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Digital Policy Hub – Working Paper

Prosecutorial Challenges in Hate-Related Cases in Canada

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Key Points

- Hate crimes and hate speech in Canada are rising, but prosecutorial challenges, including high legal thresholds and evidentiary difficulties, limit the effective application of existing legal tools.
- Prosecutors encounter high legal thresholds and Canadian Charter of Rights and Freedoms challenges, particularly with hate speech cases, resulting in low conviction rates and uneven application of sentencing enhancements.
- Judicial interpretations of hate motivation and sentencing provisions vary widely, diminishing the deterrent impact and symbolic importance of hate crime laws.
- Recommendations include national standardization of police training, creation of specialized prosecution teams, clarification of judicial guidelines, community reporting hubs and enhanced capacity to address online hate speech.

Introduction

Hate crimes and hate speech pose urgent threats to social cohesion, democratic integrity and public safety in Canada. Although Canadian law provides mechanisms to address such acts, particularly through sections 318–320(1) of the Criminal Code[1] and the sentencing enhancement provision under section 718.2(a)(i), a substantial gap persists between the existence of these legal tools and their effective use in court (Carter 2001; Ministry of the Attorney General 2017).

Despite periodic national outcry following high-profile hate crimes, prosecutors face persistent obstacles in bringing forward and sustaining hate crime and hate speech cases. These difficulties are not rooted in a lack of statutory provisions but in systemic and evidentiary challenges that shape prosecutorial decision making (Jenness and Grattet 2001; Lunny 2017; Provost-Yombo, Louden and McDonald 2020). In the 2020s, the need for effective prosecution has become increasingly urgent: Statistics Canada reported more than 4,700 police-reported hate crimes in 2023, yet conviction rates remain low, and hate-specific charges or sentencing enhancements are rarely pursued (Statistics Canada 2025; Silver, Mihorean and Taylor-Butts 2004).

A closer examination highlights several core prosecutorial challenges. High legal thresholds for proving intent make it difficult to establish bias, prejudice or hate as a motivating factor, and judges apply aggravating sentencing provisions inconsistently (Ferguson 2016). In addition, constitutional protections for freedom of expression under the Canadian Charter of Rights and Freedoms[2] set a particularly high bar for hate speech prosecutions under sections 318 and 319, often deterring Crown counsel from advancing such cases (McNamara 2005; Walker 2018). Together, these barriers

1 *Criminal Code*, RSC 1985, c C-46.

2 *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 91(24) [*Charter*].

limit the ability of prosecutors to deliver substantive justice to targeted communities, leaving many responses symbolic rather than effective (Janoff 2005; Razack 2000).

This working paper focuses on prosecutorial challenges in hate crime and hate speech cases in Canada. It examines key case law and judicial interpretations that shape prosecutorial outcomes. It concludes with policy recommendations aimed at clarifying evidentiary standards, supporting prosecutorial capacity and reinforcing the justice system's role in addressing hate-motivated violence and expression.

Overview of Canadian Hate Crime and Hate Speech Law

Since the introduction of hate-related provisions into the Criminal Code in 1970 (Walker 2018), Canada has developed a comprehensive legal framework to address hate-motivated acts. This framework combines criminal prohibitions with protections offered by human rights regimes. It amplifies the protections offered by human rights regimes by providing for criminal prosecution of hate-driven incidents. Section 318 of the Criminal Code criminalizes advocating or promoting genocide against identifiable groups,[3] while section 319 targets public incitement and promotion of hatred.[4] An "identifiable group" is defined as any segment of the public distinguished by race, religion, national or ethnic origin, age, sex, sexual orientation, gender identity or expression, or disability.[5] In addition, section 430(4.1) criminalizes mischief targeting religious property and educational institutions,[6] and section 718.2(a)(i) directs courts to consider hate motivation as an aggravating factor at sentencing.[7] Together, these legal provisions offer multiple avenues to address hate-based conduct — but their effectiveness hinges on consistent interpretation and enforcement.

Judicial Interpretation of Hate Crime Provisions

Since the introduction of hate crime laws, their application has largely been left to the discretion of trial judges, who enjoy considerable interpretive freedom in applying the rules (Bourdieu 1987, 824). This discretion has resulted in significant variability in judicial outcomes. Section 718.2(a)(i), which directs courts to consider hate motivation as an aggravating factor, illustrates some of the key challenges for prosecutors.

