The *Criminal Code* and Hate:

A CRIMINAL LAW APPROACH TO COMBATING HATE

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This article will address the issue of combating hate on the Internet, by offering an explanation of the hate propaganda sections in the Canadian *Criminal Code*, providing examples of how those sections have been used, and giving an example of an innovative approach to combating hate in British Columbia.

Hate propaganda on the Internet has concerned law enforcement, government and community groups since individuals in our borderless world started using computers to commit criminal offences – cyber-crime. As of April 2005, one study shows the number of websites promoting violence against specific groups has gone from a single website in 1995 to 5000[1].

Hate crime affects the individual, the community which he or she comes from, and society at large. These effects have been a concern in Canada for many years. In 1966, the Cohen Committee made recommendations to the federal government in its Report of the Special Committee on hate propaganda in Canada, some of which resulted in the current Hate Propaganda sections in the Criminal Code.[2]

With two exceptions, these *Criminal Code* sections have not changed since their introduction in 1970.

Chief Justice Dickson, in *Keegstra*, described the types of harm caused by hate propaganda as including the humiliation and degradation of an individual targeted by hate propaganda. A person's sense of human dignity and belonging to a community at large is linked closely to the concern and respect accorded the groups to which he or she belongs. The derision, hostility and abuse encouraged by hate propaganda have a severely negative impact on the individual's self-worth and acceptance as a member of society. He explained that the second harmful effect of hate propaganda is its substantial influence upon society at large. Individuals can be persuaded to believe almost anything if information or ideas are communicated using the right technique and the proper circumstances.

The hate/bias crime provisions of the *Criminal Code* can be separated into two categories:

1. Hate propaganda offences where the offender advocates genocide or communicates hatred of any identifiable group sections 318, 319, 320 and 320.1.
2. Any other offence motivated by bias, prejudice or hate where the sentencing judge must consider this as an aggravating factor section 718.2(a)(1). These provisions date from 1996 amendments to the *Criminal Code*.

Examples of offences where section 718.2(a)(1) would be applicable are assaults as in gay bashing, damage to property, threatening, etc. This sentencing section is applicable when the Crown can prove beyond a reasonable doubt that the offence was motivated by bias, prejudice or hate.

The *Criminal Code* also has a specific offence of "committing mischief to religious property" – section 430(4.1). A charge of this type of offence is laid when it is alleged that the damage caused to property used for religious worship was motivated by bias, prejudice or hate based on religion, race, colour or national or ethnic origin. This hate/bias offence was brought in pursuant to Bill C-36 in December 2001.

Hate propaganda offences are substantially different from the s. 718.2(a)(1) offences both in the nature of the offence and in the types of groups identified.

Sections 318, 319, 320 and 320.1 have as identifiable groups: colour, race, religion, ethnic origin, and as of April 2004, sexual orientation.

Section 718.2 (a)(1) offences focus on race, national, or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation or any similar factor when the offences are motivated by bias, prejudice or hate.

The hate propaganda offences in the *Code* are:

Section 318, "Advocating Genocide" states that every one who advocates or promotes genocide is guilty of an indictable offence. Genocide is defined as acts committed with intent to destroy in whole or in part any identifiable group, namely, including killing members of the group or deliberately inflicting on the group conditions of life calculated to bring about its physical destruction.

Section 319(1), "Public Incitement of Hatred," states that every one 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 an indictable offence or an offence punishable on summary conviction. A recent example where this offence might have been charged (if occurring in Canada) was the e-mailing and text messaging which was being used by individuals to promote racist acts by rioting crowds on the beaches and streets in Sydney, Australia. There is no requirement for the Attorney General to consent to these charges before they are laid, presumably because the police must deal with these types of incidents and charges in an exigent fashion.

Section 3 19(2) is the section most of the public would be familiar with when hate propaganda is mentioned in the media. This section states that "everyone who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of an indictable offence or an offence punishable on summary conviction." Section 319(3) sets out the defences which provide that no person shall be convicted of an offence under subsection (2):

(a) if he establishes that the statements communicated were true;
(b) if, in good faith, he expressed or attempted to establish by argument an opinion on a religious subject;
(c) 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; or
(d) if, in good faith, he intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred toward an identifiable group in Canada.

