



**NATIONAL SECRETARIAT AGAINST HATE AND  
RACISM CANADA (NSAHC)**

***HATE CRIMES, THE CRIMINAL CODE  
AND THE CHARTER OF RIGHTS  
AND FREEDOMS:***

***REPORT ON THE OCTOBER 23, 2005  
SYMPOSIUM***

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## 1. **Introduction:**

In the fall, 2002, issues of hate and racism were brought to the attention of the IBA Board after the widely publicized anti-semitic comments by David Ahenakew, former National Chief, Assembly of First Nations, and Federation of Saskatchewan Indian Nation Senator. As well, Member of Parliament, Jim Pankiw, made similarly incendiary public comments, condemning Ahenakew and the FSIN leadership as racists and criminals, and condemning all “race-based policies” that differentiate “Indians” from the rest of Canadian society.

Racism is a root cause of the discrimination suffered by Indigenous Peoples in Canada. Furthermore, the issues of racism and hate in Canada are not confined to Indigenous Peoples – many communities and individuals in Canada have become victims of these vitriolic acts.

The experience of racism and hate in Canada has been discussed and studied through various institutions and commissions, including the Report of the Commission on Systemic Racism in the Ontario Criminal Justice System and the Royal Commission on Aboriginal Peoples. For these reasons, the IBA convened a conference in March, 2004 which brought together Indigenous and non-Indigenous leaders, academics, lawyers, policy makers, educators and community activists to dialogue on existing and future strategies to address racism and hate in Canada. The conference used a multi-faceted approach, including strategies to address legal protection, public education and prevention, and community partnerships and coalitions. It built on a symposium held on March 21, 2003 sponsored by the Native Law Centre in Saskatoon and the IBA.

While convening the conference itself was a critical short-term goal, in the long-term the IBA has committed itself to building a lasting and working relationship with partners/associates involved in the production of the Conference in order to promote public awareness, education and advocacy in seeking to find solutions for the elimination of hate and racism in Canada. The conference, therefore, was a fundamental point to address hate and racism in Canada in a collaborative manner involving Indigenous and non-Indigenous peoples.

As a result of the conference, many suggestions for action were put forward to pursue common goals and directions. These recommendations concerned:

- ❖ establishing a secretariat to provide input and advice on follow-up activities;
- ❖ adopting terms of reference to guide conference follow-up actions;
- ❖ responding to recommendations for education/training, information sharing, networking and advocacy raised at the conference; and
- ❖ convening future conferences.

To pursue these recommendations, the National Secretariat Against Hate and Racism Canada (NSAHRC) was established. The NSAHRC has been meeting on a monthly regularly since July, 2004 and has had face-to-face meetings in October, 2004 and March, 2005 and October, 2005. At these meetings, the NSAHRC has been able to establish its working relationships, goals, objectives and methods of operation. At the

same time, it has also identified critical issue to address in the next few years and the need for another conference to report on what it has done, assess the status of racism and hate in Canada and support directions to continue actions to eliminate these activities. These issues include:

1. Establishing a public education and communications function.
2. Developing and implementing advocacy and lobbying on key issues.
3. Convening educational forums and conferences to address timely issues.
4. Preparing reports and conducting research on 'best practices' of communities and organizations around the world aimed at eliminating hate and racism
5. Assessing the role and future functions of the NSAHRC so that it can address proactively as well as respond to hate and racism within communities across Canada.

To facilitate some of this work, the NSAHRC convened a symposium on October 23, 2005. The purpose of this symposium was to:

- a) address the current status of hate crimes, commonalities and differences of such crimes within Aboriginal and other communities;
- b) the effectiveness of legislation to deal with hate crimes and issues concerning freedom of expression v. the rights of individuals to be protected by law and supported by the criminal justice system; and
- c) discuss the implications of Section 15 of the Charter of Rights and Freedoms as it pertains to the Criminal Code of Canada and its provisions on hate crimes, particularly the appropriateness of the law and whether there is a need for legislative reform to ensure it complies with the Charter's equality provisions.

## **2. *Symposium Coordination:***

To coordinate this symposium, the NSAHRC commissioned papers from 3 legal scholars and practitioners to address these issues and to crystallize the discussion amongst NSAHRC members and invited guests. Over twenty individuals attended the symposium and engaged in a discussion with the panelists following the presentation of their papers and the comments of a response panel.

The symposium provided a forum for discussion of the historical and contemporary contexts of racism and hate in Canada, including the experiences of Indigenous Peoples in Canada, and to promote further dialogue of legal, community, and educational strategies to combat hate and racism.

It also provided an opportunity to provide:

- ❖ strategic updates on the NSAHRC's activities, those of its members, the implications and impact/results of these and lessons learned;

- ❖ opportunities to receive information on ‘best practices’ from individuals and organizations engaged in actions to combat hate and racism; and
- ❖ a forum to create an action-oriented agenda for the NSAHRC to pursue as a follow-up to the conference.

The focus for the symposium was on the:

- ❖ the social context and definitions of racism and hate crimes;
- ❖ incidence of hate crimes and how they have been addressed through Canadian laws and the courts, particularly in terms of the guarantee of equality in section 15 of the Charter of Rights and Freedoms;
- ❖ the use and effectiveness of legal and public educational strategies to address the law and the potential need for legislative reform;
- ❖ the critical role of community-based responses and the enhancement of collaborative strategies to ensure effective law enforcement, public education and law reform.

The symposium brought together Indigenous and non-Indigenous leaders, academics, lawyers, policy makers, educators and community activists to dialogue on existing and future strategies to address racism and hate in Canada. It used a multi-faceted approach, including strategies to address legal protection, public education and prevention, and community partnerships and coalitions. It also provided opportunities for education and information sharing on providing support to victims of hate motivated violence and working together with law enforcement authorities to identify and eliminate such criminal acts.

### **3. *Focus for the Symposium:***

At the March, 2004 conference, several substantive issues were discussed concerning hate crimes and legislative remedies. These included addressing:

- ❖ Hate crimes as criminal offences motivated either entirely or in part by the fact or perception that a victim is different from the perpetrator.
- ❖ Hate crimes as an act (or acts) directed at a group and not necessarily at an individual.
- ❖ Injustices perpetrated on the Métis people by the government of Canada and the marginalization of Aboriginal women in these discussions.
- ❖ Ukrainian arguments for redress for being placed in internment camps during WW I.
- ❖ The long-term impacts of the Indian Act, anti-Black racism and slavery, and the subordination and marginalization of Chinese Canadians through the head tax.

The panelists were provided this information to assist them in preparing their papers. Papers were commissioned from:

- Mr. Donald Worme, a Cree lawyer from the Kawacatoose First Nation, Treaty Four, Saskatchewan. He is currently legal counsel for the Ipperwash Inquiry in Ontario and has been involved in the development and review of various public policies affecting Aboriginal and Treaty Rights, including two federal sectoral reviews of Lands and Trusts Services, studies for the National Indian Tax Advisory Board and research and commentary for the Royal Commission on Aboriginal Peoples. He has appeared at all levels of court, including the Supreme Court of Canada, and is currently a member of the Human Rights Tribunal of Saskatchewan. A founding member of the Indigenous Bar Association in Canada, he served as President between 1989 and 1991 and has also acted as lead counsel for the family of Neil Stonechild during the 2003 and 2004 Public Inquiry.
- Ms Amina Sherazee, a staff lawyer, Downtown Legal Services, practicing in the area of immigration and refugee law, employment and administrative law. She regularly supervises students and has acted as legal counsel to the Canadian Arab Federation, the Canadian Council of Muslim Women and the Muslim Canadian Congress. She is also a member of the Law Union and Lawyers Against the War.
- Mr. David Matas, a Winnipeg lawyer who has been very active with the Canadian Bar Association through the Racial Equality Working Group, the Racial Equality Implementation Committee and the Standing Committee on Equity. He is senior legal counsel to the League for Human Rights, B'nai Brith and author of ***Bloody Words: Hate and Free Speech***.

The response panel included:

- Ms Anita Bromberg, the Human Rights Coordinator for the League for Human Rights, B'nai Brith Canada and in house counsel for B'nai Brith.
- Ms Uzma Shakir, the Executive Director, Council of Agencies Serving South Asians, with an extensive history of work in advocacy, research and community development.

Each of these panelists has been extensively involved in efforts to combat hate and racism in their own communities and amongst other communities. Their social identities include: Aboriginal, South Asian, Middle Eastern and Jewish.

Each panelist was asked to review, examine and analyze Canada's Criminal Code and its provisions related to hate crimes using Section 15 of the Charter of Rights and Freedoms as a benchmark to assess:

- How well the Criminal Code reflects the spirit and intent of the Charter's equality provisions;

- How the Department of Justice has applied, if at all, the Charter's equality provisions in the prosecutions of hate crimes;
- How hate crimes prosecution would benefit from use of the Charter's equality provisions and the implications this may have on criminal proceedings;
- If there is a need to reform the Criminal Code of Canada to ensure its provisions on hate crimes are consistent with the Charter of Rights and Freedoms, Section 15.

The response panelists were provided with some of the drafts of the papers in advance of the symposium. This enabled them to consider how best to respond, add to or argue against the ideas advanced by the panelists. The commissioned papers formed the basis for discussion with the NSAHRC. Out of this discussion, the NSAHRC aims to develop a position paper to include in its public education and advocacy activities. These activities will be aimed at:

- 1) Increasing public awareness about hate crimes, their root causes and consequences, and effective strategies to identify and eliminate it; and
- 2) Lobbying for effective implementation of hate crime legislation or amendments to such legislation to ensure it is a preventive tool in the identification and elimination of hate crimes.

As the participants at the symposium came from diverse communities, including Aboriginal and non-Aboriginal legal scholars, academics and community activists, representatives of the Law Commission of Canada and the Department of Justice along with the members of the NSAHRC and the IBA.

In this context, the immediate impact will be upon the participants in terms of focusing the discussion on hate crimes, their occurrences/impact and the adequacy of current legislative remedies. Given that representatives of the Department of Justice were one of the groups participating, it is anticipated that these representatives will assess the adequacy of the Criminal Code and its framework for addressing hate crimes. Response panel included

#### **4. Key Issues Addressed:**

In addressing the issues noted above, the symposium produced action-oriented resolutions for follow-up by the NSAHRC. To set the context for these actions, the panelists made their presentations and engaged in discussion with those in attendance. The key issues addressed are summarized below.

Mr. David Matas discussed the role of the Charter as a legal instrument and its relationship with other federal laws, particularly in terms of the guarantee of equality. He then discussed the substance of the Charter in regard to

- The consent of the Attorney-General. In this regard, the authority for prosecution of hate crimes was outlined in detail and the opportunities for civil actions as a separate matter;

- Immunities from hate crimes prosecution. Issues regarding immunities from prosecution for alleged hate crimes were addressed in their historical context with specific reference to the Weimar Republic in Germany and the actions of foreign diplomats in Canada today, eg., Mr. Daniel Bernard of France, Mr. Raymond Baaklini of Lebanon;
- Technical interpretations. Once again drawing on parallels with the Weimar Republic, attention was drawn to the case Mr. Malcolm Ross who was a teacher in New Brunswick and held views concerning a Jewish conspiracy to control the world, the Holocaust as a hoax and the Jewish religion as devil worship. This case. In response to a parent's complaint. Mr. Ross was removed from the classroom and challenged the school board's order to the courts, arguing that the school board lacked jurisdiction to take the action it did. The case made its way to the Supreme Court of Canada;
- The defence of truth. This matter concerns those who, while being prosecuted, argue that what they are saying is in fact 'the truth' and that becomes their defence. Those prosecuted in essence deny they are spreading 'false news' and profess to be unaware that what they are doing is in fact taking such an approach
- Sentencing guidelines. A summary review of the history of sentencing was provided and the need for substantial sentencing argued as an appropriate response to hate crimes.
- Procedural issues. Three matters were raised for consideration: (i) third-party representation/intervention on behalf of victims of hate crimes; (ii) the ability of third-parties to introduce a victim impact statement; and (iii) the ability of a third-party to challenge in court the refusal of the attorney-general to consent to prosecution.

Based on a paper co-authored with Ms Katherine Hensel, Mr. Donald E. Worme, Q.C., then discussed the outrage expressed by Aboriginal peoples in response to blatantly anti-semitic comments made by David Ahenikew and the racist, anti-Aboriginal comments made by MP Jim Pankiw. Mr. Worme pointed out the inconsistency in Mr. Ahenikew's comments to Aboriginal peoples and their traditions. He also made clear that the Aboriginal communities are well aware of the impacts of racism and discrimination and, as such, Ahenikew's comments were both abhorrent to and painful for Aboriginal peoples.

Mr. Worme then pointed out instances of hatred expressed against Aboriginal peoples. These included:

- The shooting death of Leo Lachance in 1991 by a known white supremacist who also acted as an informant for the RCMP;
- The reaction to the 1999 *R. v. Marshall* decision of the Supreme Court of Canada which resulted in the Supreme Court clarifying its decision (a rare action in itself) and the actions of the Department of Fisheries to stop Aboriginal peoples from fishing, particularly the ramming of Aboriginal boats on open water;

- The repeated incendiary attacks by of MP Jim Pankiw of Saskatoon-Humboldt targeted at Aboriginal peoples in terms of employment opportunities at the University of Saskatchewan, consistent challenges to the Federation of Saskatchewan Indian Nations, and challenges to sentencing provisions under s. 718.2 of the *Criminal Code* which mandates courts to consider custodial sentences for Aboriginal offenders;
- The so-called *Starlight Tours* where Aboriginal men have been taken by the Saskatoon police to the outskirts of the city in freezing temperatures and then left there to walk home. Some of these men did not return alive.

Mr. Worme then discusses the genesis of Canada's law against hate crime, particularly as it concerns advocating genocide, the public incitement to and willful promotion of hatred, mischief to religious structures. After reviewing some of the leading cases on the willful promotion of hatred (eg., *R. v. Keegstra*, *R. v. Safadi*, *R. V. Lifchus*, *R. v. Buzzanga and Durocher*), Mr. Worme discussed the promotion of hatred against Aboriginal peoples and concludes with considerations related to Section 15 of the Charter and its applications to the sections on hate in the *Criminal Code*.

Ms Amina Sherazee concluded the panel with a focus on the state as a discriminatory agent which commits hate crimes in several ways, including:

- Racial profiling and the singling out of people of African descent by domestic police and Muslims as well as Arabs in response to the anti-terrorism legislation;
- The continued impact of colonialism on Aboriginal peoples and current concerns regarding state sponsored hate in Ipperwash and the Stonechild inquiry.

Ms Sherazee also addressed the under-inclusiveness of the *Criminal Code's* section on hate crimes. She pointed out that the law is inconsistent with the grounds enumerated in human rights law and that a Section 15 Charter challenge would be appropriate to bring forward on that basis.

A major concern addressed by Ms Sherazee was the use of the hate crimes as a political tool to stifle public dissent. As an example of this, the situation of Professor Sunera Thobani was raised, particularly her comments regarding the intransigence of U.S. foreign policy and how it was linked to the events of 9/11. Ms Sherazee also felt that student protests of Israeli policies in Palestinian territories are purposefully mischaracterized as anti-semitism as opposed to legitimate protests against the incursions of a powerful nation into homelands of the Palestinians.

Finally, Ms Sherazee directed her attention to the state itself, particularly the requirement in law that the prosecution of hate crimes requires the consent of the attorney-general. She points out that justice departments, as part of the state apparatus, have challenges in terms of facing systemic racism within their own operations. As such, allowing the attorney-general to determine when hate crimes prosecutions should be pursued may be liable to this influence and result in the under-prosecution of cases.

The response panellists, Ms Anita Bromberg and Ms Uzma Shakir, addressed the following issues in their presentation:

- Canadian society remains in denial about the reality of racism in our everyday lives;
- A threshold for determining the credibility of a hate crime victim needs to be established that takes the victims perspective. Right now there appears to be a reliance on the 'police as expert' in terms of the laying of charges;
- There needs to be a way for communities to act in the prosecution of hate crimes that allows for interventions to address the group harm of a hate crime;
- There has to be some balance in terms of the need for freedom of speech and the protection of individuals and groups from the promotion of hatred;
- Communities need to take a critical perspective in terms of the laying of charges and prosecution of hate crimes. This perspective needs to ask the question "Whose justice is this anyway?" Such a question may provide insight into why hate crimes charges and prosecutions are done as they now are;
- Communities need to focus attention on government institutions that marginalize them as potential perpetrators of hate crimes through such treatment.

