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OSCE Conference on Anti-Semitism

Legislative, Institutional and Governmental Responses to Anti-Semitism

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My assigned topic is Canada's legislative, institutional and governmental responses to anti-semitism. The short answer is that we have criminal code provisions and anti-discrimination human rights commissions to prevent hate crimes and propaganda; we have special Hate Crime Units in our police forces; we have expansive Holocaust education programmes; we have aggressive representative Jewish organizations like the Canadian Jewish Congress; we have a lively and generally supportive media; we have vigorous public debate; we have an independent judiciary constantly receiving human rights training; and we have a consistently articulated public policy against anti-semitism.

We have all of this, and yet we too have experienced the renewal of anti-semitism other countries have experienced since 2000. We know from this renewal of anti-semitism that laws and policies are an important foundation, but they are not enough. We know that what is also required as an ongoing response to what is probably the oldest form of discrimination in the world, is the ongoing willingness to acknowledge it exists and to confront it publicly. Anti-semitism must be seen as the discrete, stand-alone violation of human rights it is and entitled to its own respectful, rather than a comparative, public discourse.

And so let me start by congratulating the OSCE on this important initiative and its empathetic acknowledgement, through this conference, that Jews all over the world are once again feeling vulnerable.

First, some trite but key observations. The extent to which attitudes of prejudice and their behavioural discriminatory consequences are, and are seen to be, intolerable threads in the social fabric, depends ultimately on how strong the public perceives its government's commitment to human rights to be. The public will determine its moral parameters by watching the laws its government passes and how it enforces them; the issues it comments on and reacts to; the educational expectations it articulates for its children and the way it protects them; and the domestic and international policies and relationships it develops and the way it promotes them. That does not mean that the climate of tolerance is unaffected by other environmental pressures. It just means that protection from any turbulence created by those pressures is only really possible when the state declares itself forcefully, through its words, conduct, and laws, to be opposed to the intolerances of anti-semitism.

As for laws, they are the way governments declare the thresholds below which behaviour will not be tolerated, thresholds which define a society's aspirations, and how they are interpreted and enforced is crucial to measuring a country's tolerance of intolerance.

Canada's history, it will surprise no one to learn, was not immune to the pre-World War II anti-semitic prejudice and discrimination that denigrated and excluded Jews in the rest of the world. There were quotas on university admissions, restrictions on

employment opportunities, signs on beaches that said, "No Dogs or Jews Allowed", restrictive covenants on the sale of land, and, most shamefully, as the book by Professor Irving Abella disturbingly reveals, Canada had the worst immigration record of any Western democratic country in denying entry to the Jews of Europe.

This was the painful Canadian status quo for Jews until the 1950's, when the Holocaust's anti-semitic horror finally engaged the country's conscience and led to the promulgation of anti-discriminatory human rights codes and the establishment of Human Rights Commissions. These quasi-judicial administrative tribunals, established in each of Canada's 10 provinces, consisted of human rights experts appointed by the government who gave Canada its anti-discrimination jurisprudential foundations, giving human rights the expansive and vigorous enforcement it required. Canada's courts, on the other hand, were, regrettably and with rare exceptions, routinely denying those rights oxygen with such sclerotic interpretative zeal that a national Bill of Rights, passed in 1960, fell into disuse.

Then the culture changed – judicial, political and social. The 1960's brought not only critical public scrutiny of our traditional laws, institutions, and approaches, it produced a cacophonous chorus on behalf of human rights groups and issues, leading to legislation protecting our bilingual and multi-cultural heritage and, with the creation of the Canadian Human Rights Commission in 1977, protecting our resolutely pluralistic population.

But the most seismic shift in how we protected rights came when we constitutionalized them in the Charter of Rights and Freedoms in 1982. This magnificent acquisition to our democratic Canadian gallery totally transformed the public's entitlements and expectations, the judiciary's composition and muscularity, and the government's responsibilities, and it must be said, frustrations. With the Charter we developed, at last, a consensual national human rights culture. And that is the new context in which our leading cases on anti-semitism have been decided.

It is a context which sees human rights as the conceptual Phoenix which rose from the ashes of Auschwitz, makes a distinction between human rights and civil liberties, treats anti-semitism as a breach of human rights, applies both human rights and civil liberties concepts, but does not allow civil liberties to trump human rights. The conceptual basis of that context, which emerged from our human rights commissions and was eventually adopted by a new generation of Supreme Court of Canada judges, was a unique Canadian approach to human rights and, particularly, to equality.

The civil libertarian concept of equality is sameness, and is based on the right of every individual, regardless of differences, to be equally free from an arbitrarily intrusive state. This leads to assimilation as the ultimate human rights goal. Canada's human rights paradigm, based on our joint French and English heritage, focuses not only on the rights of the individual, regardless of differences, but on the extent to

which perceptions and stereotypes about that individual's group, identity and difference arbitrarily affected his or her social, political and economic access.

For us, differences are to be acknowledged, respected and accommodated, and our human rights goal is integration based on differences, not assimilation.

And so, when our Supreme Court interpreted our constitutionalized right to equality for the first time in 1989, it adopted the human rights approach which said that equality gives everyone the right not to be the same, but to have the same right to be free from discrimination, notwithstanding group differences – that is, the right to be free from the attribution of stereotypical or prejudicial assumptions and barriers which those differences generate.