The section provides the definition of the terms "communicating," "public place" and "statements." These definitions adequately encompass the cyber-world of today.

Section 319(2) cases are few. One of the reasons for this is that the allegations under section 319(2) rarely meet the high standard of proof that is required by the legal definitions and evidential requirements established in *Regina v. Keegstra*. In that seminal judgment, the Supreme Court of Canada had to balance the *Canadian Charter of Rights and Freedoms*' right to freedom of expression under section 2 against section 1's reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The *Keegstra* case went through several levels of court on the original charges and took several years for appeals on sentence.

The facts, briefly, are that James Keegstra was a high school teacher in Eckville, Alberta. From the 1970s to his dismissal in 1982, he attributed evil qualities to Jews. He described Jewish people as "treacherous, sadistic, money-loving, power hungry, and child killers." Keegstra taught that Jewish people seek to destroy Christianity and are responsible for depressions, anarchy, chaos, wars and revolutions. He claimed the Jews "created the Holocaust to gain sympathy" and, in contrast to open and honest Christians, were said to be deceptive, secretive and inherently evil.

Particularly egregious was the fact that his students were expected to reproduce his teachings on exams, and if they failed to do so, their marks suffered. Ironically, he later defended his actions by arguing that freedom of expression was a charter right in a democracy.

He was convicted at Superior Court, but his Charter argument was accepted in the Alberta Court of Appeal. The Crown appealed to the Supreme Court of Canada. The Supreme Court of Canada, in a four-three decision, upheld his conviction. The majority decision, established a balancing of the two Charter sections by strictly defining section 319(2) and creating a heavy burden of proof on the Crown in order to obtain

a conviction.

The *Keegstra* case was heard contemporaneously with *R. v. Andrews, Canada (Human Rights Commission) v. Taylor*, and adopted the language from an Ontario court of Appeal case, *R. v. Buzzanga and Durocher,* on the definition of "wilfully."[4]

"Wilful" was defined by the Court to not include recklessness.[5] The offence would be made out only if the accused had as a conscious purpose the promotion of hatred against the identifiable group or if they foresaw that the promotion of hatred against that group was certain or morally certain to result. Thus, the necessary intent or foresight must be brought home to him or her subjectively.

In *Andrews*, the Court held that "the conscious purpose of promoting hatred in the distribution of this material is correctly to be gleaned by reasonable inferences upon a fair reading of the materials, because wilfulness or conscious purpose or intent or qualities of the mind are rarely provided by direct statements of intention."[6]

But in *Buzzanga*, the Ontario Court of Appeal found that the trial court failed to take into account the testimony of the accused as to their purpose, only looking to the document itself to determine intention. Therefore, police and Crown counsel must look at the totality of the evidence against the accused to found a successful prosecution.

The Supreme Court of Canada, in *Keegstra,* defined "promotes" to indicate active support or instigation of hatred against an identifiable group.[7] However, the Supreme Court held in *Andrews*[8] that there is no need for the message to cause actual harm or serious risk of harm to the identifiable group.

The Court in *Keegstra* defined "hatred" as connoting emotion of an intense and extreme nature clearly associated with vilification and detestation. The Court described it as 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.[9]

As stated above, a fair reading of the material is necessary to determine if the conscious purpose of the individual is to promote hatred. Proof |of actual hatred is not required for the prosecution to obtain a conviction. The Supreme Court, in Keegstra, stated that it is equally clear that the fact that a statement is distasteful is an insufficient basis upon which to find a conviction[10].

A relatively recent Ontario case provides an example both of hate propaganda and of the development of the common law in this area. *R. v. Harding*, provides an example of both hate propaganda and the definition of "wilfully" being defined to include wilful blindness.[11]

Mark Harding was a self-described Christian pastor in North York. He was charged under section 319(2) with two counts of wilfully promoting hatred against an identifiable group, specifically Muslims, in relation to two pamphlets written and distributed by him. He was also charged with wilfully promoting hatred through telephone messages at a number members of the general public were invited to call. The counts dated from April 1997, until June 1997. The consent of the Ontario Attorney General was obtained to these charges on June 26, 1997. The accused was acquitted in relation to one of the telephone messages. He was convicted on June 19, 1998, in relation to the other telephone message and the two pamphlets on the basis they contained alarming and false allegations about the adherents of Islam.

