

**Hate Crimes
and
Hate Expression
in
Alberta and
Canada
2nd ed**

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Hate Crimes and Hate Expression in Alberta and Canada

by the

Alberta Civil Liberties Research Centre

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EXECUTIVE SUMMARY

Canada has various laws to address issues of discrimination in the form of hatred. In Alberta, there are currently four pieces of legislation that inform the discussion of hate laws: The *Canadian Charter of Rights and Freedoms*,¹ the *Alberta Human Rights Act*,² the *Canadian Human Rights Act*,³ and the *Criminal Code of Canada*.⁴

A hate crime is a criminal offence against a person or group of people, which has been motivated by *hate*. Any communication in a public place (for instance, teaching) that is motivated by hatred of a person's colour, race, religion, ethnic origin, age, sex, sexual orientation, gender identity or expression or mental or physical disability is a criminal offence under s 319 of the *Criminal Code*.

"Hate crimes" are prosecuted under the *Criminal Code*, while "hate expression" claims often fall under human rights legislation. "Hate expression" means a hateful statement, publication, or other form of hateful communication that is displayed before the public. Hate expression is a form of harassment and discrimination. The *Charter* and other human rights laws protect an individual's right to freedom of expression. Hate expression laws must be balanced with the right to freedom of expression.

Legislation

The *Criminal Code* covers actions that incite hatred towards a person or an identifiable group of persons. The relevant sections include:

- genocide (section 318),
- communications inciting hatred against an identifiable group (section 319),
- mischief against religious property (section 430.4.1), and
- criminal offences (such as assault, damage to property, threats, or harassment)

¹ *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11 [*Charter*].

² RSA 2000, c A-25.5 s 3 [*Alberta Human Rights Act*].

³ RSC 1985, c H-6 [*Canadian Human Rights Act*].

⁴ *Criminal Code*, RSC 1985, c C-46 [*Criminal Code*].

that are motivated by hate (section 718.2(a)(i)).

The Supreme Court of Canada addressed section 319 and the issue of “hatred” in the case *R v Keegstra*.⁵

Section 2(b) of the *Charter* protects freedom of expression. Those accused of hate crimes under the *Criminal Code* may make a *Charter* application that their freedom of expression is being limited or denied through the application of the *Criminal Code* provisions. Courts will look at whether the limitation of freedom of expression is “justified in a free and democratic society” as per section 1 of the *Charter*. For example, Mr. Keegstra, in the above noted case, who was charged under section 319 of the *Criminal Code*, argued that limiting his speech would violate his right to freedom of expression as protected by the Charter.

The *Alberta Human Rights Act (AHRA)* also protects specified groups against hatred. Section 3 of the AHRA prohibits expression that is likely to expose a person or group of persons to hatred based on a list of grounds: race, religious beliefs, colour, gender, gender identity, gender expression, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income, family status or sexual orientation. The *Re: Kane* case examines the questions that must be considered under section 3 (referenced above) to determine if a statement is likely to expose a person to hatred or contempt.

Two cases are relevant in highlighting how human rights legislation addresses hate expression and the balancing of freedom of expression. *Whatcott v Saskatchewan*⁶ addressed a complaint regarding hate expression under the *Saskatchewan Human Rights Code*.⁷ *Lund v Boissoin* is a hate expression case⁸ that involved a letter to the editor published in the Red Deer Advocate.

The *Canadian Human Rights Act (CHRA)* applies to federally regulated entities across Canada. Previously, section 13 of the CHRA regulated hatred or contempt that is

⁵ [1990] 3 SCR 697 (SCC) [*Keegstra*].

⁶ *Whatcott v Saskatchewan (Human Rights Tribunal)*, 2010 SKCA 26, appeal allowed in part, *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11.

⁷ *Saskatchewan Human Rights Code*, SS 1979, c S-24.1 [*Saskatchewan HRC*].

⁸ 2007 AHRC 11 (AB HRT), overturned 2010 ABQB 123 (ABQB), upheld 2012 ABCA 300 (ABCA).

made “telephonically”. Further to that section, *Citron v Zundel* decided that “telephonically” must be given a broad interpretation. Other modes of communication such as spam over email⁹ and podcasts¹⁰ were ruled as being covered by section 13, when hate is being communicated. Section 13 was repealed by Parliament in June 2013, which means that these types of activities may now only be addressed under the *Criminal Code* (as applicable).

Students can learn more about hate crimes and hate expression by reviewing the websites in this publication and by doing the exercises provided. The Alberta Civil Liberties Research Centre offers free speakers on these and other human rights topics.

⁹ *Canada (Human Rights Comm) v Taylor*, [1990] 3 SCR 892.

¹⁰ *Warman v Kyburz*, 2003 CHRT 18.

Hate Crimes & Hate Expression

Canada has various laws to address issues of discrimination in the form of hatred. In Alberta, there are currently four pieces of legislation that inform the discussion of hate laws: The *Canadian Charter of Rights and Freedoms*,¹¹ the *Alberta Human Rights Act*,¹² the *Canadian Human Rights Act*,¹³ and the *Criminal Code of Canada*.¹⁴

There are a number of parallels and similarities between federal and provincial human rights statutes; however, each law sets out its own protections, the areas in which discrimination is prohibited as well as the procedures and remedies;¹⁵ that is, the means by which a right is enforced or the violation of a right is prevented, redressed or compensated.¹⁶ Each law has anti-discrimination provisions and each law indicates the forum in which a complaint or criminal charge is to be heard. For example, cases falling under the *Alberta Human Rights Act* are initially pursued through investigation then possibly through a human rights tribunal, whereas *Charter* and *Criminal Code* cases are pursued through the courts.¹⁷

What is a hate crime?

A hate crime is a criminal offence, against a person or group of people, which has been motivated by *hate*. Any communication in a public place (for instance, teaching) that is motivated by hatred of a person's colour, race, religion, ethnic origin, age, sex, sexual orientation, gender identity or expression or mental or physical disability is a

¹¹ *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [*Charter*].

¹² RSA 2000, c A-25.5 s 3 [*Alberta Human Rights Act*].

