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TO: The Standing Committee on Justice and Human Rights

RE: Canadian Constitution Foundation brief on Bill C-9, An Act to amend the Criminal Code (hate propaganda, hate crime and access to religious or cultural places)

November 4, 2025

The CCF

The Canadian Constitution Foundation ("the CCF") has prepared this brief to outline our concerns with Bill C-9, *An Act to amend the Criminal Code (hate propaganda, hate crime and access to religious or cultural places)*.

The CCF is a non-partisan charity dedicated to defending Canadians' rights and freedoms through education, communications and litigation. The CCF is involved in dozens of cases per year in defence of the constitution. The CCF has been involved in landmark cases involving freedom of expression, including *Saskatchewan v Whatcott*, 2013 SCC 11, and *Ward v Quebec*, 2021 SCC 43. The CCF successfully challenged the invocation of the *Emergencies Act* in February 2022, where the Federal Court found the invocation was *ultra vires* and the regulations violated the *Charter of Rights and Freedoms*' protections of expression and security against unreasonable searches and seizures. The decision remains under appeal. The CCF also offers free online courses for members of the public, including courses on the fundamentals of Canada's constitution and a course on freedom of expression. I have co-written three books that discuss free expression: Pandemic Panic, Free Speech in Canada and Maple's Garden.

The CCF's concerns

Bill C-9 proposes major changes to Canada's hate propaganda regime. These changes will lead to more people being investigated, charged, and prosecuted for their words. Hate against people is wrong, and our society must confront hate and condemn it. But the criminal law is not the right tool for every social scourge. The criminal law comes with a loss of liberty, and our highest level of social stigma. Expanding the possibility of putting people in prison for their words, or even being labelled hate propagandists, also risks capturing speech that may merely offend. The scope of debate on controversial topics of public importance will be limited and chilled if the threat of criminal sanction is expanded and looms over our civil discourse.

The *Charter* right to freedom of expression guaranteed in section 2(b) protects all speech, including speech that offends, and even hate speech. The guarantee is content neutral. The question before the courts in cases involving extreme speech is always about when limits can be

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imposed on speech, not whether speech is protected. To ensure the widest possible scope of debate and the search for truth, it is vital that the threshold for criminal sanction of speech is high. Bill C-9 would lower this threshold, remove safeguards against politically motivated charges, remove political accountability for charges, would create a risk of overcharging to force plea bargains, expand the availability of hate offences beyond the criminal law, and risks limiting constitutionally protected protest activity.

Canadians are not safer when we do not know what people believe. The criminal law can never remove hate from an individual's heart. Instead, the criminal law should be oriented towards doing what it *can* do: restricting violence and threats of violence, which includes intimidation, harassment, and blockading. The concept of hatred is subjective, and when opinion is criminalized, we make martyrs out of hatemongers and draw more attention to their vile viewpoints. Criminalizing opinion forces hateful speech underground and online, where individuals can get trapped in cycles of radicalization, and where hateful ideas are not confronted with the truth. In the end, as John Stuart Mill warned in his famous defence of free speech in *On Liberty,* suppressing opinions prevents the exchange of error for truth, and deprives us of the clearer and livelier perception of the truth that comes from its collision with falsehood.

The primary duties of Parliament are to represent the electorate, hold the executive accountable, and uphold Canada's constitutional democracy. Parliament has an obligation to ensure laws it passes are in keeping with our constitution, including our constitutional protection for freedom of expression. Some of the proposals in Bill C-9 are very likely unjustified violations of this protection, guaranteed by the supreme law of Canada. Others are unnecessary because they are redundant in light of Canada's existing laws.

Accordingly, the CCF's primary recommendation is to withdraw Bill C-9.

In the alternative, the CCF proposes six amendments that could reduce, though not eliminate, the risk that C-9 unjustifiably violates freedom of expression.

Amendment 1: The definition of hate in Bill C-9 must exactly track the case law.

The Criminal Code prohibits the public incitement of hatred in section 319(1) and the wilful promotion of hatred in section 319(2).

Public incitement of hatred prohibits the communication of a statement in public that incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace.

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Wilful promotion of hatred prohibits communicating statements, other than in private communication, that wilfully promote hatred against an identifiable group.

If Parliament wishes to provide a statutory definition of "hatred" for offences in section 319 of the Criminal Code, this statutory definition must precisely track the definition that has been outlined by the Supreme Court as high enough to protect freedom of expression.

