origin, religion, etc. Even such speech that is offensive and hurtful cannot be prohibited or punished unless it amounts to incitement, defamation, obscenity, or harassment.

Various federal and provincial legal frameworks have developed in Canada to regulate hate speech, and these laws often interact with the *Charter* right to freedom of expression under s. 2(b). Some examples in the criminal and human rights contexts are provided below.

### i. Criminal Law

The *Criminal Code of Canada* at ss. 318 to 320 prohibits hate propagation.

- (a) **Advocating genocide** of a section of the public identifiable on the basis of certain grounds, including colour, race, religion, ethnic origin, sex, sexual orientation, mental or physical disability (punishable by up to five years in prison)<sup>12</sup>;
- (b) **Public incitement of hatred** against an identifiable group in a way that is likely to lead to breach of the peace (punishable by up to 2 years in prison)<sup>13</sup>;

## CHECK IT OUT!

The *Islamophobia is* video series is an educational resource that addresses systemic Islamophobia, and sparks a conversation about all forms of racism and injustice. The five-video series is free, available online, and includes an educators guide for grades 6-12. Check it out!

The [videos](#) include:

- *Islamophobia is...more than hate crimes* - Narrated by Naheed Mustafa (3:45)
- *Islamophobia is...perpetuated by mainstream media* - Narrated by Desmond Cole (3:38)
- *Islamophobia is...the myth of the Muslim ‘terrorist’* - Narrated by Hayden King (4:21)
- *Islamophobia is...gendered* - Narrated by Noura Erakat (3:55)
- *Islamophobia is...the myth of shariah takeover* - Narrated by Safiyyah Ally (5:03)

<sup>11</sup> *R. v Oakes*, [1986] 1 SCR 103.

<sup>12</sup> *Criminal Code* (R.S.C., 1985, c. C-46) at s 318(1).

<sup>13</sup> *Ibid* at s 319(1).

# MIND THE “P” WORD, ACCORDING TO THE CBC

CBC journalist standards the led to the “deletion” of the **word “Palestine”** from a segment already aired.

On August 18, in an **interview** on CBC’s *The Current*, the guest anchor, Indigenous journalist Duncan McCue introduced his guest, Joe Sacco, referencing Sacco’s “*work in Bosnia, Iraq, and Palestine*”. Joe Sacco is a graphic novelist and the creator of a work called *Palestine*. He was being interviewed regarding colonization and resource extraction.

McCue’s use of the word “Palestine” caused a flurry with CBC editors as they worked to scrub the word Palestine before the edition could play in time zones in Western Canada. The **revised transcript** introduced Sacco, saying “*your work in conflict zones, Bosnia, Iraq*” and closed out with “*Joe Sacco has spent his career telling stories from conflict zones from the Gaza Strip to Bosnia.*” Palestine was deleted.

In the August 19 recorded version of the program, CBC issued a formal correction and apology, stating: “*Yesterday in my interview with Joe Sacco I referred to the Palestinian territories as ‘Palestine,’ we apologize.*”

Joe Sacco has said: “*It’s ironic that the CBC would apologize for the use of the word “Palestine” for a segment about my book, whose subject is at least partly the attempted obliteration of the cultural identity of indigenous people of the Northwest Territories, particularly through the notorious residential school system. Imagine today if the First Nations people I talked to, the Dene, would be made to apologize for using their word “Denendeh”, which means “The Land of the People,” for describing where they live. To whom, exactly, was the CBC apologizing for using the word “Palestine”? If anything, this storm over a proper noun brings into relief a similar way*

*the adherents of colonial-settler projects seek to suppress native peoples and then laud their dominance. I’m sure none of this is lost on either Canada’s indigenous people or Canadian-Palestinians.”*

CBC/Radio-Canada is Canada’s national public broadcaster and one of the country’s largest cultural institutions. CBC/Radio-Canada’s mandate is to inform, enlighten and entertain. This includes to contribute to the sharing of national consciousness and identity, and to reflect Canada’s regional and cultural diversity.

**Several thousand letters** were sent to the CBC, a number of articles **appeared in the media**, and **complaints** were made to the CBC Omsbud Office. In the end the **CBC Omsbud Office** ruled that the word Palestine could be deleted as it was counter to CBC language standards.

DELETE

### (c) Publicly communicating statements

willfully promoting hatred against an identifiable group (subject to defences of good faith, truth and others) (punishable by up to 2 years in prison).<sup>14</sup> (subject to the defences of truth, religious belief, public interest, and good faith removal).<sup>15</sup>

An “identifiable group” is defined as “any section of the public distinguished by colour, race, religion, national or ethnic origin, age, sex, sexual orientation, gender identity or expression, or mental or physical disability”.<sup>16</sup>

The threshold is very high for a speech to amount a criminal offence under one of the provisions outlined above.

## ii. Human Rights Law

Provincial and territorial human rights codes often contain provisions prohibiting the incitement of hate or group discrimination by way of public displays, broadcasts, or publications. There is, however, not one uniform approach across Canada to the inclusion of prohibitions on hate speech and hate propaganda in human rights laws nationally.<sup>17</sup>

Each provincial and territorial legislature in Canada has passed human rights laws that prohibit discrimination based on certain prohibited grounds such as race, sex, age, religion, ability, gender identity and expression, ethnicity, creed, etc. in the context of employment, tenancy, memberships, and accessing public goods and services. In the federal context, the main human rights legislation is the *Canadian Human Rights Act*, which generally applies to the federal government departments and agencies, Crown corporations, and federally regulated businesses.

All human rights laws across Canada, except for that in the Yukon Territory, prohibit in some respect the public display, broadcast or publication of messages that announce an intention to discriminate or that incite others to discriminate, based on the identified prohibited grounds.<sup>18</sup> While these provisions do place limits on free speech, they have not been challenged, most likely because their original purpose was to guard against discriminatory actions by businesses or landlords who would use signs to indicate that certain racial or ethnic groups would not be served.<sup>19</sup>

In addition, human rights legislation in Alberta, British Columbia, Saskatchewan, and the Northwest Territories each contain a prohibition against the promotion of hatred or contempt in some formulation – these typically falling under the same provisions which address discriminatory publications.<sup>20</sup>

Not all offensive publications will count as discriminatory under the applicable human rights codes. Publications will typically only be found to be discriminatory when they have a very harmful impact on the person or group affected, based on a specific protected ground in the legislation. This will need to be determined on a case by case basis in the relevant jurisdiction.

<sup>14</sup> *Ibid* at s 319(2).

<sup>15</sup> *Ibid* at s 319(3).

<sup>16</sup> *Ibid* at s 318(4).

<sup>17</sup> Julian Walker, “Hate Speech and Freedom of Expression: Legal Boundaries in Canada” (29 June 2018) Library of Parliament, Legal and Social Affairs Division, Parliamentary Information and Research Service, Publication No 2018-25-E. See also Canadian Centre for Diversity and Inclusion, “Overview of Human Rights Codes by Province and Territory in Canada”, (January 2018), online: <https://ccdi.ca/media/1414/20171102-publications-overview-of-hr-codes-by-province-final-en.pdf>.

<sup>18</sup> Walker, *supra* at p 8; See *Alberta Human Rights Act*, RSA 2000, c A-25.5 at s. 3; British Columbia, *Human Rights Code*, RSBC 1996, c 210 at s 7; *Canadian Human Rights Act*, RSC 1985, c H-6 at s 12; Manitoba, *The Human Rights Code*, CCSM c H175, at s 18; Ontario, *Human Rights Code*, RSO 1990, c H.19, at s 13; *Quebec, Charter of Human Rights and Freedoms*, CQLR c C-12, at s 11; New Brunswick, *Human Rights Act*, RSNB 2011, c 171, at s 7; Nova Scotia, *Human Rights Act*, RSNS 1989, c 214 at s 7; Prince Edward Island, *Human Rights Act*, RSPEI 1988, c H-12 at s 12; Newfoundland and Labrador, *Human Rights Act*, 2010, SNL 2010, c H-13.1, at s 19; Northwest Territories, *Human Rights Act*, SNWT 2002, c 18 at s 13; Nunavut, *Human Rights Act*, SNU 2003, c 12 at s 14; *The Saskatchewan Human Rights Code*, 2018, SS 2018, c S-24.2 at s 14.

<sup>19</sup> Walker, *supra* at 8.

<sup>20</sup> *Ibid*; See *Alberta Human Rights Act*, RSA 2000, c A-25.5 at s. 3; British Columbia, *Human Rights Code*, RSBC 1996, c 210 at s 7; Northwest Territories, *Human Rights Act*, SNWT 2002, c 18 at s 13; *The Saskatchewan Human Rights Code*, 2018, SS 2018, c S-24.2 at s 14.



# PROVINCIAL, TERRITORIAL, AND FEDERAL HUMAN RIGHTS INFORMATION

The following includes links to provincial, territorial, and federal human rights commissions or tribunals, which provide information about the relevant human rights legislation, the protected areas and grounds of discrimination, and the complaint processes in place in applicable jurisdiction.

[ALBERTA](#)

[BRITISH COLUMBIA](#)

[MANITOBA](#)

[NEWFOUNDLAND AND LABRADOR](#)

[NEW BRUNSWICK](#)

[NORTHWEST TERRITORIES](#)

[NOVA SCOTIA](#)

[NUNAVUT](#)

[ONTARIO](#)

[PRINCE EDWARD ISLAND](#)

[QUEBEC](#)

[SASKATCHEWAN](#)

[YUKON](#)

[FEDERAL](#)

(CANADIAN HUMAN RIGHTS COMMISSION)

## CAMPAIGN TO OPPOSE THE INTERNATIONAL HOLOCAUST REMEMBRANCE ALLIANCE (IHRA) DEFINITION OF ANTISEMITISM

### THE INTERNATIONAL HOLOCAUST REMEMBRANCE ALLIANCE (IHRA) is a

34-country, intergovernmental organization focused on remembrance and education about the Holocaust. In May 2016, the IHRA adopted a working definition of antisemitism which went beyond defining antisemitism as hatred of, discrimination against, or prejudice towards Jews, and expanded the definition to include criticism of Israel and Zionism.<sup>21</sup>

In 2019, Canada adopted the IHRA working definition in its **Anti-Racism Strategy**.<sup>22</sup> In Ontario, Justice Policy Committee hearings for the Private Member's Bill 168, *An Act to combat antisemitism*<sup>23</sup>, which supports the IHRA definition, were cancelled on October 27, 2020. The day before, on October 26, 2020, the IHRA was controversially passed through Order-in-Council 1450/2020.<sup>24</sup> This

was seen as bypassing the standard hearing and submission process to the Justice Policy Committee. A number of individuals and organizations have condemned the government's declaration made by royal prerogative, without democratic process, and called for a withdrawal of the Bill.<sup>25</sup> However, Bill 168 remains at the Social Justice Committee, so technically could still move to Third Reading and into legislation.

A November 13, 2020 letter from Ontario's Deputy Attorney General David Corbett to Just Peace Advocates confirmed what the Order-in-Council actually means:

*It reflects the decision of the government of Ontario to adopt that definition for matters within the discretion of a Ministry of the Crown. It does not otherwise alter any legal definition of antisemitism that*

<sup>21</sup> See <https://www.holocaustremembrance.com/working-definition-antisemitism>.

<sup>22</sup> Government of Canada, "Building a Foundation for Change: Canada's Anti-Racism Strategy 2019-2022" at p 21 (footnote 2), online: <https://www.canada.ca/en/canadian-heritage/campaigns/anti-racism-engagement/anti-racism-strategy.html>.

<sup>23</sup> Bill 168, *An Act to combat antisemitism*, 1st Sess, 42nd Parl, Ontario, 2019 (first reading 11 December 2019; second reading 27 February 2020).

<sup>24</sup> Order in Council 1450/2020 (2020), online: <https://www.ontario.ca/orders-in-council/oc-14502020>.

<sup>25</sup> Just Peace Advocates, "Legal & Civil Society Organizations to Say No to IHRA", online: <http://www.justpeaceadvocates.ca/legal-civil-society-organizations-come-together-to-say-stop-bill-168/>. See also Karen Rodman, "Ontario government denies public scrutiny of IHRA and Bill 168", Spring (23 December 2020), online: <https://springmag.ca/ontario-government-denies-public-scrutiny-of-ihra-and-bill-168>.

may be set out in existing or future laws of Ontario, nor does it direct or require that entities that operate independent of the government adopt that same definition.<sup>26</sup>

There have also been further attempts to pass the IHRA definition in several cities in Canada but no municipalities have passed it to date.

Public bodies, local authorities, universities, and student unions are being lobbied to adopt the IHRA definition of antisemitism, however a number of them have raised concerns that it is designed to silence criticism of Israel and Zionism by equating this criticism with antisemitism. For example, the British Columbia Civil Liberties Association issued a statement in June 2019 which noted that “the legal adoption of the IHRA definition in Canada is inconsistent with the values underlying the Charter of Rights and Freedom and would greatly narrow the scope of political expression in Canada.”<sup>27</sup>

Similarly, the Canadian Federation of Students, which is the largest student organization in the country, has stated that the IHRA definition infringes on both freedom of expression and academic freedom in post-secondary education campuses, noting that “the IHRA definition conflates antisemitism with valid criticism of Israel and its promotion and/or adoption into law threatens to criminalize activists fighting for Palestinian rights as well as critical analysis on Israel and Zionism.”<sup>28</sup>

Following a 2019 conflict between pro-Israel and pro-Palestinian groups on York University campus, former Supreme Court of Canada justice Thomas Cromwell was retained by the university to investigate and **report** on the incident. Among his recommendations to York’s Administration was that it “monitor the progress of the draft legislation and also consider the IHRA’s *Working Definition* as it develops its own statement on racism and discrimination.”<sup>29</sup> In response, the York University Faculty Association (YUFA) issued a **statement**, noting:

*Justice Cromwell makes the controversial suggestion that York should consider adopting the International Holocaust Remembrance Alliance’s (IHRA) “working definition of anti-Semitism.” The IHRA working definition has been linked to a vigorous lobbying effort calling on*

*governments and other institutions like universities to condemn and even to prohibit criticisms of the state of Israel as dangerous expressions of anti-Semitism. While the YUFA Executive opposes anti-Semitism and all forms of racism and hatred, we see the adoption of the IHRA definition as a potential threat to academic freedom at our university as it can be used to restrict the academic freedom of teachers and scholars who have developed critical perspectives on the policies and practices of the state of Israel.*<sup>30</sup>

The Academic Alliance Against Antisemitism, Racism, Colonialism & Censorship in Canada (ARC), a group of Canadian professors and independent scholars, issued a report entitled **The IHRA Definition of Antisemitism & Canadian Universities and Colleges: What You Need to Know**, which notes that the IHRA is not grounded in a contemporary anti-racist and decolonial framework nor deployed within the frames of international law and human rights. It also treats antisemitism as if it occurs in isolation from other forms of racism, including Islamophobia, anti-Arab and anti-Palestinian racism.<sup>31</sup> Antisemitism is best addressed, according to ARC, through an intersectional framework of anti-oppression. Combating antisemitism should not supersede or erase other struggles but rather be understood and addressed alongside them.<sup>32</sup> The report observes that influential academic texts by some of the world’s leading scholars contain statements that are critical of Israel and the Israeli occupation of Palestine, and could therefore easily be censored as antisemitic according to the IHRA definition.<sup>33</sup>

In June 2020, Osgoode Hall Law School Professor Faisal Bhabha participated in online debate regarding the IHRA organized by the Canadian Civil Liberties Association and Ryerson’s Centre for Free Expression, and subsequently came under attack from B’Nai Brith, which accused him of antisemitism and initiated an online petition to bar him from teaching international human rights law.<sup>34</sup> He was also the subject of a vexatious Law Society of Ontario complaint made by B’Nai Brith. Professor Bhabha observes, “I fell victim to the very worry I was addressing – that the definition would be deployed to chill criticism of Israel and punish those who dare speak openly.”<sup>35</sup>

Over 450 Canadian academics have signed an **open letter** opposing the IHRA definition of antisemitism on the basis that it is worded in such a way as to intentionally equate legitimate criticism of Israel and advocacy for Palestinian rights with antisemitism, and that such conflation undermines both the Palestinian struggle for freedom, justice, and equality as well as the global struggle against antisemitism.<sup>36</sup> In addition, a number of faculty associations and unions have taken public positions against the IHRA definition.<sup>37</sup>

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## TO LEARN MORE ABOUT THE CAMPAIGN AGAINST THE IHRA DEFINITION, VISIT: [NOIHR.A.CA](https://www.noihra.ca).

