



*Manitoba  
Department of Justice  
Public Prosecutions*

*Guideline No. 2:HAT:1*

*Policy Directive*

*Subject: Hate Motivated Crime  
Date: June, 2008*

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**POLICY STATEMENT:**

Hate motivated crimes are serious offences and there is a strong public interest in their prosecution. This policy provides direction to Crown attorneys regarding steps to be taken during the course of a prosecution of a hate crime. Even if criminal prosecution is not feasible, the public interest may require the Crown attorney to cooperate with respect to other societal responses which may be available (e.g. human rights legislation).

**Activities to which this policy applies**

Hate crimes are offences that involve the intentional selection of a victim/victim group based either entirely or in part on the offender's prejudice toward the victim based on characteristics such as race, religion, ethnic origin or sexual orientation.

There are specific hate-crime offences in the *Criminal Code*:

- Section 318 creates an offence for advocating or promoting genocide against an identifiable group. An "identifiable group" is defined in section 318(4) as any section of the public distinguished by colour, race, religion, or sexual orientation.
- Section 319(1) creates an offence for communicating statements in any public place that incite hatred against any identifiable group where such incitement is likely to lead to a breach of the peace.
- Section 319(2) creates an offence for communicating statements, other than in private conversation, that willfully promote hatred against an identifiable group.
- Section 430(4.1) is a special mischief offence that relates to damaging religious property where the motivation for the offence is bias, prejudice or hate based on religion, race, colour or national or ethnic origin.

NOTE: Offences need not be specifically designated as hate crimes in order to qualify as such. Other criminal offences could be hate crimes if they are motivated by hate (e.g. "gay bashing", racist spray painting).

This policy applies to all hate motivated crime.

### **Responding To Hate Motivated Activity**

Counsel within Manitoba Justice (Prosecutions and Civil Legal Services<sup>1</sup>) have developed considerable expertise in responding to hate motivated activity. Prior to advising the police with respect to the laying of charges in hate crime cases, the Crown attorney should consult with the counsel from Civil Legal Services who advises the Manitoba Human Rights Commission and the General Counsel within Prosecutions who has been assigned to hate crimes prosecutions to determine whether criminal charges or another departmental response is appropriate.

The Prosecution policy on the Staying and Laying of Charges (2:INI:1.1) establishes a twofold test to proceed with charges:

1. Whether or not there exists a reasonable likelihood of conviction, and
2. Whether or not there exists a public interest in proceeding.

In almost all cases, public interest considerations would apply in favour of prosecution.

With respect to the requirement for reasonable likelihood of conviction, it is especially important for the Crown attorney to be satisfied that this test is met before hate-related charges are laid. Bringing forward a weak case that results in a stay of proceedings or acquittal can have serious negative ramifications: the trial will provide the accused with an opportunity to espouse his/her views; the accused may be portrayed as a martyr; an unsuccessful prosecution may be seen as exonerating or justifying the views/acts of the perpetrator. These consequences tend to be magnified by the media attention that normally accompanies these cases. Before engaging in consultations with General Counsel and Civil Legal Services with respect to the laying of charges, the Crown attorney should have received and reviewed all written statements of witnesses, copies of the appropriate documents and/or recordings and other evidential requirements.

Where charges under either s. 318 or 319 of the *Criminal Code* are considered, counsel from Constitutional Law Branch should also be involved in the consultations. These offences infringe freedom of speech, can raise delicate *Charter* issues and are usually very contentious. The prosecution has a heavy burden under both s. 318 and s. 319. Cases which illustrate the elements which must be proved are referred to below under the heading “Useful Authorities – Proof of the Offence”. In these cases, consultations are also required with respect to the following issues:

a) *Gathering of evidence*

Consideration has to be given to the use of specific search warrants under s. 320 and 320.1 for the gathering of evidence before charges are authorized. Section 320 involves the seizure of hate crime literature and s. 320.1 involves a warrant for obtaining hate crime evidence stored on a computer and/or shutting down an Internet site. The consent of the Attorney General is required for the issuance of a search warrant under each of these sections.

