Deputation Submitted to: City Council Executive Committee
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On Behalf of the Pride Coalition for Free Speech

Subject: Concerning Motion MM49.12
Submission Date: Monday, June 14th, 2010

> *The right to freely express one's views on social and political issues resides at the very heart of a democracy. In this sense, it constitutes the foundation for all other rights and freedoms guaranteed by the Charter. Restrictions which target social and political debate therefore trigger the foundational nature of freedom of speech. For this reason, such restrictions demand particular scrutiny. Because limitations on expression are by their nature often imprecise, they can also have a "chilling" or deterrent effect on entirely proper speech where the threatened speaker remains silent out of concern for potential sanctions*.[1]

> *Political speech, the type of speech here at issue, is the single most important and protected type of expression. It lies at the core of the guarantee of free expression*.[2]

Pride Coalition for Free Speech

The Pride Coalition for Free Speech ("PCFS") is an alliance of prominent queer Torontonians who support diversity of political opinion in Pride Toronto activities. Freedom of expression is one of the fundamental rights of all Canadians, enshrined in the *Charter of Rights and Freedoms*. This freedom is of particular importance to the communities that have built the Pride movement and worked in the fight for equality for decades. This commitment has been central to the message of Pride both in the past and as we move into the future.

[1] *Ontario (Attorney-General) v. Dieleman* (1994), 117 D.L.R. (4th) 449 at para. 621.
[2] *Harper v. Canada (Attorney-General)*, 2004 SCC 33, [2004] 1 S.C.R. 827, 2004 SCC 33 (CanLII), 348 A.R. 201, 239 D.L.R. (4th) 193, [2004] 8 W.W.R. 1, 119 C.R.R. (2d) 84, 27 Alta. L.R. (4th) 1 at para. 11.

I am a lawyer and social justice advocate who has been out in Toronto for almost 20 years. I have been part of Pride Toronto in many different capacities since I have been out and I have been organizing diverse communities for as long as I can remember. In 2006, I was honoured with the privilege to lead the Dyke March at Pride. Recently, I gave back that honour with 22 other Past Pride Honourees to demonstrate our objection to Pride Toronto's decision to ban a political human rights group from marching in the Parade.

Introduction

It is respectfully submitted that Pride's recent decision to limit the expression of one single statement (and by extension, one specific group) cannot withstand scrutiny, nor should it be tolerated in a free and democratic society such as Canada's. The reasoning provided by Pride to support this decision is, at best, contradictory and littered with half-truths and misinformation. It relies on the language and principles of non-discrimination, which are important and must be supported, to advance an agenda that, in actual fact, perpetuates discrimination. It demonstrates that Pride has made the decision to limit expression in the name of sponsorship and money, has bowed to threats that cannot be supported in law, and has become the unwitting tool of a group that seeks to advance a specific political agenda at the expense of the rights of others. In seeking to limit Pride's funding based on the inclusion or exclusion of one specific group, the City of Toronto has acted inappropriately and has leveraged the threat of lost funding as a means to limit free expression. This course of action is *ultra vires*.

We are asking that the motion before the Executive Committee today be withdrawn from consideration as it violates both the City of Toronto's own policies and the Charter of Rights and Freedoms. In the alternative, we request that each Committee member vote to defeat the motion. Finally, we request a declaration that the ban imposed by Pride be lifted and the free expression and participation in this year's festival be publicly encouraged.

Background

In a recent letter to InterPride, Tracy Sandilands, the Executive Director of Pride, wrote that the organization has received complaints about the participation of the group Queers Against Israeli Apartheid (QuAIA) as a group that promoted "discriminatory and exclusionary messaging."[3] She also stated that QuAIA has participated in past Pride parades and that their participation has been "peaceful" and their cause "worthy."[4] She goes on to explain that pressure has been exerted on Pride to exclude this particular group, and that the pressure has been brought by politicians, Martin Gladstone, a pro-Israel state lobbyist, and corporate sponsors.[5] She specifically states :

> The City [of Toronto] has informed us that the message of "Israeli apartheid" may contravene its anti-racism policy in relation to a person's "place of origin", and that the inclusion of a group that causes other participants to feel unwelcome contravenes the anti-discrimination policy. As a recipient of City funding and support, Pride Toronto is obliged to respect and follow this policy, a policy that also protects the rights of our communities against discrimination based on gender identity and sexual orientation, and to take such considerations into our decision-making process.[6]

