

LEGAL AND TACTICAL GUIDE



**Palestine Legal
Resources Canada
(PLRC)**

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**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.

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.

JUST PEACE ADVOCATES

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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.



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.¹

WHAT IS “EXPRESSION”?

The SCC has defined expression extremely broadly. It has held that an activity is “expressive” if “**it attempts to convey meaning**.”² 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.³ 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.⁴ 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 prostitution⁵, the dissemination of hate propaganda⁶, the deliberate dissemination of falsehoods and defamatory libel⁷, and even child pornography.⁸

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

¹ *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*].

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

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

⁴ *R. v Keegstra*, [1990] 3 SCR 697 at 828 *Keegstra*.

⁵ *Prostitution Reference*, *supra*.

⁶ *Keegstra*, *supra*.

⁷ *R. v Lucas*, [1998] 1 SCR 439.

⁸ *R. v Sharpe*, [2001] 1 SCR 45.

⁹ *Irwin Toy*, *supra*, at 970; *Keegstra*, *supra*.

¹⁰ *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.¹¹

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)¹²;
- (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)¹³;
- (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).¹⁴

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”.¹⁵

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

HATE PROPAGANDA AND SPEECH

¹¹ *R. v Oakes*, [1986] 1 SCR 103.

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

¹³ *Ibid* at s 319(1).

¹⁴ *Ibid* at s 319(2).

¹⁵ *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.¹⁶

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.¹⁷ 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.¹⁸

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.¹⁹

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



¹⁶ 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>.

¹⁷ 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.

¹⁸ Walker, *supra* at 8.

¹⁹ *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.²⁰

In 2019, Canada adopted the IHRA working definition in its Anti-Racism Strategy.²¹ 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.²² 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."²³ 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."²⁴ 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.²⁵

TO LEARN MORE ABOUT THE CAMPAIGN AGAINST THE IHRA DEFINITION, VISIT: 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*.

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

²¹ 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>.

²² Bill 168, *An Act to combat antisemitism*, 1st Sess, 42nd Parl, Ontario, 2019 (first reading 11 December 2019; second reading 27 February 2020).

²³ 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/>.

²⁴ 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/>.

²⁵ 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/>.

SOLIDARITY ACTIONS, THE RIGHT TO PROTEST, AND CRIMINAL ISSUES YOU MAY FACE²⁶

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.²⁷

²⁶ 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).

²⁷ PEN Canada, *supra*.

DO'S AND DON'TS OF DEMONSTRATIONS²⁸

DO

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

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.

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

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.

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

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

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.

DO consider wearing glasses and not contact lenses.

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.

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

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

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.

²⁸ Pivot Legal Society, *supra* at 4; McGrady and Sabet-Rasekh, *supra*, at 20-24.

ENCOUNTERING THE POLICE²⁹

- 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, you must provide proper identification to the police.
 - **2)** If you have been lawfully arrested
- 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.³⁰
- **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.³¹

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

²⁹ 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.

³⁰ *R v Manninen*, 1987 CanLII 67 (SCC), [1987] 1 SCR 1233; *R v Suberu*, 2009 SCC 33 (CanLII), [2009] 2 SCR 460.

³¹ *R v Mann*, 2004 SCC 52 (CanLII), [2004] 3 SCR 59; See also *R v Clayton*, 2007 SCC 32 (CanLII), [2007] 2 SCR 725.

• 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 CHARGES³²

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.

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)).

³² Wallia, *supra* at 4-6; McGrady and Sabet-Rasekh, *supra*, at 44-49; PEN Canada, *supra*.

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.

Assaulting a Peace Officer – s. 270

- This involves an assault of a peace officer engaged in the execution of their duties or a person acting in aid of such an officer. This offense includes resisting or preventing the lawful arrest or detention of you or another person. This offence may be punishable by up to five years in prison.

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.³³

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."³⁴ 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.³⁵ 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*.³⁶

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.

