



Ontario
Civil Liberties
Association

"The OCLA takes a vigorous and highly principled approach to defending free speech rights, which is an approach that is sorely needed in Canada today."

—John Carpay,
President,
Justice Centre for
Constitutional Freedoms

"I am very pleased to learn of the Ontario Civil Liberties Association, and wish it the greatest success in its work, which could not be more timely and urgent as elementary civil rights, including freedom of speech, are under attack in much of the world, not excluding the more free and democratic societies."

—Noam Chomsky,
Institute Professor, MIT

"Freedom of expression is our most fundamental and most precious freedom. It has been under attack in Canada for years. The Ontario Civil Liberties Association has taken a position on freedom of expression that is both courageous and principled. The OCLA now stands alone and its position should be supported by all Canadians who cherish democracy and freedom."

—Robert Martin,
Professor of Law,
Emeritus,
Western University

July 24, 2018

By Email

Hon. Caroline Mulroney
Attorney General of Ontario
Ontario, Canada
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Dear Attorney General Mulroney:

Re: Criminal Code censorship prosecutions in Ontario

The Ontario Civil Liberties Association (OCLA) advocates for civil and human rights, including the fundamental human right of individual expression, opinion and belief.

We write to ask you to refrain during your mandate from consenting to any prosecutions based on the censorship provisions of the *Criminal Code*, because the said provisions categorically violate the *International Covenant on Civil and Political Rights* (the "*Covenant*") ratified by Canada in 1976.

The impugned sections of the *Criminal Code* are:

LIBEL

- S. 296 - Blasphemous libel
- Ss. 297 to 317 - Defamatory libel

HATE PROPAGANDA

- S. 318 - Advocating genocide
- S. 319 - Public incitement of hatred / Wilful promotion of hatred
- Ss. 320 to 320.1 - Warrant of seizure

Our point is not that expression cannot be criminal. For example: ss. 22 and 464 of the *Criminal Code*, which apply to valid provisions of the *Criminal Code*.

Our point is that Canada and the provinces are obligated under international law not to enact and use laws that violate fundamental human rights.

The “blasphemous libel” (s. 296) and “defamatory libel” (ss. 297 to 317) provisions are squarely contrary to international law,¹ and opposite to all the relevant joint statements of international rapporteurs on human rights.^{2,3,4} In particular, the said provisions prescribe imprisonment, whereas international law expressly disallows imprisonment as a penalty for any type of defamation, whether characterized as “criminal” or not.⁵

Section 296 will be repealed by Bill C-51 (referred to committee on Senate second reading). The defamatory libel” sections (ss. 297 to 317) are maintained, except that “published” cannot mean solely to the person who is defamed (s. 299(c)).

The “advocating genocide” provision of the *Criminal Code* (s. 318), is noncompliant with the *Covenant* because it does not prescribe an onus on the state to establish a “direct and immediate connection” to an actual “threat”:⁶

When a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.

A valid law prohibiting advocating genocide is required to prescribe that the “advocating” must be credible and causally connected to a palpable threat.

The “public incitement of hatred / wilful promotion of hatred” provisions (s. 319) violate the *Covenant* because no actual harm to any specific person needs to be proven by the state; nor is the issue incitement of a crime, but rather incitement of “hatred” (an emotion which is not in itself a crime) in unspecified persons at large.

The court is asked to subjectively hypothesize an induced “hatred” at large. The state need only wave the magic wand of “hatred”, subjectively inferred from the impugned expression itself, to imprison an individual for up to two years.

These are victimless crimes of hypothetically inducing emotions transmitted into the ether of society, which hypothetically cause unspecified harm to unspecified persons. No evidence of any kind is needed beyond the impugned expression itself and the context of the expression.

