

October 20, 2017

To: Clerk, House of Commons Standing Committee on Justice and Human Rights

Re: Amendments to clause 14 of Bill C-51, section 176 of the *Criminal Code of Canada*

Dear honourable committee members,

The concerns over the wording of section 176 of the *Criminal Code* are not groundless, though they are relatively minor and do not render the provision unconstitutional. Nevertheless, three problems that could be improved through careful revision are: 1) the reference to male Christian clergy, 2) the illusion to arrest in civil process, and 3) the potential overbreadth.

What we are aiming for in amending the section is a provision that is narrowly directed at protecting religious services, not one that can arguably be applied to any gathering. We want to keep this provision because we recognize that a religious service is different in kind than other gatherings and because those in a religious service are more vulnerable thus requiring extra protection and because criminal action disturbing these services deserve special denunciation.

What follows is a red-line and clean copy of our proposed amendments to section 176. Our recommended amendments will preserve protections for marginalized religious groups in Canada while, at the same time, maintaining the effect of the overall bill, which is to eliminate redundancies in the Criminal Code. Attached as an addendum is a fuller analysis on the proposal to remove section 176.

Respectfully submitted,

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All that is necessary for the triumph of evil is that good men do nothing.

PROPOSED AMENDMENTS TO SECTION 176
OF THE CRIMINAL CODE OF CANADA (RED-LINE):

Obstructing or violence to ~~or arrest of officiating clergyman a religious official~~

176 (1) Every one who

(a) by threats or force, unlawfully obstructs or prevents or ~~endeavours~~ attempts to obstruct or prevent a ~~clergyman or minister~~ religious official from celebrating ~~divine a religious~~ service or performing any other function in connection with ~~his calling their religious office~~, or

(b) knowing that a ~~clergyman or minister~~ religious official is about to perform, is on ~~his their~~ way to perform or is returning from the performance of any of the duties or functions mentioned in paragraph (a)

(i) assaults or offers any violence to ~~him or them~~

(ii) ~~arrests him on a civil process, or under the pretence of executing a civil process,~~

is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

Disturbing religious worship ~~or certain meetings~~

(2) Every one who wilfully disturbs or interrupts a religious service or an assemblage of persons met for religious worship ~~or for a moral, social or benevolent purpose~~ is guilty of an offence punishable on summary conviction.

Idem

(3) Every one who, at or near a meeting referred to in subsection (2), wilfully does anything that disturbs the order or solemnity of the meeting is guilty of an offence punishable on summary conviction.

R.S., c. C-34, s. 172.

PROPOSED AMENDMENTS TO SECTION 176
OF THE CRIMINAL CODE OF CANADA (CLEAN):

Obstructing or violence to a religious official

176 (1) Every one who

(a) by threats or force, unlawfully obstructs or prevents or attempts to obstruct or prevent a religious official from celebrating a religious service or performing any other function in connection with their religious office, or

(b) knowing that a religious official is about to perform, is on their way to perform or is returning from the performance of any of the duties or functions mentioned in paragraph (a) assaults or offers any violence to them,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

Disturbing religious worship

(2) Every one who wilfully disturbs or interrupts a religious service or an assemblage of persons met for religious worship is guilty of an offence punishable on summary conviction.

Idem

(3) Every one who, at or near a meeting referred to in subsection (2), wilfully does anything that disturbs the order or solemnity of the meeting is guilty of an offence punishable on summary conviction.

R.S., c. C-34, s. 172.

Appendix:

LEGAL ANALYSIS: WILL BILL C-51 PERMIT PROTESTS IN CHURCH SERVICES?

Canada's *Criminal Code* (section 176) prohibits obstructing a "clergyman or minister" from "celebrating divine service or performing any other function in connection with his calling" or disturbing "an assemblage of persons met for religious worship".

However, Bill C-51 would delete these prohibitions from the Code. Would that mean removing legal protection for churches or ministers? Not exactly. However, it does diminish a strong protection of religious freedom and sends the wrong signal in our current cultural moment.

What is Section 176?

First, section 176 prohibits obstructing a minister who is performing a religious ceremony. Second, it prohibits disturbing an assembly (whether the purpose of the assembly is religious, moral, or social). Finally, it prohibits disturbing the order or solemnity of a meeting (again, whether the purpose of the meeting is religious, moral or social).

Section 176 has been employed numerous times. For example, in the 1990s a disfellowshipped Jehovah's Witness came to a service with protest signs, talked to congregants as they arrived (causing one elderly woman to leave), and knocking at the doors during the service (*R. v. Reed*, [1999] B.C.J. No. 2868). He was charged under section 176 and found guilty and sentenced to 3 years on probation.

Section 176 was also used in 2005 when a dinner put on by a religious group was interrupted by protesters. The speaker had to leave the podium and the event was halted until police arrived (*R v Geoghegan*, 2005 ABPC 255). The protester was ordered to pay a \$500 fine.

Most recently, charges were laid on June 9th of this year against a woman who is alleged to have entered an Ottawa church during a service, screaming and causing damage to a religious statue.

