



## **Explanation Document**

### **Hate Indicators: A Canadian Hate Crime Case Law Research Tool**

#### **INTRODUCTION**

There is a strong public interest in prosecuting hate crimes<sup>1</sup>. To this end, this resource provides research support to Crown prosecutors on hate crimes. It can also provide research support to defence counsel and inform training of Crown prosecutors, defence counsel and police alike.

This online resource was created by the Canadian Race Relations Foundation (CRRF) and Western University's Faculty of Law (Western Law) and helps advance the work of Canada's National Hate Crimes Task Force. It is based on insights and information from case law where judges have considered 718(2)(a)(i) of the *Criminal Code*<sup>2</sup>.

This resource includes:

1. A case law chart, which provides an overview of the facts and summarizes information from each case
2. A list of 14 factors that flow from the case law to identify whether a crime may be motivated by bias, prejudice or hate
3. A factor chart to identify each case in which a factor appeared to have been considered by a judge
4. Copies of unreported decisions we received from Ontario and British Columbia
5. Videos with illustrative examples of how to use the resource

#### **DISCLAIMER**

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<sup>1</sup> British Columbia's Office of the Human Rights Commissioner, [\*From hate to hope: Report of the inquiry into hate in the COVID-19 pandemic\*](#) (2023) at 266

<sup>2</sup> By virtue of subsection 718.2(a)(i) of the *Criminal Code*, evidence that an 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 on any other similar factor" is deemed an aggravating circumstance for the purpose of sentencing. It must be proven by the Crown beyond a reasonable doubt.

*Criminal Code*, RSC 1985, c C-46, ss. 718.2(a)(i), 724(3)(e)



This is an informational resource and should not be considered as legal advice. We cannot guarantee the legal accuracy or completeness of the information. Please exercise due diligence before relying on the information contained in this resource.

Please note that the factors to identify whether a crime may be motivated by bias, prejudice or hate are not determinative and are not exhaustive. In other words, a crime may not be a hate crime even if factors are present in a given case.

## TEAM

Western Law completed the research with funding and guidance from the CRRF.

### Western Law

- Sunil Gurmukh, Assistant Professor and Assistant Dean (Equity, Diversity, Inclusion and Decolonization)
- Andrew Botterell, Associate Professor and Acting Dean
- Law Student Research Assistants

### Canadian Race Relations Foundation

- Mohammed Hashim, Executive Director
- Saswati Deb, Chief of Staff and Associate Executive Director
- Fatma Hassan, Director of Public Policy
- Geneviève Mercier-Dalphonf, Public Policy Manager

## THE DEFINITION OF A HATE CRIME

A hate crime is<sup>3</sup>:

Any criminal offence committed against a person or property that is motivated in whole or in part by bias, prejudice or hate. This motivation can be based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation or gender identity or expression, or on any other similar factor. It may be an act of violence (assault), intimidation (following, shouting threats), or property damage (arson, vandalism, graffiti). A person may experience a hate crime based on intersecting aspects of their identity (e.g., religion and gender).

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<sup>3</sup> Canadian Race Relations Foundation, *Reporting hate, finding support: a toolkit for communities* (2024) at 3; See also Jing Hui Wang and Greg Moreau, “[Police-reported hate crime in Canada, 2020](#)” (Juristat) at 5, which refers to Statistics Canada, Canadian Centre for Justice and Community Safety Statistics, “Incident-based Uniform Crime Reporting Survey”



Hate crimes “harm not only one person, but also their entire community and other related communities who may feel at increased risk”<sup>4</sup>.

## POTENTIAL USES

This resource provides research support to Crown prosecutors on hate crimes. It will help Crown prosecutors find case law so they can, among other things:<sup>5</sup>

1. Provide advice to police on investigations
2. Assess charges
3. Identify and tender relevant evidence
4. Craft sentencing submissions

For example, the case law chart, list of factors and factor chart will help with, among other things:

- Identifying or tendering relevant evidence based on evidence admitted and considered in previous cases
- Determining, based on previous cases, whether there is a reasonable basis on the available evidence to conclude that a crime was motivated by bias, prejudice or hate under s. 718.2(a)(i)
- Identifying similar cases and determining a sentencing position that addresses the aggravating and mitigating circumstances

From a research perspective, the case law chart will also facilitate the identification of trends<sup>6</sup>.

In addition, this resource can provide research support to defence counsel to help them advise their clients. Finally, it can inform training of Crown prosecutors, defence counsel and police alike on legal developments and case studies.

## METHODOLOGY AND FORMAT

### Cases

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<sup>4</sup> *Ibid*

<sup>5</sup> See for example, BC Prosecution Service, “[Crown Counsel Policy Manual – Hate Crimes Policy](#),” *Province of British Columbia*.

<sup>6</sup> See, for example, Susan McDonald et al., [Hate as an aggravating factor a sentencing: a review of the case law from 2007-2020](#) (2020), *Department of Justice Canada*



To find published decisions that discussed or considered s. 718.2(a)(i) of the *Criminal Code*, we replicated the case search methodology of Susan McDonald et al., [\*Hate as an aggravating factor a sentencing: a review of the case law from 2007-2020\*](#) (2020), *Department of Justice Canada*, using CanLII, WestLaw Edge Canada, Lexis Advance Quicklaw. The report listed cases from 2007 to 2020, so we updated the search to include cases 2021-2023. In total, we analyzed 76 reported Canadian decisions that were made between 2000 and 2023 (58 English and 18 French).