¹³ RSC 1985, c H-6 [*Canadian Human Rights Act*].

¹⁴ *Criminal Code*, RSC 1985, c C-46 [*Criminal Code*].

¹⁵ Joseph R. Nolan & M.J. Connolly, eds, *Black's Law Dictionary*, 5th ed (St Paul's, Minn: West Publishing Co, 1979).

¹⁶ *Halsbury's Laws of Canada*, 1st ed, vol 17 (Markham, ON: LexisNexis Canada Inc, 2008).

"Discrimination and Human Rights, III. DISCRIMINATION, 1. Federal and Provincial Human Rights Legislation (1) Introduction (a) The Charter and Human Rights Legislation (i) Provincial and Federal Human Rights Legislation Compared A. Procedure and Available Remedies" HDH-21 at 140,141.

¹⁷ *Halsbury's Laws of Canada*, 1st ed, vol 17 (Markham, ON: LexisNexis Canada Inc, 2008).

"Discrimination and Human Rights, III. DISCRIMINATION 4. Hate Communications (1) Introduction, HDH-227 *Jurisdictions prohibiting hate messages*", HDH-227 at 399, 400.

criminal offence under s 319. In addition, the sentence for any criminal offence, (e.g., assault) can be increased if there is evidence that the offence was motivated by bias, prejudice or hate as per s 718.2. The definition of “hate” includes prejudice and bias against a person or a group of persons. Hate crimes may include actions such as: physical assault, graffiti, vandalism, threatening phone calls, fire-bombing, or destruction of religious symbols.

The Alberta Hate Crimes website¹⁸ says that hate crimes:

- are “message crimes” designed to instill fear and terror in an entire community;
- are reported to law enforcement officials only about 10% of the time;
- enhance feelings of victimization, vulnerability and fear;
- may promote community reactive crime (e.g., vigilantism);
- can lead to copycat incidents;
- can polarize communities and prevent them from supporting each other;
- may enhance loss of trust and fear in law enforcement agencies; and
- may heighten security concerns in schools, homes or places of worship.

¹⁸ Alberta Hate Crimes Committee. “Beyond Hate: A Resource Toolkit”, online: Alberta Hate Crimes Committee <http://media.wix.com/ugd/20dd2c_591c43d97311498a883860e2cf6c00db.pdf> (Accessed Feb. 22, 2019).

What is hate expression?

“Hate crimes” are prosecuted under the *Criminal Code*, while “hate expression” claims often fall under human rights legislation. “Hate expression” means a hateful statement, publication, or other forms of hateful communications that is displayed before the public. Hate expression is a form of harassment and discrimination. Hate by itself is not a crime, unless it is criminally motivated (for instance, in the case of assault, damage to property, or criminal harassment).

The *Charter* and other human rights laws protect an individual’s right to freedom of expression. Hate expression laws must therefore be balanced with the right to freedom of expression. Courts and Tribunals are cautious to make a finding that a certain expression is “hate expression” because they must also ensure that an individual’s freedom of expression is protected. Hate expression is a concept that comes into play under the *Charter*, the *Alberta Human Rights Act* and the *Canadian Human Rights Act*, while hate crimes are regulated by the *Criminal Code*.

Legislation

Criminal Code of Canada

The *Criminal Code* governs actions that incite hatred towards a person or an identifiable group of persons. These sections include:

- genocide (section 318),
- communications inciting hatred against an identifiable group (section 319),
- mischief against religious property (section 430.4.1), and
- criminal offences (such as assault, damage to property, threats, or harassment) that are motivated by hate (section 718.2(a)(i)).
- In 2015, Bill C-51 (*Anti-Terrorism Act 2015*) was passed and a section was added to the *Criminal Code* to prohibit communicating statements inspiring others to commit offences. Specifically, Section 83.221(1)(2) of the *Criminal Code* (prohibiting communicating statements knowingly advocating or promoting the

commission of offences in general) may be likened to the Code's provisions against hate propaganda in Section 319.

Genocide

Section 318 prohibits people from advocating genocide. This section addresses very serious crimes when there is an intent to destroy a group of people:

“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.¹⁹

Subsection 318(1) specifies that: “Every one who advocates or promotes genocide is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.”

Public Incitement of hatred

The hate expression prohibitions under section 319 are most closely related to the kinds of expression that are limited under human rights legislation. However, there are differences in the standard of proof and the areas in which statements are limited. Most importantly, a violation of the *Criminal Code* can result in jail time, whereas violating a human rights statute means paying some damages or other remedies.

Subsection 319(1) specifies that: “Every one who, by communicating statements in any public place, incites hatred against any identifiable group” can be guilty of a crime.

According to the *Criminal Code*, “‘Identifiable group’ means any section of the public distinguished by colour, race, religion, national or ethnic origin, age, sex, sexual orientation, gender identity or expression or mental or physical identity.”²⁰

There are four elements mentioned in section 319 that amount to “publicly inciting hatred”:

1. communication of statement(s);
2. in a public place;

¹⁹ *Criminal Code*, s 318(2).

²⁰ *Criminal Code*, s 318(4).

3. the statements incite hatred against an identifiable group; and
4. the communication of such statements is likely to lead to a breach of the peace.

Subsection 319(2) says that “willful promotion of hatred”, other than in a private conversation is also a punishable crime under the *Criminal Code*. However, there are certain defences²¹ to a conviction:

- If the statements are true;
- If, in good faith, the person expressed or attempted to make an argument based on a religious subject or religious text;
- If the statements were relevant to the public interest and the person believed them to be true; or
- If in good faith the person intended to point out matters that tend to produce feelings of hatred, so that they could be removed.

In *R v Gray*,²² the Alberta Court of Appeal held that having hate views is not a crime but acting on them is. The Court went further to state that bias based on race cannot be tolerated and must be condemned.

The Supreme Court of Canada addressed section 319 and the issue of “hatred” in the case *R v Keegstra*.²³ James Keegstra was a teacher in Alberta who was charged with unlawfully promoting hatred against an identifiable group by communicating anti-Semitic statements to his students. If the students did not reproduce Keegstra’s views on exams, their marks suffered.