Our approach to anti-semitism, therefore, is based on acknowledging that there are two distinct rights entitlements, both of which we apply. We are not, in short, embarrassed in Canada to assert that yelling "fire" in a crowded theatre is fundamentally different from yelling "theatre" in a crowded fire hall; or that teaching holocaust denial is different from teaching about the Holocaust; or that promoting racist ideas is different from promoting race. We do not accept that intellectual pluralism means the right to expect that anti-semitism and tolerance are entitled to equal deference in a civil society. To deny differences in dealing with anti-discrimination, we feel, leads to Anatole France's ironic observation that, "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread."

And this is the background for how our courts have dealt with the constitutionality of our hate speech criminal and civil legislation.

We amended our Criminal Code in 1970 to make it an offence to advocate or promote group genocide or group hatred, based on the report of a Parliamentary Committee led by Dean Maxell Cohen, whose words in 1966, still resonate today:

> *It is easy to conclude that because the number of [incidents] it not very large, they should not to be taken too seriously. The Committee is of the opinion that this line of analysis is no longer tenable after what is known to have been the result of hate propaganda in other countries, particularly in the 1930's when such material and ideas played a significant role in the creation of a climate of malice, destructive to… the values of our civilization. The Committee believes, therefore, that the actual and potential danger caused by present hate activities cannot be measured by statistics alone.*

Our Supreme Court upheld the constitutionality of these provisions in a 1990 case called *Keegstra*. Keegstra was a school teacher, who for 12 years, vilified Jews in his classroom and taught his students that the Holocaust did not happen.

Chief Justice Brian Dickson, citing Canada's commitment to the International Convention on the Elimination of All Forms of Racial Discrimination and the International Covenant on Civil and Political Rights, which required the legislated prohibition of racial or religious hate propaganda, was firmly of the view that hate propaganda, because of its denial of respect and dignity to others, undermines democratic values and is, therefore, not entitled to the protection given to political speech. This provision was used last week to charge an aboriginal leader for his disturbingly anti-semitic comments.

This same approach led the Supreme Court the same year in a case called *Taylor* involving anti-semitic recorded telephone messages, to uphold the constitutionality of the provision in the Canadian Human Rights Act which prohibits the communication of hatred. As this is a civil statute, there is no requirement of intent and the burden of proof is lower. Taylor was a member of a neo-Nazi group whose virulent anti-semitic recorded telephone messages resulted in a complaint being laid. The Chief Justice, again writing for the majority, confirmed that the importance of preventing the serious harm caused by discriminatory hate messages far outweighed the right to freedom of expression. This provision was recently used by the Canadian Human Rights Commission to ban anti-semitic material placed on the internet by Ernst Zundel.

So freedom of expression in Canada does not include freedom of hate-filled anti-semitic expression.

We also have new amendments to the Criminal Code allowing the seizure, judicial scrutiny and deletion of hate propaganda on the internet. And in 1996, the Code was amended to permit judges to increase sentences for offenders motivated by, among other things, racial or religious prejudice, a provision which resulted last year in one of our Courts of Appeal more than doubling a one-year sentence imposed on a person convicted of arson at a synagogue.

Those are the basic legislative tools we use in Canada. Not very often, it must be conceded, but their significance lies in the moral signals the public gets when they <u>are</u> used.

But the relentless ebb and flow of anti-semitism shows how progress in human rights can never been presumed. While we have come an enormous distance in Canada from the discriminatory environment that produced ungenerous policies, parochial judicial interpretations, and legislative vacuums that protected anti-semitic conduct from censure, we appear not yet to have succeeded in eradicating the anti-semitic prejudice that motivated that conduct. We have witnessed the routine hostility and intimidation experienced by Jewish students on university campuses, the vandalism of Jewish schools and institutions, the threats to Jewish officials, and, above all, the attacks on Israel's legitimacy.

What appears to have replaced the anti-semitism that led to quotas, restrictive covenants, employment discriminations, political invisibility, is what Professor Irwin Cotler calls the new anti-semitism, a phenomenon manifested both domestically and internationally.

It started after the Camp David talks broke down in 2000, took flight with the rampant racism at the UN Conference Against Racism at Durban, and spiralled out of control after September 11. This time, it is anti-semitism not just against the Jews, but against the Jewish state.

So once again we hear demonizations and vitriol; once again we are admonished to put it in context; once again the urgency is denied; and once again we are urged as mature democracies to yield our anxieties over anti-semitic speech to the centrality of freedom of expression. We appear to have forgotten that one generation ago, mature democracies made a commitment to Never Again, not Once Again.

So I close with this. About a year ago, I found something written by a young Jewish lawyer, a graduate of the Jagellonian University in Krakow, who, along with his wife, survived several years in concentration camps. He was head of the Displaced Prison Camp in Stuttgart after the war, and this is the introduction he wrote for Eleanor Roosevelt when she visited the Camp in 1948:

> *We welcome you, Mrs. Roosevelt, as the representative of a Great Nation, whose victorious army liberated the remnants of European Jewry from death. We shall never forget that aid rendered by both the American people and army. We are not in a position of showing you much assets. The best we are able to produce are these few children. They alone are our fortune and our sole hope for the future.*

That man was my father, and I was one of those few children. I know, now that I am a parent, what an act of faith in humanity and justice it was for people like my parents to decide to have children after the dehumanizing injustice they had endured. And I also know that I have a duty to vindicate their faith by remembering always that indifference is injustice's incubator.

That is why, as a proud Jewish Canadian, I am so honoured by this invitation to speak at this historic meeting, and grateful to the OSCE for keeping the vision of justice alive in tribute to the memory of those who were denied it.