We also analyzed:

- 37 unreported decisions from Ontario that were made between 2020 to 2023. These decisions were provided by Crown prosecutors from Ontario's Ministry of the Attorney General
- Three unreported decisions from British Columbia that were made in 2009, 2019 and 2022. These decisions were provided by Crown prosecutors from British Columbia's Ministry of the Attorney General

### **Case law chart**

The case law chart provides an overview of the facts and summarizes information from each case, including:

- a. Charges
- b. Conviction
- c. Demographic information about the accused and victim
- d. Factors that appear to have been considered by the court in assessing whether the crime was motivated by bias, prejudice or hate
- e. Ground at issue (e.g. race, disability, gender identity, religion)
- f. Identity group at issue (e.g. Black, Trans, Jewish, Muslim)
- g. Finding re whether the crime was motivated by bias, prejudice or hate
- h. Degree of bias, prejudice or hate required by the judge
- i. Aggravating and mitigating factors
- j. Sentence

The case law chart is organized chronologically, by province.

### **List of factors**



We applied a contextual approach to identify factors that appear to have been considered as part of hate, bias or prejudice motivation analysis in decisions. This is consistent with the test for sufficient reasons in a trial judge's decision:<sup>7</sup>

The reasons must be sufficient to fulfill their functions of explaining why the accused was convicted or acquitted, providing public accountability and permitting effective appellate review.

It follows that courts of appeal considering the sufficiency of reasons should read them as a whole, in the context of the evidence, the arguments and the trial, with an appreciation of the purposes or functions for which they are delivered (see *Sheppard*, at paras. 46 and 50; *R. v. Morrissey* (1995), 1995 CanLII 3498 (ON CA), 22 O.R. (3d) 514 (C.A.), at p. 524).

These purposes are fulfilled if the reasons, read in context, show why the judge decided as he or she did. The object is not to show how the judge arrived at his or her conclusion, in a “watch me think” fashion. It is rather to show why the judge made that decision.

The case law principally informed the development of the list of factors to identify whether a crime may be motivated by bias, prejudice or hate. They are organized under the 5Ws: Who? Where? When? What? Why? Each factor was considered by judges in at least one case. The list of factors is also consistent with articles and reports we reviewed<sup>8</sup>.

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<sup>7</sup> *R v REM*, 2008 SCC 51 (CanLII), at paras 15-17; See also *R v Sowell*, 2023 ONCA 398 (CanLII). Although not about s. 718.2(a)(i), see *R v A.B.*, 2012 NSPC 31 (CanLII) at paras 79-92; *R v Sears*, 2021 ONSC 4272 (CanLII); appeal dismissed 2021 ONCA 522 (CanLII).

<sup>8</sup> Articles and reports reviewed include the following:

- Michelle S. Lawrence & Simon N. Verdun-Jones, "Sentencing Hate: An Examination of the Application of S. 718.2(a)(i) of the Criminal Code on the Sentencing of Hate-Motivated Offences" (2011) 57:1 Crim LQ 28
- Susan McDonald et al., "[Hate as an Aggravating Factor at Sentencing: A Review of the Case Law from 2007-2020](#)" (2020)
- Barbara Perry and Kanika Samuels-Wortley, "'We're Not Where We Should Be': Enhancing Law Enforcement Responses to Hate Crimes" (2021) 63:2 Canadian Journal of Criminology and Criminal Justice 68
- The Ontario Association of Chiefs of Police, [Hate/Bias Crime: A Review of Policies, Practices & Challenges](#) (2020)
- Federal Bureau of Investigation Uniform Crime Reporting Program, [Hate Crime Data Collection Guidelines and Training Manual](#) (2022)
- MacEwan University (Office of Human Rights, Diversity and Equity), "[Supporting Victims of Hate Crimes & Incidents: A Community Centered Approach](#)" (2022)



## The factor chart

This chart identifies each case in which a factor appeared to have been considered by a judge. In other words, we cross-linked the cases to the factors.

If the court decided that hate, bias or prejudice motivation was proven beyond a reasonable doubt, we marked the case as "positive." If not, we marked it as "negative." If a factor was discussed, we marked the factor as "Y/N," depending on whether the factor existed in the case at bar or not.

## UPDATES

The CRRF and Western Law intend on updating the Crown resource with new case law every three years.

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- Facing Facts, "[The Facing Facts Guidelines for Monitoring of Hate Crimes and Hate Motivated Incidents](#)" (2012)
  - Canadian Centre for Justice and Community Safety Statistics, "Uniform Crime Reporting Survey (UCR) Manual" (2023)
  - Mark Walters et al., "[Hate Crime and the Legal Process: Options for Law Reform](#)" (England and Wales) (2017)
  - The Crown Prosecution Service, "[Hate and Religious Hate Crime – Prosecution Guidance](#)" (2022); "[Disability Hate Crime and Other Crimes Against Disabled People – Prosecution Guidance](#)" (2022); "[Homophobic, Biphobic and Transphobic – Prosecution Guidance](#)" (2022)
  - Michael Nesbitt et al., "Terrorism Sentencing Decisions in Canada Since 2001: Shifting Away from the Fundamental Principle and Towards Cognitive Biases" (2019) 52 UBC L Review 553
  - Jeannine Bell, "Pick the Lowest Hanging Fruit: Hate Crime Law and the Acknowledgment of Racial Violence" (2022) 112:4 Journal of Criminal Law and Criminology 691
  - David A. Hall, "Ten Years Fighting Hate" (2020) 10:2 U Miami Race & Soc Just L Rev 79
  - Irfan Chaudhry, "Making Hate Visible: Online Hate Incident Reporting Tools" (2021) 17:1 J Hate Stud 64