Brief to the Standing Committee on Justice Policy

Legislative Assembly of Ontario

C/O: Thushitha Kobikrishna, Committee Clerk

REGARDING: Bill 168 Combating Antisemitism Act, 2020

October 26, 2020

Submission made by Harsha Walia,

Executive Director of the BC Civil Liberties Association

I am writing to you on behalf of the British Columbia Civil Liberties Association ("BCCLA") to urge the Legislature of Ontario **not to adopt** the International Holocaust Remembrance Alliance ("IHRA") definition of antisemitism put forward in Bill 168, *Combating Antisemitism Act,* 2020. Bill 168 requires the Government of Ontario to be guided by the working definition of antisemitism and the list of illustrative examples of it adopted by the International Holocaust Remembrance Alliance plenary. While we vehemently condemn anti-Semitism, the IHRA's definition and list of illustrative examples is extremely vague, open to misinterpretation, and not suitable for any legal or administrative purposes in Canada. In our submission, Bill 168 is an unreasonable, unjustifiable, and, hence, unconstitutional, infringement on freedom of expression.

The BCCLA is Canada's oldest civil liberties and human rights organization, founded in 1962. Though we are based in BC, our work is national in scope, and we engage in litigation, law reform, community-based legal advocacy, and public engagement and education across Canada. We are unequivocally opposed to antisemitism and all forms of racism. We absolutely and fully support provincial initiatives to combat all forms of systemic racism, racial profiling, and racial targeting, including antisemitism, Islamophobia, anti-Palestinian racism, anti-Black racism, anti-Indigenous racism, anti-Asian racism, casteism, and more.

However, we are strongly opposed to the IHRA definition and its accompanying list of illustrative examples because of its threat to freedom of expression, academic freedom, and the right of Canadians to protest Israeli state policy and violations of international law. The list of illustrative examples accompanying the IHRA definition erroneously conflate criticism of the state of Israel with antisemitism. Speech criticizing the government of Israel should not be

labelled antisemitic without evidence to suggest actual antisemitic intent. The BCCLA recognizes that freedom of expression is a constitutional and *Charter*-protected right that is necessary for individuals and society to flourish. Indeed, over the past thirty years, from *Taylor*[1] to *Whatcott*[2] and beyond, Canadian courts have developed a body of jurisprudence that defines "hate" associated with racism and others forms of discrimination, attempting to preserve the weight and severity of the word while balancing the importance of freedom of expression. For example, in *R. v Keegstra*, Chief Justice Dickson wrote: "[I]n my opinion the term 'hatred' connotes emotion of an intense and extreme nature that is clearly associated with vilification and detestation."[3]

As Jewish organizations have long made clear, antisemitism cannot and must not be conflated with criticism of the state of Israel or the political ideology of Zionism. Forty international Jewish organizations issued the following statement: "The International Holocaust Remembrance Alliance (IHRA) definition of antisemitism, which is increasingly being adopted or considered by western governments, is worded in such a way as to be easily adopted or considered by western governments to intentionally equate legitimate criticisms of Israel and advocacy for Palestinian rights with antisemitism, as a means to suppress the former."[4]

In Ontario, the potential legal adoption of the IHRA definition would be inconsistent with the values underlying the *Charter of Rights and Freedoms*, and would greatly narrow the scope of

[1] *Canada (Human Rights Commission) v Taylor*, [1990] 3 SCR 892, 1990 CanLII 26 (SCC) [*Taylor*].
[2] *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11, [2013] 1 SCR 467, (CanLII) [*Whatcott*].
[3] *R. v. Keegstra*, [1990] 3 S.C.R. 697
[4] Jewish Voices for Peace, "First-ever: 40+ Jewish groups worldwide oppose equating antisemitism with criticism of Israel," July 17, 2018, https://jewishvoiceforpeace.org/first-ever-40-jewish-groups-worldwide-oppose-equating-antisemitism-with-criticism-of-israel/

political expression in Ontario and Canada. The IHRA definition of antisemitism is extremely vague, open to misinterpretation, and the document states that it is "non-legally binding." Not only is the text unsuitable for any legal or administrative purpose in Ontario or Canada, but the accompanying illustrative examples suggest that the definition conflates certain critiques of the state of Israel with antisemitism. City council motions to adopt the IHRA definition were introduced in Vancouver, Calgary, and Montreal, but, importantly, were never passed. Further, chilling political speech will not necessarily reduce antisemitism. It is unclear as to what, if any, benefit adopting the IHRA's definition as a non-binding tool has had at the federal level.

