

**Hate-motivated Offences and Aboriginal Peoples:
Sentencing Provisions of Section 718.2(a)(i) of the *Criminal Code of Canada***

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By

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Abstract

The sentencing provisions of section 718.2(a)(i) of the *Criminal Code of Canada* adopt the view that Canadians have the right to live in society without being subjected to hatred. The research has shown, however, that section 718.2(a)(i) misses the opportunity to address hate-motivated offences directed toward Aboriginal people. This is particularly troubling given the high rates of violence experienced by Aboriginal people and Aboriginal women.

It is now widely acknowledged that Euro-centric laws and discriminatory policies flourished in Canadian society in an attempt to dismantle formerly organized Aboriginal nations and their strong structures of governance, diverse cultures of language, practices and traditions. Although later laws were entrenched to transform oppressive relationships, this thesis reveals there remains significant gaps in understanding hate motivated crimes directed toward Aboriginal people and Aboriginal women.

The patterns of violence directed toward Aboriginal women substantiate the finding that for some men, Aboriginal women are considered prey. However, the sparse data available does not distinguish Aboriginal women as a specific class of people subjected to hatred. Reviewing the current case law, the thesis looks closely at: proving hate motivated offences, ideology, slurs, knowledge, degree of motivation, identity of the victim, the accused and issues surrounding denial of culpability. Several important broad findings and trends of the courts are drawn from the examined jurisprudence and literature.

This thesis reveals there is little case law giving meaningful attention to the hatred of Aboriginal people. Aboriginal people are rarely found to be victims of hate-motivated crimes. Aboriginal people and Aboriginal women are, with few exceptions, a missing category of protection under section 718.2(a)(i) in both the written provisions and case law.

The direct and specific inclusion of Aboriginal women as a protected category of protection under s. 718.2(a)(i) and a definition provision of hatred would be consistent with principles of the constitution, human rights law and the provisions of the *Criminal Code*. Most importantly, it may assist in addressing gaps in addressing hate-motivated crimes directed toward Aboriginal people and Aboriginal women.

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Believing in Someday – Maybe, Someday, we will all join hands and live together ... Helping each other, Loving each other. Maybe, Someday, We will all make the world A much better place ...¹ Mattie J.T. Stepanek

Introduction

In 1996, Canada amended the sentencing provisions of the *Criminal Code*² in the hopes of addressing issues of hate-motivated offences. Section 718.2(a)(i) of the *Code* instructs the courts to increase the penalty for crimes “... motivated by bias, prejudice or hate-motivated crimes based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation or any other comparable factor.” Such motives are deemed to be “aggravating circumstances” and cause for enhanced penalties.³

Section 718.2(a)(i) grew out of an increased awareness of hate-motivated offences in Canada. More recently, Canadian police are increasingly establishing hate crime units and reporting of hate-motivated offences.⁴ Minorities generally, and Aboriginal peoples specifically, are obvious beneficiaries of the protections offered by the sentencing legislation.⁵ Reducing racism, bias, prejudice and hatred are important goals for democratic societies pursuing equality and protection of human rights.

¹ Mattie J.T. Stepanek, *Hope through Heartsongs* (New York: Hyperion, 2002) at 59. Mattie Stepanek was a young boy who struggled and eventually succumbed to a rare form of muscular dystrophy.

² *Criminal Code*, R.S.C. 1985, c.C-46 [*Criminal Code*].

³ *Ibid.* at section 718.2(a)(i).

⁴ Cara Dowden & Shannon Brennan, “Police-reported hate crime in Canada, 2010” Juristat Statistics Canada (no. 85-002-X) released April 12, 2012 at 7, 18, online <<http://www.statcan.gc.ca/pub/85-002-x/2012001/article/11635/c-g/desc/desc01-eng.htm>>. Although the rate of police-reported hate crimes in 2010 was 4.1 per 100,000 population—a decrease from the 2009 rate of 5 per 100,000—the 2010 findings remained much higher than the 2006 rate of 3.1, the 2007 rate of 2.7 and the 2008 rate of 3.5 per 100,000.

⁵ Legislative Assembly, Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness, “Evidence” No. 041 (19 May 2005) Hon. Irwin Cotler (Minister of Justice), online <<http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=1869690&Language=E&Mode=1&Parl=38&Ses=1#Int-1291922>>.

Specific protection of Aboriginal rights is entrenched within section 35(1) of the *Constitution Act, 1982*.⁶ The provisions ensure governments could no longer rely upon past approaches to Aboriginal title and rights. As articulated in the *R. v. Sparrow*⁷ decision of the Supreme Court of Canada, the watershed case signaled to government and society that infringement of Aboriginal title and rights will not be tolerated, especially in view of the fiduciary duty owed to Aboriginal Peoples. The constitutional entrenchment of rights marked a positive step forward for the relationship of Aboriginal people with Canada. Within this framework, the enactment of the specific sentencing provisions for hate-motivated offences should represent another avenue of commitment to Aboriginal people to be free from bias, prejudice and hatred.

As highlighted in this thesis, Aboriginal people in Canada have unique histories and experiences of harms and injustices that many others did not encounter in Canada's history. Countless personal accounts by Aboriginal people and a plethora of reports provide overwhelming evidence of racial discrimination and harms leveled against Aboriginal people living in Canada.⁸ These studies show that oppression, racism and discrimination are unrelenting, pervasive and present in today's society. For instance, the incidents of violence against Aboriginal people, especially Aboriginal women, continue at alarming rates.⁹ Within the overarching crisis of

⁶ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Constitution Act*]. Section 35(1) states: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."

⁷ *R. v. Sparrow*, [1990] 1 S.C.R. 1075, 3 C.N.L.R. 160 [*Sparrow*].

⁸ Saskatchewan, Report of the Commission of Inquiry into Matters Relating to the Death of Neil Stonechild (Regina: Queen's Printer, 2004) [*Stonechild Inquiry*]; Saskatchewan, *Final Report of the Commission on First Nations and Métis Peoples and Justice Reform: Legacy of Hope: An Agenda for Change*, vol. 1 (Regina: Queen's Printer, 2004); Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice Canada* (Ottawa: Minister of Supply and Services, 1996) [*Bridging Cultural Divide*]. Aboriginal Justice Implementation Commission, Recommendation on Policing, (Winnipeg: Queen's Printer, 1991); Alberta, Task Force on the Criminal Justice System and Its Impact on the Indian and Métis People of Alberta, *Justice on Trial* (Edmonton: Province of Alberta, 1991); Michael Jackson, *Locking Up Natives in Canada – A report of the Canadian Bar Association on imprisonment and release* (1988), University of British Columbia, Jonathan Rudin, "Aboriginal Peoples and the Criminal Justice System" (Research Paper Commissioned by the Ipperwash Inquiry), online <http://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/policy_part/research/index.html>, A Review and Compilation of the Recommendations of Twenty-Two Major Reports from 1967 to 1990 on Aboriginal people and the Criminal Justice System (January, 1991), online <http://justice.alberta.ca/programs_services/aboriginal/Documents/cawsey/Cawsey_III_4_1.pdf>, accessed May 24, 2011.

⁹ *Report of the Aboriginal Justice Inquiry of Manitoba: The Justice System and Aboriginal People*, vol. 1 (Winnipeg: Queen's Printer, 1991), *Report of the Aboriginal Justice Inquiry of Manitoba: The Death of Helen Betty Osborne*, vol. 2 (Winnipeg: Queen's Printer, 1991) [collectively, *Aboriginal Justice Inquiry*], Amnesty International, *Stolen Sisters: A Human Rights Response to Discrimination and Violence Against Indigenous Women in Canada*

violence directed toward Aboriginal people and Aboriginal women, this thesis examines the sentencing provisions and case law surrounding hate-motivated crimes. The literature is examined to identify missed opportunities in the legislation's response to bias, prejudice and hatred. Finally, the thesis offers some thoughts on moving the discussions of hatred in a different way forward.

Objectives

Courts have grappled with how to analyze and sentence hate-motivated offences since the legislation was first implemented in 1996. A lens of Aboriginal values and women's perspectives provides a critical look at hate-crime sentencing provisions and the need for Aboriginal women to be free from bias, prejudice and hatred. The thesis seeks to provide a contribution to the discussion with core questions about the framework and scope of the legislation and implications for Aboriginal people.

Research Methodology

The study draws upon a myriad of sources within the academic, government, and legal and public bodies of knowledge: library resources, research centres as well as public and legal searches. Legal databases consisting of reported written judgments from across Canada were extensively canvassed as well as a selection of unreported judgments available through database searches.

Searches were conducted in Quicklaw, Westlaw, BestCase and CanLII while using a variety of search terms in many combinations including: Aboriginal, First Nation, Indian, Métis, 718.2(a)(i), bias/prejudice/hate, victim and complainant. The results were reviewed and material evaluated according to relevance.

(AI Index 20/003/2004, October 2004), online: Amnesty International <www.amnesty.ca/stolensisters/amr2000304.pdf> [*Stolen Sisters*].

Limits of the Study

This thesis does not analyze whether or not there should be legislation criminalizing hatred or punishing hate-motivated crimes.¹⁰ Nor does this thesis provide an analysis on the police units investigating hate crimes, nor does it explore Crown prosecutors decision making processes in hate-motivated crimes. Rather, this thesis focuses on examining the jurisprudence and factors the court relies upon in its decisions.

Aboriginal understandings and experiences, with a specific focus on Aboriginal women, provide the overriding perspective for this analysis. It must also be stated that while Aboriginal women's perspectives provide the lens for the analysis, this thesis does not offer an all-encompassing view of all Aboriginal women's experiences and the lives of Aboriginal women are only briefly discussed given the space limitations.

Finally, issues of Aboriginal identity are beyond the scope of this study. Accordingly, this thesis accepts the classification of identity stated or assumed by the courts in the relevant cases.

Outline of Chapters

Chapter 1 provides the historical and legal background of Aboriginal people as context for the examination of section 718.2(a)(i). Discriminatory laws and policies and its profound influences on the lives and experiences of Aboriginal peoples are briefly reviewed. This chapter provides a brief examination of the constitutional entrenchment of Aboriginal rights.

Chapter 2 maps hate crime legislation in Canada today. The human rights legislation and *Criminal Code* specific provisions addressing hatred is canvassed including the historical development of s. 718.2(a)(i) hate-motivated sentencing provisions.

¹⁰ Canadian Human Rights Commission, *Special Report to Parliament: Freedom of Expression and Freedom from Hate in the Internet Age*, (Ottawa: Minister of Public Works and Government Services, 2009). See also: Mark Carter, "Addressing Discrimination Through the Sentencing Process: Criminal Code s. 718.2(a)(i) in Historical and Theoretical Context" (2000), 44 *Criminal Law Quarterly* 399-436.

Violence and hatred directed toward Aboriginal people is noted throughout the thesis and Chapter 3 sets the context. This Chapter provides an overview of violence targeting Aboriginal women and the disparities between violence experienced and hate-motivated crimes.

Chapter 4 discusses the conceptualizations of hatred, hallmarks of hatred and definitions of bias, prejudice and hate under human rights laws and the *Criminal Code*. Insults, offensiveness, humiliation and intimidation can be manifestations of contempt. Hatred, in this way, builds upon factors of contempt to a level of vilification and detestation the Court rules is unacceptable in Canadian society.

Chapter 5 examines the enumerated groups protected and provides comparisons of hate provisions for sexual orientation, sex and gender protections under the *Criminal Code*. This chapter examines Aboriginal women as a missing category of s. 718.2(a)(i) and reviews inclusion considerations, intersectionality, and legal empowerment of Aboriginal women. Recognizing hatred of Aboriginal women as a reality similar to gendered hatred and homophobia provides a greater understanding of the failures of law.

Chapter 6 explores the courts use of evidence to prove that an offence is hate-motivated including the onus of proof, the criteria and methods for *voire dices*, expert evidence, the thresholds for triggering the provisions and how courts have approached minority status, slurs and denials of the accused. Focused attention is given to Aboriginal people as victims.

Chapter 7 provides final reflections in understanding bias, prejudice and hatred directed toward Aboriginal people in Canada. The chapter concludes with highlighting possibilities for healing of hate.

*It is difficult not to conclude that there is something deeply wrong with the manner in which, in our own lands, anti-racism does not begin with, and reflect, the totality of Native peoples' lived experience—that is, with the genocide that established and maintains all of the settler states within the Americas.*¹¹ **Bonita Lawrence**

Chapter 1: Historical Context

While many people in Canada's history have suffered from racial discriminatory laws and policies, in particular the Chinese and African American minorities,¹² the oppressive experiences of Aboriginal people as the “original people” have a unique history and law in the Canadian landscape. As people living “in organized, distinctive societies with their own social and political structures”¹³ prior to European contact or control, Aboriginal people were the first people on the land and their rights today derive from their integral practices and traditions.¹⁴

¹¹ Bonita Lawrence & Enakshi Dua, “Decolonizing Anti-racism” in Ashok Mathur, Jonathan Dewar, Mike DeGagné, eds., *Cultivating Canada: Reconciliation through the Lens of Cultural Diversity* (Ottawa, Aboriginal Healing Foundation, 2011) at 236.

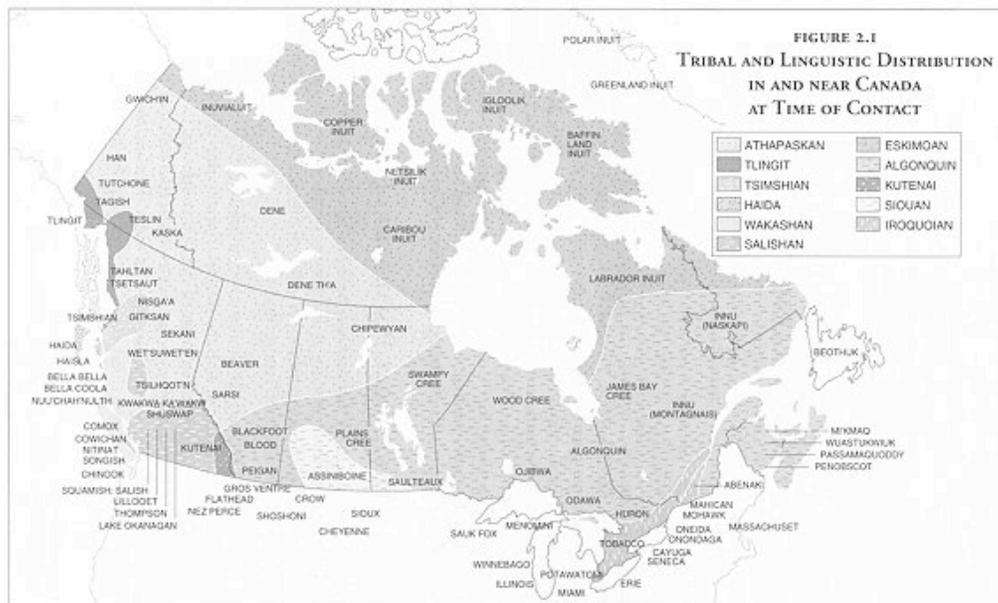
¹² Constance Backhouse, *Colour-Coded: A Legal History of Racism in Canada, 1900-1950* (Toronto: University of Toronto Press, 1999).

¹³ *R. v. Van der Peet*, [1996] 2 S.C.R. 507, [1996] 4 C.N.L.R. 146 [*Van der Peet*] held that Aboriginal rights are practices, traditions or customs existing prior to European contact and an integral part of the distinctive society. Building upon the *Van der Peet* analysis, the Supreme Court stated in *Mitchell v. Minister of National Revenue*, [2001] 1 S.C.R. 911, [2001] 3 C.N.L.R. at para. 9 and at para. 12 that “integral” requires the right to be of central significance, at the core of identity, and a defining feature that is vital to the life, culture and identity of the Aboriginal nation.

¹⁴ Aboriginal rights are not created with Canadian legislation but instead derive from Aboriginal practices and traditions that predate European effective control. *Ibid.*, *Vanderpeet* and later the Supreme Court of Canada modified the *Van der Peet* test for Métis in *R. v. Powley*, [2003] 2 S.C.R. 207, [2003] 4 C.N.L.R. 321 when the Court, in a unanimous judgment, said that the Powleys, as members of the Sault Ste Marie Métis community, can exercise a Métis right to hunt that is protected by s.35. See: Métis National Council, “Fulfilling Canada’s Promise: *R. v. Powley* - A Case Summary and FAQs” (2003), online <http://www.Métisnation.ca/POWLEY/canadas_promise/supreme_court.html>.

1.1 History

The Royal Commission on Aboriginal Peoples (RCAP)¹⁵ was established to ‘investigate the evolution of the relationship among aboriginal peoples (Indian, Inuit and Métis) and Canadian society.’ The RCAP findings provide a starting point in contextualizing bias, prejudice and hatred directed at Aboriginal people. Historically, First Nation people had well established and diverse culture as evidenced by their many languages:



Note: The lines on the map separating the various tribal groups are not precise boundaries. The map provides a general picture of where populations were living at the time of first European contact.

Source: Adapted from Olive P. Dickason, *Canada's First Nations: A History of Founding People from Earliest Times* (Toronto: McClelland & Stewart Inc., 1992), p. 65. Used with the permission of McClelland & Stewart Inc.

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¹⁵ Canada, *Royal Commission on Aboriginal Peoples, Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back*, vol. 1 (Ottawa: Minister of Supply and Services Canada, 1996); Canada, *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, vol. 2 (Ottawa: Minister of Supply and Services Canada, 1996); Canada, *Report of the Royal Commission on Aboriginal Peoples: Gathering Strength*, vol. 3 (Ottawa: Minister of Supply and Services Canada, 1996); Canada, *Report of the Royal Commission on Aboriginal Peoples: Perspectives and Realities*, vol. 4 (Ottawa: Minister of Supply and Services Canada, 1996); Canada, *Report of the Royal Commission on Aboriginal Peoples: Renewal: A Twenty-Year Commitment*, vol. 5 (Ottawa: Minister of Supply and Services Canada, 1996) [RCAP Report]. In 2008, approximately 84,000 pages of transcripts from the RCAP hearings and roundtables were made available online through the University of Saskatchewan Archives. This is “an important collection of documents from the university’s Native Law Centre – the complete set of transcriptions of hearing and round table discussion of the Royal Commission on Aboriginal Peoples (RCAP)”. This collection was originally donated to the Native Law Centre by former Saskatchewan Premier and RCAP Commissioner Allan Blakeney.’ See: David A. Smith, “The Royal Commission on Aboriginal Peoples Transcripts Online” (2009) 18, no. 2 *Native Studies Review* 135, online <<http://ecommons.usask.ca/handle/10388/302>>, accessed May 11, 2011 [RCAP Transcripts].

¹⁶ Canada, *Royal Commission on Aboriginal Peoples, Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back*, vol. 1 (Ottawa: Minister of Supply and Services Canada, 1996) at 21, online <https://qspace.library.queensu.ca/bitstream/1974/6874/5/RRCAP1_combined.pdf> [Looking Forward].

Today First Nation people have more than 50 distinct language groups. For the Inuit, they are holders of dialects within Inuktitute. In comparison, the Métis traditional language is Michif but many Métis people use combinations of languages such as French and Cree. Each language has rich diversity and different dialects within it, all of which are Aboriginal.¹⁷ These languages reflect distinctive cultures of the Peoples.

The governance and structures of Aboriginal societies changed dramatically as more settlers moved into the territories¹⁸ and demanded Aboriginal resources and land. At the same time, attitudes of Euro-Canadian superiority over Aboriginal people became strongly entrenched within communities.¹⁹ Treaties were negotiated between the Crown and Aboriginal peoples.²⁰ Aboriginal people understood treaties to be government to government agreements regarding the sharing of land and resources. It was important to the Crown to make Aboriginal land and resources available for agricultural and other economic development.²¹ In *Canada's First Nations*, author Olive Dickason discusses the treaties encompassing what is now the province of Alberta:

[Treaty Seven] cleared the way for the construction of the railroad, among other items. ... Treaty Eight, involving today's northern Alberta, northwestern Saskatchewan, northeastern British Columbia, and parts of the Yukon and

¹⁷ *RCAP Looking Forward, ibid.* at 11, 20.

¹⁸ *Ibid.* 137-141. Relationships during the early years of contact between First Nation People and the immigrants was closer to 'nation to nation' than the later 'state to ward' relations. RCAP notes early contact unfolded with mutual curiosity, apprehension, exchange of goods, barter and trade, friendships, intermarriage, military and trade alliance and bonds between nations. Cautious co-operation was the theme. Relations became formalized through treaties and the *Royal Proclamation of 1763, infra* note 25.

¹⁹ *Ibid.* at 141. For an understanding of colonization, see: Albert, Memmi, *The Colonizer and The Colonized* (Boston: Beacon Press, 1967). To understand the extreme perversity of colonization and its impact on Aboriginal people, see: Wanda D. McCaslin, ed., *Justice as Healing: Indigenous Ways* (St. Paul: MN, Living Justice Press, 2005), Wanda D. McCaslin & Denise C. Breton, "Going Outside the Colonizers' Cage" in N. Denzin, Y. Lincoln & L. Tuhiwai Smith, eds., *Handbook of Critical and Indigenous Methodologies* (Los Angeles: Sage Publications, Inc., 2008) at 511.

²⁰ Aboriginal people have Aboriginal and treaty rights. According to the Supreme Court of Canada, Aboriginal title depends on an ancestral connection to the land. Treaty rights are derived from negotiated agreements between Aboriginal and Crown governments. There is a growing body of literature by Aboriginal scholars discussing treaty and Aboriginal rights at a deeper level than this study can canvass. For an analysis of First Nations and the Crown government to governments relationships, see especially: James [Sákéj] Youngblood Henderson, "Empowering Treaty Federalism" (1994) 58 Sask. L. Rev. 241, and James Youngblood (Sákéj) Henderson; Marjorie L. Benson and Isobel M. Findlay, *Aboriginal Tenure in the Constitution of Canada* (Scarborough, Ont.: Carswell, 2000).

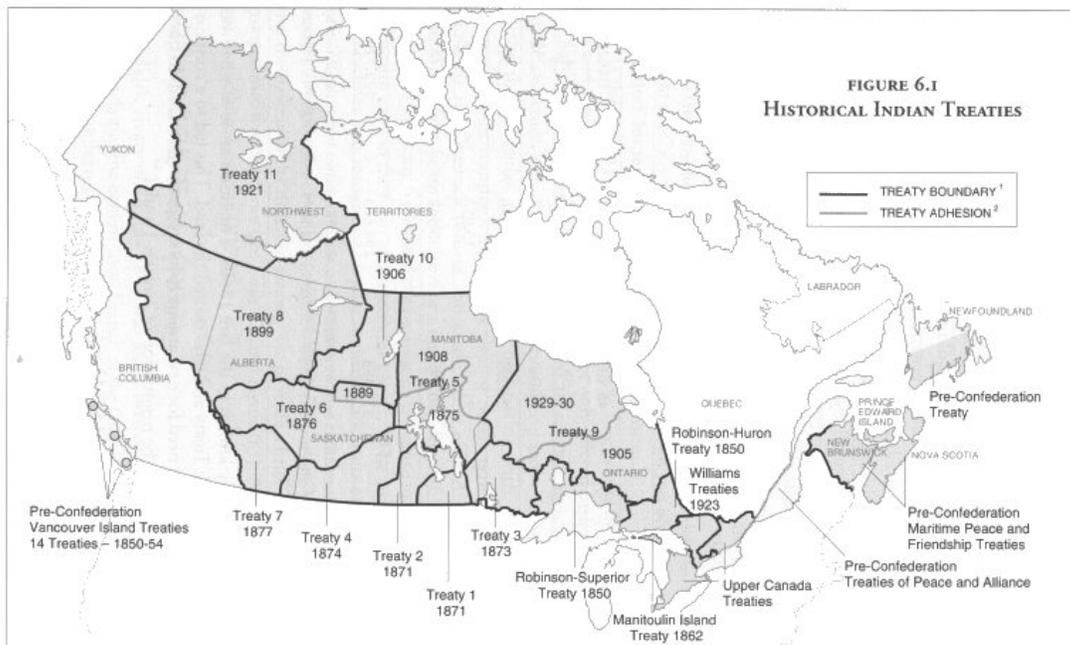
²¹ *RCAP Looking Forward, supra* note 16.

Northwest Territories, ... cleared title to most of the land that would be included in Alberta when it became a province in 1905.²²

In fact, the Crown was more likely to consider treaties as mere real estate transactions. In contrast, First Nations view treaties as sacred agreements about the sharing of land.²³ RCAP describes the difference of government and First Nations as follows:

From the Crown perspective it seemed clear that these treaties were little more than real estate transactions designed to free Aboriginal lands for settlement and resource development. From the Aboriginal perspective, however, the process was broader, more akin to the establishment of enduring nation-to-nation links, whereby both nations agreed to share the land and work together to maintain peaceful and respectful relations.²⁴

When the historical treaty process ended, Canada was a checkerboard of territories:



Notes: 1. Treaty boundary lines are approximate.
2. Extension of a treaty boundary as a result of later signatories who adhered to the terms of the original treaty.
Source: Information taken from the National Atlas Information Services map sheet number MCR4162 © 1991, Her Majesty the Queen in Right of Canada with permission of Natural Resources Canada. 25

²² Olive Patricia Dickason, *Canada's First Nations: A History of Founding Peoples from Earliest Times* (Ontario: Oxford University Press, 1997) at 257 [*Canada's First Nations*].

²³ Harold Cardinal and Walter Hildebrandt, *Treaty Elders of Saskatchewan* (Alberta: University of Calgary Press, 2000).

²⁴ *RCAP Looking Forward*, *supra* note 16 at 140. The historical treaties were promises to secure peace and alliance, gain occupancy and develop rights on Aboriginal land but are not admissions of submission. Nor do treaties give up nationhood or ways of living and governing themselves, *ibid*.

²⁵ *Ibid.* at 162. The early treaties included the 1701 Iroquois Confederacy Treaty, the 1752 Treaty with the Mi'kmaw and in 1763 the *Royal Proclamation* was passed that contained promises of "protection" for First Nation peoples. *Royal Proclamation of 1763*, R.S.C. 1985, App. II, No. 1 [*Royal Proclamation*]. The protections of the

At the same time the Crown established relationships with the First Nations, the Métis people emerged as Aboriginal people. Métis communities, practices, customs and traditional cultures developed within the territories and the Métis retained Aboriginal interests in the land. As distinct Aboriginal people, the Métis fundamentally shaped Canada's expansion westward from the Red River Resistance to the Resistance of Batoche to their inclusion as Aboriginal people with particular rights²⁶ as “distinctive rights-bearing people.”²⁷ RCAP²⁸ commented that:

Métis cultures grew out of ways of life dictated by the resource industry roles of the early Métis. For those who served the fur trade, the birth of the unique Métis language, Michif, was a consequence of using both French and Indian languages. The need to travel inspired mobile art forms: song, dance, fiddle music, decorative clothing. The periodic return to fixed trading bases, the seasonal nature of the buffalo hunt and discriminatory attitudes all shaped settlement patterns. For Métis people of the east, seasonal hunting and gathering expeditions combined with influences that stemmed from a fishing economy. In all cases, the cultures developed organically, their characteristics determined by the social and economic circumstances that germinated and nourished them.²⁹

After years of dissatisfaction with the governments response to their requests, under the leadership of Louis Riel,³⁰ the Métis issued a Declaration of Rights that led to the Red River crisis³¹ and later the Batoche Resistance.³² The Métis, like many First Nations, became the

1763 *Royal Proclamation* are specifically guaranteed to Aboriginal Peoples in s. 25 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11. The foundational principle of the *Royal Proclamation* is the clear recognition ‘that aboriginal peoples had legal and original possession of their lands and that the proper process of acquisition was the surrender of title by them and a purchase by the Crown.’ Canada, *Task Force to Review Comprehensive Claims Policy, Living Treaties: Lasting Agreements* (Ottawa: Department of Indian Affairs and Northern Development, 1985) at 7. See also, *Sparrow*, *supra* note 7.

²⁶ Canada, *Report of the Royal Commission on Aboriginal Peoples: Perspectives and Realities*, vol. 4 (Ottawa: Minister of Supply and Services Canada, 1996 [*RCAP Métis Report*]).

²⁷ *Powley*, *supra* note 14. The Supreme Court of Canada referred to the Métis as “distinctive rights bearing people”.

²⁸ Canada, *Royal Commission on Aboriginal Peoples, Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back*, vol. 1 (Ottawa: Minister of Supply and Services Canada, 1996); Canada, *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, vol. 2 (Ottawa: Minister of Supply and Services Canada, 1996); Canada, *Report of the Royal Commission on Aboriginal Peoples: Gathering Strength*, vol. 3 (Ottawa: Minister of Supply and Services Canada, 1996); Canada, *Report of the Royal Commission on Aboriginal Peoples: Perspectives and Realities*, vol. 4 (Ottawa: Minister of Supply and Services Canada, 1996); Canada, *Report of the Royal Commission on Aboriginal Peoples: Renewal: A Twenty-Year Commitment*, vol. 5 (Ottawa: Minister of Supply and Services Canada, 1996) [*RCAP Report*].

²⁹ *RCAP Métis Report*, *supra* note 26, s. 1.2 at 202.

³⁰ *Canada's First Nations*, *supra* note 22 at 236 – 247 for detailed historical review of the Métis in the Red River area.

³¹ *Ibid.* at 244. Louis Riel is often referred to as the ‘father of Manitoba’.

³² Sometimes called the Battle of Batoche or what many Métis people refer to as the 1885 Northwest Resistance.

targets of displacement from their lands. The ethnocentric demands for First Nation and Métis land and resources continued unabated.

Aboriginal people had possessed all the land and resources and should be the richest people in the territory of what is now known as Canada. However, colonization and all of its manifestations of racism, sexism and oppressive law transformed Aboriginal societies from powerful nations to societies that struggled to claim their rights to land. Aboriginal people have never fully recovered from the cultural and racial onslaught of colonization.

Colonial powers introduced sharp status distinctions, imposed strict rules for governing conduct, controlled the system of social rewards and punishments, and manipulated power and status symbols. These alterations are generally discussed in reference to past events, but it can be readily argued that the impacts have contemporary and generational application and effect.³³[*footnotes omitted*]

The socio-economic findings show that Aboriginal people live well below minimum standards of well-being. Aboriginal people have or experience lower education rates, lower incomes, lower health status, high rates of violence, higher rates of incarceration and higher rates of children in care than any other segment of Canadian society. These indicators of Aboriginal communities at risk or in crisis are direct manifestations of prejudice imbedded within society.³⁴ The unequal status of Aboriginal people in health and education³⁵ is a testimony to how devastating colonization has been to Aboriginal

³³ Cynthia C. Wesley-Esquimaux, "Inside Looking Out, Outside Looking In" (2007) Vol. 3, No. 4 *First Peoples Child & Family Review* at 66, online <http://www.fncaresociety.com/sites/default/files/online-journal/vol3num4/Wesley-Esquimaux_pp62.pdf>.

³⁴ Wanda McCaslin and Yvonne Boyer, "First Nations Communities at Risk And in Crisis: Justice and Security" (2009) 7:1 *Journal of Aboriginal Health* 61. Colonialism is far too often overlooked or dismissed in analysis or developments that surrounds Aboriginal issues. Yet, colonialism and its processes of domination and destruction is a major and central source of harms in many Aboriginal lives. Models of the future, including sentencing processes of s. 718.2(a)(i) must recognize the systemic structures of colonialism and the need for models of decolonization in decision-making processes. Decolonization methodologies must first start with understanding historical colonial relationships.

³⁵ Yvonne Boyer, *First Nations, Métis and Inuit Women's Health*, Discussion Paper Series in Aboriginal Health: Legal Issues, No. 4 (Ottawa/Saskatoon: National Aboriginal Health Organization/Native Law Centre, University of Saskatchewan, 2006). The Auditor General has noted that First Nations students continue to achieve far below non-Aboriginals, (Office of the Auditor General of Canada, June 2011 Status Report, Chapter 4 – Programs for First Nations on Reserves at 4.15, online <http://www.oagbvg.gc.ca/internet/English/parl_oag_201106_04_e_35372.html>. See also Marie Battiste and Jean Barman, eds., *First Nations Education in Canada: The Circle Unfolds* (BC: University of British Columbia Press, 1995).

people. Ethnocentrism and its ongoing generational effects of discriminatory laws explain these gaps, partially if not fully.

Ethnocentric thought, oppression, domination and racism are implicit features of the bias, prejudice and hatred experienced by Aboriginal people. Ethnocentric assumptions of superiority provided the needed justification to implement laws and policies that attacked Aboriginal knowledge, traditions and values. Through these perspectives of superiority, Aboriginal peoples identities and cultures were traumatized and attacked. These patterns of harms continue to be reflected in the realities of life for Aboriginal people and are unique to the histories of Aboriginal people. The early manifestations of bias, prejudice and hatred spilled into Canada's discriminatory laws and policies pertaining to Aboriginal Peoples.

1.2 Discriminatory Laws and Policies

It is now widely acknowledged that legislated discrimination against Aboriginal people is pervasive, sometimes subtle and always challenging for the Eurocentric mindset to remedy. These laws and policies institutionalized the discrimination and racism that, as Professor Constance Backhouse notes, “permeated Canadian society during the first half of the twentieth century.”³⁶ Racism, prejudice, bias and hatred devalued and attacked Aboriginal people and justified the Crown's drive to obtain land and power—an agenda that left Aboriginal people in a state of catastrophic losses and despair. In their examination of the contemporary trauma existing within Aboriginal communities and people, Cynthia Wesley-Esquimaux, Ph.D., and Magdalena Smolewski, Ph.D. observe that:

Aboriginal people were separated from their land, which was always sentient to them and affected people's lives and their social constitution through time. The introduction of non-traditional coping mechanisms damaged families, altered gender roles and diminished cultural values. Indigenous people, before contact, lived in a complex socio-economic system that required co-operation to maximize the productivity of the

³⁶ Constance Backhouse, *Colour-Coded: A Legal History of Racism in Canada, 1900-1950* (Toronto: University of Toronto Press, 1999).

landscape. After contact, Indigenous people were disfavoured in access to resources and social opportunities and killed by diseases.³⁷

Only the federal government has the authority to make laws in relations to “Indians” and “Lands reserved for the Indians,” under section 91(24) provisions of the *Constitution Act, 1867*³⁸. Since 1867, – a century and a half – Canada’s laws and policies have built up a legacy of trail-markers that have harmed Aboriginal people and continue to do so today. One of the first of these trail-markers for First Nation Peoples is the *Indian Act*.³⁹ This *Act* has had far-reaching and long term negative effects on First Nation communities and their members, particularly women. It essentially attacked Indigenous identity. The Crown had no restraints placed on it in developing legislation applicable to Aboriginal people and “it was the habit of governments to legislate in the interests of the dominant society without consulting” Aboriginal people.⁴⁰ James (Sákéj) Youngblood Henderson describes it as:

³⁷ C. Wesley-Esquimaux & M. Smolewski, *Historic Trauma and Aboriginal Healing* (Ottawa: Aboriginal Healing Foundation, 2004) at 5.

³⁸ *Constitution Act, 1867*, R.S.C. 1985, App. II, No. 5.

³⁹ *Indian Act*, R.S.S. 1985, c. I-5. For example, enfranchisement was a process under the *Indian Act* that enabled Indians to acquire the same rights as other Canadian citizens, but only if they relinquished their rights and status as an ‘Indian’ under the *Act*. See: *Indian Act*, R.S.C. 1970, c.I-6, s. 110. As Wendy Moss and Elaine Gardner-O’Toole note in *Aboriginal People: History of Discriminatory Laws* (Ottawa: Minister of Supply and Services Canada, 1987 revised 1991) at 21 [*History of Discriminatory Laws*] “Enfranchisement of Indians was one of the major objectives of federal Indian legislation. Enfranchisement has traditionally been equated with ‘civilization,’ that is, the abandonment of a culture perceived to be inferior and savage for a ‘superior’ European one.” See: *RCAP Looking Forward*, *supra* note 16 at 286-288. To take another example, in 1868 federal law criminalized the ‘sale or barter of liquor to Indians’. By 1874, if an Indian was found intoxicated, he or she was liable to imprisonment for up to one month “with an additional period not exceeding 14 days, if the Indian did not give the name of his supplier.” *Ibid.* at 23, 24. See: Native Law Centre, *Liquor Offences under the Indian Act, no. 19* (Saskatoon: University of Saskatchewan, 1983) at 16 “the only defence common to all these offences is the use or the intended use of the intoxicants in cases of sickness or accident” as stated in s. 99 of the *Indian Act*. *RCAP Looking Forward*, *supra* note 16 at 293, *An Act Further to Amend the Indian Act, 1880* S.C. 1884, c. 27, section 3; *History of Discriminatory Law*, *ibid.* at 14. “The anti-potlatch laws continued as late as 1951 ... ceremonial items and symbols of government were seized and in many cases never returned.” *Ibid.*, See: Canada, *House of Commons, Report of the Special Committee on Indian Self-Government, 1983* at 13 [*Penner Report*].

