

# LEGAL AND TACTICAL GUIDE



**Palestine Legal  
Resources Canada  
(PLRC)**

**FREE SPEECH RIGHTS | SEPTEMBER 2020**



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

# 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>;
- (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>

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>15</sup>

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

# HATE PROPAGANDA AND SPEECH

<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).

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

<sup>15</sup> *Ibid* at s 318(4).

## 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>16</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>17</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>18</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>19</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.

## 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  
\(CANADIAN HUMAN RIGHTS COMMISSION\)](#)



<sup>16</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>17</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*, CCMS 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>18</sup> Walker, *supra* at 8.

<sup>19</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.

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

## THE INTERNATIONAL HOLOCAUST REMEMBRANCE ALLIANCE (IHRA)

is a multi-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>20</sup>

In 2019, Canada adopted the IHRA working definition in its Anti-Racism Strategy.<sup>21</sup> In Ontario, Private Member's Bill 168, *An Act to combat antisemitism*, which supports the IHRA definition, has passed second reading and is at the Justice Policy Committee.<sup>22</sup> There have also been further attempts to pass the IHRA definition in several cities in Canada.

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>23</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>24</sup> Over 400 Canadian academics have now 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>25</sup>

**TO LEARN MORE ABOUT THE CAMPAIGN AGAINST THE IHRA DEFINITION, VISIT: [NOIHRA.CA](http://NOIHRA.CA). ALSO CHECK OUT MORE ABOUT BILL 168 IN ONTARIO.**

## 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 antisemitic. Criticism of Jewish people as a whole because of Israel's actions is, on the other hand, antisemitic. 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*.

<sup>20</sup> See <https://www.holocaustremembrance.com/working-definition-antisemitism>.

<sup>21</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>22</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>23</sup> 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/>.

<sup>24</sup> 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/>.

<sup>25</sup> 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/>.

## 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.

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).

## JUST PEACE ADVOCATES

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