TMU external review report criticizes legal community, chides students for ineffective advocacy

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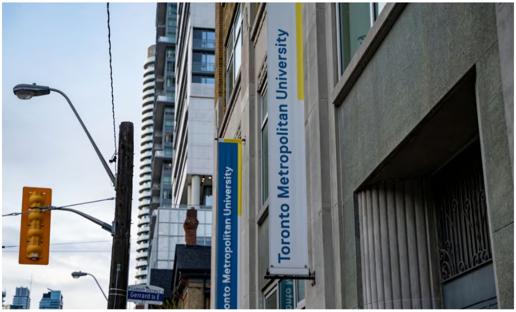
Retired judge finds students behind pro-Palestinian open letter did not break code of conduct



BY Aidan Macnab / 03 Jun 2024 / Share

An external review of an open letter signed by 74 students at Toronto Metropolitan University's (TMU) Lincoln Alexander School of Law, which critics called an antisemitic endorsement of the Oct. 7 attack against Israel, has found that the students did not breach the school's non-academic code of conduct.

TMU released "Strengthening the Pillars: Report of the TMU External Review" on Friday. The 169-page report is the culmination of the investigation into the incident led by Retired Chief Justice of Nova Scotia J. Michael MacDonald. MacDonald concluded that while the open letter was "understandably troubling and offensive to many," the students behind it were validly exercising the "wide latitude" of expression protected under the school's Statement on Freedom of Speech.

"The standard is not perfection," said MacDonald. "Students are entitled to make mistakes, and even cause harm, without necessarily facing sanctions."

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MacDonald's report criticized TMU's response to the open letter, and the backlash against students that came from the broader legal community. He also admonished the students behind the letter for their ineffective advocacy on behalf of Palestinian rights.

"Justice MacDonald's core findings should be celebrated by anyone who supports a free Palestine, or even just a free society," says Joshua Sealy-Harrington, assistant professor at the Lincoln Alexander School of Law. "He properly recognized the paramount importance of free expression and academic freedom, particularly in the university setting, and only more so during times of conflict."

"He also, crucially, found that support for Palestinian resistance and opposition to Israeli occupation, apartheid, and genocide are properly characterized as not antisemitic and not a breach of any Canadian laws or TMU policies," he says. "Indeed, it is Israel, not the students, who is clearly acting unlawfully. And if anything, it is the reprisal against the students that was actually unlawful, not their legitimate political expression."

Richard Marceau says the report "misses the target." Marceau is vice president of external affairs and general counsel at the Centre for Israel and Jewish Affairs (CIJA), He says the report fails Jewish students, Jewish faculty and staff, and the University as a whole. CIJA met with MacDonald's investigative team as an "External Stakeholder" during the review.

Marceau adds that there are broader systemic problems with antisemitism at TMU. These are highlighted in the lawsuit that a Jewish TMU student filed six weeks ago against the school, which CIJA is supporting, he says.

"The report does not go far enough," says Marceau. "We think there should have been disciplinary action imposed on the students. I think this report will not help with Toronto Metropolitan University's reputation in Ontario, Canada, and around the world."

MacDonald's external review team met with or received written submissions from 35 of the 38 students who signed their names to the open letter. Only three declined to engage with the review. The team also met with other students at the law school, as well as faculty, administration, and staff, for conversations "focused on the broader context at play and involved topics like academic freedom, anti-Palestinian racism, antisemitism, and Islamophobia," said MacDonald.

The report included a section criticizing the letter as an ineffective form of written advocacy unlikely to achieve its aim of persuading the administration "to take certain actions in solidarity with Palestinians."

"After 45 years, first as a lawyer and then a judge, I have witnessed a great deal of advocacy; some excellent, some terrible and everything in between," said MacDonald. "Perhaps it would be helpful to share some of what I have learned; what worked and what did not work."

The art of persuasion should not be confused with the art of intimidation or deception, and fundamental to the art is "the responsibility to fully comprehend and then to acknowledge your opponent's perspective," he said. Advocates that acknowledge the opposing view appear more credible and their argument more compelling.

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"A more balanced submission is, by its very nature, a more respectful one," said MacDonald. "A more respectful submission is equally more persuasive. It also prevents unnecessary harm. A submission that acknowledges an opponent's perspective does not make it weaker. Quite the opposite: it becomes stronger. An advocate who engages with counterarguments can, at the same time, be just as forceful, just as passionate and just as emotional, all while being inevitably more convincing."

Bruce Ryder has been on the faculty of Osgoode Hall Law School since 1987. He says that MacDonald used his reflections on advocacy "in a very constructive way." It was a "teaching moment" to help the students become more effective advocates and "better people who are more sensitive to the impact that their actions are having on others."

"I found all of that impressive and compelling," he says.

Under the heading "Advice for the Legal Community," MacDonald notes that the lawyers who fuelled the backlash against the students who signed the open letter "displayed the same kind of response for which they have criticized the students: using insensitive and harsh words, rushing to judgment, and not acknowledging opposing viewpoints."