⁴⁰ *Canada’s First Nations*, *supra* note 20 at 232, 233. See, for instance, *An Act to encourage the gradual Civilization of the Indian Tribes in this Province, and to amend the Law respecting Indians*, S.C. 1857, c. 6 [*Gradual Civilization*]. This is a much different definition of “Indian” than the earlier *Royal Proclamation of 1763* which does not refer to race but instead discusses ‘nations or tribes’. See: *Royal Proclamation of 1763*, R.S.C. 1985, App. II, No. 1 that states “And whereas it is just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting grounds”. The *Gradual Civilization 1869* expanded previous provisions of differential treatment of First Nation men and women. Now if a registered Indian man married a non-Indian woman, she acquired Indian status and the status was passed on to the children. If, however, a status Indian woman married a non-Indian man, she lost all rights and status. These provisions were retained in the *Indian Act* of 1876.

In the eyes of the colonists, the empire brought European civilization and culture to indigenous peoples. According to Eurocentrism, all cultures of humanity should throw off their ancient knowledge systems, heritages, customs, teachings and traditions and adopt market economics, nation-state governments, laws and culture.⁴¹

For First Nation women, the discriminatory provisions regarding land, surrenders, band election, band membership, wills, and status⁴² directly and negatively influenced their ability to be a part of their traditional cultures.⁴³ With the 1951 *Indian Act* provisions, for example, an Indian woman would not only lose her status as an “Indian” but would also be enfranchised the day of her marriage to a non-Indian man.⁴⁴ Thus, she would lose status, band membership and all of any rights she had had to reserve lands, treaty payments, capital and revenue and other moneys owed to the band.⁴⁵

Similar rules were not applicable to Indian men. Non-Indian women would gain Indian status when they married a registered Indian man.⁴⁶ In contrast, a First Nation woman who married a man that was not a status Indian (including Métis or Inuit men) would lose her Indian status and not be considered “Indian” unless she later married a status Indian man.⁴⁷ Clearly, there was a “strong emphasis on the male line of descent.”⁴⁸

⁴¹ James (Sákéj) Youngblood Henderson, *Indigenous Diplomacy and the Rights of Peoples: Achieving UN Recognition* (Saskatoon: Purich Publishing Ltd, 2008) at 23.

⁴² *Ibid.*, *RCAP Looking Forward*, *supra* note 16 at 300-303.

⁴³ Section 6, like many other *Indian Act* provisions, has been amended numerous times over the years. For a history of the various amendments, see: Sharon Helen Venne, *Indian Acts and Amendments 1868-1975, An Indexed Collection* (Saskatoon: Native Law Centre, 1981), for later amendments up to 1993 see: *The Indian Act and Amendments 1970-1993: An Indexed Collection* (Saskatoon: Native Law Centre, 1993). For legislation directly affecting Indians enacted between 1777 and 1867 (being prior to the *Indian Act*) see: *Pre-1868 Legislation Concerning Indians: a Selected and Indexed Collection* (Saskatoon: Native Law Centre, 1993).

⁴⁴ *RCAP Looking Forward*, *supra* note 16 at 302.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.* at 303.

⁴⁷ *Ibid.* at 304.

⁴⁸ *RCAP Perspectives and Realities*, *supra* note 24 at 29. Bill C-31’s passage in 1985 amended the section of the *Act* dealing with status and band membership. Status was restored to those who lost it under s. 12(1)(b) and other provisions. The “general rule was that in future Indian status would be granted to those with at least one parent with status. The concept of enfranchisement, voluntary or otherwise, was totally abolished, and those who lost status through enfranchisement had their status restored. First-generation children of restored persons were granted first-time status. Band membership was guaranteed for some classes of persons restored to status or admitted to status for the first time. Not all were guaranteed automatic band membership...” *RCAP Perspectives and Realities*, *supra* note 24 at 33, Native Women’s Association of Canada, *Guide to Bill C-31: An Explanation of the 1985 Amendments to the Indian Act* (Ottawa: 1986), online <<http://www.nwac.ca/research/nwac-reports>>, accessed May 16, 2011; *Impacts of the 1985 Amendments to the Indian Act (Bill C-31): Summary Report* (Ottawa: Minister of Indian Affairs

Bill C-31 and the later Bill C-3 were passed “to promote gender equity in Indian registration,”⁴⁹ but the *Indian Act* continues to give women and children an inferior status compared to men. For example, generational cut-off in Indian status for the descendants of cross-marriages still excludes female lineal descendants one generation earlier than male lineal descendants.⁵⁰

Identity as a First Nation person was also attacked with the establishment of residential schools. The schools were a powerful mechanism for assimilating Aboriginal people.⁵¹ It is now recognized that the experiences of residential schools had equally long lasting and far-reaching impacts on students, their families and their communities. The residential school system gave government and churches the opportunity to indoctrinate Aboriginal

and Northern Development, 1990), *Correction Historic Wrongs? Report of the National Aboriginal Inquiry on the Impacts of Bill C-31* (Ottawa: Minister of Indian Affairs and Northern Development, 1990), Martin Cannon, “First Nations Citizenship: An Act to amend the Indian Act (1985) and the Accommodation of Sex Discriminatory Policy” (2006) 56 Can. Rev. of Social Policy at 40; *RCAP Perspectives and Realities*, *supra* note 24 at 34-37. Bill C-31 categories used to designate Indian status creates gaps; namely, s. 6(1) or s. 6(2) creates a situation in which the descendants of a woman who married out before 1985 will have fewer Indian rights than her hypothetical brothers’ children who were never enfranchised. *RCAP Perspectives and Realities*, *supra* note 24 at 39, 40. See: *McIvor v. Canada (the Registrar, Indian and Northern Affairs)*, 2007 BCSC 26, [2007] B.C.J. No. 33, (the ‘statutory appeal’); *McIvor v. Canada (the Registrar, Indian and Northern Affairs)*, 2007 BCSC 827, [2007] B.C.J. No. 1259, 3 C.N.L.R. 72 (the ‘constitutional case’); *McIvor v. Canada (the Registrar, Indian and Northern Affairs)*, 2007 BCSC 1732, [2007] B.C.J. No. 2569, (the ‘trial order’) and *McIvor v. Canada (the Registrar, Indian and Northern Affairs)*, 2009 BCCA 153, [2009] B.C.J. No. 669, 2 C.N.L.R. 236 (the ‘appeal’), collectively known as the “*McIvor Case*”. For a summary and review of the *McIvor Case* see: National Centre for First Nations Governance, *Memorandum: Summary of the McIvor Decisions* (June 14, 2009) prepared by Racliff & Company, LLP, online <<http://fngovernance.org/publications>>, accessed May 16, 2011, Native Women’s Association of Canada, *Aboriginal Women Lose in Dismissal of McIvor Decision*, (Nov. 6, 2009), online <<http://www.nwac.ca/fr/node/305>>, accessed May 16, 2011.

⁴⁹ Canada, Bill C-3, *An Act to promote gender equity in Indian registration by responding to the Court of Appeal for British Columbia decision in McIvor v. Canada*, 3rd Sess., 40th Parl., 2010 (Registrar of Indian and Northern Affairs), online <<http://www.parl.gc.ca/committeebusiness/StudyActivityHome.aspx?Cmte=AANO&Language=E&Mode=1&Parl=40&Ses=3&Stac=3067456>>, accessed May 16, 2011, see: Library of Parliament, Legislative Summary: Bill C-3: Gender Equity in Indian Registration Act (Parliamentary Information and Research Service, March 18, 2010) prepared by Mary C. Hurley, online <http://www.parl.gc.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?Language=e&ls=C3&Mode=1&Parl=40&Ses=3&source=library_prb>, accessed May 17, 2011.

⁵⁰ Bill C-3 has been criticized for leaving out grandchildren born prior to September 4, 1951 who trace their descent through the matrimonial line. See: Native Women’s Association of Canada, Research & Data, online <www.nwac.ca/research-data> and <<http://rabble.ca/news/2010/05/indian-act-remedy-bill-c-3-flawed>>, accessed May 17, 2011.

⁵¹ The Métis were not immune from suffering the residential school experience. Indeed, the first missionary educational experience for the Métis occurred shortly after the Battle of Seven Oaks in 1816. Larry Chartrand, Tricia Logan and Judy Daniels examined the history and experiences of the Métis in the residential school system. See: Larry Chartrand, Tricia Logan & Judy Daniels, *Métis History and Experience and Residential Schools in Canada* (Ottawa: Aboriginal Healing Foundation, 2006) at 13 [*Métis Residential Schools*].

children – the most vulnerable - in Christian values, which the government and churches deemed necessary for them to become civilized citizens. Madeleine Dion Stout and Gregory Kipling, in their Aboriginal Healing Foundation Report expressed it as:

Subscribing to an ideology that constructed Aboriginal people as backward and savage, government officials believed assimilation was in the population's best interests ...

Aboriginal people across the country have paid a high price; both individually and collectively, for the government's misguided experiment in cultural assimilation.⁵²

While a body of literature and studies document the harms that residential schools committed against Aboriginal people,⁵³ very little published research exists on exactly how the schools fostered bias, prejudice and hatred of a People. Typically, research examines the effects (both short and long term) of the schools on the Aboriginal survivors, families and communities. The literature focuses on individual experiences (both negative and positive), individual responses while in the schools (submissive and resistant), and the resulting correlation between the residential school system and the problems Aboriginal people have had in contemporary society. However, research on the residential schools' heavy message of bias, prejudice and hatred against Aboriginal people is sparse.⁵⁴

⁵² Madeleine Dion Stout and Gregory Kipling, *Aboriginal People, Resilience and the Residential School Legacy* (Ontario: Aboriginal Healing Foundation, 2003) at 28, 30. "[I]t was thought that Aboriginal children could be integrated... and imbued with the principles and knowledge required to progress toward civilization," in J. Kevin Barlow, *Residential Schools, Prisons, and HIV/AIDS among Aboriginal People in Canada: Exploring the Connections* (Ottawa: Aboriginal Healing Foundation, 2009) at 7.

⁵³ For an extensive list of residential school resources including a condensed timeline of residential school related events, a residential school bibliography (books, videos, articles, theses, etc.), a directory of residential schools in Canada and other material, see: The Aboriginal Healing Foundation, online <<http://www.ahf.ca/publications/residential-school-resources>>. For a research series on residential schools including Métis residential schools history, the settlement agreement, healing, prisons, FAS, suicide reconciliation and other critical studies, see: The Aboriginal Healing Foundation, online <www.ahf.ca/publications/research-series> accessed May 4, 2011.

⁵⁴ A study with this focus would add to the dialogue and understandings of the residential schools' long-term systemic impacts on Aboriginal people. It is, however, beyond the scope of this thesis to examine all the evidence and the negative consequences relating to the specific patterns of bias, prejudice and hatred. Instead, the major categories of abuse will be discussed to show that "Indian" and their practices, traditions and customs were thought of as uncivilized, savage and unworthy of respect.

It is now well-known that students were forbidden to practice their languages, culture, practices and traditions in the schools, and that those who were caught speaking their languages and practicing their traditions were cruelly and harshly punished.⁵⁵

The school officials were determined to destroy the Indian languages, to ensure that the Indian children would be assimilated into the white culture. In many cases, they were successful.⁵⁶

But the full range of indoctrination and suppression remain to be fully documented. In short, discriminatory laws and policies have had far-reaching and long-term negative effects on First Nation communities, and Aboriginal women have been specifically targeted. Aboriginal women's past experiences with discriminatory laws and policies have left them with collective memories of trauma as their trail-markers. They know firsthand how discriminatory laws and policies have damaged their health, their children and their communities across generations. Hostile laws attacked individual and collective dignities and continue to affect lives today.⁵⁷

1.3 Constitution of Canada

The history of laws and policies of domination and assimilation of Aboriginal peoples were an impetus for inclusion of Aboriginal Peoples in the *Constitution Act, 1982*.⁵⁸ Canada now recognizes that Aboriginal rights are inherent to Aboriginal people. Aboriginal law and its standing within the Canadian legal framework through the constitution of Canada require that the legal system eradicate bias, prejudice and hatred directed at Aboriginal people. Canada's constitution also requires governments to respond with full intent, energy and vigor when these historical patterns of discrimination manifest themselves any way in society. Canada's constitution is part of a long journey toward justice. Equal justice and protection for Aboriginal Peoples remain outstanding.

⁵⁵ *Supra*, note 49 list the punishments meted out to the children.

⁵⁶ Geoffrey York, *The Dispossessed: Life and Death in Native Canada* (Toronto: Little, Brown and Company (Canada) Ltd., 1992) at 36 [*Dispossessed*].

⁵⁷ *RCAP*, vol. 4, *supra* note 15, Chapter 2 at 54, 55.

⁵⁸ *Constitution Act, 1982*, *supra* note 6.

Canada's constitution⁵⁹ provides the authority under sections 52(1) and 35 of the *Constitution Act, 1982* for establishing new and restructured relationships between Aboriginal Peoples and Canadian society; Section 52(1) states:

The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.⁶⁰

As the "supreme law of Canada," the constitution entrenched Aboriginal and treaty rights on April 17, 1982 in section 35 of the *Constitution Act, 1982*⁶¹ which states:

35.(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.⁶²

Aboriginal peoples have occupied the land in organized, distinct societies with their own languages, and traditions since time immemorial. As Aboriginal people, they were already established in societies on the land base that is now called Canada long before the arrival of the Europeans to the land. The Supreme Court of Canada has confirmed this through case law. In *Calder*, Judson J. noted that "...the fact is that when settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had for centuries. This is what Indian title means".⁶³

⁵⁹ *Ibid.*

⁶⁰ *Ibid.* Prior to 1982, parliamentary supremacy governed Canada and any action of parliament was the supreme law. After 1982, the Constitution of Canada became the supreme law of Canada.

⁶¹ *Ibid.* *British North America Act, 1867* (U.K.), 30 & 31 Vict., c.3, reprinted in R.S.C. 1985, App. II, No.5. [*B.N.A. Act, 1867*] made reference to "Indian" in s. 91(24).

⁶² *Constitution Act, 1982*, *supra* note 6.

⁶³ *Calder v. British Columbia* (Attorney General), [1973] S.C.R. 313, [1973] 4 W.W.R. 1, 34 D.L.R. (3d) 145, 7 C.N.L.C. 91 at 150 [cited to C.N.L.C.] [*Calder*]. The later 1984 *Guerin* decision rejected the "guardian and ward" characterization of the government and Aboriginal relationship. Instead the Supreme Court of Canada held there was a fiduciary relationship and as a result, the Crown has fiduciary duties and responsibilities towards Aboriginal Peoples. *Guerin v. R.*, [1984] 2 S.C.R. 335, [1985] 1 C.N.L.R. 120 [*Guerin*].

In *R. v. Van der Peet*,⁶⁴ Chief Justice Lamer articulated the historical grounds for Aboriginal rights:

In my view, the doctrine of Aboriginal rights exists, and is recognized and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America, Aboriginal peoples *were already here*, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates Aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status.⁶⁵ [*emphasis added*]

In *R. v. Nikal*, the Supreme Court of Canada affirmed that Aboriginal people are the only ones who exercise Aboriginal rights, because it "...must also be remembered that aboriginal rights, by definition, can only be exercised by Aboriginal peoples."⁶⁶ Aboriginal scholars Marie Battiste and James (Sákéj) Youngblood Henderson explain:

In the last constitutional reform, section 35 of the *Constitution Act, 1982* affirmed the Aboriginal and treaty rights of Aboriginal peoples. This extended constitutional protection and the rule of law to Aboriginal and treaty rights. Aboriginal rights are derived from Indigenous knowledge and heritage, while treaty rights were forged in the prerogative power in foreign jurisdiction reconciliation as part of the Constitution of Canada.⁶⁷

Battiste and Henderson have argued that the constitution has an obligation to protect Aboriginal and treaty rights and that this requires more than sustenance practices. It encompasses a broad notion of Aboriginal 'knowledge, ecological relationships, and linguistic and heritage rights.'⁶⁸

Existing Aboriginal rights create new constitutional contexts for the interpretation of governmental responsibility for protecting Indigenous knowledge and heritage in Canada.⁶⁹

Within this framework, constitutional law, the rule of law, and the protection that the law affords extend to 'modern manifestations of Indigenous knowledge and heritage.'⁷⁰ These rights are of fundamental importance to Aboriginal peoples' sense of self, identity and their beliefs. Battiste and Henderson emphasize the importance of constitutional protections as "defined by the

⁶⁴ *Van der Peet*, *supra* note 13.

⁶⁵ *Ibid.* at 30.

⁶⁶ *R. v. Nikal*, [1996] 1 S.C.R. 1013, 3 C.N.L.R. 178 at 95 [cited to S.C.R.] [*Nikal*].

⁶⁷ M. Battiste & J.Y. Henderson, *Protecting Indigenous Knowledge and Heritage: A Global Challenge* (Saskatoon: Purich Publishing, 2000) at 205 [*Indigenous Knowledge*].

⁶⁸ *Ibid.* at 212.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.* at 213.

Indigenous traditions of the Aboriginal peoples in Canada as perceived by them and as supported by evidence.”⁷¹ From this perspective they note:

For the Aboriginal peoples of Canada, Aboriginal rights perform several vital functions. These constitutional rights are a bond that strengthens cohesiveness and identity and *raises the quality of life*.⁷² [*emphasis added*]

In 2003, the Métis won a watershed constitutional rights case when the Supreme Court of Canada unanimously ruled that the Powleys, as Métis members of the historic Métis community of Sault Ste. Marie, have the protected right to hunt under s. 35 of the constitution.⁷³ A decade later in 2013, the Federal Court ruled that Métis and non-status Indians in Canada are Indians under the constitution as federal jurisdiction responsibilities.⁷⁴ Closely following this was the 2013 *Manitoba Métis Federation Inc.*⁷⁵ Supreme Court of Canada judgment ruling that the Crown owed a duty of diligence in fulfilling its obligations to the Métis under s. 31 of the *Manitoba Act*.⁷⁶

As noted, Aboriginal peoples’ history and their constitutionally protected Aboriginal and treaty rights are relevant to future legal and policy developments. And they are particularly relevant to evaluating how Canada’s government responds to hate crimes. Specifically, the framework of legal protection bears implications for the sentencing provisions for hate-based actions against Aboriginal people. It also speaks to the deeper question of whether bias, prejudice or hatred should be considered in the sentence.

1.4 Summary

Aboriginal people in Canada are diverse in cultures, histories and traditions. However, they share similar experiences of harm and injustices from policies and laws designed to assimilate Aboriginal women and men into Euro-Canadian society. The effects of colonization on

⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ *R. v. Powley*, [2003] 2 S.C.R. 207, [2003] 4 C.N.L.R. 321 [*Powley*].

⁷⁴ *Daniels v. Canada (Minister of Indian Affairs and Northern Development)* 2013 FC 6, [2013] F.C.J. No. 4, [2013] 2 C.N.L.R. 61 [*Daniels*] The Federal Court stated “The recognition of Métis and non-status Indian as Indians under section 91(24) should accord a further level of respect and reconciliation by removing the constitutional uncertainty surrounding these groups” at para. 568. See also: *Métis Law Summary* by Jean Teillet, online <http://metisportals.ca/MetisRights/wp/?page_id=407&sourcePage=425>.

⁷⁵ 2013 SCC 14, [2013] S.C.J. No. 14, [2013] 2 C.N.L.R. 281 [*MMF*]. In 2014 the Federal Court of Appeal severed non-status Indians from the lower court ruling, 2014 FCA 101, [2014] F.C.J. No. 383.

⁷⁶ *Ibid.* at para. 9.

Aboriginal people—historically and through laws—cannot be overstated. The consequences have been catastrophic for individuals, families, communities, languages, and cultures. Canada’s laws continue to gouge the fabric of Aboriginal experiences. The oppression of Aboriginal peoples and cultures, now imprinted on the mindset of Canadian culture by this legal history, is a reality that courts must consider when they make decisions about bias, prejudice and hatred against Aboriginal people.

To change this legal history and remedy its ongoing effects, the courts must recognize two fundamental realities when they consider cases involving Aboriginal people: the distinct Aboriginal ways of knowledge, government, and law that flourished before European invasion on one hand; and the discriminatory laws and policies that still influence today’s society on the other. When courts hear cases involving Aboriginal women in particular, they must take into account what Aboriginal women have suffered due to Canada’s legal framework namely, exclusion from their own culture at the hands of an invading society. The degraded status imposed on them has contributed to a racial mindset of stereotypes and negative views of Aboriginal women.

With this legal history in mind, it is time to push Canadian law toward doing greater justice in how it handles bias, prejudice and hatred against Aboriginal people. How does it analyze and understand such cases? How effectively does section 718.2(a)(i) address hate-motivated crimes? Gaps in section 718.2(a)(i) and in its interpretation by the courts lead to failed justice for Aboriginal people. These gaps persist for two reasons: the systemic nature of bias, prejudice and hatred perpetrated against Aboriginal people, and Canada’s failure to address these race-based harms at the macro level. As a result, Canada’s laws are failing to protect Aboriginal people from racial hatred at alarming rates.

The constitutional recognition of inherent Aboriginal rights alone is not sufficient for bettering the lives of Aboriginal people (and Aboriginal women in particular) or for providing the protection from racial attacks that should be a given. Of course, the goals of section 35(1)—recognizing and affirming existing Aboriginal rights and treaty rights that are equally available

to women under 35(4)—are clearly important. The goals are a start, but they do not take us the full distance in doing justice.

Specifically, this section, broadly defined, does not specify how the laws are to be applied to Aboriginal people or to non-Aboriginal people who act from a legacy of racial hatred and prejudice against them. The history and standing of Aboriginal peoples as well as their needs today as a result of this history are unique relative to all other immigrant settler populations living within Canada's borders. When the Courts struggle with issues of racism, bias, prejudice and hatred in cases involving Aboriginal people, as it does under section 718.2(a)(i), it would make sense to pass laws that directly address the complex, layered, and historical issues that affect Aboriginal people, distinct as these issues are from those facing any other population living in Canada. Aboriginal-specific laws could provide the much-needed legal analysis that incorporates the historical and legal context. This could well be the most reparative approach.

*Like the salt of the earth, spilt upon a worn
Wooden floor
Falling through the cracks, to a place you cant
Find it anymore
You could take a pinch of it and give a lucky toss
Smile at the madness as you aint got no loss.¹ Susan Aglukark*

Chapter 2: Mapping the Legislation

Crimes motivated by hatred are ancient problems that have been in existence for a long time. Although an age-old problem, the urgency in addressing hatred and its manifestations of bias, prejudice and hatred continues to be a pressing issue for today.² Both human rights and criminal law statutes have been used to fight hatred, each with distinct approaches. The following chapter starts with a brief highlight of human rights legislation and the *Criminal Code*³ provisions addressing hatred, including the historical developments and sentencing provisions of hate-motivated offences under s.718.2 (a)(i) of the *Code*.

2.1 Human Rights Legislation

From a historical overview of the Canadian legal landscape, the first meaningful and substantial legislation to address bias, prejudice and hatred in Canada is found in human rights law.⁴ Human

¹ Susan Aglukark, “Slippin Through the Cracks” *This Child* (Lyrics No. 9).

² In 2011 Statistics Canada found the number of hate crime reports jumped by 35 percent in 2008 and another 42% in 2009. See: Statistics Canada, *Police-reported hate crimes* (Ottawa: The Daily, June 2011), online <<http://www.statcan.gc.ca/daily-quotidien/110607/dq110607a-eng.htm>>.

³ *Criminal Code*, R.S.C. 1985, c. C-46 [*Criminal Code*].

⁴ Although discussed in further detail in Chapter four, it is beyond the scope of this paper to examine the considerable information in the human rights decisions of Canada. See: Luke McNamara, “Negotiating the Contours of Unlawful Hate Speech: Regulation Under Provincial Human Rights Laws in Canada” (2005) 38 U.B.C.L. Rev. 1 who canvasses human rights legislation involving hate speech with a focus on the provincial and territorial laws. McNamara offers a critical analysis on the “small but significant body of commission, tribunal, and court decisions on the scope of provincial hate speech laws”. See also the Ontario Human Rights Code Review Task Force, *Achieving Equality: A Report on Human Rights Reform* (Toronto: Queen’s Printer, 1992) (Chair: M.

rights legislation in Canada developed, for the most part, after World War II.⁵ In 1947, Saskatchewan implemented the first detailed provincial statute to protect human rights under the *Saskatchewan Bill of Rights*.⁶ Other provinces followed and developed their own human rights legislation. By 1975, every province in Canada had human rights legislation.⁷ In 1977, the Canadian Human Rights Commission was established to address discrimination in areas of federal jurisdiction⁸ and accordingly, the *Canadian Human Rights Act*⁹ was established to “ensure equality of opportunity and freedom from discrimination, in areas under federal jurisdiction.”¹⁰ Within all of the provincial and territorial human rights legislation,¹¹ sex is a protected category.¹²

Cornish) [*Cornish Report*], Minister Responsible for Multiculturalism and Human Rights, *Report on Human Rights in British Columbia* by William Black (Vancouver: Ministry Responsible for Multiculturalism and Human Rights, 1994) [*Black Report*], Saskatchewan Human Rights Commission, *Renewing the Vision: Human Rights in Saskatchewan Summary Report* (Regina, 1996), online <www.shrc.gov.sk.ca/codereview/summary/default.html> [*Renewing Vision*] and discussion by Ken Norman, “Human Rights Tribunal Effective” *The StarPhoenix* (29 April, 2010), online <<http://www2.canada.com/saskatoonstarphoenix/news/forum/story.html?id=09fd9241-6737-4224-9132-07f814ce8583&p=1>>. The historical development of human rights in Canada is also explored by Dominique Clément, Will Silver, Daniel Trottier in Canadian Human Rights Commission, *The Evolution of Human Rights in Canada* (Ottawa: Minister of Public Works and Government Services Canada, 2012), online <http://www.chrc-ccdp.ca/sites/default/files/ehrc_edpc-eng.pdf>.

⁵ Heather M. MacNaughton, “Human Rights Reform: Again?” (2011) 74 Sask.L.Rev. 235 at para. 8. It is important to recognize that human rights legislation, albeit sparse, did exist in Canada prior to the 1940’s. For instance, in 1793, the legislative assembly of Upper Canada passed an act prohibiting the importing of slaves and children of slaves were to be set free at the age of 25. Later, in 1833, the British Parliament passed the *Emancipation Act* outlawing slavery throughout the empire. But thereafter and aside from minor adjustments, “there was practically no legislation in support of human rights in Canada from 1833 to the mid-1940s.” Daniel G. Hill & Marvin Schiff, *Human Rights in Canada: A Focus on Racism*, 3rd ed. (Ottawa: The Canadian Labour Congress and the Human Rights Research and Education Centre, University of Ottawa, 1994) at 24 [*Human Rights*].

⁶ *Saskatchewan Bill of Rights Act*, 1947, S.S. 1947, c. 35 [*Saskatchewan Bill of Rights*], E. Mendes, ed., *Racial Discrimination: Law and Practice* (Toronto: Carswell Thomas Professional Publishing, 1995) at 1-20 [*Racial Discrimination*].

⁷ *Racial Discrimination*, *ibid.* at 1-21. For an overview of human rights law in Canada and sexual orientation see: Carl F. Stychin, “Essential Rights and Contested Identities: Sexual Orientation and Equality Rights Jurisprudence in Canada” (1995) 8 Can. J.L. & Juris. 49.

⁸ Canadian Depository Services Program, Law and Government Division, *Canadian Human Rights Act: Processing Complaints of Discrimination* by Nancy Holmes (October, 1997), online <<http://publications.gc.ca/Collection-R/LoPBdP/BP/bp394-e.htm>>, accessed July 11, 2011.

⁹ *Canadian Human Rights Act*, R.S.C., 1985 c. H-6, online <<http://www.canlii.org/en/ca/laws/stat/rsc-1985-c-h-6/latest/rsc-1985-c-h-6.html>>.

¹⁰ *Supra*, note 8.

¹¹ Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. Supp (Toronto: Carswell, 2007) [*Hogg*].

The constitutional division of powers determines jurisdictional issues and accordingly, human rights complaints involving banking, national airlines, railways, or federal government employees are within federal jurisdiction, whereas complaints involving school boards, city government, or restaurants are under provincial jurisdiction.

¹² *British Columbia Human Rights Code*, R.S.B.C. 1996, c. 210, s. 7, online <http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96210_01>, *Alberta Human Rights Act*, R.S.A. 2000, c. A-25.5, s. 3.(1) protects gender that includes pregnancy, sexual harassment and gender identity, online <http://www.qp.alberta.ca/1266.cfm?page=A25P5.cfm&leg_type=Acts&isbncln=9780779744060>. See also

The prohibition of hatred under human rights law was an important issue in the 1990 *Canada (Human Rights Commission) v. Taylor*¹³ case and continues today as evidenced in the 2013 Supreme Court of Canada *Whatcott*¹⁴. *Taylor*, as a foundational case set the overarching framework of discussing rights under the Canadian *Charter* legal landscape and hate propaganda.¹⁵ The Supreme Court of Canada held that rights can co-exist within Canadian society and as such, ruled that s. 13(1) of *Canadian Human Rights Act* is a reasonable limit on Section 2(b) of the *Charter* protection of freedom of expression.¹⁶ The worthiness of the human rights legislative objective to promote equal opportunity unhindered by discrimination and to prevent harms of hate propaganda was of sufficient importance to place limits on constitutional protections. Although s. 13(1) is no longer part of the *Act*, *Taylor* remains an important case as

discussion of gender online

<http://www.albertahumanrights.ab.ca/other/statements/what_to_know/section_3_discussion.asp>, *Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1, online
<<http://www.qp.gov.sk.ca/documents/English/Statutes/Statutes/S24-1.pdf>>, *Manitoba Human Rights Code*, C.C.S.M. c. H175, online <<http://www.manitobahumanrights.ca/>, legislation>, also online
<<http://web2.gov.mb.ca/laws/statutes/ccsm/h175e.php>>, *Ontario Human Rights Code*, R.S.O. 1990, c. H.19, online
<http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90h19_e.htm>, *Quebec Charter of Human Rights and Freedoms*, RSQ, c C-12, online <<http://www.canlii.org/en/qc/laws/stat/rsq-c-c-12/latest/rsq-c-c-12.html>>, *New Brunswick Human Rights Code*, R.S. 1973, c.H-11, s. 1; 1985, c. 30, s.3, online
<<http://www.gnb.ca/hrc-cdp/index-e.asp>>, *Nova Scotia Human Rights Act*, R.S., c. 214, s. 1, online
<<http://nslegislature.ca/legc/statutes/humanrt.htm>>, Newfoundland and Labrador *Human Rights Act*, 2010 c.H-13.1, online <<http://assembly.nl.ca/Legislation/sr/statutes/h13-1.htm>>, Prince Edward Island, *Human Rights Act*, c. H-12, online <<http://www.gov.pe.ca/humanrights/>>, NWT *Human Rights Act*, S.N.W.T. 2002, c.18, online <<http://nwthumanrights.ca/>>, Yukon *Human Rights Act*, online <<http://www.yhrc.yk.ca/4-yourrights.htm>>, *Nunavut Human Rights Act*, online <<http://www.nhrt.ca/english/resources>>.

¹³ *Racial Discrimination*, *supra* note 6 at 4-33,4-34. *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892, 75 D.L.R. (4th) 577 [*Taylor*]; In 1979 the Canadian Human Rights Commission Tribunal found Taylor and the Western Guard Party were exposing Jewish people to hatred and contempt in telephone messages accessible by the public. The Tribunal ordered the defendants to “cease and desist” and pursuant to the *Act*, the order was filed with the Federal Court Trial Division. The order was ignored and the defendants were found in contempt of the order. Taylor was sentenced to one year of imprisonment and the Western Guard Party fined \$5,000.00. In 1980 the Federal Court of Appeal upheld the sentence but it was suspended on the condition the actions were to be stopped immediately. The actions did not stop. After Taylor finished his sentence, the messages started again and in 1983, the Commission applied for a second contempt order. The *Charter* had been recently implemented and the defendants argued s. 13(1) of the *Canadian Human Rights Act* violated their guarantee of freedom of expression in s. 2(b) of the *Charter*. The then Chief Justice Dickson delivered the majority judgment that although s.13(1) violates s. 2(b) it is a justifiable limit on freedom of expression within the meaning of s. 1 of the *Charter*. The Court noted differences between s. 13(1) of the *CHRA* and s. 319 of the *Criminal Code* as there is no intent requirement in s. 13(1) and the defence of truth is not available as it is in s. 319(3). As well, s. 13(1) prohibitions include private communications between consenting individuals while s. 319 requires public communication. In 2012, s. 13 was repealed from the *Act*.

¹⁴ *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11, [2013] S.C.J. No. 11 [*Whatcott SCC*].

¹⁵ *Taylor*, *supra* note 13.

¹⁶ *Ibid.*, s. 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 ... 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.

the Supreme Court of Canada affirmed that hate propaganda is an expression unacceptable in Canadian society.¹⁷ Hate propaganda is a serious threat that undermines the “dignity and self-worth”¹⁸ of a group under attack and contributes to disharmony among racial, cultural and religious groups.¹⁹ The later *Whatcott* Supreme Court decision affirms that balancing of values are essential in a free and democratic society. In this case a “commitment to equality and respect for group identity and the inherent dignity owed to all human beings”²⁰ is a reasonable limit on freedom of expression.²¹ The Supreme Court of Canada *Whatcott*²² analysis of defining hatred and hate provisions coupled with the June 2009 Canadian Human Rights Commission *Special Report to Parliament: Freedom of Expression and Freedom from Hate in the Internet Age*²³ affirms the ongoing priority of addressing hatred in Canada. This was prepared in response to an earlier report by Richard Moon that argued for a repeal of s.13 of the *Canadian Human Rights Act* that prohibits electronic transmission of messages likely to expose one or a group to hatred or contempt based on a prohibited ground of discrimination.²⁴ In 2012 the Conservative government repealed s. 13 from the *Canadian Human Rights Act*.²⁵

¹⁷ *Ibid.* at para. 2.

¹⁸ *Ibid.* at para. 41.

¹⁹ *Ibid.*

²⁰ *Whatcott SCC*, *supra* note 14 at para. 66.

²¹ *Taylor*, *supra* note 13 established the framework of analysis at para. 33 – 84.

²² *Whatcott SCC*, *supra* note 14. Mr. Whatcott distributed flyers containing crude, harsh and demeaning comments about homosexual practices. The Supreme Court of Canada was asked whether the lower appellate court was correct in holding the flyers did not violate s. 14(1)(b) of the *Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1 It was ruled by the Saskatchewan Court of Appeal the flyers did not promote “hatred against individual because of their sexual orientation” in violation of the *Code*. In February 2013 the Supreme Court of Canada upheld key provisions of the *Saskatchewan Human Rights Code* but struck a segment of the section to find the remaining portion of the code constitutional as a reasonable limit on the infringement on the rights to expression and religion.

²³ Canadian Human Rights Commission, *Special Report to Parliament: Freedom of Expression and Freedom from Hate in the Internet Age* (Minister of Public Works and Government Services, 2009) [*Special Report*], online <www.chrc-ccdp.gc.ca>. The report was prepared as a response to Richard Moon’s earlier report and recommendation to repeal section 13 and leave the prosecution of extreme hate speech to the criminal legal system. See: Canadian Human Rights Commission, *Report to the Canadian Human Rights Commission Concerning Section 13 of the Canadian Human Rights Act and the Regulation of Hate Speech on the Internet* by Richard Moon (2008), online <http://www.chrc-ccdp.ca/publications/report_moon_rapport/toc_tdm-eng.aspx> [*Moon Report*].

²⁴ *Special Report*, *ibid.* at 4.

²⁵ For a summary on Bill C-304 amending s. 13 of the *Canadian Human Rights Act*, see: Judy Feng, “House of Commons Votes to Repeal “Hate Messages” Section of the *Canadian Human Rights Act*” (University of Alberta: Centre for Constitutional Studies, 2012), online <<http://ualawccsprod.srv.ualberta.ca/ccs/index.php/constitutional-issues/the-charter/fundamental-freedoms-section-2/62-house-of-commons-votes-to-repeal-hate-messages-section-of-the-canadian-human-rights-act?highlight=WyJiaWxsIiwYy0zMDQlLCJiaWxsIGMtMzA0Ii0=>>>. See also: Haroon Siddiqui, “Repeal of Section 13 Leaves Only *Criminal Code* to Deal with Hate Speech” Editorial, *Toronto Star* (13 June 2012), online <<http://www.thestar.com/opinion/editorialopinion/article/1211070--repeal-of-section-13-leaves-only-criminal-code-to-deal-with-hate-speech.html>>. Interestingly, on January 31, 2014, the Federal Court of Appeal ruled that s. 13 is constitutionally valid and does not violate freedom of expression thereby creating an opportunity

2.2 Criminal Code Legislation

2.2.1 Defence of Provocation

Hatred in criminal law leading to extreme anger or emotional disturbance resulting in a loss of control has historically provided a provocation defence to a murder charge. In this way, the criminal law accepts hatred as a reason to reduce the liability of murder to manslaughter. For instance, unwanted sexual advances may provoke uncontrollable rage and violence leading to homicide. In these situations, the court can consider the hatred of homosexual people as reducing the culpability of murder to manslaughter.²⁶

2.2.2 Specific Offences

Canada's criminalization of specific hate behaviors²⁷ stem back to the findings of the 1965 *Report of the Special Committee on Hate Propaganda in Canada* [*Cohen Report*].²⁸ Concerned

for a new government to reinstate the provisions. *Warman v. Lemire*, 2014 FCA 18, [2014] F.C.J. 108. See also: online <<http://news.nationalpost.com/2014/02/02/court-finds-internet-hate-speech-law-section-13-to-be-constitutionally-valid-doesnt-violate-freedom-of-expression/>>.

