2009 APSA Annual Meeting
Toronto, Ontario, Canada

The following materials provide background information about academic freedom and free speech in Canada related to participating in the APSA Annual Meeting. We have compiled this information in response to queries about whether academic freedom or free speech might be impaired in Canada. The following questions and answers have been compiled by the Association to help members answer their own questions about participating in the meeting. In addition, the role of Human Right Commissions considered in the following materials will be the subject of sessions organized by the 2009 meeting program co-chairs

FREQUENTLY ASKED QUESTIONS*

1) What are the basic legal provisions that pertain to academic freedom and freedom of expression in Canada?

The Canadian Charter of Rights and Freedoms ("Charter") is part of Canada's Constitution. It sets out the rules and laws of Canada in relation to individual rights. Freedom of opinion and expression is explicitly protected. Section 2 of the Canadian Charter of Rights and Freedoms says the following:

> 2. Everyone has the following fundamental freedoms:
>
> *a*) freedom of conscience and religion;
>
> *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. (emphasis added)

See: Canadian Charter of Rights and Freedoms

Since these values are enshrined in the Charter, Canadian courts have ruled that governments can only restrict a person's freedom of opinion and expression in limited circumstances.

One circumstance that justifies restrictions on expression is the protection of other Charter rights, such as the section 15 right to equality. When expression could violate another human right, the government may be able to limit that expression. However, it must be able to prove that the purpose for restricting expression is sufficiently important to override it. The government does this by proving that the law is rationally connected to its purpose, that the law impairs freedom of expression as little as possible, and that the beneficial effects of the law outweigh its deleterious effects.

When assessing impairment, the court will look at whether the expression serves one of the three underlying values of expression: participation in social and democratic decision-making, attainment of truth, and individual self-fulfillment. While there is no explicit protection of academic freedom in the Charter, the high value placed on participation in social and democratic decision-making will often give scholarly work high value.

An example where the courts have allowed government restraint of expression is the approval of hate speech laws. In the case of R v Keegstra, the Supreme Court of Canada decided that criminal laws against hate speech were justified because the purpose of hate speech is to hurt others. This purpose has little to do with the underlying values of expression and much to do with infringing the equality rights of others. However, the Court also decided that authorities must tread lightly when infringing an individual's freedom of expression and opinion.

In Keegstra, the Supreme Court of Canada held that "[i]n a free society such as our own, where the privilege of speech can induce ideas that may change the very order itself, there is a bias weighted

heavily in favour of the maximum of rhetoric whatever the cost and consequences. But that bias stops this side of injury to the community itself and to individual members of identifiable groups innocently caught in verbal cross-fire that goes beyond legitimate debate."

In Canada (Human Rights Commission) v. Taylor, the Court held that "it is important to recognize that expressive activities advocating unpopular or discredited positions are not to be accorded reduced constitutional protection as a matter of routine."

In summary, infringements on freedom of expression are rare, but legally accepted in the case of hate speech.

As a result of cases such as Keegstra and Taylor, there are three possible hate speech laws that could impact a participant at the APSA conference in Toronto next year. One is the Criminal Code of Canada, and the other two are the provincial Human Rights Commissions and the Canadian Human Rights Act.

2) What does the Canadian Criminal Code say about hate speech and how, if at all, might the criminal code pertain to academic papers?

The chances of prosecution for presenting a paper on a controversial topic at the APSA meetings in Toronto are minimal, so long as the presentation respects basic academic expectations.

1. Criminal Code of Canada

The Criminal Code of Canada is a federal statute that applies to all provinces in Canada. Section 319 of the Criminal Code makes it an offence to advocate or promote genocide, or to make statements that incite hatred against any identifiable group if that incitement leads to violence or is likely to lead to a breach of the peace.

Criminal Code of Canada:

318. (1) Every one who advocates or promotes genocide is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

319. (1) Every one who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace is guilty of

(*a*) an indictable offence and is liable to imprisonment for a term not exceeding two years; or

(*b*) an offence punishable on summary conviction.

319 (2) Every one who, by communicating statements, other than in private conversation, willfully promotes hatred against any identifiable group is guilty of

(*a*) an indictable offence and is liable to imprisonment for a term not exceeding two years; or

(*b*) an offence punishable on summary conviction.

For the purposes of this section, the Criminal Code defines "identifiable group" as a section of the public distinguished by color, race, religion or ethnic origin.

See: Section 319 of the Criminal Code of Canada

This is the law that would most directly relate to presentations at the APSA meetings in Toronto. It is the only hate speech law that relates to speaking in public. Further, it is the only law that would result in a criminal conviction against the accused. However, the possibility of prosecution under this law is minimal.