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- 26 Just Peace Advocates, “Ontario Attorney General Deputy Confirms Order-in-Council relates to IHRA matters within the discretion of Ministry of the Crown” (13 November 2020), online: <https://www.justpeaceadvocates.ca/ontario-attorney-general-deputy-confirms-order-in-council-relates-to-ihra-matters-within-the-discretion-of-a-ministry-of-the-crown/>.
- 27 British Columbia Civil Liberties Association, “The BCCLA opposes the international campaign to adopt the International Holocaust Remembrance Association (IHRA) definition of antisemitism” (18 June 2019), online: [https://bccla.org/our\\_work/the-bccla-opposes-the-international-campaign-to-adopt-the-international-holocaust-remembrance-association-ihra-definition-of-antisemitism/](https://bccla.org/our_work/the-bccla-opposes-the-international-campaign-to-adopt-the-international-holocaust-remembrance-association-ihra-definition-of-antisemitism/).
- 28 Canadian Federation of Students, “CFS Supports IJV’s Definition of Antisemitism” (26 February 2020), online: <https://cfs-fcee.ca/cfs-supports-ijvs-definition-of-antisemitism/>.
- 29 The Honourable Thomas A. Cromwell CC, “York University Independent Review”, York University (30 April 2020), at 47 online: <https://president.yorku.ca/files/2020/06/Justice-Cromwell%E2%80%99s-Independent-External-Review.pdf?x79145>.
- 30 YUFA Staff, “YUFA flags academic freedom concerns in Cromwell Report”, York University Faculty Association (YUFA) (29 June 2020), online: [https://www.yufa.ca/yufa\\_flags\\_academic\\_freedom\\_concerns\\_in\\_cromwell\\_report](https://www.yufa.ca/yufa_flags_academic_freedom_concerns_in_cromwell_report).
- 31 Academic Alliance Against Antisemitism, Racism, Colonialism & Censorship in Canada (ARC), “The IHRA Definition of Antisemitism & Canadian Universities and Colleges: What You Need to Know”, online: <https://static.squarespace.com/static/5f52a48dce98340e25350e2/ft/600094a68202a35037e4ebd/1610650790923/Final+Document+-+IHRA+Report+-+jan14-1255.pdf>.
- 32 *Ibid* at 10.
- 33 *Ibid* at 6.
- 34 See Faisal Bhabha, “Smearing, Silencing and Antisemitism” *Obiter Dicta* (20 January 2021), online: <https://obiter-dicta.ca/2021/01/20/smearing-silencing-and-antisemitism/?fbclid=IwAR2mpGYLOMKJrsP97GTo7dFbC-mJh4DfzJQtXuZo-W4P7mrXukDp8LrVv1hQ>; Shree Pardkar, “Controversies at U of T Law, York University highlight escalating suppression of moderate voices criticizing Israel”, *The Toronto Star* (25 October 2020), online: <https://www.thestar.com/opinion/star-columnists/2020/10/25/controversies-at-u-of-t-law-york-university-highlight-escalating-suppression-of-moderate-voices-criticizing-israel.html>.
- 35 Bhabha, *supra*, at 2.
- 36 Independent Jewish Voices Canada, “Open Letter from Canadian Academics Opposing the IHRA Definition of Antisemitism” (27 February 2020), online: <https://www.ijvcanada.org/open-letter-from-canadian-academics-opposing-the-ihra-definition-of-antisemitism/>.
- 37 See “Faculty Against the IHRA Definition”, online: <https://www.noihra.ca/academic-campaign>.

## CONCLUSION

Expression critical of Israeli policies is neither hate propaganda nor hate speech aimed at disparaging a religious or ethnic group's identity, as many detractors claim. Rather, criticism of Israel is constitutionally protected speech addressing an issue of domestic and international importance. Expression that condemns Israel as an apartheid state is not anti-Semitic. Criticism of Jewish people as a whole because of Israel's actions is, on the other hand, anti-Semitic. Disparagement of an individual based on stereotypes of Jewish

people may also be anti-Semitic "hate speech" in violation of hate propagation laws or human rights protections. Similarly, a generalized denunciation of Palestinians or Muslims as "terrorist" may be Islamophobic hate speech or discrimination. Generally speaking, however, criticism of Israeli policies is not hateful towards Jewish people, and would be considered protected speech for the purposes of the *Charter*.

# UNIVERSAL DECLARATION OF HUMAN RIGHTS | ARTICLE 19

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**EVERYONE HAS THE RIGHT TO FREEDOM OF OPINION AND EXPRESSION; THIS RIGHT INCLUDES FREEDOM TO HOLD OPINIONS WITHOUT INTERFERENCE AND TO SEEK, RECEIVE AND IMPART INFORMATION AND IDEAS THROUGH ANY MEDIA AND REGARDLESS OF FRONTIERS.**

**EVERYONE HAS THE RIGHT TO FREEDOM OF OPINION AND EXPRESSION; THIS RIGHT INCLUDES FREEDOM TO HOLD OPINIONS WITHOUT INTERFERENCE AND TO SEEK, RECEIVE AND IMPART INFORMATION AND IDEAS THROUGH ANY MEDIA AND REGARDLESS OF FRONTIERS.**

## SOLIDARITY ACTIONS, THE RIGHT TO PROTEST, AND CRIMINAL ISSUES YOU MAY FACE<sup>38</sup>

### CONSTITUTIONAL RIGHT TO PROTEST

In Canada, the right to protest is protected under ss. 2(b), (c), and (d) of the Canadian *Charter of Rights and Freedoms*, which encompass the rights to freedom of expression, peaceful assembly, and association, respectively:

#### CANADIAN CHARTER OF RIGHTS AND FREEDOMS

2. Everyone has the following fundamental freedoms:
  - (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
  - (c) freedom of peaceful assembly; and
  - (d) freedom of association.

Protesting is a democratic right and is legal in itself. Protests are allowed on any public property so long as they remain peaceful. Public property includes government-owned spaces such as parks, government buildings, and public squares.

Private property is any property that is owned by one or more individuals. You can attempt to protest on private property, but may be asked to leave by the owner(s). Even if you move to a surrounding area that is designated as public property, the police may be called if the protest or demonstration is causing a disturbance to the nearby private property owner(s).

Take note that some spaces such as malls and schools often appear as public spaces but are usually privately owned. Accordingly, you should always research the venue and its potential owner, as well as any relevant municipal laws, before organizing or staging a protest.<sup>39</sup>

<sup>38</sup> Sources consulted, relied upon, and used in the development of this section, in addition to the relevant jurisprudence, include Pivot Legal Society, "Legal Information for People Attending Wet'suwet'en Solidarity Actions", "Vancouver" Edition, (February 14, 2020); Harsha Walia, "Movement Defense: Legal Information for Cross-Country Wet'Suwet'en Strong Actions" (2020); PEN Canada, "A Guide to Protest and Demonstrations in Canada" (2016); Leo McGrady and Sonya Sabet-Rasekh, "The Law of Protest Workshop" (2017), Canadian Association of Labour Lawyers 2017 Annual Conference; Canadian Civil Liberties Association, "Know Your Rights Guide to Protesting" (2020).

<sup>39</sup> PEN Canada, *supra*.

# DO'S AND DON'TS OF DEMONSTRATIONS<sup>40</sup>

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## DO

**DO** attend with a friend. Stay together and leave together.

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**DO** tell someone who is not attending the protest where you will be and what time you anticipate to be home and have a plan to check-in. Put a support and/or emergency plan in place for childcare, eldercare, pets, etc.

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**DO** bring a pen and paper to record detailed notes of any incidents that might occur during the demonstration, such as police interactions.

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**DO** memorize or bring a phone number of a lawyer you can call in the event that you are arrested. Write the number in permanent marker on your body.

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**DO** bring photo identification in case you are arrested. Having this may mean you are processed faster if you are taken into custody.

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**DO** wear suitable and comfortable clothing, including shoes that are appropriate for running.

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**DO** consider bringing a digital camera as an alternate means to a cellphone for capturing photos and video.

**DO** bring a water bottle. This can be used to bathe eyes in the event that police use tear gas.

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**DO** consider wearing glasses and not contact lenses.

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**DO** bring enough prescription medication in the original bottle to last a few days (note that you may still face issues gaining actual access to your medications if you are taken into police custody and should have an emergency plan for this, including a number for a lawyer on hand, if you think you will be at risk of arrest).

## DON'T

**DON'T** bring illegal drugs.

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**DON'T** bring anything that might be considered a weapon.

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**DON'T** bring an address book or any other document that contains sensitive personal information.

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**DON'T** bring a cellphone, if you are planning to risk being arrested. If you must bring one, ensure that it is password protected, and not activated with finger print or facial recognition.

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<sup>40</sup> Pivot Legal Society, *supra* at 4; McGrady and Sabet-Rasekh, *supra*, at 20-24.

## ENCOUNTERING THE POLICE<sup>41</sup>

- At any protest or demonstration, it is likely that there will be a police presence there.
- You have the right to photograph, record, or videotape police officers who are on duty, and they cannot ask you to delete the content or seize the equipment used to take it. You cannot, however, interfere with or obstruct officers in the course of their duties.
- You are usually not required to provide the police with your name, address, or formal identification, however, there are a few exceptions:
  - **1)** If you are detained while driving or riding your bike, you must provide proper identification to the police.
  - **2)** If you have been lawfully arrested
  - **3)** During the COVID-19 pandemic, some provinces and/or territories have enacted emergency laws or regulations which allow police and other provincial offences officers to stop individuals suspected of violating a COVID-related law. They may request your ID if you are stopped.
- The police, including the provincial police and/or the RCMP, are allowed to approach you and ask you questions. You are not required to respond, but it is recommended that you remain polite to avoid a confrontation. Do not lie or provide false documents.
- The police cannot search you unless:
  - You consent to a search (do not consent to be searched);
  - They have a warrant to search you;
  - You have been detained and they are conducting a pat down or frisk search to check for weapons and assess for safety; or
  - You have been arrested.
- If the police approach you, you should first **ask if you are free to go**, and if the answer is “yes”, leave.

- If the police answer “no” or if the answer is unclear, you can ask, **“am I under arrest or detention?”**
  - If they answer “no” but continue to state that you cannot leave, get the officer’s badge number. You can also ask, **“why not?”**
- **DETENTION**
  - If they answer “yes”, ask **“why?”**. You are entitled to know the reasons for your detention or arrest pursuant to s. 10(a) of the *Charter*.
  - Get the police officer’s badge number.
  - If you are detained by the police, you cannot leave and walk away.
  - You have the right to remain silent pursuant to s. 7 of the *Charter* and the right to speak to a lawyer pursuant to s. 10(b) of the *Charter*. The police must inform you of your right to speak with a lawyer immediately upon detention, and provide you with an opportunity to do so.<sup>42</sup>

## CHARTER OF RIGHTS AND FREEDOMS

- 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice
- 10. Everyone has the right on arrest or detention
  - (a) to be informed promptly of the reasons therefor;
  - (b) to retain and instruct counsel without delay and to be informed of that right

<sup>41</sup> Walia, *supra* at 2-4; Pivot Legal Society, *supra* at 6, 8-10; Canadian Civil Liberties Association, *supra*; McGrady and Sabet-Rasekh, *supra*, at 37-44.

<sup>42</sup> *R v Manninen*, 1987 CanLII 67 (SCC), [1987] 1 SCR 1233; *R v Suberu*, 2009 SCC 33 (CanLII), [2009] 2 SCR 460.

- **Tell the officer that you would like to remain silent and that you would like to speak to a lawyer.**
- The police have a common law power to detain an individual for investigative purposes and conduct a pat down search if they believe that their safety, or the safety of others, is at risk.<sup>43</sup>

## • ARREST

- If you are arrested, you continue to have the same rights under the *Charter* to be advised promptly of the reason for arrest (s. 10(a)); the right to retain and instruct counsel (s. 10(b)); and the right to remain silent (s. 7).
- However, you must provide your name and address to the police upon request and they have the right to conduct a search of your “immediate surroundings”, which includes you, your clothing, anything you’re carrying such as your backpack, purse, cellphone, etc., and your vehicle, if you are in one.
- If you are being arrested, engaging in a physical struggle with the police or attempting to or actually running away will likely result in further charges.
- Exercise your right to remain silent and speak to a lawyer as soon as possible.
- If you do not have a lawyer, you have a right to speak with a legal aid lawyer for free and police must allow you to contact them.

## COMMON PROTEST CHARGES<sup>44</sup>

Even though protesting is legal in Canada, you can run into encounters with the police if you break other laws in the act of demonstrating. The charges outlined below are the most common ones that arise in a protest context; however, you can be arrested for breaking any law at a protest. This list is not exhaustive. The section numbers (e.g. s. 175(1)) below refer to the relevant provision in the *Criminal Code*, which outlines the criminal laws across Canada.

<sup>44</sup> Walia, *supra* at 4-6; McGrady and Sabet-Rasekh, *supra*, at 44-49; PEN Canada, *supra*.

### **Breach of the Peace – s. 31**

- Peace officers have the right to arrest you to prevent or stop a breach of the peace. However, it is not a charge in and of itself, nor is there a record of the charge. The police will usually release you soon after the action unless they are going to charge you for breaking some other law, and in any case within 24 hours. It is a commonly used police tactic to use breaching charges so the police can round people up, put them in police vehicles, drive them far from their original location, and release them there.

### **Causing a Disturbance – s. 175(1)**

- If you cause a disturbance in or near a public place by fighting, screaming, shouting, swearing, singing, using insulting or obscene language, being drunk, impeding or molesting other persons, loitering or obstructing people, you may be charged with this offence, which is punishable with up to six months in prison or a \$5,000 fine.

### **Common Nuisance – s. 180**

- This offence involves stopping people from exercising/enjoying their rights, or endangering the lives, safety or health of the public. Common nuisance can be punishable by up to two years in prison.

### **Mischief – s. 430(1)**

- This includes willfully destroying or damaging property, rendering property dangerous, useless, inoperative or ineffective, or obstructing, interrupting or interfering with the lawful use, enjoyment or operation of property. This would include spray-painting, chaining doors shut, smashing windows, slashing tires, or blockading entrances. Mischief can be punished by a life sentence if you endanger someone’s life. Mischief that damages property, the value of which exceeds \$5,000, can be punished by up to 10 years in prison or a \$5,000 fine.

### **Unlawful assembly – s. 63**

- This involves an assembly of three or more people who gather with the intent to carry out some common purpose, in a manner that causes others around them to reasonably fear that they will “disturb the peace tumultuously” or will provoke others to do so. “Tumultuous” involves an element of violence and this charge is most common when protests involve violent clashes with the police.

Although the police will usually announce that an assembly has become unlawful (usually by ordering you to disperse), it is not essential. This law gives significant discretion to police, but has typically only been used in mass protests such as the 2012 Quebec student protests. Unlawful assembly can be punished by six months in prison or a \$5,000 fine (s. 66(1)). If you are wearing a disguise, the prison sentence could increase to five years (s. 66(2)).

#### **Rioting – s. 64**

- This is when a group of three or more people actually do cause a violent disturbance. Rioting can be punished by up to two years in prison, but that sentence could increase to 10 years if you are wearing a disguise (s. 65(2)).

#### **Resisting or Obstructing a Peace Officer (i.e., Resisting Arrest) – s. 129**

- You can be charged with this if you resist or willfully obstruct a public officer or peace officer in the execution of his duty or any person lawfully acting in aid of such an officer. This includes if you resist being arrested or try to prevent a police officer from arresting someone else. Holding onto a pole or struggling against arrest is resisting, however going limp or refusing to unlock is not resisting.

## **COURTS OF JUSTICE ACT, R.S.O. 1990, C. C.43**

137.1 (1) The purposes of this section and sections 137.2 to 137.5 are,

(a) to encourage individuals to express themselves on matters of public interest;

(b) to promote broad participation in debates on matters of public interest;

(c) to discourage the use of litigation as a means of unduly limiting expression on matters of public interest; and

(d) to reduce the risk that participation by the public in debates on matters of public interest will be hampered by fear of legal action. 2015, c. 23, s. 3.

### **POTENTIAL LONG TERM REPERCUSSIONS TO CONSIDER**

Being arrested and charged at a protest could result in a criminal record, which could have severe negative repercussions on one's employment, housing, travel prospects, and immigration status, as well as lead to social stigma. Having a criminal record could also jeopardize one's immigration or refugee application for individuals seeking permanent residency and/or citizenship status in Canada, and lead to deportation. Even if the charges are dropped or dismissed, the incident may still appear on Criminal Record Checks.



# POTENTIAL LAWSUITS BY OR AGAINST YOU

Civil lawsuits may be brought by individuals or entities (i.e., the plaintiffs). They may seek either money (i.e., monetary damages) or a court order requiring the party being sued (i.e., the defendant) to take (or stop) certain actions to remedy wrongdoing.

## DEFAMATION

Defamation is a tort that provides a civil law remedy for a person whose reputation has been damaged by false statements made by a defendant. The false statements can be spoken or written.

In the common law provinces, a case for defamation is made out and the defendant is presumptively liable in damages if the plaintiff can prove:

- i. That the words in issue are defamatory in the sense that they lower the plaintiff's reputation in the eyes of a reasonable person;
- ii. The words in issue refer to the plaintiff; and
- iii. The words in issue were communicated/published by the defendant to at least one third party.<sup>45</sup>

The court may also take into consideration "all the circumstances of the case, including any reasonable implications the words may bear, the context in which the words are used, the audience to whom they were published and the manner in which they were presented."<sup>46</sup> When all three elements are made out, there is a presumption that the words in issue are false and that they caused the plaintiff

harm. Proof of malice or fault is not necessary in order to establish defamation.

The legal threshold for establishing defamation is low. Most of the nuanced and complicated issues in defamation actions relate to whether one of a list of defences may apply.<sup>47</sup> There are a number of recognized defences to a defamation action, including "truth" or "justification", "immunity" or "absolute privilege", "qualified privilege", "responsible communication in mass media" or "responsible journalism", "reportage" or "reporting on matters of public interest", "fair comment", "consent" and, those found in provincial and territorial legislation, such "statutory limitations" found in *Ontario's Libel and Slander Act*.<sup>48</sup>

Like all lawsuits, defamation suits can be difficult. They target speech, are hard to prove, and often involve extensive discovery, meaning that parties have to provide the other side with personal records, which is very expensive and often intrusive into personal or organizational affairs.

