

The Centre for Free Expression
Ryerson University
Dr. James Turk, Director
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Submission to
Standing Senate Committee on Legal and Constitutional Affairs
Hearings on Bill C-51
June 14, 2018

Bill C-51:

- Objectives include amending, removing or repealing passages and provisions that have been ruled unconstitutional or that raise risks with regard to the *Canadian Charter of Rights and Freedoms* and
- Amending, removing or repealing those that are obsolete, redundant or that no longer have a place in criminal law [our emphasis]

Criminal libel:

- The *Criminal Code* punishes three forms of criminal libel: blasphemous libel (s.296); seditious libel (s.59(2)); and defamatory libel (ss. 301 and 300)
- The Minister proposes to repeal blasphemous libel, “to enhance freedom of expression protected by s.2(b) [of the *Charter*]” [see *Charter* statement]
- Apart from a minor amendment to defamatory libel, Bill C-51 retains seditious and defamatory libel as *Criminal Code* offences

Submission:

- All three forms of criminal libel in the *Criminal Code* constitute a serious and unjustifiable violation of s.2(b) of the *Charter*, which guarantees freedom of expression
- We invite and ask the Committee and Minister to repeal all criminal libel offences, including seditious and defamatory libel, as well as blasphemous libel

Blasphemous and seditious libel

- In functional terms, seditious and blasphemous libel are obsolete criminal offences
- The last conviction for blasphemous libel was 1936; the last charge about 35 years ago was stayed (Monty Python; *Life of Brian*)
- We have found no convictions or charges for seditious libel since *Boucher v. the King* (1950)
- Blasphemous and seditious libel also raise risks under s.2(b) and courts would likely find that these offences are an unjustifiable violation of expressive freedom

Defamatory libel:

- Defamatory libel is not obsolete, but continues to be charged and prosecuted; as such this form of criminal libel poses a serious ongoing risk to expressive freedom under s.2(b) of the *Charter*
- In fact, defamatory libel is a greater threat to the constitutional rights of Canadians than blasphemous or seditious libel
- The *Criminal Code* criminalizes two forms of defamatory libel: s.301 and s.300

Section 301:

- Making a defamatory statement of any kind – whether true or false – exposes an individual to being charged, convicted and subject to imprisonment for up to two years;
- Defamatory libel includes matter that is likely to injure another person’s reputation by exposing that person to “hatred, contempt or ridicule” or is “designed to insult the person” (s.298(1))
- This definition, in combination with the uncertainty of defences, makes s.301’s criminal offence harsher than the civil law of defamation; for this reason, it is a serious interference with expressive freedom
- Section 301 has been found unconstitutional by courts in 5 different provinces: *R. v. Finnegan* (Alberta QB 1992); *R. v. Lucas* (Sask QB 1995); *R. v. Gill* (Ont CJ 1996); *R. v. Osborne* (NB QB 2004); *R. v. Prior* (Nfld/Lab SupCt 2008)
- It is assumed that s.301 is unconstitutional; however, without a provincial appellate or Supreme Court decision s.301 is relied on in public and private prosecutions for improper purposes (*i.e.*, to silence those who speak out against public officers; to provide grounds for a search warrant)

Section 300:

- An individual who publishes a defamatory libel that he “knows to be false” can be imprisoned for up to 5 years
- *R. v. Lucas* (1998) held that s.300 was a justifiable violation of s.2(b) (Supreme Court of Canada)
- Almost 20 years later, s.300 raises “risks” under the *Charter* that are within Bill C-51’s mandate for repeal, and should also be repealed
- There are 4 central concerns:
 - *Lucas* is inconsistent with *R. v. Zundel* (1991), which earlier invalidated the “false news” provision of the *Code* as an impermissible violation of s.2(b) of the *Charter*
 - *Lucas* relied on *Hill v. Church of Scientology* (1995), a civil defamation decision which was superseded by *Grant v. Torstar Corp.* (2009)
 - Section 300 has been used to harass and charge individuals who are harshly critical of public officers, in violation of their *Charter* rights, and
 - Like blasphemous libel, defamatory libel is an artifact of the 17th century, aimed originally at preventing duels and keeping the peace; in 1984 the Law Reform Commission of Canada recommended that defamatory libel be struck from the *Code* and abolished; See: https://archive.org/stream/defamatorylibel00lawr/defamatorylibel00lawr_djvu.txt