With respect, the statement that inclusion of Quail **"may"** violate policy is not a reason to swiftly ban the group or its message. If anything, it is a reason to investigate further to determine whether there is, in fact, a violation. Without an exact determination that a statement contravenes the policy, actions to ban it reflect a premature censorship that is based on speculation and fear, but not fact. This conclusion that there "may" be a violation of the policy is somewhat confusing, as later in her letter Ms. Sandilands explains that Pride sought the advice of a lawyer on this very point ("Pride Toronto's Recent Risk Mitigation" document says they did such in 2008 and 2009, both with same conclusions). Pride was informed in both legal opinions that there was no violation.[7]

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[3] Letter from Tracey Sandilands (9 June 2009) online: <http://www.facebook.com/pages/Pride-Coalition-for-Free-Speech/110607518983341#!/notes/pride-coalition-for-free-speech/email-from-pride-toronto-to-international-pride-communities-contributed-by-xtra/129058087123464>. Last visited June 10, 2009.
[4] *Ibid.*
[5] *Ibid.*
[6] *Ibid.*
[7] *Ibid.*

It is also important to make the point that this is not an anti-Pride issue, nor should it be reduced to the idea of "internal squabbling." While Ms. Sandilands suggests that those opposed to the ban account for less than 1% of the Pride community,[8] the fact that 23 past award recipients and the 2010 Honoured Dyke, 2010 Grand Marshal and 2010 International Grand Marshals have returned their awards and refused the honours bestowed by Pride speaks volumes regarding the support for this issue.[9] The International Grand Marshals are the Co-Chairs of ILGA, the International Lesbian, Gay, Bisexual, Trans and Intersex Association, which represents over 600 LGBTI groups around the world. We have also hosted several public forums on this issue and have seen thousands attendees come out in support.

Ms. Sandiland's statement makes it clear that Pride has acted to limit the expression of this particular group, and that it has done so in large part because of pressure from municipal government and the threat of the motion in front of the Committee today. If this is truly the case, then it would seem that the City of Toronto is attempting to push through the back door what it must know cannot go through the front. Any preliminary examination of the laws governing freedom of expression shows that the government bears a significant burden when curtailing this right, and that the allegation that there "may" be an infringement, without significant evidence to back up the allegation, simply does not meet the test. By threatening to cut funding so close to the beginning of the Pride festivities, the City may have acted to force a result that it could not have obtained through legal means. This is unacceptable.

Two violations of the policy are alleged in the excerpted statement above: discrimination based on place of origin and the suggestion that discrimination is present because the group's presence makes others feel unwelcome. These two issues are distinct and must be addressed separately.

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[8] *Ibid*.
[9] John Hume, "Pride's Shame Award" *NOW Magazine* (7 June 2010) online: NOW Magazine <http://www.nowtoronto.com/daily/story.cfm?content=175324>. Last visited June 11, 2010.

Human Rights Law

At the outset it may be helpful to set out the relevant law. The Ontario *Human Rights Code* ("the *Code*")[10] seeks to ensure that all individuals live free from discrimination based on an enumerated list of grounds reasons. These grounds are: race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or disability.[11] Section 13 of the *Code* states:

(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.
(2) Subsection (1) shall not interfere with freedom of expression of opinion.[12]

Under this legislation, it would be prohibited for any individual or group to join in the Pride parade and displayed the intention to infringe one of the enumerated rights.

To ban the use of a phrase because it "may" infringe an enumerated right is not enough to limit expression. Expressing an opinion as to the conduct of a sovereign state is not equivalent to an infringement of the enumerated grounds, and is in fact protected by s. 13(2) of the *Code*.

Queers Against Israeli Apartheid is an organization standing in solidarity with other LGBTTQI people against divisive and oppressive policies of one government. Commenting on the policies of one government or any government for that matter is NOT equivalent to commenting against that states people or those with ties to those states. Commenting against state practices does not amount to discrimination on any of the enumerated grounds and in fact is a FUNDAMENTAL FREEDOM protected by the supreme law of our land.

[10] *Human Rights Code*, R.S.O. 1990, CHAPTER H.19.
[11] *Ibid*. at s.1.
[12] *Ibid*. at s.13.

Political Speech and Freedom of Expression

It is extremely important to recognize that Pride's action and the City's threats amount to a limit on free expression, even though Ms. Sandilands states that this is not the case.[13] It is also important to note that most of the people who are making wide sweeping comments and decisions on this matter are not Constitutional Law experts or experts in the area of discrimination (e.g. Ms. Sandilands and Councillor Mamolitti).

