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SUBMISSIONS ON BILL C-51: AN ACT TO AMEND THE CRIMINAL CODE AND THE DEPARTMENT OF JUSTICE ACT AND TO MAKE CONSEQUENTIAL AMENDMENTS TO ANOTHER ACT

SUBMITTED TO THE

STANDING COMMITTEE OF JUSTICE AND HUMAN RIGHTS

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PREFACE

Christian Legal Fellowship (CLF) is a national charitable association representing over 700 lawyers, law students, professors, and retired judges. As Canada's national association of Christian lawyers, CLF has members across the country practising in all areas of law and in every size of practice. It has local chapters in cities across Canada and student chapters in most Canadian law schools. While having no direct denominational affiliation, CLF's members represent more than 30 Christian denominations working in association together. CLF is dedicated to advancing the public good and working with others to determine what justice requires in a free and democratic society, and to this end regularly participates in court interventions and public consultations.

CLF has intervened in more than 20 separate proceedings involving *Charter* issues, including many before the Supreme Court of Canada, seeking to advance justice, protect the vulnerable, promote equality, and advocate for freedom of religion, conscience, association, and expression. In 2012, CLF was recognized by the Quebec Superior Court as "possess[ing] an important degree of expertise in the areas of philosophy, morality, and ethics..."[1]

Additionally, CLF has appeared before Parliamentary committees and provincial governments to consult on issues of conscience, religious freedom, inviolability of life, and human rights. CLF has also been granted Special Consultative Status as a Non-Governmental Organization (NGO) with the Economic and Social Council of the United Nations, and has been involved in numerous international proceedings and consultations.

CLF appreciates the opportunity to express its views on the proposed changes to the provisions of the *Criminal Code* in Bill C-51, *An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act*.

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[1] *Leblanc v. Attorney General of Canada et al* at para 45, translation.

"There is no difficulty in concluding that [s. 176]…serves the needs of public morality by precluding conduct potentially injurious to the public interest."

-Supreme Court of Canada[2]

"Such things as freedom of assembly and freedom of association, which are also in the *Charter*, could be meaningless without some such protection such as [s. 176]."

-British Columbia Court of Appeal[3]

OVERVIEW

Bill C-51 purports to repeal a number of offences that are "no longer required in the *Criminal Code* for various reasons", including those that "have been ruled unconstitutional" or are "obsolete, redundant or that no longer have a place in criminal law." [4]

One of the provisions to be repealed by Bill C-51 is section 176, which prohibits activity that obstructs or interferes with religious officials seeking to perform their religious duties or with "assemblages of persons met for religious worship or for a moral, social or benevolent purpose."[5]

Section 176 is not "unconstitutional", "outdated", or "duplicative of more general offences" as Bill C-51's *Charter Statement* suggests of the provisions to be repealed.[6] To the contrary, Canadian courts, including the Supreme Court of Canada, have consistently applied the provisions currently found in s. 176 and upheld their constitutionality.[7] A number of appellate judges have expressly affirmed that these provisions are necessary for the realization of such fundamental rights as freedom of assembly and freedom of association.[8]

CLF will focus its submissions on the following two issues:

I. **The necessity of section 176** – the provisions extend necessary protection to freedom of peaceful assembly, freedom of association, and freedom of religion (as guaranteed by the *Canadian Charter of Rights and Freedoms*) in ways that other *Criminal Code* provisions do not.

II. **The requirements of international law** – Canada has positive obligations, pursuant to its international commitments, to actively protect the fundamental freedoms of religious expression, association, and peaceful assembly. These commitments would be undermined should section 176 be repealed.

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[2] *Skoke-Graham v The Queen*, [1985] 1 SCR 106 at para 20 ["*Skoke-Graham*"].
[3] *R v Reed*, [1985] BCJ No 1899 at para 41 per Esson J.A. [*Reed* 1985]; passage adopted and applied by the majority in *R v Reed (BCCA)*, [1994] BCJ No 1817 at paras 37-38, 53 [*Reed* 1994].
[4] Bill C-51, *An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act*, 1st Sess, 42nd Parl, 2017, summary (fist reading June 5 2017) [Bill C-51].
[5] *Criminal Code*, RSC, 1985, c C-46, s 176 [*Criminal Code*].
[6] Charter Statement - *Bill C-51: An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act*, Department of Justice, online: <http://www.justice.gc.ca/eng/csj-sjc/pl/charter-charte/c51.html>
[7] *Skoke-Graham* at paras 18-22; *Reed* 1985 at paras 28, 36 and 41; *Reed* 1994 at paras 35-39, 63.
[8] *Reed* 1985 at para 41; *Reed* 1994 at paras 37-38.