²⁶ Provocation is a controversial defence that is often discussed by legal academics and more recently canvassed in the Alberta Law Review (2010) special issue: Rethinking Canadian Homicide Law. See: Sanjeev Anand & Kent Roach, "Inertia, Uncertainty, and Canadian Homicide Law: An Introduction to the Special Issue" (2010) 47 Alta. L. Rev. 643 noting that Professor Renke "tackles the subject of provocation head-on by noting that there have been calls for the repeal of the controversial partial defence for condoning and privileging homicidal and often male rage" at para. 16, 17. It is countered that the provocation defence is the recognition of human weakness and, therefore, should not be expunged from criminal law. The provocation defence requires that the accused meet the "reasonable person" standard. Some scholars have argued that the defence should be disallowed particularly in circumstances involving homosexual violence. It is suggested that a provocation defence legitimizes homophobia or gay panic killing of homosexuals in reducing a murder charge to manslaughter. See: Douglas Victor Janoff, *Pink Blood: Homophobic Violence in Canada* (Toronto: University of Toronto Press, 2005) [*Pink Blood*] and Cynthia Lee, "The Gay Panic Defence" (2008) 42 Univ. of California, Davis 471.

²⁷ There are different *Criminal Code* mechanisms for addressing hate propaganda. For instance, criminal offences can range from sedition, defamatory libel, spreading false news as well as the specific provisions dealing with hate propaganda, *Racial Discrimination*, *supra* note 6 at 4-6. Under s. 59 – 61 Sedition, a leading Supreme Court of Canada case *R. v. Boucher*, [1951] S.C.R. 265, 2 D.L.R. 369, acquitted the accused but was divided on whether seditious intention required proof in all cases of an intention to incite acts of violence or public disorder. Boucher was a Jehovah's Witness who published a pamphlet arguing, among other statements, that Quebec Catholics are blinded by priests and think they serve God's cause in mobbing Jehovah's Witnesses. The defamatory libel provisions of the *Criminal Code*, s. 297 – 317 only apply to defamatory attacks upon a person and as such groups enumerated by race, religion, colour, and ethnic origin are not included, *Racial Discrimination*, *supra* note 6 at 4-28. Section 168 made it an offence to use the mails to transmit, or deliver anything that is obscene, scurrilous, immoral or indecent. The accused must intend to use the mail for this purpose, see: *R. v. Popert* (1981), 58 C.C.C. (2d) 505, 19 C.R. (3d) 393 (Ont. C.A.) *sub norm.* *R. v. Pink Triangle Press*.

²⁸ Maxwell Cohen, Chairman, *Report to the Minister of Justice of the Special Committee on Hate Propaganda in Canada* (Ottawa: Queen's Printer, 1996) [*Cohen Report*].

with the growing hate activities in Canada, this early major report argued that Canadian citizens have the right to live without “being victimized by the deliberate, vicious promotion of hatred against them.”²⁹ To address the problems of hate, the *Cohen Report* suggested that criminal law could be used as a way to combat hatred considered “a clear and present danger to democratic societies”.³⁰ The *Cohen Report* emphasized the importance of hate crime legislation as a duty owed to society as the:

Canadian community has a duty, not merely the right, to protect itself from the socially corrosive effects of hate propaganda.³¹

Senaka K. Suriya, in a 1998 Master of Arts thesis exploring the socio-legal dimensions of criminalizing hate in Canada,³² notes the importance of the report on the Canadian landscape as “the beginning of an important change of direction respecting the need for legislative protection

²⁹ *Ibid.* at 24. An extensive body of literature, too voluminous to list, has developed on the unique issues of freedom of expression v. freedom from hatred and the harms that hate crime have on victims and the wider community. See: Jeremy Waldron, *The Harm in Hate Speech* (Harvard University Press, 2012) who argues hate speech should be regulated as it undermines and targets members of a group. This goes against the security and dignity that society should provide to all, see: <<http://search.barnesandnoble.com/The-Harm-in-Hate-Speech/Jeremy-Waldron/e/9780674065895?workid=1105866560>>. See also: David Matas, *Bloody Words: Hate and Free Speech* (Winnipeg: Bain & Cox Publishers, 2000). Critical race theorists (CRT) argue the harms of hate speech far outweigh the restrictions on free speech principles. It is submitted that the harms of racial violence and discrimination attack not only the person but also the group. Ishani Maitra & Mary Kate McGowan, “On Racist Hate Speech and the Scope of a Free Speech Principle” (2010) 23 Can. J.L. & Juris. 342 at para. 80. CRT recognize both individual and institutional racism within society. For a synopsis see: Department of Justice, *Disproportionate Harm: Hate Crime in Canada* by Julian V. Roberts (Ottawa: Research, Statistics and Evaluation Directorate, 1995) [*Disproportionate Harm*], online <http://www.justice.gc.ca/eng/pi/rs/rep-rap/1995/wd95_11-dt95_11/toc-tdm.html>. Hon. Allan Rock, the then Minister of Justice, stated in the House of Commons debate that hate-motivated laws “are commonly called laws against crimes of intimidation because the offender knows that the effect of the act is not only to harm, to frighten or to affect the person who is at the end of the punch or the kick. It is to intimidate every member of that group who is intended to feel more vulnerable the next time they walk down the street.” *House of Commons Debates*, No. 219 (15 June 1995) at 1525, 1535 (Hon. Allan Rock), online <<http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=2332476&Language=E&Mode=1#13921>> [*Rock Debates*]. Martha Shaffer argued specific crimes should be established to recognize the harm of hate violence. See: Martha Shaffer, “Criminal Responses to Hate-Motivated Violence: Is Bill C-41 Tough Enough?” (1995) 41 McGill L.J. 200 [*Tough Enough?*]. In contrast, critics of hate crime laws have raised questions on the need for any type of hate crime legislation. While hatred and bigotry is considered a serious problem, free speech activists are concerned that hate crime laws tread dangerously close to criminalizing free speech and question the value of enacting hate crime laws, see: Susan Gellman “Sticks and Stones Can Put You In Jail, but Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws” (1991) 39 UCLA L. Rev. 333. For a discussion of the symbology of hate crime laws see especially: Mark Carter, “Addressing Discrimination Through the Sentencing Process: Criminal Code s. 718.2(a)(i) in Historical and Theoretical Context” (2000), 44 Criminal Law Quarterly 399-436.

³⁰ *Cohen Report*, *supra* note 28 at 24.

³¹ *Ibid.*

³² S. Suriya, *Combatting Hate?: A Socio-Legal Discussion on the Criminalization of Hate in Canada* (M.A. Thesis, Carleton University Department of Law, 1998) [unpublished][*Combatting Hate*].

to guard against hate”.³³ The *Cohen Report* set the framework for the early hate crime legislation in the *Criminal Code* for addressing issues of hate propaganda³⁴ and since 1970³⁵, it includes offences of genocide, public incitement and wilful promotion of hatred.³⁶

Sections 318 to 320 of the *Criminal Code* make it illegal to espouse racial and religious hatred and encompass the prohibition of the advocating of genocide, public incitement of hatred and the willful promotion of hatred.³⁷ Section 318 states:

318.(1) Every one who advocates or promotes genocide is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.³⁸

Genocide is defined as the act of killing members of an identifiable group or of deliberately inflicting conditions on an identifiable group calculated to bring about the destruction of that group:

(2) In this section, “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.³⁹

The protected group of s. 318 is identified as:

(4) In this section, “identifiable group” means any section of the public distinguished by colour, race, religion, ethnic origin or sexual orientation.

Crimes of public incitement are captured under s. 319(1) and wilful promotion of hatred is outlined in 319(2) of the *Criminal Code*. Under s. 319, two types of offences involving the

³³ *Ibid.* at 31.

³⁴ *Ibid.*

³⁵ *Ibid.* at 33. Bill C-3 received Royal Assent on June 11, 1970.

³⁶ *Criminal Code*, *supra* note 3. See also: Sanjeev Anand, "Beyond the Wilful Promotion of Hatred: The Other Criminal Code Provisions Proscribing Expressions of Racial Hatred" (1998) 3 Canadian Criminal Law Review 141-160 [*Proscribing Expressions*]. See also: Sanjeev Anand, "Expressions of Racial Hatred and Racism in Canada: A Historical Perspective" (1998) 77 Canadian Bar Review 181-197 [*Historical Perspective*].

³⁷ *Criminal Code*, *ibid.*

³⁸ *Ibid.*, s. 318 (1). In *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 100, 197 C.C.C. (3d) 233, the Supreme Court of Canada held the provision does not require proof that genocide had actually occurred although the incitement has to be direct and public with an intent to prompt or provoke another to commit genocide. The accused's public speech was found to be a deliberate call to murder Tutsis in Rwanda and was an attempt to incite others to act and accordingly, was sufficient to meet the *mens rea* test. Les Perreux, "Mugesera returns to Rwanda" *The Globe and Mail* (23 January 2012), online <<http://www.theglobeandmail.com/news/national/mugesera-returns-to-rwanda/article554462/>>.

³⁹ *Criminal Code*, *ibid.* s. 318 (2).

inciting or promotion of hatred against an identifiable group are criminalized. Subsection 1 criminalizes hatred incited by the communication of hatred in a public place with words likely to lead to a breach of peace:

319.(1) 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 guilty⁴⁰ [of an offence.]

Subsection 2 criminalizes wilful promotion⁴¹ of hatred against an identifiable group through the communication of statements other than in private conversation:

(2) Every one, who by communicating statements, other than in private conversation, willfully promotes hatred against any identifiable group is guilty⁴² [of an offence.]

⁴⁰ *Ibid.* s. 319(1).

⁴¹ For an analysis of “wilful promotion”, issues of infringement under s. 2(b) of the *Charter* (freedom of thought, belief, opinion and expression), freedom of expression and equality of s. 15(1) provisions, hate speech and holocaust denial, see: Kathleen Mahoney, “*R. v. Keegstra*: A Rationale for Regulating Pornography?” (1992) 37 McGill L.J. 242, Bruce P. Elman, “Combatting Racist Speech: The Canadian Experience” (1994) 32 Alta. L. Rev. 623, *Proscribing Expressions*, *supra* note 36.

⁴² *Criminal Code*, *supra* note 3 at s. 319(2). Subsection (3) provides defences to the offence where the statements are found to be true, that they amount to good faith expression of an opinion on a religious subject or an opinion based on a belief in a religious text, that they are reasonably believed to be true and are published with public interest and to public good, or published in good faith effort to identify hate matters to have them removed. In a speech in 2002, David Ahenakew blamed the Jews for causing World War II and a newspaper reported later asked him to clarify his comments. Ahenakew called Jewish people a disease and characterized the WWII murders of millions of people as cleaning up the world. Ahenakew was charged and found guilty of promoting hatred and ordered to pay a fine of \$1000.00. Upon appeal, the conviction was overturned and a new trial ordered. At his second trial in 2009, Ahenakew was acquitted of the charge of promoting hatred of Jewish people under section 319(2) of the *Criminal Code* as the court found Ahenakew did not intend to promote hatred, *R. v. Ahenakew*, [2009] S.J. No. 105, (2009) 329 Sask R. 140. In *R. v. Buzzanga and Durocher* (1979), 49 C.C.C. (2d) 369 (Ont. C.A.), the accused were charged under s. 281.2(2) (the now s. 319(2)) for wilfully promoting hatred by distributing anti-French pamphlets. In *R. v. Keegstra*, [1990] 3 S.C.R. 697, 61 C.C.C. (3d) 1, the accused was charged under s. 281.2(2) (now s. 319(2)) hate propaganda. The accused was a public school teacher in Alberta who taught his students that Jewish people were evil, were responsible for wars, anarchy and created the Holocaust to gain sympathy. The Supreme Court of Canada reviewed the constitutional law questions including issues of freedom of expression under s. 2(b) of the *Charter*. Although the court was sharply divided (4 to 3) on the issue of the constitutionality of the prohibition of hate propaganda, the majority held the criminal provisions do not violate the *Charter*. Accordingly, the court held s. 319(2) and 319(3)(a) of the *Code* are constitutional as it did in *R. v. Andrews*, [1990] 3 S.C.R. 870, 61 C.C.C. (3d) 490. Andrews was the leader of the Nationalist Party of Canada, a white supremacy organization. Andrew’s organization published and distributed a bimonthly newsletter promoting white superiority. For further analysis and background see: Richard Moon, “Drawing Lines in a Culture of Prejudice: *R. v. Keegstra* and The Restriction of Hate Propaganda” (1992) 26 U.B.C. L. Rev. 99. Two years after *Keegstra*, the Supreme Court of Canada held in *R. v. Zundel*, [1992] 2 S.C.R. 731, 75 C.C.C. (3d) 449 the *Criminal Code* provisions of s. 181 against spreading false news being: “Every one who wilfully publishes a statement, tale or news that he knows is false and that causes or is likely to cause injury or mischief to a public interest is guilty of an indictable offence and liable to imprisonment...” violated the guarantee to freedom of expression under s. 2(b) of the *Charter* and was unconstitutional. Zundel was an extremist distributing pamphlets denying the existence of the Holocaust. The Attorney-General refused to charge Zundel under the hate propaganda provisions leaving the Canadian Holocaust Remembrance Association to lay private charges under s. 181 of the *Criminal Code*, *Racial*, *supra* note 6 at 4-22-26.

Under s. 318 and s. 319, hate crime are committed through verbal or written communication of hatred.⁴³ The protected “identifiable group” of s. 318 and 319 is any section of the public distinguished by colour, race, religion, ethnic origin or sexual orientation.⁴⁴ However, under s. 318 and s. 319 of the *Criminal Code*, sex⁴⁵ is not a protected “identifiable group”. This is unlike s. 718.2(a)(i) that specifically includes “sex” as a category.

The *Criminal Code* considers hatred on the internet an offence and under s. 320.1 a Court, with the consent of the Attorney General, can ‘seize’ hate propaganda⁴⁶ even if it is ultimately found that there is not sufficient evidence to prove it is hate propaganda.⁴⁷ Section 320(1) allows judges the authority to seize publications deemed to be hate propaganda which can include writings, signs and computers.⁴⁸

320.(1) A judge who is satisfied by information on oath that there are reasonable grounds for believing that any publication, copies of which are kept for sale or distribution in premises within the jurisdiction of the court, is hate propaganda,

⁴³ *Criminal Code*, *supra* note 3. Section 319. (7) states the communication methods can include telephone, broadcast or through other audio or visual means. See also: Dr. Valerie Pruegger, “Alberta Hate/Bias Crime Report” (2009) (City of Calgary: Alberta Hate Crimes Committee) at 10. In 2001, the Ontario Court of Appeal in *R. v. Harding*, 2001ONCA C35767, [2001] O.J. No. 4953, [2001] CanLII 21272 [*Harding*] ruled the self-described Christian pastor met the *mens rea* requirement for the offence of wilfully promoting hatred in s. 319. At para. 1, the Court notes Harding was “charged with two counts of wilfully promoting hatred against Muslims in relation to two pamphlets written and distributed by him. He was also charged with two counts of wilfully promoting hatred through two telephone messages at a number that he invited members of the general public to call. The appellant was acquitted” in one of the telephone messages but convicted for the other telephone message and two pamphlets. The appellant appealed his conviction. The Ontario Court of Appeal dismissed the appeal.

⁴⁴ *Criminal Code*, *ibid*. For an analysis of the historical legislative efforts to expand the definition of “identifiable group” to include sexual orientation see: Jonathan Cohen, “More Censorship or Less Discrimination? Sexual Orientation Hate Propaganda in Multiple Perspectives” (2000) 46 McGill L. J. 69 at para. 12, 13, 14, 15.

⁴⁵ This thesis does not delineate between the term “sex” and “gender” when discussing the protection of an enumerated group. It is, however, recognized that the term “sex” and “gender” have very different definitions. “Sex” refers to biological facts while “gender” refers to characteristics and behaviours that a society or culture attribute to the sexes. For instance, “female gender role” can refer to the female sex and feminine characteristics. See: Anne-Maree Nobelius, “What is the difference between sex and gender?” (Monash University: Medicine, Nursing and Health Sciences, 2004), online <<http://www.med.monash.edu.au/gendermed/sexandgender.html>>.

⁴⁶ *Criminal Code*, *supra* note 3 at s. 320.1. “The Code provisions are intended to prohibit the public distribution of hate propaganda. Private speech is not covered by the provisions: the act of promoting hatred can only be committed by communicating statements other than in a private conversation, and inciting hatred is only prohibited if statements are communicated in a public place. Online communications that advocate genocide or willfully promote or incite hatred are likely to fall within the provisions because the internet is a public network. Under section 320(1), a judge has the authority to order the removal of hate propaganda from a computer system that is available to the public. Such authority extends to all computer systems located within Canada”, online <<http://mediasmarts.ca/online-hate/online-hate-and-canadian-law>>.

⁴⁷ *Ibid*. s. 320 allows a court to order the material removed from the website and thereafter a summons be issued to the “occupier” to appear before the court and show cause why the matter seized should not be forfeited.

⁴⁸ *Criminal Code*, *supra* note 3, s. 320.1(1).

shall issue a warrant under his hand authorizing seizure of the copies.⁴⁹

More recent *Criminal Code* hate provisions find their genesis from the 2001 *Anti-terrorism Act*⁵⁰. Building upon the *Act*, section 430 (4.1) criminalizes bias, prejudice or hate-motivated mischief to religious or relating to religious property:

(4.1) Every one who commits mischief in relation to property that is a building, structure or part thereof that is primarily used for religious worship, including a church, mosque, synagogue or temple, or an object associated with religious worship located in or on the grounds of such a building or structure, or a cemetery, if the commission of the mischief is motivated by bias, prejudice or hate based on religion, race, colour or national or ethnic origin,
(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years; or
(b) is guilty of an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months.⁵¹

Although the protections under s. 430(4.1) extend to religion, race, colour or national or ethnic origin, it does not include sex as a protected group⁵² within the specific provisions.⁵³

2.2.3 Sentencing Provisions

In the mid 1990's, groups lobbied for the *Criminal Code* to specifically penalize hate-motivated offences through sentencing. Part of the impetus for change was because Canada was experiencing racially motivated violence in towns and cities across the nation.⁵⁴ For instance,

⁴⁹ *Ibid.*

⁵⁰ *Anti-terrorism Act*, S.C. 2001, c.41, online <<http://laws-lois.justice.gc.ca/eng/acts/A-11.7/FullText.html>>, accessed October 17, 2011. After the September 11, 2001 attacks, the Canadian Parliament responded swiftly with the *Anti-terrorism Act* (ATA) that amended the *Criminal Code* and a number of other *Acts*. On October 15, 2001 ATA was introduced as Bill C-36 and received Royal Assent on December 18, 2001. Department of Justice, "About the *Anti-terrorism Act*", online <<http://www.justice.gc.ca/eng/cj-jp/ns-sn/act-loi.html>>.

⁵¹ *Criminal Code*, *supra* note 3, s. 430 (4.1). Interestingly this leaves the categories open to interpretation and as such, could potentially include Aboriginal Cultural Centres or First Nation Band or Métis property if "primarily used" in religious worship.

⁵² One could envision a hate-motivated crime against a religious building with LGBT ministers or performing same sex marriages. See also: Chapter 5.

⁵³ *Pink Blood*, *supra* note 26 at 121. See: *Tough Enough*, *supra* note 29 discussing specific legislation for crimes of hate violence.

⁵⁴ A. Barnes & P.H. Ephross, "The Impact of Hate Violence on Victims: Emotional and Behavioral Responses to Attacks" (1994) 39 *Social Work* 247, online <<http://www.socialworkers.org/pressroom/events/911/barnes.asp>>, P. Prutzman, "Bias-Related Incidents, Hate Crimes and Conflict Resolution" (1994) 27:1 *Education and Urban Society* at 71, Statistics Canada, *Hate-Motivated Violence* by G. Gilmour (Ottawa: Department of Justice, May 1994) at 9 [*Hate-Motivated Violence, 1994*], *Historical Perspective*, *supra* note 36, Pearson-Shoyama Institute, *Report of the National Planning Meeting on Hate Crime and Bias Activity*, 1997, online <[32](http://www.pearson-</p></div><div data-bbox=)

focused attention was given to the 1991 shooting death of Leo LaChance, a First Nation man killed by Carney Nerland, a known white supremacist. The media and public outcry was not soothed when Nerland was charged with manslaughter after police and the prosecution office concluded the death was not linked to his white supremacist neo-Nazi beliefs but, in their view, was merely an accidental shooting.⁵⁵ At the same time, further acts of hatred were occurring across Canada.⁵⁶ The Department of Justice *Hate-Motivated Violence* Report examined the 1990's hate activity in Canada. In 1993, seven synagogues were defaced with swastikas and a Nazi slogan. Later that same year in Toronto, three strangers viciously attacked an immigrant man. One assailant was a 19-year-old skinhead linked to white supremacist organizations.⁵⁷ As well, the 1991 *Audit of Anti-Semitic Incidents* undertaken by the League for Human Rights of B'nai Brith Canada found:

incidents over the years, [increased] from 63 in 1982 to 196 in 1992. ... Attacks against homosexuals have been reported ... "gay-bashing" reported by the press include not only assaults but, in some cases, the killing of homosexuals.⁵⁸ [footnotes omitted]

By 1994 the Chrétien government proposed that Bill C-41 categorize hate-motivated offences as an aggravating factor for sentencing. Much of the debate in the House of Commons on the Bill

shoyama.ca/Hot_Button/hate_crime.htm>, Karen Mock, *Extent of Hate Activity and Racism in Metropolitan Toronto* 1997, online <<http://www.crr.ca/en/component/flexicontent/items/item/19935-the-extent-of-hate-activity-and-racism-in-metropolitan-toronto>>, *Disproportionate Harm*, *supra* note 29.

⁵⁵Saskatchewan, *Report of Commission of Inquiry into the Shooting Death of Leo Lachance: Relating to the January 1991 shooting death of Leo LaChance at Prince Albert, Saskatchewan and the consequent plea and sentence of Carney Milton Nerland for the crime of manslaughter* (Saskatchewan, 1993) at 51 [*LaChance Inquiry*]. Mr. LaChance was shot and killed when leaving a pawn shop in Prince Albert Saskatchewan. Pawn shop owner Carney Nerland was a member of the Aryan Nations. In 1990, CBC News videotaped Nerland at a meeting in Alberta wearing a Nazi armband, see: "LaChance Shooting Remembered in Prince Albert", CBC News (28 January 2011), online <<http://www.cbc.ca/news/canada/saskatchewan/story/2011/01/28/sk-leo-lachance-1101.html>>. Nerland was charged with manslaughter. Nerland pled guilty and was sentenced to four years in prison. A public inquiry was held to examine police and prosecutors conclusions that Nerland's white supremacist views had nothing to do with the shooting. Although Nerland was an experienced gun handler who fired a gun into the floor of the shop in the presence of Leo Lachance and "within seconds of doing so, he pulled the trigger of the gun while it was pointing in the direction of Lachance who had left or was leaving the store", the police and prosecutors concluded his racist beliefs were not connected to the shooting. The Aboriginal community strongly disagreed as highlighted in "Addressing Racism in Prince Albert" *Saskatchewan Indian* (April 1997) v. 27, online <<http://www.sicc.sk.ca/archive/saskindian/a97apr07.htm>>.

⁵⁶ Statistics Canada, *Hate-Motivated Violence* by G. Gilmour (Ottawa: Department of Justice, May 1994) at 9 [*Hate-Motivated Violence*, 1994]. See also: I. Peritaz, "Montreal Gay Killings: Tip of Iceberg" *The Toronto Star* (26 December 1991) B5, "Vandals Attack 3 Metro Synagogues" *The Toronto Star* (24 September 1992) A4, "Swastikas Painted on Synagogue and Cars" *The Toronto Star* (5 April 1993) A6, K. Hudson, "Anti-semitic Slogans Deface Memorial in a Park" *The Toronto Star* (5 August 1993) N.Y.1 noted in *Tough Enough*, *supra* note 29 at fn 3, 6 and 7.

⁵⁷ *Hate-Motivated Violence*, 1994, *ibid.* at 2.

⁵⁸ *Ibid.*

surrounded the issue of inclusion of “sexual orientation” as an enumerated group. Some opponents to the Bill, including Reform Party members, argued Bill C-41 was promoting homosexuality⁵⁹ and giving special gay rights.⁶⁰ Advocates of the Bill disagreed and argued that remedying hate-motivated crimes in their communities is a human rights issue for all people regardless of their personal attributes.⁶¹ The then Justice Minister Allan Rock acknowledged the controversy by stating in the House of Commons:

[T]here is one feature of the bill which dwarfs the others in terms of the attention it has received and the controversy it has created. It is section 718.2 of the bill which deals with aggravating circumstances that the court should take into account in determining the appropriate sentence.⁶²

Minister Rock attempted to calm fears by stating:

This has nothing to do with policing or punishing the way people think or the views they hold. It has nothing to do with the freedom of thought or the creation of thought police to govern the attitudes of individuals.⁶³

He emphasized:

The only special status that is on that list is vulnerability. The only special rights we are talking about here are the rights to be targeted. The very purpose of this legislation is to redress that unfairness.⁶⁴

Legal scholar Kent Roach commented on the controversy and notes Minister Rock:

argued that Bill C-41 is a criminal law bill which amends the Criminal Code. ... (by saying) it was not the government who has identified these groups for special treatment. It is the hoodlums and the thugs who have identified them for special treatment.⁶⁵ [footnotes omitted]

The controversy did not impede the Bill coming into force in 1996 amending the *Criminal Code* to address hate-motivated offences through sentencing under s. 718.2(a)(i).⁶⁶ The sentencing

⁵⁹ *Pink Blood*, *supra* note 26 at 52, 53.

⁶⁰ *Combatting Hatred*, *supra* note 32 at 48.

⁶¹ Kent Roach, *Due Process and Victims' Rights: The New Law and Politics of Criminal Justice* (Toronto: University of Toronto Press, 1999) at 238 [*Due Process*].

⁶² *Rock Debates*, *supra* note 29.

⁶³ *Ibid.*

⁶⁴ *Ibid.*

⁶⁵ *Due Process*, *supra* note 61 at 238, 239.

⁶⁶ The first reading of Bill C-41 was June 1994 and it was passed by the House of Commons and given Royal Assent in 1995. The Order in Council P.C. 1996-1271 in relation to s. 718.2(a)(i) came into force September 3, 1996. *Combatting Hate*, *supra* note 32 at 46, fn 101.

provision gave clear direction to judges to consider the motivation of a hate crime.⁶⁷ The remedial nature of the provisions was first affirmed in *R. v. Miloszewski*,⁶⁸ a case involving the killing of an elderly Sikh and received intense attention.⁶⁹ British Columbia Provincial Court Judge Stewart described the legislation as:

[M]ore than simply a reaffirmation of the existing sentencing principles. It is a direction to sentencing judges to give substantial weight to this aggravating factor as the section now reflects the will of Canadians expressed by Parliament.⁷⁰

Author Candice Grant in *R. v. Keshane: Case Commentary*⁷¹ reiterated the remedial nature of the law:

When s. 718.2(a)(i) first came into effect, there was some debate as to whether it was simply a codification of existing principles, or whether it was remedial in nature. It is now generally accepted, both by academics and by the courts, that the section was not intended merely to codify the actions that judges were already taking, but to draw their attention specifically to the process that ought to be undertaken when there was evidence of racial motivation, and to distinguish this aggravating factor in severity from the various other factors that have been identified by the common law over time.⁷² [footnotes omitted]

Within this remedial context, the provisions read:

718.2 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 limited 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 any other similar factor.⁷³

The sentencing provisions of s.718.2(a)(i) give courts the freedom to consider other factors as well under the “or other similar factor” provisions. As a result, the parameters of the protected enumerated categories remain open under s. 718.2(a)(i).

⁶⁷ Candice Grant, “*R. v. Keshane: Case Commentary*” (2008) 71 Sask. L. Rev. 153 at 21 [Grant].

⁶⁸ *R. v. Miloszewski*, [1999] B.C.J. No. 2710 (B.C.Prov.Ct.) [Miloszewski].

⁶⁹ Department of Justice, *Print Media Treatment of Hate as an Aggravating Circumstance for Sentencing: A Case Study by Steven Bittle* (Ottawa: Research and Statistics Div, 2001) at v, vi, 5-7, 9-19, online <http://www.justice.gc.ca/eng/pi/rs/rep-rap/2001/rr01_11/p3>.

⁷⁰ *Miloszewski*, *supra* note 68 at para. 141.

⁷¹ Grant, *supra* note 67.

⁷² *Ibid.* at para. 21.

⁷³ *Criminal Code*, *supra* note 3 at s. 718.2(a)(i).

2.3 Summary

Canadian human rights and the *Criminal Code* recognize the existence of bias, prejudice and hatred in Canada and acknowledge its impacts on the lives of people and communities. Although the precise lines between freedom of expression and prohibition of hatred remain a topic of debate, the Supreme Court of Canada in *Taylor* (1990) and later *Whatcott* (2013) confirmed that addressing hatred in Canada remains a pressing issue.⁷⁴

There is no question that the *Criminal Code* considers hatred in two vastly different ways. On the one hand, hatred is a means to reduce culpability of murder to manslaughter under the defence of provocation.⁷⁵ At the same time, the *Criminal Code* has, since the 1970's, criminalized behaviour that deliberately targets people and property because of hatred of a perceived or actual group characteristic.⁷⁶ Sex, gender and sexual orientation⁷⁷ are not consistently protected categories. For instance, hatred of sexual orientation can be used as a “panic defence”⁷⁸ reducing culpability but is also an identified protected category under s. 318 and s. 319 but not under s. 430 (4.1). The constructs of categories do not include sex or gender under s. 318, s. 319, s. 430 (4.1) but is part of s. 718.2(a)(i) sentencing provisions. While it is understandable that different *Code* provisions are seeking to address different underlying goals, the fact remains the underlying inconsistencies in categories of protection are disconnected to the violence experienced in Canada.⁷⁹

⁷⁴ *Supra* note 13, 14.

⁷⁵ *Supra* note 26.

⁷⁶ *Supra* note 35.

⁷⁷ See Chapter 3.

⁷⁸ *Supra* note 26.

⁷⁹ *Supra* note 76.

This text tells stories of courage. It also exposes experiences that should inspire great shame in the hearts of the perpetrators. It is my hope that by breaking the silence, meaningful and systemic change will occur within my lifetime. This change will occur when we all begin to accept our responsibilities and begin to examine more fully the contours of all oppression.¹

Patricia Monture-Okanee

Chapter 3: Hate-motivated Violence

Canada's reputation of respecting diversity and difference amongst its citizens remains a prevalent perspective by many inside and outside of Canada. Despite Canada's reputation, Euro-centric constructs established at the time of contact remain, for the most part, within institutions and the legal order. Consequently, Aboriginal people remain marginalized through their experiences of discrimination, racism and hatred. In some instances Aboriginal women have been specifically targeted for violence as noted in many of the Native Women's Association of Canada and other reports.² The theme that resonates throughout the literature is the vulnerability and disproportionately high number of missing and murdered Aboriginal women. These experiences of violence and racism touch the personal lives of far too many Aboriginal women.

This chapter provides a brief account of institutional racism and its implications for Aboriginal women. The examination of comparative rates of violence and hatred in Canada is undertaken to advance the idea that while Aboriginal women experience high rates of violence, it is apparent that the related issue of hatred remains largely hidden. This disregard of connections between the

¹ Patricia Monture-Okanee, *Thunder in My Soul: A Mohawk Woman Speaks* (Halifax: Fernwood Publishing Ltd., 1995) at 60.

² Native Women's Association of Canada, NWAC Reports: Missing and Murdered Aboriginal Women and Girls, online <<http://www.nwac.ca/research/nwac-reports>>, House of Commons, "Ending Violence Against Aboriginal Women and Girls: Empowerment – a New Beginning" Standing Committee on the Status of Women (December 2001) (Chair: Irene Mathyssen, M.P) at 10, online <<http://www.parl.gc.ca/content/hoc/Committee/411/FEWO/Reports/RP5322860/feworp01/feworp01-e.pdf>> [*Ending Violence*].

reported violence and rates of hatred for Aboriginal people and women is highlighted throughout the chapter.

3.1 Violence and Hatred in Canada

Canada has an international reputation as being accepting of different cultures within its citizenship and in this way, Canada is considered a raceless society. It would be expected, therefore, that rates of racial discrimination, violence and hatred in Canadian society would be low. However, author Constance Backhouse questions the validity of Canada's historical reputation as a raceless nation. She argues the reputation of being raceless is misplaced,

Despite remarkable evidence to the contrary, despite legislation that articulated racial distinctions and barriers, despite lawyers and judges who used racial constructs to assess legal rights and responsibilities, the Canadian legal system borrowed heavily from this mythology, and contributed to the fostering of the ideology of Canada as a 'raceless' nation.³

Through this lens of 'racelessness', issues of racism, bias, prejudice and hatred are dismissed as unconnected to Canadian society. Author Stanley Barrett agrees when he suggests racial violence is outside the typical Canadian perspective:

The prevalent opinion among Canadians of British origin is that there is almost no racism in the country, ... there may be a handful of neo-Nazis, but they are poorly-educated, half-crazy thugs clinging to the periphery of society, unconnected to the mainstream. To the extent that racism exists at all in Canada, it can be dismissed as an American virus which has unfortunately breached the border.⁴ [*footnotes omitted*]

In attempting to explain the dismissal of Aboriginal people, author Barbara Perry suggests cultural imperialism is the underlying lens that constructs Aboriginal people as less human and therefore less worthy of respect:

Typically, anti-Indian sentiment and activity is framed by cultural imaging of the subordinate group. Within such constructs, the values and experiences of the dominate group typify the norm, while subaltern groups are rendered invisible at best, deviant at worst. These trends also lend permission to hate, in that they

³ Constance Backhouse, *Colour-Coded: A Legal History of Racism in Canada, 1900-1950* (Toronto: University of Toronto Press, 1999) at 13 [*Colour-Coded*].

⁴ Stanley Barrett, "The role of violence in the far right in Canada" in Michel Prum, Bénédicte Deschamps and Marie-Claude Barbier, eds., *Racial, Ethnic, and Homophobic Violence: Killing in the Name of Otherness* (New York: Routledge-Cavendish, 2007) 73.

imply the Native Americans are not fully worth of respect.⁵

By removing the existence, or downgrading the extent of racial discrimination, violence and hatred, Canada's reputation is maintained and gives permission to continue the hatred.⁶ Thus, a legacy of oppression continues today.⁷

3.2 Institutional Racism

Institutional discrimination and racism provides a backdrop of the relationship between Aboriginal and non-Aboriginal people. For instance, systemic racism has been recognized and extensively discussed in a plethora of reports, articles, books and inquiries. The overarching theme that resonates throughout the reports is that the legal system is failing Aboriginal people.⁸ In a watershed study, the 1991 *Aboriginal Justice Inquiry of Manitoba* provided sweeping recommendations to the Minister of Justice on how to improve the relationship between the administration of justice and Aboriginal peoples of Manitoba.⁹ The report was unequivocal in finding that Aboriginal people are failed at every turn by the Euro-Canadian system:

[I]n almost every aspect of our legal system, the treatment of Aboriginal people is tragic ... they have paid the price of high rates of alcoholism, crime and family abuse. ... Canada's treatment of its first citizens has been an international disgrace.¹⁰

⁵ Barbara Perry, *Silent Victims: Hate Crimes Against Native Americans* (Tucson: University of Arizona Press, 2008) at 38 [*Silent Victims*]. See Chapter 4 for further discussion on conceptualizations of hatred.

⁶ *Silent Victims*, *ibid.*

⁷ *Ibid.* at 39. For a fuller discussion see Chapter 5.