In 2015, Ontario enacted the *Protection of Public Participation Act, 2015*, which in turn introduced 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.³⁷

³³ *Grant v Torstar Corp.*, 2009 SCC 61, [2009] 3 SCR 640, at para 28.

³⁴ *Botiuk v Toronto Free Press Publications Ltd.*, [1995] 3 SCR 3, at para 62.

³⁵ Law Commission of Ontario, "Defamation Law in the Internet Age: Final Report" (Toronto: March 2020) at 18-19.

³⁶ RSO 1990, c L 12

³⁷ Courts of Justice Act, RSO 1990, c C43

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. 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.

Quebec was the first Canadian province to enact anti-SLAPP legislation, which was incorporated into its *Code of Civil Procedure*.³⁸ 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.³⁹

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.⁴⁰

³⁸ 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>.

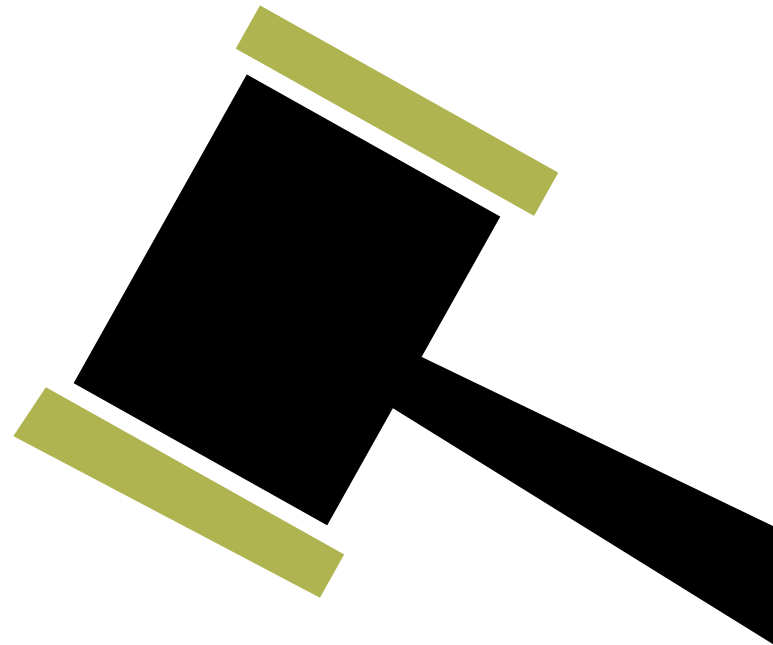
³⁹ SBC 2019, c 3.

⁴⁰ 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,

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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.⁴¹

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.

⁴¹ *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.

CUPW, 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 Movement ("BDS Movement") 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 Movement 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 movement, 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.

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.**⁴² 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.

⁴² 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; 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; 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.**⁴³ As well, at least one university Student Union has included the Ottawa Protocol⁴⁴ 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.

⁴³ 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.

⁴⁴ 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>.

UNIVERSAL DECLARATION OF HUMAN RIGHTS | **ARTICLE 19**

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.

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 Request⁴⁵ under the *Access to Information Act*⁴⁶ 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!

⁴⁵ See <https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/access-information/request-information.html>. Each request costs \$5.00 CAD.

⁴⁶ 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 THE BOYCOTT, DIVESTMENT, AND SANCTIONS (“BDS”) MOVEMENT?

The BDS movement 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.⁴⁷ 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 the BDS movement 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.

⁴⁷ 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**.⁴⁸ 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.⁴⁹ 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 36⁵⁰ 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.⁵¹ 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.

⁴⁸ House of Commons, Journals, 42nd Parl, 1st Sess, No 22 (22 February 2016) at 176.

⁴⁹ Bill 202, *An Act respecting participation in boycotts and other anti-Semitic actions*, 1st Sess, 41st Leg, Ontario, 2016 (1st Reading May 17, 2016).

⁵⁰ Ontario, Legislative Assembly, *Orders and Notices Paper*, 41st Parl, 2nd Sess, No 38 (1 December 2016) at 3, 11 at 17.