Section 319(3) of the Code provides a series of defenses to anyone charged under section 319. It provides that:

(3) No person shall be convicted of an offence under subsection (2)

(*a*) if he establishes that the statements communicated were true;

(*b*) if, in good faith, the person expressed or attempted to establish by an argument an opinion on a religious subject or an opinion based on a belief in a religious text;

(*c*) if the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true; or

(*d*) if, in good faith, he intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred toward an identifiable group in Canada.

These defenses make it very unlikely that authorities would find occasion to prosecute a member of APSA for presenting a paper at the Toronto convention.

3) What are the provincial Human Rights Commissions, and how might their authority pertain to academic papers?

1. Human Rights Legislation

In additional to Criminal Code laws, each province in Canada has its own Human Rights Commission responsible for ensuring the equal treatment of all citizens in that province. There is also a federal Human Rights Commission assigned to ensure equality on the federal level. Unlike Criminal Code legislation, where government authorities file charges, anyone who feels they have been discriminated against can file a complaint under human rights legislation of the country. Prosecution under one of these laws does not lead to a criminal conviction. These commissions have the authority to impose fines and order an accused to cease certain communications.

Since the APSA conference is scheduled to take place in Toronto, Ontario, APSA members would be subject to the laws of the Ontario Human Rights Commission ("OHRC") and the Canadian Human Rights Commission ("CHRC").

2. Ontario Human Rights Code

Section 13 of the Ontario Human Rights Code states the following:

Announced intention to discriminate

13. (1) A right under Part I is infringed by a person who publishes or displays before the public or causes the publication or display before the public of any notice, sign, symbol, emblem, or other similar representation that indicates the intention of the person to infringe a right under Part I or that is intended by the person to incite the infringement of a right under Part I.

See: Ontario Human Rights Code

This section does not apply to speech or published studies and articles. In the only case prosecuted under this section of the Ontario Human Rights Code, a Toronto woman complained of discrimination by the owners of an apartment building. She argued that the owners would not rent her a unit because she had a child. The complainant however, later dropped her allegations under section 13. She had provided no proof that a sign had been posted that notified of an intention to discriminate based on her family status.

See: Ontario Human Rights Commission and Albena St. Hill and V.R.M Investments Ltd.

Section 13 of the Ontario Human Rights Code would not apply to APSA member presenting papers at the APSA meetings. Application would exist only if the member posted signs around the conference, notifying of intent to discriminate against certain persons based on color, race, religion, or ethnic origin.

There is no other section of the Ontario Human Rights Code that would appear to apply to presenters of scholarly papers at the APSA meetings.

4) What about national Human Rights legislation? Could that apply to academic papers presented in Canada?

1. Canadian Human Rights Act

The Canadian Human Rights Commission ensures compliance with the Canadian Human Rights Act ("CHRA") in areas of federal jurisdiction.

Sections 12 and 13 of the CHRA relate to hate speech.

Section 12 of the CHRA is identical to section 13 of the Ontario Code above. It therefore has little application to APSA members giving presentations in Toronto.

Section 13 of the CHRA addresses telecommunication messages inciting hate. The legislation makes it an offence to communicate via telephone or Internet anything that is likely to expose persons to hatred or contempt based on race, national or ethnic origin, color, religion, age, sex, sexual orientation, marital status, family status, disability, and conviction for which a pardon has been granted.

> Hate messages
>
> 13. (1) It is a discriminatory practice for a person or a group of persons acting in concert to communicate telephonically or to cause to be so communicated, repeatedly, in whole or in part by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament, any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination.
>
> Interpretation
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> (2) For greater certainty, subsection (1) applies in respect of a matter that is communicated by means of a computer or a group of interconnected or related computers, including the Internet, or any similar means of communication, but does not apply in respect of a matter that is communicated in whole or in part by means of the facilities of a broadcasting undertaking.

This section does not relate to public speech such as presentations of scholarly works at the APSA conference. Instead, it would only apply to any papers that an APSA member may post on the Internet from a Canadian server or messages they may spread through telephone recordings. APSA members would likely post their papers on the APSA website and their own servers based in the United States. They would therefore be out of the jurisdiction of the CHRA.

5) Since the national legislation pertains predomination to "telecommunication messages" could posting papers electronically open them up to challenge?

The Supreme Court of Canada has decided that section 13 of the CHRA applies to "expression intended or likely to circulate extreme feelings of opprobrium and enmity against a racial or religious group." The expression has to foster extreme hatred and contempt. The Court has interpreted "hatred" to mean "a feeling of extreme ill-will that allows for no redeeming qualities in the person towards whom it is directed." Contempt encompasses looking down upon or treating as inferior the object of one's feelings.