⁸ Nova Scotia, Royal Commission on the Donald Marshall, Jr., Prosecution, *Commissioner's Report: Findings and Recommendations*, 1989 vol. 1 (Halifax: Queen's Printer, 1989); Alberta, *Justice on Trial: Report of the Task Force on the Criminal Justice System and its Impact on the Indian and Métis People of Alberta* (Edmonton: The Task Force, 1991); *Report of the Aboriginal Justice Inquiry of Manitoba: The Justice System and Aboriginal People*, vol. 1 (Winnipeg: Queen's Printer, 1991) [*Aboriginal Justice Inquiry*, vol. 1], *Report of the Aboriginal Justice Inquiry of Manitoba: The Death of Helen Betty Osborne*, vol. 2 (Winnipeg: Queen's Printer, 1991) [collectively, *Aboriginal Justice Inquiry*]; Law Reform Commission of Canada, *Aboriginal Peoples and Criminal Justice: Equality, Respect and the Search for Justice* (Ottawa: Law Reform Commission of Canada, 1991); Ontario, *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (Toronto: Queen's Printer, 1995); Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: Supply and Services Canada, 1996) [*Bridging Cultural Divide*]; Saskatchewan, Commission on First Nations and Métis Peoples and Justice Reform, *Legacy of Hope: An Agenda For Change* (Saskatoon: Commission on First Nations and Métis Peoples and Justice Reform, 2004) [*SJRC, Legacy of Hope*]. See also *R. v. Williams*, [1998] 1 S.C.R. 1128, [1998] S.C.J. No. 49 where the Supreme Court took judicial notice of the existence of racism against Aboriginal people in noting "the widespread racism has translated into systemic discrimination in the criminal justice system" at para. 58, and see: Department of Justice, "Aboriginal Justice Strategy Annual Report: 2005-2006", online <<http://www.justice.gc.ca/eng/pi/ajs-sja/rep-rap/0506/1.html>>.

⁹ *Aboriginal Justice Inquiry*, vol. 1, *ibid.* at 3.

¹⁰ *Ibid.* at 674.

The report - being one of many - found Aboriginal people were grossly overrepresented in the legal system:

It [the Canadian justice system] has been insensitive and inaccessible, and has arrested and imprisoned Aboriginal people in grossly disproportionate numbers. Aboriginal people who are arrested are more likely than non-Aboriginal people to be denied bail, spend more time in pre-trial detention and spend less time with their lawyers, and, if convicted, are more likely to be incarcerated.¹¹

The consequences of systemic violations and violence inflicted by the criminal legal system on Aboriginal people in Canada is a denial of justice:

[I]s not merely that the justice system has failed Aboriginal people; justice also has been denied to them. For more than a century the rights of Aboriginal people have been ignored and eroded. The result of this denial has been the injustice of the most profound kind. Poverty and powerlessness have been the Canadian legacy to a people who once governed their own affairs in full self-sufficiency.¹²

The 1996 *Royal Commission on Aboriginal Peoples* went further in finding that:

The Canadian criminal justice system has failed the Aboriginal peoples of Canada – First Nations, Inuit and Métis people, on-reserve and off-reserve, urban and rural – in all territorial and governmental jurisdictions. The principle reason for this crushing failure is the fundamentally different world views of Aboriginal and non-Aboriginal people with respect to such elemental issues as the substantive content of justice and process of achieving justice.¹³

Although now acknowledged and accepted that “Aboriginal peoples experience systemic discrimination every time they come into contact with the justice system”,¹⁴ the failures continue. This is despite the repeated findings that racism and violence is a pressing issue in Canada today and remains inadequately addressed, particularly for Aboriginal women.¹⁵

¹¹ *Ibid.* at 1.

¹² *Ibid.*

¹³ *Bridging Cultural Divide*, *supra* note 8 at 309.

¹⁴ Department of Justice, *A Review of Research on Criminal Victimization and First Nations, Métis and Inuit Peoples 1990 to 2001* by L. Chartrand & C. McKay (Ottawa: Research and Statistics Div, 2006) at 43 [*Criminal Victimization*].

¹⁵ For an extensive review of the legal system and Aboriginal people see: *Aboriginal Justice Inquiry*, *supra* note 8, Amnesty International, *Stolen Sisters: A Human Rights Response to Discrimination and Violence Against Indigenous Women in Canada* (AI Index 20/003/2004, October 2004), online: Amnesty International <www.amnesty.ca/stolensisters/amr2000304.pdf> [*Stolen Sisters*]; Saskatchewan, *Report of the Commission of Inquiry into Matters Relating to the Death of Neil Stonechild* (Regina: Queen's Printer, 2004) [*Stonechild Inquiry*]; Saskatchewan, *Final Report of the Commission on First Nations and Métis Peoples and Justice Reform: Legacy of*

3.3 Violence Against Aboriginal Women: Dual Discrimination

A plethora of reports from the Native Women's Association of Canada and others have underscored the patterns of violence targeting Aboriginal women. The attacks are supported by racist stereotypes that encourage men to feel they can get away with violent acts of hatred against Aboriginal women. For example, the Amnesty International "Stolen Sisters" report substantiated the fears of a large number of missing and murdered Aboriginal women in Canada.¹⁶ The Federation of Saskatchewan Indian Nations agreed and highlighted the death of Cynthia Sanderson as a hate-motivated crime against Aboriginal women.¹⁷ In this case, Ms. Sanderson was killed by a motor vehicle operated by a man shouting racial slurs. Another infamous and publicized situation is Robert Pickton murdering women of which many were Indigenous women.¹⁸ More recently, in December, 2012, Thunder Bay police reported a sexual assault was

Hope: An Agenda for Change, vol. 1 (Regina: Queen's Printer, 2004); Royal Commission on Aboriginal Peoples, *Bridging Cultural Divide*, *supra* note 8; Aboriginal Justice Implementation Commission, *Recommendation on Policing*, (Winnipeg: Queen's Printer, 1991); Alberta, *Task Force on the Criminal Justice System and Its Impact on the Indian and Métis People of Alberta, Justice on Trial* (Edmonton: Province of Alberta, 1991); Michael Jackson, *Locking Up Natives in Canada – A report of the Canadian Bar Association on imprisonment and release* (1988), University of British Columbia; Jonathan Rudin, "Aboriginal Peoples and the Criminal Justice System" (Research Paper Commissioned by the Ipperwash Inquiry), online <http://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/policy_part/research/index.html>; R.A. Caswey, et al., *Justice on Trial: Report of the Task Force on the Criminal Justice System and its Impact on the Indian and Métis People of Alberta* (January, 1991), Vol. III, s. 4 – "A Review and Compilation of the Recommendations of Twenty-Two Major Reports from 1967 to 1990 on Aboriginal People and the Criminal Justice System", online <http://justice.alberta.ca/programs_services/aboriginal/Publications%20Library%20%20Aboriginal%20Justice/CawseyReportVolumeIII.aspx>, accessed May 24, 2011; "The justice system has failed Manitoba's Aboriginal people on a massive scale" *Aboriginal Justice Inquiry, vol. 1, supra* note 8 at 1.

¹⁶ For instance, *Stolen Sisters*, *supra* note 15 and a plethora of Native Women's Association of Canada reports have all highlighted the patterns of violence against Indigenous women supported by the "racist and sexist stereotypes that encourage men to feel they can get away with violent acts of hatred against them", online <<http://www.amnesty.ca/our-work/issues/indigenous-peoples/no-more-stolen-sisters>>.

¹⁷ In 2002, the Federation of Saskatchewan Indian Nations identified the death of Cynthia Sanderson as a hate-motivated crime. Cynthia was run over and killed by a man shouting racial slurs, online <http://www.cbc.ca/news/canada/story/2002/09/10/hatecrime_020910.html>.

¹⁸ Robert Pickton murdered a number of women at his pig farm in British Columbia, many being Indigenous women as noted by Deidre d'Entremont, "Seeking Justice for Canada's 500 Missing Native Women" (2004) 28.3 Cultural Survival Quarterly, online <<http://www.culturalsurvival.org/publications/cultural-survival-quarterly/canada/seeking-justice-canada-s-500-missing-native-women>>.

motivated by hatred of Aboriginal women.¹⁹ As noted in these studies and in the ever growing literature,²⁰ Aboriginal women have and continue to be targets of violence.

Dr. Patricia Monture²¹ suggests that Aboriginal women carry dual discrimination as being both a woman and being Aboriginal. Dr. Monture's examination articulates the dual discrimination as,²²

Aboriginal women's experience is both gendered and racialized. Often these two grounds of discrimination cannot be distinguished... Race (including colonialism) and gender are not discrete categories but overlapping and independent experiences.²³

Dr. Monture articulates that feminism and the women's movement do not capture her experiences of oppression as an Aboriginal woman. She suggests that feminism is focused on gender but for her, she is a dual person as having a culture and gender. The two are not separate entities. She explains that feminism does not capture her lived experiences,

Some Aboriginal women have turned to the feminist or women's movement to seek solace (and solution) in the common oppression of women. I have a problem with perceiving this as a full solution. I am not just woman. I am a Mohawk woman. It is not solely my gender through which I first experience the world, it is my culture (and/or race) that precedes my gender. Actually if I am the object of some form of discrimination, it is very difficult for me to separate what happens to me because of my gender and what happens to me because of my race and culture....

To artificially separate my gender from my race and culture forces me to deny the way I experience the world. Such denial has devastating effects on Aboriginal constructions of reality. Many, but not all, Aboriginal women reject the rigors of feminism as the full solution to the problems that Aboriginal women face in both the dominant society and within our own communities.²⁴

¹⁹ In late December, 2012, Thunder Bay police report a sexual assault motivated by hatred of Aboriginal women, online <<http://www.theglobeandmail.com/news/national/thunder-bay-sex-assault-hate-crime-probe-sharpen-focus-on-native-womens- plight/article6885373/>> and see also: <<http://www.cbc.ca/news/canada/thunder-bay/story/2013/01/29/tby-first-nation-hate-crime-witness.html>>.

²⁰ See also: *Silent Victims*, *supra* note 5.

²¹ Patricia Monture, *Thunder in My Soul: A Mohawk Woman Speaks* (Halifax: Fernwood Publishing, 1995) [*Thunder*]. Dr. Patricia Monture has written extensively on the oppression of the legal order and the changes that are needed to address Aboriginal issues within a post-colonial context.

²² Patricia Monture-Angus, *The Lived Experiences of Discrimination: Aboriginal Women Who Are Federally Sentenced* (Ottawa: Canadian Association of Elizabeth Fry Societies, 2002), fn 16, online <<http://www.elizabethfry.ca/submissn/aborigin/1.htm>>, accessed June 15, 2011 [*Lived Experiences*]. Dr. Monture notes the courts have historically had difficulty dealing with intersectionality.

²³ *Ibid.* at 8, 9.

²⁴ *Thunder*, *supra* note 16 at 177, 178.

For Dr. Monture, the explanation of over-representation in the criminal legal system rests within the understanding that cultural oppression, social deconstruction and inflicted violence remain entrenched within the lives of Aboriginal people. Racism and its related sexism and cultural oppression are intertwined. The now British Columbia Child Advocate, Mary Ellen Turpel and Dr. Monture underscored this by writing:

In the words of an aboriginal parolee and member of the Task Force on Federally Sentenced Women:

The critical difference is racism. We are born to it and spend our lives facing it. Racism lies at the root of our life experiences. The effect is violence, violence against us, and in turn our own violence. The solution is healing: healing through traditional ceremonies, support, understanding and the compassion that will empower Aboriginal women to the betterment of ourselves, our families and our communities.²⁵

Author Barbara Perry²⁶ agrees when stating that sexual violence has “long been part of the arsenal of violence used to contain Native Americans”.²⁷ The legal response has been slow as noted in the *Aboriginal Justice Inquiry of Manitoba*²⁸ established in response to the murder of Helen Betty Osborne in The Pas, Manitoba.²⁹

Dr. Monture, Sherene Razack and the others³⁰ have analyzed and written extensively on the inequalities of the law and violence experienced by Aboriginal women. The research shows that the law does not protect cultural and gender identities unique to Aboriginal women. In a 2002 case study by Sherene Razack, she paints a vivid picture of the violence that Pamela George, an

²⁵ Patricia Monture & Mary Ellen Turpel, “Aboriginal Peoples and Canadian Criminal Law: Rethinking Justice” (1992) U.B.C.L. Rev. 239 at 30 [*Rethinking Justice*].

²⁶ *Silent Victims*, *supra* note 5.

²⁷ *Ibid.* at 33. Barbara Perry describes rape, murder and sterilization assaults as systemic forms of violence that characterized the colonization of the Aboriginal lands, at 33-37.

²⁸ *Aboriginal Justice Inquiry*, vol. 1, *supra* note 8.

²⁹ *Ibid.* The Pas community knew the identity of Helen Betty Osborne’s killers but it took almost 15 years before one of four white men was tried for her death.

³⁰ *Thunder*, *supra* note 16; Sherene H. Razack, ed., *Race, Space and the Law: Unmapping a White Settler Society* (Toronto: Between the Lines, 2002) [*Race, Space and the Law*]; Native Women’s Association of Canada, “Aboriginal Women and the Legal Justice System in Canada: An Issue Paper” (National Aboriginal Women’s Summit, 20 June 2007); Native Women’s Association of Canada, “Collaboration to End Violence: National Aboriginal Women’s Forum 2011”, online <<http://www.nwac.ca/research/collaboration-end-violence-national-aboriginal-womens-forum-2011>>.

Aboriginal woman, experienced before her death. Razak articulates how gendered racism was a critical factor in Ms. George's death.³¹ She explains,

A number of factors contributed to masking the violence of the two accused ... because Pamela George was considered to belong to a space of prostitution and Aboriginality, in which violence routinely occurs, while her killers were presumed to be far removed from this zone, the enormity of what was done to her and her family remained largely unacknowledged.³²

Sherene Razak argues the dismissal of Ms. George and her family as being less worthy to receive fair treatment in the legal order is unjust. By excluding violence motivated by racism and compounding the disregard through indifference of Indigenous women allows perpetrators to escape justice.³³

The ongoing dismissal by authorities of the violence directed toward Aboriginal women was canvassed in the "Stolen Sisters" report.³⁴ The research revealed that government policies and laws negatively impact Aboriginal women's lives by creating increased risks of violence.³⁵ With a history of government policies pushing a "disproportionate number of Indigenous women into dangerous situations that include extreme poverty, homelessness and prostitution"³⁶ combined with a lack of protection, Aboriginal women are left vulnerable to "extreme brutality".³⁷

³¹ Sherene H. Razack, "Gendered Racial Violence and Spatialized Justice: The Murder of Pamela George" in *Race, Space, and the Law*, *ibid.*, at 123 [*Gendered Racial Violence*]. Easter weekend, 1995, Pamela George, a Saulteaux woman with two children was murdered in Regina. She had worked as a prostitute and her two murderers were young middle class white men. The men were convicted of manslaughter and sentenced to just over six years prison after taking into consideration time served at 123, 124.

³² *Ibid.* at 125, 126.

³³ *Ibid.*

³⁴ *Stolen Sisters*, *supra* note 5 at 15.

³⁵ *Ibid.* at 2. Canada's laws seeking to protect women from harm can be a contributing factor to increased vulnerability of all women including Aboriginal women. For instance, Chief Justice McLachlin of the Supreme Court of Canada, writing for an unanimous court, took a strong stance against prostitution laws that were undermining the safety and lives of women in stating that laws that prevent safe havens or screening to prevent women from harm is a law that "has lost sight of its purpose". This resonates with the findings of this thesis and its implications for Aboriginal women. *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] S.C.J. No. 72 at para. 136, 158. The Supreme Court of Canada noted "If screening could have prevented one woman from jumping into Robert Pickton's car, the severity of the harmful effects is established" at para. 158. The ruling by the SCC striking down the laws of prostitution has been suspended for one year for the federal government to respond.

³⁶ *Ibid.*

³⁷ *Ibid.*

The “systemic biases in the policies and actions of government officials and agencies, or of society as a whole” has put Aboriginal women at risk.³⁸ There is a direct “link between racial discrimination and violence against Indigenous women” that “has not yet been adequately acknowledged or addressed.”³⁹ This is “very much a human rights issue”.⁴⁰ The report suggests that within the larger human rights context,

Indigenous women have the right to be safe and free from violence. When a woman is targeted for violence because of her gender or because of her Indigenous identity, her fundamental rights have been abused.⁴¹

The Native Women’s Association of Canada follow up paper, the *Sisters in Spirit 2010 Research Findings*,⁴² found that many of the missing and murdered Aboriginal women were often young mothers, living in an urban centre in the West.⁴³

The report importantly noted that strangers more often target Aboriginal women and girls than non-Aboriginal women. The research suggested that to understand the targeting of Aboriginal women, issues of racism, discrimination and colonization must be considered,

To address the issue of violence, one must understand the history and impact of colonization on Aboriginal peoples in Canada. It is the ongoing narration of violence, systemic racism and discrimination, purposeful denial of culture, language and traditions and legislation designed to destroy identity that has led to the realities facing Aboriginal peoples. This research will begin with an explanation of how colonization is not simply a strategy of the past, but a reality that reinforces the silence surrounding the violence experienced by First Nations, Inuit, and Métis women today. It is this foundation of knowledge that answers the questions of why? And how? So many Aboriginal women and girls have gone missing or been found murdered without recognition of government or society. It is also this understanding of the contemporary realities of colonization that informs the recommendations for change.⁴⁴

³⁸ *Ibid.* at 3.

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ *Ibid.* at 4.

⁴² Native Women’s Association of Canada, *Sisters In Spirit 2010 Research Findings: What Their Stories Tell Us* (2010), online <<http://www.nwac.ca/research/nwac-reports>, accessed April 20, 2011> [*2010 Research Findings*].

⁴³ *Ibid.*; British Columbia, Missing Women Commission of Inquiry, online <<http://www.missingwomeninquiry.ca/obtain-report/>>. The Missing Women Commission of Inquiry was established by the British Columbia government in 2010 to investigate police investigations of missing women from downtown eastside Vancouver between 1997 to 2002. The Missing Women Commission of Inquiry closed its office on August 1, 2013.

⁴⁴ *2010 Research Findings, supra* note 37 at 1.

The 2011 Report of the Standing Committee on the Status of Women: *Ending Violence Against Aboriginal Women and Girls: Empowerment – A New Beginning*⁴⁵ agrees when recommending that the government “develop and disseminate training materials with respect to the cultural and historical context in which violence against Aboriginal women occurs.”⁴⁶

3.4 Comparative Rates

Statistical and other studies have demonstrated that the level and occurrence of violence⁴⁷ experienced by Aboriginal people and women consistently remain higher than other non-Aboriginal people. At the same time, the rates of police reporting by Aboriginal women are low.⁴⁸ This was also noted in Larry Chartrand and Celeste McKay’s *Review of Research on Criminal Victimization and First Nations, Métis and Inuit Peoples 1990 to 2001*⁴⁹ that found that there was a broad range of Aboriginal offender studies but significantly less coverage on Aboriginal people as victims of violence.⁵⁰

In examining victims of violence, the statistics of 1996 showed the Aboriginal population of approximately 3%⁵¹ had thirty five percent reporting victim violence.⁵²

⁴⁵ *Ending Violence, supra* note 2.

⁴⁶ *Ibid.* at 19.

⁴⁷ Violence against women can include: physical abuse, sexual abuse, emotional or verbal abuse, financial abuse, spiritual abuse, criminal harassment/stalking, Canadian Women’s Foundation, “The Facts About Violence Against Women”, online <<http://www.canadianwomen.org/facts-about-violence#20>>. See also: Department of Justice, Justresearch reports, online <<http://www.justice.gc.ca/eng/pi/rs/rep-rap/rd-rr/rd3-rr3/p3.html#ftn2>>.

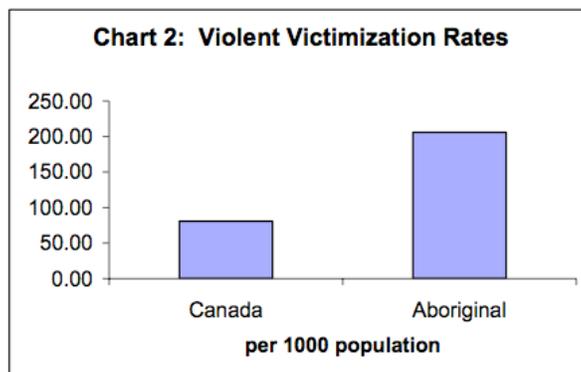
⁴⁸ *United Nations Declaration on the Elimination of Violence Against Women*, 85th Plen. Mtg, UN Doc A/RES/48/104 (1993), Article 1 defines violence against women as “Any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life”, online <<http://www.un.org/documents/ga/res/48/a48r104.htm>>. See also: United Nations Entity for Gender Equality and the Empowerment of Women, “Lets End Violence against Women 2012”, online <<http://www.unwomen.org/en/news/in-focus/end-violence-against-women/2012>>.

⁴⁹ *Criminal Victimization, supra* note 14.

⁵⁰ *Ibid.* at 7.

⁵¹ *Ibid.* at 17,

⁵² *Ibid.* at 20.



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The *Juristat* examination of *Violent Victimization of Aboriginal People in Canadian Provinces, 2009*⁵⁴ by Samuel Perreault found that Aboriginal people more often report being victimized than non-Aboriginal people. Overall, 37% of Aboriginal people self-reported being the victim of a crime compared to 26% of non-Aboriginal people.⁵⁵ Aboriginal women were “almost three times more likely than non-Aboriginal women to report” they were victims of spousal violence.⁵⁶

When looking at the specifics of all violence experienced by Aboriginal women, the rates of violence continues unabated as illustrated by Shannon Brennan in the 2011 *Juristat* release of *Violent Victimization of Aboriginal People in the Canadian Provinces, 2009*⁵⁷. The research shows that Aboriginal women not only experience high rates of violence but the “rate of self-reported violence victimization among Aboriginal women was almost three times higher than the rate of violent victimization reported by non-Aboriginal women”.⁵⁸ Although Aboriginal women experience much higher rates of victimization overall, the *Juristat* notes Aboriginal women do

⁵³ *Ibid.*

⁵⁴ Statistics Canada, *Juristat, Violent Victimization of Aboriginal People in the Canadian Provinces, 2009*, by Samuel Perrault, released March 1, 2011, online <http://www5.statcan.gc.ca/access_acces/alternative_alternatif.action?l=eng&teng=Violent%20victimization%20of%20Aboriginal%20people%20in%20the%20Canadian%20provinces,%202009&tfra=La%20victimisation%20violente%20des%20Autochtones%20dans%20les%20provinces%20canadiennes,%202009&loc=/pub/85-002-x/2011001/article/11415-eng.pdf> [*Violent Victimization of Aboriginal People*].

⁵⁵ *Ibid.* at 5.

⁵⁶ *Ibid.*

⁵⁷ Statistics Canada, *Juristat, Violent Victimization of Aboriginal Women in the Canadian Provinces*, by S. Brennan, released May 17 2011, Catalogue no. 85-002, online <<http://www.statcan.gc.ca/pub/85-002-x/2011001/article/11439-eng.pdf>> [*Violent Victimization of Aboriginal Women*].

⁵⁸ *Ibid.* at 5.

not often report non-spousal violence to the police.⁵⁹

More recently, the 2013 Statistics Canada Report on *Measuring Violence Against Women* concludes that Aboriginal women are disproportionately represented as homicide victims and, not surprisingly, have higher rates of spousal and non-spousal violence.⁶⁰ Sadly, the report notes that “overall, it has been consistently found that Aboriginal women have a higher likelihood of being victimized compared to the rest of the female population.”⁶¹ For example, Aboriginal women spousal homicide corresponds to population rate of 4%⁶² but are 2.5⁶³ times more likely than other women to experience spousal violence and have much higher rates of non-spousal violence⁶⁴. While both Aboriginal and non-Aboriginal women are at risk for violence from dating partners, Aboriginal women account for 11% of this type of homicide victims.⁶⁵

Although the statistical rates of hate-motivated crimes appear relatively low in number,⁶⁶ the rates are contrary to the research that consistently demonstrates that Aboriginal women are targets for violence. An explanation may be partially found in the underreporting of the women. Kris Christmann and Kevin Wong, believe the under-reporting of hate-motivated offences is epidemic.

The current policy imperative is aimed at encouraging the reporting of hate crime, driven by the conviction that reporting rates are notoriously low. There is good reason to believe that this is the case as much of the research literature suggests that victims of hate crime are less likely to report their victimization to the police when compared to other crimes.⁶⁷

In Canada, hate-motivated crimes are largely under reported with an estimated one-third of all

⁵⁹ *Ibid.* at 9. Approximately 76% Aboriginal women and 70% of non-Aboriginal women do not report non-spousal violence to police.

⁶⁰ Statistics Canada, *Measuring Violence Against Women: Statistical Trends* (Canadian Centre for Justice Statistics, February 25, 2013) at 9, online <<http://www.statcan.gc.ca/pub/85-002-x/2013001/article/11766-eng.pdf>> [*Statistical Trends*].

⁶¹ *Ibid.* at 19.

⁶² *Ibid.*

⁶³ *Ibid.* at 61.

⁶⁴ *Ibid.* at 61 and see Chart 2.5 at 62.

⁶⁵ *Ibid.* at 57.

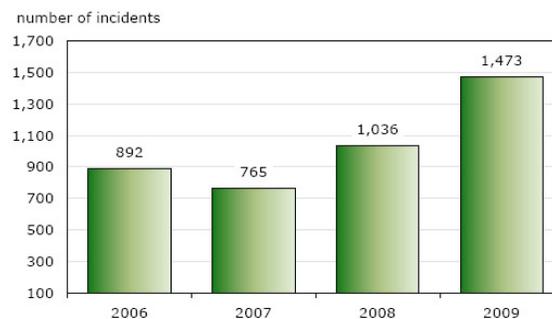
⁶⁶ *Ibid.* at 13.

⁶⁷ Kris Christmann & Kevin Wong, “Hate crime victims and hate crime reporting: some impertinent questions” in Neil Chakraborti, ed., *Hate Crime: Concepts, Policy, Future Directions*, (Oregon: Willan Publishing, 2010) at 195 [*Impertinent Questions*].

hate-motivated crimes being reported to police.⁶⁸ Accordingly, low statistical rates of hate-motivated crimes should be viewed with caution. In 2011, Statistics Canada reports that statistics gathered by police:

under-estimate the true extent of hate crime in Canada as not all incidents are reported to police. Self-reported information from the 2009 General Social Survey suggests that about one-third (34%) of incidents perceived by respondents to have been motivated by hate were subsequently reported to police. It is quite likely that had all incidents been reported to police, at least some would have been determined to meet the legal definition and evidentiary requirements of a hate crime.⁶⁹

Although clearly under reported, the rates of hate-motivated crimes are increasing across Canada.⁷⁰ For instance, the number of racially-motivated hate crimes increased by 35%,⁷¹ with an overall crime rate of approximately 5 hate crimes for every 100,000 citizens.⁷² Police-reported hate crimes, 2006 to 2009:



Notes: In total, information reflects data reported by police services which, in 2009, covered 87% of the population of Canada. **Source:** Statistics Canada, Canadian Centre for Justice Statistics, Uniform Crime Reporting Survey.

Mischief accounted for more than half of the 2009 hate crimes. Thereafter, minor assaults and threats were the most common types of offences. Police-reported hate crimes, by type of offence, 2009:

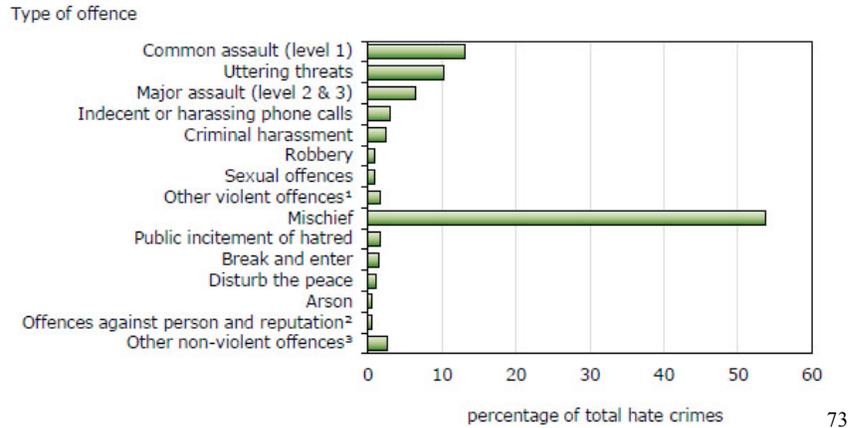
⁶⁸ Statistics Canada, Juristate, “Police-reported hate crime in Canada, 2009” (no. 85-002-X) released June 7, 2011 by Mia Dauvergne & Shannon Brennan at 6, online <<http://www.statcan.gc.ca/daily-quotidien/110607/dq110607a-eng.htm>> [*Police Reports 2009*].

⁶⁹ *Ibid.*

⁷⁰ *Ibid.* For example, in 2009 police reported a 42% increase in hate crimes with over half motivated by race or ethnicity with the largest increase among those motivated by religion, which rose 55%.

⁷¹ *Ibid.*

⁷² *Ibid.* at 7.



1. Includes, for example, assaults not otherwise specified, intimidation and extortion. 2. Includes, for example, defamatory libel. 3. Includes, for example, threats against property or animals and advocating genocide. **Notes:** Data are based upon information reported by police services covering 51% of the population of Canada. Counts are based upon the most serious offence in the incident. One incident may involve multiple violations. **Source:** Statistics Canada, Canadian Centre for Justice Statistics, Uniform Crime Reporting Survey.

The increased rates were mostly in Ontario and Quebec. This is not, however,

necessarily indicative as the reporting can be influenced by many factors:

The existence (or absence) of specialized hate crime units within police services, training initiatives, zero tolerance policies, victim assistance programs, hot-lines and community awareness campaigns can influence whether victims choose to report a hate crime to police and how police subsequently respond. In other words, the rate of hate crime in a given area may be more indicative of reporting practices by the public and local police services rather than of prevalence levels.⁷⁴

As evidenced in the following chart, the trend from 2008 to 2009⁷⁵ shows significant percentage increases in hate-motivated crimes in Ontario. The prairie-province reports available exhibit some increased activity overall. For instance, Saskatoon hate-motivated crimes went from zero to 19 incidents, Regina from 9 to 3, Calgary down from 40 to 30, Edmonton up from 27 to 33 and Winnipeg the same number of incidents at 14. See:

⁷³ *Ibid.* at 8.

⁷⁴ *Ibid.*

⁷⁵ *Ibid.* at 10. Statistic Canada notes this discrepancy as “unavailable as the Royal Canadian Mounted Police outside British Columbia was unable to extract hate crime data from its records management systems.”

Police-reported hate crimes, by census metropolitan area, 2008 and 2009

Census metropolitan area ^{1,2,3}	2008		2009		percent change in number from 2008 to 2009 ⁵
	number	rate ⁴	number	rate ⁴	
Kitchener-Cambridge-Waterloo	31	6.1	93	17.9	200.0
Guelph ⁶	10	8.2	21	17.1	110.0
Peterborough	4	3.3	18	14.8	...
Ottawa ⁷	51	5.6	134	14.5	162.7
Saskatoon	0	0.0	19	8.5	...
Vancouver	143	6.3	163	7.0	14.0
Kingston	12	7.7	11	6.9	-8.3
Toronto	271	5.4	350	6.9	29.2
Brantford	9	6.9	9	6.8	...
Sherbrooke	7	3.8	12	6.5	...
London	40	8.2	30	6.1	-25.0
Calgary	57	5.3	63	5.6	10.5
Abbotsford-Mission	10	5.9	8	4.6	...
Hamilton	33	6.3	23	4.3	-30.3
Edmonton	27	3.4	33	4.0	22.2
Victoria	11	3.2	12	3.4	9.1
Québec	15	2.0	25	3.4	66.7
Kelowna	5	2.9	6	3.4	...
Windsor	5	1.6	10	3.3	...
Gatineau ⁸	9	3.0	8	2.7	...
Montreal	38	1.0	99	2.6	160.5
St. Catharines-Niagara	18	4.1	11	2.5	-38.9
Winnipeg	14	2.1	14	2.1	0.0
Halifax	7	1.8	7	1.8	...
Regina	9	4.7	3	1.6	...
Saguenay	0	0.0	1	0.7	...
Trois-Rivières	1	0.7	1	0.7	...
Greater Sudbury	2	1.2	1	0.6	...
St. John's	1	0.5	0	0.0	...
Saint John	2	2.0	0	0.0	...
Barrie	0	0.0	0	0.0	...
Thunder Bay	1	0.8	0	0.0	...
Total CMAs	843	4.0	1,185	5.6	40.6
Less than 100,000 population (non-CMAs)	193	2.4	288	3.5	49.2
Total	1,036	3.5	1,473	5.0	42.2

... not applicable
 1. A census metropolitan area (CMA) consists of one or more neighbouring municipalities situated around an urban core. A CMA must have a total population of at least 100,000 of which 50,000 or more live in the core. To be included in the CMA, other adjacent municipalities must have a high degree of integration with the urban core, as measured by commuting flows derived from census data.
 2. A CMA typically comprises more than one police service. Populations have been adjusted to follow policing boundaries. The Oshawa CMA is excluded from this table due to the incongruity between the police service jurisdictional boundaries and the CMA boundaries. The Moncton CMA is excluded as police services in this area were unable to extract hate crime data from their records management systems.
 3. In 2009, coverage for each CMA exceeded 90% except for the following: Winnipeg (88%), Saskatoon (84%), Hamilton (74%), Barrie (70%) and Edmonton (70%). CMA populations have been adjusted to reflect coverage.
 4. Rates are calculated per 100,000 population.
 5. Due to the variability in small numbers, percent changes have not been calculated when the number of hate-motivated crimes is below 10 in any given year.
 6. Information from the Guelph Police Service reflects 2009 data as of March 31, 2011. At the time of this publication, some additional incidents were still under investigation as possible hate crimes.
 7. Ottawa refers to the Ontario part of the Ottawa-Gatineau CMA.
 8. Gatineau refers to the Quebec part of the Ottawa-Gatineau CMA.
Note: In total, information reflects data reported by police services which, in 2009, covered 87% of the population of Canada.
Source: Statistics Canada, Canadian Centre for Justice Statistics, Uniform Crime Reporting Survey.

The most common motivation for hate crimes is race or ethnicity of the victim.⁷⁷ The majority of hate crimes (54%) were based on hatred of race or ethnicity. The next primary motivations were religion (29%) and sexual orientation (13%). The remaining (4%) of hate-motivated crimes were based on factors such as language, mental or physical disability, sex or other issues such as profession or political beliefs.⁷⁸

From an urban perspective, the motivation for hate crimes reported in the prairie-provinces is largely based on race or ethnicity. For example, Calgary racial or ethnic motivation is 71.4%, Edmonton is 60.6% although Winnipeg has a higher rate for religious motivation at 50% of incidents. See:

⁷⁶ *Ibid.* at 20.

⁷⁷ *Ibid.* at 10.

⁷⁸ *Ibid.*

Police-reported hate crimes, by type of motivation, ten largest census metropolitan areas, 2009

Census metropolitan area ^{1,2,3}	Race or ethnicity		Religion		Sexual orientation	
	number	percent	number	percent	number	percent
Toronto	190	54.3	107	30.6	42	12.0
Vancouver	86	54.1	27	17.0	44	27.7
Ottawa	80	62.0	34	26.4	13	10.1
Montréal	29	33.0	38	43.2	10	11.4
Kitchener–Cambridge–Waterloo	56	65.1	26	30.2	4	4.7
Calgary	45	71.4	16	25.4	2	3.2
Edmonton	20	60.6	9	27.3	3	9.1
Québec	13	52.0	5	20.0	2	8.0
Hamilton	17	73.9	1	4.3	5	21.7
Winnipeg	4	28.6	7	50.0	3	21.4

Census metropolitan area ^{1,2,3}	Other ⁴		Unknown		Total	
	number	percent	number	percent	number	percent
Toronto	11	3.1	0	...	350	100
Vancouver	2	1.3	4	...	163	100
Ottawa	2	1.6	5	...	134	100
Montréal	11	12.5	11	...	99	100
Kitchener–Cambridge–Waterloo	0	0.0	7	...	93	100
Calgary	0	0.0	0	...	63	100
Edmonton	1	3.0	0	...	33	100
Québec	5	20.0	0	...	25	100
Hamilton	0	0.0	0	...	23	100
Winnipeg	0	0.0	0	...	14	100

... not applicable
 1. A census metropolitan area (CMA) consists of one or more neighbouring municipalities situated around a central core. A CMA must have a total population of at least 100,000 of which 50,000 or more live in the core. To be included in the CMA, other adjacent municipalities must have a high degree of integration with the central core, as measured by commuting flows derived from census data.
 2. A CMA typically comprises more than one police service. Populations have been adjusted to follow policing boundaries. The Oshawa CMA is excluded from this table due to the incongruity between the police service jurisdictional boundaries and the CMA boundaries. The Moncton CMA is excluded as police services in this area were unable to extract hate crime data from their records management systems.
 3. In 2009, coverage for each CMA exceeded 90% except for the following: Winnipeg (88%), Hamilton (74%) and Edmonton (70%). CMA populations have been adjusted to reflect coverage.
 4. Includes mental or physical disability, language, sex and other similar factors. Examples of "other similar factors" may include age or political beliefs.
 5. Ottawa refers to the Ontario part of the Ottawa–Gatineau CMA.
Note: Percentages have been calculated excluding unknown motivations.
Source: Statistics Canada, Canadian Centre for Justice Statistics, Uniform Crime Reporting Survey.