I. Section 176 is the only section of the *Criminal Code* that offers explicit legislative protection for the exercise of section 2(a), (c), and (d) *Charter* rights

Section 176 of the *Criminal Code* contains three subsections:

- Subsection (1) makes it a crime to obstruct or prevent a clergyman or minister from performing their duties (including officiating divine services) either by "threats or force," assault, violence or "arrest … on a civil process, or under the pretense of executing a civil process."[9]

- Subsection (2) makes it a crime to "willfully [disturb] or [interrupt] an assemblage of persons met for religious worship or for a moral, social or benevolent purpose."[10]

- Subsection (3) makes it a crime to "willfully [do] anything that disturbs the order or solemnity" of such a meeting.[11]

Note that subsections (2) and (3) differ from subsection (1) in that they do not require the presence of a forceful or threatening act in order for a crime to take place.

a. Section 175 does not render section 176 redundant

It has been suggested that most of the activity prohibited by s. 176 is sufficiently covered by s. 175 of the *Criminal Code*.

Section 175 makes it a crime for anyone to "[cause] a disturbance in or near a public place" by "fighting, screaming, shouting, swearing, singing or using insulting or obscene language," "by being drunk," "by impeding or molesting other persons" or by "[loitering] in a public place in any way [that] obstructs persons who are in that place," amongst other things.[12]

But as the British Columbia Court of Appeal has observed, ss. 175 and 176 are "quite different."[13]

Section 175, for instance, only applies in the context of a "public place." Section 176 has no such restriction.

Further, section 175 only prohibits disturbances that are the result of either violent activity or some sort of verbal disruption such as screaming, shouting, or swearing. Section 176 is not so limited; courts have specifically held that it does not require "shouting or screaming or causing

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[9] *Criminal Code*, s 176(1).
[10] *Criminal Code*, s 176(2).
[11] *Criminal Code*, ss 176(3).
[12] *Criminal Code*, s 175.
[13] *Reed* 1994 at para 25.

an undue amount of noise".[14] Rather, under s. 176, "it is an offence simply to disturb or interrupt an assemblage of persons met for religious worship, regardless of the motive."[15]

Indeed, the British Columbia Court of Appeal has highlighted several ways in which ss. 175 and 176 are distinct:

> Section 175(1)(a) makes it an offence to cause a disturbance in or near a public place. Section 176 makes it an offence to willfully disturb or interrupt an assemblage of persons met for religious worship, or to willfully do anything that disturbs the order of solemnity of such a meeting. **In my view, the sections are quite different**. Section 176 specifically targets interference with religious services or worship, but s. 175 deals with a variety of problems.[16]

It is simply incorrect to suggest that s. 175 is sufficient to cover all conduct currently prohibited by s. 176.

b. Section 430 does not render section 176 redundant

It has also been suggested that s. 430 of the *Criminal Code* adequately addresses the conduct currently prohibited by s. 176. This too is incorrect.

Currently, section 430 holds that anyone commits mischief who, among other things, "willfully … obstructs, interrupts or interferes with the lawful use, enjoyment or operation of property" or "obstructs, interrupts or interferes with any person in the lawful use, enjoyment or operation of property."[17]

Section 430 differs from section 176 in several key respects. While both sections may prohibit activity or behaviour that interrupts a worship service or assembly at certain places, the former will **only offer protection to the extent that a property interest is engaged and violated**.

But what of interruptions of meetings, services, or assemblies that do not involve property damage or are not considered to involve an obstruction or interference with the use or enjoyment of property? Gatherings such as outdoor baptism services or other open-air gatherings – which are commonplace in many religious traditions – may not be protected by s. 430.

