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Human Rights and Security: The Canadian Legal Profession's Struggle to Help Preserve What's Worth Fighting for in the Fight Against Extremism

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Human Rights and Security: The Canadian Legal Profession's Struggle to Help Preserve What's Worth Fighting for in the Fight Against Extremism

Canada is a nation rightfully proud of its accomplishments in the human rights field. Many nations look to our 1982 *Canadian Charter of Rights and Freedoms*¹ for inspiration in constitutional drafting or interpretation. It contains robust guarantees of democratic rights, legal rights on arrest and detention, the right to a fair trial, equality rights, personal freedoms of expression, religion and thought, among others, linguistic rights, and acknowledgements of our multicultural heritage and the Aboriginal and treaty rights of the first peoples of Canada. Our country has been a safe harbour for refugees, most recently taking in more than 40,000 Syrians. In 2016, Canada ranked second in the world for refugee resettlement.² One-fifth of our population are “visible minorities” and nearly 4% are Indigenous.³ We have been called “a vibrant global powerhouse and one of the most open and successful multicultural nations in the world.”⁴ Our openness is likely one of the reasons our country tops the list of countries and organizations having the most positive influence on world affairs.⁵

Of course, the reality is more complex. Only recently has Canada started to come to terms with the ongoing effects of colonization of Indigenous peoples and the hard work needed to build a path towards reconciliation. Our history includes embedded racism in immigration laws; persecution of religious minorities, political dissidents and trade unionists; a discriminatory “head tax” for Chinese Canadians; as well as the dispossession and internment of Japanese Canadians during the Second World War. Some have critiqued

¹ Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

² Sonja Puzic, “Record number of refugees admitted to Canada in 2016, highest since 1980,” *CTV News* (April 24, 2017), online: <http://www.ctvnews.ca/canada/record-number-of-refugees-admitted-to-canada-in-2016-highest-since-1980-1.3382444>

³ Statistics Canada, “Immigration and Ethnocultural Diversity in Canada” and “Aboriginal Peoples in Canada: First Nations People, Métis and Inuit, National Household Survey, 2011” (Ottawa: Minister of Industry, 2013).

⁴ Nicholas Kristof, “Canada, Leading the Free Word” *New York Times* (February 7, 2017), online: <https://www.nytimes.com/2017/03/06/opinion/canada-leader-of-the-free-world.html?action=click&contentCollection=Opinion&module=RelatedCoverage®ion=Marginalia&pgtype=article>

⁵ “Dangerous World,” *Ipsos Global Advisor* (June 13, 2017), online: https://www.ipsos.com/sites/default/files/2017-06/G%40%20Dangerous%20World-Report-2017-06-13_0.pdf

Canadian multiculturalism itself on the basis that it promotes a “tolerance” rather than an inclusion mindset.⁶

From an ambivalent past, Canadians find themselves in an ambivalent present. Despite Canadians’ welcome of refugees, one-quarter of Canadians surveyed say they have experienced racism,” with a majority indicating that Muslims and Arab Canadians are the group most likely to be targeted in their community.⁷ Hate crimes against Muslims have increased by 60% and have almost tripled in the past three years. There are an estimated 100 white nationalist groups across Canada.⁸

This year, a Canadian-born, non-Muslim killed six people in a Quebec City mosque. The mosque had an influx of hate mail both before and *after* the shooting. This past month, a nearby suburb blocked the establishment of a Muslim cemetery. A former CEO of the Canadian Jewish Congress has called the combination of the “movement of the marginal” (white supremacists) and the partisan use of racially-charged wedge issues in our past election, such as a proposed “barbaric cultural practices” tip line, as a “process of demonization in overdrive.”⁹

The Jewish community has also experienced several disturbing incidents of vandalism at synagogues, a bomb threat in Vancouver, and other criminal incidents motivated by anti-Semitism over the past year. They remain the most targeted religious group for hate crimes in Canada. In July, a group of men longing for the colonialism of the past interrupted an Indigenous protest ceremony. However, the government and the media

⁶ Sunera Thobani, *Exalted Subjects: Studies in the Making of Race and Nation in Canada* (Toronto: University of Toronto Press, 2007) at 155-162.