## SLAPP LITIGATION

Strategic Lawsuits Against Public Participation (SLAPPS) are lawsuits which are typically brought without merit with the objective of intimidating and silencing individuals or organizations, who often have significantly less financial means than those bringing the lawsuit. SLAPPS arise within the context of existing defamation suits. SLAPPS often arise within the context of existing defamation suits, but may also arise in other limited circumstances such as breach of contract or breach of confidentiality.

In 2015, Ontario enacted the *Protection of Public Participation Act*, 2015, which in turn introduced

<sup>45</sup> *Grant v Torstar Corp.*, 2009 SCC 61, [2009] 3 SCR 640, at para 28.

<sup>46</sup> *Botiuk v Toronto Free Press Publications Ltd.*, [1995] 3 SCR 3, at para 62.

<sup>47</sup> Law Commission of Ontario, "Defamation Law in the Internet Age: Final Report" (Toronto: March 2020) at 18-19.

<sup>48</sup> RSO 1990, c L 12

ss. 137.1 to 137.5 to the *Courts of Justice Act (CJA)* to provide an expedited, summary mechanism for defendants of SLAPP suits to seek to have those actions dismissed in a faster and less expensive manner.<sup>49</sup>

In Ontario, s. 137.1 of the *CJA* allows for the defendant to move for an order to dismiss the proceeding at any time after it has started. To do so, the defendant being sued for defamation must satisfy the judge that the matter arises from a statement/comment they made that relates to the public interest. The onus then shifts to the plaintiff to show that 1) the original defamation claim has substantial merit and 2) the defendant has no valid defence in the proceeding. Finally, the defendant must show that the harm to their reputation is serious enough that it outweighs the public interest in protecting freedom of expression – otherwise the lawsuit cannot proceed pursuant to the anti-SLAPP legislation. The overall analysis involves a balancing exercise between freedom of expression, reputational harm, and the public interest.<sup>50</sup>

Quebec was the first Canadian province to enact anti-SLAPP legislation, which was incorporated into its *Code of Civil Procedure*.<sup>51</sup> British Columbia's anti-SLAPP legislation, which came into force in 2019, is called the *Protection of Public Participation Act*, and was modelled after the Ontario *Act*.<sup>52</sup>

This type of legislation is important because the fear of getting sued can cause “libel chill”. In addition, defamation suits are extremely expensive and time consuming. Under such legislation, a successful claimant typically has their legal costs covered by the opposing party and may be entitled to additional damages if the court finds the suit was brought in bad faith.<sup>53</sup>

<sup>49</sup> Courts of Justice Act, RSO 1990, c C43

<sup>50</sup> 1704604 *Ontario Ltd v Pointes Protection Association*, 2020 SCC 22; Bent v Platnick, 2020 SCC 23

<sup>51</sup> See Code of Civil Procedure, CQLR c C-25.01, at Division II, ss 51-55; Bill 9, *An Act to amend the Code of Civil Procedure to prevent improper use of the courts and promote freedom of expression and citizen participation in public debate*, online: <http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=5&file=2009C12A.PDF>.

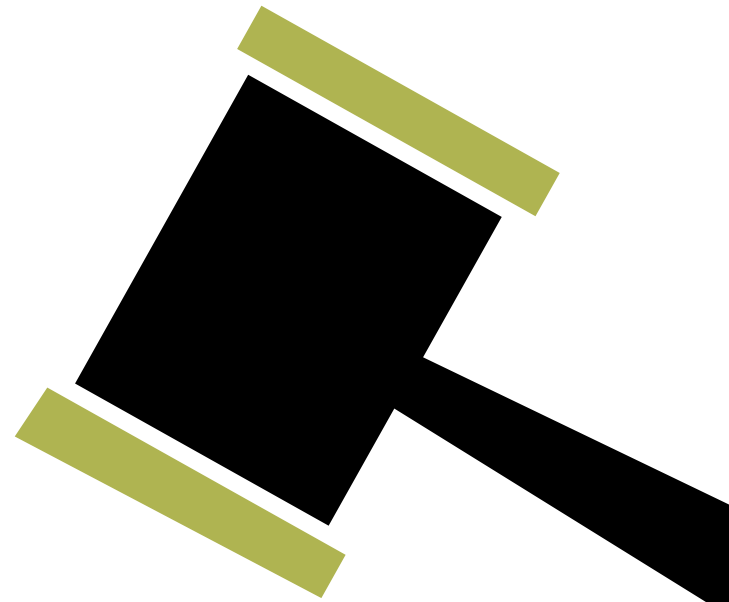
<sup>52</sup> SBC 2019, c 3.

<sup>53</sup> Isabel Ruitenbeek, “Could BC’s New Anti-SLAPP Law Help #MeToo Survivors?”, *The Tyee* (7 May 2019).

## COURTS OF JUSTICE ACT, R.S.O. 1990, C. C.43

137.1 (1) The purposes of this section and sections 137.2 to 137.5 are,

- (A) to encourage individuals to express themselves on matters of public interest;
- (B) to promote broad participation in debates on matters of public interest;
- (C) to discourage the use of litigation as a means of unduly limiting expression on matters of public interest; and
- (D) to reduce the risk that participation by the public in debates on matters of public interest will be hampered by fear of legal action. 2015, c. 23, s. 3.



# ANTI-SLAPP MOTION CASE STUDY: *LASCARIS V B'NAI BRITH CANADA*, 2019 ONCA 163

The appellant, Mr. Lascaris, appealed from an order of a motion judge of the Ontario Superior Court of Justice that dismissed his action pursuant to s. 137.1 of the *Courts of Justice Act* on the basis that it was a Strategic Litigation Against Public Participation (“SLAPP”) action.<sup>54</sup>

The appellant is a lawyer, human rights advocate, and the former Justice Critic in the Green Party of Canada’s shadow cabinet who advanced a resolution calling on the Green Party to support the use of peaceful Boycott, Divestment and Sanctions (“BDS”) to bring an end to Israel’s occupation of Palestinian territories. The respondent, B’nai Brith Canada, is an independent, charitable organization involved in human rights and advocacy initiatives that describes itself as a voice for the Canadian Jewish community.

In June 2016, the respondent began a campaign against the appellant, the Green Party, and others related to the BDS resolution, stating that the resolution was anti-Semitic. In addition, in relation to prior Facebook postings of the appellant’s, the respondent published an article entitled “Green Party Justice Critic Advocates

on Behalf of Terrorists”. The appellant subsequently found a Twitter posting on the respondent’s account stating: “[the appellant] resorts to supporting #terrorists in his desperation to delegitimize the State of #Israel”. It contained a link to the previous article, which accused the appellant of being an “advocate on behalf of terrorists”.

Following the Twitter posting, the appellant served a defamation claim on the respondent regarding the publications pursuant to Ontario’s *Libel and Slander Act*. B’nai Brith did not retract, remove, correct, or edit its publications. Rather, it brought a motion to dismiss the action under s. 137.1 of the *Courts of Justice Act*. The motion judge granted the motion and dismissed the action.

The Court of Appeal held that the motion judge erred in this finding and overturned the decision, finding for Mr. Lascaris.

The court considered the defences of fair comment and qualified privilege and concluded that the appellant had met his burden under the legislation.

Writing for the Court, Nordheimer J. also observed that this action had none of the recognized indicia of a SLAPP lawsuit because here, there was no history of the appellant using litigation or the threat of litigation to silence critics; any financial or power imbalance appeared to favour the respondent; there was no evidence that the appellant had a punitive or retributory purpose for bringing the defamation lawsuit; and the potential damages to the plaintiff were significant.

In assessing the balance of harm, the court held that it clearly favoured the appellant, holding that “accusing any person of supporting terrorists is about as serious and damaging an allegation as can be made in these times” (para 40). The Court went on to note that of added significance was the fact that Mr. Lascaris is a lawyer and his reputation is central to his ability to carry on his profession.

The matter was set aside and the appellant was awarded legal costs in the amount of \$15,000, and the ability to continue his defamation claim.

<sup>54</sup> *Lascaris v B’nai Brith Canada*, 2018 ONSC 3068

# ANTI-SLAPP

*LASCARIS V B'NAI BRITH CANADA*

# ANTI-SLAPP MOTION CASE STUDY: *CUPW V B'NAI BRITH CANADA ET AL, 2020 ONSC 323*

The moving party, B'nai Brith Canada, brought a motion pursuant to s. 137.1 of the *Courts of Justice Act* to dismiss the respondent, the Canadian Union of Postal Workers' (CUPW), defamation claim as Strategic Litigation Against Public Participation (SLAPP), or in other words an anti-SLAPP motion. B'nai Brith contended that the defamation action brought against the defendants by CUPW was an illegitimate attempt to suppress freedom of expression on a matter of public interest and the action should be stayed or dismissed.

CCUPW, as part of its ongoing work, regularly works with similar unions in foreign jurisdictions, including participating in an international capacity building project with the Palestinian Postal Service Workers Union (PPSWU). In addition, CUPW also takes positions on political and human rights issues from time to time, and has for many years supported Boycott, Sanctions and Divestment ("BDS") through a boycott of Israeli products because of what the union believes is Israel's mistreatment of Palestinians in the occupied territories.

B'nai Brith recognizes that criticizing Israel is not in itself anti-Semitic but it believes that much anti-Israel activity is anti-Semitic, and it regards the BDS as an anti-Semitic movement designed to delegitimize and demonize Israel. A worker and Jewish CUPW member brought a complaint to B'nai Brith about the union's support of the BDS, which led to them looking into CUPW's 2018 activities and associations. In the course of this research, the defendant discovered CUPW's support of PPSWU.

When investigating social media accounts associated with the Palestinian union, B'nai Brith found a page maintained by a senior member of the union which included messages in Arabic praising individuals involved in terrorist activity as heroes. B'nai Brith sent this information to CUPW and called for a comment, advising that they intended to publish a story about CUPW and its association with PPSWU. Five days later, they published a press release under the heading "Canadian Postal Workers Align with Pro-Terrorism Palestinian Union" with statements that PPSWU glorifies terrorists and "rather than using the union movement to build peace between Israel and the Palestinians, the CUPW leadership has aligned itself with the path of violence and extremism." A second press release was published on August 2, 2018, which commented on the unfairness of the union compelling Jewish and Israeli members to pay union dues and using those dues to "pay fees, which may be used to support a foreign organization that wants to see them murdered".

CUPW subsequently sued for defamation. In turn, B'nai Brith brought the anti-SLAPP motion seeking to have the action dismissed.

The Court dismissed the motion, allowing the defamation lawsuit to move forward. The Court held that "there is no doubt that there is a solid case for defamation" (para 25) and that the defences raised by B'nai Brith are not certain to be successful.

It agreed that the issue of the conflict between Israel and Palestine was a matter of public interest and that legitimate criticism of the union's views was protected speech. However, it also found that it would be difficult for B'nai Brith to rely on 'truth' as a defence to its public claims about CUPW, noting that like CUPW, the Canadian government, the European Union, the United Nations and the State of Israel had all sponsored projects in the past in Gaza and the West Bank. The Court pointed out that this alone would not be enough to validate a claim of supporting terrorism.

The Court also found evidence to suggest that B'nai Brith had acted on assumptions without exercising due diligence, which may be fatal to a defence of "fair comment" in the defamation action. Its research into PPSWU consisted of a cursory internet search and review of a few social media pages, and it had ignored completely CUPW's publicly-posted policies against terrorism, violence, and anti-Semitism. The Court went as far as noting that there was also the possibility that B'nai Brith had acted with malice, stemming from its vast disagreement with CUPW's support of BDS, noting that "rather than attacking that directly without defaming the union, the defendants chose to focus on the relatively minor involvement with the PPSWU and to blow that out of proportion" (para 30).

The Court held that based on the evidence before it, it was satisfied there was a legitimate defamation action, and dismissed the motion. No order was made on costs.

## **CUPW V B'NAI BRITH CANADA**

## ASSAULT AND BATTERY

If you were threatened and reasonably believed you were in immediate physical danger (assault), or if you were actually physically touched and the contact was uninvited (battery), there may be a civil claim for assault and/or battery. Even an action that doesn't physically harm the other person, such as spitting at someone, or grabbing something they're holding, can be a battery.

## BENEFITS AND PROBLEMS WITH LITIGATION

- **Lawsuits for violations of constitutional rights may help to advance the law on social justice issues and protect movements for social change.**
- **Lawsuits can result in good precedent that advances social justice, or can create bad precedent and present a legal setback.** In either case, movements often continue to press for justice in other ways to create an environment that will be favourable to the changes they seek. The often unfavourable legal climate for many social justice causes makes using the law more difficult. Lawsuits should therefore be thought of as one of many tactics to achieve a movement's goals, when undertaken at the direction of and in close coordination with that movement. But they should not be relied on or considered an end in themselves.
- **Always consider the downsides of litigation. Lawsuits can be expensive and often take years with no guarantee of a just resolution.** Even a victory can be subject to a lengthy appeal process that could take years. Meanwhile, the movement

may have moved on and your lawsuit may become irrelevant. Being a party to a lawsuit may cause anxiety and can distract you from your life and movement work. Also consider what may be exposed if the other party is allowed to see your documents and other private or group strategy communications as part of the discovery process in a lawsuit.

- **If you challenge a lawsuit brought against you as a SLAPP (Strategic Lawsuit Against Public Participation) that aims to silence your legitimate speech or activities through expensive litigation, the other party could be forced to pay your legal fees and other penalties.** If you are thinking of filing a lawsuit, bear in mind that it, too, may be subject to an anti-SLAPP motion. Currently, anti-SLAPP legislation only exists in British Columbia, Ontario, and Quebec.
- **Litigation is usually best viewed as a last resort when your rights have been violated.** While it's difficult to achieve social change through a lawsuit alone, many whose rights have been violated have been vindicated in court.

**IF YOU BELIEVE YOUR RIGHTS WERE VIOLATED IN ORDER TO REPRESS YOUR PALESTINE SOLIDARITY ACTIVISM, CONTACT PALESTINE LEGAL RESOURCES IN CANADA AT [INFO@JUSTPEACEADVOCATES.CA](mailto:INFO@JUSTPEACEADVOCATES.CA).**

**INFO@JUSTPEACEADVOCATES.CA**

# CAMPUS SPECIFIC ISSUES

## ENGAGING WITH UNIVERSITY OR COLLEGE ADMINISTRATION

- **Building relationships with faculty, staff, other student groups and community organizations** is important in order to have a support network and connect your group's work with other social justice issues.
- **Most administrators want to avoid exposing their institutions to public scrutiny and possible condemnation for intolerant reactions to student activism.** In any case, it is important to document your communications with university or college officials to show your efforts to communicate in good faith. If you meet in person with a university or college official, send a written note summarizing your understanding of the conversation and ask for their confirmation of your understanding.
- **Build relationships with university or college administrators before you need their assistance, so that a trusting relationship is forged before situations arise.** It may help to minimize problems later if you establish your trustworthiness by getting necessary approvals from administrators for your events and making them familiar with your group's mission and goals.

## UNIVERSITY OR COLLEGE DISCIPLINE ISSUES

- **Be familiar with your school's policies, regulations and codes of conduct** before organizing events and engaging in activities, and follow the applicable procedures to get approval before an event when necessary.

- **Be prepared that Palestinian rights activism and related academic discourse on campuses are often targeted** by claims that it discriminates against pro-Israel Jewish student groups on campuses.
- **Universities and colleges typically enact by-laws, regulations and/or policies for the conduct of the University's affairs, including the discipline of students for academic and non-academic conduct.**<sup>55</sup> Review these in detail and familiarize yourself with processes in place at your institution. Note that university disciplinary procedures often include an appeals procedure, which involves some type of hearing, but you do NOT have the same rights as a criminal defendant (e.g., rights to counsel, to call and ask questions of adverse witnesses, to a formal hearing, to a high burden of proof, etc.). Accordingly, it is important that you review each institution's code or policy in detail, as the same process may not apply from one university to the next.
- **Make sure that the school's disciplinary procedures are being properly followed.** If the university or college does not follow its own rules and procedures, that may be a way to challenge them.
- **Ask for all procedural safeguards that seem reasonable to you, even if they're not officially enforceable under student conduct codes or law.** Safeguards to request include: a clear and reliable recording of the proceedings in question; your own unofficial recording of discussions, investigatory interviews, and hearings; being allowed to bring a trustworthy uninvolved third person (another student, faculty, staff member or lawyer) to all discussions, investigations, and hearings; more time to gather papers, witnesses, and other evidence that you think would help your side of the case. They may refuse these requests, but it's worth asking.