See: Canada (Human Rights Commission) v. Taylor

Case law suggests that it is very difficult to reach the threshold level of hatred and contempt required for prosecution under section 13 of the CHRA. Only publications which involve feelings of an "ardent and extreme nature" and expressing "unusually strong and deep-felt emotions of detestation, calumny and vilification" will override the constitutional guarantee of freedom of expression.

Traditionally, the Commission has also considered whether publications have been part of a larger political debate when deciding on prosecution. In the major CHRC decision *Citron v Zundel*, the Commission had to decide whether posts on the Internet by Ernst Zundel aroused such unusually strong feelings and emotions of detestation, calumny and vilification that they undermined the

promotion of equality. Mr. Zundel had posted messages on the Internet that were both quasi articles questioning the accuracy of the Holocaust, and personal opinions on what happened. Mr. Zundel argued that his writings were part of a larger debate and intellectual exchange. The Commission concluded that if Mr. Zundel's writings "truly were a neutrally worded, 'academic' debate", its analysis would be quite different. However, Mr. Zundel's writings did not possess the typical characteristics of an academic exchange and therefore did not get protection as academic speech.

This decision suggests that even if a member of the public lodges a complaint against a paper presented by a member of APSA, writings that are truly part of an academic debate may receive positive treatment by the Commission.

In Mr. Zundel's case, the Commission decided that Mr. Zundel's writing contained scare quotes to question the existence of the Holocaust, unsubstantiated assertions about the behavior and characteristics of Jewish people, as well as extreme generalizations and the use of metaphors to describe Jewish people as liars, racketeers, extortionists and frauds. These characteristics created a tone "so malevolent in its depiction of Jews" that they were deemed hate messages.

While this may cause some concern, the Supreme Court of Canada has ruled that the Commission should restrain the application of section 13 so that any limitation on free speech is minimized "to the greatest possible extent." As a result, there have only been 14 cases prosecuted under section 13 of the Act. While 13 of those prosecutions have resulted in a violation of the Act, none of these prosecutions have been against a scholarly work. Instead, they have prosecuted members of the public who have posted opinions on message boards and forums. These people were members of groups such as the Canadian Nazi Party, BC White Pride, and the Canadian Ethnic Cleansing Team. The posts have consisted of racially offensive jokes, and threats of violence against members of different racial groups.

See: Canadian Human Rights Commission: Questions and Answers about section 13

6) Has anyone ever been challenged or prosecuted under Canadian or Ontario Law for work presented at an academic conference?

We have been unable to find any case where someone has been prosecuted under Canadian or Ontario law for work presented at an academic conference.

There have been cases where speakers have been challenged. However, they have not resulted in prosecution or conviction.

Concerned members of APSA may refer to cases from other jurisdictions in Canada. However, these cases can not be compared to threats to APSA members who will not be subject to the same laws. The most well-known case of an academic challenged under the same laws that would apply to APSA members is the case of Philippe Rushton.

Professor Rushton is an academic at the University of Western Ontario. He studies altruism, evolutionary psychology, and ethnic variations. In 1989, Professor Rushton made a presentation in San Francisco to the Association for the Advancement of Science. In his presentation Professor Rushton discussed his recent research on the evolutionary differences between various races. Professor Rushton concluded that some races were smarter than others, while some were more sexually active. Organizers were so shocked by his research and conclusions that they immediately publicized their disassociation with Professor Rushton's work. On his return to Canada, Professor Rushton discovered that members of the public had filed complaints with the Ontario Human Rights Commission and that government authorities were considering prosecution under the hate speech laws in the Criminal Code of Canada.

While many voiced their disdain for Professor Rushton's work, and investigations ensued, there were no charges pursued under any of the hate laws. Section 13 of the Ontario Human Rights Code did not apply. Arguments of inequality in his teachings based on other sections of the Code could not be proven. Authorities investigating Criminal Code violations concluded that Professor Rushton's research, while controversial, was not criminal and did not pursue charges.

See Professor Rushton's research here

7) What about the human rights complaint brought against Maclean's magazine and Mark Steyn? What happened there?

In March 2007, three law students at York University in Ontario complained to Maclean's magazine over the publication of articles they felt were dangerous and incited hate against Muslims. They demanded that Maclean's magazine publish an article by an author of their choosing to counter the opinions of these previously written articles. The magazine refused.