Freedom of expression is protected in the *Canadian Charter of Rights and Freedoms* ("the *Charter*") under section 2(b).[14] This right is, as with all other rights, protected under the *Charter*, limited only in accordance with section 1 of the *Charter*, which states:

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.[15]

An act of the municipal government to remove funding and access unless a certain group's-freedom of expression is curtailed can only occur within the bounds of the *Charter*. A statement that QuAIA's message "may" be discriminatory rests well below the bar that has been set to limit freedom of expression. The onus always lies with the government to justify the limit of a freedom protected by the *Charter*, and absolutely no evidence has been brought forward that could support this conclusion. To the contrary, all the evidence brought forward supports the finding that QuAIA's is a political group whose political expression would be protected by the *Charter.*

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[13] Letter from Tracey Sandilands (9 June 2009) online: <http://www.facebook.com/pages/Pride-Coalition-for-Free-Speech/110607518983341#!/notes/pride-coalition-for-free-speech/email-from-pride-toronto-to-international-pride-communities-contributed-by-xtra/129058087123464>. Last visited June 10, 2009.
[14] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11, s. 2(b).
[15] *Ibid*. s.1.

Political Speech

Within the protection of section 2(b) there are, of course, a wide variety of forms of expression. One of the most important is political speech. In *R. v. Keegstra* Justice Dickson holds:

> The connection between freedom of expression and the political process is perhaps the linchpin of the s. 2(b) guarantee, and the nature of this connection is largely derived from the Canadian commitment to democracy. Freedom of expression is a crucial aspect of the democratic commitment, not merely because it permits the best policies to be chosen from among a wide array of proffered options, but additionally because it helps to ensure that participation in the political process is open to all persons. Such open participation must involve to a substantial degree the notion that all persons are equally deserving of respect and dignity. The state therefore cannot act to hinder or condemn a political view without to some extent harming the openness of Canadian democracy and its associated tenet of equality for all.[16]

Justice McLachlin, as she then was, writing in the same case holds:

> Arguments based on intrinsic value and practical consequences are married in the thought of F. Schauer (*Free Speech: A Philosophical Enquiry* (1982)). Rather than evaluating expression to see why it might be worthy of protection, Schauer evaluates the reasons why a government might attempt to limit expression. Schauer points out that throughout history, attempts to restrict expression have accounted for a disproportionate share of governmental blunders -- from the condemnation of Galileo for suggesting the earth is round to the suppression as "obscene" of many great works of art. Professor Schauer explains this peculiar inability of censoring governments to avoid mistakes by the fact that, in limiting expression, governments often act as judge in their own cause. They have an interest in stilling criticism of themselves, or even in enhancing their own popularity by silencing unpopular expression. These motives may render them unable to carefully weigh the advantages and disadvantages of suppression in many instances. That is not to say that it is always illegitimate for governments to curtail expression, but government attempts to do so must *prima facie* be viewed with suspicion.[17]

Justice Adams, writing in the case of *Ontario (Attorney-General) v. Dieleman* states:

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[16] *R. v. Keegstra*, [1990] 3 S.C.R. 697, 1990 CanLII 24 (S.C.C.), [1991] 2 W.W.R. 1, 61 C.C.C. (3d) 1, 1 C.R. (4th) 129, 3 C.R.R. (2d) 193, 77 Alta. L.R. (2d) 193 (CanLII).
[17] *Ibid*.

> A need for judicial caution relates as well to the peculiar nature of free expression. The right to freely express one's views on social and political issues resides at the very heart of a democracy. In this sense, it constitutes the foundation for all other rights and freedoms guaranteed by the Charter. Restrictions which target social and political debate therefore trigger the foundational nature of freedom of speech. For this reason, such restrictions demand particular scrutiny. Because limitations on expression are by their nature often imprecise, they can also have a "chilling" or deterrent effect on entirely proper speech where the threatened speaker remains silent out of concern for potential sanctions.[18]

In *Harper v. Canada (Attorney General)* the minority decision of the Supreme Court of Canada holds:

> Political speech, the type of speech here at issue, is the single most important and protected type of expression. It lies at the core of the guarantee of free expression; see *R. v. Guignard*, 2002 SCC 14 (CanLII), [2002] 1 S.C.R. 472, 2002 SCC 14, at para. 20; *R. v. Sharpe*, 2001 SCC 2 (CanLII), [2001] 1 S.C.R. 45, 2001 SCC 2, at para. 23; *Thomson Newspapers Co. v. Canada (Attorney General)*, 1998 CanLII 829 (S.C.C.), [1998] 1 S.C.R. 877, at para. 92; *Committee for the Commonwealth of Canada v. Canada*, 1991 CanLII 119 (S.C.C.), [1991] 1 S.C.R. 139, at p. 175; *Edmonton Journal v. Alberta (Attorney General)*, 1989 CanLII 20 (S.C.C.), [1989] 2 S.C.R. 1326, at p. 1336; *Irwin Toy Ltd. v. Quebec (Attorney General)*, 1989 CanLII 87 (S.C.C.), [1989] 1 S.C.R. 927, at p. 968.
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> The right of the people to discuss and debate ideas forms the very foundation of democracy; see *Reference re Alberta Statutes*, 1938 CanLII 1 (S.C.C.), [1938] S.C.R. 100, at pp. 145-46. For this reason, the Supreme Court of Canada has assiduously protected the right of each citizen to participate in political debate. As Dickson C.J. stated in *R. v. Keegstra*, 1990 CanLII 24 (S.C.C.), [1990] 3 S.C.R. 697, at p. 764, "[t]he state therefore cannot act to hinder or condemn a political view without to some extent harming the openness of Canadian democracy and its associated tenet of equality for all."
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> Permitting an effective voice for unpopular and minority views — views political parties may not embrace — is essential to deliberative democracy. The goal should be to bring the views of all citizens into the political arena for consideration, be they accepted or rejected at the

[18] *Ontario (Attorney-General) v. Dieleman* (1994), 117 D.L.R. (4th) 449 at para. 621.

end of the day. Free speech in the public square may not be curtailed merely because one might find the message unappetizing or the messenger distasteful (*Figueroa*, *supra*, at para. 28):

> Put simply, full political debate ensures that ours is an open society with the benefit of a broad range of ideas and opinions. . . . This, in turn, ensures not only that policy makers are aware of a broad range of options, but also that the determination of social policy is sensitive to the needs and interests of a broad range of citizens.

Participation in political debate "is . . . the primary means by which the average citizen participates in the open debate that animates the determination of social policy"; see *Figueroa*, at para. 29.

The right to participate in political discourse is a right to effective participation — for each citizen to play a "meaningful" role in the democratic process, to borrow again from the language of *Figueroa*. In *Committee for the Commonwealth*, *supra*, at p. 250, McLachlin J. stated that s. 2(*b*) aspires to protect "the interest of the individual in effectively communicating his or her message to members of the public" (emphasis added). In the same case, Lamer C.J. declared that "it must be understood that the individual has an interest in communicating his ideas in a place which, because of the presence of listeners, will favour the effective dissemination of what he has to say" (emphasis added); see *Committee for the Commonwealth*, at p. 154.

The ability to engage in effective speech in the public square means nothing if it does not include the ability to attempt to persuade one's fellow citizens through debate and discussion. This is the kernel from which reasoned political discourse emerges. Freedom of expression must allow a citizen to give voice to her vision for her community and nation, to advocate change through the art of persuasion in the hope of improving her life and indeed the larger social, political and economic landscape; see *R.W.D.S.U., Local558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8 (CanLII), [2002] 1 S.C.R. 156, 2002 SCC 8, at para. 32; *U.F.C.W., Local 1518 v. KMart Canada Ltd.*, 1999 CanLII 650 (S.C.C.), [1999] 2 S.C.R. 1083, at para. 43.

Freedom of expression protects not only the individual who speaks the message, but also the recipient. Members of the public — as viewers, listeners and readers — have a right to information on public governance, absent which they cannot cast an informed vote; see *Edmonton Journal*, *supra*, at pp. 1339-40. Thus the *Charter* protects listeners as well as speakers; see *Ford v. Quebec (Attorney General)*, 1988 CanLII 19 (S.C.C.), [1988] 2 S.C.R. 712, at pp. 766-67.