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<sup>1</sup> Counsel from Civil Legal Services provides legal advice to the Manitoba Human Rights Commission (MHRC) and has extensive experience with the Manitoba *Human Rights Code* and other issues relating to hate activity. The MHRC also has its own in house counsel.

- b) *Determining whether to proceed by indictment or summary conviction with respect to a charge under s. 319.* (Charges under s. 318 are straight indictable.)

Charges under both sections 318 and 319(2) require the consent of the Attorney General prior to instituting proceedings. However, a charge under s. 319(1) does not. Similarly, other hate motivated crime that is charged under one of the general offences of the *Code* does not require the consent of the Attorney General.

Not all incidents of bigotry and intolerance will come within the scope of criminal activity. There may be other avenues that can be taken to deal with their occurrence. Manitoba's *Human Rights Code* prohibits discriminatory practices with respect to employment or the provision of any service, accommodation, facility, good, right, licence, benefit, program or privilege available or accessible to the public or to a section of the public, unless bona fide and reasonable cause exists for the discrimination. Discrimination is prohibited on the basis of:

- (a) ancestry, including colour and perceived race;
- (b) nationality or national origin;
- (c) ethnic background or origin;
- (d) religion or creed, or religious belief, religious association or religious activity;
- (e) age;
- (f) sex, including pregnancy, the possibility of pregnancy, or circumstances related to pregnancy;
- (g) gender-determined characteristics or circumstances other than those included in clause (f);
- (h) sexual orientation;
- (i) marital or family status;
- (j) source of income;
- (k) political belief, political association or political activity;
- (l) physical or mental disability or related characteristics or circumstances, including reliance on a dog guide or other animal assistant, a wheelchair, or any other remedial appliance or device.

Under s. 22(1) of *The Human Rights Code*, a person may file a complaint alleging that another person has contravened the *Code*. In addition to addressing acts of discrimination which may directly or indirectly impact on persons, s. 18 of the *Human Rights Code* prohibits discriminatory speech in certain circumstances. As well, there is a prosecution section in the *Human Rights Code* which is rarely used. Where a criminal prosecution is not available but the facts indicate that proceedings under *The Human Rights Code* may be appropriate, the Crown attorney should consult with counsel from Civil Legal Services to determine whether Human Rights proceedings are warranted.

The *Canadian Human Rights Act* (federal legislation) applies to matters "within the purview of matters coming within the legislative authority of Parliament". Section 13 is a strong, frequently utilized tool for challenging hate messages that appear on recorded telephone devices or, more importantly, on the Internet. Repeated and successful proceedings against Ernst Zundel and other on-line hate advocates have been of significant value. Counsel from Civil Legal Services

is able to assist in determining whether the Crown attorney should refer a case to the Commission for investigation under the *Canadian Human Rights Act*.

The use of community-based justice programs for hate motivated offences is generally inappropriate given the nature and impact of these offences. The Prosecution policy on Extra-Judicial Community-Based Justice Programs (5:COM:1.1) specifically provides that hate crimes or racially motivated offences should only be referred for community-based justice programs if there are exceptional circumstances. In addition, before such a referral can be made, a Senior Supervising Crown Attorney must be consulted and a written note setting out the exceptional circumstances must be placed in the file and in PRISM.

### **Controversial Issues Alert**

Hate crimes almost always attract media interest. In the past, Senior Management has requested that it be provided with a CIA (Controversial Issues Alert) in any case that has already or is likely to garner media attention. In addition, hate crimes will generally qualify as “sensitive cases” under the Sensitive Cases Policy (2:REP:1) thus triggering certain reporting requirements.