The law students filed human rights complaints with the Ontario Human Rights Commission. The students specifically complained about the publishing of an article by Author Mark Steyn entitled "*The Future Belongs to Islam*." The students alleged that Mr. Steyn's writings were racist and suggested all Muslims were a threat to the Western world.

See: "The Future Belongs to Islam" on the Maclean's website.

Members of the Muslim community also filed complaints with the British Columbia Human Rights Commission and the Canadian Human Rights Commission. While the filing of three human rights complaints in three different jurisdictions created immense public scrutiny and media debate, the complaints themselves did not have much weight. Both the Ontario and Canadian Human Rights Commissions dismissed the complaints.

The Canadian Human Rights Commission decided it did not have jurisdiction to rule on the magazine articles, but could rule on the report as it appeared on the Internet under section 13 of the Canadian Human Rights Act. But the CHRC dropped the allegations against Maclean's and Mark Steyn.

"The writing is polemical, colourful and emphatic, and was obviously calculated to excite discussion and even offend certain readers, Muslim and non-Muslim alike," the Commission said in its decision to dismiss the case. "Overall, however, the views expressed in the Steyn article, when considered as a whole and in context, are not of an extreme nature as defined by the Supreme Court in the Taylor decision. Considering the purpose and scope of section 13(1), and taking into account that an interpretation of s. 13(1) must be consistent with the minimal impairment of free speech, there is no reasonable basis in the evidence to warrant the appointment of a Tribunal."

See: Canadian Human Rights Commission decision.

The Ontario Human Rights Commission dismissed the complaints on April 9, 2008. It confirmed that the Ontario Human Rights Code does not give the Commission jurisdiction to deal with the content of speech in magazine and newspaper articles.

See: Ontario Human Rights Commission Statement.

Finally, the British Columbia Human Rights Tribunal (which would not have jurisdiction over APSA members in Ontario) heard the case against Maclean's Magazine. The British Columbia Commission does not have a method of dismissing cases before they go to the tribunal as in Ontario. As a result, a full hearing took place. Here the complainants alleged that the Maclean's article violated section 7(1)(b) of the British Columbia Human rights Code. Section 7(1)(b) states:

> A person must not publish, issue or display, or cause to be published, issued or displayed, any statement publication, notice, sign, symbol, emblem or other representation that
>
> (b) is likely to expose a person or a group or class of persons to hatred or contempt.

The Commission decided that there was no proof that the articles reached the threshold level of hatred and contempt required for prosecution under this section of the Code. While the Commission agreed that the article contained historical, religious and factual inaccuracies, there was insufficient proof that these inaccuracies would incite hatred.

"Whether we agree with the Article's content is not the issue," The Commission said. "The Article sets out purported facts, draws conclusion from these facts, and expresses opinion, which many

would, and did, find objectionable and disagreeable. However, as explained above, we have determined that, considered in its context, and on the evidence before us, the complainants have not met their burden of demonstrating that the Article rises to the level of detestation, calumny and vilification necessary to breach s. 7(1)(b) of the Code."

See: Paragraph 155 of Elmasry and Habib v. Roger's Publishing and MacQueen

8) What about legal costs for people who are accused under the Human Rights Code? Do they bear the costs of defending themselves even if complaints against them are ultimately dismissed?

As in regular court proceedings, parties bear the costs of defending themselves against both Canadian and Ontario Human Rights Commission complaints. Even if the Commission ultimately dismisses the complaints, the defendants are still responsible for any legal costs they incur during the investigation stage. This is the same as in regular criminal court proceedings; an accused cannot go after the prosecution for legal costs incurred when defending against a criminal charge, except in exceptional circumstances.

Notwithstanding the above, the Ontario Human Rights Commission may pay the defendant's legal costs if the Commission refers a case to the Tribunal and the Tribunal dismisses the case. In Ontario, if the Tribunal dismisses the case against the defendant, it will not order a complainant to pay the costs of the defendant. However, it can order the Human Rights Commission to pay the defendant's legal costs. This is because the Commission is considered one of the parties bringing the complaint to the Tribunal. The Tribunal orders these costs under section 45.2 of the Code. However, if the complainant is successful at the Tribunal, the Tribunal may order the defendant to pay the complainant for legal costs incurred, if requested.

At the national level, the Canadian Human Rights Act does not allow the Tribunal to award legal fees to the defendant, and no cases have been identified where the Tribunal has ordered the Commission to pay these costs.

9) What about recent allegations that a presentation at a recent Canadian Political Science Association panel might result in a censure action there?

APSA has inquired of the CPSA leadership about these allegations and has learned that the allegations are not accurate and that they have received no requests to censure anyone.

10) What does the Canadian academic community say about academic freedom in Canada?