⁷ Maham Abedi, “Canada is 150 and still needs to face its racism problem: advocates” *Global News* (June 29, 2017), online: <http://globalnews.ca/news/3556823/racism-in-canada/>.

⁸ Catherine Solyom, “The Trump effect and the normalization of hate in Quebec” *Montreal Gazette* (November 15, 2016), online: <http://montrealgazette.com/news/quebec/the-trump-effect-and-the-normalization-of-hate>

⁹ Bernie M Farber, “Hate Moves to the Mainstream” *iPolitics* (February 6, 2017), online: <http://ipolitics.ca/2017/02/06/hate-moves-to-the-mainstream/>

discuss the problem of violent extremism primarily in relation to those perceived to threaten Canada at large (read: the majority), rather than white supremacists.¹⁰

These circumstances present a challenge for the legal profession. Government initiatives aimed at addressing and neutralizing extremism fall back on criminalization and enhanced security as the primary responses, responses that disproportionately affect marginalized groups and may be counter-productive.¹¹ In an era where the world is perceived as more dangerous,¹² how do we address the prioritization of security over what lies at the heart of the nation we are seeking to protect: democracy and constitutional values of freedom of thought, conscience, expression and the rights to equality and privacy? Put more plainly, how can the legal profession intervene to ensure that nations do not, paradoxically, risk what is worth protecting with ever-increasing layers of criminal legal responses and hyper-securitization.

The Canadian Bar Association has expressed concerns about the increasing reach of the state in gathering information without sufficient protections over misuse, and the creation of vaguely defined and potentially broad new crimes against promoting or advocating terrorism. At the same time, the bar has promoted diverse and effective responses to hate speech directed at minorities to protect them against discrimination and violence and deter future incidents.

We do not see the two positions – upholding freedom of expression and thought in the face of increased securitization and countering hate speech – as being in conflict. In fact, both are essential to an open, free and democratic society. Our positions are grounded in a conception of inclusive democracy, the rule of law and other constitutional values. We believe the legal profession should use its privileged position to counter the fomentation of fear by sharing our knowledge with fellow citizens and insisting on rights being upheld in

¹⁰ Julius Haag, Doctoral Candidate, Centre for Criminology & Sociological Studies, University of Toronto, “Canada Must Counter the Growing Terror Threat of Right-Wing Extremism” *Huffington Post* (February 6, 2017), online: http://www.huffingtonpost.ca/julius-haag/right-wing-extremism_b_14629734.html.

¹¹ See, e.g. Stéfanie von Hlatky and Nora Abdelrahman Ibrahim, “Violent Extremism in Canada and Abroad” (Special Policy Report, Centre for International and Defence Policy, Queen’s University) (March 2017), online: http://www.queensu.ca/cidp/sites/webpublish.queensu.ca.cidpwww/files/files/Research/CVE/CVE-Report_2017_E.pdf

¹² *Ipsos Global Advisor*, *supra* note 5.

the face of popular criticism. I will address the Canadian context of both issues – national security and hate speech – in turn.

In 2015, the Canadian government passed Bill C-51, called by two of our foremost security law experts, “the most radical national security law ever enacted” in the post-*Charter* period.¹³ Among other things, the Bill made it an offence for anyone to communicate statements knowingly or recklessly that “advocate or promote the commission of terrorism offences in general” and empowered the court to order the deletion of “terrorist propaganda” from the internet.¹⁴

The CBA pointed out problems with potential breadth and vagueness. It applies to *all* statements, whether in public or private. No one knew the scope of “terrorist offences in general.” It is unclear what advocacy and promotion was meant to add, since counselling an offence and inciting a terrorist act are already crimes. There is no requirement that those charged personally supported terrorism. There are no public interest or education defenses. We pointed out that these vague provisions could have applied to Nelson Mandela’s call to dismantle apartheid. The deletion orders similarly had no requirement of mental fault and no public interest, education, or religious discussion defences. Academic or political commentary only indirectly connected with anything that might be called violent could be considered ‘terrorist propaganda’ and subject to a deletion order.¹⁵

Governments have a legitimate interest in collecting and sharing information between government agencies about actual security threats. Nevertheless, the Canadian government keeps extending its powers to intercept communications, engage in online surveillance and intelligence gathering, and share information, including personal information, without precise definitions, basic privacy protections or clear limitations on the purpose for sharing personal information. There is no necessity threshold and no safeguards to ensure that the shared information is reliable. The lesson about safeguards

¹³ Craig Forcese and Kent Roach, *False Security: The Radicalization of Canadian Anti-Terrorism* (Toronto: Irwin Law, 2015) at viii.