> This is not a Canadian idiosyncrasy. The right to receive information is enshrined in both the *Universal Declaration of Human Rights*, G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948), and the *International Covenant on Civil and Political Rights*, Can. T.S. 1976 No. 47. Canada is a signatory to both. American listeners enjoy the same right; see *Red Lion Broadcasting Co. v. Federal Communications Commission*, 395 U.S. 367 (1969), at p. 390; *Martin v. City of Struthers*, 319 U.S. 141 (1943), at p. 143. The words of Marshall J., dissenting, in *Kleindienst v. Mandel*, 408 U.S. 753 (1972), at p. 775, ring as true in this country as they do in our neighbour to the south:
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> > [T]he right to speak and hear — including the right to inform others and to be informed about public issues — are inextricably part of [the First Amendment]. The freedom to speak and the freedom to hear are inseparable; they are two sides of the same coin. But the coin itself is the process of thought and discussion. The activity of speakers becoming listeners and listeners becoming speakers in the vital interchange of thought is the means indispensable to the discovery and spread of political truth. [Citations omitted.][19]

One can continue to cite cases extolling the vital importance of freedom of expression, and political expression in particular, for countless pages. What the above clearly demonstrates is that open discussion about political matters is a protected right for both the person expressing the opinions and the listener. Curtailing this right is unconscionable. By threatening to withhold funding or refuse to grant permits in an effort to limit freedom of expression, the City of Toronto should feel great shame.

It is difficult to imagine that the City of Toronto disagrees with the thoughts outlined above with respect to the value and importance of free political expression. One would be hard-pressed to find Canadian citizens who would be willing to curtail their right to freely express political ideas. The crux of this debate then turns on the question of whether QuAIA's message amounts to political speech or whether it is something else.

[19] *Harper v. Canada (Attorney-General)*, 2004 SCC 33, [2004] 1 S.C.R. 827, 2004 SCC 33 (CanLII), 348 A.R. 201, 239 D.L.R. (4th) 193, [2004] 8 W.W.R. 1, 119 C.R.R. (2d) 84, 27 Alta. L.R. (4th) 1 at paras. 11-12, 14-18.

The City of Toronto Grants Policy: Anti-Racism and Equity

The City of Toronto Grants Policy clearly states that place of origin is a prohibited ground and that discrimination based on this ground will not be tolerated.[20] As discussed above, this is also a prohibited ground under the Code.[21] The policy is sound, and discrimination on this ground should not be tolerated. However, an analysis that conflates the government of a state with "place of origin" is simply not sufficiently nuanced, and contributes to an incorrect interpretation of the policy. Whether or not one agrees with the statements of QuAIA is beside the point: QuAIA takes a position on the government of the state of Israel but does not take any position on individuals who come from that state or who are Jewish. For the "place of origin" argument to stand one must accept that the state of Israel and Jewish people the world over are one in the same, which is simply and bluntly: incorrect.

This issue can become complicated as rhetoric on all sides of the debate can, and does, take positions that collapse a cultural identity with a particular state. Dialogue on either side of the aisle that does this is unhelpful, as it tends to fuel a discussion in which even individuals who do not live in or have never visited a particular state adopt the position that to criticise the state is to criticise their own personal identity. Arguments against the very existence of a recognized democratic state are not only unhelpful to a fulsome debate, but in fact distract from any substantive dialogue. This is not a reason to ban all discussion regarding the conduct of state governments. It is a reason to carefully deconstruct arguments and to attempt to achieve a nuanced dialogue.

In *Sloan v. Canada (Elections Canada)*[22] Mr. Sloan, a candidate for the Communist Party of Canada, objected when some of his campaign posters were removed. Some of these

[20] City of Toronto, "City of Toronto Grants Policy - Appendix 2 Anti-Racism, Access and Equity Policy and Guidelines Applicable to Recipients of Grants from the City of Toronto and its agencies, boards and commissions," (December 1998), online: <http://www.toronto.ca/grants/pdf/grants_policy_anti-racism_access_equity.pdf> at 3. Last visited June 10, 2010.
[21] *Human Rights Code*, R.S.O. 1990, CHAPTER H.19.
[22] *Sloan v. Canada (Elections Canada)*, 2009 FC 1264 (CanLII).

posters contained the phrase "End Canadian Support of Apartheid Israel." While the case dealt with an issue of standing, the evidence discussed by Justice Harrington makes it clear that the signs were removed, in part, after complaints were made about the content of the posters.[23] What is important to note about this decision is that not only did the Federal Court not determine that the content of the signs was illegal, as alleged, but that Mr. Sloan did in fact have standing to continue his complaint against the removal of the signs.[24]