The Court found that the statements were calculated to arouse fear and hatred of Muslims in all non-Muslim people, particularly Christians, including:

> Muslims are a dangerous people capable of terrorism and great cruelty; Muslims are intolerant of other faiths and pose a threat to other faiths; Canadian Muslims are no different from their brethren in other countries, but that they dishonestly masquerade as pacifists; it is the objective of all Canadian Muslims to take over Canada.

After reading the material as a whole and listening to the witnesses as well as counsel submissions, the judge was convinced beyond a reasonable doubt that Mr. Harding either intended to promote hatred towards Muslims, or was wilfully blind that such was a certain consequence.

The Court found that, in reference to the defences of good faith or honest belief, it would be a rare case where one who intends to promote hatred can be acting in good faith or upon honest belief.

The learned judge paraphrased Chief Justice Dickson in *Keegstra* when he said that he would

find very little chance that an expression promoting hatred against an identifiable group is true.

There was an appeal to the Ontario Court of Justice on law regarding wilful blindness and the defence of good faith on a religious subject. The appeal was dismissed. A further appeal to the Ontario Court of Appeal resulted in a dismissal of Mr. Harding's appeal and a confirmation of the conviction on October 9, 2001.

Another section 319(2) case to be discussed is what is believed to be the first prosecution in Canada of promotion of hatred on the Internet.

The case of *R. v. William Patrick Nicholson* was decided on July 11, 2002, in the Provincial Court of British Columbia in Merritt, B.C. (Merritt Registry 10621).[12]

On July 9, 1999, the Merritt RCMP detachment opened a file after finding a business card which stated "New Order Knights of the KKK, Racial purity is Canada's security" and then provided a box number in Merritt. On August 25, 1999, a member of the B.C. Hate Crimes Team prepared a letter under a fictitious name, asking for more details about the New Order Knights of the KKK. A letter was received with a return address, thanked the writer for his interest, discussed different races and provided a webpage address for e-mails. The letter was signed "Bill Nicholson, Grand Titan, New Order Knight Ku Klux Klan, Empire of Canada." On April 20, 2001, the Merritt RCMP received information that Nicholson possessed several unregistered and restricted weapons including AK-47s. He was also alleged to be in possession of five sticks of dynamite stolen from a break-and-enter in Hinton, Alberta.

As a result of the information, Merritt RCMP and the Vancouver RCMP National Security Investigation Section obtained a search warrant to search his house on April 26, 2001. In addition to the grounds for the weapons, the RCMP felt they had sufficient grounds to obtain a search warrant for his computer to obtain a basis for charges of promoting hate.

As the search was being carried out, authorities spoke to a neighbour, who admitted to being a card-carrying member of the KKK. He produced a passport indicating that he was a Grand Titan of the KKK and advised that Nicholson processed his membership. Inside the house was a computer, which Nicholson's wife said was hers, and she gave permission for them to seize and search. Pictures were found in the house of Nicholson in KKK regalia.

On May 3, 2001, a set of 12 photos were given to police from a photo clerk at a drugstore which had been copied from a roll processed at the store for Nicholson six months previously. They showed Nicholson and friend in their KKK robes. The clerk, providing an example of the community interest in these issues, thought that the police would be interested in the content of the photos at a later date.

On July 2, 2001, Nicholson pleaded guilty to possession of the weapons and explosive substances. He was sentenced to nine months' incarceration. At sentencing, it was accepted that his possession of the weapons was coloured by his white supremacist views.

Meanwhile, his computer was sent for examination in Vancouver and a duplicate of the hard drive was made. A single CD was produced containing the images, text documents, web pages, and e-mail in whole or fragmentary form. From that single CD, 422 pages of material were printed. The volume indicates the complexity of computer-related investigations and how much material can be produced from one home computer.

E-mails were found between Nicholson and others which, while "private conversations," at least offered insight into Nicholson's intent in wilfully promoting hatred in his more public communications.

There were chatroom discussions between small numbers of officers, members or adherents of Nicholson's groups. The content included such chat as the "best weapon to kill a nigger," and the lack of self-restraint or criticism from others suggested that the access was restricted.