#### **5. Recommended Actions for the NSAHRC:**

In the open plenary, there was considerable support for the comments made by the panellists. It was clear from the presentations, that individuals and communities that are victimized by hate crimes have many things in common. As such, based on the presentations and dialogue with those in attendance, there were several strategies suggested for the NSAHRC to address. These included:

1. providing education on the under-inclusiveness of sections 318-320 of the *Criminal Code* so that the personal characteristics enumerated therein are reflective of those within human rights law and the Charter of Rights and Freedoms;
2. raising concern that the aforementioned sections of the *Criminal Code* address only the promotion of hatred and do not address acts of violence based on hate;
3. ensuring that the police charges of hate crimes take into consideration the concerns of the victim so that both are agreed as to the nature of the alleged offense;
4. ensuring that attorneys-general and the federal Justice Minister have anti-racist criteria in place to guide them in deciding whether to prosecute an alleged hate crime;
5. providing legal and community-based services to support victims of hate crimes in both criminal proceedings and in their efforts to be whole within their community;
6. enabling third-party interventions in prosecutions of hate crimes, including challenging the federal Justice Minister and attorneys-general for failures to prosecute such cases;

## **APPENDICES**

***EQUALITY AND HATE CRIMES: THE JEWISH  
COMMUNITY PERSPECTIVE  
by David Matas***

## The Role of the Charter

The experience of the Jewish community is that protection against incitement to hatred is essential to the protection of human rights. The Jewish community historically has suffered violations of every human right imaginable. The motor, the engine, driving all these violations of human rights is incitement to hatred.

### The Universal Declaration of Human Rights

"All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination."<sup>1</sup>

The right to freedom from incitement to discrimination is found in the same article of the Declaration as the right to equality. The Universal Declaration of Human Rights reminds us that the right to freedom from discrimination is part and parcel of the right to equality. The article itself recognizes the linkage between incitement to discrimination and discrimination. The article accepts that incitement to discrimination can lead to discrimination.

The International Covenant on Civil and Political Rights separates the right to freedom from incitement to hatred and the right to equality, placing them in two different articles<sup>2</sup>. This separation should not allow us to forget their common origin, that the right to be free from incitement to hatred is a facet of the right to equality.

Because the right to be free from incitement to hatred is an integral part of the right to equality, the absence of effective laws prohibiting incitement to hatred is a denial of the right to equality. When the right to be free from incitement to hatred is denied, the right to equality is denied. The requirement that the right to equality be respected in turn demands that the right to be free from incitement to hatred be respected.

It is generally true that the Canadian Charter of Rights and Freedoms does not impose on either the Parliament or the legislatures that they enact laws where none exist. It would be difficult to argue that, where there are no laws prohibiting incitement to hatred, the equality guarantee in the Canadian Charter of Rights and Freedoms creates such laws or imposes on Parliament or the legislatures the obligation to enact such laws.

However, the matter is different where anti-hate laws are on the statute books but are ringed in with exceptions, defences and limitations which make them ineffective. In that situation, the equality guarantee in the Canadian Charter of Rights and Freedoms can be used to render inoperative those exceptions, defences and limitations.

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<sup>1</sup> Article 7.

<sup>2</sup> Articles 20(2) and 26.

### Consent of the Attorney-General

Prosecution for the offence of incitement to hatred requires the consent of the Attorney-General. Most offences in the Criminal Code can be prosecuted privately, by anyone who has reasonable grounds to believe that an offence has been committed<sup>3</sup>. The offence of incitement to hatred is an exception. While not every denial of consent to the offence of incitement to hatred would flout the equality guarantee in the Canadian Charter of Rights and Freedoms, some would. For those cases where the refusal to consent amounts to a denial of equality, the Canadian Charter of Rights and Freedoms equality guarantee should override that refusal to consent.

Sabina Citron, a Holocaust survivor, launched a private prosecution against Ernst Zundel. He was prosecuted under a provision of the Criminal Code that prohibited willful publication of news that the publisher knew to be false and that caused or was likely to cause injury or mischief to a public interest<sup>4</sup>. The false news was Holocaust denial. The injury to the public interest was incitement of hatred against Jews. The Attorney General of Ontario took over the prosecution and assumed conduct of it.

Sabina Citron never prosecuted Zundel for willfully propagating hatred because legally she could not. A false news prosecution could be launched privately. A hate propaganda prosecution requires the consent of the Attorney General and, for prosecution of Zundel, that consent was refused.

One has to wonder, given the fact that the prosecution took the position that the public interest that Zundel injured was the interest in preventing incitement to racial hatred, why the Attorney General of Ontario never charged Zundel under the hate propaganda provision of the Criminal Code. No satisfactory answer has ever been given to that question.

Zundel was convicted and appealed. The Ontario Court of Appeal overturned the conviction because of a faulty trial judge charge to the jury. Zundel was retried, and convicted a second time. This time, on appeal, the Supreme Court of Canada struck down the false news provision of the Criminal Code as unconstitutional, because it violated the guarantee in the Canadian Charter of Rights and Freedoms on freedom of expression. According to the majority, the provision in the Code about mischief to the public interest was overbroad. The provision was not appropriately measured and restrained having regard to the evil addressed<sup>5</sup>.

The false news provision was then removed from the Criminal Code. While it was there, as the Zundel case demonstrated, it was a safety valve, because of the requirement of

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<sup>3</sup> Criminal Code section 504.

<sup>4</sup> Section 181, Criminal Code, Revised Statutes of Canada, 1985, Chapter C-46.

<sup>5</sup> *Zundel v. The Queen*, August 17, 1992, Court Number 21811, judgment of the majority, McLachlin J. page 38.

consent by the Attorney General to a hate propaganda prosecution but not to a false news prosecution<sup>6</sup>.

The Law Reform Commission of Canada in 1988, in a working paper on private prosecutions, recommended that the right to prosecute privately ought to be extended to those offences where they are presently proscribed<sup>7</sup>. If the prosecution is abusive, the Attorney General may intervene to stay proceedings<sup>8</sup>. The Commission also suggested the introduction of an effective costs system. An abusive prosecutor would have to pay the court costs of the accused.

In another working paper, the Law Reform Commission, anticipating the decision of the Supreme Court of Canada in the Zundel appeal, recommended that the offence of publishing false news be abolished<sup>9</sup>. The Commission said that there should be a new offence designed to deal with causing public alarm. It should be defined in a precise enough manner to prevent its being used to prosecute hate messages.

I have no quarrel with these recommendations of the Commission, provided they are viewed as a package. What is intolerable is the present situation in Canada where the false news offence has been removed as an avenue for hate propaganda prosecution and the Attorney General consent remains a requirement for the offence of hate propaganda. Now, Attorneys General can effectively block prosecutions for hate propaganda.

Historically, Attorney General refusal has been a real problem. Zundel is far from the only case where consent has been refused despite requests for prosecution where *prima facie* the offence has been committed. Such consent has been consistently been refused, for instance, for prosecution against another Holocaust denier, this one found in New Brunswick, Malcolm Ross.

## Immunities

A lesson to be drawn from the Jewish experience with the Weimar Republic is the need to avoid immunities. Legislative immunities to prosecution for incitement to hatred violate, in my view, the Canadian Charter of Rights and Freedoms equality guarantee.

In Weimar Germany, there was the immunity of members of the Reichstag, the German Parliament. Nazi members of Parliament became the editors in name of antisemitic publications, sometimes one deputy becoming an "editor" of several publications. These facades meant that no one could be prosecuted for the defamations in the publications. The Reichstag could waive immunity for its members, but did so rarely<sup>10</sup>.

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<sup>6</sup> David Matas "Bloody Words: Hate and Free Speech" Bain & Cox, 2000 Chapter six.

<sup>7</sup> Working Paper 52, 1986.

<sup>8</sup> Criminal Code section 579.

<sup>9</sup> Working Paper 50, 1986.

<sup>10</sup> "Bloody Words" Chapter seven.

In Canada and other countries, the problem today is not so much Parliamentary immunity as diplomatic immunity. For example, Daniel Bernard, then French ambassador to the United Kingdom, at a dinner party in December 2001, called Israel "a shitty little country". He added: "Why should the world be in danger of World War III because of those people?" Lebanese ambassador to Canada Raymond Baaklini in an Arabic Lebanese newspaper Al Anwar in January 2003 stated that Christian Lebanese immigrants in Canada "have opened a Zionist shop on their own account". Later that month, in another Arabic newspaper Sada Al Mashriq, the ambassador gave a second interview in which he was asked about the listing by Canada of Hezbollah as a terrorist organization. He said:

The most determined party that has benefited from this matter is the Zionist party in Canada which, as you know, controls 90% of Canadian media. It takes its instructions and support from many Zionist organizations located either in Canada or abroad.

A prime perpetrator of incitement to hatred in Canada is the Embassy and consulates of China, hiding behind diplomatic and consular immunity to propagate hatred against the Falun Gong. For example, Joel Chipkar, a Falun Gong practitioner, wrote a letter to the Toronto Star expressing concern about the cover up of SARS in China. Chinese Deputy Consul General in Toronto, Pan Xinchun, wrote a reply letter to the Toronto Star May 2003 in which he labelled Chipkar and other Falun Gong practitioners as members of a "sinister cult". Chipkar sued the Chinese Deputy Consul General for libel. Joel Chipkar won the libel suit against the Chinese consul by default, in December 2003. The consul refused to defend against the lawsuit. The amount awarded against him was \$1000 Canadian plus legal fees<sup>11</sup>. However, once there is a contest, even if the contest is over the execution of a default judgment, the law of diplomatic and consular immunity comes into play.

It would go beyond the scope of this paper to canvass the law of diplomatic and consular immunity and the extent to which they allow protection from Canadian laws for incitement to hatred<sup>12</sup>. Suffice to say here that insofar as the laws of diplomatic and consular immunity do allow protection from Canadian laws for incitement to hatred, the Canadian Charter of Rights and Freedoms equality guarantee should render inoperative that protection.

### **Technical interpretations**

A third lesson from the Jewish community experience is the need to avoid technical interpretations of the hate speech laws. In the Weimar republic, the laws were interpreted in a technical manner. This meant that many accused went free although in

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<sup>11</sup> See "Chinese Consulate Official Noted in Default in Libel Case" December 18, 2003, Falun Dafa Information Centre at <[www.fofg.org](http://www.fofg.org)>.

<sup>12</sup> See David Matas "Hate speech and diplomatic immunity", remarks prepared for delivery at a Forum on Upholding Justice, Montreal, January 19, 2004.

substance it was clear that the offence had been committed. The law against insulting a religious community, for instance, was interpreted to exempt insults centring around the Talmud, on the ground that the Talmud is only a doctrine and not an institution of the Jewish community, or on the ground that the Talmud was not used for religious instruction.

A Canadian hate speech case which almost got derailed on technicalities was the case of Malcolm Ross<sup>13</sup>. Malcolm Ross believes in a Jewish conspiracy to control the world. He is certain that the Holocaust never happened, that it is a hoax and part of the world Jewish conspiracy. He claims that the Jewish religion is worship of the devil.

For him, this hatred was not just a private opinion; it was a public cause. He wrote books on his opinions; he gave television and radio interviews; he wrote letters to the editor to newspapers setting out his hate fantasies.

Yet, from 1971, Malcolm Ross taught school, elementary school, in the public school system in New Brunswick. He did not teach his hatred in school. However, his mere presence in the classroom as a highly visible symbol of antisemitic bigotry caused a stir. The school board, in New Brunswick School District 15, received complaints from parents about leaving a known bigot in the class room<sup>14</sup>.

The school board did virtually nothing. The board monitored Ross' class from time to time to ensure that Ross was not preaching his hatred in the classroom. The board appointed a review committee that went nowhere. In 1986, the school superintendent warned Ross against further publication of his views. In March 1988, the school board issued a similar warning, saying further publications or public discussion of his views or work could lead to dismissal. This warning remained on Ross' file until September 1989.

David Attis, a parent of three Jewish students in the school district in which Ross taught, filed a complaint with the New Brunswick Human Rights Commission in April 1988 claiming that the school board, by its tolerance of Ross, had discriminated against his daughter on the basis of ancestry or religion. The Commission appointed a Board of Inquiry in September 1988, consisting of one member, Brian Bruce. Professor Bruce, in August 1991, found that the school board had discriminated against the Attis children by creating a poisoned environment in the school district.

Bruce ordered the school board to remove Ross from the classroom, to place him on a leave of absence of eighteen months, to appoint him to a non-teaching position during the leave period if one became available, to terminate his employment after the leave period if during the leave period no non-teaching position became available, and to terminate his employment in any event if at any time he published, sold or distributed his anti-Jewish hate propoganda. A non-teaching librarian position did become available during the leave period and Ross took it up.

Ross challenged the order of Bruce in the Queen's Bench of New Brunswick on a number of different grounds. One was a technical argument, that Bruce had no

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<sup>13</sup> *Ross v. N.B. School District Number 15*, [1996] 1 S.C.R. 825

<sup>14</sup> "Bloody Word" Chapter ten.

jurisdiction to make the order he did. Mr. Justice Creaghan in the Queen's Bench accepted that technical argument. The New Brunswick Human Rights Act provides that

...where the Board of Inquiry finds, on a balance of probabilities, that a violation of the Act has occurred, it may order any party found to have violated the Act to do certain things designed to rectify the violation.

Mr. Justice Creaghan ruled:

In this instance, there was no claim that the Department of Education violated the Act; there was no investigation as to whether the Department of Education violated the Act; and there was no finding that the Department of Education violated the Act. There was no jurisdiction in the Board of Inquiry to make an order requiring compliance by the Department of Education simply because it was designated as a party to the inquiry.

The Supreme Court of Canada in overruling this aspect of the judgment of Mr. Justice Creaghan wrote:

So far as the power of the Board to make the impugned order is concerned, it is enough to say that the Board's discretionary power is set forth in s. 20(6.2) of the Act in such broad terms that it cannot be said to fall outside its jurisdiction. Indeed, s. 20(6.2)(a) and (b) authorize the Board to make any order to effect compliance with the Act or to rectify the harm caused by a violation of the Act.<sup>15</sup>

The Court also said:

What requires examination at the administrative law level is the Board's decision regarding the issue of discrimination and the statutory jurisdiction of the Board to make its order. These reviews are untouched by the Charter. Rather, they must be determined in accordance with the interpretation of the provisions of the Act governing the Board's jurisdiction.

So, the Court held that the issue whether the Board had statutory jurisdiction to make the order it did could be resolved without reference to the Charter. Yet, I would argue that though reference to section 15 of the Charter was unnecessary, it was available. If the statute itself could not bear the interpretation which the Board gave to it to exercise its jurisdiction, then section 15 of the Charter could have come to its aid.

### **The defence of truth**

The defence of truth to the offence of incitement to hatred in the Criminal Code is problematic and potentially unconstitutional. The Supreme Court of Canada in the case of *Keegstra*, held that the offence of hate propaganda in the Criminal Code was constitutional and that the defence of truth was not necessary for the offence to remain constitutional. Mr. Justice Dickson said,

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<sup>15</sup> Paragraph 33.

"I find it difficult to accept that circumstances exist where factually accurate statements can be used for no other purpose than to stir up hatred against a social or religious group. It would seem to follow that there is no reason why the individual who intentionally employs such statements to achieve harmful ends must, under the Charter, be protected from criminal censure."<sup>16</sup>

The experience of the Jewish community has been that the defence of truth has hampered the effective working of hate speech laws. In the German Weimar republic, one reason that its hate speech laws were unworkable was the availability of the defence of truth. The accused and their lawyers used the prosecutions to deliver antisemitic tirades. Since truth was a defence, Nazi accused inevitably attempted to demonstrate in court the "truth" of the antisemitic slurs for which they were prosecuted.

There are a number of different reasons why truth should not be a defence to a hate propaganda charge. One is, as the Weimar Republic showed, that where truth is a defence, the trial becomes a forum for the propagandists. The first Zundel case was a classic from this point of view.

As noted, Ernst Zundel was prosecuted for Holocaust denial; the offence for which he was charged was knowingly spreading false news. If Zundel wanted to try for acquittal on that charge, all he had to do was show that he did not know that the news he was spreading, that the Holocaust did not happen, was false. Instead he went about trying to show that the news was true, that the Holocaust did not in fact happen.