Is there a reason to remove Section 176?

When asked during an exchange in the House of Commons, Liberal MP Marco Mendicino (Parliamentary Secretary to the Minister of Justice) asserted that each provision that Bill C-51 proposes to remove is either unconstitutional, redundant, or obsolete.

However, there has been no court ruling that section 176 is unconstitutional, nor does it appear to be obsolete given that it has been used just this year.

The Justice Minister confirmed that redundancy is the reason for proposed removal when questioned at the Standing Committee on Justice and Human Rights on Wednesday, October 18th. The Right Honourable Jody Wilson-Raybould emphasized that section 176 is redundant since other sections of the Criminal Code prohibit assault and harassment. She also implied that the section is only for the Christian religion.

Is Section 176 redundant?

There are a couple of *Criminal Code* prohibitions that may capture similar activity as that covered by section 176. However, as will be explained below, the special protection that section 176 offers is different in kind.

Section 175 prohibits causing a disturbance in a public place by screaming, swearing, or singing, among other things. “Public place” here means any place open to the public and would include religious services. The main question is what constitutes a disturbance. The Supreme Court has said a disturbance is “something more than mere emotional upset or annoyance...[and] must cause an externally manifested disturbance of the public peace” (*R. v. Lohnes*, [1992] 1 S.C.R. 167).

Disturbance has the same meaning under section 176. There might have been a time when section 176 captured more specific acts than section 175, whether it be shouting idolatry during a service (*Girt v. Fillingham*, 1901) or singing loudly while a minister is speaking (*Matthews v. King*, [1934] 1 K.B. 505). However, there are not any recent examples that would clearly distinguish the application of sections 175 (causing a disturbance in a public place) and 176.

Other redundancies would depend on the severity and type of conduct. More serious conduct might constitute causing mischief by interfering with use of property (section 430) or assault (section 265). Less serious conduct, such as trespass or nuisance, might fall under provincial or municipal laws.

Why we should keep Section 176

The removal of this provision will not allow assaults on ministers or violent protests in temples. However, other laws that address assault, public disturbance, threats or trespass do not offer the same degree of protection as section 176. Nor do they recognize the unique character and nature of religious gatherings and the unique character of offences directed against religion.

Consider the laws against assault and sexual assault. One could argue that the *Criminal Code* could be simplified by removing all references to sexual assault (sections 271, 272, 273) since that is simply a *type* of assault and could be covered by the general prohibition on assault. However, this honourable committee would rightly reject such reasoning; sexual assault is different *in kind* to assault simpliciter. It is a violation of the integrity of the person in a way that common assault is not, and therefore sexual assault deserves special denunciation and potential victims deserve special protection. In a similar way, the disturbance of a worship service is different in kind to general disturbances or nuisance.

Religious freedom has been given explicit and singular protection under the law, and is regarded rightly as a uniquely important and foundational element of our entire human rights system. The removal of section 176 would relegate religious freedom to a secondary consideration, indistinguishable from other concerns involving public safety.

A question remains: how will the removal of section 176 impact borderline instances? What about the disgruntled individual yelling as a religious service starts? What about the protesters who bring offensive signs outside a mosque? When do these activities cross a line into becoming disturbances? Section 176 directs a judge to consider the context: did the alleged disturbance take place in an assembly with a religious purpose? Bill C-51 would remove the explicit direction to judges to take the particular setting into account.

As it is now, under both sections 175 and 176, what constitutes a disturbance is a very fact-specific analysis with reference to the context. Swearing or yelling on a street corner will likely not be a disturbance, but the same conduct in another setting might be. The benefit of having section 176 is that it makes clear that protection of religious assemblies (rather than just the general public) is beneficial. It sends a message that communities should be able to gather for religious, social or moral purposes without fear of disruption either from individuals or disagreeing communities.

Furthermore, while we enjoy relative peace between religious groups in Canada, that has not always been the case, nor should we assume that it will continue. The tension between Roman Catholics and Protestants in Canada's early years might well have justified section 176. As Canada welcomes more people of diverse faiths and conversations around controversial cultural issues increases tension, it is likely that we will have greater need for section 176, not less, in the coming decades.

A reading from the Torah in a synagogue, a prayer service in a mosque, a song in a Sikh temple, a worship service in a church, or a religious procession in a public space: each of these is a communal event that involves an encounter with the transcendent.

An attack against a religious assembly or the deliberate assault of a religious official outside a house of worship is *a different kind of offence* from other public disturbances, assaults, threats or incitement to hatred. An offence against a people at worship reverberates through the community and touches every member. An offence against one particular person or community at worship has an impact on all religious adherents.

Section 176 is not obsolete or redundant. In a climate of increasing incidents against faith communities across Canada, and in view of the role of the Criminal Code in serving as a deterrent and educational guide to society, we believe it is essential to maintain the specific protections that section 176 affords to religious gatherings and to those who lead them.

Retaining section 176 will ensure that the fundamental right to freedom of religion is protected, and that respect for the religious practices and observances of others remains a recognized Canadian value.