Proving Motivation: The Core Challenge

The most significant prosecutorial challenge lies in establishing that a crime was motivated, either solely or significantly, by bias, prejudice or hate. A judge

3 *Criminal Code*, *supra* note 1, s 318.

4 *Ibid*, s 319.

5 *Ibid*, s 318.

6 *Ibid*, s 430(4.1).

7 *Ibid*, 718.2(a)(i).

enjoys "a partial autonomy that is no doubt the best measure of his position in the structure of distribution of juridical authority's specific capital" (ibid., 826). As such, the requirement in section 718.2(a)(i) that "bias, prejudice or hate"[8] be proved by prosecutors as the motivation has created variability in rulings.

R. v. Baxter[9] illustrates the difficulty for Crown counsel in proving bias, prejudice or hate as motivation. The accused was under the influence of alcohol when he argued with his girlfriend in the lobby of her apartment building. He then exchanged verbal insults with bystanders, which included racial epithets, and struck two individuals, Girdharry and Chowbray. The Crown alleged that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language or skin colour. The judge, however, held that "[t]he racial aspect of a particular assault has to be dealt with firmly and involve the strongest censure possible by a Court. Nevertheless, it is my view that, given the precipitating factors here — alcohol, the personality disorder, and some difficulties [the accused] was having with his girlfriend…the best way of characterizing this assault is simply a personality disorder fuelled by alcohol and a loss of emotional control as a result of situational exigencies in this case."[10]

Though the assault involved racial epithets and the accused was found to have "extremely negative views of other races and cultures,"[11] the judge held that the assault was caused by "a personality disorder fuelled by alcohol and a loss of emotional control."[12] The accused pleaded guilty to assault causing bodily harm; however, racial bias was not held as an aggravating factor.

Recent cases further demonstrate how an offence may be driven by a mix of anger, personal grievances or mental health issues, making it difficult to isolate hate as the definitive cause. In *R. c. Ngarukiye*,[13] the accused was found guilty of second-degree murder of his cellmate. The court noted that despite the accused's homophobic and religious comments, it was not proven beyond a reasonable doubt that the murder was motivated by hate, as the accused's alleged motive was theft. In *R. v. Johnson*,[14] while the defendant's behaviour included hateful and racist statements, the judge concluded that the evidence did not prove beyond a reasonable doubt that his motivation was based on the victim's race or religion. Instead, the court applied the hate-motivation aggravating factor because the victim was a participant in a protest that the accused disagreed with. The court applied this as an aggravating factor under the "any other similar factor" clause of section 718.2(a)(i) of the Criminal Code,[15] arguing that an attack on peaceful protest, regardless of the specific group, poses a special danger to a democratic society.

8 *Ibid.*

9 *R v Baxter,* [1997] OJ No 5811.

10 *Ibid* at para 17.

11 *Ibid* at para 18.

12 *Ibid* at para 17.

13 *R c Ngarukiye,* 2024 QCCS 2334 (CanLII).

14 *R v Johnson*, 2025 BCSC 1591 (CanLII).

15 *Criminal Code*, *supra* note 1, s 718.2(a)(i).

Interpretations of Key Legal Terms

Courts also grapple with the interpretation of key legal terms, particularly the phrase "any other similar factor" in section 718.2(a)(i) of the Criminal Code.[16]

- **Law enforcement:** In *R. v. Friestadt*,[17] the accused pleaded guilty to uttering a death threat against a US police officer via email. The email was detailed and graphic, referencing acts of extreme violence. The court cited *R. v. Mills*[18] and concluded that threats against a police officer, while an aggravating factor, did not fall under "any other similar factor" because being a law enforcement officer is not an immutable characteristic in the same vein as those listed in the Criminal Code.
- **Political beliefs versus immutable characteristics:** Court cases have also raised a conflict over whether political beliefs should be treated as a "similar factor" to characteristics such as race or religion. The Ontario Court of Appeal in *R. v. Mills* suggested that the phrase is limited to characteristics that are, to some degree, "immutable, constitutive, and unchosen," such as those explicitly listed in the provision.[19] However, in *R. v. Johnson*, the court respectfully disagreed, with an overemphasis on "immutability," and found that an attack on a peaceful political protest could constitute an aggravating factor, as it undermines the fundamental principles of a democratic society.[20]

Together, these cases demonstrate the range of judicial interpretation of "any other similar factor" in section 718.2(a)(i),[21] showing that it may be applied either narrowly or more broadly depending on the context.