In the *Keegstra* decision, the Supreme Court of Canada reiterated the need for restriction of freedom of expression of teachers if it conflicts with a positive educational environment,²⁴ while noting that a school board has a duty to maintain a positive school environment for all of its students. The Court in *Keegstra* held that while section 319(2)

²¹ *Criminal Code*, s 319(3).

²² *R v Gray*, 2013 ABCA 237.

²³ [1990] 3 SCR 697 (SCC) [*Keegstra*].

²⁴ See also, *Ross v New Brunswick School District No. 15*, [1996] 1 SCR 82 [*Ross*].

infringes the freedom of expression provisions of the *Charter* by prohibiting willful promotion of hatred, it is a justified limitation. The debate on restricting freedom of expression will be discussed further under the section on the *Charter*.

Mischief relating to religious property

Subsection 430(4.101) states that mischief relating to religious property is considered a crime if motivated by bias, prejudice or hate based on religion, race, colour, national or ethnic origin, age, sex, sexual orientation, gender identity or expression, or physical or mental disability. Although this subsection is not used as much as section 319, it adds a limitation to protect religious property. This subsection also applies to mischief directed at schools and educational institutions, buildings used for cultural and sports events and residences for seniors, among other locations, such as war memorials, if motivated by bias, prejudice or hate on the grounds listed above.

Purposes and principles of sentencing

The *Criminal Code* clearly defines how the existence of “hate”, as a motivation for crime, can be used in sentencing an offender. Sentences are enhanced when the crime has been motivated by bias, prejudice or hate. Section 718, as well as some of the of the four that we have discussed (i.e., sections 318, 319, 430(4.101) and 718), include many of the same grounds that are protected under the *Alberta Human Rights Act* (discussed in the next section). However, The *Criminal Code* and the *Alberta Human Rights Act* are not identical. For example, the *Alberta Human Rights Act* does not include the ground of language, whereas section 718.2 of the *Criminal Code* does not include source of income, marital status or family status.

Section 718.2 specifies that:

A court that imposes a sentence shall also take into consideration the following principles:

- (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,
 - (i) 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 gender identity or expression, or any other similar factor.

Including hate in the *Criminal Code* affirms that these offences are serious violations that have serious punishments. The punishment for committing the crimes discussed above ranges from eighteen months to ten years in jail. In order to find a perpetrator guilty, a court must find that the offender is guilty “beyond a reasonable doubt”. This is a higher standard than in a civil proceeding because of the potential loss of freedom.

In *R v Porco*,²⁵ Justice Javed of the Ontario Court of Justice stated that Section 718 of the *Criminal Code* now has a community component, thus having an effect on sentencing. Specifically, at paragraph 12, Justice Javed stated:

In 2015, Parliament amended the *Criminal Code* to include the *Canadian Victims Bill of Rights*. S.C. 2015, c. 13, Bill C-32. The fundamental purpose of sentencing was amended to include the protection of society. Section 718 of the *Criminal Code* now has a community component and requires courts to consider as an objective of sentencing, just sanctions that (a) denounce unlawful conduct and the harm done to victims or the community that is caused by unlawful conduct and (e) to promote a sense of responsibility in offenders and acknowledgement of the harm done to victims or to the community.

Canadian Charter of Rights and Freedoms

The *Charter* applies to any government actions (including federal, provincial and municipal). For instance, if a city refuses to give a permit for a political march against racism, it may be limiting the rights of the marchers to freely express their opinions. Whether this limitation is permissible will depend upon the facts surrounding the march and the reasons for its refusal.

Section 15(1) of the *Charter* protects equality rights:

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 or physical disability.²⁶

²⁵ *R v Porco*, 2017 ONCJ 676 (CanLII).

²⁶ *Charter*, s 15.

Section 2(b) protects freedom of expression:

Everyone has the following fundamental freedoms:

2(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;²⁷

As discussed above, sometimes there is a clash between protecting a group's equality rights under section 15 and protecting freedom of expression under section 2(b). For instance, in *Keegstra*,²⁸ where the teacher was fired for making anti-Semitic statements to high school students and one of the parents complained to the local school board, Mr. Keegstra was charged under section 319 of the *Criminal Code* for "willfully promoting hatred against an identifiable group".²⁹ Mr. Keegstra argued that limiting his speech would violate his right to freedom of expression. The Supreme Court of Canada ruled that although this limitation violated his right to freedom of expression under section 2(b) of the *Charter*, it was justified under section 1 of the *Charter*. In other words, given the potential for people, who were targeted by the speech, to be humiliated, it was permissible to prohibit Mr. Keegstra's hateful words. This was acceptable even though it denied him the right to freedom of expression. The Court analyzed the guiding philosophy behind the freedom of expression provisions in the *Charter*:

The question is always one of balance. Freedom of expression protects certain values, which we consider fundamental -- democracy, a vital, vibrant and creative culture, and the dignity of the individual. At the same time, free expression may put other values at risk. It may harm reputations, incite acts of violence. It may be abused to undermine our fundamental governmental institutions and undercut racial and social harmony. The law may legitimately trench on freedom of expression where the value of free

²⁷ *Charter*, s 2(b).

²⁸ *Keegstra*.

²⁹ *Criminal Code*, RSC 1970, c C-34 s 281.2(2); now RSC 1985, c C-46 s 319(2).

expression is outweighed by the risks engendered by allowing freedom of expression.³⁰

In order for a Court to decide in a particular case that a publication or statement is in fact hate expression, the Court has to conclude not only that the publication constitutes “hate expression”, but also that the limitation of the particular expression is more important (because of the hate involved) than the person’s right to freedom of expression. Where the *Charter* is being argued, the Court will do this by determining whether section 1 of the *Charter* applies to the particular case.