In *R v Keegstra*, [1990] 3 SCR 697, the majority of the Supreme Court held that "the term 'hatred' connotes emotion of an intense and extreme nature that is clearly associated with vilification and detestation." The court in *Keegstra* warned that there is a danger that a court may improperly infer hatred from statements he or she personally finds offensive. This is why the court recognized the need to circumscribe the definition of "hatred" in such a precise manner.

In *R v Andrews*, [1990] 3 SCR 870, Cory J.A. stated that: "Hatred is not a word of casual connotation. To promote hatred is to instil detestation, enmity, ill-will and malevolence in another. Clearly an expression must go a long way before it qualifies within the definition in [s. 319(2)]."

More recently, in *Saskatchewan v Whatcott*, 2013 SCC 11, the Court reiterated that: "...the legislative term "hatred" or "hatred or contempt" is to be interpreted as being restricted to those *extreme* manifestations of the emotion described by the words "detestation" and "vilification"." This filters out expression which, while repugnant and offensive, does not incite the level of abhorrence, delegitimization and rejection that risks causing discrimination or other harmful effects" (emphasis added).

In *Whatcott*, Justice Rothstein struck down a Saskatchewan provision that outlawed speech that "ridicules, belittles or otherwise affronts the dignity of" protected groups because that definition of hatred "could capture a great deal of expression which, while offensive to most people, falls short of exposing its target group to the *extreme* detestation and vilification which risks provoking discriminatory activities against that group" (emphasis added).

The definition of hatred laid out in C-9 is a lower threshold than that set out in *Keegstra*.

Section 319(7) of -9 defines hatred as "the emotion that *involves* detestation or vilification and that is stronger than disdain or dislike" (emphasis added).

The proposed definition removes the requirement that the speech be the "intense and extreme", and now merely requires that the emotion "involve" detestation or vilification rather

than be "clearly associated" with detestation and vilification. It also lowers the standard by defining hate as the emotion associated with detestation "or" vilification, rather than detestation "and" vilification.

While the Minister of Justice has suggested that the intention of the bill is to reflect the case law and paraphrase the words of the court, the most important aspect of the law, if passed, that a future court will consider is the actual text. The intention of the Minister will likely be argued, but Parliament does not vote on the Minister's statements: it votes on the text. If Parliament is to legislate the definition of hatred, it risks violating constitutional rights if it departs from the words the court has already upheld as constitutional limits on free expression.

Recommendation 2: Maintain the requirement for attorney general consent for hate crime offences

Currently, any prosecution for a hate propaganda offence in section 319 of the Criminal Code requires consent of the attorney general. This requirement is an important institutional safeguard on the abuse of this especially sensitive provision of the Criminal Code.

Determining whether someone will face a prison sentence for the words they speak requires political accountability, and charges require a careful balancing of the public interest and the constitutional guarantee for freedom of expression.

There are serious risks associated with removing the requirement of attorney general consent, including the risk of arbitrary, inconsistent, or selective enforcement based on political or ideological grounds. It also risks charges that have no chance of conviction on the basis of speech that offends the public. This risks chilling lawful political debate and dissent.

There is an additional concern that removing attorney general consent will allow for the possibility of private prosecutions. While private prosecutions for criminal offences are rare in Canadian law, the subjective nature of hatred combined with the current climate of political polarization makes the risk of abuse of private prosecutions for this type of law especially concerning.

Recommendation 3: Remove the standalone hate offence in proposed section 320.1001(1)

The law currently treats hatred as an aggravating factor at the sentencing stage. If an offence is motivated by hatred, the sentencing judge can take that into account and impose a more serious sentence. This should not be changed.

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Bill C-9 proposes the creation of new standalone hate crime offences that layer on top of another offence. And this is not confined to criminal law. Bill C-9 proposes that everyone who commits an offence contrary to any act of Parliament that is "motivated by hatred" is guilty of a separate offence.

This dramatically expands criminal liability. It could make quasi-criminal or even regulatory offences criminal offences if they are "motivated" by hatred. This approach is duplicative punishment for criminal offences, and it risks transforming non-criminal offences into criminal offences that carry with them terms of imprisonment and the social stigma of the criminal law.

By creating the possibility of a duplicate offence with high penalties, Bill C-9 creates a risk of overcharging. Crowns, no longer constrained by the requirement of attorney general consent, may pressure defendants to plead guilty by layering the threat of more serious hate charges on top of other criminal – or even quasi-criminal – charges. Hatred should remain a sentencing consideration.