<sup>55</sup> See for example, McGill University Code of Student Conduct and Disciplinary Procedures: [https://www.mcgill.ca/secretariat/files/secretariat/code\\_of\\_student\\_conduct\\_and\\_disciplinary\\_procedures.pdf](https://www.mcgill.ca/secretariat/files/secretariat/code_of_student_conduct_and_disciplinary_procedures.pdf); University of Alberta Discipline Process: <https://www.ualberta.ca/provost/dean-of-students/student-conduct-and-accountability/discipline-process.html>; University of Manitoba Student Discipline Bylaw: [http://www.umanitoba.ca/admin/governance/governing\\_documents/students/student\\_discipline.html](http://www.umanitoba.ca/admin/governance/governing_documents/students/student_discipline.html); Western University Code of Student Conduct: <https://www.uwo.ca/univsec/pdf/board/code.pdf>; York University Code of Student Rights & Responsibilities: <https://oscr.students.yorku.ca/student-conduct#hearing>

- **There has been some movement by Canadian universities and colleges to update Codes of Conduct to reflect that criticism of Israeli policies could be considered problematic.**<sup>56</sup> As well, at least one university Student Union has included the Ottawa Protocol<sup>57</sup> in their handbook. If you believe your university administration and/or student union has protocols or Codes of Conduct that are inherently discriminatory you are encouraged to obtain expertise and support.
- **Consider exposing any abusive, intolerant, unfair or discriminatory administrative conduct** to the media and public scrutiny, and do so before there is a decision. Trying to influence a fair outcome is usually easier than challenging the outcome after the fact, when the decision-maker is compelled to defend the decision. Also, **consider if there has been discrimination based on one of the protected grounds in your provincial or territorial human rights legislation or a *Charter* violation**, and if these types of claims should be raised.
- **One tactic that has been used in several universities is to have student groups de-certified.** If this is a concern, you should take steps as soon as possible to consult the relevant policy and procedures of your institution, and garner expertise and support from others who can assist your student group in challenging decertification.
- **Students may take initiative to do work related to Palestine, such as arrange an internship or study abroad period, but be prevented from doing so by their university or college.** In such instances, further investigation is required and proactive steps are needed to understand if the denial is a result of an anti-Palestinian bias by the university decision makers.

<sup>56</sup> Universities Canada was lobbied by several Zionist groups to have their 97 university and college presidents update their institution's Code of Conduct to reflect place of origin as a grounds to protect criticism against the state of Israel.

<sup>57</sup> The Ottawa Protocol was signed by the Canadian government in 2011 with the objective to silence criticism of Israel by equating that criticism with antisemitism. See Government of Canada, News Release, "Canada becomes first country to sign the Ottawa Protocol" (19 September 2011), online: <https://www.canada.ca/en/news/archive/2011/09/canada-becomes-first-country-sign-ottawa-protocol.html>.

## SUPPRESSION OF SCHOLARSHIP ON PALESTINE AT THE UNIVERSITY OF TORONTO

### OVERVIEW

The University of Toronto's Faculty of Law came under widespread criticism after being accused of caving to external pressure from a sitting federal judge and university donor not to hire Dr. Valentina Azarova as director for its renowned International Human Rights Program (IHRP) because of her scholarship on Israel's occupation of the Palestinian territories.<sup>58</sup>

An **external review** was subsequently conducted by former Supreme Court of Canada justice Thomas Cromwell, which ultimately exonerated the university

and its senior administrators of any wrongdoing.<sup>59</sup> The inquiry itself has been the subject of widespread criticism from the legal community.

In the meantime, UofT has been censured by the Canadian Association of University Teachers (CAUT) for its actions surrounding the hiring scandal; the IHRP has been without a Director for two academic years; and the university has ignored calls to reinstate Dr. Azarova in the IHRP Director position. The judge in question – Justice David Spiro of the Tax Court of Canada – was the subject of a complaint to the

<sup>58</sup> See Masha Gessen, "Did a University of Toronto Donor Block the Hiring of a Scholar for Her Writing on Palestine?", *The New Yorker* (8 May 2021), online: <https://www.newyorker.com/news/our-columnists/did-a-university-of-toronto-donor-block-the-hiring-of-a-scholar-for-her-writing-on-palestine>; Sean Fine, "U of T Law school under fire for opting not to hire human-rights scholar after pressure from sitting judge", *The Globe and Mail* (17 September 2020); Shree Paradkar, "Search for new director of U of T law faculty's International Human Rights Program leads to resignations, allegations of interference", *The Toronto Star* (17 September 2020), online: <https://www.thestar.com/news/gta/2020/09/17/search-for-new-director-of-u-of-t-law-facultys-international-human-rights-program-leads-to-resignations-allegations-of-interference.html>; Sean Fine, "U of T law dean denies offering scholar job, caving to Tax Court judge's pressure", *The Globe and Mail* (18 September 2020).

<sup>59</sup> The Honourable Thomas A. Cromwell C.C., "Independent Review of the Search Process for the Directorship of the International Human Rights Program at the University of Toronto, Faculty of Law" (March 15, 2021), online: <https://www.president.utoronto.ca/secure-content/uploads/2021/03/Report-of-the-Hon-Thomas-A-Cromwell-CC-%E2%80%93-March-15-2021.pdf>. [Cromwell Report]

Canadian Judicial Council and despite finding he made “serious mistakes”, he will remain on the bench.<sup>60</sup>

## THE SCANDAL

In August 2020, prominent international legal scholar Valentina Azarova was unanimously selected by a three-person committee to fill the Director position of the faculty of law’s International Human Rights Program (IHRP). According to the Cromwell report, of the 140 applicants for the position, Dr. Azarova was the “strong, unanimous and enthusiastic first choice of the selection committee”, with “glowing” references.<sup>61</sup>

On September 4, 2020 around the same time that Dr. Azarova was engaged in advanced negotiations about the details of her hiring with the Assistant Dean of the law school, a phone call occurred between Justice David Spiro, a Tax Court of Canada judge and major donor to the University of Toronto, and the Assistant Vice President (AVP) of the university (presumed to be Chantelle Courtney) in which the judge disclosed to the AVP that he had learned of the potential appointment of Dr. Azarova to the IHRP.<sup>62</sup> Justice Spiro disclosed that he learned of the confidential information from a staff member of an organization of which he had been a director of prior to his appointment to the bench (David Spiro was a previous director of the Centre for Israel and Jewish Affairs (CIJA)) that flagged the “pending appointment of [a] major anti-Israel activist” to UofT and was concerned “that a public protest campaign [would] do major damage to the university, including in fundraising”.<sup>63</sup>

According to the Cromwell Report, Justice Spiro asked the AVP about the appointment of a new IHRP Director, naming Dr. Azarova. He indicated that as a judge he could not become involved, but “wanted to alert the University that if the appointment were made it would be controversial and could cause reputational harm to the University and particularly to the Faculty of Law. He wanted to ensure that the University did the necessary due diligence.”<sup>64</sup> It was ultimately communicated back to Justice Spiro through the AVP that Dr. Azarova was indeed the candidate but that no final hiring decision had been made, despite it being part of a confidential hiring process.<sup>65</sup>

Also on September 4, the law school’s then Dean, Edward Iacobucci (whose term as Dean ended in December 2020), became involved in the hiring process for the first time. He was briefed about Justice Spiro’s objections to Dr. Azarova by the Assistant Dean of Alumni and Advancement (presumed to be Jennifer Lancaster) and also called Professor Audrey Macklin, the chair of the hiring committee, to inform her of the donor’s call and discuss the candidate.

By September 6, the Dean made the decision to discontinue the hiring process with Dr. Azarova, overriding the decision of the selection committee. He called Professor Macklin to notify her of his intention to terminate the process. The Dean emailed the formal decision to terminate the hire on September 9.

## IMMEDIATE FALL OUT

The events caused significant unrest within the UofT community as well as amongst academics, lawyers, and activists domestically and abroad. Following the announcement that Dr. Azarova would no longer be hired, Professor Audrey Macklin resigned from her position in protest. Vincent Wong, a second member of the hiring committee, resigned from his paid position as a Research Associate with the IHRP, citing a lack of “objectivity, fairness, and transparency” in the director search process.<sup>66</sup> The IHRP’s entire program advisory board, comprised of Professors Vincent Chiao, Trudo Lemmons, and Anna Su, also resigned *en masse* in Fall 2020. They, along with several other faculty professors, **wrote** to the university Vice President and Provost seeking to expose the “high-handed manner of governance” that allowed such an incident to occur.<sup>67</sup>

Over 1400 lawyers and academics also signed an **open letter**, noting that the treatment of Dr. Azarova in Canada is consistent with a broader and intensifying climate of suppression of Palestinian speech globally.<sup>68</sup>

## THE EXTERNAL REVIEW

In October 2020, in response to the widespread criticism, UofT announced that it would conduct an “impartial review” into the search for a new Director for the IHRP, initially retaining Professor Bonnie Patterson to serve as the external reviewer.<sup>69</sup> After

concerns about her independence and impartiality were raised<sup>70</sup>, UofT President Meric Gertler **announced** that the inquiry would be led by former Supreme Court of Canada justice Thomas Cromwell, and provided a Terms of Reference for the review.<sup>71</sup>

<sup>60</sup> Canadian Judicial Council, Press Release, “Canadian Judicial Council completes its review of the matter involving the Honourable D.E. Spiro” (21 May 2021), online: <https://cjc-ccm.ca/en/news/canadian-judicial-council-completes-review-matter-involving-honourable-de-spiro>.

<sup>61</sup> Cromwell Report, *supra* at 5 and 11.

<sup>62</sup> *Ibid* at 31.

<sup>63</sup> *Ibid* at 31-32.

<sup>64</sup> *Ibid* at 32.

<sup>65</sup> *Ibid* at 33.

<sup>66</sup> CAUT Report, *supra*, at 8.

<sup>67</sup> Letter from Vincent Chiao, Associate Professor of Law; Anver Emon, Professor of Law; Mohammad Fadel, Professor of Law; Ariel Katz, Associate Professor of Law; Trudo Lemmons, Professor of Law; Jeffrey MacIntosh, Professor of Law; Denise Reaume, Professor of Law; Kent Roach, Professor of Law; and David Schneiderman, Professor of Law to Cheryl Regehr, Vice President and Provost (7 October 2020), online: [http://ultravires.ca/wp/wp-content/uploads/2020/10/Letter\\_to\\_Provost-distd.pdf](http://ultravires.ca/wp/wp-content/uploads/2020/10/Letter_to_Provost-distd.pdf).

<sup>68</sup> Azeza Kanji, David Palumbo-Liu, and Dania Majid, “Repression of speech and scholarship on Palestine needs to end”, Al Jazeera (1 October 2020), online: <https://www.aljazeera.com/opinions/2020/10/1/repression-of-speech-and-scholarship-on-palestine-needs-to-end/>. See also Open letter from IHRP students and alumni to Dean Edward Iacobucci (17 September, 2020), online: [https://docs.google.com/document/d/1ukoJ2r\\_08aCBf6jclrzbd-C6LqztxwXWY2JQYrVegz4g/edit](https://docs.google.com/document/d/1ukoJ2r_08aCBf6jclrzbd-C6LqztxwXWY2JQYrVegz4g/edit); Letter from Current and Former Members of the IHRP Alumni Network Steering Committee to Dean Edward Iacobucci re: Concerns Regarding Interference in Hiring Process for the IHRP’s New Director (13 September 2020 and 23 September 2020), online: <http://ultravires.ca/wp/wp-content/uploads/2020/09/Letters-from-IHRP-Alumni-Network-Steering-Committee-Members-Sep-23-13.pdf>.

<sup>69</sup> Kelly Hannah-Moffat, Memo No 2020-78 “Statement on the Search Process for a Director of the International Human Rights Program at the Faculty of Law”, University of Toronto, Division of Human Resources & Equity (14 October 2020), online: <https://hrandequity.utoronto.ca/memos/statement-on-the-search-process-for-a-director-of-the-international-human-rights-program-at-the-faculty-of-law/>.

<sup>70</sup> See “U of T investigation of hiring controversy flawed: CAUT”, Canadian Association of University Teachers (15 October 2020), online: <https://www.caut.ca/latest/2020/10/u-t-investigation-hiring-controversy-flawed-caut>; President Meric Gertler, “Statement on the External Review of the Search Process for a Director of the International Human Rights Program of the Faculty of Law”, University of Toronto, Office of the President (29 October 2020), online: <https://hrandequity.utoronto.ca/wp-content/uploads/2020/10/29-Statement-on-External-Review-IHRP.pdf>; Letter from Vincent Chiao, Associate Professor of Law; Anver Emon, Professor of Law; Mohammad Fadel, Professor of Law; Ariel Katz, Associate Professor of Law; Trudo Lemmons, Professor of Law; Jeffrey MacIntosh, Professor of Law; Denise Reaume, Professor of Law; Kent Roach, Professor of Law; David Schneiderman, Professor of Law; and Anna Su, Associate Professor of Law to President Meric Gertler (29 October 2020), online: <http://ultravires.ca/wp/wp-content/uploads/2020/10/To-President-Gertler-re-IHRP-Review-Process-final.pdf?fbclid=IwAROM18xrMf1xFGutYsu2j7iCQoTo4oBRKK-po4wOrcJ1gdXPQH3MVZl5gEco>; Marta Anielska, “CAUT begins census process against U of T over IHRP hiring controversy”, The Varsity (25 October 2020), online: <https://thevarsity.ca/2020/10/25/caut-begins-census-process-against-u-of-t-over-ihrp-hiring-controversy/>.

<sup>71</sup> President Meric Gertler, “Statement on Updates to the External Review of the Search Process for a Director of the International Human Rights Program at the Faculty of Law”, University of Toronto, Office of the President (7 December 2020), online: <https://drive.google.com/file/d/1pTHtzf8AzYvofa0Dyx3j-TX2eN7DqnAv/view> at 3.



The **external review** of the incident conducted by Mr. Cromwell was released on March 29, 2021. The report laid out detailed facts of the events, making no findings of credibility, and ultimately exonerated the university and the Dean.<sup>72</sup> It concluded that no offer and acceptance in the strict legal sense had occurred between the university and Dr. Azarova, but rather that the parties were at an advanced stage of negotiations.<sup>73</sup>

The Dean provided the following explanations for terminating Azarova's hire: 1) that there was a hard starting date of September 30, 2020 (an issue that two members of the hiring committee disputed); 2) that the independent contractor arrangement was illegal; and 3) that other qualified Canadian candidates existed who could start by September 30, 2020 (also disputed by two members of the hiring committee).

Cromwell concluded that the decision of Dean Iacobucci to discontinue the candidacy of Dr. Azarova was not due to external alumni influence, but rather to technical and legal constraints involving cross-border hiring as well as the faculty's timing needs.<sup>74</sup> He found no significant gaps in the university's policy framework, although recognized that there were clear breaches of confidentiality with regard to the hiring process. He did not opine on the role, if any, of academic freedom in the recruitment process for position.<sup>75</sup>

A **response** to the review issued by University President Meric Gertler confirmed that the university would accept and implement all of its recommendations, and that a letter of apology had been issued to Dr. Azarova for the fact that confidentiality was not maintained in the search process.<sup>76</sup>

### RESPONSE TO THE CROMWELL REPORT

The Cromwell Report faced extensive blowback, with many finding its conclusions disappointing and unconvincing, underlining the troubling relationships between external donors and universities.<sup>77</sup> It has been questioned why, if the technical and legal barriers no longer exist, Dr. Azarova can no longer be offered the Director position.<sup>78</sup>

A key concern is why Cromwell limited himself to only setting out the facts about which there were no dispute when there were critical facts *in dispute* that he should have addressed in the report.<sup>79</sup> For instance,

Réaume observes that Cromwell treats the following as true, undisputed facts when in reality each claim *is* disputed:

- that the Dean acknowledged Justice Spiro's intervention to Professor Audrey Macklin but described it as 'irrelevant' rather than as 'an issue that it was unnecessary to get to'
- that the starting date was September 30, 2020 rather than 'before the January 2021 term'
- that the independent contractor arrangement necessary to permit Dr. Azarova to start by September 30 was not feasible, and
- that there were qualified Canadian candidates.<sup>80</sup>

It has also been observed that Cromwell decontextualized the conversation between Justice Spiro and university advancement staff, thereby underplaying the power and lobbying dynamics truly at play.<sup>81</sup>

### CAUT CENSURE

The Canadian Association of University Teachers (CAUT), a federation of independent associations and trade unions that represents 72,000 academic and general staff at 125 universities and colleges across Canada, also raised concerns and took action against the University of Toronto.

On April 22, 2021, in a 79-0 decision (with one abstention) delegates to the CAUT Council voted to censure UoT, finding on a balance of probabilities that the Dean's decision to terminate the hiring process was influenced by Justice Spiro's intervention such that fundamental principles of academic freedom, collegial governance, and institutional autonomy were violated.<sup>82</sup>

The CAUT Council concluded that the decision to cancel Dr. Azarova's hiring was politically motivated, and as such constituted a serious breach of the principles of academic freedom.<sup>83</sup> It also found that the University administration did not adequately remedy the situation, noting that it could have re-offered the still-vacant IHRP Director position to Dr. Azarova but had not.<sup>84</sup>

<sup>72</sup> The Honourable Thomas A. Cromwell C.C., "Independent Review of the Search Process for the Directorship of the International Human Rights Program at the University of Toronto, Faculty of Law" (March 15, 2021), online: <https://www.president.utoronto.ca/secure-content/uploads/2021/03/Report-of-the-Hon-Thomas-A-Cromwell-CC-%E2%80%93-March-15-2021.pdf>.

<sup>73</sup> *Ibid* at 12.

<sup>74</sup> *Ibid* at 46-56.

<sup>75</sup> *Ibid* at 69-75.