While it is important to be wary of anti-Semitism in all of its forms, conflating a state with "place of origin" in this situation is incorrect and an overly broad application of policy and law. As Tony Judt points out in his recent opinion piece published in the New York Times, criticism of Israel is not necessarily anti-Semitic, and such criticism is vocalized from a variety of legitimate sources, some of whom are Jewish individuals themselves.[25] While some individuals who genuinely harbour anti-Semitic feelings may latch onto an idea of Israeli apartheid in an effort to spread the suggestion that the state itself has no right to exist, removing this vehicle does nothing to stem anti-Semitism. It only limits legitimate free expression in a misguided attempt to protect a group. As Judt points out, Israel is a legitimate state, and should be treated as such; democratic states such as Israel must necessarily be subjected to criticism in an open marketplace of ideas.[26] The argument that criticism of this democracy is necessarily discrimination based on "place of origin" does not withstand scrutiny.

"Making Others Feel Unwelcome": Is not the definition of Discrimination

It should be pointed out that the definition of discrimination provided in the City if Toronto policy is action(s) that "someone is being treated unfairly because of her/his

[23] *Ibid*. at para. 14.
[24] *Ibid*. at paras. 20-23.
[25] Tony Judt, "Israel Without Clichés" *The New York Times* (10 June 2010) online: The New York Times <http://www.nytimes.com/2010/06/10/opinion/10judt.html?pagewanted=2&ref=opinion>. Last visited June 10, 2010. See also "Power and Politics: Elle Flanders vs. Marting Galdstone" online: <http://vimeo.com/11097116>. Last visited June 10, 2010.
[26] Tony Judt, *Ibid*.

status."[27] A list of protected grounds is also provided.[28] Nowhere does the definition include causing individuals to feel unwelcome. While Pride no doubt wishes to make all who attend feel welcome, the simple fact is that this is an impossible goal, no matter what actions are taken. Those who are offended by nudity may feel unwelcome when the group Totally Naked Men Enjoying Nudity (TNT!MEN) walks past. In fact, efforts have been made in the past, in the form of political pressure, to limit this groups' participation, but they have never been banned.[29] "Free Tibet" and anti-Catholic signs have been included in the past,[30] which could reasonably make some individuals feel unwelcome. Yet no action has been taken to ban such expressions.

One is left to conclude that this decision is made based on the feeling and beliefs of those who collapse the state of Israel and Jewish identity into a single entity, and that by criticising the state QuAIA is also criticizing Jewish individuals in general, thereby making them feel unwelcome at Pride festivities. This conclusion is based on an understanding that does not properly recognize the sovereignty of Israel or its ability to withstand the criticism that is levelled against all sovereign states. It relies on a misinterpretation of the evidence and then concludes that discrimination has occurred because some people feel "unwelcome" at Pride. This does not fit the definition of discrimination found within the City's policy and it fails to recognize vital differences between legitimate criticism and anti-Semitism. Ironically, the actual outcome of the ban is that a group has been made to feel unwelcome in that Pride policy has officially stated so much: QuAIA is banned and treated differently (and made unwelcome) based on their political affiliation, which is a protected ground under the City's anti-discrimination policy.

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[27] City of Toronto, "City of Toronto Grants Policy - Appendix 2 Anti-Racism, Access and Equity Policy and Guidelines Applicable to Recipients of Grants from the City of Toronto and its agencies, boards and commissions," (December 1998), online: <http://www.toronto.ca/grants/pdf/grants_policy_anti-racism_access_equity.pdf> at 3. Last visited June 10, 2010.
[28] *Ibid*.
[29] Paul Gallant, "What's Really Been In and Out of the Parade" *Birdland* (blog) (5 June 2010) online: Birdland <http://bird.blogspot.com/2010/06/whats-really-been-in-and-out-of-parade.html>. Last visited June 10, 2010.
[30] *Ibid*.