¹⁴ These provisions are now ss. 83.221 and 83.222 of the *Criminal Code*, RSC, 1985, c C-46.

¹⁵ Canadian Bar Association, “Bill C-51, *Anti-terrorism Act, 2015* (March 2015), online: <https://www.cba.org/CMSPages/GetFile.aspx?guid=94bd7a6e-87c2-4143-a288-e780504d2f51>; Canadian Bar Association, “Our Security, Our Rights: National Security Green Paper, 2016” (December 2016), online: <http://www.cba.org/CMSPages/GetFile.aspx?guid=82a13ac6-df5c-472a-969b-b832bb18f87d>

for information sharing was an especially difficult one for Canadians – inaccurate information that our national police force, the RCMP, shared with US authorities was the likely cause of a Canadian citizen’s transport to and torture in Syria. We ignore this lesson and risk repeating the same mistakes in our contemporary laws.

Criminalizing public and private communications alike may encourage government agencies to exercise their new powers increasingly to widen the net of surveillance over what Canadians are listening to, watching, and gathering in person or online to discuss. To make matters worse, Bill C-51 empowered judges to hold secret hearings to authorize law enforcement activities that would breach the *Charter* in order to reduce threats to the security of Canada. The only limitation was that these actions could not obstruct justice, cause bodily harm, or violate sexual integrity. Based on reports of CSIS surveillance activities, the expansive definition of “threats to the security of Canada” appears to have been interpreted to include environmental activists, Indigenous groups and other social or political activists.¹⁶ Canada has created a new Parliamentary Committee to oversee the activities of the national security and intelligence-gathering agencies, which we endorse. However, there are legitimate concerns about the scope of the Parliamentary Committee’s mandate and built-in mechanisms that could permit Ministers to interfere with its work.

The CBA is studying the implications of a new bill introduced by the Trudeau government, which proposes to polish off some of the rough constitutional edges off Bill C-51.¹⁷ Bill C-59 would modify the advocating or promoting terrorism offence to a more typical counselling offence, and writes in moderate protection of protest and dissent. It clarifies that our spy agency would still be able to breach a *Charter* right or freedom, but only in relation to a closed list of activities and after a judge determines that a *Charter* limitation is justified and issues a warrant. It introduces a “front end” Intelligence Commissioner to authorize electronic intelligence-gathering conduct that would

¹⁶ See e.g. Sean McCarthy, “‘Anti-petroleum’ movement a growing security threat to Canada, RCMP say,” *Globe and Mail* (February 17, 2015), online: <https://www.theglobeandmail.com/news/politics/anti-petroleum-movement-a-growing-security-threat-to-canada-rcmp-say/article23019252/>; Darryl Dick, “Canada’s spy agency kept close watch on rapidly growing First Nations protest movement: documents” *National Post* (August 11, 2013), online: <http://nationalpost.com/g00/news/canada/canadas-spy-agency-kept-close-watch-on-rapidly-growing-first-nations-protest-movement-documents>.

¹⁷ Bill C-59, *National Security Act, 2017*, 1st Sess, 42nd Parl, 2017 (First Reading June 20, 2017). The CBA is studying the implications of the Bill.

contravene the law and a stand-alone review entity that will oversee all security and intelligence gathering agencies to supplement the Parliamentary committee. It requires information sharing institutions provide information on accuracy and reliability (but no prohibition on sharing unreliable information). Bill C-59 does not retract Bill C-51, but adds on.¹⁸ We need further study to assess whether these changes create meaningful safeguards or whether they simply put up a more pleasing façade on the security edifice.