<sup>76</sup> President Meric Gertler, "President's Response to the Independent Review of the Search Process for the Directorship of the International Human Rights Program at the University of Toronto, Faculty of Law, by the Honourable Thomas A. Cromwell, C.C.," University of Toronto, Office of the President (29 March 2021), online: <https://www.president.utoronto.ca/secure-content/uploads/2021/03/Presidents-Response-to-the-Report-of-Hon.-Thomas-A.-Cromwell-CC.pdf>.

<sup>77</sup> See Joseph H Carens, "Academic Freedom and the Power of University Donors: Dogs That Don't Bark and Other Reflections on the Cromwell Report at the University of Toronto" (23 April 2021), online: <http://ultravires.ca/wp-content/uploads/2021/04/Carens-Academic-Freedom-and-University-Donors-3.pdf>; Letter from Anver M Emon, Professor of Law; Mohammad Fadel, Professor of Law; Ariel Katz, Associate Professor of Law; Trudo Lemmons, Professor of Law; Jeffrey MacIntosh, Professor of Law; Denise Réaume, Professor of Law; and David Schneiderman, Professor of Law; to President Meric Gertler (20 April 2021), online: <http://ultravires.ca/wp-content/uploads/2021/04/Professors-Letter-to-President-Final.pdf>; Anver M Emon, "On the Cromwell Report: Spiro and External Influence", online: <http://ultravires.ca/wp-content/uploads/2021/05/Cromwell-and-Philanthropy.pdf>; Vincent Wong, "What the IHRP Hiring Scandal Tells us About Intersectional Privilege in Canadian Legal Institutions", *Opinio Juris* (6 April 2021), online: <http://opiniojuris.org/2021/04/06/what-the-ihrp-hiring-scandal-tells-us-about-intersectional-privilege-in-canadian-legal-institutions/>; Richard Moon, "Bad Times at a Great University and Its Law School" (21 April 2021) Centre for Free Expression (blog), online: <https://cfe.rverson.ca/blog/2021/04/bad-times-great-university-and-its-law-school/>; Joe Friesen and Sean Fine, "University of Toronto hiring decision not affected by judge: report", *The Globe and Mail* (29 March 2021); Joe Friesen, "U of T report underlines troubling relationship between donors and academia", *The Globe and Mail* (1 April 2021); Shree Paradkar, "External review exonerates U of T in faculty hiring fiasco, but exposes what critic calls a 'goldmine of impropriety'", *The Toronto Star* (31 March 2021); Alan Freeman, "The hiring scandal at the University of Toronto that was supposed to die", *iPolitics* (1 April 2021), online: <https://ipolitics.ca/2021/04/01/the-hiring-scandal-at-the-university-of-toronto-that-was-supposed-to-die/>; "UofT Report Exposes Pro-Israel Attempts to Interfere in Hiring Process for Law School Director", *Canadians for Justice and Peace in the Middle East (CJPME)* (31 March 2021), online: [https://www.cjpme.org/pr\\_2021\\_03\\_31\\_uoft\\_report](https://www.cjpme.org/pr_2021_03_31_uoft_report).

<sup>78</sup> See Shree Paradkar, "U of T could right the wrong - by hiring the 'highly qualified' human rights scholar whose appointment it scuttled", *The Toronto Star* (1 April 2021).

<sup>79</sup> See Richard Moon, "Bad Times at a Great University and Its Law School" (21 April 2021) Centre for Free Expression (blog), online: <https://cfe.rverson.ca/blog/2021/04/bad-times-great-university-and-its-law-school/>; Denise Réaume, "An Analysis of the Cromwell Report", online: <http://ultravires.ca/wp-content/uploads/2021/05/Analysis-of-Cromwell-Report.pdf>.

<sup>80</sup> Réaume, *supra*, at 1.

<sup>81</sup> See Réaume, *supra*, at 4-6; Anver E Emon, "On the Cromwell Report: Spiro and External Influence", online: <http://ultravires.ca/wp-content/uploads/2021/05/Cromwell-and-Philanthropy.pdf>.

<sup>82</sup> See Canadian Association of University Teachers, "Why did CAUT Council censure the U of T administration?", *PowerPoint* (27 May 2021), online: <https://www.dropbox.com/s/u2izggh63pnyhe/Presentation%20to%20UFA%20meeting%20re%20censure%20282021%2005%2027%29.pdf?dl=0>; Memorandum from David Robinson, CAUT Executive Director Re: Motion of Censure Against the Administration of the University of Toronto (20 April 2021), online: [https://drive.google.com/file/d/1qxV8qNH-h7ocr-BBOVN\\_xozMbl0WbdN0/view](https://drive.google.com/file/d/1qxV8qNH-h7ocr-BBOVN_xozMbl0WbdN0/view); "CAUT Council imposes rare censure against University of Toronto over Azarova hiring controversy", *Canadian Association of University Teachers* (22 April 2021), online: <https://www.caut.ca/latest/2021/04/caut-council-imposes-rare-censure-against-university-toronto-over-azarova-hiring>. See also Canadian Association of University Teachers, "CAUT Report on Academic Freedom at the Faculty of Law, University of Toronto" (October 2020), at 6 online: [https://council.caut.ca/sites/default/files/1\\_caut\\_report.pdf](https://council.caut.ca/sites/default/files/1_caut_report.pdf).

<sup>83</sup> *Ibid*.

<sup>84</sup> *Ibid*.

A censure is a rarely imposed sanction in which CAUT members are asked not to accept appointments at the censured institution; not to accept invitations to speak or participate in academic conferences there; and not to accept any distinction or honour that may be offered by that institution, according to CAUT procedures.<sup>85</sup> The last time CAUT applied a censure was in 2008 for governance violations at First Nations University.<sup>86</sup>

The University of Toronto responded to the censure by stating that it was unwarranted and doubling down on the findings and recommendations of the Cromwell Report.<sup>87</sup>

The CAUT censure had immediate and powerful consequences on the University of Toronto, with resignations and cancellations beginning just days after the censure was imposed.<sup>88</sup> On April 23, 2021, another prominent faculty of law professor Kent Roach resigned from his post as Faculty Chair of the Advisory Group for the David Asper Centre for Constitutional Rights in protest, citing concerns related to academic freedom and the need to protect clinical instructors.<sup>89</sup>

A large number of university-wide events have also been cancelled, including those with high profile speakers such as the Right Honourable Michaëlle Jean, who was to give a talk at the Faculty of Social Work on systemic racial discrimination but postponed after pressure from well-known Black intellectuals and others to respect the censure.<sup>90</sup> Events were also cancelled by former Member of Parliament Celina Caesar-Chavannes<sup>91</sup> and author and activist Harsha Walia<sup>92</sup>, among many others.

In addition to the cancellations, numerous organizations and individuals have ended their formal partnerships with the university, at least until it rectifies its actions in the Azarova matter.<sup>93</sup> Several other organizations and individuals have issued statements of solidarity in support of the censure.<sup>94</sup>

- 85 "Procedures Relating to Censure", *Canadian Association of University Teachers*, online: <https://www.caut.ca/about-us/caut-policy/lists/administrative-procedures-and-guidelines/procedures-relating-to-censure>.
- 86 CAUT Council imposes rare censure against University of Toronto over Azarova hiring controversy", *Canadian Association of University Teachers* (22 April 2021), online: <https://www.caut.ca/latest/2021/04/caut-council-imposes-rare-censure-against-university-toronto-over-azarova-hiring>.
- 87 Letter from President Meric S Gertler (23 April 2021), online: <https://hrandequity.utoronto.ca/wp-content/uploads/2021/05/2021-04-23-Presidents-letter.pdf>; Memorandum from Kelly Hannah-Moffat, Vice-President, Human Resources & Equity and Cheryl Regehr, Vice-President & Provost Re: CAUT Censure (27 May 2021), online: [https://www.dropbox.com/s/jk7o8btu5wq8c3j/PDADC\\_Memo\\_CAUT%20Censure.pdf?dl=0](https://www.dropbox.com/s/jk7o8btu5wq8c3j/PDADC_Memo_CAUT%20Censure.pdf?dl=0).
- 88 See Censure UoFT, online: <https://censureuoft.ca/>; ALT\_IHRP, @AltIhrp, online: <https://twitter.com/altIhrp?lang=en>. An updated list of resignations and cancellations is available at Censure UoFT, online: <https://censureuoft.ca/events-cancelled/>.
- 89 Letter from Professor Kent Roach to Dean Jutta Brunnée (23 April 2021), online: [https://drive.google.com/file/d/1AilEUh6e9PuDFqfla\\_Gw1cOe9zLcLU/view](https://drive.google.com/file/d/1AilEUh6e9PuDFqfla_Gw1cOe9zLcLU/view).
- 90 Michaëlle Jean, "Statement on my decision to postpone a lecture on systemic racial discrimination at the #FactorInwentashFacultyofSocialWork @UoFT @CAUT\_ACPPU #UoFTcensure #BlackScholars" (6 May 2021), online: <https://twitter.com/MichaëlleJean/status/1390361129315143685>; "Request from Black intellectuals asking Michaëlle Jean to respect censure of the University of Toronto" (6 May 2021), online: [https://docs.google.com/forms/d/e/1FAIpQLSehHsKoYAEIbjZfJ4Jlt-WWz5Z1MdBsDT4pq8xFr\\_HnhdTnPBWA/viewform](https://docs.google.com/forms/d/e/1FAIpQLSehHsKoYAEIbjZfJ4Jlt-WWz5Z1MdBsDT4pq8xFr_HnhdTnPBWA/viewform); Shree Paradar, "Michaëlle Jean pulls out of planned lecture at U of T over law school hiring fiasco, as several groups cut ties", *Toronto Star* (6 May 2021), online: <https://www.thestar.com/news/gta/2021/05/06/michalle-jean-pulls-out-of-planned-lecture-at-u-of-t-over-law-school-hiring-fiasco.html>.
- 91 Celina Caesar-Chavannes, "I have cancelled this event in support of @CAUT\_ACPPU's decision to censure @UoFT. I add my name to the list of Black Intellectuals and students calling on others to do the same. If the university is committed to #equity, it will hold its leadership accountable." (5 May 2021), online: <https://twitter.com/iamcelinacc/status/1389958566447091713>.
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Censure.pdf; profdeibert, "After careful deliberation of my own and in consultation with my team @citizenlab, we have decided that we cannot collaborate with the @UTLaw because of the @IHRP\_UoFT appointment decision, and as long as the @CAUT\_ACPPU #UoFTcensure is in effect. 1/" (8 May 2021), online: <https://twitter.com/RonDeibert/status/1391093762894487553>; Letter from Richard Elliot, Executive Director, HIV Legal Network to President Meric Gertler and Dean Jutta Brunnée (6 May 2021), online: <http://ultravires.ca/wp/wp-content/uploads/2021/05/HIV-LegalNetwork-ltr-UoFT-IHRP-6May2021.pdf>; Jameel Jaffer, "Very sorry to do this but in the circumstances I don't feel like I have any choice." (8 May 2021), online: <https://twitter.com/JameelJaffer/status/1391175490396905474>; Letter from Janani Shanmuganathan to Dean Jutta Brunnée (14 May 2021), online: <http://ultravires.ca/wp/wp-content/uploads/2021/05/2021-05-14-Letter-to-Dean-Brunnee-University-Tribunal.pdf>; See Sherif Foda, "Hey @UTLaw, I will no longer welcome any applicants from your law school at my firm for any placements or positions until you rectify the situation with @censureutoronto. I know some might say this is unfair to students. To those people, I say #FreePalestine." (8 May 2021), online: <https://twitter.com/SherifMFoda/status/1391174660054716422>; Saron Gebresellassi, "Effective immediately our Firm's Toronto Office has temporarily delisted @UoFT & @UTLaw from our roster for clinical partnerships until it satisfies the conditions to lift the rare censure invoked by @CAUT\_ACPPU. We look forward to speedy resumption upon the lifting of sanctions." (10 May 2021), online: <https://twitter.com/SaronGeb/status/1391823083460337664>.

94 "Open letter from UTSC members on the CAUT censure to Professor Wisdom Tetty, Principal and Professor William Gough, Vice Principal Academic & Dean, University of Toronto Scarborough", online: <https://docs.google.com/forms/d/e/1FAIpQLSfWNkHegxwPTPUhpbzvHj5gQfQ-7jIbxi-eHaRjFlInleTOZZQ/viewform>; "#UoFTscandal: Jewish Faculty at the University of Toronto in Support of the CAUT Censure", (17 May 2021), online: <https://censureuoft.ca/2021/05/17/jewish-faculty/>; "Open Letter to UoFT: We demand the immediate restoration of Dr. Azarova's job offer!" (13 May 2018), online: [https://docs.google.com/forms/d/e/1FAIpQLSfOb4Dxjc\\_7REYyNxVtjtn5PKYd9Z-FIjByi87QMUv\\_z0IIF7g/viewform](https://docs.google.com/forms/d/e/1FAIpQLSfOb4Dxjc_7REYyNxVtjtn5PKYd9Z-FIjByi87QMUv_z0IIF7g/viewform); University of Toronto Law Union, "Statement of Support for CAUT Censure from the University of Toronto Law Union" (5 May 2021), online: <https://drive.google.com/file/d/1FmeOqPRwhk6aF-Z1181UdZ6JbbQlQnJl/view>; Professor Jeffrey Ansloos et al., "Indigenous Education Network Response to CAUT Censure of University of Toronto" (6 May 2021), online: [https://www.oise.utoronto.ca/en/iEN\\_Response\\_to\\_CAUT\\_Censure\\_of\\_University\\_of\\_Toronto.html](https://www.oise.utoronto.ca/en/iEN_Response_to_CAUT_Censure_of_University_of_Toronto.html); "CUPE 3907 supports the CAUT censure of UoFT" (19 May 2021), online: <https://3907.cupe.ca/2021/05/19/cupe-3907-supports-the-caut-censure-of-uoft/>; "Pledge to Respect the CAUT Censure of UoFT", online: <https://uoftcensurepledge.wordpress.com/>.

## CANADIAN JUDICIAL COUNCIL COMPLAINT

Justice David Spiro's involvement in the Azarova matter sparked a number of official complaints to the Canadian Judicial Council (CJC), a body which has the authority to investigate and discipline judicial misconduct.<sup>95</sup>

The CJC announced on January 11, 2021 that it would constitute a five-person Review Panel in respect of the complaints filed relating to Justice Spiro's alleged interference in the appointment of a Director of the IHRP.<sup>96</sup>

On May 21, 2021, the CJC announced that the Judicial Conduct Review Panel had completed its review of the matter involving Justice David Spiro and concluded that while the judge made a serious a mistake in raising the concerns in the manner he did, they were not serious enough to warrant a recommendation for his removal from office.<sup>97</sup> The Panel took note of that fact that the judge recognized his mistakes and expressed remorse.<sup>98</sup>

Similar to the Cromwell Report, the Review Panel found that Justice Spiro was voicing his concerns about the potential impact of the appointment and associated controversy on the University and the Faculty, as opposed to actively campaigning or lobbying against the appointment.<sup>99</sup> The Panel also concluded that there was no suggestion of perceived bias on his part against Palestinian, Arab or Muslim interests.<sup>100</sup>

Only days after the Spiro CJC complaint was closed, Senator Marc Gold introduced legislative amendments to the *Judges Act* aimed at strengthening the judicial complaints process, originally established 50 years ago.<sup>101</sup> The proposal, if passed, would amend and streamline the process for more serious complaints, where removal from the bench could be an outcome. It would also impose mandatory sanctions on a judge when a complaint of misconduct is found to be justified, but is not serious enough to warrant removal from office. Such sanctions would include counselling, continuing education and reprimands.<sup>102</sup>

<sup>95</sup> At least one of the complaints was submitted by Professor Leslie Green of Queen's University and is available here: <http://ultravires.ca/wp/wp-content/uploads/2020/10/CJC-20-09-29.pdf>.

<sup>96</sup> Canadian Judicial Council, Press Release, "Canadian Judicial Council constitutes a Review Panel in the matter involving the Honourable DE Spiro" (11 January 2021), online: <https://cjc-ccm.ca/en/news/canadian-judicial-council-constitutes-review-panel-matter-involving-honourable-de-spiro>.

<sup>97</sup> Canadian Judicial Council, Press Release, "Canadian Judicial Council completes its review of the matter involving the Honourable D.E. Spiro" (21 May 2021), online: <https://cjc-ccm.ca/en/news/canadian-judicial-council-completes-review-matter-involving-honourable-de-spiro>. See also Aidan McNab, "Canadian Judicial Council closes complaint against Justice David Spiro", *Law Times* (24 May 2021), online: [https://www.lawtimesnews.com/resources/professional-regulation/canadian-judicial-council-closes-complaint-against-justice-david-spiro/356435?utm\\_source=GA&utm\\_medium=20210525&utm\\_campaign=LTW-Newsletter-20210525&utm\\_content=A03C5F4C-5A11-4AB9-B8C1-3DAA693435D5&tu=A03C5F4C-5A11-4AB9-B8C1-3DAA693435D5](https://www.lawtimesnews.com/resources/professional-regulation/canadian-judicial-council-closes-complaint-against-justice-david-spiro/356435?utm_source=GA&utm_medium=20210525&utm_campaign=LTW-Newsletter-20210525&utm_content=A03C5F4C-5A11-4AB9-B8C1-3DAA693435D5&tu=A03C5F4C-5A11-4AB9-B8C1-3DAA693435D5).