Between 2008 and 2009, increases in the number of incidents were reported among each of the three most common motivations. Proportionately, however, the largest increase was for hate crimes motivated by religion, up by 55% (or 145 incidents). The number of racially motivated hate crimes rose by 35% (or 199 incidents) and those motivated by sexual orientation rose by 18% (or 29 incidents).⁸⁰

When examining the various religions, it was the Jewish faith that was most often targeted. Similar to years past, the incidents in 2009 made up approximately 7 in 10 reported crimes against religious targets. However, the rates of reported incidents increased dramatically over the year. The number of hate-motivated crimes against the Jewish faith increased by 71% while the Muslim faith (Islam) hate-motivated incidents had a 38% increase.⁸¹

⁷⁹ *Ibid.* at 22.

⁸⁰ *Ibid.* at 11.

⁸¹ *Ibid.* at 12.

Hate-motivated crimes based on sexual orientation are often violent.⁸² In almost three quarters of sexual orientation based crimes, there was violence, often in the nature of an assault. As a result, many of the victims suffered physical harm although most relatively minor in nature (90%) requiring some first aid.⁸³ When compared to other categories of hate-motivated crimes, sexual orientation victims are 63% likely to be physically injured compared to 39% of racial or ethnic motivation victims and 23% of religiously motivated victims.⁸⁴ Violent crimes motivated by hate “more typically involved strangers, accounting for more than two-thirds (68%) of all incidents in 2009.”⁸⁵

From 2006 to 2009, there were overall increases in the number and percentage of hate-motivated crimes.

Police-reported hate crimes, 2006 to 2009

Year	Race or ethnicity		Religion		Sexual orientation	
	number	percent change in number	number	percent change in number	number	percent change in number
2006	502	..	220	..	80	..
2007	490	-2.4	173	-21.4	71	-11.3
2008	563	14.9	265	53.2	159	123.9
2009	762	35.3	410	54.7	188	18.2

Year	Other ¹		Unknown		Total	
	number	percent change in number	number	percent change in number	number	percent change in number
2006	22	..	68	...	892	..
2007	14	-36.4	17	...	765	-14.2
2008	33	135.7	16	...	1,036	35.4
2009	55	66.7	58	...	1,473	42.2

.. not available for a specific reference period

... not applicable

1. Includes mental or physical disability, language, sex and other similar factors. Examples of "other similar factors" may include age or political beliefs.

Note: In total, information reflects data reported by police services which, in 2009, covered 87% of the population of Canada. Percentages have been calculated excluding unknown motivations.

Source: Statistics Canada, Canadian Centre for Justice Statistics, Uniform Crime Reporting Survey.

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Black people were often targeted in hate-motivated crimes. Almost 4 in 10 (38%) racially motivated incidents in 2009 were against Black people. This is similar to years past.⁸⁷ South Asians (including East Indian, Pakistani descent) accounted for 13%, Arabs or West Asians

⁸² *Ibid.* at 13. Incidents motivated by sexual orientation, predominantly homosexuality, were more likely than those driven by other motivations to involve violence.

⁸³ *Ibid.* At the time of the study, police outside of Quebec, Ontario and British Columbia did not track hate crimes.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.* at 14.

⁸⁶ *Ibid.* at 19.

⁸⁷ *Ibid.* at 11.

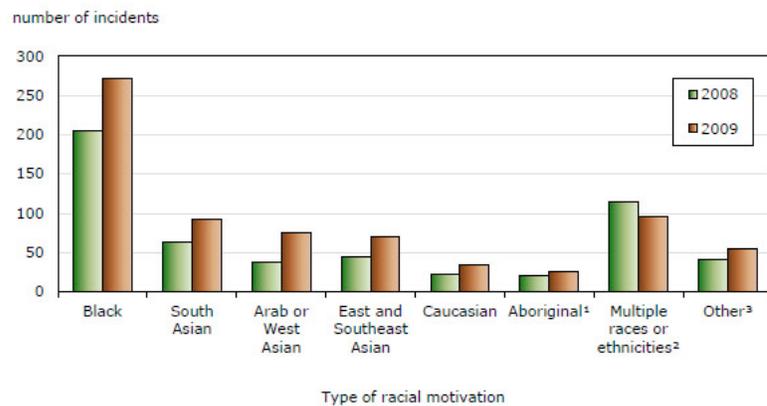
10%, and another 10% of crimes were committed against East and Southeast Asians (including Chinese, Japanese, Korean, Vietnamese, Indonesian).

Hate-motivated crimes reported against Aboriginal people in Canada were very low at 4%. This extremely low reporting is discussed in the report when noting:

The number of hate crimes against Aboriginal people may be under-reported due to the unavailability of data from police services in the territories and the Prairie provinces where the proportion of the Aboriginal population in Canada is highest.⁸⁸

Interestingly, it was reported that more Caucasians experienced hate-motivated crimes (5%) than Aboriginal people (4%). Other races or ethnicities encompassed the remaining 21% of incidents.⁸⁹

Police-reported hate crimes, by type of race, 2008 and 2009:



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1. The number of hate crimes against Aboriginal people may be under-reported due to the unavailability of data from police services in the territories and the Prairie provinces where the proportion of the Aboriginal population in Canada is highest.² Includes hate crimes that target more than one race or ethnic group. 3. Includes motivations based upon race or ethnicity not otherwise stated (e.g. Latin American, South American). **Note:** In total, information reflects data reported by police services which, in 2009, covered 87% of the population of Canada. **Source:** Statistics Canada, Canadian Centre for Justice Statistics, Uniform Crime Reporting Survey.

Police-reported hate crimes by motivation, 2008 and 2009:

⁸⁸ *Ibid.* at 18, fn 14.

⁸⁹ *Ibid.* at 11.

⁹⁰ *Ibid.* at 12.

Police-reported hate crimes, by type of motivation, 2008 and 2009

Type of motivation	2008		2009		percent change in number from 2008 to 2009
	number	percent	number	percent	
Race or ethnicity					
Black	205	37.3	272	37.7	32.7
South Asian	64	11.7	92	12.8	43.8
Arab or West Asian	37	6.7	75	10.4	102.7
East and Southeast Asian	44	8.0	71	9.8	61.4
Caucasian	22	4.0	34	4.7	54.5
Aboriginal ¹	20	3.6	26	3.6	30.0
Multiple races or ethnicities ²	115	20.9	96	13.3	-16.5
Other	42	7.7	55	7.6	31.0
Unknown	14	...	41	...	192.9
Total	563	100.0	762	100.0	35.3
Religion					
Jewish	165	64.2	283	71.5	71.5
Muslim (Islam)	26	10.1	36	9.1	38.5
Catholic	30	11.7	33	8.3	10.0
Other	36	14.0	44	11.1	22.2
Unknown	8	...	14
Total	265	100.0	410	100.0	54.7
Sexual orientation					
Homosexual (Lesbian or Gay)	152	96.2	175	96.2	15.1
Other	6	3.8	7	3.8	...
Unknown	1	...	6
Total	159	100.0	188	100.0	18.2
Other motivations					
Language	4	12.1	9	16.4	...
Mental or physical disability	3	9.1	7	12.7	...
Sex	6	18.2	6	10.9	...
Other similar factor ³	20	60.6	33	60.0	65.0
Total	33	100.0	55	100.0	66.7
Unknown	16	...	58	...	262.5
Total	1,036	...	1,473	...	42.2

... not applicable

1. The number of hate crimes against Aboriginal people may be under-reported due to the unavailability of data from police services in the territories and the Prairie provinces where the proportion of the Aboriginal population in Canada is highest.

2. Includes hate crimes that target more than one race or ethnic group.

3. Includes other motivations not otherwise stated. Examples may include age or political beliefs.

Note: In total, information reflects data reported by police services which, in 2009, covered 87% of the population of Canada. Where the number of hate-motivated crimes is below 10 in any given year, percent changes have not been calculated. Percentages have been calculated excluding unknown motivations.

Source: Statistics Canada, Canadian Centre for Justice Statistics, Uniform Crime Reporting Survey.

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Although continuing to remain low, over recent years the reporting rates of hate-motivated crimes against Aboriginal people have, on average, increased although the precise numbers for Aboriginal women remain unclear.⁹² There remains large gaps in the data collection and analysis in large parts of the country⁹³ that undermine the ability to recognize and respond to hate-motivated violence directed toward Aboriginal people.

3.5 Summary

The literature recognizes the existence of institutional racism and its related manifestations of violence and hatred directed toward members of the Aboriginal community. The Native Women's Association of Canada confirms that while far too many Aboriginal women struggle with issues associated with increased vulnerability such as poverty, abuse or addictions, many were targeted for the very reason that they were Aboriginal women.⁹⁴ Aboriginal women and

⁹¹ *Ibid.* at 21.

⁹² The type of motivation does not provide a distinct category for Aboriginal women although the literature suggests that Aboriginal women are targeted for violence for the very fact that they are both Aboriginal and women. There are exceptions year to year and trend to trend but for the most part, violence against women in Saskatchewan is double the national rate, *Statistical Trends, supra* note 55; as noted in *Ending Violence, supra* note 2 at 21. "There are wide differences in access to courts, and in their operations with respect to violence against Aboriginal Women. In some communities, because only circuit courts are available there are fewer opportunities to take cases forward."

⁹³ *Statistical Trends, ibid.* at 21.

⁹⁴ *2010 Research Findings, supra* note 37 at 2.

girls were much more likely to be targeted by strangers than non-Aboriginal women⁹⁵ because they were Aboriginal and assumed they either would not fight back or they would not be missed.⁹⁶

Although the government has acknowledged the disproportionate representation of Aboriginal women as homicide and victims of violence, the incidents are rarely treated as hate based crimes.⁹⁷ The precise number of racially motivated hate crimes against Aboriginal people and Aboriginal women remain unclear. In light of the disparity between the violence experienced and the reporting of hate crime against Aboriginal people, it is unreasonable to assume that hate-motivated crimes do not, or rarely occur against Aboriginal people. Accordingly, the data collection and analysis should be reviewed more closely in evaluating hate-motivated crimes against Aboriginal people generally, and specifically to the experiences of Aboriginal women.

⁹⁵ *Ibid.* at ii, 13, 29, 37.

⁹⁶ *Ibid.* at 2.

⁹⁷ *Police Reports, supra* note at 63. Although rarely reported, the numbers are increasing as noted in the 30% increase between 2008 (20 incidents) and 2009 (26 incidents) at 21.

*Hatred is strong but Love is stronger.
If we want to live in a nice society then we have to let
Love conquer.¹ Courtney S.L. McCaslin*

Chapter 4: Theories, Concepts and Definitions

The legislation in Canada encompassing hatred seeks to protect its citizens from the harms of hatred. The discussion on how to approach a complex and broad issue such as hatred, must first start with an examination of the theories and concepts of hatred. Although the theories of hatred are age-old questions,² hatred is not defined within the *Criminal Code*³ leaving the interpretation as a task for the courts. The research suggests that courts could benefit from a definition within the interpretation section of the *Code*. This chapter canvasses the concepts and various definitions of hatred discussed by philosophers, human right decisions and common law court decisions.

4.1 Theorizing and Conceptualizing Hatred

Recent trends are conceptualizing hatred from a global perspective⁴ and the United Nations *International Covenant on Civil and Political Rights (ICCPR)*⁵ is a leading interpretation document. The *ICCPR* recognizes the right to freedom of expression with limitations through the impositions of obligations to prohibit national, racial, or religious hatred⁶ as articulated under

¹ Courtney Sarah Lloydell McCaslin, age 13, comments, May 15, 2011. Children's words set and guide a framework of hope for this thesis and are necessary reminders of what we seek for their future.

² Robert J. Sternberg and Karin Sternberg, *The Nature of Hate* (New York: Cambridge University Press, 2008) at 16 [Nature].

³ *Criminal Code*, R.S.C. 1985, c. C-46 [Criminal Code]. A definition of hatred in the *Code* could also assist law enforcement investigation and prosecutions of hate-motivated offences.

⁴ Edward B. Royzman, Clark McCauley, and Paul Rozin, "From Plato to Putnam: Four Ways to Think About Hate" in Robert J. Sternberg, ed., *The Psychology of Hate* (Washington, DC: American Psychological Association, 2005) at 7 [Plato].

⁵ *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, arts. 9-14, Can. T.S. 1976 No. 47, 6 I.L.M. 368 (entered into force 23 March 1976, accession by Canada 19 May 1976) [ICCPR], online <<http://www.unhcr.org/refworld/docid/3ae6b3aa0.html>>.

⁶ *Ibid.*, Article 7, 8 and 20.

article 20:

Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.⁷

Similarly, the *International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)* contains an extensive list of obligations to assist in the prevention of racial discrimination of people.⁸ The *ICERD* has made it explicit in prohibiting hate speech, hate crimes and the financing of racist activities:

Article 4:

States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia:

- (a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;
- (b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;
- (c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.⁹

The description of hatred has been used in a casual, lay or subjective manner. For instance, describing the hatred of needles or an ex-spouse is a generic use of the term hatred. In contrast,

⁷ *Ibid.*, Article 20.

⁸ *International Convention on the Elimination of All Forms of Racial Discrimination*, 7 March 1966, 660 U.N.T.S. 195, Can. T.S. 1970 No. 28 (Entered into force 4 January 1969, accession by Canada 14 October 1970), Article 2 (2).

⁹ *Ibid.*, Article 4.

the violence of hatred has also led to the genocide of races of peoples.¹⁰ In addition, hatred has been used to describe the violence of systemic discrimination and its manifestations of racism, sexism and homophobia. In *The Psychology of Hate*¹¹, authors Edward B. Royzman, Clark McCauley, and Paul Rozin¹² suggest the conceptions of hatred¹³ fit into either classic or modern theories. These two concepts are not, however, neat categories of theoretical approaches. For instance, the classic theoretical approach to defining hatred by Aristotle, Descartes, Spinoza, Hume and Darwin are steeped in contradictions.¹⁴ For Descartes, the definitional analysis is from a perspective that hate is something people should withdraw from but for Spinoza and Aristotle, the analysis is on whether hate is pain or pain free. Darwin argued hate could be understood as a feeling manifesting itself as rage. Interestingly, Hume refused to conceptualize a definition for hatred as he “argued that neither love nor hate can be defined at all, because both are irreducible feeling with the introspective immediacy of sensory impressions.”¹⁵

Other theorists, such as Ekman, conceptualize hate as less an emotion but more an “emotional attitude,”¹⁶ while others suggest that hate is very much an emotion caused by a judgment. Following the latter theory, hatred is perceived as a judgment that the “other” is evil and therefore worthy of contempt and disgust.¹⁷ In contrast, it has been suggested that hatred should

¹⁰ Raphael Lemkin described the Nazi destruction of the Jews as “a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves.” Raphael Lemkin, *Axis Rule in Occupied Europe* (Washington, D.C.: Carnegie Endowment for International Peace, 1944) at 79 – 95, online <<http://www.preventgenocide.org/lemkin/AxisRule1944-1.htm>>, accessed January 9, 2012. Genocide became an international crime under the United Nations with the *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 U.N.T.S. 277, Can. T.S. 1949 No. 27 (entered into force 12 January 1951). Article 2 states genocide means acts committed with intent to destroy, in whole or in part, national, ethnical, racial or religious groups. The prohibited acts include: a) killing members of the group, b) causing serious bodily or mental harm to members of the group; c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; d) imposing measures intended to prevent births within the group; and e) forcibly transferring children of the group to another group. It seems reasonable to recognize the linkage between genocide and hate-motivated crimes, as they are acts of terror and degradation of human beings.

¹¹ Robert J. Sternberg, ed., *The Psychology of Hate* (Washington, DC: American Psychological Association, 2005) [*Psychology*].

¹² *Plato*, *supra* note 4 at 3.

¹³ *Ibid.* at 3, 4. There is no consensus in the major conceptions of hatred in both the classic and modern approach but the theories of hate can be categorized in four ways: categorical, meta-description (paradigm-based) causal explanation, stipulation, and Platonic insight. Each offer distinct basis for defining and evaluating hate as discussed generally in *Plato*. See also: *Nature of Hate*, *supra* note 2, Chapter 2: Definitions and Theories of Hate, at 15 - 50.

¹⁴ *Plato*, *ibid.*

¹⁵ *Ibid.* at 4.

¹⁶ *Ibid.* at 6.

¹⁷ *Ibid.*

not be confused with emotions of malice, viciousness and denigration, as these are all emotions of resentment.¹⁸ This theory argues that hatred is not resenting a weaker opponent, but rather it is only those that are on equal footing that are subjected to the hatred. This theory posits that hatred must be understood as an emotion of equality. Robert Solomon, a University of Texas philosophy professor agrees with this latter approach and suggests:

Hatred is an emotion that treats the other on an equal footing, neither degrading him as ‘subhuman’ (as in contempt) nor treating him with the lack of respect due to a moral inferior (as in indignation) nor humbling oneself before (or away from) him with the self-righteous impotence of resentment. ... There can be no hatred in weakness.¹⁹ [*footnotes omitted*].

Human rights lawyer David Matas focuses his attention on the emotion but emphasizes that hatred is much more than a thought. Instead, the emotion of hatred seeks to subvert and undermine and “insofar as there is an idea embedded in the emotion, it is the emotion that generates the idea.”²⁰ He goes further in conceptualizing hatred not just as a “matter of emotion” of a vilified group. The deeper layering for Matas is the critical component of conceptualizing, in the context of hate speech, whether it is “likely to arouse hatred” in others.²¹ He is not focused on the existence of hatred, but rather on whether it inspires others to hate. He describes it as:

Hatred is a basic human emotion. Hatred will always be with us. What the laws are directed against is the communication of hatred, getting others who initially do not hate to join in the hatred. The ultimate focus of the laws is not the perpetrator, the vilified group, or even the message, but rather the potential convert. A message that is unlikely to lead to hatred in anyone is not hate propaganda at all.²²

Hate is also conceptualized as anger or fear with the threat of some feature found in the hated.²³ Conceptualizing hate is not through a literal dictionary explanation but through examples of instances on what hate looks like.²⁴ Hatred, in this way, is understood by the actions intended to harm, threaten or intimidate a person identified as a member of a group. Defining hate within

¹⁸ *Ibid.* at 7.

¹⁹ *Ibid.* Robert C. Solomon (1942-2007) was a professor of continental philosophy at the University of Texas, online <<http://www.utexas.edu/faculty/council/2008-2009/memorials/solomon.html>>.

²⁰ David Matas, *Bloody Words: Hate and Free Speech* (Winnipeg: Bain & Cox, Publishers, 2000) [*Bloody Words*] at 37.

²¹ *Ibid.* at 45.

²² *Ibid.* at 45.

²³ Plato, *supra* note 4 at 7.

²⁴ *Ibid.* at 8.

this context is compatible to psychological underpinnings of anger, boredom, fear²⁵ as well as superiority and vilification. However, Edward B. Royzman, Clark McCauley, and Paul Rozin suggest that anger is not an appropriate element, as it would provide an unwelcome normative perspective. They underscore:

There has been a strong and honorable tradition in both philosophy and psychology of linking anger to a legitimate defense of one's rights ... Thus, citing "anger" as a motive of someone's aggressive action may carry a built-in implication of legitimacy-ascription and evaluative approval that is unwelcome in the context of criminal attacks based on race or sexual orientation."²⁶

One might reasonably suggest that hate crime is culturally senseless violence, however, this approach could open the application of what is senseless for one culture may be justifiable to another culture. For this reason and although initially compelling, a cultural conceptualization could result in absurd results. European history with the Nazi regime has shown that hate violence justified by cultural superiority or sensibilities leads to arguments of purity of race.

Lurking behind the concept of "hate crime," there seems to be yet another cultural meaning of hate as that which motivates acts of senseless (normatively unjustifiable) violence. Of course, what seems senseless to one person may seem like a justifiable act of force to another.²⁷

Instead, the "insistence on the use of hate in a particular situation may be less a matter of descriptive characterization than a reflection of normative commitment to identify with the plights of the victims while distancing from the viewpoints of the perpetrators."²⁸ This normative approach is important as it can contextualize how one approaches the definition and application of 'hate' in different circumstances. Thus, depending upon the characterization of circumstances and the analyzer's own normative approach, it can create the "possibility that a disagreement over whether a certain folk psychological concept is applicable in a particular case may really be a disagreement about whether the evaluative meaning of that concept should dominate its descriptive (psychological) meaning or vice versa."²⁹

²⁵ *Ibid.* at 9.

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ *Ibid.* at 10.

²⁹ *Ibid.* The authors go on to cite the example of "courage". The concept (or normative understanding) includes the elements of both fearless in a dangerous situation and a capacity or willingness to continue. This definition fits for both a "hero" and a person committing a break and enter. They also highlight that the concept also fits when

Although the concepts of hatred described in the literature have been refined by the case law in human rights cases and by the Supreme Court of Canada as discussed later in this thesis, these theories remain critically important as observations to help identify problems as well as provide a roadmap that legislators must be aware of and knowledgeable about to guide for the future.

4.2 Defining Hatred

4.2.1 Prejudice and Bias

Prejudice is defined as “pre-judging” a person or group of people.³⁰ Prejudice³¹ refers to beliefs or attitudes based on stereotyping.³² People may not be aware that they have stereotypes, as prejudice is “a complex cognitive representation” just “waiting to be activated”.³³ In comparison, stereotypes are shared views that authors Robert J. Sternberg and Karin Sternberg suggest can be based on little or no rational evidence:

... stereotypes are stronger when they are based, not on personal experience, but rather, on information received from others. In other words, the strongest stereotypes can be those that have the least basis in personal experience!³⁴
[references omitted]

Stereotypes can evolve over four stages: activate and retrieve stereotype information; integrate stereotype information with other information to form an overall impression; select a rule or criteria to make a decision and finally, decide whether to act.³⁵ A bias is a tendency to favor one response over another and can exist when judging a situation or person in a prejudice or discriminatory manner.³⁶ The literature continues to expand in understanding prejudice

reviewing the public outcry that arose after Bill Mahr’s statements the terrorists of 9/11 may be considered people of “courage” and not the actions of cowards.

³⁰ British Columbia Human Rights Coalition, “Responding To Incidents of Racism and Hate: A Handbook for Service Providers” (February 2003) at 7. The handbook was developed by the British Columbia Human Rights Coalition in partnership with the Ministry of Community, Aboriginal and Women’s Services, Settlement and Multiculturalism Branch and the Ministry of Public Safety and Solicitor General, Victim Services Division, online <<http://www.bchrcoalition.org/files/Racism-handb.pdf>>.

³¹ Contemporary theoretical and empirical analysis of prejudice is reviewed in Janet K. Swim and Charles Stangor, eds., *Prejudice: The Target’s Perspective* (San Diego: Academic Press, 1998) [*Prejudice*]. The book discusses encountering prejudice, consequences of prejudice, and coping with prejudice.

³² *Ibid.*

³³ *Nature*, *supra* note 2 at 69.

³⁴ *Ibid.*

³⁵ *Ibid.* at 70.

³⁶ *Prejudice*, *supra* note 31 at 13.

perspectives and consequences of harms to people and communities.³⁷

Bias or prejudice is rarely discussed in the criminal law case law. However, the motivation of bias or prejudice was considered in *Stalker* (2011) where the British Columbia Supreme Court held the assault was motivated not by hatred but by prejudice against Indo-Canadians.³⁸ The prejudice was proven through the accused's negative descriptive language used before the assault with the accused saying he doesn't "dance with brown guys".³⁹ The court held the remarks were "ignorant and ill-considered" but were not to be taken seriously prior to the "aggressive and violent" actions of the accused.⁴⁰ This court ruled there was sufficient evidence of bias or prejudice to engage the provisions of s.718.2(a)(i). The emphasis on prejudice is not the usual approach of the court in analyzing hatred.

4.2.2 Hallmarks of Hatred in Human Rights

Human rights law has developed common understandings of what are "hallmarks of hate"⁴¹ that target a group and the larger society. It is not intent or anger, but rather the impact or adverse effect, just as it is with regard to any other violation of a human rights code. As a hallmark of hatred, the targeted group could be "portrayed as a powerful menace that is taking control of major institutions in society and depriving others of their livelihoods, safety, freedom of speech and general well-being."⁴² Descriptions of the target group could include being portrayed as predators of the vulnerable, the cause of a current social problem, dangerous or violent by nature, devoid of any redeeming qualities, and requiring banishment, segregation or eradication to save society from harm.⁴³ Affirming these hallmarks of hatred in *Warman v. Kouba*⁴⁴, the 2008

³⁷ *Ibid.* at 2.

³⁸ *R. v. Stalker*, 2011 BCSC 1401, [2011] B.C.J. No. 1950 at para. 35 [*Stalker*].

³⁹ *Ibid.* at para. 31, 35, 38.

⁴⁰ *Ibid.* at para. 6.

⁴¹ *Warman v. Kouba*, [2006] C.H.R.D. No. 50 (Canadian Human Rights Tribunal) [*Kouba*], *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11, [2013] S.C.J. No. 11 [*Whatcott SCC*]. At para. 44, 45 and at 46, the Supreme Court of Canada noted the human rights "hallmarks of hate" jurisprudence does not include offensive or hurtful expression but identifies only the extreme examples of delegitimizing people. The mental element is different from the hate crime provisions under the *Criminal Code*. For human rights law, it is the effect that governs the analysis. In criminal law it is the intention, knowledge or recklessness of the accused that must be proven. See: Chapter 2, section 2 and *R. v. Buzzanga and Durocher* (1979), 49 C.C.C. (2d) 369 (Ont. C.A.), the accused were charged under s. 281.2(2) (now s. 319(2)) for wilfully promoting hatred by distributing anti-French pamphlets.

⁴² *Kouba, ibid.* at para. 23.

⁴³ *Ibid.*

⁴⁴ *Ibid.*

Canadian Human Rights Tribunal notes the non-exhaustive list of eleven hallmarks of hate include:

- (1) The Powerful Menace Hallmark: the targeted group is portrayed as a powerful menace that is taking control of the major institutions in society and depriving other of their livelihoods, safety, freedom of speech and general well-being;
- (2) The True Story Hallmark: the messages use true stories, news reports, pictures and reference from purportedly reputable sources to make negative generalizations about targeted group;
- (3) The Predator Hallmark: the targeted group is portrayed as preying upon children, the aged, the vulnerable, etc.;
- (4) The Cause of Society's Problems Hallmark; the targeted group is blamed for the current problems in society and the world;
- (5) The Dangerous or Violent by Nature Hallmark: the targeted group is portrayed as dangerous or violent by nature;
- (6) The No Redeeming Qualities Hallmark: the messages convey the idea that members of the targeted group are devoid of any redeeming qualities and are innately evil;
- (7) The Banishment Hallmark: the messages communicate the idea that nothing but the banishment, segregation or eradication of this group of people will save others from the harm being done by this group;
- (8) The Sub-human Hallmark: the targeted group is de-humanized through comparisons to and associations with animals, vermin, excrement, and other noxious substances;
- (9) The Inflammatory Language Hallmark: highly inflammatory and derogatory language is used in the messages to create a tone of extreme hatred and contempt;
- (10) The Trivializing or Celebration of Past Tragedy Hallmark: the messages trivialize or celebrate past persecution or tragedy involving members of the targeted group;
- (11) The Call to Violent Action Hallmark: calls to take violent action against the targeted group.⁴⁵

The human rights hallmarks of hatred capture circumstances of extreme hatred that dehumanize and vilify people.⁴⁶

4.2.3 Jurisprudence

The evolution in common law definitions of hatred stem from the 1990 Supreme Court of

⁴⁵ *Ibid.* The hallmarks of hatred jurisprudence includes: *Citron v. Zundel*, (No. 4) (2002), 41 C.H.R.R. D/274, *Warman v. Tremaine* (No. 2), 2007 CHRT 2, 59 C.H.R.R. D/391, *Payzant v. McAleer* (1994), 26 C.H.R.R. D/271, *aff'd* (1996), 26 C.H.R.R. D/280 (F.C.T.D.), *Warman v. Northern Alliance*, 2009 CHRT 10 (CanLII), Centre for Research-Action on Race Relations v. www.bcwhitepride.com, 2008 CHRT 1 (CanLII) and *Warman v. Winnicki* (No. 2), 2006 CHRT 20, 56 C.H.R.R. D/381 as identified in *Whatcott SCC*, *supra* note 38 at para. 45.

⁴⁶ Affirmed in *Whatcott SCC*, *ibid.* at para. 45, 46.

Canada *Keegstra* decision establishing the definition parameters of hatred. The Supreme Court of Canada declared:

Hatred is predicated on destruction, and hatred against identifiable groups therefore thrives on insensitivity, bigotry and destruction of both the target group and the values of our society. Hatred in this sense is a most *extreme emotion* that belies reason; 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.⁴⁷ [*emphasis added*]

The extreme emotional nature of hatred the Supreme Court of Canada identifies was further discussed by the Court in *Taylor*, with Chief Justice Dickson defining hate as “unusually strong and deep-felt emotions of detestation, calumny and vilification”.⁴⁸ The then Chief Justice Dickson ruled that discriminatory acts attack the “dignity and self-worth” of the individual and collective cohesiveness in society and:

Undermine the dignity and self-worth of target group members, and more generally contribute to disharmonious relations among various racial, cultural and religious groups ...⁴⁹

The Supreme Court of Canada has shown the definition of hatred as described by human rights law in *Andrews*, is not a word of casual connotation but instead instills detestation, enmity, ill-will and malevolence.⁵⁰ This approach is also affirmed in *Keegstra*'s definition of hatred that

⁴⁷ *R. v. Keegstra*, [1990] 3 S.C.R. 697, 61 C.C.C. (3d) 1 at para. 116 [*Keegstra*]. In comparison, a casual or generic connotation of hatred will not engage the legislation. In *R. v. Goodstone*, [2005] A.J. No. 1454 (QB) the Court accepts that hate, in a generic sense, may exist between an accused and victim but is not sufficient in the “hate crime sense” at para. 111.

⁴⁸ *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892, 75 D.L.R. (4th) 577 [*Taylor*]; *Taylor* was a narrowly split 4-3 decision. The Supreme Court of Canada appeal surrounded the constitutionality of s. 13(1) of the CHRA. Earlier, the case at the Canadian Human Rights Tribunal level had referred to the Oxford dictionary defining “hatred” as: active dislike, detestation, enmity, ill will, malevolence and “contempt” as: the condition of being condemned or despised; dishonour or disgrace. See: also: *Nealy v. Johnston* (1989), 10 C.H.R.R. D/6450 and the later Canadian Human Rights case of *Schnell v. Machiavelli and Associates Emprize Inc.*, [2002] C.H.R.D. 21 that comments on “ill will, detestation, enmity and contempt towards homosexuals” at para. 104. See also: Richard Warman, a human rights lawyer that has been the successful complainant in numerous human rights cases focusing on hatred, online <<http://www.richardwarman.ca/>>.

⁴⁹ *Taylor, ibid.* at para. 41. In 1999 an independent Panel, established by the Liberal government under the direction of the Honourable Anne McLellan, then Minister of Justice, reviewed the *Canadian Human Rights Act*. The Panel, chaired by the Honourable Gérard La Forest with members Renée Dupuis, William Black, Harish Jain released: *Promoting Equality: A New Vision* (Ottawa: Canadian Human Rights Act Review Panel, 2000), online <<http://publications.gc.ca/collections/Collection/J2-168-2000E.pdf>> [*LaForest Report*]. The *LaForest Report* examined whether or not s. 13 prohibiting hate messages was consistent with the freedom of expression as protected in the Charter. The Panel relied on *Taylor* comments that s. 13(1) was a reasonable limit justified in a free and democratic society.

⁵⁰ *R. v. Andrews*, [1990] S.C.R. 870 at 179 [*Andrews*].

refers to only the intense forms of emotion and dislike⁵¹ and is an “emotion of an intense and extreme nature that is clearly associated with vilification and detestation.”⁵² The Court of Appeal of Saskatchewan in *R. v. Ahenakew*⁵³ ruled wilfully promoting hatred must be more than shocking, brutal and hurtful statements even if said in a manner of fury and passion.⁵⁴

In *Saskatchewan (Human Rights Commission) v. Whatcott*, the Supreme Court of Canada was asked to clarify the definition of hatred in human rights law.⁵⁵ In this case, William Whatcott distributed four flyers that were objected to on the basis that they targeted and promoted hatred against homosexuality, contrary to s. 14 of the *Saskatchewan Human Rights Code (SHRCode)*.⁵⁶ Two of the flyers were entitled “Keep Homosexuality out of Saskatoon’s Public Schools!” and “Sodomites in our Public Schools”. The other two flyers were reprints of classified advertisements with handwritten comments.⁵⁷ In *Free Speech: ‘The Right to be Stupid’ v. ‘Words Matter’* Professor Ken Norman points out that in Canada, words do matter and can harm both the targets of the hatred as well as society’s democratic values of inclusiveness, diversity

⁵¹ *Keegstra*, *supra* note 47 at 116.

⁵² *Ibid.*

⁵³ *R. v. Ahenakew*, 2005 SKPC 76, [2005] S.J. No. 439 [*Ahenakew #1 – Trial*] Ahenakew was acquitted for his speech comments but convicted under s. 319(2), wilfully promoting hatred for his comments to a reporter. *R. v. Ahenakew*, 2006 SKQB 110, [2006] S.J. No. 212 [*Ahenakew #2 – Canadian Jewish Congress [CJC] Intervener Application*] intervener application allowed, *R. v. Ahenakew*, 2006 SKQB 272, [2006] S.J. No. 354 [*Ahenakew #3 – Appeal with New Trial Ordered*], the QB judge held at para. 30, 31 the trial judge was correct in concluding the comments were not “private” but should have considered “the tone of voice” and anger in deciding whether or not willful promotion of hatred was proven and as it was not, the QB judge set aside the conviction and ordered a new trial. *R. v. Ahenakew*, 2007 SKCA 54, [2007] S.J. No. 219 [*Ahenakew #4 – CJC & B’nai Brith Intervener Application*], applicant B’nai Brith granted intervener status for Crown appeal of conviction being set aside, CJC dismissed as already represented and protected by Crown, *R. v. Ahenakew*, 2008 SKCA 4, [2008] S.J. No. 9 [*Ahenakew #5 – Appeal of Dismissal of Conviction and Ordering New Trial*], Court of Appeal dismissed Crown appeal and held the QB judge made no error in law. The Court of Appeal ruled that Ahenakew’s comments were “shocking, brutal and hurtful” but did not have the necessary intent to “willfully promote” hatred against an identifiable group when taking all the evidence into account at para. 43, 52. *R. v. Ahenakew*, 2009 SKPC 10, [2009] S.J. No. 105 [*Ahenakew #6 – Re-Trial and Acquittal*], the Provincial Court ruled Ahenakew’s comments to the reporter were not private but did not have the necessary intent to wilfully promote hatred in his responses he gave in an argumentative and confrontational tone at para. 27, 29. Although on first blush the facts appear to meet the test of hatred, however, the highly inflammatory statements against Jewish people and his belief that Hitler “cleaned up a hell of a lot of things” were not sufficient to meet the wilfully promoting hatred test of s. 319(2). While words used are part of the analysis in wilful promotion, the contextual circumstances must also be considered. In this case, the Court of Appeal of Saskatchewan said to meet the test for hatred, it must include a consideration of “not only the words used by the accused, but the circumstances and context in which they were spoken.” *Ahenakew #5* at para. 20.

⁵⁴ *Ahenakew #5*, *ibid.* at para. 52.

⁵⁵ *Whatcott SCC*, *supra* note 41. For CPAC video of the Supreme Court of Canada Whatcott Hearing see: <<http://www.cpac.ca/eng/programs/supreme-court-hearings/episodes/saskatchewan-human-rights-commission-v-william-whatcott>>.

⁵⁶ *Saskatchewan Human Rights Code*, S.S. 1979, c.S-24.1 [*SHRCode*], *Whatcott SCC*, *ibid.* at para. 3.

⁵⁷ *Ibid.* at 8.

and equality.⁵⁸ The words used in Whatcott's pamphlets were offensive to many people.⁵⁹

After receiving and reviewing the human rights complaint, the Saskatchewan Human Rights Commission referred the matter to the Saskatchewan Human Rights Tribunal that held the four flyers exposed people to hatred and ridicule on the basis of their sexual orientation.⁶⁰ The tribunal found Whatcott violated the prohibition of s.14 of the *SHRCode*,⁶¹

14. –(1) No person shall publish or display, or cause or permit to be published or displayed, on any lands of premises or in a newspaper, through a television or radio broadcasting station or any other broadcasting device, or in any printed matter or publication or by means of any other medium that the person owns, controls, distributes or sells, any representation, including any notice, sign, symbol, emblem, article, statement or other representations:

(a) tending or likely to tend to deprive, abridge or otherwise restrict the enjoyment by any person or class of person, on the basis of a prohibited ground, or any right to which that person or class of persons is entitled under law; or

(b) that exposes or tends to expose to hatred, ridicules, belittles or otherwise affronts the dignity of any person or class of persons on the basis of a prohibited ground.