Ryder says MacDonald is "on solid ground" in suggesting that this is a learning opportunity, not just for the students, but for members of the profession "who rushed to judgment in a very punitive mode."

"I found that very distressing at the time as a member of the profession, and as a member of a law faculty," says Ryder. "I don't think it's appropriate for us to punch down at students who've made mistakes. Our job is to educate them and prepare them to be to live up to the highest ideals of the legal profession."

The report criticized the administration for publicly condemning the open letter without allowing the students to explain themselves. Students told the external review team that the administration "threw them under the bus" when they needed support and protection. The students also had to contend with "many external actors, including prominent lawyers and interest groups," many of whom called for their expulsion, and "caused further, and significant, harm to the students," said MacDonald.

The backlash against the students not only impacted the open letter's signatories, but the entire law school. One letter signed by 23 lawyers, including four Law Society of Ontario Benchers, called the administration's response inadequate and threatened the law school with the withholding professional placements offered to its students if the school failed to impose consequences on the students who signed the letter.

The general backlash led to yet another open letter, in which 722 lawyers, law profs and academics decried the "pervasive repression of speech and scholarship on Palestinian liberation." These signatories said students faced a "new McCarthyism," with lawyers advocating on social media to blacklist them, contacting employers to have them fired, and bullying and defaming as antisemites those who have voiced support for Palestinian human rights or attended public protests. Students criticizing Israel are being threatened with expulsion, and employers are rescinding interview offers, the letter said.

MacDonald notes in the report that B'nai Brith Canada labelled the students "terror apologists" and called for them to be expelled, and that Howard Levitt wrote in the Financial Post that their names should be circulated so "employers will know not to hire them."

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"Commenters on news stories and opinion pieces about the letter said the students should be named, expelled, and deported (making assumptions about the students' nationalities and citizenship status)," said MacDonald.

B'nai Brith called MacDonald's report "downright irresponsible" for finding the students should not face consequences "at a time when antisemitism is escalating at an unprecedented rate, much of it resulting from exactly the type of incitement contained in this letter."

In a statement shared with Law Times, the Arab Canadian Lawyers Association (ACLA) welcomed MacDonald's findings and highlighted the impact of the backlash against students and others in the legal community who advocate for Palestinian human rights.

"The racism and vitriol directed at the TMU students, especially by members of the legal profession, was traumatic," the ACLA said. "Further, the backlash experienced by TMU law students reverberated across law schools across the province and beyond, causing harm to Palestinians, Arabs and allies beyond TMU."

"ACLA commends the investigation for recognizing anti-Palestinian racism in the report, including in describing the experiences and impacts on students and in its recommendations for administration."

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The group added that the report included "well-deserved criticism" for members of the legal profession who engaged in "racist and threatening behaviour." The ACLA said it hopes the report will "lift the chill" in the legal profession and encourage members of the profession to show support for those advocating for Palestinian human rights.

The Toronto immigration lawyer Sergio Karas says that it was bewildering that the report "castigates the reaction to the letter by the legal profession."

"If the students took an action that was calculated to obtain a certain result, they should have thought of the reaction it would provoke," he says. "Instead, they wanted to have their cake and eat it too. The report fails to offer an objective analysis of whether the students violated the university Code of Conduct and instead looks for justifications for their conduct and decries the potential consequences they may suffer."

As MacDonald outlined in his report, on Oct. 20 a student emailed the law school administration informing them that the student organization, the Abolitionist Organizing Collective (AOC), would release an open letter called "Lincoln Alexander School of Law's unequivocal solidarity with Palestine and list of demands for the administration." The open letter was written in response to a mass email to law students from the administration on Oct. 10 which called for "empathetic discourse" and offered student well-being support resources. The AOC open letter condemned the law school's "neutral position" on Israel and Palestine.

The open letter condemned any organization that only condemned Hamas' war crimes on Oct. 7 but stays silent on "the historic and ongoing war crimes committed by Israel." The letter said "'Israel' is not a country, it is the brand of a settler colony," that the Hamas attack was a "direct result of Israel's 75-year-long systemic campaign to eradicate Palestinians," and Israel is "therefore responsible for all loss of life in Palestine."

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The signatories called on the administration to issue a new statement that would demand the Canadian government call for an immediate ceasefire, that Canada allow humanitarian aid into Gaza, and demand "an end to the entire system of settler colonialism that has strangled Palestine for the last century." They also asked the administration to recognize "Palestinian resistance as fundamentally just and as a means of survival for Palestinians."

MacDonald said that the open letter, which was interpreted as endorsing the Oct. 7 attack, "caused deep hurt and real pain for Jewish students" and sparked "widespread attention on social media and in traditional media… leading to an intense and widespread backlash against the students who participated."

A few days after the open letter emerged, the law school's administration posted a statement "unequivocally" condemning "the sentiments of Antisemitism and intolerance expressed in this message."

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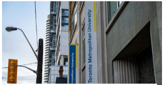

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