<sup>98</sup> *Ibid.*

<sup>99</sup> *Ibid.*

<sup>100</sup> *Ibid.*

<sup>101</sup> Department of Justice Canada, News Release, "Government of Canada introduces legislation to foster greater confidence in the judicial system" (25 May 2021), online: <https://www.canada.ca/en/department-justice/news/2021/05/government-of-canada-introduces-legislation-to-foster-greater-confidence-in-the-judicial-system.html>.

<sup>102</sup> *Ibid.*

# UNIVERSITY OF TORONTO

# SENSURED

## PROTESTING THE ISRAELI DEFENSE FORCES ON YORK UNIVERSITY CAMPUS

Controversy erupted at Toronto's York University campus after student group Herut Canada hosted an event called "Reservists on Duty: Hear from Former Israeli Defense Forces (IDF) Soldiers" on November 20, 2019. Hundreds of students joined Students Against Israeli Apartheid (SAIA) to denounce the presence of IDF personnel on campus.<sup>103</sup> The event was also attended by members of the Jewish Defense League (JDL), a far-right group classified as a terrorist organization in the U.S., that is external to the university and had been previously banned by York University. Tensions quickly escalated between attendees, leading to verbal and physical altercations.

The event received domestic and international media attention, with the SAIA protestors quickly being called out by prominent Canadian politicians for anti-Semitic violence.<sup>104</sup> Prime Minister Justin Trudeau tweeted, "*On Wednesday night, violence & racist chants broke out against an event organized by the Jewish community at York University. What happened that night was shocking and absolutely unacceptable. Anti-Semitism has no place in Canada. We will always denounce it & all forms of hatred.*"<sup>105</sup>

Ontario's Premier, Doug Ford tweeted a similar statement, "*I am disappointed that York University allowed for a hate-filled protest to take place last night at Vari Hall. I stand with the Jewish students and the Jewish community. There is no place in Ontario for racism and hatred,*"<sup>106</sup> as did Toronto Mayor John Tory, who stated, "*I am very disturbed by the apparent polarization and violence evident from the events of last night at York University. I have heard concerns from several Jewish groups in our city today. Anti-Semitism and violence is totally unacceptable.*"<sup>107</sup>

These narratives failed to recognize that many of the SAIA protesters faced violence themselves, some of which were captured on video, including one student who was punched in the face, another who was choked with their own scarf, and another who was knocked unconscious.<sup>108</sup> In addition to the smear campaigns faced by SAIA, their student club status – as well as that of Herut Canada's – was suspended following the November 2019 event.<sup>109</sup> Their status was not reinstated until the following January.

In December 2019, university officials directed that an external review of the incidents take place, and retained former Supreme Court of Canada Justice Thomas Cromwell to complete the independent inquiry. The final **report** was released publicly in June 2020. It included a series of recommendations, among them suggestions that the university clearly define acceptable speech, what constitutes discrimination and harassment, and the consequences for violating the university's codes. One of the more controversial recommendations was that the administration "consider the International Holocaust Remembrance Alliance's (IHRA)'s working definition of anti-Semitism as it develops its own statement on racism and discrimination."<sup>110</sup> The York University Faculty Association (YUFA) issued a **statement** opposing this recommendation, noting that the IHRA working definition has been linked to a vigorous lobbying effort calling on governments and other institutions like universities to condemn and even to prohibit criticisms of the state of Israel as dangerous expressions of anti-Semitism. They also observed that its adoption is a potential threat to academic freedom.<sup>111</sup>

<sup>103</sup> Joel Roberts, "Protesting the Israel Defense Forces is not anti-Semitic", Canadian Dimension (23 November 2019), online: <https://canadiandimension.com/articles/view/protesting-the-israel-defense-forces-is-not-anti-semitic>.

<sup>104</sup> Davide Mastracci, "Debunking Politicians' Falsities About the York University Protest", Medium (26 November 2019), online: <https://medium.com/@Davide-Mastracci/debunking-politicians-lies-about-the-york-university-protest-9b9c-f096a2f8>;

<sup>105</sup> Justin Trudeau (22 November 2019), online: <https://twitter.com/JustinTrudeau/status/1197941965775618051>.

<sup>106</sup> Doug Ford (21 November 2019), online: <https://twitter.com/fordnation/status/1197583699614810112>.

<sup>107</sup> John Tory (21 November 2019), online: <https://twitter.com/JohnTory/status/1197602497898188800>. See also Stephen Lecce (21 November 2019), online: <https://twitter.com/Sflecce/status/1197644173182164999>; Andrew Scheer (21 November 2019), online: <https://twitter.com/AndrewScheer/status/1197672842306961408>; Roman Baber (21 November 2019), online: [https://twitter.com/Roman\\_Baber/status/1197529408631951363](https://twitter.com/Roman_Baber/status/1197529408631951363); Michelle Rempel Garner (21 November 2019), online: <https://twitter.com/MichelleRempel/status/1197517889080897536>; Michael Levitt (21 November 2019), online: <https://twitter.com/LevittMichael/status/1197558924729311234>.

<sup>108</sup> The Honourable Thomas A Cromwell CC, "York University Independent Review", York University (30 April 2020), at 14 online: <https://president.yorku.ca/files/2020/06/Justice-Cromwell%E2%80%99s-Independent-External-Review.pdf?x79145>.

<sup>109</sup> "Faculty for Palestine Denounces York University President's Suspension of Students Against Israeli Apartheid-York", Faculty for Palestine Canada (10 December 2019), online: <https://www.faculty4palestine.ca/faculty-for-palestine-denounces-york-university-presidents-suspension-of-students-against-israeli-apartheid-york/>.

<sup>110</sup> The Honourable Thomas A Cromwell CC, "York University Independent Review", York University (30 April 2020), at 47 online: <https://president.yorku.ca/files/2020/06/Justice-Cromwell%E2%80%99s-Independent-External-Review.pdf?x79145>.

<sup>111</sup> YUFA Staff, "YUFA flags academic freedom concerns in Cromwell Report", York University Faculty Association (YUFA) (29 June 2020), online: [https://www.yufa.ca/yufa\\_flags\\_academic\\_freedom\\_concerns\\_in\\_cromwell\\_report](https://www.yufa.ca/yufa_flags_academic_freedom_concerns_in_cromwell_report).

# SURVEILLANCE AND LAW ENFORCEMENT

## THE RIGHT TO PRIVACY

In Canada, a person's privacy interests are protected by s. 8 of the Canadian *Charter of Rights and Freedoms*. Section 8 of the *Charter* guarantees that:

Section 8 acts as a limitation on the search and seizure powers of the government, including police and other government investigators. The purpose of s. 8 is the protection of a person's privacy interests, not the protection of property. There are three zones in which an individual has a privacy interest:

**CANADIAN CHARTER  
OF RIGHTS AND FREEDOMS**  
**s.8 Everyone has the  
right to be secure  
against unreasonable  
search and seizure.**

- 1) Personal (i.e., the body)
- 2) Informational
- 3) Territorial (i.e., places or things)

## WHAT IS A "SEARCH"?

Police actions will only constitute a "search" where they intrude on an individual's **reasonable expectation of privacy**. A person's expectation of privacy varies depending on the environment, and there are some situations where the expectation of privacy is stronger.

People have high expectations of privacy in relation to searches of the body or person. While all searches of the body breach bodily integrity, the more invasive the search (e.g., DNA samples, strip searches, etc.), the higher the expectation of privacy.

With respect to informational privacy, the greatest protection is given to information about biological attributes or that which reveals intimate details of a person's lifestyle, health information, and/or personal choices.

Regarding territorial privacy, the more a place shares the quality of being a home, the higher the expectation of privacy. Places like airports, public parks, etc. have much lower expectations of privacy than a person's home.

## WHAT IS A SEARCH WARRANT?

A warrant is a document that police obtain from a justice of the peace or judge that gives them legal authority to search a particular place for a particular item or items. The general requirements for obtaining a warrant are set out in s. 487 of the *Criminal Code*. Other sections of the *Criminal Code* address special types of warrants, such as warrants for wiretaps (s. 186) and DNA (s. 487.05).

In order to obtain a warrant, a police officer must appear before a justice of the peace (or judge) and swear *an information* – that is, they must provide evidence to show why the police need to conduct the search. This can also be done over the phone in special circumstances (s. 487.1). The evidence must specify where the police intend to search, what they intend to search for, and why the search is necessary for their investigation.

In order to issue a warrant, the justice of the peace must be satisfied that there are **reasonable and probable grounds** to believe that the items sought exist and will be found in the place police want to search. The justice of the peace must also be satisfied that there are grounds for believing a criminal offence has been committed, and that evidence of that offence will be found in the place to be searched. If the justice of the peace is satisfied by the police officer's evidence, the warrant will be issued.

The police must have the warrant with them when they conduct the search and they must knock and announce their presence before trying to force entry. The person who is being searched must be shown the warrant.

## SURVEILLANCE AND LAW ENFORCEMENT ISSUES

- Law enforcement (local police, provincial police, RCMP) can use a number of methods to spy on you, some of which require permission from courts. Assume that your activities and communications may be monitored without your knowledge, in ways that don't require a court order, or under a court order that you don't know about, or even by private surveillance or intrusion. Be aware of the risks of different types of communication. Experts repeatedly warn that there is no such thing as "secure" electronic communication. Law

enforcement and private organizations often monitor activists' online activities and use the information against them in criminal cases or otherwise.

- Infiltration of organizations by undercover agents or informants is common. Be aware of people who suggest and encourage violent/unlawful action, whose background you don't know, who are divisive, or who appear suddenly and become actively engaged without prior known activism in the area. Agents can perform illegal activities and lie to you without penalty.
- If confronted by law enforcement, you may be asked to provide your name, address, and identification. You are not required to do so unless:
  - **1)** You are detained while driving, and then you must provide proper identification to the police.
  - **2)** You have been lawfully arrested.
- You are not required to say anything else, even if pressured to do so. If you decide to speak to law enforcement, be aware that anything you say can be used against you, your community, or group. If you decide not to talk to law enforcement, state clearly that you do not wish to talk (i.e., that you would like to remain silent, as is your right pursuant to s. 7 of the *Charter*), and would like to speak with a lawyer. Even if you want to speak with law enforcement, it is best to have a lawyer present, especially if you are under investigation or under arrest. The police must inform you of your right to speak with a lawyer immediately upon detention, and provide you with an opportunity to do so.
- Do not lie or provide false documents to the police. Silence and a lawyer may be best in any situation involving law enforcement potentially investigating you.
- If law enforcement asks to search you or your home, you can say explicitly "I do not consent to a search." You may be deemed to have consented to a search by your actions (e.g., by opening the door, letting them in, etc.) If they come to your home and you do not want to talk to them or let them in, you may talk through the door or step outside, and tell them your lawyer will contact them.

- If law enforcement has a search warrant, you can demand to see it before letting them in. To make sure it is a valid warrant, check for a judge's or justice of the peace's signature, specific language about where and what the search is for, and the correct name and/or address. You could be charged with obstruction of justice if you try to stop an authorized search from taking place. If you believe a search is not authorized, tell law enforcement but do not try to stop them. You can say "I do not consent to this search" and can challenge the search later if anything they find is used against you, and/or make a complaint. Be sure to record the officers' names and badge numbers and what they did during the search.
- If you want to find out what information the government is collecting about you, consider using tools like the federal Access to Information and Privacy (ATIP) Online Request<sup>112</sup> under the *Access to Information Act*<sup>113</sup> and/or provincial, territorial, and municipal public records request laws to discover information/records that federal, state or municipal government agencies or officials have about you or your group. These requests can also be used in other contexts to expose communications and documents coming from government actors, government or public university contracts, investments, or other relationships with target companies, etc. Sustained follow-up may be needed to obtain requested documents if the public agency is resistant to your request and to follow up on delays, etc. Contact us for resources to help you with such requests.
- Despite all of these warnings, be smart, rather than paranoid — do not let it hamper your activism!

<sup>112</sup> See <https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/access-information/request-information.html>. Each request costs \$5.00 CAD.

<sup>113</sup> R.S.C., 1985, c. A-1

## HOW TO MAKE A FREEDOM OF INFORMATION REQUEST

The following provides links to federal, provincial, and territorial access to information and privacy legislation, as well as information on requesting access to governmental records.

**FEDERAL** [\*Access to Information and Privacy \(ATIP\) Online Request\*](#)

**ALBERTA** [\*Freedom of Information and Protection of Privacy Act \(FOIP Act\)\*](#)

**BRITISH COLUMBIA** [\*Freedom of Information and Protection of Privacy Act \(FOIPPA\)\*](#)

**MANITOBA** [\*Freedom of Information and Protection of Privacy Act \(FIPPA\)\*](#)

**NEWFOUNDLAND** [\*Access to Information and Protection of Privacy Act\*](#)

**NEW BRUNSWICK** [\*Right to Information and Protection of Privacy Act\*](#)

**NORTHWEST TERRITORIES** [\*Access to Information and Protection of Privacy \(ATIPP Act\)\*](#)

**NOVA SCOTIA** [\*Freedom of Information and Protection of Privacy Act \(FOIPOP\)\*](#)

**NUNAVUT** [\*Access to Information and Protection of Privacy Act \(ATIPP Act\)\*](#)

**ONTARIO** [\*Freedom of Information and Protection of Privacy Act \(FIPPA\)\*](#)

**PRINCE EDWARD ISLAND** [\*Freedom of Information and Protection of Privacy Act \(FOIPP\)\*](#)

**QUEBEC** [\*Commission d'accès à l'information\*](#)

**SASKATCHEWAN** [\*The Freedom of Information and Protection of Privacy Act\*](#)

**YUKON** [\*Access to Information and Protection\*](#)

Note that municipalities have separate legislation, which will need to be researched separately. For example, in Ontario, the municipalities are covered under the [\*Municipal Freedom of Information and Protection of Privacy Act \(MFIPPA\)\*](#).

# BOYCOTT, DIVESTMENT, AND SANCTIONS (BDS)

## WHAT IS BOYCOTT, DIVESTMENT, AND SANCTIONS (“BDS”)

BDS is a call from Palestinian Civil Society that uses non-violent boycotts and divestment measures in an attempt to pressure the Israeli government to recognize Palestinians’ human rights, including their rights to full equality, freedom from violence and forced displacement, and their right to return.<sup>114</sup> The movement was inspired by the South African anti-apartheid movement, and urges action to pressure Israel to comply with international law.

The three stated objectives of BDS are:

1. Ending Israel's occupation and colonization of all Arab lands and dismantling the Wall;
2. Recognizing the fundamental rights of the Arab-Palestinian citizens of Israel to full equality; and
3. Respecting, protecting and promoting the rights of Palestinian refugees to return to their homes and properties as stipulated in UN resolution 194.

BDS is now a global movement made up of unions, academic associations, churches, and grassroots movements across the world, including in Canada.

<sup>114</sup> BDS Movement, “Palestinian Civil Society Call for BDS” (9 July 2005), online: <https://bdsmovement.net/call>.

**BOYCOTTS:** The Palestinian BDS National Committee (BNC) calls for a boycott of Israeli and international companies that are complicit in violations of Palestinian rights. Virtually all Israeli companies are complicit to some degree in Israel’s system of occupation and apartheid. We focus our boycotts on a small number of companies and products for maximum impact. The BNC focuses on companies that play a clear and direct role in Israel’s crimes and where we think we can have an impact.

Israeli cultural and academic institutions directly contribute to maintaining, defending or whitewashing the oppression of Palestinians, as Israel deliberately tries to boost its image internationally through academic and cultural collaborations. As part of the boycott, academics, artists, and consumers are campaigning against such collaboration and “rebranding.” A growing number of artists have refused to exhibit or play in Israel.

**DIVESTMENT** means that a company or organization removes resources or investments and/or ensures that their investment portfolios and pension funds are not used to finance companies directly supporting or profiting from the Israeli occupation of Palestinian land. These efforts raise awareness about the reality of Israel’s policies and encourage companies to use their economic influence to pressure Israel to end its systematic denial of Palestinian rights.

**SANCTIONS** are an essential part of demonstrating disapproval for a country’s actions. Israel’s membership of various diplomatic and economic forums provides both an unmerited veneer of respectability and material support for its crimes. By calling for sanctions against Israel, campaigners educate society about violations of international law and seek to end the complicity of other nations in these violations.



## IS IT ILLEGAL TO SUPPORT BDS?

- No. Boycotts, campaigns, and protests to draw attention to human rights violations are protected activity under the right to free speech, which is protected pursuant to s. 2(b) of the Canadian *Charter of Rights and Freedoms*.
- Unlike in the United States, Canada does not currently have any anti-boycott regulations that prohibit participating in a boycott against a “friendly country” if the boycott is called by a “foreign country.”
- In February 2016, Canada’s Parliament did pass a motion asking the government to condemn groups and individuals who promote the BDS movement in Canada; however, it is not officially against the law to do so – **no law or legislation was passed banning BDS activity**.<sup>115</sup> The motion was put forward by then Conservative Member of Parliament for Parry Sound-Muskoka Tony Clement, and stated:

*That, given Canada and Israel share a long history of friendship as well as economic and diplomatic relations, the House rejects the Boycott, Divestment and Sanctions (BDS) movement, which promotes the demonization and delegitimization of the State of Israel, and call upon the government to condemn any and all attempts by Canadian organizations, groups or individuals to promote the BDS movement, both here at home and abroad.*

- It passed easily, with a vote of 229 in favour (mostly conservatives and liberals) to 51 against (mostly NDP and Bloc Québécois).
- Beyond the federal motion, on May 19, 2016, the Ontario legislature voted down Private Members’ Bill 202, *An Act respecting participation in boycotts and other anti-Semitic actions*, which would have prevented the provincial government from entering into contracts with individuals or entities supporting the BDS movement.<sup>116</sup> The proposed legislation passed first reading before being defeated at second reading by a vote of 39 to 18.
- On December 1, 2016, Private Member’s Motion 36<sup>117</sup> passed in the Ontario legislature, which rejected the differential treatment of Israel, including the boycott, divestment and sanctions movement. It

## BDS ON CANADIAN CAMPUSES

Canadian student groups are leaders in the BDS movement!