Section 430 is limited to interference with *property*, not necessarily with *people* – section 176, conversely, clearly *would* apply where an accused deliberately obstructs worshippers on their way to a place of worship.[18] For example, an individual wearing placards and making

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[14] *Reed* 1985 at para 28.
[15] *Reed* 1985 at para 28.
[16] *Reed* 1994 at para 25 [emphasis added].
[17] *Criminal Code*, s 430.
[18] See Halsbury's Laws of Canada - Criminal Offences and Defences (2016 Reissue), HRC-119.

confrontational remarks to parishioners as they walked into their religious service was found guilty under s. 176.[19]

In contrast, s. 430(7) provides a complete defence for anyone "attending at or near" a place for the "purpose only of communicating information." This has been interpreted broadly to cover any communication that does not "constitute trespass or harassment" or "endanger anyone" or that poses "no potential risk of damage to [property]."[20]

This is a much narrower interpretation than the test laid out by the Supreme Court of Canada for s. 176(3), which is met where an accused:

1. willfully does "anything";
2. at or near "an assemblage of persons met for a religious or moral, social or benevolent purpose";
3. that "disturbs the order of solemnity of the meeting."[21]

Perhaps the most significant distinction between s. 430 and s. 176 is that **they are directed at two different purposes**. The former is primarily aimed at upholding property rights, while the latter is directed toward protecting the fundamental freedoms guaranteed by s. 2 of the *Charter*, specifically freedom of assembly, freedom of association, and freedom of religion.[22]

Indeed, on two occasions, the British Columbia Court of Appeal has affirmed that "Such things as freedom of assembly and freedom of association, which are also in the *Charter*, could be meaningless without some such protection such as [s. 176(2)]."[23]

Where *Criminal Code* provisions serve different purposes, conduct prohibited by one provision may not be considered an offence under another; the requisite *actus reus* for each offence is contextual. As Supreme Court Justice Wilson held, the *actus reus* of the offence in s. 176 is not necessarily the physical act *per se* but "**doing so in a certain context** i.e., where it was known that to do so would disturb the solemnity of a religious service."[24] She further explained that an act which **is not otherwise criminal** could nevertheless constitute an offence where it results in the disturbance of a religious service:

> "**Just as an act which is guilty in one context may be quite innocent in another, so also an act which is innocent in one context may be guilty in another**. To use a simple example, it may be an offence to use foul and abusive language in a courtroom but it may be inoffensive to do the same thing in a noisy tavern or in the privacy of one's own home.

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[19] *Reed* 1994.
[20] *Criminal Code*, s 430(7); *R v Tremblay*, 2010 ONCA 469 at para 32.
[21] *Skoke-Graham* at para 28.
[22] Halsbury's Laws of Canada, *Constitutional Law: Charter of Rights (Newman)* (Markham, Ont: LexisNexis Canada, 2014) at HCHR-42 "Freedom of Assembly".
[23] *Reed* 1985 at para 41; passage adopted and applied by the majority in *Reed* 1994*:* paras 37-38, 53.
[24] *Skoke-Graham* at para 72 [emphasis added].

> While it is, in my view, sound to interpret the *Criminal Code* in such a way that the appellants' conduct is not characterized as criminal, it is a much more radical step to assert that the *Criminal Code* could not characterize the appellants' conduct as criminal where **the result of such conduct is to disturb the carrying on by their fellow parishioners of their religious services**. I would be hesitant, indeed, to accept such a submission."[25]

c. Overlapping criminal provisions are not "redundant"

There may be some overlap between s. 176 and other offences, but this is true of many provisions in the *Criminal Code.* Some frauds are also thefts. Some threats are also assaults. There are many other examples, including: sexual interference and sexual assault, impaired driving and driving over 80, theft by power of attorney and theft, and fraud and uttering a forged document.

However, Canadian law has long recognized that criminal prohibitions may overlap and cover similar conduct. A person can be convicted of multiple offences arising from the same matter in various circumstances, including where the different "offences are designed to protect different societal interests."[26]

Section 176 serves a distinct, important purpose that no other provision of the *Criminal Code* serves. As the Supreme Court of Canada held in *R v Skokes-Graham*, it protects people who have gathered to pursue socially beneficial activities and "safeguard[s] the rights of groups of people to meet freely and to prevent the breaches of the peace which could result if these types of meetings were disrupted."[27] It therefore targets a unique societal interest and protects against a specific harm.