This was a strategy that was almost certain to lead to a conviction. When a jury is asked to convict or acquit on the basis of whether the Holocaust did happen or did not happen, there is little doubt what the verdict will be. Yet, because Zundel was able, by the nature of the case, to put the Holocaust in issue, he was able to publicize his propaganda in a way that would not have been possible otherwise.

Zundel behaved not far differently from the way Paul Joseph Goebbels and Julius Streicher did in pre Nazi Germany during the Weimar republic. What that Weimar history showed, as the Zundel prosecution itself showed, was problems with the way the law was working. The Goebbels, the Streicher and the Zundel prosecutions do not undermine the value of the laws as such. They do put into question allowing truth as a defence.

The existence of truth as a defence creates a perverse effect. Instead of the law serving as a deterrent, there develops an incentive to violate the law, so that the courtroom can be used as a platform.

The dynamics of publicity for a hate propaganda trial are different from the dynamics of publicity in the ordinary criminal case. In the ordinary criminal case, the accused does not normally want publicity. He or she is embarrassed by the charge. In spite of the presumption of innocence, there is a cloud that hangs over the accused simply because of the charge. Evidence in the case, even when it leads to an acquittal, may be of a

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<sup>16</sup> *R. v. Keegstra* (1991) 61 C.C.C. (3d) 1.

highly compromising nature. In criminal law, there is a long history of accused or witnesses seeking exclusion of the public and the press<sup>17</sup>.

In order to change those dynamics, in order to remove the incentive of seeking prosecution in order to obtain a court platform of hate propaganda, truth needs to be removed as a defence. Otherwise we create a dilemma, having to choose between a trial which becomes a forum for hate propaganda and giving hate propaganda free rein.

The questions that are posed as true or false are not just questions where the answer the hate propagandist gives is offensive. The very question gives offense.

Are blacks dirty? Do Jews control the world? Are Serbians bloodthirsty? Are Tutsis genocidal? The very attempt to answer these questions demeans the administration of justice. It would make a mockery of justice to have the Crown go about attempting to disprove such things. Though the offence of hate propaganda is clearly committed, the absurdity of proof of falsity could prevent the Attorney General from ever launching a case.

The evil of hate propaganda is not only in the conclusions reached. It is in the questions being asked. Hate propagandists approach the world with a frame of reference that is skewed to conform to their own world view. Hate propagandists live in a self contained world of delusional paranoia where the vilified group is the enemy and they are the defenders of virtue.

A prosecution where truth is a defence adopts the frame of reference of the propagandist. The trial asks the question the propagandist asks, adopts the approach to the world the propagandist has. A hate propaganda trial where truth is a defence may reject the answers of the propagandist. Yet, it accepts the question of the propagandist as valid ones, and gives credence to them.

When an event happens in court, it has a different status than when it happens out of court. One reason we press for the prosecution of Nazi war criminals, as I have done, is that it is an official recognition, a statement by the state that these crimes have happened, that what was done was wrong, that the perpetrators should be punished. All of that could be said outside of court. However, statements of that sort in court are more than statements of individuals expressing opinions. They are pronouncements of society acting as a whole.

What happens in court, as well, is more than just declaratory. It is constitutive. Court procedures are not just statements of what has happened. Court procedures are themselves events that happen. When a person is convicted of a crime, what has occurred is more than just the uttering of a statement that the person is guilty. What has occurred is the conviction itself. The person is liable to punishment. He has a criminal record. The situation has changed for the accused and for society.

We must not lose sight of these consequences of court proceedings when we launch a hate propaganda case. When a court case asks a question that a hate promoter would ask, it gives a status to the question it would not otherwise have. The trial may not make

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<sup>17</sup> "Bloody Words" Chapter 14.

the answer of the hate promoter legitimate. However, it makes the question of the hate promoter legitimate. That is something no hate propaganda trial should do. It is not just that the assertions the hate propagandist makes are awkward and demeaning to disprove. The very asking of these questions in court gives the questions a status in society they should not have.

The media coverage of the first Zundel trial illustrates this point. While attitudinal surveying after the trial showed no resulting increase in antisemitism, the Zundel message was nonetheless highly publicized and unremittingly anti-semitic<sup>18</sup>.

The harm it caused in the anguish it inflicted on survivors of the Holocaust and the Jewish community in general was real. It was an affront to the community to have their suffering ridiculed in this public way.

What, after all, is the whole point of human rights and fundamental freedoms? The underlying value is promotion of human dignity and individual worth. Hate propaganda is an attack on the human dignity of the vilified group. In the words of Mr. Justice Quigley, the trial division judge in the *Keegstra* case, the willful promotion of hatred "contradicts the recognition of spiritual and moral values which impel us to assert and protect the dignity of each member of society."

The reasons that lead us to legislate against hate propaganda in the first place should impel us to want to legislate against truth as a defence. Otherwise the goal we have sought, of protecting vilified groups from hate propaganda, is undercut by the very means we have used.

The truth will out. It is both wrong and futile to suppress truth. However, a hate propaganda trial where truth is not a defence is not an attempt to suppress the truth. What is at issue is not whether the truth will be told or hidden. Rather the issue is whether the trial will be used to publicize an investigation that no one concerned with the search for truth would undertake.

It is important to keep in mind who are being convicted in hate promotion cases. If the search for human dignity is the foundation for all rights and freedoms, this foundation supports, at its next level, a commitment to democracy. Free speech is important to society both because it allows the self-realization of individual human beings, and because of its contribution to democracy.

Yet, those who promote hatred against identifiable groups are enemies of democracy and free speech. They use the opportunities free speech gives to attempt to undermine the truth-seeking process.

It is hard to credit the neo-Nazi movement, who are targets of hate propaganda prosecutions in Canada, as defenders of Canadian democracy. On the contrary, they are committed to destroying it. Their aim ultimately is a suppression of all but their truth.

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<sup>18</sup> Conrad Winn and Gabriel Weimann *Hate on Trial* Mosaic Press, 1986, page 73.

We cannot pretend the danger of neo-Nazism is not there. Part and parcel of that danger is the goal of neo-Nazis to end forever the search for truth, to impose only their official truth.

If we are interested in seeking truth, if we are interested in protecting democracy, these interests argue against protecting expressions aimed at subverting the truth-seeking process itself. When we protect expression that is attempting to subvert our very efforts to protect expression, then we undermine our own efforts to seek truth, to promote democracy.

Yet another reason why truth should not be admitted as a defence is that it makes prosecution a high risk game. When an accused is acquitted it can be for any one of a number of reasons, some of which may be highly technical or specific in nature. Yet, if a truth is a defence, there is the risk that an acquittal will be seen as a court affirmation of the truth of the hate propaganda.

When an accused denies the Nazi policy of genocide, the murder of six million Jews, the existence of the gas chambers, as Zundel did, when these facts are put in issue, as they were in both Zundel trials, there is a risk that an acquittal, on no matter what grounds will be seen as a determination that there was no Nazi policy of genocide, that there were no six million killed, that there were no gas chambers. Zundel, himself, would no doubt have asserted that an acquittal meant exactly that. The risk of interpreting a verdict in that way is almost reason enough for not having truth as a defence.

Moreover, allowing truth as a defence leads to a mischaracterization of the issue before the courts, and the danger that society faces from hate propaganda. The harm of hate propaganda is not the harm of saying something that is false. Making a false statement is not, and should not be a crime. Allowing a defence of truth gives a mistaken impression that what the accused has done wrong is to say something false. Yet that is not the harm against which the offence of hate propaganda is directed.

The focus of a hate propaganda trial should be whether the accused promoted hatred. Even true statements can be parleyed in such a way as to foment hatred against a group identifiable by race, religion or ethnic origin. Allowing truth as a defence suggests there is a right way to promote hatred, by plastering together a string of true statements in such a way that hatred is the likely result, and a wrong way to promote hatred, by using false statements. If hate propaganda is to be curtailed by the law then it should be curtailed no matter how hatred is promoted.

Alan Borovoy of the Canadian Civil Liberties Association has said we have to feel uncomfortable when we put someone behind bars for telling the truth. Yet, that is not what we are doing when a court convicts a propagandist of promoting hatred. The propagandist is convicted for his promotion of hatred, not for his use of the truth to do it.

Is a person without truth as a defence left defenceless? I would say no. The Canadian Human Rights Act gives tribunals established under the legislation the power to prohibit the communication of hatred by telephone. The Act does not allow truth as a defence. Yet the tribunals imposing prohibition orders have dealt with real and substantial issues. In particular, tribunals have had to examine whether the messages communicated were likely to expose the victims to hatred on the grounds of race, colour, national or ethnic origin or religion.

In the Criminal Code of Canada there are two hate propaganda offenses, public incitement of hatred, and willful promotion of hatred. Public incitement of hatred likely to lead to a breach of the peace is an offence, whether the statements communicated are true or not. Truth is not a defence and the absence of truth as a defence for this offence has not raised the concern of commentators.

Indeed, none of the defences legislated for the other offence of willful promotion of hatred - truth, religion, reasonable belief in truth and removal - are defences for the offence of public incitement of hatred. Yet the offence of public incitement of hatred meets with no criticism. That is also true of the offenses of sedition and obscenity. Truth is not a defence to either of these offenses. Nor is it commonly suggested that it should be.

The Law Reform Commission at Canada says that truth should be a defence because otherwise we put at risk legitimate scholars who insert themselves into areas of controversy by publishing factually accurate material critical of socially important groups. Yet scholars would be at risk only if, in addition to injecting themselves into controversy, they promoted hatred.

Mark MacGuigan, a member of the Special Committee on Hate Propaganda, chaired by Maxwell Cohen, whose report was published 1965, said in the House of Commons in 1970, that it would be unseemly for someone who is taking a position which could be demonstrably shown to be true to be convicted because of the circumstances in which he uttered the word. I suggest promotion of hatred is itself unseemly, in its totality, and it is equally unseemly for a court to be subjected to an inquiry whether hate propaganda is true or not.

The Cohen Committee said that there will almost always, if not always, be a public benefit derived from true statements about groups, because generalizations about groups play a vital role in public discussion. Again, here it is hard to see the public benefit in promotion of hatred. It is hard to accept that hate propaganda plays a vital role in any public discussion. It is also worth noting that this conclusion was not unanimous; Samuel Hayes, one of the Committee members dissented, and would have wished truth to be excluded as a defence.

Mr. Justice Dickson, who gave the majority judgment of the Supreme Court of Canada in the *Keegstra* case, said that there is very little chance that the views of society inherent in statements intended to promote hatred against an identifiable group will lead to a better world. To portray such statements as crucial to the betterment of the political and social milieu is, he ruled, misguided.

Allowing truth as a defence is more than just adding an unnecessary restriction to prosecution of the offence. Allowing truth as a defence to the offence of hate propaganda is a self-contradictory stance. It means accepting the notion that some forms of hate propaganda may have a constructive role to play in public discussion.

## Sentences

Yet another lesson the Jewish community has learned from experience is the need for more than derisory sentences when a person is convicted of incitement to hatred. Charter equality values dictate the imposition of sentences with punitive and deterrent effects.

Again this was a bitter message from the Weimar Republic which imposed light sentences on those convicted of racial insult. Most of the convictions led only to fines. Karl Holz, editor of the antisemitic *Sturmer*, was sentenced in 1931 to one year in prison for the offence of insulting, the maximum for that offence. However, it was his sixteenth conviction. Joseph Goebbels was sentenced to prison twice, once to three weeks and once to six weeks. Julius Streicher was sentenced to prison once for two months. Theodor Fritsch was sentenced to prison on one occasion for four months after a libel action that went on for years. Those sentenced for destruction of Jewish tombstones or painting swastikas on synagogues and in cemeteries typically got light jail sentences if they got jail sentences at all.

Hate crime convictions must never be allowed to become just the cost of doing business for hate groups. It is generally true that an offence will not be an effective deterrent if there are no meaningful penalties attached to conviction. Because of the particular nature of hate crime offenses, what is generally true in the criminal law, is especially true here.

The need for substantial sentences becomes crucial once truth is an allowed defence to the offence of spreading racial hatred. In the case of hate speech prosecutions where truth is a defence, the accused, instead of wanting to avoid publicity, may actively seek publicity. Where truth is a defence, the only deterrence is conviction and sentencing itself. If the sentence is derisory, then the lesson of Weimar is that the law is bound to fail.

That is a lesson that Canada is far from having learned. None of the best known hate speech propagators in Canada has received a substantial sentence for his activities.

Ernst Zundel came closest, having been sentenced to a fifteen month jail term after his first conviction and to a nine month jail term after a new trial and his second conviction. However, he served neither term, because of his successes on appeal.

James Keegstra, an Alberta teacher who taught anti-semitism in his classroom and examined his students on it, was prosecuted and convicted for promoting hatred. He was sentenced to a fine of \$5000.00 after his first conviction and to a fine of \$3000.00 after a new trial and his second conviction. The prosecution appealed the sentence after the second trial because they considered the punishment derisory. The Alberta Court of Appeal, in the fourth of a remarkable series of judgments on the side of Keegstra, rejected the prosecution appeal and upheld the sentence. The only modification was the addition of a one year suspended sentence plus two hundred hours of community service.

Donald Clarke Andrews and Robert Wayne Smith were sentenced to one year and seven months in prison, respectively. On appeal, the sentences were reduced to three

months for Andrews and one month for Smith. John Ross Taylor was sentenced to one year in jail, served his jail term, and repeated his behaviour. He was sentenced to a second one year jail term.

On the other side of the scale, the Canadian Parliament in 1995 passed legislation which provides sentencing guidelines for judges<sup>19</sup>. One of those guidelines is that racial hatred as a motivation to a crime is to be considered an aggravating factor for sentencing purposes. So, a crime of violence motivated by racial hatred is more likely to receive a substantial sentence, now that the law has passed. However, the problem remains of imposing substantial sentences for hate speech offenses alone. On balance, the Weimar lesson about the need for substantial sentencing is decidedly a lesson that Canada has yet to learn.

Julius Streicher was convicted at Nuremberg, sentenced to death and executed for crimes against humanity. The crimes against humanity for which he was convicted were the propagation of hatred against the Jews. What weighed most heavily on the minds of the judges in convicting and sentencing Streicher was that Streicher continued his hate propaganda in the midst of the Holocaust, after he knew it was going on. They wrote "With knowledge of the extermination of the Jews in the Occupied Eastern Territory, this defendant continued to write and publish his propaganda of death."<sup>20</sup>

Today we all know the Holocaust happened. No one today propagating hate speech can claim ignorance of the consequences of hate speech. I do not advocate the death penalty for hate promoters, or for anyone. However, I would argue that, today, the crime of propagating hatred must be treated as seriously as the International Military Tribunal at Nuremberg treated Streicher's crimes, that there are circumstances in which this crime is one of the most heinous crimes known to humanity.

## Procedure

Three procedural issues arise for victim groups wanting to assert the legal positions put forward here. One is whether an organization representing victims can intervene in a prosecution to raise a constitutional issue that a defence should not exist. The second is whether such an organization can make a victim impact statement on sentencing. The third is whether such an organization can challenge in Court the refusal of the Attorney-General to consent to prosecution.

In private proceedings, there are no legal obstacles to prevent either side from arguing that the statutory defences of the other side are unconstitutional. For Crown prosecutions, the matter is different. The Crown is expected to defend the constitutionality of legislation, not argue against it.

Would the Court allow intervener status to a victim group for the purpose of allowing the group to argue that a defence an accused wishes to invoke is unconstitutional? There

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<sup>19</sup> 1995 Statutes of Canada, chapter 22 adding section 718.2 to the Criminal Code

<sup>20</sup> "International Military Tribunal Judgment", (1947) 41 American Journal of International Law 172 at page 295.

are three potential obstacles to such an effort. One is the Court may insist that an individual victim make the motion rather than a victim group. The second is that courts are reluctant to allow any interveners at all in criminal prosecutions. Criminal prosecutions are normally considered matters between the state and the accused alone. The third is the reluctance of courts to allow outsiders to introduce any issue which has not been raised by the parties. Normally, interveners are permitted entry to raise a different perspective on an issue already before the Court, not to raise new issues.

These obstacles might be overcome by a freestanding victim group initiative. In that initiative, the victim group would seek a declaration in Court that a particular defence, say the defence of truth, is unconstitutional as a violation of the equality guarantee in the Canadian Charter of Rights and Freedoms. The victim group would have to show that there was no other reasonable and effective manner in which the issue could be brought before the Court<sup>21</sup>.