### **Consultation with Victims**

Due to the sensitive nature of these offences, Crown attorneys should consult with the direct victim of a hate crime in order to obtain the victim’s input on decisions relating to the prosecution and to ensure that the victim is advised of developments in the case as required by *The Victims’ Bill of Rights* and the Victims Policy (2:VIC:1). Where there is no direct victim (e.g. where the charge is under s. 319), consultation is not practical.

### **Information Sharing with the Target Group**

Hate crime has a general terrorizing effect on the entire target group. Organizations representing the targeted group will often be drawn into the court process (e.g. representatives of an organization representing the target group may attend court because of their interest in the case or to provide support to the victim, the news media may approach members of these organizations for comments regarding the case, etc.). Crown attorneys should be sensitive to the needs of the target group generally as they are, in a very real sense, victims of the offence as well. Where an organization representing the targeted group has come forward to express an interest in a prosecution, the Crown attorney responsible for the case should be available to explain any decision taken in the case.

While the Crown attorney should be mindful of the target group’s interest in obtaining information about the case, there should not be any sharing of information about the case before a decision is made on whether charges will or will not be laid. The Crown attorney must assess whether there is a reasonable likelihood of conviction without interference. Representatives of the target group can be advised of the decision, but they should not be seen to have input into the decision to charge or not to charge. If the decision is that no charges will be laid, the Crown attorney should be available to explain that decision.

Representatives of these groups can often provide valuable information regarding the effect of the crime on the target group. At the sentencing stage of a case, it may be beneficial for the Crown attorney to solicit this information from the target group.

### **Bail**

When charges under sections 318 or 319 are laid, bail conditions should include measures that prevent further dissemination of the perpetrator's views. These might include a condition that the accused not have access to a computer or other means of communication that were reportedly used to distribute hate messages. In addition, consideration should be given to bail terms with no contact provisions (both with respect to others with whom the accused is alleged to have associated in promoting his views and with members of the targeted group), reporting requirements and area restrictions. It may be necessary to consider a warrant for the arrest of the accused in order to allow appropriate conditions to be imposed.

For other hate-motivated crime, the accused should usually be arrested in order to obtain bail terms that will, among other things, prevent a repetition of the offence and contact with the victim.

### **Sentencing**

Section 718.2(a)(1) of the *Criminal Code* requires a court to consider 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 as an aggravating circumstance on sentence.

The harmful effects of hate crimes are broad:

- *Impact on the Individual:* Hate crimes have a tremendous impact on the individuals who are victimized. In addition to the psychological and emotional harm caused by hate crime, and its repercussions on the identity and feelings of self-worth of the victim, the degree of violence involved in hate-motivated offences is often more extreme than in non-hate crimes.
- *Impact on the Target Group:* Hate crime makes all members of the target group feel vulnerable to victimization and thereby has a general terrorizing effect on the entire group to which the victim belongs.
- *Impact on Other Vulnerable Groups:* Hate crimes have a negative impact on other vulnerable groups that share minority status or identify with the targeted group, especially if the hate motivation is based on an ideology or doctrine that covers a number of the groups that live within the community.
- *Impact on the Community as a Whole:* This, perhaps, is the greatest evil of hate crime. In a multicultural society like Canada, which celebrates diversity and encourages all groups to live together in harmony and equality, hate crime is a negation of the fundamental values of Canada.

Given the effects of hate crime on the victim, target groups and the wider community, the presentation of evidence relating to such effects may be particularly helpful at the sentencing phase of proceedings. Community-based organizations are often in a position to provide relevant information that may assist in the sentencing process, including the effect of the crime on the

targeted group (e.g. see notes from *R. v. Lelas* and *R. v. J.S.* below). The impact of the offence on society should be emphasized as an aggravating factor to the court.