¹ General comment No. 34, *International Covenant on Civil and Political Rights*, Human Rights Committee, 102nd session, CCPR/C/GC/34, <<http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>>, paras. 47 to 49

² JOINT DECLARATION: Current Challenges to Media Freedom, by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, 30 November 2000, <<http://www.osce.org/fom/40190>>

³ JOINT DECLARATION, by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, 10 December 2002, <<http://www.osce.org/fom/39838>>

⁴ JOINT DECLARATION ON DEFAMATION OF RELIGIONS, AND ANTI-TERRORISM AND ANTI-EXTREMISM LEGISLATION, by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR (African Commission on Human and Peoples’ Rights) Special Rapporteur on Freedom of Expression and Access to Information, 10 December 2008, <<http://www.osce.org/fom/35639>>

⁵ General comment No. 34, *International Covenant on Civil and Political Rights*, Human Rights Committee, 102nd session, CCPR/C/GC/34, <<http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>>, para. 47

⁶ See Article 20 of the *Covenant*; and see General comment No. 34, *International Covenant on Civil and Political Rights*, Human Rights Committee, 102nd session, CCPR/C/GC/34, para. 35

The Supreme Court itself determined this statutory interpretation of prosecutions pursuant to ss. 319(1) and 319(2):⁷

The offence does not require proof that the communication caused actual hatred. ... The risk of hatred caused by hate propaganda is very real. This is the harm that justifies prosecuting individuals under this section [319] of the *Criminal Code*. In the *Media Case*, the ICTR said that '[t]he denigration of persons on the basis of their ethnic identity or other group membership in and of itself, as well as in its other consequences, can be an irreversible harm'. [Emphasis added]

The proverbial slippery slope has now led us beyond this victimless crime — in which any effect or harm from the expression need not be proven and cannot be tested — to a place where “holocaust denial” is argued to automatically generate the said hatred at large. On the contrary, the *Covenant* holds the state to an entirely different standard:⁸

Laws that penalize the expression of opinions about historical facts are incompatible with the obligations that the Covenant imposes on States parties in relation to the respect for freedom of opinion and expression. The Covenant does not permit general prohibition of expressions of an erroneous opinion or an incorrect interpretation of past events.

The impugned *Criminal Code* provisions include overt “book burning” clauses (ss. 319(4), 320 and 320.1) for recorded materials that are subjectively hypothesized to induce “hatred” in the reader, listener or viewer.

Canada has an obligation to remove these laws,⁹ an obligation that it appears to be largely disregarding despite our calls starting in February 2016.

All prosecutions pursuant to the impugned provisions are fundamentally unjust towards the individual, extraordinarily wasteful of public resources, and harmful to democracy itself.

The “hate propaganda” prosecutions are structurally political because they are made at the discretion of the Attorney General (ss. 318(3), 319(6) and 320(7)). They have a potential to be used as propaganda and societal manipulation, much as witch trials were used in the Reformation in competing for “religious market share” between Catholics and Protestants.¹⁰ Those who seek censorship of a particular negative view are often partisans of a particular political party or ideology or may have a special interest they wish to advance. Reactions to views one finds repugnant are emotional vectors that can align, consolidate, increase or strengthen partisan affiliation when the issue is predictably mediatized through a controversial trial.

In addition, we ask you to retract the Attorney General's consent for all the ongoing such prosecutions, which were consented to by the previous Attorney General despite our requests.

⁷ *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 SCR 100, 2005 SCC 40 (CanLII), <<http://canlii.ca/t/11249>>, at para. 102

⁸ General comment No. 34, *International Covenant on Civil and Political Rights*, Human Rights Committee, 102nd session, CCPR/C/GC/34, <<http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>>, at para. 49

⁹ General comment No. 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, *International Covenant on Civil and Political Rights*, Human Rights Committee, 80th session, CCPR/C/21/Rev.1/Add.13, 26 May 2004, <<http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=478b26ae2>>, para. 13

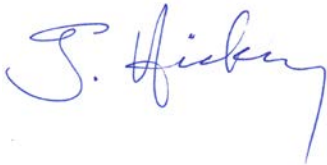
¹⁰ “Witch Trials” by Peter T. Leeson and Jacob W. Russ, *The Economic Journal*, 2017, DOI: 10.1111/econj.12498

We know of three current such prosecutions being pursued in Ontario:

- Kevin Johnston - for expressed negative opinions about Muslims
- James Sears - for expressed negative opinions about women and Jews
- Bill Whatcott - for expressed negative opinions about gays

Please let us know your responses so that we may report these to our members and to the public.

Yours truly,

A handwritten signature in blue ink, appearing to read "J. Hickey". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Joseph Hickey
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Cc: Hon. Jody Wilson-Raybould, Attorney General of Canada, Jody.Wilson-Raybould@parl.gc.ca, mcu@justice.gc.ca