Section 1 of the *Charter* says:

The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.³¹

This section of the *Charter* allows for other sections or rights and freedoms guaranteed by the *Charter* (e.g., freedom of expression) to be limited or denied, if this limitation can be “justified in a free and democratic society”. The following criteria have to be met in order for section 1 to apply and thereby justify limiting someone’s freedom of expression:

1. There has to be a law or government action that prohibits the type of publication made.
2. The law prohibiting the hate expression has to have an objective that is sufficiently serious to justify limiting the right to freedom of expression.
3. The law prohibiting the hate expression has to be reasonable and ‘justified in a free and democratic society’. A Court must look at a few sub-criteria to determine if the negative effect that the law has in denying the right to freedom of expression is proportionate to the positive effect that it has in prohibiting hate expression.³²

³⁰ Ray-Ellis, Soma. *Halsbury's Laws of Canada - Discrimination and Human Rights*, III. DISCRIMINATION, 1. Federal and Provincial Human Rights Legislation (1) Introduction (a) The Charter and Human Rights Legislation (i) Provincial and Federal Human Rights Legislation Compared A. Procedure and Available Remedies.

³¹ *Charter*, s 1.

³² *R v Oakes*, [1986] 1 SCR 103. For further discussion: see Mary C Hurley, “Charter of Equality Rights: Interpretation of Section 15 in Supreme Court of Canada Decisions” (March 2007), online: Library of Parliament – Parliamentary Information and Research Service <<http://www.parl.gc.ca/content/LOP/ResearchPublications/bp402-e.htm#atheoakestest>> [Hurley].

An example of how this works in balancing the rights under the *Charter* is evident in *R v Andrews*.³³ Mr. Andrews used the *Charter* section 2(b) freedom of expression provision as a defense to a hate crime charge. Mr. Andrews was the leader of the Nationalist Party. A newspaper for the Nationalist Party of Canada, called the Nationalist Reporter, had been promoting white supremacy. The Nationalist Party was accused of publicly inciting hatred against an identifiable group (non-white people) and thus violating section 319(2) of the *Criminal Code*. The Court of Appeal of Ontario³⁴ found that although this hate expression violated Mr. Andrews' and the Party's right to freedom of expression, the violation was justified under section 1 of the *Charter*.

Prohibiting Mr. Andrews' hate expression was justifiable, even though it denied him the right to freely express himself by promoting white supremacy. The Court of Appeal said that there were several defences that were provided by section 319. It concluded that the section was "...a reasonable limit prescribed by law that can be demonstrably justified in a free and democratic society."³⁵ The Supreme Court of Canada dismissed Mr. Andrew's appeal.³⁶ *R v Andrews* demonstrates the balancing that must be done to protect freedom of expression while limiting the willful promotion of hate.

Alberta Human Rights Act

The *Alberta Human Rights Act* also protects specified groups against hatred. Section 3 prohibits expression that is likely to expose a person to hatred based on a list of grounds: race, religious beliefs, colour, gender, gender identity, gender expression, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income, family status or sexual orientation. It states:

3(1) No person shall publish, issue or display or cause to be published, issued or displayed before the public any statement, publication, notice, sign, symbol,

³³ *R v Andrews*, [1990] 3 SCR 870 [*Andrews SCC*].

³⁴ *R v Andrews*, 1988 CanLII 200 (ON CA) [*Andrews CA*].

³⁵ *Andrews CA* at p 42.

³⁶ *Andrews SCC*.

emblem or other representation that

(a) indicates discrimination or an intention to discriminate against a person or a class of persons, or

(b) is likely to expose a person or a class of persons to hatred or contempt because of the race, religious beliefs, colour, gender, gender identity, gender expression, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income, family status or sexual orientation of that person or class of persons.

(2) Nothing in this section shall be deemed to interfere with the free expression of opinion on any subject.

(3) Subsection (1) does not apply to

(a) the display of a notice, sign, symbol, emblem or other representation displayed to identify facilities customarily used by one gender,

(b) the display or publication by or on behalf of an organization that

(i) is composed exclusively or primarily of persons having the same political or religious beliefs, ancestry or place of origin, and

(ii) is not operated for private profit, of a statement, publication, notice, sign, symbol, emblem or other representation indicating a purpose or membership qualification of the organization, or

(c) the display or publication of a form of application or an advertisement that may be used, circulated or published pursuant to section 8(2), if the statement, publication, notice, sign, symbol, emblem or other representation is not derogatory, offensive or otherwise improper.³⁷

The type of expression that is covered under the *Alberta Human Rights Act* is noted under section 3 as a “statement, publication, notice, sign, symbol, emblem or other representation” [hereinafter “Statements”]. Section 3 limits Statements that discriminate against a person or are “likely to expose” a person to hatred or contempt based on one of the grounds listed in the section.

The courts have defined hatred and contempt.³⁸ *Hatred* has been defined as “active dislike, detestation, enmity, ill-will, malevolence”. Contempt is “the condition of being condemned or despised; dishonor or disgraced”.

³⁷ *Alberta Human Rights Act*.

³⁸ For example, for a summary of caselaw see: *Kane, Re*, 2001 ABQB 570 at para 106, *Whitcott v Saskatchewan (Human Rights Tribunal)*, 2010 SKCA 26 and *Lund v Boissoin*, [2012] AJ No 1036.

The Alberta Human Rights Commission website³⁹ says that:

Courts and human rights tribunals have set up an analytical framework to examine whether a statement is likely to expose a person to hatred or contempt. Justice Rooke summarized these in the opinion for *Re Kane*. The following questions will be considered within the context of each case:

- Does the communication itself express hatred or contempt of a person or group on a basis of one or more of the listed grounds?
- Would a reasonable person, informed about the context, understand the message as expressing hatred or contempt?
- Assessed in its context, is the likely effect of the communication to make it more acceptable to others to manifest hatred or contempt against the person or group concerned?
- Would a reasonable person consider it more likely than not to expose the target group members to hatred and contempt?

Some of the factors that courts and human rights tribunals examine to answer the above questions are the:

- content of the communication;
- tone of the communication;
- image conveyed, including whether the use of quotations, references and sources give the message more credibility;
- vulnerability of the target group;
- degree to which the expression reinforces existing stereotypes;
- circumstances surrounding the message, including whether the message appeals to well publicized issues;
- medium used to convey the message;
- circulation of the publication;
- credibility to be accorded to the communication; and context of publication, for example, whether it is part of a debate or whether it is presented as news, or as a purportedly authoritative analysis.