Following a report in the Canadian press about the petition to APSA, President Katzenstein was contacted by the Canadian Association of University Teachers/ Association canadienne des professeures et professeurs d'université with the following message. The CAUT/ACPPU serves a role in Canada similar to the AAUP in the United States.

September 17, 2008

Canadian Association of University Teachers
Association canadienne des professeures et professeurs d'université

By facsimile: (202) 483-2657

Dr. Peter Katzenstein, President
American Political Science Association
1527 New Hampshire Ave., NW
Washington, DC 20036-1206
United States of America

Dear Professor Katzenstein:

Re: Academic Freedom in Canada

We are writing on behalf of the more than 65,000 academic staff at 121 universities and colleges across Canada represented by CAUT to provide some information that may be of use as your members discuss concerns about the suitability of Toronto as a host city for the American Political Science Association's annual meeting. We were certainly surprised to learn that there was some controversy within your organization over the choice of Toronto for the 2009 meeting. From the petition circulating among APSA members as reported by Inside Higher Ed, www.insidehighered.com/news/2008/08/29/apsa, we understand that some of your members worry that their academic freedom and free speech rights could be impaired while in Canada.

As leaders of an organization that aggressively defends academic freedom, we would like to assure your members that academic freedom is both alive and well and is highly valued in Canada. Like our sister organization, the AAUP, we promote academic freedom through collective bargaining and policy work, through investigation of alleged violations of academic freedom and through pressure on institutions that fail adequately to defend academic freedom.

For those of your members who make the trip to Toronto from the United States, the familiar protections of the First Amendment will, of course, cease to apply at the border, and they will be subject to the laws and customs of our country. Fortunately, the Canadian Charter of Rights and Freedoms guarantees everyone a corpus of fundamental freedoms that should feel reassuringly familiar to every rights-conscious American; notably, the freedom of association, freedom of assembly, freedom of conscience, and freedom of "thought, belief, opinion and expression." In Canada, these freedoms are "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society," and we are confident that the grounded arguments of academics, shared with professional colleagues in a well publicized scholarly meeting fall fully within those "reasonable limits."

On the specific matter of human rights commissions in Canada, there seems to be a good deal of confusion and obfuscation in the materials being circulated about the threat posed to free speech and their relevance to a meeting of the APSE. For starters, none of the specific cases noted by the authors of the petition's accompanying information piece ("What's the Matter with Canada") were heard by the Ontario Human Rights Tribunal, the only such body that would have jurisdiction over an event (unrelated to federal activities) taking place in Toronto. In this regard, the examples being used by the petition's promoters are about as fair as us warning against travel to Massachusetts because Nebraska maintains the death penalty.

In fact, Ontario's commissioners decided against proceeding with the now infamous complaint involving *Maclean's* magazine, precisely because the Code in Ontario limits freedom of expression very narrowly. Far from enabling a broad attack on freedom of speech, the Code only concerns itself with such "notice, sign, symbol, emblem, or other similar representation that indicates the intention of the person to infringe a right under Part I [i.e. the right to be free of discrimination in the areas of accommodation, employment, contracts, union membership, and the provision of goods, services or facilities] or that is intended by the person to incite the infringement of a right under Part I." Put another way, the APSA would be in violation of the Code if it posted a sign reading "No Blacks Allowed" outside one of its panel sessions with the intention of restricting admission to that session on the basis of race. Such a scenario is, of course, quite ludicrous.

International travel in the modem world requires no little fortitude, regardless of destination. In recent years, those traveling to the United States for scholarly conventions have needed to contemplate the attendant risks and, frankly, the greatest threat facing American attendees of a meeting in Toronto may be their return home. Enclosed for your convenience (and available online at www.caut.ca/uploads/Travel_Advisory_Laptops.pdf is an advisory that CAUT prepared for anyone crossing into the United States. Please feel free to circulate copies of this document to your members as you see fit. Essentially, it reminds travelers of the possibility for having one's laptop computer seized and its contents copied by U.S. customs agents when crossing into the United States.

We would be more than pleased to answer any questions or provide more information if you wish.

Sincerely,

Penni Stewart
President

James L. Turk
Executive Director

cc. Michael Brintnall, Executive Director

11) Where can I go for more information about my right of free expression as a participant in the Toronto meeting?

For more information on free expression and human rights legislation, please consult the following links:

University of Ottawa: Constitutional Law of Canada

Ontario Human Rights Commission

Canadian Human Rights Commission

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[*] This information has been compiled from a variety of sources available to the Association. APSA appreciates the help of Melissa Williams, University of Toronto and Danielle Stone, University of Toronto, for their assistance.