Individual victims can make victim impact statements, but not organizations representing groups of victims<sup>22</sup>. The relevant Criminal Code provision is attached to this paper. Victim impact statements remain possible either because the Crown may adopt as its own a statement a victim group would wish to make or because the convicted person may consent. Normally, the Court would allow a victim impact statement by a group where both the Crown and the convicted person consent.

If both oppose, the potential for a Charter challenge is direct. A victim group could move to have the Court allow the victim impact statement based on the equality guarantee of the Canadian Charter of Rights and Freedoms.

In principle, a person or group who seeks the consent of the Attorney-General for prosecution of an offence can seek judicial review of refusal to consent. However, the standard of review for the exercise of prosecutorial discretion on questions of fact is flagrant impropriety<sup>23</sup> a standard, one can assume, that, in most cases, would be impossible to meet.

However, the standard of review of prosecutorial discretion on questions of law is correctness. It would amount to an error of law for the Attorney-General to fail to have regard to Charter values, including the equality guarantee in the Charter, when reaching a decision on whether or not to consent. Insofar as a refusal to consent is made without regard to Charter equality values, that refusal could be set aside in Court and returned to the Attorney-General for reconsideration with instructions that, this time, Charter equality values be taken into account.

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<sup>21</sup> *Minister of Justice of Canada v. Borowski*, [1981] 2 S.C.R. 575

<sup>22</sup> Criminal Code section 722(4).

<sup>23</sup> *Law Society of Alberta v. Krieger* 2002 SCC 65, October 10, 2002

## Conclusion

People live in community. Rights are exercised in community. The spreading of hate propaganda corrodes and disintegrates the society that is needed for all rights to flourish<sup>24</sup>.

The effect of promotion of hatred run rampant against a victim group is to weaken self-assertion by members of the group. The Jewish community has only to look at its own experience, its own vocabulary to see the effect anti-semitism has on freedom of expression. The notion of "sh'a shtill", keep quiet, has been a political slogan, a byword in the Jewish community.

The concept of "shanda fur de yidden", an embarrassment for the Jews has permeated Jewish discourse. The Jewish community expresses concern about what other Jews say or do, because of how it might reflect on the community.

The fear of stirring up anti-semitism is a constant concern. There is apprehension that Jewish visibility, not perhaps in every arena, but in support of some people or some causes, will create resentment against the Jewish community.

An attitude exists within the Jewish community that Jews are guests in a non-Jewish society, and that the Jewish community should behave so as not to antagonize their hosts, even if it means curtailing words and deeds. There is a view that the Jewish community should not be criticising its benefactors; that the community exists in its host nation not as a right, but by dispensation from the majority and must do nothing to antagonize or offend that majority.

The danger of racist speech is more than the inhibition of words or deed. Racist speech affects self perception. Self esteem depends on the esteem of others. When others think less of the community, the community thinks less of itself and the very identity of the community, or at least of individual members of the community, is stifled. Avoidance grows to be become more than just a tactic. It becomes grafted on to the community's soul.

Mr. Justice Dickson, then Chief Justice of the Supreme Court of Canada in the *Keegstra* case, put the matter this way:

"In my opinion, a response of humiliation and degradation from an individual targeted by hate propaganda is to be expected. A person's sense of human dignity and belonging to the community at large is closely linked to the concern and respected accorded the group to which he or she belongs....The derision, hostility and abuse encouraged by hate propaganda therefore have a severe negative impact on the individual's sense of self and acceptance. This impact may cause target group members to take drastic measures in reaction, perhaps avoiding activities which bring them into contact with non group members or adopting attitudes and positions directed towards blending in with the majority. Such consequences bear heavily in a nation that prides itself on tolerance and

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<sup>24</sup> "Bloody Words" Chapter 3.

the fostering of human dignity through, among other things, respect for the many racial, religious and cultural groups in our society."<sup>25</sup>

The repression within the victim community reinforces the incomprehension of outsiders. When victims themselves evade the harm of hate speech, rather than confront it directly, the tendency of outsiders is to ignore it completely.

The right to be free from incitement to hatred is a community right that belongs primarily to the community that is the target of the hatred. In a larger sense, it belongs to the whole human community. Hate speech, by dehumanizing components of the human family, by undermining the tolerance that keeps the community together, ultimately harms not just its victims but all of humanity. As one genocide after another has demonstrated, the banning of hate speech is something on which the survival of the whole human community depends.

### **Attachment: Criminal Code provisions on victim impact statements**

722. (1) For the purpose of determining the sentence to be imposed on an offender or whether the offender should be discharged pursuant to section 730 in respect of any offence, the court shall consider any statement that may have been prepared in accordance with subsection (2) of a victim of the offence describing the harm done to, or loss suffered by, the victim arising from the commission of the offence.

#### Procedure for victim impact statement

(2) A statement referred to in subsection (1) must be

- (a) prepared in writing in the form and in accordance with the procedures established by a program designated for that purpose by the lieutenant governor in council of the province in which the court is exercising its jurisdiction; and
- (b) filed with the court.

#### Presentation of statement

(2.1) The court shall, on the request of a victim, permit the victim to read a statement prepared and filed in accordance with subsection (2), or to present the statement in any other manner that the court considers appropriate.

#### Evidence concerning victim admissible

(3) Whether or not a statement has been prepared and filed in accordance with subsection (2), the court may consider any other evidence concerning any victim of the offence for the purpose of determining the sentence to be imposed on the offender or whether the offender should be discharged under section 730.

#### Definition of "victim"

- (4) For the purposes of this section and section 722.2, "victim", in relation to an offence,
- (a) means a person to whom harm was done or who suffered physical or emotional loss as a result of the commission of the offence; and
  - (b) where the person described in paragraph (a) is dead, ill or otherwise incapable of making a statement referred to in subsection (1), includes the spouse or common-law

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<sup>25</sup> (1990) 61 Canadian Criminal Cases (3d) 1 at page 36.

partner or any relative of that person, anyone who has in law or fact the custody of that person or is responsible for the care or support of that person or any dependant of that person.

R.S., 1985, c. C-46, s. 722; 1995, c. 22, s. 6; 1999, c. 25, s. 17(Preamble); 2000, c. 12, s. 95.

#### Copy of statement

722.1 The clerk of the court shall provide a copy of a statement referred to in subsection 722(1), as soon as practicable after a finding of guilt, to the offender or counsel for the offender, and to the prosecutor.

1995, c. 22, s. 6; 1999, c. 25, s. 18(Preamble).

#### Inquiry by court

722.2 (1) As soon as practicable after a finding of guilt and in any event before imposing sentence, the court shall inquire of the prosecutor or a victim of the offence, or any person representing a victim of the offence, whether the victim or victims have been advised of the opportunity to prepare a statement referred to in subsection 722(1).

#### Adjournment

(2) On application of the prosecutor or a victim or on its own motion, the court may adjourn the proceedings to permit the victim to prepare a statement referred to in subsection 722(1) or to present evidence in accordance with subsection 722(3), if the court is satisfied that the adjournment would not interfere with the proper administration of justice.

1999, c. 25, s. 18

***THE CHALLENGE OF SYSTEMIC RACISM  
IN GOVERNMENT AND HATE CRIMES***

*Presentation by Amina Sherazee  
(Text edited by Charles C. Smith)*

Thank you, for inviting me to join you. I want to first of all acknowledge and express gratitude to the Aboriginal people for generosity and sharing their land and their resources with us. I have been allowed to make Canada to make my home in your home, and, here, unfortunately, both our communities have and continue to experience racism and I recognize how important it is to work in solidarity in combating this problem and the struggle for human rights and justice in Canada.

I want to outline some ideas that I think important in terms of addressing the prevalence of hate crimes in Canada today. At the outset, it is critical to acknowledge that racism is a reality in Canada, an epidemic, and institutionally entrenched in every part of the Canadian system. It's not only an assumption that must be the premise of all our discussions today -- and I was very happy to read in the national secretariat's conference material that we are starting off with this presumption; but it is also a fact. The fact of systemic racism, especially against the Aboriginal people and the black community, has been proven time and time again. The Canadian Courts, based on empirical and broadly submitted evidence have recognized, along with the royal commission inquiries that systemic racism exists in the criminal justice system; and the Ontario Court of Appeal, in *R. v. Parks* in 1993 has summarized racism as manifesting in three ways:

- First, those who express and espouse racist views as part of a personal credo -- and that's always the easiest to challenge, because it's overt -- and we've received -- arrived at a sufficiently high level of consciousness about racism and our intolerance to it so that we can lay hate crimes provisions. We can use those provisions. We can also use the provincial and federal human rights legislation and complaints regime.
- Then, the Court also identified that there are others who sub-consciously hold negative attitudes towards persons based on stereotypical assumptions; and
- Finally, and most importantly, the Court stated: 'Most pervasively, racism exist within the interstices of our institutions,' and it's the systemic racism that I think needs to always inform our analysis of Criminal Code provisions and their effectiveness in combating racism.

The Supreme Court in *R. v. Williams* in 1998, adopted and fully endorsed the findings of the fact in *R. v. Parks* in the Ontario Court of Appeal. Most recently, in 2003, in *R. v. Brown*, the Ontario Court of Appeal recognized that rarely if ever can the motivation behind racist conduct be proven. In that case, an African Canadian man who was driving an expensive car was pulled over by the police. The police then proceeded to charge him with speeding, and the defence that the driver had was that 'you would not have even pulled me over had you not suspected that as a black man driving an expensive car, I might be a drug dealer, or I might have stolen this car'. He was allowed to proceed with that defence, and at the Court below, the -- and during Trial, the Crown was able to show that there's no way the driver could have proven what was in the mind of the police officer, and the Court of Appeal reversed the acquittal, and stated that rarely if ever can you prove motivation.

In fact, you can't get the police officer up on the stand to admit that because they have a certain opinion of black men driving expensive cars, they pull them over. So, I think it's really important to remember these kinds of holdings, when we're looking at whether or

not the attorney-general is willing to consent to laying prosecutions, to take from the criminal law on racial profiling because there is, even though it's in its infancy stages, some jurisprudence there that we can borrow from and adopt in applying to the willingness to prosecute hate crimes.

In terms of the courts' pronouncements today, and government studies through royal commissions, I would like to assert another assumption, and that is that as long as racism exists, the guarantee of equality in our Charter under section 15 will not be realized. We are here to discuss the implications of section 15 of the Charter as it pertains to the hate crimes provisions in the Criminal Code. Section 15 itself does not exist in a vacuum. Its structural underpinnings are set out in the Supreme Court of Canada's Quebec secession reference, the 1998 decision of the Supreme Court; and although section 15 is not the only provision that the Court referenced, basically the Court states in this decision that the underlying constitutional principles enunciated by the Supreme Court inform and sustain the constitutional text, including section 15 which include democracy, rule of law, and respect for minorities; and the premise for the rule of law is that the law, the criminal law, applies to all equally, and that no one is above the law, including the King, including Mr. Pankiw. I would respectfully submit that this is not the case with hate crimes.

In the context of hate crimes, section 15 can be read as follows. Section 15: 'Every individual (with my own edits) is equal before and under the law, and has the right to the equal protection and equal benefit of the law, without discrimination, and in particular, without discrimination based on race or ethnic origin, colour, religion, with the consent of the attorney-general'; and section 15 does not read like that; but if you look at how the hate crime provisions are applied, and whether or not they have the benefit of section 15, and whether they're being applied in a manner that's in accordance with section 15, that's basically what is being applied to the victims of hate crime where hate crime is not prosecuted.

What is left out here are grounds for hate such as National origin, Sex, Age, Mental or physical disability. These grounds, enumerated in the Charter, are excluded from section 3-18 and 3-19, and the other Criminal Code provisions with respect to grounds for prosecuting hate crimes. The ideal embodied in section 15 of the Charter is that a law expressed to bind all should not, because of irrelevant personal differences, have more burdensome or less beneficial impact on one than the other. This section spells out four basic rights which apply to all persons, whether citizens or not. These are important in the context of immigrants and refugees and others to have the right to equality before the law, the right to equality under the law, the right to equal protection of the law, and the right to equal application and benefit of the law

All of these four rights are to be without discrimination. Discrimination exists when there is a distinction that's made, and my basic premise is to pick up where Donald Worme left off in that why is it that at certain times we've seen such a graphic display of hatred towards Aboriginal people, towards black people, towards other racialized communities, towards Arabs, that have not been prosecuted and characterized as hate, either in the media or through the attorney-general's. This is because the hate crime provisions of the Criminal Code requires the consent of the attorney-general in order to proceed with prosecuted as a hate crime.

For those groups who are included under section 3-18 and 3-19 of the *Criminal Code* as identifiable groups, as I mentioned people with mental and physical disabilities, gender, women, for those victims of hate crimes who are victims within an identifiable group, do not enjoy equality because they're denied equal protection and benefit of the hate crimes provisions. Now, in my assertion, therefore, the hate crimes provisions are structurally discriminatory in that they constitute a section 15 breach in and of themselves because they do not place everyone to the same level of rule of law, and the effectiveness of the law to deal with hate crimes is seriously undermined and the legislation itself becomes a discriminatory tool where the attorney-general in fact can withhold consent because the decision of whether or not to characterize something as a hate crime and to proceed with its prosecution in that manner is something that's in the hands of the attorney-general.

Keeping what I said earlier in mind, that the highest Court in this country has recognized that systemic racism exists throughout the entire criminal justice system, and has been endorsed by the Supreme Court as existing also in every level of society, why then would we be surprised that the attorney-general would also not be tainted by this type of systemic racism, especially when the political, historical and sociological reality in Canada bear out that implementation is not only discriminatory, but it can actually be used to perpetuate further discrimination and racism. The grounds as I mentioned earlier are under inclusive, and that in itself is a problem, because hate is propagated not only on the basis of race, but perpetuated and tolerated on the basis of economic and social status, as well. For the Aboriginal communities in particular, hate is manifested through race and class.

Hate crime legislation does not catch hate directed against racialized communities on the basis of poverty. No one talks of hate crimes or inciting hatred when politicians publicly say that they want to get rid of the scum off the streets, referring to the homeless. Hate against the homeless and the poor is not only socially but, according to the hate crime legislation, legally acceptable. Now, if we substitute 'scum' and 'homeless' with any other word, we can see how heinous it would be. Nobody would dare say 'we have to get those blacks off the street'. 'We have to get the Jews off the street'. That would be just -- we would know that that is overt racism, and yet somehow the homelessness is disguised as the racial component of the same type of hate.

Given the historical landscape of this country, in a bizarre way, hate crime legislation facilitates hate crime prosecution of the preferred and privileged, racially and religiously while at the same time disarms and further victimizes and takes the voice away of alienated groups through the threat of criminal prosecutions. As I mentioned earlier in my example, politicians who spew hate against the homeless and the poor are tolerated, and the criminal prosecution of Ontario Coalition Against Poverty members and activists who are actually charged with criminal offences for fighting for the rights of the homeless, as well, and there are other examples.

The whole idea of hate crime has been turned on its head to actually criminalize dissent, and this happened very soon after September 11, and in response, some pretty high profile members of the Canadian community who spoke out against U.S. imperialism and the war in Iraq. For example, there is an organization that I have done some work with. It's an anti-war organization in Ontario responsible for organizing a meeting in city hall in 2002, to organize the anti-war rally. The organizers were officially informed by city hall officials who inquired about the content of the meeting, that if any of the content was critical of the U.S. foreign policy or even the U.S., the organizers would be subject to

prosecution under the anti-hate by-laws. Meanwhile, those supporting the war who openly state that 'we will bomb the Iraqis into the Dark Ages' are not prosecuted, though there are politicians who get up and say that, who support the war. However, those working in anti-war organizations are actually being threatened with criminal prosecution, and this has a chilling effect.

Another example is student groups in college and universities, mostly Palestinian human rights groups, who are denied status as student organizations, denied access to school facilities, or prohibited from displaying or distributing their pamphlets and information under the university's anti-hate policy, if it's critical of the state of Israel. There has to be a really strong distinction made between political criticism of existing political institutions and anti-semitism and hate, and if we obfuscate the two, then what we're doing is we're actually using the hate crime provisions to censor those very people who are fighting for greater tolerance and justice and human rights.