Section 2(b) of the *Charter of Rights and Freedoms* holds that everyone has the following fundamental freedoms: freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication. The values underlying the protection of freedom of expression are the enhancement of individual self-fulfilment, democratic discourse, and the search for truth. Those freedoms were called "fundamental" by the framers of the *Charter* for a reason; without them, we would have no right to hold or express our conscientiously held beliefs, or to join with others, whether to worship, to educate, to celebrate, to create art, for mutual support, or to work for political, social or economic change. Indeed, the freedom to join together in accordance with our beliefs with those who share our beliefs, on the terms we choose, is vital, especially for marginalized groups. That freedom is essential to the ability of those who are made marginal and vulnerable by state and social structures to be able to act collectively to challenge unjust laws, practices and institutions. In fact, on numerous occasions, the Supreme Court of

Canada has held the *Charter*-protected right to freedom of expression is closely connected to and "*perhaps the linchpin* (emphasis added)" to the political process and democratic governance.[5]

It is our submission that Bill 168 is fundamentally flawed and should not be enacted. It is a legislative infringement on expressive content—specifically, highly protected political speech—and unjustifiably removes *Charter* section 2(b) protections in both purpose and effect. Canadian courts interpret section 2(b) generously and broadly, thus taking government infringements of freedom of expression seriously. The Supreme Court of Canada has held where the purpose of a government action is to restrict the content of expression, to control access to a certain message, or to limit the ability of a person who attempts to convey a message to express themselves, that purpose will infringe freedom of expression. Canada is also a signatory to the *International Covenant on Civil and Political Rights*, Article 19 of which holds "Everyone shall have the right to freedom of expression."

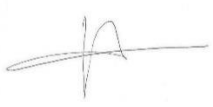
If implemented in Ontario, the IHRA definition will serve to severely infringe on freedom of expression, as well as chill political expressions of criticism of Israel and the legitimate defense of the human rights of Palestinians. The recent aborted hiring of Dr. Valentina Azarova as the director of the University of Toronto's law school's International Human Rights Program, allegedly due to her work on the subject of Israel's occupation of the Palestinian territories, illustrates very clearly how dangerous it already is in Ontario for those who speak up for Palestinian rights. This is not an isolated case; in June 2020, our colleagues at the Ryerson University's Centre for Free Expression organized a debate on the IHRA definition. Following

[5] *R. v. Keegstra*, [1990] 3 S.C.R. 697; *Thomson Newspapers Co. v. Canada (A.G.),* [1998] 1 S.C.R. 877; *Harper v. Canada (Attorney General),* [2004] 1 S.C.R. 827.

the debate, a pro-Israel organization launched a petition against one of the speakers, human rights lawyer Faisal Bhabha, and accused him of anti-Semitism for his critiques of the state of Israel and Zionism. Furthermore, we fear that by endorsing and entrenching this definition of antisemitism in Ontario, human rights groups doing important work domestically and abroad could be falsely perceived or designated as antisemitic, a chilling development that is already occurring in the USA.[6]

The BCCLA strongly believes that a broad range of perspectives must be welcome in our public sphere. We support the rights of people to celebrate or condemn the actions of foreign or domestic governments, without being vulnerable to censorship or other action from their provincial government. The Ontario government must combat antisemitism and other forms of racism, while ensuring that *Charter* rights are protected in the context of political speech and legitimate political action. In our respectful submission, Bill 168, requiring the Government of Ontario to be guided by the working definition of antisemitism and the list of illustrative examples of it adopted by the International Holocaust Remembrance Alliance plenary, is an unreasonable and unjustifiable infringement on freedom of expression. Therefore, Bill 168, *Combating Antisemitism Act*, 2020, should not be enacted.

Sincerely,



Harsha Walia, Executive Director

[6] Nahal Toosi, "U.S. weighs labeling leading human rights groups 'anti-Semitic,'" *Politico*, https://www.politico.com/news/2020/10/21/state-department-weighs-labeling-several-prominent-human-rights-groups-anti-semitic-430882.