It should be noted that the analysis focuses on the effect the hate statement has on an

³⁹ “Statement, publication, notice, sign, symbol, emblem or other representation” Online: http://www.albertahumanrights.ab.ca/other/statements/what_to_know/section_3_discussion.asp (Accessed November 19, 2012) [“AHR Website”]; *Kane, Re*, 2001 ABQB 570 [*Re Kane*].

individual or on a group of persons and not on the intention of the person distributing or circulating the statement.

Section 3(2) of the *Alberta Human Rights Act* provides a balance to section 3(1) and protects freedom of expression and opinion. It notes that section 3 of the *Alberta Human Rights Act* is not meant to interfere with freedom of expression. The Alberta Human Rights Commission put a notice on its website that it is currently revising one of its publications that may shed more light on hate crimes in Alberta (titled: "***Defences to Human Rights Complaints***").

Certain types of expression that are not derogatory or offensive are excluded⁴⁰ by section 3(3). For instance:

- ⁴³A sign for male or female washrooms; or
- A publication advertising about a cultural group made up of primarily people from the same cultural background.

The method of applying section 3 and other similar sections (from laws of other provinces) is the subject of much debate and litigation. Below is a discussion of two cases addressing these issues. The Court of Appeal in the *Lund v Boissoin*⁴¹ decision notes that the legislation is not clear and understandable to the public and should be more clearly set out so that it is easily understood.

*Whatcott v Saskatchewan*⁴² addressed a complaint regarding hate expression under the *Saskatchewan Human Rights Code*.⁴³ In 2001 and 2002, Bill Whatcott distributed flyers that advocated for the re-criminalization of sodomy and attempted to convince readers that gays and lesbians posed a threat to Saskatchewan's children and educational system. The flyers were created under the name of the Christian Truth Activists, and were distributed to homes in Regina and Saskatoon bearing headings such

⁴⁰ *Alberta Human Rights Act*, s 3(3).

⁴¹ *Lund v Boissoin*, 2012 ABCA 300 at para 3 [*Lund CA*].

⁴² *Wallace v Whatcott*, 2005 CanLII 80912 (SK HRT) [*Whatcott HRT*].

⁴³ *Saskatchewan Human Rights Code*, SS 1979, c S-24.1 [*Saskatchewan HRC*].

as "Keep Homosexuality out of Saskatoon's Public Schools" and "Sodomites in our Public Schools."

Four individuals complained to the Saskatchewan Human Rights Tribunal,⁴⁴ which held that the materials promoted hatred against individuals based on their sexual orientation. The Court of Queen's Bench⁴⁵ upheld the Tribunal's decision. In 2010, Whatcott appealed the decision to the Saskatchewan Court of Appeal,⁴⁶ which overturned the lower court decision. The Court of Appeal held that, taken in isolation, some of the words were demeaning, but did not constitute hate expression under the legislation.⁴⁷ The Court of Appeal agreed with the definition of hatred in *R v Keegstra*,⁴⁸ in order to qualify as hatred the statement must express "unusually strong and deep-felt emotions of detestation, calumny and vilification." The Court also followed the definition used in *Taylor* of "active dislike, detestation, enmity, ill-will, malevolence." The Supreme Court of Canada heard the appeal in the *Whatcott*⁴⁹ case and allowed it, in part. The Supreme Court of Canada agreed with *Taylor's* definition of "hatred" but made some modifications. The Court said that the following principles must be used:⁵⁰

1. ...whether a reasonable person, aware of the context and circumstances surrounding the expression, would view it as exposing the protected group to hatred.
2. ...the legislative term 'hatred' or 'hatred and contempt' is to be interpreted as being restricted to those extreme manifestations of the emotion described by the words 'detestation' and 'vilification'.
3. ...tribunals must focus their analysis on the effect of the expression at issue. Is the expression likely to expose the targeted person or group to hatred by others?"

These principles must be applied using an objective standard.

⁴⁴ *Whatcott*, HRT.

⁴⁵ *Whatcott v Saskatchewan (Human Rights Tribunal)*, (2007) SKQB 312 [*Whatcott HRT*].

⁴⁶ *Whatcott v Saskatchewan (Human Rights Tribunal)*, 2010 SKCA 26. [*Whatcott CA*].

⁴⁷ *Whatcott CA* at para 73.

⁴⁸ [1990] 3 SCR 697 [*Keegstra*].

⁴⁹ *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11 (*Whatcott SCC*).

⁵⁰ *Whatcott SCC*, at para 56-58.

In relation to Flyer D and E, the Supreme Court of Canada agreed with the Tribunal, and found that the flyers had many of the “hallmarks’ of hatred”.⁵¹

The Tribunal isolated certain passages from each of the flyers. With regard to Flyer D, it found that the combined references in six phrases “clearly exposes or tends to expose [homosexuals] to hatred, ridicules, belittles or otherwise affronts their dignity on the basis of their sexual orientation” (para 51):

. . . children . . . learning how wonderful it is for two men to sodomize each other;

Now the homosexuals want to share their filth and propaganda with Saskatchewan’s children;

degenerated into a filthy session where gay and lesbian teachers used dirty language to describe lesbian sex and sodomy to their teenage audience;

ex-Sodomites and other types of sex addicts who have been able to break free of their sexual bondage and develop wholesome and healthy relationships;

sodomites and lesbians who want to remain in their lifestyle and proselytize vulnerable young people that civil law should discriminate against them;

Our children will pay the price in disease, death, abuse . . . if we do not say no to the sodomite desire to socialize your children into accepting something that is clearly wrong.

The Tribunal made an identical finding with respect to the following passages from Flyer E (para 50):

Sodomites are 430 times more likely to acquire Aids and 3 times more likely to sexually abuse children!;

Born Gay? No Way! Homosexual sex is about risky and addictive behaviour!;

If Saskatchewan’s sodomites have their way, your school board will be celebrating buggery too!;

⁵¹ *Whatcott SCC*, at para 182-187.

Don't kid your selves; homosexuality is going to be taught to your children and it won't be the media stereotypes of two monogamous men holding hands;

The Bible is clear that homosexuality is an abomination;

Sodom and Gomorrah was given over completely to homosexual perversion and as a result destroyed by God's wrath;

Our acceptance of homosexuality and our toleration of its promotion in our school system will lead to the early death and morbidity of many children.