(2) Nothing in subsection (1) restricts the right to freedom of expression under the law upon any subject.⁶² [*emphasis added*]

Upon appeal, the Saskatchewan Court of Queen's Bench⁶³ held the flyers met the standard of hatred required to communicate "extreme feelings and strong emotions of detestation, calumny and vilification."⁶⁴ The Court held the Tribunal decision was correct as the "flyers equated homosexuals with pedophiles and child abusers."⁶⁵ However, when the Queen's Bench decision was appealed in 2010 to the Saskatchewan Court of Appeal, it ruled the flyers, in their entirety,

⁵⁸ Ken Norman, *Free Speech: 'The Right to be Stupid' v. 'Words Matter'*, University of Pittsburgh School of Law: Jurist Forum, March 19, 2013, online <<http://jurist.org/forum/2013/03/ken-norman-hate-speech.php>> [Norman].

⁵⁹ See: Norman, *ibid.* summarizing the pamphlets at issue in *Whatcott SCC*, *supra* note 41.

⁶⁰ *Whatcott SCC*, *ibid.* at para. 10, 11. The Tribunal ordered Whatcott to pay \$2,500.00 to one complainant and \$5,000.00 to three other complainants. The difference of the penalty was because the three complaints occurred under new legislation that doubled the limit on compensation, at para. 204.

⁶¹ *Ibid.* at para. 10. The prohibition was a reasonable restriction on the rights to freedom of religion and expression guaranteed by ss. 2(a) and (b) of the Charter. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

⁶² *SHRCode*, *supra* note 56, s.14 as highlighted in *Whatcott SCC ibid.* at para.12.

⁶³ 2007 SKQB 450, 306 Sask.R. 186.

⁶⁴ *Whatcott SCC*, *supra*, note 41 at para. 13 citing Queen's Bench decision at para. 21.

⁶⁵ *Ibid.* at para. 13.

did not reach the level of emotion required for hatred. The Court of Appeal did agree the test was correct in that “the *Code* must be interpreted and applied so as to only prohibit communications involving extreme feelings and strong emotions of detestation, calumny and vilification”⁶⁶; however, it held that the facts of the case did not meet the test. The Court of Appeal reasoned that sexual orientation remained a controversial subject and therefore was a subject that “must always be open to debate”.⁶⁷ Although differing in their end conclusions, the tribunal, Queen’s Bench and Court of Appeal analysis implicitly accepted and followed the definition of hatred as being emotions of vilification as articulated in the *Taylor* trilogy.⁶⁸

The appeal to the Supreme Court of Canada resulted in a 57 page unanimous⁶⁹ 2013 decision upholding the tribunal’s decision that Whatcott violated the *Code* by inciting hatred against homosexual people.⁷⁰ Two of the four flyers were held to be hatred as they vilified and denigrated homosexuals. The Court notes the flyers’ content:

delegitimizes homosexuals by referring to them as filthy or dirty sex addicts and by comparing them to pedophiles, a traditionally reviled group in society.⁷¹

Civil libertarians, media and religious groups may lament the decision as restricting free speech and freedom of religion,⁷² but the Court ruled these are not absolute rights and limitations are

⁶⁶ *Ibid.* at para. 15.

⁶⁷ *Whatcott v. Saskatchewan (Human Rights Tribunal)*, 2010 SKCA 26, [2010] S.J. No. 108 [*Whatcott SKCA*] at para. 36, 135. “It was a genuine shock to many human rights lawyers to see the Saskatchewan Court of Appeal (which was overturned by the Supreme Court) suggest in its ruling that while speech perpetrating hatred based on religion or ethnicity is prohibited discrimination, speech based on sexual orientation is still controversial and therefore more permissible” as discussed in: David Matas, Ken Norman and Margaret Parsons, “The Supreme Court got it right” *The Leader-Post* (25 March, 2013), online <http://www.leaderpost.com/story_print.html?id=8146329&sponsor=>.

⁶⁸ *Whatcott SCC*, *supra* note 41 at para. 20 – 30. At para. 21 the Court notes *Taylor* was part of a trilogy of hate speech cases in the 1990’s along with *Keegstra*, *supra* note 47, and *Andrews*, *supra* note 50.

⁶⁹ *Whatcott, SCC, ibid.*, the majority decision was delivered by Judge Rothstein, supported by McLachlin C.J., Lebel, Fish, Abella and Cromwell JJ. Justice Deschamps heard the appeal in 2011 but had retired by the time the decision was released.

⁷⁰ *Ibid.* This was the first time in over two decades the Supreme Court of Canada ruled on the issue of hate speech.

⁷¹ *Ibid.* at para. 187.

⁷² *Ibid.* at para.142, 143 the court rejected the argument by some interveners there should be a defence of sincerely held belief so that speech in good faith would have protection or be an absolute defence. Proponents of unlimited freedom of expression may argue the ‘marketplace of ideas’ would ensure the truth would emerge out of competition of ideas in a free and transparent public discourse. The marketplace rationale is based on the belief that restricting speech is not necessary because truth would prevail. At para. 102, 103, 104, 140 and at 171, the Court goes on to say “that the rights of a vulnerable group are a matter of ongoing discussion does not justify greater exposure by that group to hatred and its effects. This is because the only expression which should be caught by s. 14(1)(b) of the *SHRCode* is hate-inspiring expression that adds little value to political discourse or to the quest for

essential under s. 1 of the *Charter's* commitment to “equality and respect for group identity and inherent dignity owed to all human beings.”⁷³ The Court ruled the provisions of the *SHRCode* banning speech that affronts dignity⁷⁴ does not meet the level of ardent and extreme feelings essential for a finding of hatred.⁷⁵ Accordingly, the Court struck down and severed the ‘ridicules, belittles or affronts the dignity’ section of the *SHRCode* as “representations belittling a minority group or attacking its dignity through jokes, ridicule or insults may be hurtful and offensive”⁷⁶ but are not sufficient to justify infringing freedom of expression or religion.⁷⁷ In other words, repugnant or offensive language does not incite the level of vilification required to find hatred even if the words “inspire feelings of disdain or superiority”.⁷⁸

Instead, the Court focuses its attention to those “representations that expose a target group to detestation”⁷⁹ and “tend to inspire enmity and extreme ill will”⁸⁰ beyond dislike.

The Court ruled the expression must reach the level of “detestation and vilification” to meet the test of hatred. The Court notes:

Exposure to hatred can also result from expression that equates the targeted group with groups traditionally reviled in society, such as child abusers, pedophiles .. or “deviant criminals who prey on children” ..One of the most extreme forms of vilification is to dehumanize a protected group by describing its members as animals or as sub-human. References to a group as “horrible creatures who ought not be allowed to live”... “Incognizant primates”, “genetically inferior” and “lesser beasts” ... or “sub-human filth” ... are examples of dehumanizing expression that calls into question whether group members qualify as human beings.⁸¹

Although hatred may be directed toward a person’s “superior”,⁸² the Court said that more often

truth, self-fulfillment, and an embracing marketplace of ideas.” The case had 26 interveners including written submissions on behalf of the Assembly of First Nations, the Federation of Saskatchewan Indian Nations and the Métis Nation of Saskatchewan supporting the legislation.

⁷³ *Ibid.* at para. 66. See also: para. 64, 65.

⁷⁴ *Ibid.* at para. 3, 12, 85, 87, 88, 89.

⁷⁵ *Ibid.* at para. 89.

⁷⁶ *Ibid.* at para. 90.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.* In *Saskatchewan (Human Rights Commission) v. Bell (c.o.b. Chop Shop Motorcycle Parts)*, [1994] S.J. No. 380, 120 Sask.R. 122 (C.A.) at para. 30, 31, 32, 33 and at para. 34 the Court read down the *SHCode* provisions “by taking the words “ridicules, belittles or affronts the dignity of” to be of no force and effect.”

⁷⁹ *Whatcott SCC*, *supra* note 41 at para. 41.

⁸⁰ *Ibid.* at para. 151.

⁸¹ *Ibid.* at para. 45.

⁸² *Ibid.* at para. 43.

hatred contains an “element of looking down on or treating” another as inferior.”⁸³ Contempt is an important component of “delegitimizing a group as unworthy, useless or inferior” people⁸⁴ and is more than hurt feelings or humiliation.⁸⁵

On a deeper level, the Court accepts that the goal of the legislation is not to remove hatred as it recognizes the impracticality of seeking that lofty of a goal, at least for a law, as law “will not eliminate the emotion of hatred from the human experience.”⁸⁶ More realistically, the law is aimed at eliminating “the most extreme type of expression that has the potential to incite or inspire discriminatory treatment against protected groups on the basis of a prohibited ground”⁸⁷ and as such, is a worthy goal.

The Court elaborated on the inherent subjectivity of the concept of hatred and suggests it is a mistake to focus on the ideas being expressed rather than the effect.⁸⁸ The test of hatred or standard to be applied does not depend on the view of the author or on the targeted group but is to follow an objective standard⁸⁹ of a reasonable person:

The courts pose the question of whether “when considered objectively by a reasonable person aware of the relevant context and circumstances, the speech in question would be understood as exposing or tending to expose members of the target group to hatred”... a judge or adjudicator is expected to put his or her personal views aside and to base the determination on what he or she perceives to be the rational views of an informed member of society, viewing the matter realistically and practically.⁹⁰ [*references omitted*]

The Court emphasized that the focus of the inquiry must be on the effect of the speech to the targeted person or group and not the intent or belief of the speech giver:

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? ... [i]t is irrelevant whether the author of the expression intended to incite hatred or discriminatory treatment or other harmful conduct towards the protected group. The key is to determine the likely effect of the expression on its audience, keeping

⁸³ *Ibid.*

⁸⁴ *Ibid.*

⁸⁵ *Ibid.* at para. 47.

⁸⁶ *Ibid.* at para. 48.

⁸⁷ *Ibid.*

⁸⁸ *Ibid.* at para. 31.

⁸⁹ *Ibid.* at para. 34, 35.

⁹⁰ *Ibid.* at para. 35.

in mind the legislative objectives to reduce or eliminate discrimination.⁹¹

A common criticism against prohibitions of speech is that they stop an author from discussing what they consider a sin. Whatcott relied upon this logic as justification for his flyers. However the Court refused to accept his reasoning as the words attacked the person and could not be severed from the act. Justice Rothstein wrote there is a recognition of the “strong connection between sexual orientation and sexual conduct” and:

Where the conduct that is the target of speech is a crucial aspect of the identity of the vulnerable group, attacks on this conduct stand as a proxy for attacks on the group itself. If expression targeting certain sexual behavior is framed in such a way to expose persons of an identifiable sexual orientation to what is objectively viewed as detestation and vilification, it cannot be said that such speech only targets the behavior. It quite clearly targets the vulnerable group.⁹²

It is within these circumstances the infringement of freedom of expression under s. 2 (b) is demonstrably justified in a free and democratic society.⁹³ The purpose of the *SHRCode* is of a pressing and substantial nature with a high societal impact of people being considered inferior, sub-human, or lawless.⁹⁴ Thus, the practice and the person must be protected from hate speech. Moreover, the hate speech “lays the groundwork for later, broad attacks”⁹⁵ on people within vulnerable groups. These attacks can range from discrimination, to ostracism, segregation, deportation, violence and, in the most extreme cases, to genocide.⁹⁶

As the Supreme Court of Canada pointed out, if no limits were placed on freedom of speech, groups being targeted would not participate freely in the dialogue. It is difficult to participate in a dialogue where you are dehumanized and vilified as a person. Instead, one would first have to justify their own humanity. As first described in *Keegstra* and reaffirmed in *Whatcott*:

Hate propaganda opposes the targeted group’s ability to find self-fulfillment by articulating their thoughts and ideas. It impacts on that group’s ability to respond to the substantive ideas under debate, thereby placing a serious barrier to their full participation in our democracy. Indeed, a particularly insidious aspect of hate

⁹¹ *Ibid.* at para. 58.

⁹² *Ibid.* at para. 124. See also: para. 121 and 123 that discuss how certain practices cannot be separated from the identity of the person resulting in hate speech directed at a behavior that is integral to and inseparable from the identity of the group.

⁹³ *Ibid.*

⁹⁴ *Ibid.* at para. 74.

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

speech is that it acts to cut off any path of reply by the group under attack. It does this not only by attempting to marginalize the groups so that their reply will be ignored; it also forces the group to argue for their basic humanity or social standing, as a precondition to participating in the deliberative aspects of our democracy.⁹⁷

The Court continues the analysis by finding the limitations of the rights are proportionate to its objectives through a rational connection to the objective of eliminating discrimination and other harmful effects of hatred. Reducing discrimination goes beyond the individual to the community. This is because hatred is not only leveled at attacking an individual but seeks to attack the whole group. In particular:

Hate speech seeks to marginalize individuals based on their group characteristics. To satisfy the rational connection requirement, the expression ... must rise to a level beyond merely impugning individuals: it must seek to marginalize the group by affecting its social status and acceptance in the eyes of the majority.⁹⁸

Certainly, hate harms the individual, but it is also their community membership that is publically⁹⁹ attacked through hate speech:

[a] person's sense of human dignity and belonging to the community at large is closely linked to the concern and respect accorded the groups to which he or she belongs ... However, in the context of hate speech, this harm is derivative of the larger harm inflicted on the group, rather than purely individual.¹⁰⁰ [*references omitted*]

The *HRCODE* protects “on the basis of characteristics that are shared by others and have been legislatively recognized as a prohibited ground of discrimination.”¹⁰¹ The Court observed that discrimination can occur to both the majority and minority groups identifiable by an enumerated characteristic, but the “historical and jurisprudential experience demonstrates that hate speech is virtually always aimed at the minority subgroup.”¹⁰² In this context, the flyers equating homosexuals as carriers of disease, sex addicts, pedophiles and predators of children causing their death can be objectively seen as exposing homosexual people to detestation and vilification.

⁹⁷ *Ibid.* at para. 75.

⁹⁸ *Ibid.* at para. 80.

⁹⁹ *Ibid.* at para. 83 prohibitions of public communications of hate do not restrict hateful expression in private communications. Although private hate messages can inflict significant harms, it does not impact the societal status of the enumerated group.

¹⁰⁰ *Ibid.* at para. 81.

¹⁰¹ *Ibid.* at para. 84.

¹⁰² *Ibid.*

While the Supreme Court of Canada decision has set a high standard of defining hatred or “hatred and contempt” within the human rights hate speech provisions, these types of statements reach the level of “detestation” and “vilification”.¹⁰³

Canadian society continues to have the right to teach or share religious beliefs,¹⁰⁴ however, the expression of thoughts and opinions cannot be done in a hateful manner.¹⁰⁵ The Court agreed that one can express disapproval of a particular conduct and can advocate that topics should not be a part of the curriculum in public schools or at university conferences. However, when the Court reviewed the content and context in the *Whatcott* case, the expressions were found to be hate-inspiring representations.¹⁰⁶ In other words, tempering expressions is similar to limitations placed on other protected constitutional rights. As co-authors Ken Norman, David Matas and Margaret Parsons note “all rights, including speech rights, are subject to limits. This is one of the most basic propositions in any civilized legal system worthy of that name.”¹⁰⁷

Interestingly, in *Whatcott* a coalition comprised of the Assembly of First Nations, the Federation of Saskatchewan Indian Nations and the Métis Nation-Saskatchewan argued in an intervener factum that the “historical experience of Aboriginal peoples and the lingering hatred directed at these peoples demonstrates that there is a pressing need for this legislation.”¹⁰⁸ They pointed out that “the historic effects of unfettered hate rhetoric in public debate may in fact underline the need for targeted groups to have a remedy before hatred becomes legitimized...”¹⁰⁹ In fact, the ongoing racist rhetoric in Canadian society is “part of the public discourse” and “continues to reflect the abiding prejudice of earlier eras.”¹¹⁰ They rightly asserted these facts must be given

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.* at para. 97.

¹⁰⁵ *Ibid.*

¹⁰⁶ Shortly after the release of the 2013 *Whatcott SCC*, *ibid.* decision, *Whatcott* was publicly canvassing against homosexuality at the University of Saskatchewan. See: Lori Coolican, “*Whatcott’s* Visit to U of S Draws Protest: Students Counter Message,” *The StarPhoenix*, March 8, 2013, online <<http://www.thestarphoenix.com/news/Whatcott+visit+draws+protest/8066627/story.html>>.

¹⁰⁷ David Matas, Ken Norman and Margaret Parsons, “The Supreme Court got it right” *The Leader-Post* (25 March, 2013), online <http://www.leaderpost.com/story_print.html?id=8146329&sponsor=>>.

¹⁰⁸ *Whatcott SCC*, *supra* note 41. (Factum of the Coalition, comprised of: Federation of Saskatchewan Indian Nations, Assembly of First Nations, and Metis Nation-Saskatchewan, prepared by David Stack, Counsel for Coalition) at para. 3 [*Coalition Factum*].

¹⁰⁹ *Coalition Factum*, *ibid.* at para. 13. See: fn 17 noting international examples as discussed in William A. Schabas, “Hate Speech in Rwanda: The Road to Genocide” (2000), 46 McGill L.J. 141-171.

¹¹⁰ *Ibid.* at para. 4, 5 [*footnotes omitted*].

serious consideration when attempting to remedy hatred in Canada.

Hateful rhetoric and outright lies continue against the Aboriginal peoples in Canada, and the destinies of these peoples remain a hostage of hate.

...

RCAP observed that “derision or contempt may well undermine the self-respect of people” and “jeopardizes their ability to participate as active members of their communities and to function effectively as autonomous individuals in work and private life.” There is no legitimate juridical reason why any person or group should be subjected to such abuse ...¹¹¹

The Supreme Court of Canada did not discuss the issue of hatred of Aboriginal people and this may be because a specific Aboriginal fact based case would be a better opportunity for the Court to canvass the issue in greater detail. Nevertheless, the *Whatcott* case is an important decision for Aboriginal people in Canada as it is a clear rejection of hatred.

4.3 Summary

There are overlaps in the conceptualization of hatred within international, human rights and criminal law. In theorizing hatred, however, there is no singular approach or consensus of viewpoints. Whether one accepts or rejects any of the theories, there is little doubt the theories each offer a distinct basis for defining and evaluating hatred that can influence Canadian case law. For instance, human rights law “hallmarks of hate” and criminal case law all describe extreme hatred that vilify and dehumanize people.

In *Whatcott*, the Supreme Court of Canada was unequivocal in asserting that the right to freedom of expression and right to freedom of religion protect one to be able to believe and practice religious beliefs but they must be balanced with the rights of others to be equal and free from hatred. As noted in the *Whatcott* factum submitted on behalf of Federation of Saskatchewan Indian Nations, Assembly of First Nations, and Métis Nation – Saskatchewan, the historical record of unfettered hate toward Aboriginal people in the public discourse is a reflection of the historical contempt that remains a pressing issue for today.¹¹²

¹¹¹ *Ibid.* at para 24 [footnotes omitted].

¹¹² *Ibid.* at para. 4, 5, 24.

*Helen Betty is named Kay yah pi ka ki no amakate Ikwe –
The Woman who Continues to Teach.
Her spirit is an inspiration for those who have wanted and worked for change for justice.¹
Helen Betty Osborne Memorial Foundation*

Chapter 5: Categorical Distinctions

This chapter examines the categories of enumerated groups protected from hatred under the *Criminal Code* and reveals the inconsistencies in law. The inconsistencies have implications in addressing gendered racial violence and contribute to the perception that Aboriginal women do not deserve protection from violence. The failure to designate Aboriginal women as a specific enumerated group worthy of protection under s.718.2(a)(i) dismisses the patterns of violence targeting both race and gender.² Further, the exclusion of Aboriginal women is inconsistent with other sentencing provisions that recognize the unique circumstances of Aboriginal people in Canada³.

The failure of law exasperates the vulnerability of Aboriginal women and as the research has shown, too often men deliberately attack and target Aboriginal women.⁴ The violence generated

¹ Helen Betty Osborne Memorial Foundation ensures Helen Betty's spirit lives and continues to teach generations of students in working toward eliminating racism, sexism and indifference, online <<http://helenbetty.ca/home/about-helen-betty/>>.

² Amnesty International, *Stolen Sisters: A Human Rights Response to Discrimination and Violence Against Indigenous Women in Canada* (AI Index 20/003/2004, October 2004), online: Amnesty International <www.amnesty.ca/stolensisters/amr2000304.pdf> [*Stolen Sisters*], Native Women's Association of Canada examination of the patterns of violence against Indigenous women, online <<http://www.nwac.ca/research/nwac-reports>>. See also: a discussion on Robert Pickton murdering women, many being Indigenous women in Deidre d'Entremont, "Seeking Justice for Canada's 500 Missing Native Women" (2004) 28.3 *Cultural Survival Quarterly*, online <<http://www.culturalsurvival.org/publications/cultural-survival-quarterly/canada/seeking-justice-canada-s-500-missing-native-women>>. See also: Barbara Perry, *Silent Victims: Hate Crimes Against Native Americans* (Tucson: University of Arizona Press, 2008) [*Silent Victims*].

³ For instance, s. 718.2(e) requires judges to take judicial notice of the unique circumstances of Aboriginal people at sentencing. See: *R. v. Gladue*, [1999] 1 S.C.R. 688, 2 C.N.L.R. 252 and the analysis of Judge M.E. Turpel-Lafond, "Sentencing within a Restorative Justice Paradigm: Procedural Implications of *R. v. Gladue* in Wanda McCaslin, ed., *Justice as Healing: Indigenous Ways* (St. Paul, Living Justice Press, 2005) at 280.

⁴ Sherene H. Razack, "Gendered Racial Violence and Spatialized Justice: The Murder of Pamela George" in S. Razack, ed., *Race, Space, and the Law: Unmapping a White Settler Society* (Toronto: Between the Lines, 2002) [*Unmapping*].

through Euro-centric attitudes of superiority over Aboriginal women⁵ can be considered actions of gendered racial privilege⁶.

5.1 Enumerated Group Comparisons

The *Criminal Code* hate crime provisions have distinct and different categories of enumerated groups. For instance, s. 318 and s. 319 identify the enumerated categories as colour, race, religion, ethnic origin or sexual orientation.⁷ While s. 430 (4.1) includes colour, race, religion and ethnic origin, the provisions also include national origin as a category of protection.⁸ In comparison, under s. 718.2(a)(i) the identifiable groups are: colour, race, religion, ethnic or national origin, sexual orientation as well as language, sex, age, mental or physical disability, or any other similar factor.⁹ The open-ended category of “any other similar factor” allows courts to assess additional traits that may be targeted for bias, prejudice or hate-motivated offences. In this way, the categories of enumerated groups under s. 718.2(a)(i) remain open for interpretation by the courts.

5.1.1 Sexual Orientation

Although sexual orientation is an identified protected group under s. 318 and s. 319, it is not included in s. 430(4.1) that criminalizes bias, prejudice or hate-motivated mischief to religious or relating to religious property:

(4.1) Every one who commits mischief in relation to property that is a building, structure or part thereof that is primarily used for religious worship, including a church, mosque, synagogue or temple, or an object associated with religious worship located in or on the grounds of such a building or structure, or a cemetery, if the commission of the mischief is motivated by bias, prejudice or hate based on religion, race, colour or national or ethnic origin,¹⁰

⁵ See Chapter 2 and 3 - violence targeting LGBT people.

⁶ *Unmapping*, *supra* note 4 at 128. “Factors that brought Pamela George to the Stroll” and the white men that killed her suggests that “the encounter between the white men and Pamela George was fully colonial – a making of the white, masculine self as dominant through practices of violence directed at a colonized women.” Aboriginal women are more likely than other women to be subjected to violence from a stranger as noted in Chapter 2. There are significant gaps in data about the violators, see Chapter 2.

⁷ *Criminal Code*, R.S.C. 1985, c. C-46 [*Criminal Code*], s. 318 (4) and s. 319 (7) protects: colour, race, religion, ethnic origin or sexual orientation.

⁸ *Ibid.* s. 430(4.1).

⁹ *Ibid.* at s. 718.2(a)(i). My discussion re-orders the list of protected groups to highlight the similarities and differences amongst the legislation.

¹⁰ *Ibid.*, s. 430 (4.1).

The provisions omitting sexual orientation do not foresee situations of property owned by lesbian, gay, bisexual and transgender (LGBT) organizations being subjected to actions of hatred based on sexual orientation.¹¹ However in today's society, LGBT organizations have established, and continue to establish every year, offices offering "counselling, hotlines, health" and other support services¹² that could include religious worship. However, as the current enumerated categories exist, s. 430(4.1) would not be applicable if the hatred was motivated by sexual orientation. The message to LGBT people is that they are less worthy of protection from hate-motivated violence.

5.1.2 Sex and Gender

Canada and the world's awareness of gendered hatred grew in 1989 when 14 female students were killed at Montreal's Ecole Polytechnique.¹³ Recognizing gendered hatred led to Canada establishing the "National Day of Remembrance and Action on Violence Against Women" honouring the 14 women and other female victims of violence.¹⁴ Despite the growing recognition of gendered hatred, a 2013 Juristat statistical study, "Measuring Violence Against Women" found that hatred of sex was the primary motive in only seven crimes in 2010¹⁵ although women represented one-quarter of victims of all hate crimes in Canada.¹⁶ An explanation may, in part, be found in the difficulty in determining motive when there are

¹¹ See Chapter 2 and 3, Douglas Victor Janoff, *Pink Blood: Homophobic Violence in Canada* (Toronto: University of Toronto Press, 2005) [*Pink Blood*].

¹² Janell L. Carroll, *Sexuality Now: Embracing Diversity*, 3 ed., (Belmont: Wadsworth Cengage Learning, 2010) at 297, online

<<http://books.google.ca/books?id=5f8mQx7ULs4C&pg=PA298&lpg=PA298&dq=GLB+organizations+owning+property&source=bl&ots=9FQLCcUSCz&sig=M7Vo1Nvx3tWQHIAw1z65gxs-UiU&hl=en&sa=X&ei=5TigT9HpCOPs0gHL44QG&ved=0CE8Q6AEwBg#v=onepage&q=GLB%20organizations%20owning%20property&f=false>>, accessed January 25, 2012.

¹³ Established in 1991, December 6 is the National Day of Remembrance and Action on Violence Against Women that remembers the 14 young women at l'École Polytechnique de Montréal and is a day of reflection on violence against women. Government of Canada, Status of Women, online <<http://www.swc-cfc.gc.ca/commemoration/vaw-vff/index-eng.html>>.

¹⁴ *Ibid.*

¹⁵ Of the seven crimes, three were violent. Statistics Canada, *Measuring Violence Against Women: Statistical Trends* (Canadian Centre for Justice Statistics, February 25, 2013) at 13, online <<http://www.statcan.gc.ca/pub/85-002-x/2013001/article/11766-eng.pdf>> [*Statistical Trends*].

¹⁶ *Ibid.* Women accounted for 32% of incidents motivated by religion, 29% by race or ethnicity and 16% by sexual orientation.

multiple intersections of identity. For instance, in circumstances of hate involving both race and gender.¹⁷

Although gender has not historically been included in anti-hate crime provisions, the literature has shown that “women are victims of gender-bias offenses simply because they are women.”¹⁸

Author Jessica Hodge’s explains the omission as,

Even individuals who consider themselves supportive of hate crime laws sometimes question the validity of including certain protected groups. Because gender is not universally considered a core group, it has taken longer for this category to be incorporated into state statutes.¹⁹

Even in circumstances where it is agreed that provisions should include sex and gender, there can be debate about the type of crimes that would apply.²⁰ Others have raised concerns of inclusion of sex and gender as problems associated with increasing the number of gender-motivated hate crimes.²¹

¹⁷ Some courts have discussed hate-motivated crimes against women. For instance, in *R. v. Smith* [2002] O.J. No. 5018 at 24, the Provincial Court ruled the sexually violent material describing the killing of women was not motivated by hatred of women. Bill C-380 (previously Bill C-254) was a Private Member’s Bill to amend the *Criminal Code* hate propaganda law to add women and girls to the protected groups. The Bill died when the election in May 2011 was called, online <<http://thefreeradical.ca/hatePropaganda/billC254.html>>. See also: fn 27.

¹⁸ Jessica P. Hodge, *Gendered Hate: Exploring Gender in Hate Crime Law* (Boston: Northeastern University Press, 2011) at 5 [*Gendered Hate*].

¹⁹ *Ibid.* at 4, 5.

²⁰ *Ibid.* at 45. As Jessica Hodge explains: “lawmakers debated whether sexual offences should be included as gender-motivated bias crimes” or whether gender should be an exemption in sexual offense prosecutions. If gender is excluded from sexual offences, a bias charge would not be attached to a charge of sexual assault if the motivating factor was solely the gender. At 57 – 62, the author canvasses the suggestion that sexual assault be exempted from gender bias as it is inconsistent with the typical hate crime model of race, ethnicity, religion, sexual orientation. As well, sexual assault is considered an offense of power and control rather than hatred. Further, others offer pragmatic reasons on the potential burden on the criminal justice system. Others argue that gendered sexual offenses are already addressed in the law. Author Jessica Hodge responds to each of the positions while noting the legal profession is dominated by men and violence of women remain a second-tier crime. She goes further to note that if sexual assaults were properly labeled as hate crimes, discussion and education of the public would ensue in society. It is critical to understand that rapists express hatred toward women as a group and not just a specific victim. Failing to recognize gender bias in the same manner as other bias crimes continues a patriarchal view that female victims do not have legal legitimacy as other victims of hate crimes. She summarizes her position as “In the end, this treatment not only obscures the gender animus within sexual assaults, it also reinforces the notion that anti-female violence is common and just part of the natural order of society.”

²¹ *Ibid.* at 53.

Despite the growing recognition of hatred directed toward sex and gender,²² s. 318, s. 319 and s. 430 (4.1) provisions do not include sex or gender as a protected enumerated category from hatred. In comparison, s. 718.2(a)(i) specifically recognizes sex as an enumerated category protected from hate-motivated offences. Indeed, s. 718.2(a)(i) takes an expansive and flexible approach as it includes sex as well as age, mental or physical disability as a protected enumerated group. The sentencing provisions also recognize that there may be other factors in a hate-motivated crime as the provisions read “any other similar factor”²³ may be considered.²⁴

The importance of including sex and gender as a listed enumerated group would respond to actions of “some men [who] deliberately target women with violence.”²⁵ Gendered violence impacts not only the specific victim but also targets all women and “the consequences of gendered violence are extensive and damaging, not only to the millions of women experiencing such violence, but also to millions of women who fear victimization”.²⁶

Once again, the omission of sex and gender as an enumerated protected group under hate provisions of the *Criminal Code* gives the clear message the law does not consider sex and gender with the same seriousness as other categories of hatred. Interestingly, there have been efforts made to include sex, gender and transgender as categories of protection however, to date no changes have been implemented to the prohibited grounds under the *Canadian Human Rights Act* or *Criminal Code*.²⁷

²² Sex refers to the biological structures of a person. The World Health Organization defines sex as the biological and physiological characteristics that define men and women. The term gender refers to the attitudes, feelings and lifestyle. Gender identity refers to how one perceives oneself as male, female or transgender. Sexual orientation is defined by the gender to which he or she is sexually attracted. See: Human Rights Campaign: Working for Lesbian, Gay, Bisexual and Transgendered Equal Rights, online <<http://www.hrc.org/resources/entry/sexual-orientation-and-gender-identity-terminology-and-definitions>>, World Health Organization, online <<http://www.who.int/gender/whatisgender/en/>>, see also: American Psychological Association, online <<http://www.apa.org/pi/lgbt/resources/sexuality-definitions.pdf>>.

²³ *Criminal Code*, *supra* note 7 at s. 718.2(a)(i): race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation or any other similar factor.

²⁴ See Chapter 2. The “any other similar factor” category could consider hate motivate offenses targeting Aboriginal women.

²⁵ *Gendered Hate*, *supra* note 18 at 1.

²⁶ *Ibid.* at 2, 3. See also: Julie Goldscheid, “Gender-motivated Violence: Developing a Meaningful Paradigm for Civil Rights Enforcement” (1999) 22 Harv. Women’s L.J. 123.

²⁷ Bill C-279 is the fourth attempt to pass legislation amending the *Canadian Human Rights Act* to include gender identity as a prohibited ground of discrimination as well as amend the *Criminal Code* to include gender identity as a distinguishing characteristic protected under s. 318 and as an aggravating circumstance to be considered under s.

5.2 Aboriginal Women: A Missing Category

Literature has featured the devastating and destructive impacts that violence and sexual violence of Aboriginal women have on Indigenous communities.²⁸ Author Barbara Perry suggests that normativity of violence toward Aboriginal women stem from the perspective that racism is a common and accepted part of life,

... racial harassment and violence often go unnoticed because they are so common: they are unremarkable events when experienced in the context of daily collective and individual memories.²⁹

The insidious stereotypes that continue to surround Aboriginal women in Canadian society provide permission to target and attack Aboriginal women.³⁰ This unique form of violence inflicted on Aboriginal women is evidenced in many lives including the stories of Helen Betty

718.2(a)(i) at the time of sentencing. Gender identity is defined in respect of an individual, the individual's deeply felt internal and individual experience of gender, which may or may not correspond with the sex that the individual was assigned at birth. Bill C-279 as a Private Member's Bill in September 2011 passed First and Second Reading and was sent to the Justice Committee. The Bill sought to include the phrase "gender expression" in addition to "gender identity," neither of which was accompanied by a definition. Attempts were made in Committee to amend the Bill by removing "gender expression" and adding a definition of "gender identity." These changes were necessary to maintain support but the amendments were not completed, and the Bill went back to Third Reading in its original form. The Bill then passed Third Reading in March 2013 and then moved to First Reading in the Senate in March 2013. Second Reading was in May 2013, then to the Standing Senate Committee on Human Rights in June 2013, and to Third Reading in June 2013. During Third Reading, Senator Ruth attempt to amend the Bill to add "sex" to Sections 318 and 319 of the *Criminal Code*, arguing that both sex and gender should be included as criteria for hate propaganda to ensure specific protections for cisgender (ie, women born women). If passed with the amendment, the Bill would have gone back to the House of Commons to be voted on again before becoming law. However, Prorogation of Parliament in mid-2013 sent the Bill back to First Reading in the Senate and removed Senator Ruth's amendment. The Bill was reinstated when Parliament reconvened in October. It passed First Reading in the Senate in October. Second Reading debate on the Bill began on February 4, 2014 when Senator Grant Mitchell, the Senate sponsor of the Bill, reintroduced it. The Bill is currently at Second Reading in the Senate.

²⁸ *Silent Victims*, *supra* note 2 at 34, Andrew Jackson, the seventh President of the United States of America, was a methodical Indian hater encouraging armies to kill all Indigenous women and children after a battle to minimize the reproductive capacities and "to shrink the Indian population to nothing". Perry discusses Aboriginal women raped, forced into sexual slavery and prostitution to erode traditions and replace values with euro-centric models of domination. Violence, forced sterilization, boarding school violence, all "inflicted parallel forms of violence that minimizes the intergenerational reproduction of communities and culture" at 34, 35, 36, 37.

²⁹ *Ibid.* at 83.

³⁰ See Chapter 1, Chapter 3 – Violence of Aboriginal Women. Aboriginal women have been subjected to patterns of racist and sexist violence as evidenced in the more than 580 cases of missing and murdered Aboriginal women documented by the Native Women's Association of Canada. *ibid.* at 33 – 37, Sexual Violence as Genocide. Indigenous women were killed to stop reproductive capacities combined with widespread rape, trauma and sterilizations served euro-centric racial and ethnic domination purposes.

Osborne and Pamela George.³¹ Challenging violence directed at Aboriginal women generates discussion and education in communities.³²

Literature discussing the intersectionality of women often expresses concern on the lack of understanding and interrogation of inequalities based on race, class, and gender.³³ Author Vijay Agnew suggests the innumerable intersections come with theoretical and empirical difficulties in overcoming exclusions experienced by racialized women.³⁴ Hatred of women as misogyny³⁵ can be a manifestation of many intersectionality factors.

The inclusion of sex in s. 718.2(a)(i) as a protected category protects women at a broad level but does not capture those circumstances when Aboriginal women are targeted for hatred not only because of their sex but also because of their culture. Women of color and LGBT women increasingly challenge the view that sex is the primary or only factor that should be considered when examining the violence they experience.³⁶ Instead issues of culture, race, gender, class, ability and other intersectionality axis create multiple levels of oppression.