The public conversations and webpage material provided the grounds for the charges. His postings included the following remarks: "heathens should stand up and be counted," "the grim reaper's coming," "niggers, Jews and Liberals should be aware," "the day of reckoning approaches," "chimps, Jews and queers should hide," and "it's time to teach them a lesson."

On July 11, 2002 after four days of a preliminary hearing, Nicholson pleaded guilty to the charge. In sentencing the accused, the Court found that the private communications were offensive, odious, monotonous and repugnant. The public comments and communications found on the bulletin boards and the web pages controlled and written where he espoused and promoted hatred provided the Court with the necessary evidence for the proof of the charge.

In considering the previous incarceration for the weapons offences, the Court imposed a one-year conditional sentence including a three-year probation order, which prohibited him from using a personal computer or any device capable of communicating with the Internet during the terms of the conditional sentence order and the probation order. He was also banned from direct or indirect contact with members or adherents of any white supremacist organizations for both orders.

The other hate propaganda sections included in the *Criminal Code* are what lawyers refer to as "in rem" procedures. That is, those sections focus on the material produced for sale or distribution to the public, not the suspect. The sections provide procedures for police to obtain a warrant from a superior court in order to seize the material. A hearing is then held in superior court to determine whether the material is hate propaganda or not. Section 320 is the original section and provides a basis for the owner or author of the material to appear in superior court and argue that the material that is to be distributed is not hate propaganda. If it is not, the material is returned; if it is, it is forfeited to the Crown for destruction. The consent of the Attorney General is required before police can seek a warrant from the court.

An amendment to the hate propaganda sections in the *Criminal Code* was proposed as a result of an incident in B.C. The B.C. Hate Crime Team made this suggestion to the then Attorney General of B.C. when it investigated a local website which had linked hate propaganda on it from the United States. There was insufficient evidence to charge the owner of the site with wilfully promoting hate propaganda.

With the Attorney General's support, two members of the B.C. Hate Crime Team, who were also members of the Federal/Provincial/Territorial Working Group on Offensive Content on the Internet, put forward this recommendation to that Working Group. The Working Group submitted it, along with others, in a March 21, 2001, published report on *Offensive Content on the Internet* which went to the federal government. In the aftermath of September 11, 2001, Parliament quickly enacted section 320.1 on December 24, 2001.

The amendment imposed the civil standard of balance-of-probabilities burden of proof on the Crown. It is a lower standard of proof than the normal criminal burden of "beyond a reasonable doubt." Presumably, it was based on the fact that this section was directed at the material, not at the author, publisher or website owner of the material.

However, it is arguable that this new burden is not applicable to section 320 and that the original standard of proof of "beyond a reasonable doubt" still applies to section 320.

The new section 320.1 provides a procedure for the police to go before a superior court judge with information on oath providing reasonable grounds to believe that there is hate propaganda available on a computer system within the jurisdiction. If the judge is satisfied that the police have reasonable grounds, he or she may order the custodian of the computer system to give an electronic copy of the material to the court, ensure that it is no longer available on the system, and provide the information necessary to identify and locate the person who posted the material. Again, it is a procedure that has as its aim to remove the material from public distribution. It is not a criminal charge against an individual but a hearing to determine if the material is hate propaganda. If it is, the court orders its deletion. The section can serve both the public and the telecommunications industry in identifying what is hate propaganda giving the latter a legal basis for the removal and also in removing hate propaganda from the Internet.

It is clear that the hate propaganda sections are to be utilized by law enforcement and Crown counsel with a discretionary awareness of what the Supreme Court of Canada, in *Keegstra* and related cases, and other courts have made clear. That is, law enforcement and Crown counsel must be cognizant of the balancing of free expression under s. 2 of the *Canadian Charter of Rights and Freedoms* with s. 1's reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Mr. Justice Dickson has said, "It is clear that the word 'wilfully' imports a difficult burden for the Crown to meet and, in doing so, serves to minimize the impairment of freedom of expression."[13]

Similarly, he stated, "I hope, however, that my comments as to the scope of the provision make it obvious that only the most intentionally extreme forms of expression will find a place within s. 319(2).[14]

"I see no reason to assume that the state will always utilize the most severe tool at hand, namely, the criminal law, to prevent the dissem-

ination of hate propaganda. Where the use of s.319(2) is imprudent, employing human rights legislation may be the more attractive route… a less confrontational approach."[15]

In fact, most hate/bias incidents, and most racist, homophobic or sexist acts, while abhorrent in nature, are not *Criminal Code* offences. Federal or provincial human rights legislation, harassment policies or community-building efforts are the other methods currently available in most provinces to address hate/ bias incidents.