However, the Supreme Court of Canada found that phrases such as those found in Flyer F and G did not constitute "hatred":

Saskatchewan's largest gay magazine allows ads for men seeking boys!;

If you cause one of these little ones to stumble it would be better that a millstone was tied around your neck and you were cast into the sea.⁵²

These expressions were offensive but did not constitute "hatred" as per the modified definition of *Taylor*.

Lund v Boissoin is a hate expression case⁵³ that involved a letter to the editor published in the Red Deer Advocate. Dr. Darren Lund filed a complaint against the Red Deer Advocate and Reverend Stephen Boissoin of the Concerned Christian Coalition, the author of the letter. The letter was entitled "Homosexual Agenda Wicked" and was lengthy. The following is a short excerpt:

[W]ar has been declared so as to defend the precious sanctity of our innocent children and youth, that you so eagerly toil, day and night, to consume...It's time to stand together and take whatever steps are necessary ...Where homosexuality flourishes, all manner of wickedness abounds ... These [LGBT rights] activists...are perverse, self-centered and morally deprived individuals who are spreading their psychological disease into every area of our lives. Homosexual rights activists and those

⁵² *Whatcott SCC*, at para 184.

⁵³ 2007 AHRC 11 (AB HRT), overturned 2010 ABQB 123 (ABQB), upheld 2012 ABCA 300 (ABCA).

that defend them, are just as immoral as the pedophiles, drug dealers and pimps that plague our communities...It's time to start taking back what the enemy has taken from you...⁵⁴

The Red Deer Advocate apologized and settled the complaint with Dr. Lund but the complaint went forward against Mr. Boissoin and the Concerned Christian Coalition ["Coalition"].

The Alberta Human Rights Panel⁵⁵ held that Boissoin and the Concerned Christian Coalition had, in a letter to the editor of a newspaper, expressed comments likely to expose gays and lesbians to hatred and/ or contempt due to their sexual orientation. Boissoin and the Concerned Christian Coalition subsequently applied for judicial review.

On appeal to the Alberta Court of Queen's Bench, Boissoin was successful in arguing that his letter was not a violation of s 3(2) of the *Alberta Human Rights Act*.⁵⁶ The Court of Queen's Bench overturned the Tribunal decision and Dr. Lund appealed this decision to the Alberta Court of Appeal.

The Court of Appeal in *Lund CA* examined the letter and noted that it was a letter to the Editor, which is an important means whereby "...citizens express their opinions on matters of public interest."⁵⁷ This consideration was important in looking at the context of the letter and whether it was necessary to limit freedom of expression. The Court of Appeal said:

Whether offensive or not, the letter was perceived to stimulate and add to an ongoing public debate on matters of public interest, as distinct from hate propaganda which serves no useful function and has no redeeming qualities. A certain amount of public debate concerning such an issue must be permitted, even if some of it is offensive, to make the general public aware that such type of thinking is present in the community and to allow for its rebuttal.⁵⁸

⁵⁴ *Lund CA* at para 3.

⁵⁵ *Lund v Boissoin*, 2007 AHRC 11.

⁵⁶ *Lund v Boissoin*, 2010 ABQB 123.

⁵⁷ *Lund CA* at para 72.

⁵⁸ *Lund CA* at para 70.

The Court of Appeal found that the letter was expressing hostility towards teaching that being gay or lesbian was normal. However, when examined within the context and circumstances it did not meet the definition of hatred.⁵⁹

There has been much discussion about the effect of subsection 3(2), which states: “Nothing in this section shall be deemed to interfere with the free expression of opinion on any subject.” Earlier cases found this section required balancing freedom of expression against the goal of eradicating discrimination. However, the Court in *Lund CA* found that section 3(2) exempts statements that qualify as an expression of opinion. Whether the statement is an expression of opinion will be up to the Court or Tribunal to determine.⁶¹

The Alberta Hate Crimes Commission (AHCC) has implemented the ***stophateab.ca*** project and the public is encouraged to report hate expressions or hate incidents to AHCC through that website. Note, however, that hate crimes must be reported to the Police.

Canadian Human Rights Act

The *Alberta Human Rights Act* applies to citizens of Alberta and provincial organizations and companies, while the *Canadian Human Rights Act* applies to federally regulated entities across Canada. The repealed section 13(1) regulates hatred or contempt that is made “telephonically”:

Section 13(1): It is a discriminatory practice for a person or a group of persons acting in concert to communicate telephonically or to cause to be so communicated, repeatedly, in whole or in part by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament, any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination.⁶²

(2) For greater certainty, subsection (1) applies in respect of a matter that is communicated by means of a computer or a group of interconnected or related computers, including the Internet, or any similar means of communication, but

⁵⁹ *Lund CA* at para 77.

⁶¹ *Lund CA* at para 93.

⁶² *Canada Human Rights Act*, s 13(1).

does not apply in respect of a matter that is communicated in whole or in part by means of the facilities of a broadcasting undertaking.⁶³

Subsection 2 (now repealed) was added into the Act in 2001 to address the increasing use of the internet. The definition of “telephonically” is provided in *Citron v Zundel*. Regarding the limitations of the word “telephonically” the Canadian Human Rights Tribunal favoured a broad interpretation:

We are not persuaded that “telephonically” implies a limitation on the precise sensory format in which the communication is expressed, nor that it should be defined solely by reference to the particular device used for the communication. Whether a message is communicated aurally, by voice, or visually, by text, has no effect on its capacity to influence the listener, or humiliate the subject. Nor does the specific device used to effect the communication alter the harmful character of the message conveyed. A telephone handset is not uniquely effective in the communication of hate messages.⁶⁴

The definition of “telephonically” changed over the years. Today there are many more methods of communication: cell phones, texting, instant messaging, chat rooms, blogs, email, tweets and others. Tribunals and courts recognized other modes of communication, such as spam over email⁶⁵ and podcasts⁶⁶ as covered by the repealed section 13, when hate was being communicated.