Another example is Sunera Thobani. Former president of the National Action Committee on the Status of Women, and a professor at the University of British Columbia, she was speaking at a women's conference in Ottawa, against colonialism and imperialism, and U.S. foreign policy, and just before the U.S. war in Iraq, she referred to U.S. foreign policy as being soaked in blood. There were immediate allegations of hate that were used to suppress her criticism, and the RCMP in fact informed the media that they were investigating her for hate crimes. This too, of course, has a chilling effect on those who speak out against war and violation of human rights, not just nationally but internationally.

Then there is also the state's racial profiling and police brutality. Neither of those are categorized as hate crimes, yet why is it that a police officer in uniform racially and hatefully targeting a black man in a car or a native man, does not constitute a hate crime? Why is it sanitized into an academic term such as 'racial profiling'? And, other examples of overt racism and hate are not prosecuted as hate crimes.

I just have to show examples that we've experienced in the Muslim community where, in 2004, there was a graffiti on a Muslim mosque, and the graffiti with the words 'terrorist' and a swastika. Instead of treating that as a hate crime, it was treated as vandalism, similar to the Sikh Gurdwara that was burnt down. It was treated as arson, not as a hate crime; and so what becomes clear is that if you are a religious racial minority, then you have to depend on the attorney-general to name your crime in the way that you experience it. As a victim, however, you would think that the categorization of what constitutes a hate crime should be in the hands of the victim, or at least the victim should be able to have a say in it.

Other examples for which I am amazed that we have not charged people with hate crimes include 1990 in Oka where a Quebecois commentator actually incited Quebecers to throw rocks at Mohawk women and children as they were leaving the reserves. As a result, the Quebecois mob swarmed in one instance an ambulance that was carrying an injured Mohawk child to the hospital, and attempted to turn it over. It was well documented that he had actually helped fan the flames, that he was repeatedly inciting listeners to get angrier at the Mohawk, by instigating them to do things such as throwing rocks, as well as saying things like, 'the Mohawks don't even speak French'. Yet, he has not been charged with hate crimes, and his words actually led to the incitement of a very concrete action, and a book has been written about it, a

documentary called **'Rocks at Whiskey Trench'**. There's also the example of Dr. Pierre Malieux whose hate speech is being propagated by CACK Radio and TVQ. He has been inciting hate against black and native people alleging that they're intellectually inferior and because he has said that he has studies to prove this, the radio has not censored him nor asked him to discontinue this hateful speech.

There are also the documents coming out of the Ipperwash Inquiry, and the extremely hateful conduct of the police officers, and yet none of the officers are being charged with hate crime offences, where native Indians were being referred to as 'big fat fucking Indians' 'who could be easily baited with a case of Labatt's 50, because in the south' -- in the U.S. -- 'it works with watermelon', and the only comment from the O.P.P. is that they don't condone these remarks, and they require them to be subject to sensitivity training. That's the worst they can expect.

Another thing that came up through the O.P.P. is the three officers -- the two constables and one sergeant -- who were involved in designing and producing mugs and T-shirts that were made by the police called the Team Ipperwash. Those mugs had an O.P.P. crest with an arrow through it, and the T-shirts had an O.P.P. crest with a feather underneath it, and the symbolism I understand is when a feather is placed underneath something, it symbolizes death. If that is not a glaring example of inciting hatred, then I don't what is, and yet none of these officers are being prosecuted for hate crimes.

Finally, I just want to talk about an example in our community, in the Muslim and Arab community. We have been seeing the application of the secret trial mechanisms under the Immigration Act, and for me, it's a matter of equality, and I know this is something that the Courts have dealt with in terms of making distinctions between criminal law and civil law, and immigration falls under civil matters, therefore there's less due process rights and less procedural protections, because these are aliens, after all. I think that sort of dehumanization is what allows the Federal Court to be able to hear cases of five Muslim and Arab men held on secret Trial without criminal charges, with just mere allegations where they don't have a chance to see the evidence against them. They don't have a chance to cross-examine any of the sources of the evidence, and to be able to convict on this very, very low standard, and potentially deport to death, and that can only really happen when you have systemic type of racism.

In conclusion, I would say the single, most important recommendation I can suggest is the removal of the attorney-general's consent to prosecute hate crimes because it is contrary to the rule of law. We need to be able to trust the judiciary to apply the law, or at least give them an opportunity to apply the law equally, and it is important for the independence of the judiciary to be able to proceed with all prosecutions without the interference, the political interference of the attorney-general. For the Arab communities, both Muslim and non-Muslim, as well as the ethnically and nationally diverse Muslim communities in Canada, documentation of hate and prosecution of crimes against them on the basis of race and religion is relatively new, and as we navigate this new terrain, we look to the guidance and look to work in solidarity with the Aboriginal people, the black, the Jewish, and other communities who have and continue to challenge the extensive racism and systemic hate.

***The Face of Hatred: Hate Crimes and Aboriginal Peoples in Canada***

*by Donald E. Worme, Q.C. and Katherine Hensel<sup>1</sup>*

## Kaweetuskaytoowa

“We agree to live in peace and harmony as good neighbours do with the white people”

### Introduction

On December 13, 2002, while speaking at a conference sponsored by the Federation of Saskatchewan Indian Nations, David Ahenakew, told those in attendance<sup>2</sup> that “The Second World War was created by Jews, they say, you know.”<sup>3</sup> Following his presentation, Ahenakew told a reporter, James Parker of the Saskatoon StarPhoenix, that:

The Jews damn near owned all of Germany. Prior to the war. That's how Hitler came in. He was going to make damn sure that the Jews didn't take over Germany or Europe. That's why he fried six million of them, you know... Jews owned the goddamn world and look at what they're doing. They're killing people in the Arab countries. I was there, I was there... How do you get rid of... a disease like that that's gonna take over, that's gonna dominate, that's gonna everything, and the poor people, they... They owned the banks, they owned the factories, they owned everything. They loaned money out to the peasants knowing damn well that they can't pay it back so they took their land... All I know is what the Germans told me when I was there two years... Of course I believe them.... because I saw the Jews kill people in, in the Egypt when was over there.... I saw them fucking dominate everything...(The Canadian Army was there) to liberate the world, not the Jews... We didn't give a damn about the Jews.... Well, you know, (Hitler) cleaned up a hell of a lot of things, didn't he? You'd be, you'd be dominated by, you'd be owned by the Jews right now the world over... Anyway, to hell with the Jews, I can't stand them and that's it.<sup>4</sup>

David Ahenakew is a former Chief of the Assembly of First Nations and a 1978 recipient of the Order of Canada. In June, 2003, Saskatchewan's Minister of Justice consented to the laying of charges against Mr. Ahenakew under s. 319(2) of the *Criminal Code*<sup>5</sup>. On July 8, 2005, he was found guilty of promoting hatred. On July 11, 2003, the Governor General of Canada revoked Mr. Ahenakew's membership in the Order of Canada. He has filed an appeal of his conviction.

In his July 8, 2005 decision, Irwin P.C.J. found that in publicly referring to Jewish people as “a disease ... that's gone take over, that's gonna dominate, etc.”, by stating “(t)hat's why he fried six million of those guys, you know”, by claiming that in killing Jews, gypsies, homosexuals, and others, Hitler was “clean(ing) up the world,” and adding that Hitler “cleaned up a hell of a lot of things, didn't he? You'd be dominated by, you'd be owned by the Jews right now the world over”, Ahenakew committed the offence of willfully promoting hatred.<sup>6</sup> In so finding, Irwin P.C.J. commented:

When one heard the audio tape (of Ahenakew making the referenced comments) and the fury and passion in the delivery of these statements, the court is convinced beyond a reasonable doubt that the sole purpose and intent in making these statements was to willfully promote hatred against people of the Jewish faith within the meaning

of section 319(2) of the Act. To equate a definable group of people to a disease is to dehumanize them, to deny them the basic respect and dignity that all human beings are entitled to and that it is justified to kill or to use the more offensive word, “fried”, is clearly to subject them to being despised and subject to ill treatment even in the extreme such as was demonstrated by the Holocaust.... to suggest that any human being or group of human being are a disease is to invite extremists to take action and to give a justification for violence against them. This is precisely why Parliament enacted section 319(2) and our Supreme Court of Canada declared it as being constitutional.<sup>7</sup>

While it is not for the authors to express the pain Mr. Ahenakew caused the Jewish people, it must be said that he has caused immeasurable pain to his own people, who are well acquainted with the effects of prejudice and bias, and know the face of hatred only too well.

That David Ahenakew is a Cree man, and has long served as a leader in the Cree community and the broader Aboriginal community. He is well known, and indeed, prior to this dark stain on his reputation, was held in high regard by the public and his community. Make no mistake, however – these offensive words do not reflect traditional First Nations values. In fact, they are contrary to the main principles underlying indigenous value systems.

From a Cree perspective<sup>8</sup>, relations with Opaykapow (the people that came from off the water) are governed by the values and relationships embodied by the intratraditional protocols of dealing with those who share land and in the more formal arrangements we ultimately engaged. At the signing of the Treaties, for example, Cree leaders made representations to and agreements with both the Opaykapow and Oh-skichee (the Creator, through the presence of the Treaty Pipe and the Holy Bible at the signings). Hence, there were three parties to the Treaties, the Cree people, Oh-skichee, and the Opaykapow, in agreements that were considered to be binding in legal, political, and spiritual terms, in perpetuity.

Under the terms of those agreements, the Cree people agreed to abide by the terms of the Treaties under the following principles:

1. Kaweetuskaymya – we agreed to live in peace with the white people;
2. Kaweetuskeetoowa – we agreed to live together and to share the land with the white people;
3. Kaweetuskaytoowa – we agreed to live in peace and harmony as good neighbours do with the white people;
4. Kameeowechaytoowa – we agreed to get along in friendship as brothers do, as family as communities and as nations;
5. Kameepikeetoowa – we agreed to abide by and respect the respective growth of the people, as civilized peoples, as nations within a nation;
6. Kaweecheekoowa – we agreed that when we would require help and assistance that the white man would be there to assist us to adapt to the new ways of life that came with the arrival of the Opaykapow.

These concepts had and have legal and spiritual significance for the Cree, as signatories of the Treaties. They were and are the instructions, the laws that govern our relations

with the Opaykapow. To be sure, Ahenakew's words did not accord with these principles. Nor do the collective experiences of our relations with the Opaykapow since the time of the signing of the Treaties accord.

This paper will describe those instances in the authors' view, where hatred, discrimination and bias have been directed towards Aboriginal people. As will be evident in our discussion of these various incidents, the principles of Kameepikeetoowa, Kameeoweechaytoowa, and Kaweecheekoowa seem to have fallen from the minds of many of the Opaykapow (as they appear to have fallen from some of our own minds). The laws of the Opaykapow, as embodied in the *Criminal Code* and the *Charter of Rights and Freedoms*, appear to provide few remedies for actions that profoundly transgress our understanding of our relationships as brothers and families, as nations within a nation.

Several provisions in the *Criminal Code* describe offences or sentencing principles relating to hate, either through its incitement<sup>9</sup> or its willful promotion<sup>10</sup>, which constitute offences in themselves, or as an aggravating factor in the sentencing of offenders whose actions are found to have been motivated by bias, prejudice or hate<sup>11</sup>. Mischief in relation to religious buildings or structures is also criminalized, with more severe penalties than mischief to other types of property.<sup>12</sup> In the events described here, the Crown (whether through individual Crown attorneys or Attorneys General), police and the courts have demonstrated a marked reluctance to characterize the actions of the perpetrators as hate crimes or to find that hatred motivated their actions. The descriptions of the events themselves will be followed by a discussion of Canadian criminal law, where it addresses hatred, and whether *Criminal Code* provisions intended to address hate crimes were or should have been triggered in incidents involving Aboriginal people. Finally, we will discuss whether Canadian criminal law is, in its substance or in its application, consistent with s. 15 of the *Charter*.

## **Instances of Hate Against Aboriginal People**

### ***The Death of Leo Lachance***

On January 28, 1991, Leo LaChance, a Cree trapper, was shot in the back as he left a store in Prince Albert, Saskatchewan. The store was owned and operated by Carney Nerland, a man who once led the Saskatchewan chapter of the Church of Jesus Christ Christian Aryan Nation, a white supremacist organization. Nerland was also an RCMP informant. He claimed that he shot LaChance accidentally. In April, 1991, Nerland pleaded guilty to manslaughter, receiving a four-year sentence. His sentence did not take into account potentially hateful motives for the crime.

The charge of manslaughter (as opposed to murder) was met with public outrage, particularly after it became known that Nerland was an informant for the RCMP. In response to that outrage, Saskatchewan's Minister of Justice convened the Commission of Inquiry into the Shooting Death of Leo LaChance ("Hughes Commission"), chaired by former Saskatoon judge Ted Hughes, who was joined by Commissioners Delia Opekokew and Peter MacKinnon. In its report, the Hughes Commission concluded that the Prince Albert police "did not recognize when they should have that racism may have been the motivating factor for the actions of Nerland" and that while the police may have acted in good faith, they were not diligent enough in pursuing evidence that might have

proven that LaChance's shooting was not accidental. The Commission recommended that:

- Prince Albert police have at least one officer fluent in Cree on duty at all time; and
- The province improve training for police and prosecutors to deal with racism.

Through these recommendations, the Commission clearly recognized that, while hatred may be difficult to recognize for those who have not been targeted, it is unmistakable to those with direct experience as the targets of hatred.

### ***The Reaction to the Supreme Court of Canada decision in R. v. Marshall (1999)***

On September 17, 1999, the Supreme Court of Canada released its decision in *R. v. Marshall*.<sup>13</sup> A majority of the Court held that Marshall, Jr.'s convictions for selling eels without a license, fishing without a license and fishing during the close season should be overturned. The majority based its decision on the facts that Marshall, Jr., as a Mi'kmaq Indian, had a treaty right (protected by s. 35 of the *Constitution Act*) to engage in the commercial fishery, and was not subject the Crown's regulation of that fishery. It noted further that the Crown had not made any attempts to justify such regulation, as required law, but had merely asserted that the treaty right claimed by Marshall, Jr., did not exist.<sup>14</sup> As a result of the majority's decision, members of 34 Maritime and Quebec First Nations affected by the decision began fishing lobster outside of the federally prescribed lobster-fishing season. Non-Aboriginal fishers responded with outrage. At Burnt Church, New Brunswick, they responded with violence.

On October 3, 1999, 150 non-Aboriginal fishing boats set out into the Miramichi Bay, to protest against the Aboriginal fishery. They destroyed hundreds of traps set and owned by First Nations fishers. There was further vandalism of fishing equipment and three fish plants.<sup>15</sup> Several non-Aboriginal fishers were charged as a result. The violence prompted the intervention of then Federal Fisheries Minister Herb Dhaliwal, who met with First Nations, resulting in 32 of the 34 bands agreeing to a voluntary moratorium on fishing. Two bands, Burnt Church and Indian Brook, refused to agree to the regulation of the fishery.

On November 17, 1999, the Supreme Court, in response to an application by the West Nova Fishermen's Coalition for a re-hearing, released a new ruling<sup>16</sup>. While the Court refused to allow a re-hearing of the entire case, it did issue further comments, with a view to "clarifying" its earlier decision. The Court noted that in its earlier decision, it had not meant to imply that there could be no regulation of treaty rights to fish commercially, but had merely held that any regulation had to be justified for reasons of conservation or otherwise, and that because the Crown had not sought to justify regulation, no such justification or regulation was found. The Court also noted:

In its written argument on this appeal, the Coalition also argued that no treaty right should 'operate to involuntarily displace any non-aboriginal existing participant in any commercial fishery', and that "neither the

authors of the Constitution nor the judiciary which interprets it are the appropriate person to mandate who shall and shall not have access to the commercial fisheries". The first argument amounts to saying that the aboriginal and treaty rights should be recognized only to the extent that such recognition would not occasion disruption or inconvenience to non-aboriginal people. According to this submission, if a treaty right would be disruptive, its existence should be denied or the treaty right should be declared inoperative. This is not a legal principle. It is a political argument. What is more, it is a political argument that was expressly rejected by the political leadership when it decided to include s. 35 in the *Constitution Act, 1982*.<sup>17</sup>

Members of Burnt Church and Indian Brook continued to fish lobster and to refuse to be regulated in doing so throughout the summer of 2000. Further violence erupted then Department of Fisheries boats rammed Burnt Church boats, forcing fishers to jump into the water to avoid going down with their boats.