Balancing Sentencing Principles

The competing goals of sentencing can also be particularly complex in hate crime cases. While denunciation and deterrence are considered the primary objectives for hate-motivated crimes, judges also take into account the offender's individual circumstances and potential for rehabilitation.

- **Mental health and mitigating factors:** In *R. v. Severite*,[22] the court imposed a less restrictive, non-custodial sentence partly due to the accused's background as an Indigenous woman with a history of abuse and addiction, although the judge was clear that this did not excuse the hate-based nature of the crime. Similarly, in *R. v. Johnson*, the judge acknowledged the accused's mental health struggles and balanced them against the need for denunciation, opting for a provincial prison sentence rather than a harsher federal penitentiary term.[23] In contrast, in

16 *Ibid.*

17 *R v Friestadt*, 2024 PESC 18 (CanLII).

18 *R v Mills*, 2019 ONCA 940 (CanLII).

19 *Ibid.*

20 *R v Johnson, supra* note 14.

21 *Criminal Code, supra* note 1, s 718.2(a)(i).

22 *R v Severite*, 2022 ABPC 228 (CanLII).

23 *R v Johnson, supra* note 10.

R. v. Delaney,[24] the court concluded that the offender's schizophrenia did not reduce moral blameworthiness, as his threats were specific and vile rather than simply delusional or disorganized.

- **First-time offenders:** The principle of restraint, which favours less restrictive sanctions for first-time offenders, can also be challenged by the gravity of hate-motivated crimes. In *R. v. Grant*,[25] the judge found that granting a discharge would be "manifestly contrary to the public interest" due to the hateful nature of the crime, despite the accused having no prior record. Similarly, in *R. v. Kamienik*,[26] the court refused a discharge for a hate-motivated mischief offence, rather than prioritizing denunciation and deterrence over the potential negative consequences of a criminal record.

Judicial Interpretation of Hate Speech Provisions

While Canada's hate speech laws, particularly sections 318, 319(1) and 319(2) of the Criminal Code, were designed to address the harms caused by inciting hatred or advocating genocide, their enforcement has also been constrained by interpretive challenges, high legal thresholds and Charter-based concerns. Judicial reluctance to apply these provisions consistently reflects broader questions about balancing freedom of expression with protection from harm — a tension that lies at the heart of the Canadian legal tradition (McNamara 2005; Walker 2018).

The Question of Wilful Intent

Section 319 criminalizes "public incitement of hatred"[27] against identifiable groups but includes multiple defences, such as truth, religious belief or public interest.[28] Section 319(2), which criminalizes "wilful promotion of hatred,"[29] requires proof beyond a reasonable doubt of both the wilfulness and the intent to promote hatred — two elements that are notoriously difficult to establish in court. Courts have also shown caution in applying this provision, often dismissing charges unless the hateful intent is overwhelmingly clear and the language used is unambiguously harmful. As Luke McNamara (2005) notes, this requirement creates significant barriers to successful hate speech prosecutions. Courts typically scrutinize the broader context, the speaker's intent and whether alternative interpretations of the speech exist. This approach narrows the scope of what can qualify as criminal hate speech, further complicating prosecutions.

R. v. Whatcott[30] involved a single charge of wilfully promoting hatred against gay men under section 319(2) of the Criminal Code. William Whatcott, a "Christian Truth Activist,"

24 *R v Delaney*, 2025 MBPC 21 (CanLII).

25 *R v Grant*, 2025 ONCJ 231 (CanLII).

26 *R v Kamienik*, 2024 BCPC 33 (CanLII).

27 *Criminal Code*, *supra* note 1, s 319(1).

28 *Ibid*, s 319(3).

29 *Ibid*, s 319(2).

30 *R v Whatcott*, 2021 ONSC 8077 (CanLII).

and five associates distributed a flyer titled "Zombie Safe Sex Packets" during the 2016 Toronto Pride Parade.[31] The central issues were whether the flyer promoted hatred and, if so, whether Whatcott acted wilfully. The court ultimately found him not guilty, concluding that reasonable doubt existed on both elements.