Research points on defamatory libel

- Defamatory libel prosecutions are not rare; there have been at least 408 prosecutions between 2000-2015, and the number climbed from an average of 20 per year in 2000 to 40 per year between 2010-2015
- 1/3 of the cases involved political expression by individuals who were critical of state actors such as police, prosecutors, municipal officials, prison guards, etc.; while their expression may have taken the form of invective, it commented on matters of public importance at the core of s.2(b)
- Many charges do not go to trial but engage the investigative process and often result in lengthy proceedings, which can include search warrants, serial charges, and the need to retain counsel and defend against charges
- While criminal libel laws in other countries often target journalists or prominent individuals who have the power to defend themselves, the target of these laws in Canada are often powerless individuals who have offended those in authority
- The other 2/3 of charges relate to personal vendettas (*i.e.* cyber-smearing; slut-shaming etc.); a range of *Criminal Code* provisions are available to deal with these forms of transgressive conduct: <http://www.justice.gc.ca/eng/rp-pr/other-autre/cndii-cdncii/p4.html>

Proposal:

- We ask the Committee to acknowledge the constitutional infirmity of criminal libel, and to adopt amendments to Bill C-51 that will repeal the seditious libel (ss.59-61) and defamatory libel provisions (ss.297-316) of the *Criminal Code*
- We are supported in this position by PEN Canada and Canadian Journalists for Free Expression
- We draw to your attention that in 2009 the UK abolished all common law libel offences (seditious libel; defamatory libel; obscene libel) [s.73, *Coroners and Justice Act 2009*]; see: <http://merlin.obs.coe.int/iris/2010/2/article20.en.html>; <http://www.pressgazette.co.uk/criminal-libel-and-sedition-offences-abolished/>

Please see:

J. Cameron, “Repeal Defamatory Libel” Centre for Free Expression Blogpost, July 5, 2017 <https://www.cfe.ryerson.ca/blog/2017/07/repeal-defamatory-libel>

L. Taylor & D. Pritchard, “The Process is the Punishment: Criminal Libel and Political Speech in Canada” (paper available at the Committee’s request)

L. Taylor, “In Canada, we criminalize public-interest speech.” The Globe and Mail, April 3, 2018 <https://www.theglobeandmail.com/opinion/article-in-canada-we-criminalize-public-interest-speech/>

APPENDIX A: BIOGRAPHIES OF PRESENTERS

**Professor Jamie Cameron
Osgoode Hall Law School
York University**

Jamie Cameron is a Professor at Osgoode Hall Law School and a member of the full-time faculty since 1984. She is one of Canada's senior constitutional scholars, whose scholarly and teaching interests over the years have focused on constitutional law, the *Charter of Rights and Freedoms*, US constitutional law, and criminal law. Professor Cameron is well known for her scholarship and advocacy on freedom of expression and freedom of the press and media under the *Charter*. She was a Vice-President of the Canadian Civil Liberties Association for over 20 years and remains a member of the CCLA Board of Directors. She has appeared at the Supreme Court of Canada on s.2(b) cases.

**Professor Lisa Taylor, LLB, LLM
Ryerson University**

Lisa Taylor is a faculty member in the School of Journalism, Ryerson University, where she teaches ethics and law to students in both the undergraduate and graduate journalism degree programs. Her research interests include impediments to journalists' freedom of expression and access to information. She is the co-editor of *The Unfulfilled Promise of Press Freedom in Canada*, published by the University of Toronto Press (2017). She is a member of the Canadian Association of Journalists' ethics advisory committee; in that capacity, she is currently leading a revision of the organization's ethics codes.

**Dr. James Turk, Executive Director
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James Turk is Distinguished Visiting Professor at Ryerson University and Director of Ryerson's Centre for Free Expression. From 1998 to 2014, he served as Executive Director of the Canadian Association of University Teachers. Professor Turk has written and spoken extensively on academic freedom, freedom of expression, civil liberties, and related public policy issues. His most recent book is an edited collection, *Academic Freedom in Conflict: The Struggle over Speech Rights in the University*. Professor Turk is a member of the Board of the Canadian Centre for Policy Alternatives, a member of the Steering Committee of the International Civil Liberties Monitoring Group, and served as a consultant to the American Association of University Professors' Committee A on Academic Freedom and Tenure.