- On November 29, 2018, the Canadian Federation of Students, Canada’s oldest and largest student organization, **voted** to endorse the BDS movement in solidarity with Palestinian human rights advocates.
- On March 30, 2017, the University of British Columbia chapter of Solidarity for Palestinian Human Rights successfully won a case before BC’s Supreme Court in the case of *Presch v Alma Mater Society of the University of British Columbia*, **2017 BCSC 963**, in which the Court ruled that its referendum on BDS could proceed.
- On March 21, 2017, after a long and vigorous debate, students at King’s University College, which is part of Western University in London, Ontario, **voted** 76% in favour of boycotting and divesting from companies complicit in the Israeli occupation.
- Check out the 20+ student-led BDS victories on Canadian University campuses **HERE**

also endorsed the Ottawa Protocol on Combatting Antisemitism, which was signed by the Canadian government in 2011 with the objective to silence criticism of Israel by equating that criticism with antisemitism.<sup>118</sup> The motion was introduced by Thornhill Conservative MPP Gila Martow, and was passed by a vote of 49 to five, with almost half of the 107 members of the legislature absent. Only the NDP members in the house voted against the resolution.

<sup>115</sup> House of Commons, Journals, 42nd Parl, 1st Sess, No 22 (22 February 2016) at 176.

<sup>116</sup> Bill 202, *An Act respecting participation in boycotts and other anti-Semitic actions*, 1st Sess, 41st Leg, Ontario, 2016 (1st Reading May 17, 2016).

<sup>117</sup> Ontario, Legislative Assembly, *Orders and Notices Paper*, 41st Parl, 2nd Sess, No 38 (1 December 2016) at 3, 11 at 17.

<sup>118</sup> Government of Canada, News Release, “Canada becomes first country to sign the Ottawa Protocol” (19 September 2011), online: <https://www.canada.ca/en/news/archive/2011/09/canada-becomes-first-country-sign-ottawa-protocol.html>.

## IS BDS ANTI-SEMITIC?

- No. BDS is focused on the human rights of the Palestinian people and Israel's compliance with international human rights standards under international law. It is not anti-Semitic nor anti-Israel to require the Israeli government to comply with such obligations.

## WHAT COMPANIES SHOULD I BOYCOTT?

- For a detailed list of international companies that aid and abet Israel's violations of international law, including by operating in illegal Israeli settlements and acting as contractors for the Israeli military and government, check out the BDS Canada [Consumer Boycott Action List](#) from the Canadian BDS Coalition.

## WHAT ARE SOME IMPORTANT CONSIDERATIONS RELATED TO BUSINESS AND HUMAN RIGHTS?

- Responsible business conduct means ensuring that global operations, including supply chains, are compliant with domestic and international human rights laws. It also means doing business in a manner that is economically, socially, and environmentally sustainable.
- While there are very few binding legal obligations that are enforceable on corporations operating transnationally, a number of voluntary "soft law" mechanisms have emerged in the forms of international guidelines, ethical principles, and codes of conduct, which are based on the notion that multinational corporations have a quasi moral/legal responsibility for the protection of rights that have a strong nexus with the operations of the company.<sup>119</sup> Despite lacking an enforcement mechanism, in the absence of "hard law", these guidelines contribute to responsible business practices by solidifying the notion that corporations owe a duty to stakeholders and shareholders alike, and by providing a framework for internalizing human rights norms within a company.<sup>120</sup>
- One notable set of globally-endorsed standards is the UN Guiding Principles on Business and Human Rights (UNGPs).<sup>121</sup> Unanimously endorsed in 2011 by the UN Human Rights Council, the UNGPs provided for the first time a global standard for preventing and addressing the risk of adverse impacts on human rights linked to business activity. The UNGPs

## CANADIAN LABOUR IS A STRONG SUPPORTER OF BDS!

Canadian labour unions that have publically supported BDS include:

- Unifor
- Confédération des syndicats nationaux (CSN) / Confederation of National Trade Unions
- Canadian Federation of Students, Ontario Branch
- Centrale des syndicats du Québec (CSQ) / Quebec House of Labour
- Conseil central du Montréal métropolitain de la confédération des syndicats nationaux (CCMM-CSN)
- College and University Workers United (CUWU)
- Canadian Union of Postal Workers (CUPW) / Syndicat des travailleurs et travailleuses des Postes (STTP)
- Fédération nationale des enseignantes et des enseignants du Québec (FNEEQ-CSN) / Quebec Teachers Union
- Association pour une Solidarité Syndicale Étudiante (ASSÉ) / Association for Student Union Solidarity
- Ontario branch of the Canadian Union of Public Employees (CUPE-ON)

FOR MORE INFORMATION, VISIT [CANADIAN BDS COALITION](#).

<sup>119</sup> Justine Nolan & Luke Taylor, "Corporate Responsibility for Economic, Social and Cultural Rights: Rights in Search of a Remedy?" (2009) 87 J of Business Ethics 433 at 437.

<sup>120</sup> *Ibid* at 439.

<sup>121</sup> United Nations Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, (New York and Geneva: OHCHR 2011) [UNOHCHR, UNGP].

consist of 31 principles that outline how States and businesses should implement the UN “Protect, Respect and Remedy” Framework in order to better manage business and human rights challenges.<sup>122</sup>

The policy framework consists of three core pillars: (1) States’ duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulation, and adjudication; (2) the corporate responsibility to respect human rights, which means to act with due diligence to avoid infringing on the rights of others; and (3) the need for greater access by victims to effective remedies, judicial and non-judicial.

- Human rights due diligence is fundamental to ensuring that businesses meet their responsibility to respect human rights. This refers to the steps that companies must take to identify, prevent, mitigate, remedy, and account for any negative human rights impacts that the company may cause or contribute to through its business activities, services, or relationships.
- The UNGPs apply to all States and businesses, both transnational and others, regardless of their size, location, ownership, or structure. They also give particular attention to the rights and needs of vulnerable groups, including women, children, migrants, persons with disabilities, and Indigenous communities.
- In addition to the UNGPs, a variety of other frameworks have been developed as a means of identifying and promoting human rights obligations for businesses. Some guidelines focus on a broad range of human rights protections while others are geared towards specific sectors or issues, such as mining or security, or specific groups, such as women or children. Prior to the development of the UNGPs, one of the standards was the *Voluntary Principles of Security and Human Rights* (VPSHRs).<sup>123</sup>
- *The OECD Due Diligence Guidance for Responsible Business Conduct* applies to all sectors and include recommendations for corporations to fulfill human rights due diligence obligations.<sup>124</sup> As a member of the Organization for Economic Co-operation and Development (OECD), Canada is expected to be directed by this Guidance in its engagement with companies and its promotion of Canadian business.<sup>125</sup>

- The **UN Global Compact**, a voluntary initiative launched in 2000, also addresses the issue of business and human rights through its *Ten Principles*, which are aimed at getting business leaders to voluntarily promote and apply principles relating to human rights, labour standards, the environment, and anti-corruption.<sup>126</sup> Several thousand companies have signed onto the Global Compact. The Global Compact Network Canada (GCNC) is the Canadian local network of the UNGC. Thematic human rights frameworks have also been developed for women and children, respectively, through the *Women’s Empowerment Principles* and the *Children’s Rights and Business Principles*.<sup>127</sup>
- Companies are urged to take all necessary measures to ensure that their activities are in compliance with international humanitarian law, international human rights law, and international criminal law by ending all association with projects connected to unlawful Israeli settlements and the occupation of Palestinian territory.
- In Canada, pursuant to the *Crimes Against Humanity and War Crimes Act*,<sup>128</sup> parties that are complicit in genocide, crimes against humanity, and/or war crimes, including individuals or corporations, are liable to criminal prosecution.
- In January 2021, the Ontario government’s Capital Markets Modernization Task Force issued its **final report** containing proposals for policy reform to Ontario’s capital markets.<sup>129</sup> In the report, the Task Force recommended that public issuers be required to disclose material environmental, social, and

<sup>122</sup> UNOHCHR, *Interpretive Guide*, supra note 143 at 2.

<sup>123</sup> *Voluntary Principles Initiative, Voluntary Principles on Security and Human Rights*, (2000), online: <https://www.voluntaryprinciples.org/the-principles/>.

<sup>124</sup> OECD, *OECD Due Diligence Guidance for Responsible Business Conduct*, (2018).

<sup>125</sup> Amnesty International Canada, *Corporate Accountability Information Kit*, (2018) at 7, online: <https://www.amnesty.ca/get-involved/lead-in-your-community/corporate-accountability-information-kit>.

<sup>126</sup> United Nations Global Compact, *The Ten Principles*, (2000), online: <https://www.unglobalcompact.org/what-is-gc/mission/principles>.

<sup>127</sup> UN Women & the United Nations Global Compact, *Women’s Empowerment Principles*, 2<sup>nd</sup> ed (UN Women & UNGC, 2011), online: <http://weprinciples.org/Site/PrincipleOverview/>; UNICEF, the UN Global Compact and Save the Children, *Children’s Rights and Business Principles*, (UNICEF, 2012), online: <http://www.unicef.org/csr/12.htm>. See also UNICEF, UNICEF Canada, Government of Canada, and Barrick Gold, *Child Rights and Security Checklist*, (2016), online: [https://www.unicef.org/csr/css/Child\\_Rights\\_and\\_Security\\_Checklist\\_ENGLISH.pdf](https://www.unicef.org/csr/css/Child_Rights_and_Security_Checklist_ENGLISH.pdf); UNICEF Canada, Government of Canada, Barrick Gold, *Child Rights and Security Handbook: An implementation companion to the Child Rights and Security Checklist*, (2016), online: [https://www.unicef.ca/sites/default/files/field\\_files/FINAL\\_CRSS%20Handbook%20%28ENGLISH%29\\_February%202018.pdf](https://www.unicef.ca/sites/default/files/field_files/FINAL_CRSS%20Handbook%20%28ENGLISH%29_February%202018.pdf).

<sup>128</sup> 2000, c 24.

<sup>129</sup> Capital Markets Modernization Taskforce: Final Report (January 2021), online: <https://www.ontario.ca/document/capital-markets-modernization-task-force-final-report-january-2021>.

governance (ESG) information.<sup>130</sup> If the Task Force's recommendation is implemented, this means that public companies operating in the Occupied Palestinian Territories may be required by law to disclose information about the human rights risks associated with their activities there, if they are listed in Ontario.

- Since the 2009 Quebec Superior Court decision in *Bil'in (Village Council) c Green Park International Inc.*,<sup>131</sup> it is possible for a corporation to be held liable in a civil lawsuit in Canadian courts for complicity in a war crime. Although the *Bil'in* case was dismissed on jurisdictional grounds, it helped lay the groundwork for the Supreme Court of Canada's precedent setting February 2020 decision in *Nevsun Resources Ltd. v. Araya*,<sup>132</sup> which confirmed definitively that violations of customary international law may directly give rise to civil liability under Canadian common law (discussed further below).
- In *Bil'in*, the heirs of a Palestinian landowner and the council of a Palestinian town sued two Canadian companies in Québec, claiming that by carrying out Israeli construction orders to build condominiums in Israeli settlements in the West Bank, they were assisting Israel in war crimes in violation of international law, including the Fourth Geneva Convention and the *Crimes Against Humanity and War Crimes Act*. The Superior Court of Québec dismissed the claim, concluding that the Israeli High Court of Justice was the most appropriate forum to argue the case. However, it still set an important precedent for addressing war crimes in the West Bank because the Quebec court did recognise that a person committing a war crime could be liable under Quebec civil law.
- The complainants appealed to the Court of Appeal, but the Court affirmed the Superior Court's decision on August 11, 2010.<sup>133</sup> An application for leave to appeal was dismissed by the Supreme Court of Canada on March 3, 2011.<sup>134</sup>
- On 28 February 2013, the same claimants filed a Communication with the United Nations Human Rights Committee against Canada, claiming that Canada had breached its obligations under the International Covenant on Civil and Political Rights by failing to prevent Green Park and Green Mount from continuing its activities on the West Bank. In a Decision dated July 26, 2017, the Committee held that the Communication was inadmissible

on the basis that there was not a sufficient nexus between Canada's obligations under the Covenant, the actions of Green Park International and Green Mount International, and the alleged violations of the claimants' rights.<sup>135</sup>

- In a concurring opinion of Committee members Olivier de Frouville and Yadh Ben Achour, it was noted that, in future cases, if a communication of this nature were sufficiently substantiated, the Committee could consider it admissible.<sup>136</sup>
- On the issue of jurisdiction, the Committee members concluded that a jurisdictional link could be established if (1) there existed the effective capacity of the State party to regulate the activities of the businesses concerned, and (2) the State had actual knowledge of those activities and their necessary and foreseeable consequences in terms of violations of human rights recognized in the Covenant.<sup>137</sup> If jurisdiction was established, it would still need to then be determined whether any rights violations under the Covenant had occurred. Check out more on [Canadian business complicity](#).

## WHAT ARE SOME CONSIDERATIONS REGARDING DIVESTMENT?

- **Environmental, Social, and Governance (ESG)** are a set of factors that investors may consider in making risk and return assessment of their investments. Although there are no standard definitions, environmental factors may take into consideration a company's impact on environmental matters. The social criteria may consider issues such as how a company manages its relationships with employees, clients, customers, suppliers, and the communities where it operates, among other things. The governance factor may consider issues

<sup>130</sup> Environmental, Social, and Governance (ESG) criteria are a set of factors that investors may consider in making risk and return assessment of their investments.

<sup>131</sup> 2009 QCCS 4151.

<sup>132</sup> 2020 SCC 5.

<sup>133</sup> *Yassin c Green Park International Inc*, 2010 QCCA 1455

<sup>134</sup> *Bil'in (Village Council), Late Ahmed Issa Abdallah Yassin, Basem Ahmed Issa Yassin, Maysaa Ahmed Issa Yassin v. Green Park International inc., Green Mount International inc. and Annette Laroche*, 2011 CanLII 10843 (SCC)

<sup>135</sup> *Decision adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2285/2013* \*, \*\*, \*\*\*, CCPR/C/120/D/2285/2013, UNHRC, 2017.

<sup>136</sup> *Ibid*, Concurring opinion of Committee members Olivier de Frouville and Yadh Ben Achour, at para 1.

<sup>137</sup> *Ibid* at para 10.

# A WARNING FOR CANADIAN COMPANIES VIOLATING HUMAN RIGHTS ABROAD: *NEVSUN RESOURCES LTD. V. ARAYA*, 2020 SCC 5

In a decision released on February 28, 2020, the Supreme Court of Canada (SCC) confirmed that violations of customary international law may directly give rise to civil liability under Canadian common law, permitting a group of Eritrean workers to pursue a legal claim in British Columbia against a Canadian mining company operating in Eritrea.

The claim arose after three Eritrean refugees sued Nevsun Resources Ltd., a publicly-held BC corporation, after alleging they were forced to work in the Bisha mine, in which Nevsun has a majority stake, for 12 hours a day, six days a week, in temperatures close to 50 degrees Celsius without cover. They sought monetary damages from Nevsun for breaches of customary international law prohibitions against forced labour, slavery, cruel, inhuman or degrading treatment, and crimes against humanity. They also sought damages for breaches of domestic torts including conversion, battery, unlawful

confinement, conspiracy, and negligence.

Nevsun brought a motion to strike the claim on the basis that the British Columbia courts did not have the authority to rule on the lawsuit. It argued that the 'act of state' doctrine precluded domestic courts from assessing the sovereign acts of a foreign government – in this case, those of Eritrea.

The majority of the SCC held that the act of state doctrine was not part of Canadian law, dismissing Nevsun's appeal. It went on to declare that customary international law – including what are known as preemptory norms, or the most serious violations of rights – are part of Canadian law.

The SCC's dismissal of Nevsun's appeal would have allowed the case to return to the Supreme Court of British Columbia to hear the merits of the workers' case and determine if there were breaches of customary international law, and if so, what remedy was warranted. However,

the Eritrean workers did not have to wait that long – in October 2020, the parties reached an out-of-court settlement for an undisclosed amount of money, bringing a final resolution to the dispute.<sup>138</sup>

The case will now return to the Supreme Court of British Columbia, which will hear the merits of the workers' case and determine if there have been breaches of customary international law, and if so, what remedy is warranted.

This case is an important advancement in how civil law remedies apply to corporations for breaches of international law, and may result in more actions being brought against Canadian companies operating in countries notorious for human rights violations.