⁵¹ 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 THE BDS MOVEMENT ANTISEMITIC?

- No. The BDS movement 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.⁵² 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.⁵³
- One notable set of globally-endorsed standards is the UN Guiding Principles on Business and Human Rights (UNGPs).⁵⁴ 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](#).

⁵² Justice 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.

⁵³ *Ibid* at 439.

⁵⁴ 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.⁵⁵ 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).⁵⁶
- *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.⁵⁷ 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.⁵⁸

- 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.⁵⁹ 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*.⁶⁰
- 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*,⁶¹ parties that are complicit in genocide, crimes against humanity, and/or war crimes, including individuals or corporations, are liable to criminal prosecution.
- Since the 2009 Quebec Superior Court decision in *Bil’in (Village Council) c Green Park International Inc.*,⁶² 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 ground-

⁵⁵ UNOHCHR, *Interpretive Guide*, *supra* note 143 at 2.

⁵⁶ *Voluntary Principles Initiative, Voluntary Principles on Security and Human Rights*, (2000), online: <https://www.voluntaryprinciples.org/the-principles/>.

⁵⁷ OECD, *OECD Due Diligence Guidance for Responsible Business Conduct*, (2018).

⁵⁸ 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>.

⁵⁹ United Nations Global Compact, *The Ten Principles*, (2000), online: <https://www.unglobalcompact.org/what-is-gc/mission/principles>.

⁶⁰ UN Women & the United Nations Global Compact, *Women’s Empowerment Principles*, 2nd 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; 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_CRS%20Handbook%20%28ENGLISH%29_February%202018.pdf.

⁶¹ 2000, c 24.

⁶² 2009 QCCS 4151.

work for the Supreme Court of Canada's precedent setting February 2020 decision in *Nevsun Resources Ltd. v. Araya*,⁶³ 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, 2010.⁶⁴ An application for leave to appeal was dismissed by the Supreme Court of Canada on March 3, 2011.⁶⁵
- 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.⁶⁶
- 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.⁶⁷
- 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.⁶⁸ 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 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.

⁶³ 2020 SCC 5.

⁶⁴ *Yassin c Green Park International Inc.*, 2010 QCCA 1455

⁶⁵ *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)

⁶⁶ *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.

⁶⁷ *Ibid.*, Concurring opinion of Committee members Olivier de Frouville and Yadh Ben Achour, at para 1.

⁶⁸ *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 peremptory norms, or the most serious violations of rights – *are* part of Canadian law.

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.

- 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.

⁶⁹ BDS Movement, “What are Boycotts, Divestment and Sanctions?”, online: <https://bdsmovement.net/what-is-bds>.

⁷⁰ RSC 1985, c U-2.

⁷¹ SC 1992, c 17.

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.⁶⁹
- Canadian sanctions laws implement United Nations Security Council (UNSC) sanctions regimes under the *United Nations Act*⁷⁰, as well as Canadian autonomous sanctions regimes under the *Special Economic Measures Act*.⁷¹
- 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*.

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/>.

- 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.

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.

BDS MOVEMENT

For in-depth information, analysis and statements about BDS, visit bdsmovement.net the official website of the Palestinian BDS National Committee (BNC).

ADDITIONAL RESOURCES

ORGANIZATIONS IN CANADA

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

Canadians for Peace and Justice in the Middle East (CJPME) <https://www.cjpme.org/>

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

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

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

Canadian Arab Institute
<http://www.canadianarabinstitute.org/>

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

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

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

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

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

Boycott, Divestment, and Sanctions National Committee (BNC) www.bdsmovement.net

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

BADIL Resource Center for Palestinian Residency and Refugee Rights 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

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

Adalah - The Legal Center for Arab Minority Rights in Israel www.adalah.org

ORGANIZATIONS IN THE UNITED STATES

Palestine Legal <https://palestinelegal.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.educaloi.qc.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

Canadian Association of Lawyers for International Human Rights 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://bcccla.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.cdpedj.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

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).