Harm

The key issue in limiting expression under the Charter is the question of harm. In *R. v. Keegstra* the Supreme Court of Canada examined the limits that can be placed on hate propaganda under the *Criminal Code*. Justice Dickson, writing for the majority, concluded that

> Parliament has recognized the substantial harm that can flow from hate propaganda, and in trying to prevent the pain suffered by target group members and to reduce racial, ethnic and religious tension in Canada has decided to suppress the wilful promotion of hatred against identifiable groups. The nature of Parliament's objective is supported not only by the work of numerous study groups, but also by our collective historical knowledge of the potentially catastrophic effects of the promotion of hatred (*Jones*, *supra*, *per* La Forest J., at pp. 299-300). Additionally, the international commitment to eradicate hate propaganda and the stress placed upon equality and multiculturalism in the *Charter* strongly buttress the importance of this objective.[31]

Under this analysis, one must seek to determine whether the message in question constitutes the type of harm that should be prohibited. Does QuAIA advocate the wilful promotion of hatred against an identifiable group? The answer must be "no." QuAIA seeks to express opinions about the actions of a sovereign state and to act in solidarity with members of the queer community who live within a particular part of the world. They do not advocate for violence nor do they broadcast anti-Semitic messages.

Apartheid

The crime of apartheid is defined in Article 7 of the *Rome Statute of the International Criminal Court* ("the *Rome Statute*").[32] Canada is a signatory to and has ratified the *Rome Statute*.[33] Article 7 defines apartheid as:

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[31] *R. v. Keegstra*, [1990] 3 S.C.R. 697, 1990 CanLII 24 (S.C.C.), [1991] 2 W.W.R. 1, 61 C.C.C. (3d) 1, 1 C.R. (4th) 129, 3 C.R.R. (2d) 193, 77 Alta. L.R. (2d) 193 (CanLII).

[32] *Rome Statute of the International Criminal Court*, UN Doc. A/CONF. 183/9; 37 ILM 1002 (1998); 2187 UNTS 90, online: <http://untreaty.un.org/cod/icc/statute/romefra.htm>. Last visited June 11, 2010.

> inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime.[34]

Paragraph 1 enumerates the following acts (emphasis added):

(a) Murder;
(b) Extermination;
(c) Enslavement;
(d) Deportation or forcible transfer of population;
(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
(f) *Torture;*
(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
(i) Enforced disappearance of persons;
(j) *The crime of apartheid*;
(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.[35]

The purpose of providing these definitions is not to debate whether or not the actions of any sovereign state qualify as apartheid. Rather, it is to provide information to help frame the larger debate. In a motion put before the Ontario Legislature on May 11, 2009, Progressive Conservative MPP Peter Shurman stated:

> Today, I am asking members of this House to join me in condemning Israeli Apartheid Week by supporting a resolution I have filed. As members of this Legislature in a country that has consistently opposed

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[33] Coalition for the International Criminal Court, "The Rome Statute in the World, " online: <http://www.iccnow.org/documents/Signatures-Non_Signatures_and_Ratifications_of_the_RS_in_the_World_November_2009.pdf>. Last visited June 11, 2010.
[34] *Op cit.*
[35] *Ibid*.

> to the apartheid regime in South Africa, we can no longer stay silent while the injustice of that regime continues to be diminished.
>
> The term "Israeli Apartheid Week" is not only offensive to the fully democratic state of Israel- a state that respects the rule of law and human rights-it is also offensive to the millions of people who suffered under true apartheid in South Africa.
>
> While there is room for discussion and debate on Israeli politics, to equate this democratic country with an apartheid state reflects a lack of understanding of the meaning of that word. Debate should be focused on facts, and forgo the use of terminology that serves only to demonize an opposing point of view and spread misinformation and hatred.
>
> When I addressed this House on this matter in December last year, I said the term "apartheid" belongs in the same category as such terrifying words as "genocide." Today, I again want to stress that neither word should be used carelessly; otherwise, they will become meaningless and their true victims will be forgotten.
>
> Recently, we commemorated the victims of the Holocaust. We all know that the central theme of any ceremony commemorating the victims of genocide is "never again." Today, I am asking the members of this House to condemn Israeli Apartheid Week and, by doing so, to ensure that victims of the apartheid regime in South Africa are never forgotten and the lessons of that terrible period in history are truly understood.
>
> On behalf of the Progressive Conservative caucus, I deplore any equation of Israel with an apartheid regime, and I ask all members of this Legislature to join us in condemning Israeli Apartheid Week.[36]

This condemnation of the term has been cited by some as a form of evidence demonstrating that a ban of the term is not only acceptable but is encouraged. With respect to Mr. Shurman, a conclusion that only an apartheid regime that meets his test to be "true," in that it must be equivalent to the regime seen in South Africa, does not in fact meet the definition of an apartheid state. Nothing in the *Rome Convention* states that this is the definition. And concluding that any other use of the term will offend all those who lived through the South African regime is not only beyond Mr. Shurman's scope of

[36] Legislative Assembly of Ontario, "Official Records for 11 May 2009," online: <http://www.ontla.on.ca/web/house-proceedings/house_detail.do?Date=2009-05-11&Parl=39&Sess=1&locale=en#P277_66242>. Last visited June 11, 2010.

ability, but it is also impossible to support with evidence. It is possible, and even likely, that there are individuals who lived through the South African apartheid regime and who do not wish to see the term limited as Mr. Shurman proposes. How Mr. Shurman and others who take this position have concluded that they are able to speak on behalf of those who lived through the regime is not clear.