As discussed below, there is international legal consensus that such protection is needed.

II. Section 176 furthers Canada's international obligations by protecting peaceful assembly and freedom of association

This fundamental purpose served by s. 176 – ensuring that Canadians can exercise their right to freedom of religion, association, and peaceful assembly without fear – is not fulfilled by any other provision of the *Criminal Code*. The importance of these freedoms cannot be overstated. They are key human rights guaranteed not only by the *Charter* but in international human rights law, including treaties Canada has committed to uphold, such as the *Universal Declaration of Human Rights*[28] and the *International Covenant on Civil and Political Rights*.[29]

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[25] *Skoke-Graham* at para 72 [emphasis added].
[26] *R. v. Prince*, [1986] 2 S.C.R. 480 at para 39; *R. v. Kinnear*, 2005 CanLII 21092 (ON CA) at para 38.
[27] *Skoke-Graham* at para 19.
[28] *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).
[29] *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171.

In 2010, the United Nations' Human Rights Council – of which Canada was a member – issued a resolution affirming the utmost importance of these rights:

> "[T]he rights to freedom of peaceful assembly and of association are essential components of democracy, providing individuals with invaluable opportunities to, inter alia, express their political opinions, engage in literary and artistic pursuits and other cultural, economic and social activities, engage in religious observances or other beliefs, form and join trade unions and cooperatives, and elect leaders to represent their interests and hold them accountable."[30]

The importance of these rights and freedoms are precisely why a specific *Criminal Code* provision protecting them – as opposed to a generic provision of more limited application – is necessary. Attacking a religious worship service or peaceful assembly is not just an attack on those directly participating; it is an attack on the very freedom they are exercising and on Canada's societal commitments as expressed in the *Charter*. It is therefore a particularly egregious act and deserving of specific redress in the *Criminal Code*.

This is recognized in international human rights law. The UN Human Rights Council has called upon all member states, including Canada, to take positive measures to "respect and **fully protect** the rights of all individuals to assemble peacefully and associate freely" including those espousing minority or dissenting views or beliefs, and to "take all necessary measures to ensure that any restrictions on the free exercise of the rights to freedom of peaceful assembly and of association are in accordance with their obligations under international human rights law."[31]

In order to ensure the "promotion and protection of the rights to freedom of peaceful assembly and of association in all their manifestations", the United Nations appointed a Special Rapporteur in 2011.[32] The Special Rapporteur has emphasized that freedom of association and peaceful assembly – which include religious association and assembly – are "cornerstone in any democracy"[33], and provide a "valuable indicator of a State's respect for the enjoyment of many other human rights."[34] UN Member States – including Canada – therefore have a positive obligation to facilitate these rights, and "such responsibility should always be explicitly stated in domestic legislation."[35]

CLF submits that s. 176 of the *Criminal Code* is an important provision fulfilling this very purpose. As the Special Rapporteur has said:

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[30]UNHRC, 15th Sess, Item 3, UN Doc A/HRC/15/L.23, online: <*ap.ohchr.org/documents/E/HRC/d_res_dec/A_HRC_15_L.23.doc*>.
[31] UNHRC, 15th Sess, Item 3, Res 1, UN Doc A/HRC/15/L.23 [emphasis added].
[32] UNHRC, 15th Sess, Item 3, Res 1, UN Doc A/HRC/15/L.23
[33] UNHRC, 20th Sess, Item 3, Para 82, UN Doc A/HRC/20/27, online: <http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-27_en.pdf>.
[34] UNHRC, 20th Sess, Item 3, Para 12, UN Doc A/HRC/20/27.
[35] UNHRC, 20th Sess, Item 3, Para 33, UN Doc A/HRC/20/27.

> "…States have a positive obligation to actively protect peaceful assemblies. Such obligation includes the **protection of participants of peaceful assemblies from individuals or groups of individuals**, **including agents provocateurs and counter-demonstrators**, who aim at disrupting or dispersing such assemblies. […]
>
> The right to freedom of association obliges States **to take positive measures to establish and maintain an enabling environment**. It is crucial that individuals exercising this right are able to operate freely without fear that they may be subjected to any threats, acts of intimidation or violence…" [36]

As an NGO with Special Consultative Status with the Economic and Social Council of the United Nations, Christian Legal Fellowship is concerned that repealing s. 176 will undermine these international obligations that Canada has committed to uphold.