That approach is exemplified by the Canadian Human Rights Commission's activities in combating hate on the Internet and on telephonic systems.

Another innovative approach to attacking hate crime is the integrated team or hate unit approach adopted by several police detachments across Canada. Most of the units in the provinces in Canada are limited to city detachments or are part of an existing but single provincial agency.

A unique and integrated approach to combating hate crime was adopted in British Columbia in 1996. The British Columbia Hate Crime Team is a multi-agency unit with province-wide jurisdiction. It was created with a mandate of ensuring the effective identification, investigation and prosecution of crimes motivated by hate. Community consultations throughout the province occurred prior to its creation. Section 7 18.2(a) (1) was adopted as its definition.

Agencies involved included the Criminal Justice Branch, Police Services Branch, Multiculturalism B.C., municipal police and the RCMP representing the provincial police.

An office was opened in Vancouver in 1997, staffed by a municipal officer from the Vancouver Police Department and an RCMP officer representing the provincial police.

A part-time Crown counsel is one of the members on the team. Crown counsel's role is to assist police and Crown counsel across the province with legal advice, initial charge approval decisions, policy support, case law and other materials on hate/bias cases. A Hate/Bias Crime Policy Guide and Police Training Notes were produced for distribution, and a linkage developed with the 1-800-Victims line for the purpose of reports of hate crime victimization. The Policy Guide, subsequently revised to reflect changes in the law, outlined the role of the police on the Team, the Crown counsel and the community linkages provided by Multiculturalism B.C.

The police officers on the Team have trained over 4000 law enforcement personnel on hate/bias crime since the creation of the Team.

The Team has organized and presented at three hate crime conferences attended by provincial, national and international law enforcement personnel at locations in the province. Team members have also attended and presented at community conferences in the province and at nationally organized conferences.

A victim pamphlet with the Victims telephone line was published and later translated into seven different languages to reflect and respond to the cultural makeup of B.C.

A hate crime investigation pocket guide was produced for police officers in the province in 2001 and has been updated since.

The Team has responded to requests for assistance from RCMP detachments and municipal forces across the province.

It has also assisted with investigations in B.C., Ontario, Quebec, Saskatchewan, Oregon, the United Kingdom, France, Germany and agencies in the U.S.

The police officers on the Team have served as an intelligence source and centralized repository on hate/bias crime activity and groups for provincial, national, and international enforcement agencies. Through these established national and international linkages, the Team has also benefited by obtaining information and assistance important for law enforcement in the province.

With its multicultural partner, the police on the Team attend community' meetings around the province to present and discuss means to locally address hate/ bias incidents in the communities concerned.

The Team has also assisted in investigations on hate crimes in communities where the resources are limited or the offences are significant.

The B.C. Hate Crime Team as an integrated unit with law enforcement, Crown counsel and established community relationships has proven to be an effective tool and recognized model to combat hate crime in the province of British Columbia.

Endnotes

[1] The Canadian Jewish News, *Canada a leader in fighting Internet hate*: SWC, Diane Koven, April 14, 2005, Internet Edition.

[2] *R. v. Keegstra* 1 C.R. 129, Dickson C.J.C. at page 153

[3] *Keegstra*, Dickson C.J.C., supra, at page 171

[4] [1990] 61 C.C.C. (3rd) 490, [1990] 3 S.C.R. 892, and (1979) 49 C.C.C. (2d) 369.

[5] *Keegstra*, at page 193

[6] *Supra* at page 495

[7] *Supra* at page 195

[8] *Supra* at page 499

[9] *Supra* at page 195

[10] *Supra* at page 195

[11] (2001), 40 C.R. (5th) 119, affirmed 160 C.C.C. (3rd) 225.

[12] Merritt Registry No.10621, July 11, 2002, B.C. Provincial Court

[13] *Supra* at page 193

[14] *Supra* at page 199

[15] *Supra* at pages 200-1