In response to some public pressure and court cases, Bill C-304, a Private Member’s Bill (C-304) to repeal Section 13 was introduced in 2012 and was passed into law in June 2013. With this development, only the *Criminal Code* provisions (specifically s 319, if applicable) can be applied to address telephonic and internet messages that are hateful.⁶⁷

However, not everyone is convinced that dealing with hate crimes under the *Criminal Code* is sufficient to address hate speech in federally regulated entities, such as

⁶³ *Canada Human Rights Act*, s 13(2).

⁶⁴ *Citron v Zundel*, 2002 CHRD No 1 at para 85.

⁶⁵ *Canada (Human Rights Comm) v Taylor*, [1990] 3 SCR 892.

⁶⁶ *Warman v Kyburz*, 2003 CHRT 18.

⁶⁷ *An Act to amend the Canadian Human Rights Act (protecting freedom)* 1st Session, 41st Parliament, 60-61 Elizabeth II, 2011-2012.

the Internet and telephone. For example, in the *Keegstra* case, it was determined that hate speech is not effectively curtailed because of the high evidentiary burden required under s 319(2) to secure conviction.

Likewise, provincial legislation similar to the former federal human rights section 13 (now repealed) has been recognized as an appropriate manner in which to address hate speech. In *Whatcott*,⁶⁸ the Supreme Court, in a unanimous decision, upheld and affirmed Saskatchewan human rights laws which prohibited hate speech while noting its adverse effects and discriminatory impacts on its targets.

On the other hand, in *R v Topham*⁶⁹, Topham operated a website, “Radical Press”, and was accused of wilfully promoting hatred against Jews through his website under *Criminal Code* s 319(2). The British Columbia Supreme Court followed the decisions in *Whatcott* and *Keegstra* about hate expression and rejected the proposition that proof of harm is required in matters relating to hate speech.

Recently, a Judge in Ontario found two men (James Sears and LeRoy St. Germaine) guilty under *Criminal Code* s 319(2) of promoting hate against women and Jews through their newspaper publication.⁷⁰

Relatedly, according to Statistics Canada, incidents involving hate which have been reported to the police have been on the rise in recent years.⁷¹

It remains to be seen whether the decision to repeal section 13 and leave hate crimes to the police will be an effective approach to hate speech that occurs under federally regulated entities (e.g., internet).

⁶⁸ 2013 SCC 11.

⁶⁹ *R v Topham*, 2017 BCSC 259 (CanLII) 2017-02-17.

⁷⁰ Colin Perkel, CTV News “Your Ward News Duo Guilty of Promoting Hate against Women and Jews” (January 24, 2019) Online: <https://www.ctvnews.ca/canada/your-ward-news-duo-guilty-of-promoting-hate-against-women-and-jews-1.4266912>.

⁷¹ John Reita, CBC News “Hate-crimes reached all-time high in 2017, Statistics Canada says” (November 29, 2018) Online: <https://www.cbc.ca/news/canada/toronto/statistics-canada-2017-hate-crime-numbers-1.4925399>.

Other Federal Legislation Dealing with Hate Speech

Hate speech is also restricted in the *Broadcasting Distribution Regulation*,⁷² which governs broadcasting licenses. It is overseen by the Canadian Radio-television and Telecommunications Commission (CRTC). It specifically provides in s 8 (2)(a) that no licensee shall distribute a programming service that the licensee originates and that contains:

any abusive comment or abusive pictorial representation that, when taken in context, tends to or is likely to expose an individual or group or class of individuals to hatred or contempt on the basis of race, national or ethnic origin, colour, religion, sex, sexual orientation, age or mental or physical disability;

Summary

The above discussion provides a background of the legislation that regulates hate in Alberta. Other provinces have their own laws that regulate hate speech. This area of law is still developing as courts, tribunals and legislators explore limitations on freedom of expression within hate laws. There is an ongoing discussion as to whether these sections should stand as they are or be repealed. One argument for **not** having legal limits in this area is that public opinion should respond to hateful forms of communication, thus imposing a natural limit on hate expression. An argument for **having** legal limits on hate is that this expression is often aimed at vulnerable populations who may not be able to respond, or may not have enough support to fully address the hate that is aimed at them.

There are currently discussions about whether section 13 of the *Canadian Human Rights Act* (previously repealed) should be reinstated, particularly because of the vast world that is the Internet. It is worthy to note that the *Criminal Code* provisions about hate speech largely work as deterrents, and the penalties may include imprisonment and fines, while the human rights legislation tends more towards the

⁷² *Broadcasting Distribution Regulations*, SOR 97-555.

protection of victims of hate crimes and prevention of hate expression, and the remedies are meant to be educational.

The next section includes some exercises and websites that will help to deepen student understanding about hate crimes and hate speech. These lesson plans can be used as part of a class discussion, as homework to deepen a student's understanding or in conjunction with a speaker from the Alberta Civil Liberties Research Centre.

Curriculum

Students can learn more about hate crimes and hate expression by reviewing some of the websites in this section and by doing some of the exercises provided. Another way to teach students about hate crimes is to have a speaker come in to talk about the inter-relation of discrimination, freedom of expression and hate crimes. The Alberta Civil Liberties Research Centre offers free speakers on these and other human rights topics.

1. Find out more about Hate Crimes

Look online and in the news to find out more about hate crimes. What statistics can you find? Who are hate crimes aimed at? What makes a crime a hate crime? Here are some resources to get you started.

- Alberta Hate Crimes Committee: <http://www.albertahatecrimes.org>
- Alberta Hate/Bias Crime Report: [http://www.albertahatecrimes.ca/09/images/file/Documents/Resources/Alberta%20Hate%20Crime%20Report%20\(AHCC,%202009\).pdf](http://www.albertahatecrimes.ca/09/images/file/Documents/Resources/Alberta%20Hate%20Crime%20Report%20(AHCC,%202009).pdf)
- Alberta Hate Crimes Awareness Day <http://www.albertahatecrimes.org/hate-crimes-awareness-day>
- Report/document Alberta hate **incidents** on this website: <http://stophateab.ca/document>
- Alberta Civil Liberties Research Centre www.aclrc.com
- Canadian Human Rights Commission <http://www.chrc-ccdp.ca/en/index.asp>
- Alberta Human Rights Commission <http://www.albertahumanrights.ab.ca>
- Edmonton Police Service <http://www.edmontonpolice.ca/communitypolicing/organizedcrime/hatebiascri>

[me.aspx](#)

- Calgary Police Service <http://www.calgarypolice.ca/community-hatebias.html>

2. Small Group Discussion

Background: Students need an overview of the information, on hate crimes and hate expression, contained in this booklet.