Removing this important protection will have a negative effect on freedom of association, religion, and peaceful assembly in Canada.

It will allow private actors to disrupt, interfere with, and obstruct religious services and other gatherings protected by the *Charter* without legal sanction, unless such conduct fits squarely within narrower provisions of the *Criminal Code* aimed at different purposes entirely (i.e. upholding property rights).

III. Summary and Recommendations

Canadian courts have consistently upheld the constitutionality of section 176 of the *Criminal Code*. In order for section 176 to qualify as one of the "zombie laws" Bill C-51 targets, its provisions would need to be "obsolete, redundant or … no longer have a place in criminal law."[37]

However, as demonstrated by the preceding analysis – and the fact that s. 176 has been repeatedly applied by courts[38] and relied upon by law enforcement (as recently as June 2017[39]) – none of these categories apply.

To the contrary, courts have found section 176 to be so important that some *Charter* rights would be "meaningless" without it.[40] Thus, to suggest that section 176 – absent an effective legislative replacement – is "obsolete" or "no longer [has] a place in criminal law" is to ignore the

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[36] UNHRC, 20th Sess, Item 3, Paras 33, 63, UN Doc A/HRC/20/27.
[37] Bill C-51, summary.
[38] See cases, above; see also *R v Geogheghan*, [2005] AJ No 1528.
[39] See Josh Pringle, "Charges Laid After St. Patrick's Basilica Vandalized," *CTV News Ottawa* (12 June 2017), online: <http://ottawa.ctvnews.ca/charges-laid-after-st-patrick-s-basilica-vandalized-1.3454092>.
[40] *Reed* 1985 at para 41; *Reed* 1994 at paras 37-38.

importance of *Charter* guarantees and key human rights such as freedom of religion, freedom of assembly, and freedom of association in modern Canadian society.

In a genuinely pluralistic society, citizens must be free to meet, worship, and collectively express themselves without fear of being silenced by reprisal, intimidation, or violence. Canada's historical reality regarding the oppression of religious and other minority groups – some of which has been effectively prosecuted under section 176 – must not be forgotten.[41]

The provisions now contained in section 176 have a long history – they date back to the British *Toleration Act* of 1688 which provided freedom of worship for non-conformists,[42] and were expressly incorporated into Canadian law by the *Offences Against the Person Act 1861*.[43]

This lengthy history does not mean that these provisions are now obsolete or antiquated. To the contrary, concerns about efforts to suppress religious expression and silence minority groups, especially those espousing dissenting views, remain as pressing and relevant today as ever. The Supreme Court's recognition that section 176 protects the public interest remains a salient one. The inclusion of section 176 in the *Criminal Code* demonstrates Canada's ongoing societal commitment to protect the fundamental freedoms of religious expression and association.

There is no compelling reason to eliminate section 176. It is a constitutionally sound law and its proposed repeal cannot be justified under any of Bill C-51's stated objectives.

There are, however, several compelling reasons to retain section 176, not the least of which is to protect the freedoms guaranteed by the *Charter* and to fulfill Canada's obligations under international law.

To the extent that the terminology in section 176 is in need of updating, such adjustments can be made without repealing the provision.

As the national voice of Christian legal professionals in Canada, and as an NGO concerned with international law, CLF urges the Standing Committee on Justice and Human Rights to protect religious expression, association, and peaceful assembly by amending Bill C-51 in order to retain section 176 of the *Criminal Code*.

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[41] See, e.g., *R. v. Gauthier* (1905), 11 C.C.C. 263 (Que. K.B.) and *Chaput v. Romain*, [1955] S.C.R. 834 which both involved actions targeting religious minorities.
[42] *Toleration Act* of 1688, 1 W. & M., c. 18, s. 18.
[43] *Offences Against the Person Act 1861*, 24 & 25 Vict., c. 100, s. 36 and *An Act Respecting Offences Against The Person* S.C. 1869, c. 20.