As Prof. Peter Russell recently noted<sup>18</sup>, the unusual decision of the Court in issuing a "clarifying" judgment, and emphasizing that the Crown could unilaterally change the terms of a bilateral accord such as a treaty, undermined Aboriginal peoples' confidence in the laws of Canada to deal with us fairly and ensure that agreements were abided. In bowing to the violence, the Court demonstrated its acceptance of the illegal tactics of the Department of Fisheries and non-Aboriginal fishers to undermine the treaty rights of the Mi'kmaq people. It is difficult to understand how such lawless and violent treatment can be directed towards another human being, unless one is able to dehumanize the recipients of the treatment. It is even more difficult to understand how the ultimate arbiters of justice in Canadian law can endorse this form of dehumanization.

While the events at Burnt Church in 1999-2000 were certainly a well-publicized example of the violent backlash against First Nations people when we attempt to exercise lawful rights under the *Constitution Act*, these events were not unique.

### ***Jim Pankiw***

In what might be described as a companion case to Mr. Ahenakew's words and the legal response of the Crown, Jim Pankiw undertook a series of hateful activities in 2002 and 2003. Mr. Pankiw was first elected in 1997 as a member of the Reform Party Caucus, winning by a margin of 220 votes in the riding of Saskatoon-Humboldt. He was re-elected as a member of the Reform Conservative Alliance in 2000, by a margin of 6360 votes.

In 2000, Mr. Pankiw public castigated the University of Saskatchewan for its hiring policies, which were intended to encourage the hiring of Aboriginal people and in doing so, work towards the objective of ensuring that the faculty and administration of the University reflected the demographics of the province the University serves. Mr. Pankiw called the University's administrators "modern day Klansmen... (hiding) behind subterfuge of political correct rhetoric and doublespeak."<sup>19</sup> The University of

Saskatchewan did not respond. A group of Aboriginal students filed a complaint with the RCMP, alleging the promotion of hatred against them. No charges were laid.

In the fall of 2002, Mr. Pankiw engaged in a public campaign against the Federation of Saskatchewan Indian Nations (“FSIN”), the umbrella political organization for First Nations in the province, calling the FSIN a “native supremacist organization” for its activities in representing Saskatchewan First Nations, in an apparent characterization of First Nations’ constitutional and treaty rights as “racist”. In December, 2002, Mr. Pankiw was involved in an altercation with a Saskatoon Cree lawyer in a local restaurant, challenging the lawyer to a fight after calling him a “racist”, and inviting the lawyer to perform a lewd act on him.

In 2003, Pankiw ran as a mayoral candidate in Saskatoon and finished third, ahead of the incumbent, and garnering in excess of 16,000 votes. In December, 2003, while still a sitting Member of Parliament, Mr. Pankiw renewed his campaign against First Nations people and what he appeared to consider “racist” preferential treatment, issuing a pamphlet<sup>20</sup>, in which he attacked the sentencing provisions under s. 718.2(e) of the *Criminal Code*, which mandate that courts consider alternatives to custodial sentences when sentencing Aboriginal offenders. That provision, along with the Supreme Court of Canada decision in *R. v. Gladue*<sup>21</sup>, acknowledge the gross over-representation of Aboriginal people in Canadian prisons. Pankiw called the provision a “get out of jail free” card, and calling First Nations activists at Oka “terrorists.” Canada Post employees picketed Pankiw’s office, stating that they did not want to deliver what they considered offensive hate literature.

Pankiw issued another pamphlet, entitled “Stop Indian Crime”<sup>22</sup>, and stating that Aboriginal people are overrepresented in the prisons because Aboriginal people commit more crimes. Complaints were again made to the RCMP, alleging the willful promotion of hatred. Again, no charges were laid.

### ***Starlight Tours***

In November, 1990, the body of Neil Stonechild, aged 17, was found on the outskirts of the City of Saskatoon. He had last been seen in the back of a police cruiser. He was wearing a thin jean jacket, was missing a shoe, and had bruising and cuts to his face later found to be “likely caused by handcuff.”<sup>23</sup> He had, evidently, frozen to death. The Saskatoon Police Service investigated his death in a most cursory fashion and determined there was no evidence of foul play. That investigation that was later found by The Honourable Mr. Justice David Wright, to be “superficial and totally inadequate” in failing to follow up on a number of suspicious circumstances surrounding his death.<sup>24</sup> His family, and his mother, Stella Bignell, in particular, called for several years for a further investigation into the circumstances surrounding his death. Witnesses came forward alleging that Neil was seen in the back of a police cruiser on the night he died.

In the meantime, Darryl Night came forward. On January 28, 2000, Night, a Cree man, was left on the outskirts of Saskatoon by two members of the Saskatoon Police Service, on a freezing cold night, wearing jeans, a jean jacket, and running shoes, all grossly inadequate to protect him from the elements. In the same time frame, two other bodies of Aboriginal men were found, frozen, on the outskirts of Saskatoon in the vicinity where Constables Hachen and Munson dropped Mr. Night. Rumours circulated about police

practices of leaving people outside of town in the deadly cold, but they were not substantiated by direct accounts. Mr. Night, however, lived to tell his tale, and Constables Hachen and Munson were ultimately convicted of forcible confinement in September, 2001.

In 2003, the Minister of Justice of the Province of Saskatchewan appointed The Honourable Mr. Justice David Wright to carry out a judicial inquiry into the death of Neil Stonechild. The Inquiry released its report in October, 2004. Wright J. found, among other things:

- a) that Neil Stonechild was last seen in (Saskatoon Police Service Constables Senger and Hartwig's custody at approximately 11:56 p.m. on November 24, 1990;
- b) that he died of cold exposure in a remote industrial area in the early hours of November 25, 1990; and
- c) that there were injuries and marks on his body that were consistent with handcuffs.<sup>25</sup>

No charges were ever laid against Constables Senger and Hartwig. This boy died because he was an Indian. His death was the result of hate, bias, and prejudice, and it was a crime.

### **Hate Crime in Canadian Law**

In 1970, the *Criminal Code* was amended to criminalize certain manifestations of hatred. The 1970 amendments were the result of 1966 recommendations of the Special Committee on Hate Propaganda (the "Cohen Committee")<sup>26</sup>, which found that there had been an increase in hate propaganda in several Canadian provinces, from 1963 onwards, "mainly anti-Jewish, anti-Negro and neo-Nazi in nature"<sup>27</sup>.

The 1970 amendments included the introduction of s. 318, which criminalizes the promotion or advocacy of genocide, s. 319(1), which criminalizes the public incitement of hatred against an identifiable group, s. 319(2), which creates the offence of the willful promotion of hatred against an identifiable group, and s. 320, which permits the seizure and forfeiture of hate propaganda. Section 320 was amended in 2001 to permit the seizure and deletion of hate speech available on the Internet.<sup>28</sup>

#### **Sections 318, 319 and 320 (Criminal Code of Canada)**

Section 318 of the *Criminal Code* provides that

- (1) **Advocating Genocide** – Everyone who advocates or promotes genocide is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.
- (2) **Definition of "genocide"** – In this section "genocide" means any of the following acts committed with intent to destroy in whole or in part any identifiable group, namely,
  - a) Killing members of the group; or

- b) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction.

The section provides further that no proceeding for an offence under the section shall be instituted without the consent of the Attorney General<sup>29</sup>. “Identifiable group”, as referred to in s. 318(2), is defined as “any section of the public distinguished by colour, race, religion or ethnic origin” in s. 318(4). Notably, this definition of “identifiable group” applies to all *Criminal Code* provisions dealing with hate propaganda<sup>30</sup> (although not for the purposes of sentencing factors, which will be discussed below in relation to s. 718.2(a)). To our knowledge, s. 318 provision has only been used once, in the unsuccessful prosecution of members of the Manitoba Knights of the Ku Klux Klan.<sup>31</sup>

Section 319 of the *Criminal Code* provides that:

**319.(1) Public Incitement of hatred** – Everyone who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace is guilty of

- a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or
- b) an offence punishable on summary conviction.

**(2) Willful promotion of hatred** – Every one who, by communicating statements, other than in private conversations, willfully promotes hatred against any identifiable group is guilty of

- a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or
- b) an offence punishable on summary conviction.

The section provides defences to the willful promotion of hatred, including the truth of statements communicated<sup>32</sup>, good faith expressions or attempts to establish by argument opinions upon a religious subject<sup>33</sup>, good faith intentions to point out matters producing or tending to produce feelings of hatred towards an identifiable group<sup>34</sup>. Section 319(3)(c) also provides that no person shall be convicted of the willful promotion of hatred if “the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true.” Section 319(7) defines “communicating” as including communicating by telephone, broadcasting or other audible or visible means. “Public place” includes any place to which the public has access as of right or by invitation, express or implied. “Statements” include words spoken or written or recorded electronically, electromagnetically or otherwise and also include gestures, signs or other representations.

Section 320(1) permits a judge to issue a warrant authorizing the seizure of copies of hate propaganda, defined under s. 320(8) as “any writing, sign or visible representation that advocates or promotes genocide or the communication of which by any person would constitute an offence under s. 319.” In 2001, s. 320 was amended to permit the seizure of hate propaganda on the Internet<sup>35</sup>.

### **Section 430(4.1) – Mischief to religious structures**

Section 430(4.1) of the *Criminal Code* provides that:

**430 (4.1)** Every one who commits mischief in relation to property that is a building, structure or part thereof that is primarily used for religious worship, including a church, mosque, synagogue or temple, or an object associated with religious worship located in or on the grounds of such a building or structure, or a cemetery, if the commission of the mischief is motivated by bias, prejudice or hate based on religion, race, colour or national or ethnic origin,

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years; or

(b) is guilty of an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months.

This section specifically addresses mischief to churches and other religious structures, and increases the maximum sentence otherwise permissible for mischief to property under section 430(4) from two years to ten.

### **Section 718.2(a)(i)**

While acts of hatred, other than those outlined in ss. 318 and 319 are not, in themselves, offences, where otherwise criminal acts are motivated by bias, prejudice, or hate, courts must take this into account in sentencing offenders. Section 718.2(a) requires that

sentencing courts must taken into consideration a variety of factors, and that a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender...

Section 718.2(a)(i) provides that:

evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation or any other similar factor...

shall be taken into account, presumably as an aggravating circumstance, for sentencing purposes. Section 724(3)(e) provides that aggravating factors in sentencing must be established by proof beyond a reasonable doubt, where there is any dispute with respect to any fact relevant to sentencing.

### ***Hate Crime Provisions and Canadian Courts***

There are very few reported cases involving the prosecution of the willful promotion of hatred, and only one case (unreported) involving the willful promotion of genocide. The prosecution of David Ahenakew is described earlier in this paper. Other prosecutions under s. 319(2) include those in *R. v. Buzzanga and Durocher*<sup>36</sup>, *R. v. Keegstra*<sup>37</sup>, *R. v. Andrew*<sup>38</sup>, *R. v. Safadi*<sup>39</sup>, and *R. v. Love*<sup>40</sup>. As the discussion of these cases below will demonstrate, the language of the provision, and courts' interpretation of the requisite elements of the offence, particularly in light of *Charter* values, mean that only the most extreme language and activities will be captured by the provision. There are more cases addressing s. 718.2(a)(i) of the *Code*, and examining whether a finding of fact can be made that "bias, prejudice or hate" motivated other criminal offences, and therefore whether they should be considered in particular sentencing decisions as aggravating factors. In many of these decisions, however, courts have demonstrated a marked hesitancy to factor purportedly racist or hateful motivations into sentencing.

#### ***Cases on the Willful Promotion of Hatred***

In *R. v. Keegstra*, the accused, an Alberta schoolteacher, taught his students for 12 years that the Holocaust had never occurred, and that Jewish people were "treacherous", "sadistic", "money loving", "power hungry" and "child killers", who had "secret societies" and conspiracies, and were responsible for most of the world's calamities, including depressions, anarchy, chaos, wars and revolutions<sup>41</sup>. He characterized his lesson material as historical fact, rather than a matter of religious belief. In order to succeed in Mr. Keegstra's classroom, students were required to reproduce these "historical facts" in their classwork and exams.<sup>42</sup>

Keegstra was charged under s. 319(2) of the *Code*. He was convicted by a jury in July 1985 and sentenced to pay a fine of \$5000. His appeal of his conviction on the grounds that s. 319(2) violated s. 2(b) of the *Charter of Rights and Freedoms*, was successful at the Alberta Court of Appeal<sup>43</sup>, but the Court of Appeal's decision was overturned by the Supreme Court of Canada

In *R. v. Andrews*, a companion case to *R. v. Keegstra*, Andrews was charged under s. 319(2) as a result of his (and his organization's, the Nationalist Party of Canada) publication of a bi-monthly pamphlet expressing white supremacist and anti-Semitic ideology, such as "Israel stinks", "Hitler was right", and claiming that the Holocaust was a "hoax".<sup>44</sup> Andrews was found guilty of the willful promotion of hatred, and sentenced to a jail term of one year. The Ontario Court of Appeal upheld the conviction and held that s. 319(2) did not violate s. 2(b) of the *Charter*. The Supreme Court of Canada dismissed his appeal, as a result of its decision in *R. v. Keegstra*.

In *R. v. Safadi*, the accused was convicted of the willful promotion of hatred for writing and delivering numerous letters to organizations and individuals throughout Prince Edward Island. The letters referred "to Christianity in general, and Jesus Christ, Mary and the Holy Spirit in particular in the most obscene and disgusting language" as well as carrying "a representation of the Star of David... signed 'the Free Jews' (and)... 'Long Live Israel'". The Court found that "they were willfully put together with the intent of leading the readers to believe that Jews have a great hatred for Christianity and all that it stands for"<sup>45</sup> in finding Mr. Safadi guilty under s. 319(2).

As in all criminal prosecutions, the burden of proof where hate crimes are alleged is onerous, and it must be discharged in relation to each element of the offence. In Canada, any person accused of a criminal offence is presumed to be innocent until proven otherwise. The onus rests upon the Crown to prove the guilt of the accused beyond a reasonable doubt. In *R. v. Lifchus*, the Supreme Court of Canada commented that proof beyond a reasonable doubt “does not involve proof to an absolute certainty, it is not proof beyond any doubt nor is it an imaginary or frivolous doubt.”<sup>46</sup> However, if the trial judge concludes that the accused is merely “probably guilty”, then she must acquit.<sup>47</sup> Even if the trial judge does not accept the evidence of the accused, if the testimony of the accused or the evidence as a whole raises a reasonable doubt, then the accused must be acquitted.<sup>48</sup> Where offences under s. 319(2) are alleged, the Crown must meet a very high evidentiary standard in proving that hatred was promoted, that it was promoted in relation to an “identifiable group”, and that it was “willful”. Courts’ characterization of what constitutes “hatred” and what behaviour can be construed as “willful” are particularly narrow. The cases discussed below demonstrate that, because of the many hurdles that must be overcome in any prosecution under s. 319(2), it is not surprising that so few charges are laid and even fewer convictions entered.

### ***Definition of “Promotion”***

The fundamental requirement of the willful promotion of hatred is the act of “promotion”. In *R. v. Keegstra*, Dickson C.J. discussed the term in the following manner:

I find that the word “promotes” indicates active support or instigation.... In “promotes” we .. . have a word that indicates more than simple encouragement or advancement. The hate-monger must intend or foresee as substantially certain a direct and active stimulation of hatred against an identifiable group.<sup>49</sup>

Hence, for an accused to be convicted for the willful promotion of hatred, he or she must have taken a very active, even forceful approach to communicating their message of hate.

### ***Definition of Hatred***

In *R. v. Keegstra*, Dickson, C.J. commented, in the context of his analysis of the provision under the *Oakes* test and s. 1 of the *Charter* (discussed further below), that the word “hatred” reduced the scope of the provision, insofar as it had to be construed as encompassing only the most severe and deeply held forms of hatred. More particularly, he commented:

Hatred is predicated on destruction, and hatred against identifiable groups therefore thrives on insensitivity, bigotry and destruction of both the target group and of the values of our society. Hatred in this sense is a most extreme emotion that belies reason; an emotion that, if exercised against members of an identifiable group, implies that those individuals are to be despised, scorned, denied respect and made subject to ill-treatment on the basis of group affiliation.<sup>50</sup>

*R. v. Andrew* re “hatred is not a word of casual connotation. To promote hatred is to instill detestation, enmity, ill will or malevolence in another.” In that decision, Cory J. noted that, “Clearly an expression must go a long way before it qualifies within the definition of s. 319(2).”