Turning to the way the law addresses and perceives Aboriginal women requires an understanding of empowerment of Aboriginal women. This is not without controversy and debates on how to best to approach the unique circumstances of Aboriginal women.

Some scholars such as Dr. Patricia Monture, are firm in asserting that Aboriginal women can not separate gender and culture. In this way, sex and gender does not adequately identify the

³¹ As discussed in Chapter 3.

³² *Silent Victims*, *supra* note 2 at 121 states that individuals confronting bigotry challenge racism and racist violence directly and ensure complacency is not allowed to flourish. Perry makes an important point when noting that social movements often begin with single acts and “it is only a slight exaggeration to say that Rosa Parks stood her ground and ignited a movement that changed the nation” at 121, 122.

³³ Intersectionality is a theory that discusses how biological, social and cultural categories such as gender, race, class, ability, sexual orientation and other points of identity interact. For instance, intersectionality of racism, sexism, and homophobia do not act independently but rather are interrelated systems of oppression or are intersections of multiple forms of discrimination. Critical race theory (CRT) provides a critical examination of society and culture to the intersection of race, law and power. CRT recognizes that racism is engrained within societies’ systemic structures dominated by white privilege and supremacy. See also: Richard Delgado & Jean Stefancic, *Critical Race Theory: An Introduction* (New York: New York University Press, 2001).

³⁴ Vijay Agnew “The Conundrum of Inclusion: Racialized Women in Public Policy Reports” in V. Agnew, ed. in *Interrogating Race and Racism* (Toronto: University of Toronto Press Inc., 2007) at 325.

³⁵ Misogyny is defined as the hatred of women or girls and manifested through sexual discrimination, violence and sexual objectification. See: <<http://en.wikipedia.org/wiki/Misogyny>>.

³⁶ *Gendered Hate*, *supra* note 18.

experiences of Aboriginal women. In *Thunder in My Soul*, she explains how the *Charter of Rights* does not help her, as an Indigenous woman:

The last ground of discrimination listed in the Charter that I might identify with is sex. I am a woman and obviously my experience can fit in here. Then I think of the Lavell and Bedard cases; how far am I going to get bringing a claim as a Mohawk woman under that box of sex? The way the list is constructed forces me to focus a complaint on gender to the exclusion of or prioritized over race ... In effect such a construction of my experience turns me upside down.³⁷

For Dr. Monture, separating race and gender is an artificial construct of identity of Aboriginal women with historic rights and responsibilities.³⁸ Aboriginal women have distinct historic and cultural experiences different from other non-Aboriginal women.³⁹ Other scholars suggest that feminist theories of gender analysis provide important lessons that can be learned, shared and built upon in constructing Indigenous frameworks.⁴⁰ In this way, it is important to “argue for women’s rights in ways that are not complicit in any way with patriarchal racist or ethnocentrist formulations of the issues.”⁴¹

There remains a pressing concern that Aboriginal women are not being effectively protected and considered within the law and as such, are devalued and undermined as valuable members of Canadian society. Addressing the missing category of Aboriginal women in s.718.2(a)(i) could be an important step in the right direction in addressing the disconnect between Aboriginal women and the law.⁴² On the other hand, the continuation of Aboriginal women as a missing category

³⁷ Patricia Monture-Angus, *Thunder in my Soul: A Mohawk Woman Speaks* (Halifax: Fernwood Publishing, 1995) at 141 [*Thunder*]. See also: Tracey Lindberg, “Not My Sister: What Feminists Can Learn about Sisterhood from Indigenous Women” (2004)16(2) C.J.W.L. 342.

³⁸ *Ibid.* at 148.

³⁹ *Ibid.* at 175. For example, Aboriginal women do not fully share the history of legally sanctioned violence of other non-Aboriginal women. Violence and abuse, including political exclusion against women was not tolerated in most Aboriginal nations. Rarely incorporated into feminist analysis are the critical impacts of colonialism; they often ignore the fact that Aboriginal societies have survived colonization. This is a fundamental difference at 176. At 177 Dr. Monture states her position is a reaction to the exclusions and intrusions she felt from within the women’s movement and feminist academia. Although very woman-centred that some would call it Aboriginal feminism, Dr. Monture asserts she has no use for a label that has no meaning to her life. She says her view is simple - it is the view of a single Mohawk woman.

⁴⁰ Verna St. Denis, “Feminism Is For Everybody: Aboriginal Women, Feminism and Diversity” in Joyce Green, ed. *Making Space for Indigenous Feminism* (Nova Scotia: Fernwood Publishing, 2007) 33 at 35. [*Feminism for Everybody*].

⁴¹ *Ibid.* at 48.

⁴² *Thunder*, *supra* note 37 at 147.

under s. 718.2(a)(i) would remain a stark example of the ongoing failure of law to Aboriginal women in Canada.⁴³

5.3 Summary

This chapter makes the argument that Aboriginal women, as a missing and specific category of protection, are left vulnerable to hate-motivated offences. The discussion suggests an extension of the existing sentencing provisions to specifically apply to Aboriginal women as a protected enumerated group. Hatred of Aboriginal women is an interrelated or intersection of sex and culture. It is not enough to rely upon the few provisions that include categories of sex and gender or the “any other similar factor” of s. 718.2(a)(i) to capture the experiences of hatred directed at Aboriginal women as a race and gender. Hatred of Aboriginal women is as much a reality as any other protected enumerated category. Failing to recognize the potential existence of specific hatred of Aboriginal women is a failure of law. Further, the failure maintains a culture of consent to violate Aboriginal women. Certainly the law, regardless how it is constructed, will not remedy all hatred of Aboriginal women but it could be an important step in first recognizing there is a problem.

⁴³ See Chapter 2 for discussion on violence toward Aboriginal women. There exists little case law on hate-motivated offences against Aboriginal women in spite of the evidence of the high rates of violence inflicted toward Aboriginal women.

*Hate is like a swordfish, Invisible in the water,
Knifing suddenly into sight
with blood along its blade-
clear water misleads you.¹ Pablo Neruda*

Chapter 6: The Law of Hate-motivated Crimes

This chapter examines more closely the jurisprudence of sentencing hate-motivated crimes and the specific circumstances by which status, slurs and accused denials influence the case law analysis and conclusions. Factors of proof, motivation, status, denial and justifications are reviewed to provide illumination of hate-motivated crimes and implications for addressing hatred directed toward Aboriginal people. As highlighted in the following discussion, the courts have not taken a singular approach in analyzing slurs, knowledge, personal and degree of motivation of an accused. Nor have the courts meaningfully addressed hate-motivated crimes against Aboriginal people. The sparse case law and gaps in data have implications in the way in which hatred of Aboriginal people is understood and addressed. A University of Winnipeg professor, Helmut-Harry Loewen, argues that the current hate crimes statistics do not capture the lived experience of Aboriginal people in Canada. For instance, he notes the hatred of Aboriginal people in Winnipeg is widespread and,

That level of intolerance against aboriginals is something that needs to be looked at much more closely. ...

We need mechanisms, which we don't have right now, to gather that type of data in terms of incidents and hate crimes aimed specifically at Aboriginal people.²

¹ Pablo Neruda, "Autumn Testament" (July 12, 1904 – September 23, 1973). In 1971 the Chilean poet won the Nobel Prize for Literature, online <<http://www.thesyjhearttoheart.com/posts/autumn-testament-by-pablo-neruda/>> and see also: <http://en.wikipedia.org/wiki/Pablo_Neruda>.

² Gabrielle Giroday, "Manitoba's hate-crime rate in '10 near top" *Winnipeg Free Press* (13 April 2012), online <<http://www.winnipegfreepress.com/local/manitobas-hate-crime-rate-in-10-near-top-147283045.html>>, accessed 16 April 2012.

This chapter explores how courts currently approach hate-motivated crimes and its application to Aboriginal people.

6.1 Proving Hate-Motivated Crimes

6.1.1 Onus of Proof and Gardiner Hearings

If there is a dispute of facts around sentencing, the Crown must prove the facts they wish to rely upon beyond a reasonable doubt. Section 724(1) of the *Criminal Code* requires:

In determining a sentence, a court may accept as proved any information disclosed at the trial or at the sentence proceedings and any facts agreed on by the prosecutor and the offender.³

In *R. v. Gardiner*⁴ the Supreme Court of Canada established the Crown must prove, beyond a reasonable doubt, aggravating factors for consideration in sentencing.⁵ This principle as currently encapsulated in s.724(3) of the *Criminal Code* establishes the process for dealing with disputed facts, i.e. facts that are not proved either at trial or agreed on by the prosecutor and offender. In that situation:

724(3) (a) the court shall request that evidence be adduced as to the existence of the fact unless the court is satisfied that sufficient evidence was adduced at the trial;
(b) the party wishing to rely on a relevant fact, including a fact contained in a presentence report, has the burden of proving it,⁶

Where the relevant fact is bias, prejudice or hatred, the Crown must prove that fact beyond a reasonable doubt:⁷

³ *Criminal Code*, R.S.C. 1985, c. C-46, s. 724(1).

⁴ *R. v. Gardiner*, [1982] 2 S.C.R. 368, 68 C.C.C. (2d) 477, 30 C.R. (3d) 289 [*Gardiner*]. Following a guilty plea, if factors of the offence are disputed, the onus is on the Crown to prove the facts beyond a reasonable doubt.

⁵ In contrast, the accused has the onus of proving mitigating facts on a balance of probabilities. *Criminal Code*, *supra* note 3, s.724(3)(b)(d).

⁶ *Ibid.*, s. 724(3)(a)(b) [*C.C. s.724(3)*].

⁷ *Youth Criminal Justice Act*, S.C. 2002, c. 1, [Y*CJA*], s. 50 excludes the *Criminal Code* sentencing provisions of s.718.2(a)(i) from consideration in the sentence of a youth. Y*CJA*, s. 50. (1) reads in part: Subject to section 74 (application of *Criminal Code* to adult sentences), Part XXIII (sentencing) of the *Criminal Code* does not apply in respect of proceedings under this Act except for paragraph 718.2(e) (sentencing principle for aboriginal offenders), section 722 (victim impact statements)... See: *R. v. A.(A)*, 2009 ONCJ 321 (CanLII) at para. 83 where the Ontario Court of Justice described the accused youth calling the complainant “a dirty nigger” as appalling hateful words but is not to be considered in sentencing for two reasons. First, the court could not find as a fact that the aggravated assault was motivated by racial hatred and secondly, the court noted that s. 50 of the Y*CJA* “deliberately excludes that section of the *Code* from consideration as part of the sentence imposed on a youth.”

724(3) (e) the prosecutor must establish, *by proof beyond a reasonable doubt, the existence of any aggravating fact* or any previous conviction by the offender.⁸
[emphasis added]

Known informally as Gardiner⁹ hearings, the proof of aggravating factors such as bias, prejudice or hate motivation is dealt with in a *voir dire*.¹⁰ In a Gardiner hearing, expert evidence may be called on disputed relevant facts.

6.1.2 Expert Evidence

Most often, the issue in *voir dire*s with hate-motivated offences is the interpretation of tattoos, clothing, slurs, stereotypes, gestures, graffiti, nature of property attacked, membership in hate groups, significance of date and other ideology, etc. submitted by the Crown as circumstantial evidence of motivation for the crime. Experts are often called to interpret this type of circumstantial evidence to a trier of fact to “steer a course that would at once equip the jury with all relevant, reliable information available” to “arrive at a correct verdict, while avoiding exposure to information that could invite a verdict based on the jury’s understandably negative reaction”.¹¹

2.1 Tattoos

In *Vrdoljak*¹² (2002), Dr. Karen Mock’s expert evidence discussed the accused’s supremacist tattoos including a Celtic cross with “oi”, the number 14, number 88, spider, spider webs and the lyrics from a racist song and manuscript. The *voir dire* court relied heavily upon the expert evidence of Dr. Karen Mock regarding the more obscure tattoos on Vrdoljak and Kujtkowski, and the skull and crossbones on Kulbashian's chest. The court considered Dr. Mock's expert testimony “concerning the significance of the various tattoos” as “highly reliable”. Similarly, Dr. Mock’s expert conclusion that “the tattoos, coupled with the accused's skinhead appearance,

⁸ *Criminal Code*, *supra* note 3, s. 724(3)(e) [*C.C. s.724(3)(e)*]. For factors that are not aggravating, the burden of proof is on a balance of probabilities, See: *ibid.*, s. 724(3)(d).

⁹ *R. v. Gardiner*, [1982] 2 S.C.R. 368, 68 C.C.C. (2d) 477, 30 C.R. (3d) 289. After a guilty plea when there is conflicting evidence to the factors going to the gravity of the offence, the Supreme Court of Canada held the onus is on the Crown to prove the aggravating facts beyond a reasonable doubt.

¹⁰ A ‘*voir dire*’ is a trial within a trial to determine the admissibility of evidence or test the competency of a witness or expert.

¹¹ *R. v. Abbey*, [2009] O.J. No. 3534, 68 C.R. (6th) 201 (C.A.) at para. 60 [*Abbey 2009*].

¹² *R. v. Vrdoljak*, [2002] O.J. No. 1331, 53, W.C.B. (2d) Ont. Ct J. [*Vrdoljak Voir Dire*].

demonstrate that each was a racist, harbouring a violent enmity towards blacks and other minorities” assists the court with reliable reasoning and opinion.¹³

The acceptance of expert evidence, however, can be a contentious issue for the court.

In *R. v. Abbey*¹⁴ (2009) the Ontario Court of Appeal examined the criteria for admissibility of expert evidence in a charge of first-degree murder involving a gang member. The lower court had excluded expert evidence offered by Dr. Totten, a sociologist expert in the culture of urban street gangs in Canada¹⁵ on the potential meaning of a teardrop tattoo within urban street gang culture. The lower court rejected the expert evidence of an experienced police officer as well as the evidence of gang members.¹⁶ At trial, Dr. Totten offered his opinion that the teardrop signified (1) the death of a fellow gang member or family member or (2) incarceration served or (3) that the wearer of the tattoo had murdered a rival gang member.¹⁷ Dr. Totten’s testimony was excluded by the lower court as unreliable as it did “not take into account the possibility that the meaning of the teardrop tattoo could change in time or the possibility that a "poseur" or "wannabee" might have inscribed the tattoo ‘as some kind of fad’.”¹⁸ The trial judge also characterized Dr. Totten's opinion concerning the meaning of the tattoo as "a novel scientific theory".¹⁹ On appeal, the Crown argued that the trial judge erred in excluding evidence relating to the meaning of Abbey's teardrop tattoo. The Court of Appeal allowed the Crown appeal, quashed the acquittal and ordered a new trial.²⁰ The Appeal court ruled that an expert opinion could be grounded upon specialized knowledge gained through extensive studies and experience.²¹

As well, the Court of Appeal found that gang members and the police officer involved with the street gangs could provide evidence of the meaning of the teardrop tattoo within their gang

¹³ *Ibid.* at para. 38.

¹⁴ *Abbey 2009, supra* note 11, leave to appeal refused by the Supreme Court of Canada.

¹⁵ *Ibid.* at para. 29.

¹⁶ *Ibid.* at para. 150 – 168, 169 – 173.

¹⁷ *Ibid.* at para. 34.

¹⁸ *Ibid.* at para. 57.

¹⁹ *Ibid.* at para. 58. The Court further notes the four criteria controlling the admissibility of expert opinion 1) relevance; 2) necessity in assisting the trier of fact; 3) the absence of any exclusionary rule; and 4) a property qualified expert, *R. v. Mohan*, [1994] 2 S.C.R. 9 at para. 75.

²⁰ *Abbey 2009, ibid.* at para. 176.

²¹ *Ibid.* at para. 108.

culture.²² The focus for the Court of Appeal was on the admissibility of Dr. Trotten's evidence on the meaning of the teardrop tattoo.²³ It found:

Dr. Totten's opinion flowed from his specialized knowledge gained through extensive research, years of clinical work and his familiarity with the relevant academic literature.²⁴

...

Scientific analysis for validity of opinion is not applicable in these circumstances.²⁵

...

Scientific validity is not a condition precedent to the admissibility of expert opinion evidence. Most expert evidence routinely heard and acted upon in the courts cannot be scientifically validated. For example, psychiatrists testify to the existence of various mental states, doctors testify as to the cause of an injury or death, accident reconstructionists testify to the location or cause of an accident, economists or rehabilitation specialists testify to future employment prospects and future care costs, fire marshals testify about the cause of a fire, professionals from a wide variety of fields testify as to the operative standard of care in their profession or the cause of a particular event.²⁶

The court held the trial judge mischaracterized the expert opinion and notes:

The proper question to be answered when addressing the reliability of Dr. Totten's opinion was not whether it was scientifically valid, but whether his research and experiences had permitted him to develop a specialized knowledge about gang culture, and specifically gang symbology, that was sufficiently reliable to justify placing his opinion as to the potential meanings of the teardrop tattoo within that culture ...²⁷

For the Court of Appeal, expert evidence includes specialized knowledge gained through research, work and study of academic literature.²⁸ After the Supreme Court of Canada refusal of leave of *Abbey*, the expert opinion offered by the police officer was re-examined by the Ontario

²² *Ibid.* at para. 2, 158, 159, 160, admissibility of police officer at para. 169-173.

²³ *Ibid.*

²⁴ *Ibid.* at para. 108.

²⁵ *Ibid.* at para. 105. The trial court treated the expert opinion as a "novel scientific theory" and then assessed the reliability of the theory based upon science factors of 'error rates, 'random sampling', 'peer review', 'replication' of findings, etc. at para. 105. The Ontario Court of Appeal said it was not surprising the expert evidence was not accepted as the trial judge science based approach was unhelpful and using it as the assessment test for reliability was 'entirely foreign to his methodology' at para. 108.

²⁶ *Ibid.* at para. 109.

²⁷ *Ibid.* at para. 117.

²⁸ *Ibid.* at para. 108.

Superior Court at Abbey's retrial.²⁹ Although the 2011 court ruled the evidence as inadmissible, it did affirm that context is critical when undertaking an admissibility analysis.³⁰

Context is important in the approach mandated by the Court of Appeal in *Abbey*. Evidence that would be admissible in one context would be inadmissible in another. In evaluating the proffered evidence, context informs many considerations involved in determining admissibility, including necessity, relevance (both logical and legal), and probative value vs. prejudicial effect.³¹
[footnotes omitted]

The 2011 Superior Court found the context analysis of expert and testimony facts could reasonably lead to the police officer being an expert in gang culture but not for the specific meaning of the teardrop tattoo. The Court ruled:

Inspector Quan is an acknowledged expert in gang culture. In addition to his extensive experience in the investigation of gangs and gang culture, he has also attended courses in Canada and the United States, primarily along with other law-enforcement investigators. The courses have addressed issues of culture and gang symbology including tattoos and their meaning. He has been a presenter at courses in Canada and has lectured on various subjects including tattoos as gang symbology.

However, when it comes to the discreet issue of the meaning of the teardrop tattoo in gang culture, and his understanding of its meaning within the Malvern Street Crew, his experience and knowledge are primarily anecdotal and, with respect, fall short in my opinion, of the level of expertise required to justify reception of his opinion as an expert on teardrop tattoos.

In the result, I rule that Inspector Quan is not permitted to express an opinion as to the meaning of teardrop tattoos, either in gang culture generally, or in the Malvern Crew specifically.³²

In *Woodcock* (2010), the Ontario Superior Court of Justice allowed in part Crown expert evidence on the characteristics of how illegal firearms are often carried but disallowed evidence

²⁹ *R.v. Abbey*, [2011] O.J. No. 868, 2011 ONSC 1260, 82 C.R. (6th) 385 [*Abbey 2011*].

³⁰ Admissibility of community impact statements is relevant and admissible in the reading of s. 718.2 which directs a court to take into account hate motivation and is not limited or specify that the motivation is directed toward a particular victim. As well, s. 723(2) directs a court to hear any relevant evidence presented before sentence. See: <[https://docs.google.com/viewer?a=v&q=cache:JOF9gmcnmPgJ:www.law.utoronto.ca/documents/conferences2/CombatingHatred10_Bacchus.ppt+expert+evidence+%26+hate+motivated&hl=en&gl=ca&pid=bl&srcid=ADGEESjnPGuv3DRiEIjqw4NTnI3NjiRNw2CA-jafi5HEuIvb_K8P5Y6H9A0wl_JFufiECDpntDMgsxsEYQxphHcqt5JBKTeFqiP01AgBgYdcKjCTs9_vYnYFDjp_EC_w_zqd5sQBoHcW&sig=AHIEtbTzs4fqx-3F-WwgNcVf7SQ9f807Ug](https://docs.google.com/viewer?a=v&q=cache:JOF9gmcnmPgJ:www.law.utoronto.ca/documents/conferences2/CombatingHatred10_Bacchus.ppt+expert+evidence+%26+hate+motivated&hl=en&gl=ca&pid=bl&srcid=ADGEESjnPGuv3DRiEIjqw4NTnI3NjiRNw2CA-jafi5HEuIvb_K8P5Y6H9A0wl_JFufiECDpntDMgsxsEYQxphHcqt5JBKTeFqiP01AgBgYdcKjCTs9_vYnYFDjp_EC_w_zqd5sQBoHcW&sig=AHIEtbTzs4fqx-3F-WwgNcVf7SQ9f807Ug>)>, accessed January 30, 2012.

³¹ *Abbey 2011*, *supra* note 29 at para. 14.

³² *Ibid.* at para. 47, 48, 49.

that the person charged had characteristics consistent with that of an armed person.³³ According to this case, the way the weapon was carried is akin to experienced officers giving expert evidence about the drug trade.”³⁴ In this way, the court in Woodcock allowed the evidence on the carrying of the gun.³⁵ The evidence did not prove identity but rather offered evidence of the “characteristics consistent with that of an armed person.”³⁶

2.2 Dates

In *R. v. Soles*³⁷, an expert in the field of anti-Semitism described the significance of the date of vandalism to a Jewish Cemetery. The expert testified that the symbols of the items found on the accused³⁸ and the importance that white supremacists give to Hitler’s April birthday and the link to the 50th anniversary of the formation of the State of Israel and Warsaw Ghetto uprising³⁹ “left no doubt” in his mind that “Mr. Soles is heavily involved in and deeply committed to the neo-Nazi movement.”⁴⁰ The court was persuaded that “this court is clearly and unmistakably dealing with a case of malevolence towards and vilification of, a group of individuals”⁴¹ and this was considered an aggravating factor in sentencing.

The circumstances of a crime can be difficult to understand and expert evidence offered in a *voir dire* can provide much needed assistance in the interpretation of tattoos, behavior, and significance of dates to hate mongers. Such an expert’s specialized knowledge provides critical evaluations in understanding the culture of hatred.

³³ *R. v. Woodcock*, 2010 ONSC 671, [2010] O.J. No. 1281 at para. 22.

³⁴ *Ibid.* at para. 12.

³⁵ *Ibid.* at para. 19.

³⁶ *Ibid.* at para. 22.

³⁷ *R. v. Soles*, [1998] O.J. No. 5061, 40 W.C.B. (2d) 343 (Ont. Gen. Div.) [*Soles*].

³⁸ *Ibid.* at para. 11, 12, 13, 17. Items found on the accused included a photo of Hitler, a Swastika card trumpeting White Power, a card with the title 14 Hammerskins 88 and words Mass Extermination is the Only Solution, Fire up the Ovens, a moving company card with Nazi and white supremacy organizations, a skull and cross bones flag, a Confederate flag, items with SS and other articles bearing swastika. The tattoos included an eagle and iron cross and a circle superimposed upon a cross.

³⁹ *Ibid.* at para. 15.

⁴⁰ *Ibid.* at para. 17.

⁴¹ *Ibid.* at para. 22.

6.2 Triggering Threshold

In order for a court to consider whether an offence is hate-motivated, minimum threshold or triggering conditions must be met. If there is an absence of triggering conditions or a lack of threshold evidence, there is no need for further enquiry by a court.⁴²

6.2.1 Actions not Beliefs

An accused cannot be penalized for holding beliefs that are hateful, biased or prejudicial. Rather, the penalty is inflicted if and when an offender acts on those beliefs. The Alberta Court of Appeal stated in *Wright*:

In order for s. 718.2(a)(i) to be invoked, there must be proof beyond a reasonable doubt that the offence was motivated by one of the listed factors. The objective of that sub-section is to impose increased penalties on those who offend because of their beliefs, but not to impose such penalties for merely holding the beliefs.⁴³

The Alberta Court of Appeal was relying upon the leading 1990 Ontario Court of Appeal decision *R. v. Lelas*⁴⁴ stating:

In considering the fitness of the sentence imposed by the trial judge, I wish to make it clear at the outset that Lelas is not to be sentenced for his political or social beliefs, repugnant as those beliefs may be. The charge is mischief, not the promotion of hatred, and save where the beliefs of the respondent serve to explain his actions, I do not propose to take them into account.⁴⁵

6.2.2 Slur and Arrest

In *R. v. Wright*⁴⁶ (2002) the Alberta Court of Appeal discussed s.718.2(a)(i) in the context of the severe beating of a taxi driver resulting in permanent disabilities including facial paralysis, blindness in one eye, deafness in one ear, and profound mental impairment. The driver was robbed and left for dead near the accused crack dealer's house. At the time of arrest the offender made a derogatory comment about the victim's ethnicity.⁴⁷ The Court of Appeal held there must be something more than a racial slur at the time of arrest before a s. 718.2(a)(i) analysis can be

⁴² "Triggering conditions" is an early issue the sentencing judge must determine.

⁴³ *R. v. Wright*, [2002] A.J. No. 892, 303 A.R. 371 (C.A.) at para. 10 [*Wright*].

⁴⁴ *R. v. Lelas* (1990), O.J. No. 1587 (Ont. C.A.) [*Lelas*].

⁴⁵ *Lelas*, *ibid.* per Justice Houlden with Justice Carthy concurring.

⁴⁶ *Wright*, *supra* note 43.

⁴⁷ *Ibid.* at para. 2, 3.

triggered. For the Alberta Court of Appeal, a one time racial slur, in and of itself, is not enough to trigger the provisions. The Court notes:

The utterance in this case was made several hours after the offence. There was no basis to conclude that the beliefs expressed were the motive for the offence. Accordingly, we agree with the appellant that the slur could not amount to an aggravating factor under s. 718.2(a)(i)⁴⁸

This conclusion, however, is not the end of the analysis by the Court as it goes further to comment that while the racial slur did not trigger s.718.2(a)(i), it could be used by a sentencing judge as evidence of a lack of remorse and thus, be considered an aggravating factor. The Court comments:

The question remains as to whether the slur is an aggravating factor, beyond the scope of that sub-section. While such an utterance may be relevant to show a lack of remorse...⁴⁹

The lower court sentencing the offender considered the aggravating factors to include “the planning involved, the lack of remorse, the attempt to mislead investigators, and the racial slur uttered upon arrest.”⁵⁰ The Court of Appeal found the sentencing court had already considered the lack of remorse and could not tack on the utterance as an additional aggravating factor under the heading of lack of remorse:

While such an utterance may be relevant to show a lack of remorse, the sentencing judge had already taken that factor into account; it should not have been treated as an additional aggravating factor. We conclude that he erred in this regard.⁵¹

This case stands for the Court of Appeal’s assessment that a racial slur at time of arrest does not, in and of itself, trigger s.718.(2)(a)(i) although the racial slur can be used as evidence of a lack of remorse and therefore considered an aggravating factor. While the Court does not provide enlightenment on how the two factors of hatred and lack of remorse are different as aggravating factors, it does seem reasonable to expect conduct under s.718.2(a)(i) would be subjected to harsher or weightier consequences. Based on this case, the Alberta Court of Appeal considers a racial utterance at arrest not enough to trigger s.718.2(a)(i) sentencing provisions.

⁴⁸ *Ibid.* at para. 10.

⁴⁹ *Ibid.* at para. 11.

⁵⁰ *Ibid.* at para. 5.

⁵¹ *Ibid.* at para. 11.

6.2.3 Level of Knowledge and Personal Motivation

In an overview of hate-motivated case law, Julia Sandler (2010) notes s. 718.2(a)(i) requires something more than the presence of racial overtones to an offence that is incidental or causally unrelated to the offence. A casual and direct link must exist between the actions and the motivation, as “there must be a direct relationship between an offender’s hatred, bias or prejudice against an identifiable group and the commission of the offence at issue.”⁵² She notes that in *R. v. Baxter* the offender was arguing with his girlfriend when the victims, both visible minorities, intervened. Baxter proceeded to assault the two victims while directing racial epithets at them. The judge found that, although racism was a feature of the offence, the assault was not motivated by bias or prejudice and the accused “simply lost control”.⁵³ Similarly, in *R. v. Bradley*⁵⁴ two Sudanese men were physically and verbally attacked by a mob of people. One of the attacked men, living with a disability because of polio, was severely beaten with his crutches and subjected to racial slurs during the assault.⁵⁵ The 2009 Ontario Court of Appeal did not specifically refer to s. 718.2(a)(i) in upholding the lower court decision of five years custody for Bradley although the Court did characterize it as a racially motivated attack. Interestingly, the Court noted that not all of the five individuals that were charged were found to have participated in the “racial overtones of the offence”.⁵⁶

The appeal by Bradley was, in part, based on the argument that his sentence of five years custody offended the principle of parity. Two co-accused pleaded guilty and were sentenced to 15 months and 12 months. At the Court of Appeal level it was noted that one of the co-accused:

Mr. Paquin, who joined in the assault after it had begun, had a far less serious record than the appellant and was the father of three young children. *Although he pled guilty to assault cause bodily harm, he was unaware that there were racial*

⁵² Julia Sandler, “Hate Motivation as an Aggravating Factor on Sentence: An Overview of the Legal Landscape” (Paper presented to Combatting Hatred in the Twenty-first Century: Legal Remedies, University of Toronto, 4 February 2010) at 2, online

<http://www.law.utoronto.ca/documents/conferences2/CombatingHatred10_Sandler.pdf> [Sandler].

⁵³ *Ibid.* at 3 discussing *R. v. Baxter*, [1997] O.J. No. 5811 (Prov. Div.) [Baxter]. While Baxter suggests that hate must be the predominant feature or significant factor, the case law supports the view the offences be motivated “in part” at 3. See also: Michelle S. Lawrence, *Sentencing Hate: An Examination of the Operation and Effect of Section 718.2(a)(i) of the Criminal Code* (Master of Arts Thesis, Simon Fraser University, 2009) at 58 [Lawrence].

⁵⁴ *R. v. Bradley*, 2009 ONCA 175, [2009] O.J. No. 750, 246 O.A.C. 279 (C.A.) [Bradley].

⁵⁵ *Ibid.* at para. 3, the accused yelled “Nigger, nigger you’ve got to die”.

⁵⁶ *Ibid.* at para. 10.

*slurs and was not held responsible for the racial overtones of the offence.*⁵⁷
[emphasis added]

The Court accepted that racial slurs during the offence were enough to characterize the conduct as having racial overtones for the uttering accused but it was not enough for Paquin as he was ‘unaware’ of the slurs. There must be some level of knowledge of the racial nature of the attack. Unfortunately, the court did not provide further illumination on the level of awareness needed before triggering would occur.⁵⁸

That said, the conclusion that can be drawn from this case is that a hate-motivated crime committed by a co-accused as evidenced by racial slurs during the offence does not automatically trigger s.718.2(a)(i) in the sentencing for all other participants unless the Crown can prove a subjective level of knowledge by the other participants.

Bradley runs parallel, or at least not contrary to, an earlier case of the Saskatchewan Court of Appeal.⁵⁹ The 2005 Saskatchewan Court of Appeal *R. v. D.S.K.*⁶⁰ case discussed whether or not an offender was personally required to be motivated by 718.2(a)(i) factors or if it was sufficient to participate in an offence knowing his co-accused were hate-motivated. The victim, a Caucasian man, was invited to visit a friend at her house where four male members of the Native Syndicate attacked him.⁶¹ The attack was an “unprovoked, prolonged, and vicious group-attack upon the victim, during which he was terrorized, brutally beaten, and stabbed three times, once so near his heart as to have very nearly killed him.”⁶² One attacker informed him: “This is what happens to white boys who come into the ‘hood’.”⁶³

The Court of Appeal accepted the offender’s actions were not motivated by hatred:

⁵⁷ *Ibid.*

⁵⁸ *Ibid.* at para. 16. The Court of Appeal stated “This was a senseless, brutal and racially motivated attack involving gratuitous violence in a public place against two strangers.” The accused Paquin was not aware of the racial slurs and therefore not responsible for the racial overtones of the offence at para. 10.

⁵⁹ *R. v. D.S.K.*, [2005] S.J. No. 97, 257 Sask. R. 161 (C.A.) [*D.S.K.*]. The accused had knowledge other participants were racially motivated in committing the assault at para. 44.

⁶⁰ *Ibid.*

⁶¹ ‘Native Syndicate’ is an Aboriginal gang organization likely formed in the Saskatchewan penitentiary and Regina Correctional Centre in the 1980s or early 1990s. See: Insideprison.com, (accessed May 18, 2010).

⁶² *D.S.K.*, *supra* note 59 at para. 27.

⁶³ *Ibid.* at para. 6.

He assured us he had nothing to do with Native Syndicate, and held no racist views, saying he had been raised in an environment free of racial prejudice, had many friends of various racial origins, and harboured no animosity toward anyone because of their race, or their national or ethnic origin. He went on to say he deeply resented being tagged a racist, a tag that was haunting him in prison and elsewhere, and causing him nothing but embarrassment and trouble. Again, he appeared to be sincere when expressing these sentiments, and we shall take him at his word, meaning we are satisfied that he was not motivated to join in the attack by racially based prejudice or hate.⁶⁴

Although not personally motivated by bias, prejudice or hatred, the Saskatchewan Court of Appeal ruled that s.718.2(a)(i) was triggered because he participated in an attack that he knew was racially motivated. The Court states:

The fact remains, however, that he participated with others in an assault in which, to *his apparent knowledge*, one or more of the others were so motivated. This is of less consequence than if he himself had been motivated to act on this basis. Still, it constitutes an aggravating circumstance, one the trial judge should have taken into account and acted upon.⁶⁵ [*emphasis added*]

Courts are inconsistent on whether the Crown must prove the offender to be personally hate-motivated. As a practical matter in assessing the severity of the conduct, the personal lack of bias, prejudice or hatred under s. 718.2(a)(i) is considered by the Saskatchewan Court of Appeal to have “less consequence than if he himself had been motivated to act on this basis”.⁶⁶

6.2.4 Degree and Changing Motivation

Another complication to the triggering circumstance arises when the criminal motivation is not solely but significantly or only partially based on bias, prejudice or hatred. In *R. v. Vrdoljak*,⁶⁷

⁶⁴ *Ibid.* at para. 43, 44.

⁶⁵ *Ibid.* at para. 44.

⁶⁶ *Ibid.*

⁶⁷ *R. v. Vrdoljak*, [2002] O.J. No. 1330, 53 W.C.B. (2d) 357 [*Vrdoljak Trial*] delivered January, 2002 finding Vrdoljak guilty of two counts of assault and two co-accused, Kujtkowski and Kulbashian each guilty of one charge of assault. In *R. v. Vrdoljak*, [2002] O.J. No. 1331, 53, W.C.B. (2d) Ont. Ct J. [*Vrdoljak Voir Dire*] the court determined the Crown evidence, including expert evidence, proved the accused were members of a racist skinhead group. *R. v. Vrdoljak*, [2002] O.J. No. 1332, 53 W.C.B. (2d) 254 [*Vrdoljak Sentencing*], as the Crown proved the offence was racially motivated, the court sentenced Vrdoljak to six months imprisonment for the initial assault on a Black man and another two months concurrent for an additional assault on a woman injured in the altercation. Vrdoljak’s co-accused appealed his conviction to the Ontario Court of Appeal resulting in the ruling of *R. v. Kulbashian*, [2003] O.J. No. 2835, 58 W.C.B. (2d) 103 [*Kulbashian/Vrdoljak Appeal*] that acquitted the accused Kulbashian because the witnesses were not able to certainly identify Kulbashian as having participated in the assault. However, if identity had been proven, the result would likely have been different as the Ontario Court of Appeal approved the trial judge’s approach that any one of the skinheads involved in the pursuit of the victim was

the Ontario sentencing court affirmed that the crime need only ‘be in part’ motivated by hatred and does not need to be solely motivated by bias, prejudice or hatred.⁶⁸ The court quoted and affirmed the assertions of authors MacMillan, Claridge and McKenna in “Criminal Proceedings as A Response to Hate: The British Columbia Experience”⁶⁹

It can also be extremely difficult to determine whether or not an offender was motivated by bias, prejudice or hate. In some instances, there are a number of possible motivating factors that may be present. Moreover, there has been some debate whether a crime must be solely motivated by bias, prejudice or hate for it to be a “hate crime”. *In our view, a hate crime can be motivated in whole or in part by bias, prejudice or hate.*⁷⁰ [emphasis added]

The article relied upon by the Court makes argument that a partial motivation of bias, prejudice or hate fits within established sentencing principles of proportionality:

To suggest that, for the purpose of sentencing, an offence is only a “hate crime” if it is established that bias, prejudice or hate is the sole motivating factor simply would be inappropriate and inconsistent with sentencing practices. Sentencing proportionality requires that all aggravating and mitigating factors be taken into account at the time of sentencing, and the presence of bias, prejudice or hate indicators are clearly relevant to such an exercise.⁷¹

Another factor for consideration is whether the motivation changed during the commission of the offence. In 2001 the Ontario Court of Justice held that motivation can change during the commission of the offence, and evolve from another reason into a bias, prejudice or hate-motivated crime. For example, in *R. v. Sockalingam*⁷² the accused was convicted of assault causing bodily harm and sentenced to 60 days imprisonment with one year of probation. The

party to the assault by assisting in preventing an escape even if the person did not actually physically assault the victim, at para. 6. Accordingly, this person would also be subjected to s. 718.2(a)(i) sentencing provisions.