Recommendation 4: Remove the prohibition on "hate symbols"

Bill C-9 makes it an offence to wilfully promote hatred by displaying listed hate symbols, including the Nazi Hakenkreuz, or hooked-cross[1], the Nazi double Sig-Rune, also known as the SS bolts, as well as symbols that are "principally used by, or principally associated with" listed terrorist organizations.

To be clear, the display of these symbols to wilfully promote or incite hatred are despicable. But the proposal in Bill C-9 is flawed for at least four reasons.

First, Canadians are not made safer if we do not know that someone down the street from our home holds racist and evil views. We are better off knowing who holds disturbing opinions so that we can openly confront those viewpoints, or stay away from such people. Every year our newspapers feature at least one story about a local crank flying a Nazi symbol. And every year we are reminded that these symbols, though horrible, are legal. Driving these symbols underground through the criminal law grants them more power and mystique than they deserve.

[1] Bill C-9 calls this symbol the Nazi swastika, which is a common misnomer. The word swastika is a Sanskrit word for an ancient and sacred symbol in Eastern religions like Hinduism, Buddhism, and Jainism.

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Second, the existing hate propaganda offences can already capture the use of symbols if those symbols are used to wilfully promote or incite hatred. Under the current law, the display of these symbols alone is not sufficient for a charge. Bill C-9 could change that. While the Minister has suggested that this provision is intended to supplement the existing wilful promotion of hatred offence to place more emphasis on the use of hate symbols, the text leaves significant room for interpretation. The text could easily be read to mean that the display of these symbols on their own can now be grounds for an offence. And to reiterate, Parliament votes on the text of the Bill, not on the intentions of the minister, and a court interpreting the law will look first at the text.

Prohibiting the symbols alone would also capture too much expression. While it is distasteful, foolish and inaccurate to compare any Canadian parliamentarians to Nazis or terrorists, we often see these comparisons made by some disaffected citizens exercising their freedom of expression. Some of these comparisons are made using these symbols, and this common type of political speech could now be subject to criminal sanction.

There is also too much ambiguity in the text of the provision, as it would prohibit symbols that are "principally used by" or "associated with" terrorist groups, or symbols that "nearly resemble" the symbols of terrorist groups or that are "likely to be confused" with those symbols.

Recommendation 5: Remove new provisions on intimidation

Bill C-9 would make it an offence to engage in any conduct with the intent to provoke a state of fear in a person in order to impede their access to places of worship or cultural centres.

This provision is duplicative and can lead to confusion among law enforcement. The Criminal Code already prohibits intimidation under section 423, harassment under section 264, and mischief under section 420. Provincial highway traffic statutes also prohibit blockading roads. When protests blockade roads or building entrances, police can already use these tools to remove them. The rule of law requires the enforcement of the law, not the creation of new and increasingly narrow laws when police fail to act.

Recommendation 6: Keep the defences of truth and good faith religious opinion in section 319(3)

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There has been some suggestion that the defences to hate propaganda offences in section 319(3) of the Criminal Code should be repealed. These defences provide that no person shall be convicted of wilful promotion of hatred if the statements were true or were a good faith expression of an opinion on a religious subject or based on a belief in a religious text.

These defences must be maintained.

The courts have considered the religious belief defence in 319(3), and the existence of this defence has been core in the analysis that found the offence of wilfully promoting hatred to be a justified limit, in for example, *Keegstra*. Removing this defence would open up the legislation to a new constitutional challenge. It is also worth noting that there has never been an instance where the defence was argued successfully.

The courts have interpreted the defence as a narrow one, and found that it does not operate so as to shield speech that wilfully promotes hatred merely because it is embedded with religious language. The court in *R v Harding*, 2001 CanLII 21272 (ON CA) held that: "Although expression of religious opinion is strongly protected, this protection cannot be extended to shield this type of communication simply because they are contained in the same message and the one is used to bolster the other. If that were the case, religious opinion could be used with impunity as a Trojan Horse to carry the intended message of hate forbidden by s. 319."

Removing the religious defence, combined with removing the requirement for attorney general consent, would lead to investigations and charges based on good faith but misunderstood religious dialogue, and would inevitably lead to a chill on religious debate or even good faith political debate on moral topics out of fear of severe criminal sanction.