Desmond Tutu has publicly come out and stated that he thinks what is happening in Israel is Apartheid. In May 2009, Human Sciences Research Council of South Africa released a 300-page report, written by dozens of International Scholars, concluding that Israeli State practice in the Occupied Palestinian Territory amounts to apartheid and former Israeli Minister of Education Shulamit Aloni is quoted widely as asserting, "Yes there is Apartheid in Israel."

Any debate about the term and the message expressed needs to be respectful of those who have suffered under an apartheid regime, but it also needs to be placed within the definition as it actually stands and not as some would seek to limit it. Freedom of expression means that we are all able to actually have this debate, and bans on expression, even in limited spaces, do not foster the democratic ideals of Canada. Furthermore, a ban or limit on the use of the term does nothing to curtail actual anti-Semitism.

Conclusion

Freedom of expression is a principle of vital importance in any democracy. It is protected under the highest law of Canada. It is to be limited only in very specific situations: those that openly cause discrimination, advocate for violence, or cause harm. The government always bears the onus in limiting expression. The test to limit expression is stringent, and an allegation that there "may" be consequences or a violation, or that some are "uncomfortable," falls far below the standard.

In tabling this motion, the City of Toronto seeks to limit the expression of a group based on reasons that in no manner meet this test. In so doing, the City actually violates its own policies as it discriminates against a group based on political affiliation, a prohibited

ground. This motion cannot pass as it will mean that the municipality has acted contrary to the *Charter* and has violated the rights of the citizens.

It is possible to argue that simply by tabling this motion, the City of Toronto has exerted pressure on Pride to ban the group in question and limit expression; in this case, the City has done nothing but has forced others to limit their rights to serve the City's interests. This is unacceptable. The City cannot act in such a manner, as this is to enter through the back door when the front is so clearly barred.

PCFS requests that the motion before the Committee today be removed from consideration, or that the members of the Committee vote to defeat the motion. As the City's acts in bringing this motion forward have had the clear effect of limiting free expression and discriminating against an identifiable group on a prohibited ground, PFCS also seeks a declaration that the ban be lifted and that equal participation be permitted.

In addition the Pride Coalition for Free Speech respectfully requests, that:

The Executive Committee put forward and pass a new motion directing council and staff to interpret the anti-discrimination policy and it's references to hate activity, as per the parameters set by the *Charter*, human rights legislation and hate speech legislation only. That this interpretation be applied consistently and through expert analysis.

We ask that you investigate the City's role in fanning and fostering this divisive issue in our community, that you establish whether or not QuAIA and the term "Israeli Apartheid" violates City policy and that you seek to establish a fair, transparent and balanced process through which the Anti-Discrimination Policy can be applied in the future.

The Executive Committee pass a motion that it is not in support of arresting people who will show up to Pride and use the words "Israeli Apartheid". We ask each councilor to openly state whether they are willing to call on the police to jail people for expressing their political opinion.

It is clear to us that City staff has played an integral role in Pride Toronto's decision to censor the term "Israeli Apartheid". Meetings, statements and reports from City staff led Pride Toronto to believe their funding and in-kind support from the City was at risk and that a ban was necessary to ensure the future viability of the event and organization. No

other organization has been held to this level of scrutiny regarding the Anti-Discrimination Policy. We ask The Executive Committee to make a public statement stating that it understands the "Queers Against Israeli Apartheid" is a political human rights group that does not contravene the City's policies and that the City affirms this groups right to free speech. . Finally, we request a declaration that free expression and participation in this year's festival be publicly encouraged.

Finally, we ask that the Executive Committee confirm that it has not and does not impose any requirements on Pride Toronto other than the standard requirement that recipients of City money comply with the City's anti-discrimination policies.

Thank you for your time and consideration.

Zahra Dhanani LL. B. LL. M.
Pride Coalition for Free Speech