The past behaviour of the accused may reveal a history of hate-related activity (e.g. involvement in related activity on prior occasions, allegiance with certain organizations that promote hatred). While an offender is not to be punished for having offensive beliefs or for choosing to belong to certain groups, evidence of this type may be of great assistance to the court. It can be useful in refuting claims by the defence that the offence was “out of character” or a “spur of the moment” action. It may relate to whether claims of remorse are genuine and/or whether rehabilitation is likely to be easily achieved. Evidence of prior hate-related activity was admitted in some of the cases noted below and should be emphasized as an aggravating factor to the court.

It is generally not appropriate for the Crown attorney to agree to recommend a conditional sentence for a hate motivated crime. The need to emphasize denunciation and general deterrence, the widespread effect of hate crime on the community and the fact the *Criminal Code* specifically makes bias, prejudice and hate an aggravating factor in sentence all militate against the suitability of a conditional sentence for these offences.

If probation is considered an appropriate part of the sentence, the Crown attorney should consider no-contact provisions, whether appropriate educational programs are available and conditions that prevent a repetition of the offence (e.g. prohibition against establishing a website or use of a computer).

## Useful Authorities

### 1. Proof of the Offence

***R. v. Buzzanga and Durocher*** (1979), 49 C.C.C. (2d) 369, 101 D.L.R. (3d) 488, 25 O.R. (2d) 705 (C.A.)

The term “willfully” in s. 319(2) (Public Incitement of Hatred) is satisfied only where the accused has as his conscious purpose the promotion of hatred or if he foresees such a consequence as substantially certain to result from the act (at p. 385 CCC). It does not include recklessness. A high threshold of proof is required to establish willful promotion.

***R. v. Keegstra*** [1990] 3 S.C.R. 397, 61 C.C.C. (3d) 1, 1 C.R. (4<sup>th</sup>) 129.

The word “promotes” in s. 319(2) requires more than simple encouragement or advancement; it means active support or instigation (p. 59 CCC). The Court stated that “hatred” covers only the most intense form of dislike and implies that individuals are to be despised, denied respect and made subject of ill treatment on the basis of group affiliation (p. 59-60 CCC).

Also in *Keegstra*, the court found that although the offence under s. 319(2) infringes freedom of expression, it is a reasonable limit on that right (pp. 21-67 CCC). This view was confirmed in ***R. v. Krymowski*** (2005), 193 C.C.C. (3d) 129, 249 D.L.R. (4<sup>th</sup>) 28 (S.C.C.).

## 2. Sentencing Considerations

**R. v. Ingram and Grimsdale** (1977), 35 C.C.C. (2d) 376 (Ont. C.A.)

The two accused were convicted of Assault Causing Bodily Harm as a result of an unprovoked, racially motivated attack on the dark-skinned victim. The Court of Appeal found that the trial judge had erred in declining to consider the racial motivation for the attack as an aggravating factor in sentencing. "An assault which is racially motivated renders the offence more heinous. Such assaults, unfortunately, invite imitation and repetition by others and incite retaliation. The danger is even greater in a multicultural, pluralistic urban society. The sentence imposed must be one which expresses the public abhorrence for such conduct and their refusal to countenance it." (paragraph 10) The sentences of the accused were increased to 30 months for Ingram (in addition to the 9 months he had spent in custody prior to sentencing) and to two years for Grimsdale (in addition to the 8 months he had spent in custody prior to sentencing).

**R. v. Lelas** (1990), 58 C.C.C. (3d) 568, 74 O.R. (2d) 552 (Ont. C.A.)

The accused pleaded guilty to three counts of mischief that involved spray painting anti-Semitic and Nazi slogans on a synagogue, a Jewish school and a car. The Court of Appeal increased the six month sentence imposed in Provincial Court to one year commenting "When an offence is racially or religiously motivated and is done to cause emotional injury or shock to a particular segment of Canadian society, it calls for a far more severe penalty than mischief which is done merely to damage property." (p. 575)

During the course of the sentencing hearing, the Crown called a witness from the synagogue to testify about the effect of the offence on the members of the congregation and a witness from the Canadian Jewish Congress who testified regarding the reaction of the Jewish community to the accused's actions. (p. 572)