Instructions to Students:

1. Read the news story below.
2. Break into groups and answer the questions after the story.
3. Discuss your findings with the class.

City cops are investigating a hate crime at the University of Alberta after an openly-gay student was attacked near campus last week.

The assault against him is being considered a hate crime, police confirmed Monday, because the victim was targeted due to his sexual orientation.

“The Hate Crimes Unit is investigating the case,” said EPS spokesperson Patrycia Thenu. “The occupants uttered several disparaging remarks about his sexual orientation.”

Police say Chevi Rabbit was walking to a Safeway near his campus-area dorm on 84 Avenue around 9 p.m. last Thursday when three men pulled up next to him and began taunting him with homophobic slurs.

When Rabbit turned to walk away, a man leapt from the car, tackled him to the ground and pinned him in a headlock.

“He grabbed me and threw me to the ground,” the shaken student told the Sun, adding his iPhone was also stolen during the scuffle. “The guys in the car backed up on the one-way.”

The men — described as a Caucasian male with a French accent, a black male with short hair, and another man who appeared to be Middle Eastern — fled the area in a 2000 silver four-door Acura 3.2 TL.

Police say several witnesses rushed to help Rabbit — who was treated for minor injuries, including a gash on his hand and bruises on his knees.

The 26-year-old native studies and anthropology student is “proudly gay” and frequently dons makeup and dresses in women’s clothing.

Clayton Schug, Rabbit’s stepfather, was relieved to hear the police would be taking action.

He says his step son has been left traumatized by the attack, and the whole family is saddened by what amounts to a painful reality check.

“It just makes me sad that the truth is this stuff is still happening, and maybe people just don’t come forward,” he said from his home in Ponoka. “It (hate crimes) shouldn’t happen, this shouldn’t have happened to him.”

Thenu says reported hate crimes are always taken seriously and investigated thoroughly by police.

“Unfortunately, this does happen in society,” she said. “However, based on statistics, these numbers are quite low but we wish it didn’t happen at all.”

In 2011, close to 40 hate crimes took place in the city, and this year police are investigating 14 different instances.

Though he’s “very feminine” Rabbit says he’s never run into any issues concerning his sexuality before.

The part-time makeup artist has been staying with family in Ponoka since the attack.

He's not sure if he'll be returning to live in his dorm.

No charges have been laid and police say the investigation into the hateful attack is ongoing.

Edmonton Sun, July 23, 2012 by Angelique Rodrigues
angelique.rodrigues@sunmedia.ca

Group Discussion Questions:

1. Is the attack on Chevi Rabbit a hate crime or hate expression? What is the difference?
2. What actions, reported in the news article make this based on hate?
3. How do you think Chevi Rabbit felt after the attack?
4. If the attackers are charged, what law would apply to them? The *Criminal Code* or the *Charter of Rights and Freedoms*? Why?

Class discussion:

Discuss the groups' findings. Reiterate that the *Criminal Code* covers hate "crimes" while the *Charter of Rights and Freedoms* protects people from discrimination such as hate expression. Discuss the difference between hate crimes and hate expression.

3. Freedom of Expression vs Hate Expression

Case Study:

A religious organization, called "My Religion", says that it does not believe that followers should be able to date or marry outside of the My Religion faith. The Head of My Religion participates in speeches that announce to the public that this is a strong belief in My Religion and all followers must adhere to it. Some followers speak out against the Head of My Religion and one particular person, Irena, leaves My Religion. She marries someone from a different group called "Their Religion". Their Religion doesn't believe in restrictions about people one can marry or date. The Head of My Religion writes several letters to the newlyweds saying that they would not live a nice

afterlife and would deeply regret getting married. The Head of My Religion also writes a letter to the Editor about Their Religion, how evil it is and what horrible things would happen to congregants from Their Religion. He writes several personal letters to Irena saying that Their Religion is evil and that she was evil for marrying someone from Their Religion. He then publishes one of the letters in the My Religion Newspaper and on pamphlets that he hands out in a nearby neighbourhood.

Questions for Discussion:

1. If you were asked to argue that the actions of the Head of My Religion amounted to hate expression, what words or actions would you argue were hateful?
2. Are there any actions that you think the Head should have been allowed to do? At what point do you think his actions became an issue of promoting hate?
3. Do you think it is reasonable that a person can state their opinion about My Religion by saying that other religions are 'evil'? Why or why not?
4. What value is there in supporting the Head's right to freely express his opinion about Their Religion? At what point do you think that right to freely express an opinion ends?
5. For instance, if the Head picketed at Irena's house do you think that would be a permissible way to show his opinion about Their Religion? Is this different than publicly talking about the evils of Their Religion? Where do you think the line is for how he can express his opinion about Their Religion without going too far?
6. How might the public react to the letters that the Head of My Religion published? Is there a value in having a public discussion about the Head's opinions? What is valuable about that discussion?

Discussion:

The above questions do not have a right or wrong answer. They are meant to help students discuss what limits they are willing to impose on a person's freedom of expression in order to prevent hate expression.

Students can refer to the provisions under the *Charter* and under section 3 of the

Alberta Human Rights Act to see what the legislations says about hate expression and where the line is. However, the legislation can be difficult to interpret and the debate is an interesting aspect of the discussion. If we allow all expression without limits, then how will the targeted group (i.e., Their Religion and Irena) find protection? For instance, the Head of My Religion may have found that there was a public outcry against his opinions. This would bring the issue into public debate, but would not help Irena who was receiving personally harassing letters. Are limitations on hate the right way to address this form of expression or should these limitations be left to other circumstances that students think are even more serious?