### ***“Identifiable group”***

Only those statements intended to promote hatred against an identifiable group constitute criminal offences under s. 319(2).<sup>51</sup> The act or message must be targeted towards the intentional fostering of hatred against particular members of society, as opposed to individuals.<sup>52</sup>

### ***“Other than in a private conversation”***

Section 319(2) provides that communication that amounts to the willful promotion of hatred is only an offence if it occurs “other than in a private conversation”. In *R. v. Ahenakew*, Ahenakew claimed, and continues this claim through his appeal, that his comments to Mr. Parker (the only comments for which he was found guilty) were made in the context of a private conversation, and not an interview for publication<sup>53</sup>. Irwin P.C.J. did not accept Ahenakew’s evidence in that regard, noting Ahenakew was speaking to a person he knew to be not only a reporter, but a reporter “who had written critical columns on First Nations affairs”, and Ahenakew’s own acknowledgement of his extensive experience in dealing with the media as a First Nations politician.<sup>54</sup> He concluded that “There is a substantial difference between a private conversation and an interview, a difference that you, Mr. Ahenakew, from your experience with the media, knew well.”<sup>55</sup>

### ***“Willful”***

Perhaps the most difficult aspect in the definition of hate speech under s. 319(2) is that the promotion of hatred must be “willful”. For “promoting hatred” to be “willful”, as required by the provision, courts require a high degree of intention and certainty on the part of the accused, so high that many hateful activities and communications will not be criminalized under this provision.

Many provisions under the *Code* incorporate the term “willful” in their description of the requisite mental element for various offences, but the term “willful” does not have a fixed meaning from offence to offence.<sup>56</sup> Rather, its meaning changes depending on the nature of the provision in which it is contained,<sup>57</sup> the extent to which the particular provision otherwise violates the *Charter* (for example, under s. 2(b)), necessitating that a “minimal impairment” assessment be made under s. 1 of the *Charter*, and the degree of moral blameworthiness required for the offence to be made out.<sup>58</sup> It would appear that, in the context of s. 319(2) and hate speech, the degree of *mens rea* required by the courts is very high for the offence of the “willful promotion of hatred” to be made out. The mental element required is as stringent a requirement of *mens rea*, in fact, as exists in Canadian law.

In order to find that an offence has been committed under s. 319(2), a court must find that the accused not only intended to communicate messages or expression of

information that might result in hatred on the part of others towards an identifiable group, but that the accused in fact intended that hatred towards the identifiable group result from his or her words or actions.

In the context of other *Code* offenses, the term “willful” has been taken by the courts to mean, variously, “intentionally but ... also recklessly”<sup>59</sup>, “nothing more than intentional as opposed to accidental”<sup>60</sup>, “knowingly, or deliberately”<sup>61</sup> and the required mental element where “the offence could not be made out on the basis of accidental or unknowing conduct”<sup>62</sup>. Section 429 codifies an interpretation of “willful”, for the purposes of the requisite *mens rea* for mischief, in the following terms:

**429.** (1) Every one who causes the occurrence of an event by doing an act or by omitting to do an act that it is his duty to do, knowing that the act or omission will probably cause the occurrence of the event and being reckless whether the event occurs or not, shall be deemed, for the purposes of this Part, willfully to have caused the occurrence of the event.

In *R. v. Docherty*, the Supreme Court of Canada emphasized that the term “willful” was:

Perhaps the archetypal word to note a *mens rea* requirement. It stresses intention in relation to the achievement of a purpose. It can be contrasted with lesser forms of guilty knowledge such as “negligently” or even “recklessly”.<sup>63</sup>

Wilson J. noted further, writing for the Court, that a “full *mens rea* offence under the *Criminal Code* demands that the accused have an intent to perform the acts that constitute the *actus reus* of the offence.” Despite the characterizations of the term “willful” referenced here, the Supreme Court of Canada has also suggested that certain “reckless acts” will fit within the definition of “willful”, even if “there might not have been a bad motive.”<sup>64</sup>

In *R. v. Buzzanga and Durocher*, the first reported case pertaining to s. 319(2), the Ontario Court of Appeal established that the mental element for the promotion of hatred was the intention to promote hatred, as opposed to recklessness as to hatred being brought about.<sup>65</sup> In that case, the accused were acquitted after being charged with the willful promotion of hatred after distributing pamphlets disparaging French Canadians, purporting to be written by English Canadians. The accused were French Canadian. Their intention in distributing the pamphlet was to stir up ill-will against the English Canadian majority, rather than the French Canadian minority. The Court of Appeal overturned their convictions, finding that it was necessary that the promotion of hatred be “willful” for the offence to be made out. Martin J.A. commented further that:

The insertion of the word “willfully” in [s. 319(2)] was not necessary to import *mens rea* since that requirement would be implied in any event because of the serious nature of the offence: see *R. v. Prue*...The statements, the communication of which are proscribed by [s. 319(2)] are not confined to statements communicated in a public place in circumstances likely to lead to a breach of the peace and they, consequently, do not pose such an immediate threat to public order as those falling under [s. 319(1)]; it is reasonable to assume, therefore,

that Parliament intended to limit the offence under [s. 319(2)] to the intentional promotion of hatred. It is evidence that the use of the “willfully” in [s. 319(2)] and not in [s. 319(1)] reflects Parliament’s policy to strike a balance in protecting the competing social interests of freedom of expression on the one hand, and public order and group reputation on the other hand.<sup>66</sup>

As a result of the decision in *R. v. Buzzanga and Durocher*, many commentators called for the elimination of the word “willful” from s. 319(2). The 1982 Vancouver Symposium on Race Relations and the Law, the Special House of Commons Committee on Visible Minorities, the Government of Canada in its response to *Equality Now!*, the Canadian Bar Association Special Committee on Racial and Religious Hatred and the Special Committee on Pornography and Prostitution each urged that the word “willfully” be excised.<sup>67</sup> Other calls for the legislative reform of s. 319(2) have not been successful.<sup>68</sup>

In 1990, the Supreme Court of Canada agreed with the interpretation of the term “willful” in *R. v. Buzzanga v. Durocher*. Dickson C.J.C., writing for the majority, “wholeheartedly endorse(d)” the view that “this stringent standard of *mens rea* is an invaluable means of limiting the incursion of s. 319(2) into the realm of the acceptable (though perhaps offensive and controversial) expression.”<sup>69</sup> Dickson C.J.C. acknowledged that the requirement “imports a difficult burden for the Crown to meet” but found that this burden was necessarily imposed as a means of minimizing the impairment of freedom of speech<sup>70</sup> (the concerns around which are discussed further below).

While the *mens rea* requirement established in *R. v. Buzzanga and Durocher*, has not been diminished through the legislature, it has been moderated somewhat through the courts. In *R. v. Harding*, the Ontario Court of Appeal elaborated on the required mental element under s. 319(2), expanding the definition of “willful” in that case to include “willfully blind”. The appellant was a Christian pastor charged under s. 319(2), after distributing pamphlets and leaving telephone messages at a telephone number that he invited members of the public to call. The substance of the messages in the pamphlets and telephone messages was that the Koran and the Muslim religion were full of hate and violence, that Muslims had committed horrific acts of violence in other countries, and that Muslim was a false religion.<sup>71</sup> With respect to the pamphlets, at his trial, Pastor Harding testified that “when he prepared the pamphlet, he felt that the information within it was accurate, that it was not intended to promote hatred against Muslims, and that he did not foresee that this was its probable effect.”<sup>72</sup>

Weiler, J.A. cites other instances where Canadian courts found that restrictions on the freedom of expression where the *mens rea* of other offences<sup>73</sup>, and then expands the scope of the *mens rea* requirement to include not merely the most stringent requirement of mental elements, intent, but also “knowledge” and “willful blindness”. She writes:

Willful blindness is more than mere recklessness. Criminal law treats willful blindness as equivalent to actual knowledge because the accused ‘knew or strongly suspected’ that inquiry on his part respecting the consequences of his acts would fix him with the actual knowledge he wished to avoid.... Willful blindness satisfies the stringent *mens rea* requirement for the offence of willfully promoting hatred and does no violence to Dickson C.J.C.’s definition of the mental element for the offence in *Keegstra*, *supra*.<sup>74</sup>

The Court of Appeal's decision that willful blindness meets the *mens rea* requirement for the offence of promoting hatred means that those who do not recognize their own words or activities as hateful, or promoting hate, will no longer have a defence based in their own ignorance in this regard. This development in the caselaw is significant, in that it permits, or should be seen to permit, the successful prosecution of those who engage in public, hateful discourse, and claim as a defence that this discourse is in the public good.

### ***The Freedom of Expression - Section 2(b) Considerations***

In *R. v. Keegstra*, the appellant argued that s. 319(2) violated s. 2(b) of the *Charter* in inhibiting his right to freedom of expression. By 1990, it was established law that any activity that conveys or attempts to convey a meaning through non-violent expression, and has expressive content, falls within the scope of the word "expression" as found in the guarantee of the freedom of expression, and therefore receives *prima facie* protection.<sup>75</sup> In criminalizing certain communications that convey meaning, s. 319(2) was found to violate s. 2(b) of the *Charter*.

The Court in *R. v. Keegstra* rejected the argument that communications intended to promote hatred against identifiable groups were not protected by s. 2(b) because they were expression through a violent form, finding that the "non-violent" requirement in invoking to s. 2(b) protection referred solely to expression communicated directly through physical harm. The Court also refused to interpret the scope of s. 2(b) in light of ss. 15 and 27 of the *Charter*, or international agreements to which Canada was a signatory.

Dickson, C.J., writing for the majority, and McLachlin, J. (as she was then), writing in dissent, agreed that s. 319(2)'s violation of s. 2(b) should be weighed under the various contextual values and factors under s. 1 of the *Charter*, as set out in *R. v. Oakes*<sup>76</sup>. They each differed, however, on the results of a s. 1 analysis. Dickson, C.J., held that there was a pressing and substantial objective fulfilled by s. 319(2), citing the harm occasioned to members of groups targeted by hate propaganda, and the pressing concern of the influence of hate speech on society at large, including hate propaganda potential to "attract individuals to its cause, and in the process create serious discord between various cultural groups in society".<sup>77</sup> He noted, further, that "the alteration of views held by the recipients of hate propaganda may occur subtly, and is not always attendant upon conscious acceptance of communicated ideas."<sup>78</sup> In assessing whether the objectives of the provision were "pressing and substantial", Dickson C.J. went on to cite Canada's obligations under the United Nations' *International Convention on the Elimination of All Forms of Racial Discrimination* and the *International Covenant on Civil and Political Rights*<sup>79</sup>, in concluding that it was not only compatible with Canada's obligations as a signatory to these two treaties, but obligatory, to prohibit hate promoting expression.<sup>80</sup>

Dickson C.J. rejected arguments that the objectives of the provision might be confounded by the criminalization and "martyrdom" of promoters of hatred, stating that, instead, members of "identifiable groups" would gain comfort from the prosecution of those who would promote hatred against them. He concluded that he was "unable to

see the protection of such expression as integral to the democratic ideal so central to the s. 2(b) rationale.”<sup>81</sup>

McLachlin J., in her dissenting opinion (La Forest and Sopinka JJ. concurring), agreed that the Crown had met s. 1’s burden of demonstrating a pressing and substantial objective, but concluded that s. 319(2) could have a chilling effect on the expression of law-abiding citizens, and that it was unclear that the provision would be an effective means of curbing hate-mongering. While lauding the goal of the provision, she concluded that bringing the heavy hand of the criminal law to bear in response to hate speech did not minimally impair citizens’ rights under s. 2(b) to freedom of expression.

In *R. v. Ahenakew*, the court found that much of Ahenakew’s December 13, 2002 statements, did not amount to willful promotion of hatred under s. 319(2) of the *Criminal Code*. Irwin, P.C.J. took judicial notice of the facts that the Jews did not cause the Second World War, and that they were the victims of Nazi atrocities, and characterized Ahenakew’s suggestion that Jews had initiated events and willingly caused the death of six million other Jews, as “obscene”.<sup>82</sup> He commented, however, that Ahenakew had the right “not only to be honestly mistaken but to simply lie and fabricate stories blaming Jews for causing the Second World War,” and that “such erroneous statements only become a criminal offence if they are used as the basis of promoting hatred against an identifiable group.”

With respect to Ahenakew’s first comment to the assembled attendees at the 2002 conference, that “The Second World War was created by Jews”, which Ahenakew claimed in his testimony he formed this belief based on comments made to him by German citizens shortly after the end of the Second World War, Irwin P.C.J. concluded that:

while I do not believe your evidence, Mr. Ahenakew, I am left with a reasonable doubt as to your guilt after considering your evidence in the context of all of the evidence presented and in particularly the nature of your presentation, its lack of focus and the slight possibility that you did not intend by your statements to foster hatred against Jews.

With respect to Ahenakew’s later comments to James Parker, Irwin, P.C.J. found that only some of the comments amounted to the willful promotion of hatred (as identified earlier in this paper). He concluded that the remainder of Ahenakew’s comments<sup>83</sup>, while they may have been “distortions, unbalanced opinions, bigoted outbursts and outright lies,” did not “meet the very stringent requirements of section 319(2) of the *Criminal Code*”<sup>84</sup>, because the Crown had failed to prove that the comments amounted to the willful promotion of hatred.<sup>85</sup> Irwin P.C.J. did not specify which of what he termed the “very stringent elements” of the offence were not proven by the Crown.

### ***Discussion of the Promotion of Hatred Against Aboriginal people***

As the cases demonstrate, it is very difficult to succeed in demonstrating that the various elements that must be proven to make out the willful promotion of hatred. Under existing law, a prosecution under s. 319(2) against, for example, charges laid as a result of the incidents described in this paper involving MP Jim Pankiw would be unlikely to result in a conviction. Given the Dickson CJ’s strong words in both *R. v. Keegstra* and *R. v.*

*Andrews* concerning the meaning of the word “hatred” captured by the provision, it is highly improbable that a Canadian court would consider his characterization of First Nations leaders as “racists”, and his calls for an end to government policies and practices that comply with constitutional and other legal requirements in respect of Aboriginal peoples. More likely, the defence that the messages in the pamphlets he distributed it “were relevant to any subject of public interest, the discussion of which was for the public benefit,”<sup>86</sup> would be successful, and the tenor of the debate Pankiw intended to generate considered within the (non-criminal) “rough and tumble of public debate”, rather than as (criminal) “brutal, negative and damaging attacks upon identifiable groups”<sup>87</sup>. In any event, no charges were ever laid against Mr. Pankiw.

The substance of Mr. Pankiw's message, that Canada's Constitution ought not to be respected in relation to an identifiable group of people, is a message that is conveyed through many other media, including some national newspapers. This predictably results in hatred, discrimination and resentment towards Aboriginal people on the part of many Canadians. As Dickson, C.J.C. noted in *R. v. Keegstra*, for it to be criminal, the intention of the promoter of hate with respect to members of an “identifiable group” must be:

that those individuals are to be despised, scorned, denied respect and made subject to ill-treatment on the basis of group affiliation.<sup>88</sup>

Public statements by political leaders insisting that Aboriginal people's constitutional and treaty rights are unjustified, and mischaracterizing treaty and constitutional rights as a form of “special” (and therefore discriminatory) treatment, conferring benefits unjustifiably denied all other Canadians, leads quite naturally to profound resentment on the part of many Canadians. The natural result of that resentment in some individuals is hatred. One need only look at the aftermath of the Supreme Court of Canada's decision in *Marshall (II)*, at Burnt Church to see the type of violence, to say nothing of scorn, disrespect, and ill-treatment, that can arise against members of our “identifiable group”, “on the basis of (our) group affiliation” through the exercise of our legal rights as members of that group.

Weiler J.A.'s inclusion of “willful blindness” in *R. v. Harding* in the range of acceptable levels of *mens rea* justifying a conviction under s. 319(2), permits the characterization of the messages of Pankiw, and others, for their vehement public calls for the elimination of Aboriginal and treaty rights recognized under s. 35 of the *Constitution Act*. Pankiw called First Nations' leaders “racist” for calling for respect for the Constitutional entitlements of Aboriginal peoples, which were already affirmed by the courts. Pankiw *knew* or ought to have known, that his message would generate resentment and hatred towards Aboriginal people on the part of some of the recipients of his messages.