The court specifically found reasonable doubt as to whether Whatcott acted wilfully to promote hatred. The legal standard for wilfulness is "stringent," requiring that the conscious purpose of the offender was to promote hatred and that they foresaw this outcome as "certain, or morally certain" to result from their actions. The court noted it was "puzzling" that someone intending to promote hatred would distribute flyers to the very group they targeted, as that audience would be the "least receptive."[32] Whatcott's blog posts, which the Crown argued evidenced his hateful state of mind, were instead interpreted as intending to create "a controversy, furor, or an uproar."[33] Additionally, the use of disguises and outlandish costumes was seen as part of a "stunt," rather than demonstrating clear intent to promote hatred.[34]

Judicial Deference to Expression Rights

The hate speech provisions often face constitutional scrutiny, particularly regarding the balance between freedom of expression and the protection of identifiable groups. In *R. v. Sears*,[35] the court emphasized the need to distinguish between speech that is merely offensive or distasteful and speech that rises to the level of criminal hatred. The judge followed guidance from the Supreme Court of Canada's decision in *R. v. Keegstra*,[36] taking care not to find hatred simply because the material was personally offensive. The trial judge concluded that the appellant's newspaper conveyed an "overarching and unrelenting message of hate"[37] that went beyond distasteful expression and was supported by the substantial evidence in the 22 issues.

This judicial caution also extends beyond criminal law into the human rights domain. The civil case of *Lund v. Boissoin*[38] provides an illustrative example. Stephen Boissoin, a youth pastor, published a letter in a local newspaper condemning homosexuality in inflammatory terms, comparing it to "wickedness" and "disease."[39] The Alberta Human Rights and Citizenship Commission panel initially found that his letter violated Alberta's human rights legislation, ordering him to cease such expression and pay damages. However, this decision was overturned by the Alberta Court of Queen's Bench and upheld on appeal. The court determined that, although Boissoin's views were offensive and hurtful, they did not meet the legal threshold for hate speech and were protected under section 2(b) of the Charter.[40]

31 *Ibid.*

32 *Ibid.*

33 *Ibid.*

34 *Ibid.*

35 *R v Sears*, 2021 ONSC 4272 (CanLII).

36 *R v Keegstra*, 1990 CanLII 24 (SCC), [1990] 3 SCR 697.

37 *Ibid.*

38 *Lund v. Boissoin*, 2012 ABCA 300 (CanLII).

39 *Ibid.*

40 *Ibid.*

Defining the "Identifiable Group"

In *R. v. Krymowski*,[41] the Supreme Court of Canada addressed the challenge of evolving language and its relationship to an identifiable group. The accused used the term "gypsies" during a protest, while the Crown's charge specified "Roma."[42] The trial judge acquitted the accused because the Crown had not explicitly proven that the terms were interchangeable. The Supreme Court reversed this decision, holding that the trial judge erred by focusing too narrowly on a single word. The court emphasized that judges should consider the totality of the evidence, including the context of the protest, the use of Nazi symbols and dictionary definitions, to determine whether the promotion of hatred was, in fact, directed at the specified group.

Recommendations

- **Recommendation 1: National standardization of enforcement protocols.** Establish federal guidelines requiring uniform training for police officers on recognizing and documenting hate motivation in both hate crimes and hate speech, including online manifestations. This will reduce investigative discretion and improve accurate identification.
- **Recommendation 2: Specialized prosecution teams for hate crimes and hate speech.** Create dedicated Crown attorney units in each province, specializing in prosecuting hate crimes and hate speech cases to enhance expertise, consistency and case outcomes.
- **Recommendation 3: Clarify judicial interpretation of section 718.2(a)(i) of the Criminal Code and hate speech laws.** Amend the Criminal Code or issue clear judicial guidelines confirming that a significant motivating role of hate suffices for sentencing enhancements under section 718.2(a)(i) and establish clearer standards for prosecuting hate speech to balance freedom of expression with protection from harm.
- **Recommendation 4: Community-based reporting and support systems.** Develop community hubs to empower victims and marginalized groups to report hate incidents, provide legal assistance, and strengthen trust between communities and justice institutions.
- **Recommendation 5:** Strengthen enforcement against online hate speech. Equip law enforcement and prosecutors with resources and training to investigate and prosecute online hate, integrating hate crime laws with digital legislation such as the proposed Online Harms Act.

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41 *R v Krymowski*, 2005 SCC 7 (CanLII), [2005] 1 SCR 101.

42 *Ibid.*

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Sophie Liu is a former Digital Policy Hub doctoral fellow and a Ph.D. candidate in sociology at the University of British Columbia, specializing in law and society, race and migration. Her dissertation focuses on Canadian society's response to hate, including online hate expression. Her particular areas of interest include digital platform regulation, pathways to justice for individuals impacted by hate and the role of hate-crime and hate-incident data in policy making. She employs diverse methodologies to explore these issues, including survey experiments, in-depth interviews and content analysis.

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