Some, like Muslim communities, have felt targeted by enhanced surveillance and security measures. These are amongst the very communities that have also have been targeted by hateful speech. One critical element for combatting hate speech was the educational, remedial and preventative functions of our federal human rights tribunal, who had civil jurisdiction over hate speech. Under the *Canadian Human Rights Act*, discriminatory practices were deemed to include communications “likely to expose a person or persons to hatred or contempt” by virtue of their identification with a protected ground (such as race or religion). The Canadian Human Rights Tribunal can order damages and other remedies to rectify the discrimination, and make orders preventing repetition of the discriminatory acts. This law, and equivalent provincial legislation, were found by our Supreme Court to constitute reasonable limits on freedom of expression. In doing so, the Court said the extreme nature of the speech was far from the core of the guarantee and the clarity of the standard. The laws did not prohibit merely offensive speech, but speech that expressed extreme and deep-felt emotions of detestation, vilification, ill will and an emotion that allows for “no redeeming qualities” in the person at whom it is directed.¹⁹

One important idea to which the Canadian Bar Association contributed, and which was affirmed by the Supreme Court, is that conflicts over hate speech should not to be conceived as a matter of “clashing values,” of the equality of the target groups on the one side and freedom of expression on the other. Hate speech in fact inhibits the speech of the target group.

¹⁸ My comments on Bill C-59 draw upon the analysis of Craig Forcese, “A Law for New Seasons: Bill C-59 from the ‘Big Picture’ Perspective of National Security Reform” (June 24, 2017), online: <http://craigforcese.squarespace.com/national-security-law-blog/2017/6/24/a-law-for-new-seasons-bill-c-59-from-the-big-picture-perspec.html>; and Craig Forcese and Kent Roach, “A report card on the national security bill,” *Policy Options* (June 22, 2017), online: <http://policyoptions.irpp.org/magazines/june-2017/a-report-card-on-the-national-security-bill/>.

¹⁹ *Canada (Human Rights Commission) v. Taylor*, [1990] 3 SCR 892.

It erodes their ability to publicly defend themselves against discriminatory stereotypes by undermining their status as legitimate and truthful social commentators.²⁰ Hate speech prohibitions may not silence, but they result in a more egalitarian “marketplace of ideas.”

Unfortunately, a previous government paid heed to those who presented the issue as a “zero sum game” that chilled speech and muzzled dissent. It repealed the provision four years ago. Only 26 court cases in the past five years involved hate propaganda offences or mischief relating to religious property. Out of those, there were 14 convictions.²¹ This data is particularly troubling given what we know about the increase in hate crimes against specific target groups. The CBA is not in favour of increased criminalization. We say that the state should use a variety of tools adaptable to the circumstances to prevent, detect and deter violators, and help target groups deal with its effects. Criminal law is a blunt, rarely used instrument not up for tackling the extent of the problem alone. It is properly reserved for only the worst cases, rather than the only option.

The legal profession in Canada points out these gaps and flaws in its advocacy to government and before the courts, representing individuals and as a collective, through the Canadian Bar Association and other legal organizations’ lobbying the government and intervening as friends of the court. We maintain that protecting the safety and security of Canadians, and preserving Canadians’ constitutional values are equally fundamental responsibilities of the government. It is often a difficult task to convince fellow citizens to choose constitutional values over gut feelings about the nature of the threats facing the nation, even though these feelings may be based on fear not fact, on prejudices not justice. The task is easier when you have many others standing with you. The CBA extends the invitation for you to support for our efforts and welcomes the opportunity to join with others in the legal profession internationally to build a global community based not only on security, but on inclusion, human rights, and the fundamental freedoms necessary for every one of us to live out our own “conception of the good life”²² in peace.

²⁰ *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11, [2013] 1 SCR 467 at paras 112 & 114.

²¹ Jennifer Yang, “Why Hate Crimes are Hard to Prosecute,” *Toronto Star* (February 27, 2017), online: <https://www.thestar.com/news/gta/2017/02/27/why-hate-crimes-are-hard-to-prosecute.html>

²² *R v Morgentaler*, [1988] 1 SCR 30.