<sup>138</sup> Yvette Brend, "Landmark settlement is a message to Canadian companies extracting resources overseas: Amnesty International", CBC News (23 October 2020), online: <https://www.cbc.ca/news/canada/british-columbia/settlement-amnesty-scc-africa-mine-nevsun-1.5774910#:text=CBC%20News%20Loaded-,Landmark%20settlement%20is%20a%20message%20to%20Canadian%20companies%20extracting%20resources,amount%2C%20according%20to%20Amnesty%20Internationa>

such as a company's board structure, leadership, audits, shareholder rights, executive compensation, and internal controls. In considering divestment strategies it is useful to check out a company's ESG commitments, and if it is a member of an organization for responsible investment such as the Responsible Investment Association: <https://www.riacanada.ca/about/>

- A **divestment resolution** is a stated commitment from a company or organization to divest monies and investments from companies directly supporting or profiting from the Israeli occupation of Palestinian land.
- The trustees or managers of a fund often have a **fiduciary duty** to manage assets entrusted to them for the benefit of the assets' owners and without injuring owners' interests. The ability to take non-financial criteria, such as ESG factors, into account in making an investment decision

by a fiduciary depends significantly on the type of fund (i.e., whether it is an endowment fund, pension fund, charitable fund, or other type of fund). If a fund's trust instrument permits non-financial criteria to be considered, and there is no other regulatory or statutory limitation that applies, then it can do so. One may even compel a fiduciary to consider non-financial criteria if it is clear in the trust instrument that it is permitted and there are no other legal constraints.

- Divestment resolutions of investors must respect fiduciary duty, where the investor or the company has a fiduciary duty to invest monies, and where fiduciary rules are in place.
- Divestment may be allowed based on ESG criteria where **alternative investments of equal value and risk return profile to the properties to be divested** are available, also accounting for the risk of investment, the rate of return, and other factors,

such as diversification, matching the obligations of the fund, and others.

- Pension funds are an important exception to the above statement regarding the ability of a trustee or fund manager to take non-financial criteria, such as ESG factors, into account in making an investment decision. In the case of pension funds, pension regulation restricts the criteria that can be considered by trustees to those that are **material to financial risk-reward considerations**. That is, you can consider divestment in the context of a pension fund investment decision if there is a material risk-return factor that divestment is based on.
- Also, with respect to pension funds, trustees have sole discretion to manage funds, so a resolution that usurps in any way this discretion is unenforceable. Pension fund trustees may therefore be asked to make decisions to sell entrusted funds based on ESG criteria as long as the divestment resolution does not intrude in any way on the trustees' discretion to implement the resolution how and when they decide, in their sole discretion. The divestment resolution must also allow trustees to implement it without injuring the interests of fund owners in any way that owners have not authorized.
- Divestment is an action on a spectrum of actions that investors can take, and ESG is a set of factors that investors can consider in determining what actions to take. Other steps can include engaging stakeholders, asking for policy changes, moving business units around, selling parts of a company, or ultimately, divesting entirely.

### WHAT ABOUT DIVESTMENT LANGUAGE?

- **Language to use for a “Therefore” clause:** Divestment language may say, for example:

*“We request the trustees to divest from Caterpillar, at such time and in such manner as they may determine.” Or: “We ask the trustees to divest from companies directly supporting or profiting from the Israeli occupation*

*of Palestinian land, as they may identify as appropriate for such action.”*

- **Language to avoid:** Divestment resolution language that orders trustees to divest (“trustees shall divest ...”) or to divest immediately or by some other externally imposed deadline would likely not be enforceable, because it interferes with the trustees' discretion about when and how to divest.

### WHAT ARE SANCTIONS?

- Sanctions campaigns pressure governments to fulfil their legal obligations to end Israeli apartheid, and not aid or assist its maintenance, by banning business with illegal Israeli settlements, ending military trade and free-trade agreements, as well as suspending Israel's membership in international forums such as UN bodies.<sup>139</sup>
- Canadian sanctions laws implement United Nations Security Council (UNSC) sanctions regimes under the *United Nations Act*<sup>140</sup>, as well as Canadian autonomous sanctions regimes under the *Special Economic Measures Act*.<sup>141</sup>

## A CASE FOR DIVESTMENT: UNIVERSITY OF TORONTO

The University of Toronto Graduate Students' Union (UTGSU), the BDS Ad Hoc Committee, and Students Against Israeli Apartheid at the University of Toronto (SAIA UT) have called on the University of Toronto (UofT) to immediately divest its stock in three companies – Northrop Grumman, Hewlett Packard, and Lockheed Martin – on the basis that these companies manufacture and sell weaponry and other technologies which cause social injury to Palestinians in the West Bank and Gaza Strip, and violate international law and internationally recognized human rights. The groups also call on UofT to refrain from investing in all companies involved in violations of international law with respect to Palestine. For more information, visit <http://www.uoftdivest.com/>.

<sup>139</sup> BDS Movement, “What are Boycotts, Divestment and Sanctions?”, online: <https://bdsmovement.net/what-is-bds>.

<sup>140</sup> RSC 1985, c U-2.

<sup>141</sup> SC 1992, c 17.

- Pursuant to the *Special Economic Measures Act*, sanctions may be ordered when gross and systematic human rights violations have been committed in a foreign state. In this regard, Canada's own domestic law could call for sanctions based on Israel's systemic human rights violations and violations against humanitarian law, including the Geneva Conventions. Check out more on the Al-Haq [Gaza20/20](#) campaign which in Canada references the *Special Economic Measures Act*.
- Just Peace Advocates calls on the Government of Canada to implement the following sanctions with regard to Israel and the Occupied Palestinian Territories (OPT):
  - To take positive measures toward respecting international law, including by banning illegal settlement products and services.
  - To take all necessary measures to ensure full respect for and compliance with international law norms, including the Geneva Conventions, the relevant resolutions of the United Nations Security Council, the United Nations General Assembly, and the United Nations Human Rights Council regarding third state obligations toward the OPT; and
  - To abide by Canada's obligations as a third state and as High Contracting Party to the Geneva Conventions of 1949, notably under Common Article 1, to respect and to ensure respect for international humanitarian law in the OPT in all circumstances.

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**FOR ADDITIONAL  
INFORMATION  
AND RESOURCES,  
VISIT THE  
FOLLOWING:**

**CANADIAN BDS COALITION**

For analysis, information and statements about BDS in Canada visit the Canadian BDS Coalition website at [bdscoalition.ca](http://bdscoalition.ca).

# ADDITIONAL RESOURCES

## ORGANIZATIONS IN CANADA

Canadian BDS Coalition  
<https://bdscoalition.ca/>

- See member organizations <https://bdscoalition.ca/coalition-members/>
- This includes national organizations, as well as regional, and local organizations. Also, see other organizations that are friends of the Coalition.

Canada Palestine Association  
<http://cpavancouver.org/>

Just Peace Advocates  
<https://www.justpeaceadvocates.ca/>

Palestinian and Jewish Unity  
<http://pajumontreal.org/fr/>

Canadian Foreign Policy Institute  
<https://www.foreignpolicy.ca/>

Canadian Federation of Students  
<https://cfs-fcee.ca/>

Independent Jewish Voices Canada (IJV)  
<https://www.ijvcanada.org/>

Canadian Palestinian Congress  
<http://www.pcc-cpc.ca/>

Quebec BDS  
<https://www.bdsquebec.ca/>

Canadian Friends of Sabeel  
<https://friendsofsabeel.ca/>

Canadian Arab Federation  
<https://www.facebook.com/CAF50/>

## EXCELLENT RESOURCES TO CHECKOUT

Zatoun  
<https://zatoun.com/learn/>

Nakba 70 Action  
<https://nakba70action.org/links/>

## ORGANIZATIONS IN PALESTINE

PASSIA (Palestinian Academic Society for the Study of International Affairs) \*provides the most comprehensive info about all organizations in Palestine <http://www.passia.org/>

Al-Haq [www.alhaq.org](http://www.alhaq.org)

Institute of Palestine Studies (IPS)  
<https://www.palestine-studies.org/>

Defence for Children International Palestine  
<https://www.dci-palestine.org/>

BADIL Resource Center for Palestinian Residency and Refugee Rights [www.badil.org](http://www.badil.org)

The Civic Coalition for Palestinians' Rights in Jerusalem (CCPRJ)  
<https://www.facebook.com/pages/category/Non-Governmental-Organization--NGO-/Civic-Coalition-for-Palestinian-Rights-in-Jerusalem-317320764997516/>

Al-dameer Association for Human Rights  
[www.aldameer.org](http://www.aldameer.org)

Palestinian Non-Government Organizations (PNGO) <http://www.pngo.net/>

B'Tselem - The Israeli Information Center for Human Rights in the Occupied Territories  
[www.btselem.org](http://www.btselem.org)

Adalah - The Legal Center for Arab Minority Rights in Israel [www.adalah.org](http://www.adalah.org)

## LEGAL AID - PROVINCIAL AND TERRITORIAL

Alberta  
Alberta Legal Aid  
<https://www.legalaid.ab.ca/Pages/default.aspx>

British Columbia  
Legal Services Society  
<https://lss.bc.ca/>

Manitoba  
Legal Aid Manitoba  
<https://www.legalaid.mb.ca/>

Newfoundland and Labrador  
Legal Aid Newfoundland and Labrador  
<https://www.legalaid.nl.ca/index.html>

New Brunswick  
New Brunswick Legal Aid Services Commission  
<http://www.legalaid-aidejuridique-nb.ca/home/>

Nova Scotia  
Nova Scotia Legal Aid  
<https://www.nslegalaid.ca/>

Northwest Territories  
Legal Aid Offices of NWT  
<https://www.justice.gov.nt.ca/en/legal-aid/>

Nunavut  
Legal Services Board of Nunavut  
<http://nulas.ca/en/>

Ontario  
Legal Aid Ontario  
<http://www.legalaid.on.ca/>

Prince Edward Island  
Prince Edward Island Legal Aid  
<https://www.princeedwardisland.ca/en/information/justice-and-public-safety/legal-aid>

Quebec  
Commission des Services Juridique  
<https://www.csj.qc.ca/commission-des-services-juridiques/>

Saskatchewan  
Legal Aid Saskatchewan  
<https://www.legalaid.sk.ca/>

Yukon  
Yukon Legal Services Society  
<https://legalaid.yk.ca/>

## PLAIN LANGUAGE LEGAL INFORMATION - PROVINCIAL AND TERRITORIAL

Centre for Public Legal Education Alberta  
<https://www.cplea.ca/>

Justice Education Society of British Columbia  
<https://www.justiceeducation.ca/>

People's Law School (British Columbia)  
<https://www.peopleslawschool.ca/>

Community Legal Education Association Manitoba (CLEA-Manitoba)  
<https://www.communitylegal.mb.ca/>

Public Legal Education and Information Service of New Brunswick (PLEIS-NB)  
<http://www.legal-info-legale.nb.ca/en/>

Public Legal Information Association of Newfoundland and Labrador  
<https://publiclegalinfo.com/>

Legal Information Society of Nova Scotia (LISNS)  
<https://www.legalinfo.org/>

Steps to Justice - Your Guide to Law in Ontario  
<https://stepstojustice.ca/>

Community Legal Education Ontario (CLEO)  
<https://www.cleo.on.ca/en>

Community Legal Information Association of PEI (CLIA)  
<https://www.legalinfopei.ca/en/home>

Éducaloi  
<https://www.educaloiquc.ca/en>

Public Legal Education Association of Saskatchewan  
<https://www.plea.org/>

Yukon Public Legal Education Association  
<http://yplea.com/#>



## LEGAL ORGANIZATIONS THAT MAY BE ABLE TO ASSIST

Arab Canadian Lawyers Association  
[www.canarablaw.org](https://www.canarablaw.org)

Canadian Association of Lawyers for International Human Rights [www.claihr.ca](http://www.claihr.ca)

Movement Defense League  
<https://movementdefense.org/>

Pro Bono Canada (PBC)  
<https://probonocanada.org/>

Probono Ontario (PBO)  
<https://www.probonoontario.org/>

Public Legal Education Association of Canada  
<https://www.pleac-aceji.ca/en/home>

## ORGANIZATIONS THAT CAN PROVIDE SUPPORT RELATED TO DISCRIMINATION

National Council of Canadian Muslims  
<https://www.nccm.ca/>

- Report discrimination: <https://www.nccm.ca/programs/incident-report-form/>

Canadian Muslim Lawyers' Association  
<https://www.cmla-acam.ca/>

National Security Student Support Hotline  
(416) 978-8409

- The National Security Student Support Hotline is a support service for students, co-sponsored by the Institute of Islamic Studies at the University of Toronto, the Canadian Muslim Lawyers Association, the National Council of Canadian Muslims, and Downtown Legal Services Clinic. The Hotline supports students who have been approached by an agent of a Canadian national security agency, such as Canadian Security Intelligence Service (CSIS) or the Royal Canadian Mounted Police (RCMP) for an informational interview unrelated to criminal investigations or prosecution. Read more <https://islamicstudies.artsci.utoronto.ca/research-labs/the-national-security-student-support-hotline-nat-secssh/>

## CIVIL LIBERTIES ORGANIZATIONS

Canadian Civil Liberties Association  
<https://ccla.org/>

British Columbia Civil Liberties Association  
<https://bccla.org/>

Ontario Civil Liberties Association  
<http://ocla.ca/>

Alberta Civil Liberties Research Centre  
<http://www.aclrc.com/>

Manitoba Association for Rights and Liberties  
<http://www.marl.mb.ca/>

American Civil Liberties Union  
<https://www.aclu.org/>

## LAW UNIONS

Law Union of British Columbia  
<http://www.bclawunion.org/>

Law Union of Ontario  
<https://www.lawunion.ca/>

## PROVINCIAL, TERRITORIAL, AND FEDERAL HUMAN RIGHTS INFORMATION

Alberta  
<https://www.albertahumanrights.ab.ca/>

British Columbia  
<https://www2.gov.bc.ca/gov/content/justice/human-rights/human-rights-protection>

Manitoba  
<http://www.manitobahumanrights.ca/v1/>

Newfoundland and Labrador  
<https://thinkhumanrights.ca/>

New Brunswick  
<https://www2.gnb.ca/content/gnb/en/departments/nbhrc.html>

Northwest Territories  
<http://nwthumanrights.ca/>

Nova Scotia  
<https://humanrights.novascotia.ca/>

Nunavut  
<http://www.nhrt.ca/splash.html>

Ontario  
<http://www.ohrc.on.ca/en>

Prince Edward Island  
<http://www.gov.pe.ca/humanrights/>

Quebec  
<http://w4.cdpdj.qc.ca/en/Pages/default.aspx>

Saskatchewan  
<https://saskatchewanhumanrights.ca/>

Yukon  
<https://yukonhumanrights.ca/>

Federal (Canadian Human Rights Commission)  
<https://www.chrc-ccdp.gc.ca/eng>

## FREEDOM OF INFORMATION REQUESTS

Federal  
Access to Information and Privacy (ATIP) Online Request  
<https://atip-airpr.tbs-sct.gc.ca/en/Home/Welcome>

Alberta  
Freedom of Information and Protection of Privacy Act (FOIP Act)  
<https://www.servicealberta.ca/foip/>

British Columbia  
Freedom of Information and Protection of Privacy Act (FOIPPA)  
<https://www2.gov.bc.ca/gov/content/governments/about-the-bc-government/open-government/open-information/freedom-of-information>

Manitoba  
Freedom of Information and Protection of Privacy Act (FIPPA)  
<https://www.gov.mb.ca/fippa/index.html>

Newfoundland  
Access to Information and Protection of Privacy Act  
<https://www.gov.nl.ca/atipp/>

New Brunswick  
Right to Information and Protection of Privacy Act  
[https://www2.gnb.ca/content/gnb/en/departments/finance/office\\_of\\_the\\_chief\\_information\\_officer/content/rti.html](https://www2.gnb.ca/content/gnb/en/departments/finance/office_of_the_chief_information_officer/content/rti.html)

Northwest Territories  
Access to Information and Protection of Privacy (ATIPP Act)  
<https://www.justice.gov.nt.ca/en/access-to-information-held-by-public-bodies/>

Nova Scotia  
Freedom of Information and Protection of Privacy Act (FOIPOP)  
<https://novascotia.ca/nse/dept/foipop.asp>

Nunavut  
Access to Information and Protection of Privacy Act (ATIPP Act)  
<https://www.gov.nu.ca/eia/information/how-place-atipp-request>

Ontario  
Freedom of Information and Protection of Privacy Act (FIPPA)  
<https://www.ontario.ca/page/how-make-freedom-information-request>

Prince Edward Island  
Freedom of Information and Protection of Privacy Act (FOIPP)  
<https://www.princeedwardisland.ca/en/information/justice-and-public-safety/freedom-information-and-protection-privacy-foipp>

Quebec  
Commission d'accès à l'information  
<https://www.cai.gouv.qc.ca/english/>

Saskatchewan  
The Freedom of Information and Protection of Privacy Act  
<https://www.saskatchewan.ca/residents/justice-crime-and-the-law/your-rights-and-the-law/make-a-freedom-of-information-request>

Yukon  
Access to Information and Protection of Privacy Act (ATIPP)  
<https://www.saskatchewan.ca/residents/justice-crime-and-the-law/your-rights-and-the-law/make-a-freedom-of-information-request>

**NOTE** that municipalities have separate legislation, which will need to be researched separately. For example, in Ontario, the municipalities are covered under the Municipal Freedom of Information and Protection of Privacy Act (MFIPPA).