The Crown also presented evidence that hate-related items had been found at the accused's residence at the time of his arrest and evidence of the accused's participation in various white supremacist groups. (p. 571)

**R. v. J.S.** [2003] B.C.J. No. 2877 (B.C. Youth Ct.)

The accused and other youths went to a park for the purpose of attacking "peeping Toms" and "voyeurs". They beat the victim to death with baseball bats and golf clubs. The sentencing judge stated at paragraph 50:

The attack and beating of [the victim] was in fact a "hate crime" as set out in section 718.2 (a)(1) of the Criminal Code. I am aware that the Crown has conceded that since J.S. has stated that they went to the park looking for "peeping-toms" or "voyeurs", and that he did not know that this area was frequented by homosexuals, she has no way of establishing that this was a "hate crime." I disagree.

[Section 718.2 of the *Criminal Code* quoted]

I am of the opinion that this crime was motivated by "bias, prejudice or hate based" on a factor similar to sexual orientation and is covered by this section of the *Criminal Code*. It strikes me that this section contemplates hatred against "peeping toms" and/or "voyeurs"

as being within its purview, since in my opinion such activity represents a sexual lifestyle which some may consider deviant, but is a sexual lifestyle all the same.

... I find it incredible that the accused and his friends who were obviously in the habit of visiting the park to beat up "peeping toms" and "voyeurs" were so naive that they did not notice that this area was frequented by gays. In any event a gay person was "bashed" by the accused and his friends in an area reputedly frequented by gays, and in that regard I fail to see why it cannot be regarded as a "gay bashing."

The court imposed a Custody and Supervision Order for three years with two years to be served in closed custody and one year in the community under conditional supervision.

At paragraph 19 of the judgment, it is noted that "a written statement was provided by a member of the Gay Community who states that the incident ... was a 'gay bashing' which spread terror and fear in that community".

At paragraph 33, the sentencing judge attached some significance to the fact that the accused had engaged in this activity for "entertainment" and had done so on multiple occasions (about 3 times according to the accused's statement – see paragraph 3, point 9(i))

*Criminal Proceedings as a Response to Hate: The British Columbia Experience* (2002), 45 C.L.Q. 419, Craig S. MacMillan, Myron G. Claridge and Rick McKenna. At p. 452, the authors make the following observations:

It can also be extremely difficult to determine whether or not an offender was motivated by bias, prejudice or hate. In some instances, there are a number of possible motivating factors that may be present. Moreover, there has been some debate whether a crime must be solely motivated by bias, prejudice or hate for it to be a "hate crime". In our view, a hate crime can be motivated in whole or in part by bias, prejudice or hate. This is not a novel concept in sentencing, since judges have always taken into account numerous aggravating and mitigating factors at the time of sentencing. To suggest that, for the purpose of sentencing, an offence is only a "hate crime" if it is established that bias, prejudice or hate is the sole motivating factor simply would be inappropriate and inconsistent with sentencing practices. Sentencing proportionality requires that all aggravating and mitigating factors be taken into account at the time of sentencing, and the presence of bias, prejudice or hate indicators are clearly relevant to such an exercise.

This passage is quoted with approval in *R. v. Vrdoljak* [2002] O.J. No. 1332 (Ont. Court of Justice) at para. 5. *Vrdoljak* also includes a discussion of when a conditional sentence may be appropriate for a hate crime.

*R. v. Sandouga* (2002), 167 C.C.C. (3d) 321, 217 D.L.R. (4<sup>th</sup>) 303, [2002] A.J. No. 1042 (Alta. C.A.) at para. 7.

The notion of imposing a conditional sentence for arson to a synagogue was rejected.

**RATIONALE:**

Hate crime is a negation of the fundamental values of Canada. Consequently, there is a strong public interest in the prosecution of these crimes. Prosecution of hate cases should be pressed firmly to its legitimate limit.