What other members of an “identifiable group” must defend themselves from violent attacks when they exercise their constitutional rights, with no charges arising against their attackers? What other “identifiable group” has its legal rights challenged and disavowed through almost daily newspaper articles and editorials in national newspapers, and by elected political leaders, resulting, quite predictably in hatred, discrimination, and resentment on the part of many Canadians towards its members?

In Darryl Night's case, the officers were convicted of unlawful confinement, contrary to s. 279(2) of the *Code*. In its sentencing submissions, the Crown argued that their offence

was motivated by “bias, prejudice or hate based on race”, and that this motivation should be considered an aggravating factor, as required under s. 718.2(a)(i) of the *Code*. In his sentencing decision, Scheibel J. noted that:

This issue (of race) has raised some serious concerns during the course of the trial. There have been allegations that the unlawful confinement of Night was related to his race. However, this has been disputed by the accused and their counsel.

For the purposes of the sentencing process, s. 723(1) of the *Code* permits the admissibility of hearsay evidence at a sentencing hearing. Nevertheless, where there are disputed facts of any aggravating circumstances, s. 724(3)(e) requires that “the prosecutor must establish, by proof beyond a reasonable doubt, the existence of any aggravating fact...”.<sup>89</sup>

Once again, the import of hatred, bias and discrimination were excised from the application of the criminal law through the skepticism of police, the Crown and the Court.

While it is difficult, under the law as we have outlined it above, to demonstrate that the words of Pankiw and many others constitute the willful promotion of hatred, it is not impossible. What is most evident in a review of the case law and various incidents involving Aboriginal people is that, despite the provisions in the *Criminal Code* intended to deal with hatred, in its various manifestations, charges are seldom laid under those provisions. We have yet to locate a single case where an accused has been charged with the willful promotion of hatred against Aboriginal people. Yet we know that such hatred exists, and that it is promoted. In the very few cases where hateful motivated has been presented by the Crown as a motive for an offence, and therefore an aggravating factor for sentencing purposes, it is not accepted by the courts.

### ***The Equal Protection of the Law: Section 15 of the Charter and Hate Provisions in the Criminal Code***

In Canada, charges are seldom laid alleging hate crimes. Hateful motive is rarely acknowledged as a motive for offences by courts in sentencing decisions. As demonstrated by our discussion of the *Code* provisions and attendant case law, a combination of discretion on the part of Attorneys General, Crown attorneys, and police, and skepticism on the part of the courts in response to allegations of hatred, mean that in all but the most extreme cases (and even in many extreme cases), hateful activities and communications go unpunished by Canadian courts.

Section 15(1) of the *Charter of Rights and Freedoms* provides that:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex age or mental and physical disability.

Section 15(2) provides that:

Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals

or groups including those that the disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Section 15 applies solely to the application of Canadian law, and requires that laws created by legislatures and the courts comply with its basic premise of equality. Most importantly for our discussions here, it does not criminalize discrimination. Its purpose, according to the Supreme Court of Canada, is to prevent:

The violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.<sup>90</sup>

In so doing, s. 15 signals the value which Canadian society places on protecting the dignity of its citizens through the prevention of “disadvantage, stereotyping or... prejudice”. The question, remains, however, as to what impact, if any, s. 15 has or should have on the *Criminal Code* provisions relating to hatred. Should the most extreme manifestations of discrimination, through hateful activities and communications, be assessed for criminal culpability in light of s. 15?

It is clear from the events described in this paper that the provisions of the *Criminal Code* intended to protect all people in Canada from the poisonous and devastating effects of hatred, prejudice and bias, are only reluctantly considered by courts and rarely employed, by police and Crown Attorneys. The discretion imbedded at every stage of the investigative and prosecutorial processes leave many opportunities for those who do not recognize hatred when they see it to derail cases involving hatred and prevent them from proceeding to a trial stage. In those rare cases where trial courts and sentencing judges hear allegations of criminal hatred, bias and prejudice, the skepticism that we witness with respect to our constitutional rights re-appears. That skepticism is again evident when it comes time to decide whether the hatred, prejudice and bias that has been directed at our families, our children, and our communities, or whether that hatred is really just a legitimate part of public discourse.

It is difficult to inject s. 15 analyses into the pockets of discretion imbedded in the investigation and prosecution of criminal offences. The criminal law is a blunt and largely ineffective tool for social reform. Be that as it may, there is no question that in the instances described here, hatred, bias and prejudice has both motivated the actions of the perpetrators and been promoted through their actions and words. Those perpetrators have acted willfully or with willful blindness. The silence on the part of the Canadian public, police, Crown, and courts in response to these hateful acts and words is not only saddening – it is discriminatory.

## REFERENCES

- <sup>1</sup> The authors would like to thank Emily Morton (Ruby & Edwardh, Barristers & Solicitors) for her kind assistance and helpful comments on an earlier draft of this paper.
- <sup>2</sup> Those in attendance included First Nations people, representatives of the College of Physicians and Surgeons, the College of Dentistry, Amnesty International, and the World Health Organization: *R. v. Ahenakew*, [2005] SKPC File No.76.
- <sup>3</sup> *Ibid.*, at para. 8.
- <sup>4</sup> *Ibid.*, at para. 11.
- <sup>5</sup> R.S.C. 1985, c. C-46.
- <sup>6</sup> *R. v. Ahenakew*, *supra*, at para. 20.
- <sup>7</sup> *Ibid.*, at para. 21.
- <sup>8</sup> Donald E. Worme, Q.C.: “The truth is that I know nothing other than that passed on to me by those wiser than me. In this instance, I owe much of what I know to my Moshum, Edward Worme, Sr., and elders like him who took pity on me for my ignorance.”
- <sup>9</sup> Section 318(1).
- <sup>10</sup> Section 318(2).
- <sup>11</sup> Section 718.2(a)(i).
- <sup>12</sup> Section 430(4.1).
- <sup>13</sup> [1999] 3 S.C.R. 456 (S.C.C.).
- <sup>14</sup> *R. v. Marshall*, *supra*, at paras. 2, 4.
- <sup>15</sup> CBC News, *Indepth: Fishing – The Marshall Decision*, May 9, 2004 at [www.cbcnews/background/fishing/marshall.html](http://www.cbcnews/background/fishing/marshall.html).
- <sup>16</sup> *R. v. Marshall*, [1999] 3 S.C.R. 533 (S.C.C.).
- <sup>17</sup> *Supra*, at para. 45.
- <sup>18</sup> Prof. Peter Russell, “First Nations for the First Court”, in *Globe and Mail*, October 11, 2005, p. A19.
- <sup>19</sup> James Parker, *Star Phoenix*, April 11, 2002.
- <sup>20</sup> A copy of this pamphlet is attached, as Appendix “A” to this paper, along with other material distributed by Mr. Pankiw during this period.
- <sup>21</sup> [1999], 1 S.C.R. 688, 133 C.C.C. (3d) 385, 23 C.R. (5<sup>th</sup>) 197 (S.C.C.).
- <sup>22</sup> A copy of this pamphlet is attached to this paper as Appendix “B”.
- <sup>23</sup> The Honourable Mr. Justice David H. Wright, *Report of the Commission of Inquiry into Matters Relating to the Death of Neil Stonechild* (Saskatchewan Department of Justice, 2004) [hereinafter “*Stonechild Commission*”], at p. 212.
- <sup>24</sup> *Ibid.*,
- <sup>25</sup>
- <sup>26</sup> *Report to the Minister of Justice of the Special Committee on Hate Propaganda in Canada*, (Ottawa: Queen’s Printer, 1966) at 11-25.
- <sup>27</sup> *Ibid.*, at p. 2.
- <sup>28</sup> Bill C-36, *An Act to amend the Criminal Code, the Official Secrets Act, the Canada Evidence Act, the Proceeds of Crime (Money Laundering) Act and other Acts, and to enact measures respecting the registration of charities, in order to combat terrorism*, 1<sup>st</sup> Sess., 37<sup>th</sup> Parl., 2001 (assented to 18 December 2001, S.C. 2001, c. 14).
- <sup>29</sup> S. 318(3) provides that “no proceeding for an offence under this section shall be instituted without the consent of the Attorney General”. S. 2 defines “Attorney General” as the “Attorney General of the province under which proceedings are taken and includes his lawful deputy”.
- <sup>30</sup> This definition of “identifiable groups” was expanded to include any section of the public distinguished by sexual orientation in 2004 in Ch. 14 (Bill C-250), *An Act to amend the Criminal Code (hate propaganda)*, assented to April 29, 2004.
- <sup>31</sup> The case is unreported, but see Francine Aumueller, “Hate Propaganda Law and Internet-Based Hate”, *Crim. L.Q.* 91, at 93, citing Senaka K. Suriya, “Combating Hate? A Sociological Discussion on the

Criminalization of Hate in Canada (M.A. Thesis, Carleton University, Department of Law, 1998) [unpublished] at p. 21.

<sup>32</sup> Section 319(2)(a).

<sup>33</sup> Section 319(2)(b).

<sup>34</sup> Section 319(2)(d).

<sup>35</sup> *Supra*.

<sup>36</sup> (1979), 49 C.C.C. (2d) 369 (S.C.C.).

<sup>37</sup> [1990] 3 S.C.R. 000, rev'g (1988), 60 Alta. L.R. (2d) 1.

<sup>38</sup> [1990] 3 S.C.R. 870 (S.C.C.)

<sup>39</sup> [1993] 108 Nfld. & P.E.I.R. 66 (PEI TD).

<sup>40</sup> [2003] O.J. No. 5597 (Ont. Ct. Jus.).

<sup>41</sup> [1990] 3 S.C.R. 697, 61 C.C.C. (3d) 1 (S.C.C.) at pp. 12, .

<sup>42</sup> *Ibid*.

<sup>43</sup> (1988), 43 C.C.C. (3d) 150; 65 C.R. (3d) 289 (Alta. C.A.).

<sup>44</sup> [1990] 3 S.C.R. 870 (S.C.C.) at para. 6.

<sup>45</sup> *R. v. Safadi*, [1993] Nfld. and P.E.I.R. 66.

<sup>46</sup> [1997] 3 S.C.R. 320, at para. 36. (S.C.C.)

<sup>47</sup> *R. v. Avetyan*, [2000] 2 S.C.R. 745 (S.C.C.), at para. 14; *R. v. Starr*, [2000] 2 S.C.R. 144 (S.C.C.), at para. 242.

<sup>48</sup> *R. v. W.(D.)*, [1991] 1 S.C.R. 742 (S.C.C.).

<sup>49</sup> *R. v. Keegstra*, *supra*, at p. 59.

<sup>50</sup> *Supra*, at pp. 59-60.

<sup>51</sup> *R. v. Keegstra*, *supra*; *R. v. Ahenakew*, *supra*, at para. 6.

<sup>52</sup> *R. v. Keegstra*, *supra*, at p. 59.

<sup>53</sup> *R. v. Ahenakew*, *supra*, at para. 12. Ahenakew also claimed in his testimony that his comments were “prompted or affected by diabetes, wine or change in medication.” Irwin, P.C.J., in rejecting this claim, found that Ahenakew’s “appearance, demeanor and delivery belied that defence.” (at para. 22)

<sup>54</sup> *Supra*, at paras. 12, 14.

<sup>55</sup> *Ibid.*, at paras. 12, 16.

<sup>56</sup> *R. v. Buzzanga and Durocher* (1979), 49 C.C.C. (2d) 369 (Ont. C.A.).

<sup>57</sup> *Ibid*.

<sup>58</sup> *R. v. Vaillancourt*, [1987] 2 S.C.R. 636 (S.C.C.).

<sup>59</sup> In the case of s. 446, in *R. v. Toma*, 2000 B.C.C.A. 494 at para. 15.

<sup>60</sup> Also in reference to s. 446, in *R. v. Butler* (1984), 42 C.R. (3d) 268 (Ont. Co. Ct.), at pp. 272-273;

see also *R. v. Tese*, [1968] 1 C.C.C. 363 (Ont. C.A.); *R. v. Muma* (1989), 51 C.C.C. (3d) 85 (Ont. C.A.).

<sup>61</sup> In reference to s. 430 of the *Criminal Code*, in *R. v. Hnatiuk*, 2000 ABQB 314, at para. 46.

<sup>62</sup> In reference to s. 139 of the *Criminal Code*, in *R. v. Guess*, 2000 B.C.C.A. 547, at para. 30.

<sup>63</sup> [1989] 2 S.C.R. 941 (S.C.C.), at p. 947, in relation to the offence of breach of probation.

<sup>64</sup> *R. v. Battar*, [1989] 2 S.C.R. 1429 (S.C.C.).

<sup>65</sup> *R. v. Buzzanga and Durocher* (1979), 49 C.C.C. (2d) 369 (Ont. C.A.).

<sup>66</sup> *Supra* at pp. 381-2.

<sup>67</sup> Summarized in P. Rosen, *Hate Propaganda* (Ottawa: Library of Parliament, 1996), at p. 6, and cited in *R. v. Keegstra*, *supra*.

<sup>68</sup> See, for example, MP Margaret Michell’s 1993 proposed amendment to s. 319, which included removing the *mens rea* requirement from s. 319(2) in *Bill C-41, An Act to amend the Criminal Code (hate propaganda)*, 3d Sess., 34<sup>th</sup> Parl., 1993 (1<sup>st</sup> reading 5 May 1993).

<sup>69</sup> *R. v. Keegstra*, *supra*, at p. 58.

<sup>70</sup> *Ibid*.

<sup>71</sup> *R. v. Harding* (2001), 57 O.R. (3d) 333 (Ont. C.A.), at paras. 6-25.

<sup>72</sup> *Supra*, at para. 9.

<sup>73</sup> Weiler J.A. writes, at para. 64, that: “The appellant submits that willful blindness cannot satisfy the stringent *mens rea* requirement of an offence that limits freedom of expression. That is not so. The offence of knowingly selling obscene material without lawful justification under s. 163(2) of the *Criminal Code* limits freedom of expression, but, like *Keegstra*, *supra*, it is save by s. 1. See *R. v. Butler*, [1992] 1

S.C.R. 452. Although s. 163(2) limits freedom of expression, the Supreme Court held in *R. v. Jorgensen*, [1995] 4 S.C.R. 55 that willful blindness satisfies the *mens rea* requirement for this offence.

<sup>74</sup> *Supra*, at para. 6.

<sup>75</sup> *Irwin Toy v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927.

<sup>76</sup> [1986] 1 S.C.R. 103 (S.C.C.).

<sup>77</sup> *R. v. Keegstra, supra*, at para. 62.

<sup>78</sup> *Ibid.*

<sup>79</sup> 999 U.N.T.S. 171 (1965).

<sup>80</sup> *R. v. Keegstra, supra*, at para. 73.

<sup>81</sup> *Supra*, at paras. 90 and 92.

<sup>82</sup> *R. v. Ahenakew, supra*, at para. 9.

<sup>83</sup> At para. 18, Irwin P.C.J., identifies those statements that do not constitute the willful promotion of hatred:

- “1. The Jews own damn near all of Germany. Prior to the war. That that’s how Hitler came in, that he was gone make damn sure that the Jews didn’t take over Germany or Europe.
2. Well, Jews, Jews owned the goddam world and look at what they’re doing. They’re killing people in the Arab countries. I was there, I was there.
3. They owned the banks, they owned the factories, they owned everything. They loaned money out to the peasants knowing damn well that they can’t pay it back so they took their land.
4. Well, because I saw the Jews kill people in, in the Egypt when I was over there. And the Palestinians, the Egyptians, the, the Arabs, generally, eh. I saw them fucking dominate everything.
5. Look at a small little country like that and everybody supports them, the States, who in the hell owns many of the banks in the States, many of the corporations, many, well, look it here in Canada, ASPER.
6. Anyway, anyway, to hell with the Jews. I can’t stand them and that’s it.”

<sup>84</sup> *Ibid.*, at paras, 18-19.

<sup>85</sup> *Ibid.*

<sup>86</sup> A defence afforded by s. 319(3)(c).

<sup>87</sup> *R. v. Keegstra, supra*, at p. 61.

<sup>88</sup> *Supra*, at pp. 59-60.

<sup>89</sup> *R. v. Munson*, [2002] 212 Sask. R. 305 (SKQB), at paras. 22-23.

<sup>90</sup> *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, 170 D.L.R. (4<sup>th</sup>) 1 (S.C.C.), at para. 4.