⁶⁸ *Vrdoljak Sentencing, ibid.* at para. 6. Implications of using primary motivation and judges’ discretion shortly after the implementation s.718.2(a)(i) see: Julian V. Roberts and Andrew J.A. Hastings, “Sentencing in Cases of Hate-Motivated Crime: An Analysis of Subparagraph 718.2(a)(i) of the Criminal Code” (2001) 27 Queen’s L.J. 93. See also: Mark Carter, “Addressing Discrimination through the Sentencing Process: Criminal Code s. 718.2(a)(i) in Historical and Theoretical Context” (2000-2001) 44 Crim. L.Q. 399 [*Addressing Discrimination*]. For a summary of case law and the degree of motivation required see: Michelle S. Lawrence, *Sentencing Hate: An Examination of the Operation and Effect of Section 718.2(a)(i) of the Criminal Code* (M.A. Thesis, Simon Fraser University, School of Criminology, 2009) at 56 – 62.

⁶⁹ *Vrdoljak, ibid.* at para. 5 quoting Craig S. MacMillan, Myron G. Claridge and Rick McKenna, “Criminal Proceedings as a Response to Hate: The British Columbia Experience” (2002), 45 C.L.Q. 419 at 452 [*B.C. Experience*].

⁷⁰ *B.C. Experience, ibid., Vrdoljak, ibid.* at para. 5.

⁷¹ *B.C. Experience, ibid.*

⁷² *R. v. Sockalingam*, [2001] O.J. No. 5999 (Ct.J.) [*Sockalingham*].

accused was denied service because of intoxication by the store manager at an L.C.B.O.⁷³ The manager was pushed and beaten outside of the store by several men while being called racial slurs.⁷⁴ The Court ruled the assault was initially undertaken because of the refusal of service but evolved into a bias, prejudice or hate-motivated crime. The court found that:

The commencement of this assault, it is clear to me on the facts, came about or was motivated by the fact that this group of people were refused service because of signs that they had consumed alcohol. They were in the process of assaulting a person who appeared to be the manager or the leader within, the store, the one that was telling them to leave, the one that appeared to have some authority and was speaking on behalf of the LCBO, and was the main instrument in attempting to get them to leave. It obviously is not a planned event, something they went in there with the idea they were going to assault someone if they were not served.⁷⁵

However, the motivation changed during the assault as evidenced by the racial slurs and the fact that other people that were attempting to restrain the attackers were not assaulted.

I think it is significant that neither of the two men who were involved in trying to restrain or move the people, including Mr. Sockalingam who were doing the assault, were assaulted in any way whatsoever. There is no indication they were flailed at, kicked at, pushed or touched at all. Simply they would physically move someone, and the person would go back in and continue the assault on that one individual only.⁷⁶

The Court asserts the assault motivation evolved into racial overtones but this, in and of itself, did not fit the requirements of s. 718.2 (a)(i). “So while the commencement of the offence was not motivated by, and therefore perhaps does not fit strictly under 718.2”,⁷⁷ the racial bias is a factor. Accordingly, the Court found that “it is something I must take into consideration as an aggravating factor.”⁷⁸ The Court further notes:

the words, as the Crown has suggested, must have been uttered for some reason at the time of the assault. So while it was not motivated or started by the man's background or race or ethnic origin, that fact was clearly, at the moment of the assault by Mr. Sockalingam, on the offender's mind.⁷⁹

⁷³ Liquor Control Board of Ontario [*L.C.B.O.*].

⁷⁴ *Sockalingam*, *supra* note 72 at para. 7. A witness testified that during the assault the manager was called “You fucking Trini-boy”.

⁷⁵ *Ibid.* at para. 11.

⁷⁶ *Ibid.* at para. 12.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

6.2.5 Summary

While the courts provide some guidance on the triggering principles, the cases leave much undecided in terms of identifying the factors to be used in the analysis. This flexibility, while not providing as much certainty as some might wish, does, however, allow for the case law to develop with discretionary power with the judiciary. As it currently exists, the triggering principles provide the judiciary the opportunity and discretion in the weighing and decision making on whether to engage in the duty to enquire further. If, given the circumstances before the court, there is uncertainty whether s. 718.2(a)(i) is triggered, it would lead one to expect that there would not be enough evidence to support a finding of hate motivation beyond a reasonable doubt, thereby halting any further enquiries. The provisions are not triggered by hateful beliefs as it only actions motivated by bias, prejudice or hatred that are subjected to s.718.2(a)(i). A one-time racial slur at arrest is not enough to trigger the provisions but may be evidence of lack of remorse by the accused.

Triggering is met when there is some level of knowledge of the racial nature of the attack. Motivation can be partially based on bias, prejudice and hatred.⁸⁰ The bias, prejudice or hatred may be in the mind or known by the accused during the offence but motivation can change during the commission of the offence where it evolves into a bias, prejudice or hate-motivated crime. There may be other triggering circumstances as well. For example, uttering threats of violence or hatred may, under some circumstances, be enough to trigger the provisions for further enquiry.

6.3 Three-Prong Approach

Once the threshold for hate motivation is triggered, the analysis must next turn to the causal assessment of the crime. How causation theories develop within the jurisprudence has been categorized into three situational contexts. First, the characteristic status or perceived status of the victim is assessed. This may include a disclosure of the accused's status in the discussion of the issue. Next, the exploration of the timing and evidentiary weight given to slurs is undertaken.

⁸⁰ Courts have required varying degrees of motivation of hatred including: solely caused by or predominately, significant factor or motivated in part by bias, prejudice or hatred. See: *Sandler*, *supra* note 52 at 3, *Lawrence*, *supra* note 53 at 58.

Third, denials and explanations offered by the accused are reviewed.⁸¹ There will, of course, be frequent overlapping in the jurisprudence, as it is difficult, if not impossible, to separate the three situational contexts neatly into categories. However, the organization gives the discussion the ability to bring forward principles of interpretation. It should be noted that the following is not an exhaustive examination of all Canadian jurisprudence under the hate-motivated categories; instead it provides context to the principles at play in the jurisprudence, particularly the issues specific to Aboriginal people.

6.3.1. Status and Perceived Status of Victim

Judicial examination of the status or perceived status of the victim as a member of a group will influence the finding of causation. Status, for this purpose refers to the affiliation or perceived membership of the victim to a particular enumerated group.⁸² As a key aspect of the jurisprudence, the issue of requiring actual or perceived membership status in a group has led judges to reflect in a way that may not be necessary. For example, during court proceedings one judge asked three times whether the victim ‘is in fact gay’?⁸³ The judge emphasized, “I would want to know that”.⁸⁴ However, this line of inquiry is not useful or beneficial to either deciding the issue of causation or to the victim as judicial inquiries on the actual status of the victim shift the focus, whether meaning to or not, to emphasize actual status of the victim rather than the perceived status. This turns the definition to actual status and results in the exclusion of perceived status as a recognized category of harm. Most of the jurisprudence, however, does not rely upon this overly restricted approach to status. Instead, the majority of the jurisprudence supports the view that the perceived status of the victim by the accused can and should be the issue in deciding whether or not the actions were hate-motivated. This approach makes sense even if it is not specifically outlined in the legislation. As described in *Disproportionate Harm: Hate Crime in Canada*,⁸⁵ in order to protect the privacy of victims of hate crimes, the definitions of hate crimes should include both the actual and perceived status of the victim.⁸⁶

⁸¹ For discussion on how courts reason on issues of causation, status and an insightful scrutiny of factors, see: Sheila R. Foster, “Causation in Antidiscrimination Law: Beyond Intent versus Impact” (2005) 41 Hous. L. Rev. 5.

⁸² See Chapter 3, section 3.

⁸³ *R. v. Amr*, [2006] A.J. No. 92, (2006) 394 A.R. 278 (Alta. Prov. Ct.) at para. 4 [*Amr*].

⁸⁴ *Ibid.*

⁸⁵ Department of Justice Canada, *Disproportionate Harm: Hate Crime in Canada* by J.V. Roberts (Ottawa: Canadian Centre for Justice Statistics, 1995), online <http://www.justice.gc.ca/eng/pi/rs/rep-rap/1995/wd95_11-dt95_11/p5.html>. The author suggests “the definition of a hate crime should refer to the “actual or perceived”

In rare cases, the courts have found victim status as sufficient evidence to prove the motivating factor of hatred.⁸⁷ One of the first cases after the coming into force of s. 718.2(a)(i) identified the importance of the victim's status in holding the crime was motivated by hatred.⁸⁸ The court notes the victim is "an Indo-Canadian" and further concluded he "is a person contemplated by section 718.2(a)(i) of the *Criminal Code*."⁸⁹ The trial judge accepts that the victim "is dead simply because he was Indo-Canadian" and "was attacked because he was different from the accused. It is that simple."⁹⁰ The accused knew and committed the crime because of the victim's status.⁹¹ Similarly, in *R. v. Van-Brunt*⁹² the status of the victim motivated the assault. Here the court found the accused targeted the victim as evidenced by the fact he was the only one attacked and the only black man in a group of white companions.⁹³

Jurisprudence,⁹⁴ as well as literature,⁹⁵ has expanded and expounded on issues of sexual orientation status as a category of hate-motivated crimes. Sexual status has been held to be a significant factor in hate-motivated crimes.⁹⁶ One of the earliest court discussions was in 1999 in

group status of the hate crime target" at 49. The "central problem in the classification and recording of hate crimes is the issue of definition" and requires the adoption of a standard definition of hate or bias crime at 6, 9.

⁸⁶ *Ibid.* at Recommendation 4.

⁸⁷ *R. v. Demelo*, [1999] O.J. No. 3952 (Prov. Div.).

⁸⁸ *R. v. Miloszewski*, [1999] B.C.J. No. 2710 (Prov. Ct.) [*Miloszewski*]. In dismissing the appeal of L.E.N. and Synderck in *R. v. Miloszewski*, 2001 BCCA 745, [2001] B.C.J. No. 2765 [*Miloszewski Appeal*], the British Columbia Court of Appeal said "in a gang crime committed together by a like-minded group of racial bigots together carrying into effect their deplorable aims there is no room for nice distinctions about degrees of participation" at para. 27.

⁸⁹ *Miloszewski, ibid.* at para. 75.

⁹⁰ *Moloszewski, ibid.* at para. 161. Not only was Mr. Gill a member of a minority race in Canada but he was also a devote Sikh that worked to serve the needs of the community at para. 26, 29, 34, 35.

⁹¹ *Miloszewski, ibid.* at para. 83. The Court held the accused knew the status of Mr. Gill as a member of an ethnic minority.

⁹² *R. v. Van-Brunt*, [2003] B.C.J. No. 3226 (Prov. Ct.) [*Van-Brunt*].

⁹³ *Van-Brunt, ibid.* at para. 48. See also: *Sockalingam, supra* note 72 and *Vrdoljak Voir Dire, supra* note 67 on further discussion of targeting the victim as the only minority among a group of people.

⁹⁴ This seems to be an ever growing area of concern that has been percolating through the legal order. For instance, British Columbia appears to be coping with these issues and given focus with the killing of Aaron Webster in Vancouver's Stanley Park. Fast forward to nine years later in *R. v. Woodward*, [2010] B.C.J. No. 2196 (BC Prov. Ct.) [*Woodward*] the assault of a gay man in a bar and the more recent assault of two homosexual men holding hands on the streets of Vancouver in *R. v. Kandola*, 2010 BCSC 841, [2010] B.C.J. No. 1160 [*Kandola*].

⁹⁵ For instance, Douglas Victor Janoff, *Pink Blood: Homophobic Violence in Canada* (Toronto: University of Toronto Press, 2005) [*Pink Blood*] provides a critical analysis of homophobic violence, concepts of homophobia, the "homosexual panic defence" and hate crime legislation.

⁹⁶ *Amr, supra* note 83, *R. v. J.V.*, [2006] O.J. No. 2392 (Sup. Ct.) [*J.V.*]; *R. v. M.D.J.*, [2001] B.C.J. No. 2110 (Prov. Ct.) [*M.D.J.*]; *Demelo, supra* note 87 and discussed in *Sandler, supra* note 52 at fn 6.

*R. v. Demelo*⁹⁷ where the accused was aware that the victim was a lesbian and targeted her for that reason.⁹⁸ Later, in *M.D.J.*⁹⁹ in 2001, the British Columbia Provincial Court held the victim was subjected to slurs and attacked because of sexual orientation. In 2006, *R. v. J.V.*¹⁰⁰ found the accused believed, although denied by her, that his ex-girlfriend was in a lesbian relationship. Based on this belief,¹⁰¹ the accused broke into her home and killed the ex-girlfriend and attacked the other woman found in her home.¹⁰² In a different jurisdiction but the same year, the Alberta Provincial Court in *R. v. Amr*¹⁰³ reasoned the aggravated assault was motivated by the offender's belief the victim was a homosexual. At the time of the assault, the victim was in the washroom of a nightclub wearing a tight skeleton costume for Halloween and had to partly disrobe to go to the bathroom.¹⁰⁴ The complainant was attacked with a beer bottle to the head resulting in serious and permanent injuries to his eye.¹⁰⁵ The offender made homosexual slurs during the attack as well as to an undercover officer while detained in jail.¹⁰⁶ The *R. v. Demers* decision in 2006 by the Alberta Provincial Court accepted a joint submission for the accused's attack on a person attending a gay pride event at City Hall. Given the circumstances before the court, the accused was sentenced to a conditional sentence of six months followed by 12 months of probation.¹⁰⁷

Religion, another status category, attracts the second highest rate of bias, prejudice or hatred crime as noted in Chapter 2.¹⁰⁸ The courts' application of the legislation to religion is canvassed in *R. v. Gholamrezazdehshirazi*,¹⁰⁹ *R. v. El-Merheibi*,¹¹⁰ and *R. v. Soles*.¹¹¹ In *R. v. Sandouga*¹¹²

⁹⁷ *Demelo, ibid.*

⁹⁸ *Ibid.*

⁹⁹ *M.D.J.*, *supra* note 96. The slurs included "fucking faggots" and "queers".

¹⁰⁰ *J.V.*, *supra* note 96. The accused broke into the home and repeatedly stabbed his ex-girlfriend and stomped on her with his boots. He was found on the roof of a home and wanted the police to shoot him, para. 29, 30, 31, 34. He was sentenced to life imprisonment.

¹⁰¹ *Ibid.* as evidenced by his statements against the victims and all homosexuals generally at para. 36, 50.

¹⁰² *J.V.*, *supra* note 96.

¹⁰³ *Amr*, *supra* note 83.

¹⁰⁴ *Ibid.* at para. 4.

¹⁰⁵ *Ibid.* at para. 4, 31.

¹⁰⁶ *Ibid.* The offender was no stranger to verbal abuses as he was subjected to being bullied in school due to his own background of being a Libyan born Muslim at para. 17, 20.

¹⁰⁷ *R. v. Demers*, [2006] A.J. No. 1204 at para. 270, 345. The victim was dressed in drag queen regalia at para. 73 and attacked across from the court house at para. 62. The accused told the security officer that he attacked the victim because of how he was dressed at para. 75. At the time of arrest he indicated he was "not fond" of homosexuals at para. 76.

¹⁰⁸ Chapter 2, at 32, fn 95.

¹⁰⁹ *R. v. Gholamrezazdehshirazi*, [2008] A.J. No. 726, 451 A.R. 326 (Prov. Ct.) [*Shirazi*].

(2002), the Jewish community was targeted with a Molotov cocktail in the window of an Edmonton synagogue.¹¹³ The Alberta Court of Appeal held the actions were hate-motivated against the Jewish religion:

Sandouga's actions were directed against an identifiable religious group and were motivated by revenge against all members of that group. Sandouga targeted the synagogue because its congregants are adherents of the same religion as the people he considers responsible for problems in Palestine. There is a clear link between his enmity towards or prejudice against the Jewish people, and his commission of the crime. The offence is therefore a hate crime.¹¹⁴

The Alberta Court of Appeal in *Sandouga* was clear that hatred of religion should have been included in the calculation of the sentence and found the "sentencing judge erred in principle by failing to consider this serious aggravating circumstance."¹¹⁵ In *R. v. Gholamrezazdehshirazi*¹¹⁶ (2008), the Alberta Provincial Court considered and appeared to give significant weight to the Muslim religious status of the victim, underscored by the accused's personal history in finding the accused's actions were hate-motivated.¹¹⁷ The accused had served in the Iran-Iraq war and his brother had been tortured by Islamic police officers.¹¹⁸ The accused attended a dentist office that he did not know and was angered by medical questions that he considered offensive and racist¹¹⁹ that reminded him of past history in Iran.¹²⁰ The victim was a Muslim and it was because of this status that he was attacked by the accused. The court found that:

¹¹⁰ *R. v. El-Merhebi*, [2005] J.Q. No. 110, (Ct.Q.), [2005] R.J.Q. 671. The accused threw a bomb through the library window of a Jewish elementary school. The note left said it was an act against Israelis and Zionists at para. 3. The court classified it as actions of terrorism motivated by prejudice and hate at para. 16, 17, 18.

¹¹¹ *R. v. Soles*, [1998] O.J. No. 5061 (Ct. J.) [*Soles*]. See: *Sandler*, *supra* note 52 at fn 7.

¹¹² *R. v. Sandouga*, 2002 ABCA 196, [2002] A.J. No. 1042 (C.A.) [*Sandouga*].

¹¹³ Although section 430 (4.1) of the *Criminal Code* was introduced in 2001 and the decision was released in 2002, the provisions are not applicable as the act was committed in the year 2000.

¹¹⁴ *Ibid.* at 18.

¹¹⁵ *Ibid.*

¹¹⁶ *Shirazi*, *supra* note 109.

¹¹⁷ *Ibid.* at 13. The accused came to Canada in 2006. He was born in Iran and was a Iranian Christian that supported the Shah. His family lands were taken, his brother tortured and he sustained injuries while fighting in the Iran-Iraq war. The Court also noted the accused's psychiatric assessments found he suffered from a conspiratorial delusion against Muslims and may suffer from major depression at para. 14, 15, 16.

¹¹⁸ *Ibid.* at para. 13.

¹¹⁹ *Ibid.* at para. 4, 5, 6, 51. After leaving the dentist's office, he returned and became aggressive and slashed the doctor's left arm with a broken bottle. The accused left while screaming repeatedly that he would return to kill the dentist. The injuries to the dentist were severe with permanent repercussions. Injuries sustained included two severe slash wounds that required surgery and lengthy recovery of 2 or more years with a probable loss of dexterity (up to 50%). The injuries were held to impact his enjoyment of life and the court concluded that the injuries had a significant negative impact on his ability to be a dentist. The accused was sentencing to four years custody for aggravated assault and one year concurrent for uttering threats.

The offender based his actions on a bias or prejudice motivated belief that the victim was a Muslim with an Iranian background. He had grown to be biased against such persons because of their mistreatment of him and his family. It was his view that the victim was part of a group that had disenfranchised and tormented him and his family in Iran. ... Thus, his personal bias against Muslims played a significant role in the assault.¹²¹

Here the court held the historical hatred of a people was an aggravating factor in sentencing the accused.¹²²

1.1 Aboriginal People as Victims

Research has shown a lack of case law discussing the significance or existence of hatred of Aboriginal people as members of a vulnerable group.¹²³ This is partly due to the difficulty in obtaining data of Aboriginal people as complainants in hate-motivated crime as discussed earlier, especially in chapter 2 and 4. The sparse case law prior to *R. v. Gray* that does exist either does not provide meaningful discussion of hatred against Aboriginal people or discusses Aboriginal people as being the instigators of hatred.¹²⁴

The Alberta Court of Appeal *R. v. Gray*¹²⁵ (2013) decision in the death of an Aboriginal man and the severe beating of another Aboriginal man illustrates the Court's seriousness in addressing

¹²⁰ *Ibid.* at para. 13. The accused was a Christian in Iran and subject to persecution by the Islamic social revolution. The court held his historical background could not be accepted as justification, excuse or mitigation for the actions at para. 38.

¹²¹ *Ibid.* at para. 45.

¹²² *Ibid.*

¹²³ Often issues of Aboriginal people are characterized as race based, and while I have accepted this false premise as the source of the many forms of hatred for the purposes of analyzing hatred, I consider nationality or peoplehood as the proper basis of rights of Aboriginal people. See generally, Marie Battiste, *Decolonizing Education: Nourishing the Learning Spirit* (Saskatoon: Purich Publishing Ltd., 2013) at Chapter 6 - Confronting and Eliminating Racism.

¹²⁴ For instance, in *R. v. Munson*, 2001 SKQB 542, [2001] S.J. No. 735 at para. 24, the court was addressing police officers, Munson and Hachen dropping off an Aboriginal man, Mr. Night, in the outskirts of Saskatoon in -25 C winter weather: "There is no doubt there are strong suspicions that race played a part in this offence. However, suspicion is not evidence and since the Crown has failed to prove beyond a reasonable doubt that race played a role, I am unable to consider whether or not the issue of race was an aggravating circumstance." Further research of reported case law has shown a gap in meaningful case law discussion of hate-motivated crimes against Aboriginal people. In the process, this same research has also revealed instances of Aboriginal people charged with hate crimes, see: *D.S.K.*, *supra* note 59. These findings run contrary to the extremely high rates of violence Aboriginal people experience.

¹²⁵ *R. v. Gray* (27 November 2009), Lethbridge/MacLeod 080792112Q1 (ABQB), the accused was found guilty of second degree murder of Mr. Many Shots and guilty of aggravated assault of Mr. Panther Bone. Judge Miller sentenced the accused to life imprisonment with no eligibility for parole for ten years on the conviction of second degree murder (noted in *Gray #4*, para. 2) [*Gray #1 – Jury Trial Verdict*]; *R. v. Gray*, 2012 ABCA 51, [2012] A.J.

hate-motivated crimes against Aboriginal people. The Court of Appeal supports and agrees with the findings of the trial judge in that the issue is “not whether the Appellant harboured a racial animus towards Aboriginals, but rather whether the victims of his assaults were targeted because of their racial background. The evidence is clear and unequivocal.”¹²⁶

The accused Gray bore an animus against Aboriginal people and violently attacked two Aboriginal men as they were peacefully walking by his residence. Preceding the attack, Gray made racist derogatory remarks to his neighbor about Aboriginal people committing crimes and the police being unwilling or unable to respond. As Mr. Many Shots and Mr. Panther Bone went by, Gray “went to them and began viciously beating Many Shots” and after Mr. Many Shots collapsed, “Gray ran after Panther Bone, caught him, and then beat him as well.”¹²⁷ Mr. Many Shots and Mr. Panther Bone did not resist.

As Mr. Many Shots lay unconscious in the alley, Mr. Panther Bone escaped as Gray returned to his house to put on a pair of boots. Gray then returned to Mr. Many Shots and “kicked the unconscious Many Shots some more.”¹²⁸ The unprovoked attack resulted in the death of Mr. Many Shots because of the “multiple injuries” with “at least forty external bruises, cuts and abrasions. There was bleeding in Mr. Many Shots’ left eye. His nose was broken, as was his sternum, his jaw ... and eight of his ribs ... There were multiple lacerations to his liver ... artery and bowel” that “caused significant abdominal bleeding” with the cause of death as blunt force trauma.¹²⁹

Mr. Panther Bone had “injuries to his head and face, including his right ear, left forehead and right cheek, as well as a bruise on the inside of his left knee and one over his collar bone ...

No. 159, (C.A.), murder conviction set aside and a conviction for manslaughter substituted and matter remitted to the trial judge to impose sentence, aggravated assault conviction upheld [*Gray #2 – Murder Appeal*]; *R. v. Gray*, [2012] S.C.C.A. No. 163, [2012] C.S.C.R. No. 163, appeal of Court of Appeal decision to Supreme Court of Canada dismissed [*Gray #3 - Leave to SCC*]; *R. v. Gray*, 2012 ABQB 725, [2012] A.J. No. 1379, sentence for manslaughter to life imprisonment with no eligibility for parole for 10 years [*Gray #4 - Sentencing*]; *R. v. Gray*, 2013 ABCA 237, [2013] A.J. No. 705, appeal from manslaughter sentence of life imprisonment with no eligibility for parole for 10 years. The Court of Appeal upheld life imprisonment sentence but parole eligibility set aside [*Gray #5 - Appeal of Parole Eligibility*].

¹²⁶ *Ibid.* at para. 17.

¹²⁷ *Gray #4 - Sentencing, ibid.* at para. 4, 5.

¹²⁸ *Ibid.* at para. 4, 5, 6.

¹²⁹ *Gray #5 – Appeal of Parole Eligibility, supra* note 125 at para. 4.

Broken bones included his left wrist, left cheekbone, and some ribs. He had some bleeding in his brain and a concussion, the effects of which would never go away.”¹³⁰

After the beating, Gray attempted to divert attention from himself by setting the stage that Mr. Many Shots and Mr. Panther Bone were fighting each other.¹³¹ Gray called 911 reporting “he just watched an Indian get boot fucked in the back alley”.¹³² When asked what injuries, Gray replied “I didn’t look that close, he’s just another Indian to me” and then later complained to the ambulance attendants and police about the “fucking Indians” in the neighbourhood.¹³³ Gray complained that the last time he called police in response to a theft, “it took you guys forever to get here. Two Indians get into a fight and you’ve got the fire department, the police department here and you’re here in no time.”¹³⁴

Mr. Panther Bone, when arrested for the beating death of Mr. Many Shots, “told police that he and Many Shots had not fought each other, that they both had been beaten by a white man.”¹³⁵ At trial, the jury found Gray guilty of second degree murder of Mr. Many Shots and aggravated assault of Mr. Panther Bone.¹³⁶ On appeal of the conviction for second degree murder and aggravated assault, the Alberta Court of Appeal substituted manslaughter for the murder conviction and upheld the conviction for aggravated assault.¹³⁷ The Court of Appeal took careful measure to note “the principles of sentencing require a distinction to be drawn between the constituent elements of the crime of second-degree murder from those applicable to manslaughter.” The Court of Appeal went on to indicate that, although convicted of second-degree murder, the manslaughter in this case was at the severe end of the spectrum, when it stated: “The manslaughter conviction substituted by this Court on appellant review and at the urging of the Crown, nonetheless, amounts to ‘near murder’”.¹³⁸

¹³⁰ *Ibid.* at para. 5.

¹³¹ *Gray #4 – Sentencing, supra* note 125 at para. 34 notes the actual language of the witnesses who testified at trial.

¹³² *Ibid.* at para. 8.

¹³³ *Gray #5 – Appeal of Parole Eligibility, ibid.* at para. 8, 9.

¹³⁴ *Gray #2 – Murder Appeal, supra* note 125 at para. 10, *Gray #4 – Sentencing, supra* note 125 at para. 11.

¹³⁵ *Gray #4 – Sentencing, ibid.* at para. 7.

¹³⁶ *Gray #1 – Jury Trial Verdict, supra* note 125.

¹³⁷ *Gray #2 – Murder Appeal, supra* note 125.

¹³⁸ *Gray #5 – Appeal of Parole Eligibility, supra* note 125 at para. 19.

The Court of Appeal held that the facts of the case warranted a life sentence for the manslaughter conviction. Although the parole eligibility was set aside,¹³⁹ the Court of Appeal may not have disturbed the eligibility term if racial hatred was given in explanation as: “The factual underpinnings recited above justify the invocation of s. 718.2(a)(i) of the *Criminal Code*. *It is difficult to conceive of a clearer case of a racially motivated near murder and aggravated assault causing bodily harm.*”¹⁴⁰ [*emphasis added*]

6.3.2 Slurs

As discussed earlier, the presence of slurs may meet a triggering threshold but is not, in and of itself, sufficient to automatically prove a hate motivating offence.¹⁴¹ The slurs are to be assessed as evidence, either alone or in combination with other supporting evidence, in deciding whether the acts were hate-motivated. In *R v. Kandola*¹⁴² (2010) the British Columbia Supreme Court assessed the evidence of anti-homosexual language used before and after an assault, but no evidence of slurs during the actual assault and all occurring within a matter of seconds. The court ruled the actions are to be viewed as one continuous flowing event¹⁴³ and it is not necessary for the slurs to be used during the assault, as it is “not possible to separate out intent that existed both before and after a momentary and sudden act from the intent that existed when the sudden act occurred.”¹⁴⁴

¹³⁹ *Gray #5 – Appeal of Parole Eligibility*, *supra* note 125 at para. 24, 25.

¹⁴⁰ *Gray #5 – Appeal of Parole Eligibility*, *supra* note 125 at para. 19.

¹⁴¹ For further discussion of slurs, see Chapter 3.

¹⁴² *Kandola*, *supra* note 94.

¹⁴³ *Kandola*, *ibid.* at para. 14. *Kandola* was found guilty of assault causing bodily harm to Smith and his boyfriend who were walking together holding hands. A store security camera captured a group of males, that including *Kandola*, approach Smith. The video shows *Kandola* moving out of the pack and hitting Smith from his blind side. *Kandola* admitted to shouting obscenities before and after the sucker punch. The Court held the attack was motivated by hatred of Smith’s sexual orientation and sentenced him to 17 months incarceration, plus one year probation and 50 hours of community service.

¹⁴⁴ *Ibid.* at para. 14.

2.1 Prior to Offence

The Ontario Court of Appeal in *R. v. Bradley*,¹⁴⁵ ruled the accused's beating of the victim with crutches,¹⁴⁶ combined with slurs just prior to the attack¹⁴⁷ supported the finding that "the appellant was the first one to attack"¹⁴⁸ and guilty of a hate-motivated offence.¹⁴⁹

In *Gabara*¹⁵⁰, a Chinese shopkeeper objected to being repeatedly called "George" by the accused. When told to stop, the accused became angry, told the complainant to leave Canada and slapped him two or three times.¹⁵¹ Here the court accepted that the renaming of the complainant was a negative slur against the minority status of the complainant. This case is significant as it recognizes that slurs have context and accordingly, the name "George" was a highly offensive term. The court notes the use of the name "George" after being asked to stop was racially prejudicial or "certainly couched, in bias and prejudice by the victim's racial original." Accordingly, the accused's slurs and physical attack led the court to find the actions were hate-motivated.¹⁵²

In *R. v. Lankin*¹⁵³ slurs¹⁵⁴ made against a Chinese neighbor of the accused were clear and unequivocal in language.¹⁵⁵ The accused subjected the complainant to racist messages on the front door, threw dirty clothing on the porch and damaged property.¹⁵⁶ The British Columbia Provincial Court held the slurs were of such a nature to find the accused was guilty of criminal harassment motivated by bias, prejudice or hatred.¹⁵⁷

¹⁴⁵ *Bradley*, *supra* note 54. Five individuals were charged in relation to the attack and two were acquitted after trial. The other two plead guilty and were sentenced to fifteen months and twelve months respectively at para. 6.

¹⁴⁶ *Ibid.*

¹⁴⁷ *Ibid.* at para. 2, 3.

¹⁴⁸ *Ibid.* at para. 12.

¹⁴⁹ *Ibid.* at para. 7, 8, 9, 10 the Court found that Bradley's co-accused actions were less aggravating and at para. 12 held that Bradley was the "first one to attack" and "was the only one shouting racial slurs" of "Nigger" and "you've got to die". The five years custody was upheld on the appeal at para. 3.

¹⁵⁰ *R. v. Gabara*, [1997] B.C.J. No. 3090.

¹⁵¹ *Ibid.* at para 6.

¹⁵² *Ibid.* at para. 37, 38.

¹⁵³ *R. v. Lankin*, 2005 BCPC 1, [2005] B.C.J. No. 10 (Prov. Ct.) [*Lankin*].

¹⁵⁴ *Ibid.* at para. 3. The slurs were not subtle as the accused taped a paper that read "Goocks Chincks Not Welcome" with a swastika.

¹⁵⁵ *Ibid.* At arrest Lankin said that it was not fair that the government allowed employers to hire minorities and that the practice discriminated against him since he "was not a member of a minority" at para. 10.

¹⁵⁶ *Ibid.* at para. 3.

¹⁵⁷ *Ibid.*, *Criminal Code*, *supra* note 3, s. 264.

2.2 During and After Offence

In *R. v. Sockalingam*¹⁵⁸ the manager of a LCBO was pushed and beaten outside of the store by several men uttering racial slurs.¹⁵⁹ The Court ruled the assault was initially undertaken because of the refusal of service but evolved into a bias, prejudice or hate-motivated crime as evidenced by the slurs during the assault.¹⁶⁰ Other instances of slurs during an assault include *R. v. J.R.B.*¹⁶¹ where the accused singled out three young black men, who he called “niggers” and told them they “were not welcome to live here in this great Country of ours.”¹⁶² Additionally, in *R. v. Van-Brunt*,¹⁶³ a serious racially motivated assault, the accused calls the complainant “nigger” while hitting him with a metal bar. In *R. v. Amr*,¹⁶⁴ the complainant was called a “French fag” while being hit with a beer bottle resulting in a punctured eye. Based upon the above, the courts tend to accept more readily the evidence of a slur during the offence as indicators that the offence is more likely motivated by hatred.

In *R. v. Wright*,¹⁶⁵ after the severe beating of a taxi driver,¹⁶⁶ the Alberta Court of Appeal held there must be something more than a racial slur uttered only once at the time of arrest before finding the crime was hate-motivated. A one time racial slur, in and of itself, is not enough to trigger, nor prove a hate-motivated crime:

The utterance in this case was made several hours after the offence. There was no basis to conclude that the beliefs expressed were the motive for the offence. Accordingly, ... the slur could not amount to an aggravating factor under s. 718.2(a)(i)¹⁶⁷

¹⁵⁸ *Sockalingham*, *supra* note 72. The accused was convicted of assault causing bodily harm and sentenced to 60 days imprisonment with one year of probation.

¹⁵⁹ *Ibid.* at para. 7. A witness testified that during the assault the manager was called “You fucking Trini-boy”.

¹⁶⁰ *Ibid.*

¹⁶¹ *R. v. J.R.B.*, [2004] N.J. No. 101 (Prov. Ct.) [*J.R.B.*].

¹⁶² *Ibid.* at para. 2.

¹⁶³ *Van-Brunt*, *supra* note 92.

¹⁶⁴ *Amr*, *supra* note 83.

¹⁶⁵ *Wright*, *supra* note 43.

¹⁶⁶ *Ibid.* The Alberta Court of Appeal discussed the legislation in relation to the severe beating of a taxi driver that resulted in facial paralysis, blindness, deafness and profound mental impairment.

¹⁶⁷ *Ibid.* at para. 10.

The British Columbia Supreme Court revisited the issue ten years later and suggested that a volley of slurs after the offence are sufficient evidence of hate motivation. In *R. v Woodward*¹⁶⁸, the accused Woodward was drinking in a pub with others when he was given a tap on the shoulder with an “offer of a drink and invitation to shoot a game of pool”.¹⁶⁹ Woodward became angry and walked over and punched the complainant in the face, stepped over his body and left the pub.¹⁷⁰ When restrained, Woodward repeatedly uttered homophobic language¹⁷¹ leading the Court to find “no other possible explanation or motivation” for the assault other than “virulent homophobia”.¹⁷²

Slurs against sexual orientation was offered as evidence in *R. v. J.V.*¹⁷³ The accused made numerous slurs against homosexuals¹⁷⁴ and after killing his ex-girlfriend,¹⁷⁵ the Ontario court imposed a life sentence:

There can be no doubt, notwithstanding some equivocation by Mr. J.V. when he was interviewed by the police, that his bias against homosexuals was part of his motivation in committing this offence. That fact is eminently apparent from the many comments he made both before and after the offence was committed.¹⁷⁶

¹⁶⁸ *Woodward*, *supra* note 94.

¹⁶⁹ *Ibid.* at para. 17.

¹⁷⁰ *Ibid.* at para. 18, 19.

¹⁷¹ *Ibid.* Statements included “he’s a fag” and “he deserved it” while leaving the victim a “flicker” of what he once was combined with no remorse or apologies during the trial. WEAVE (West Enders Against Violence Everywhere), a neighbourhood watch and support group formed in 2001, urged the actions be considered a hate-motivated crime. See: Kate Adach and Sam Eifling, “Ten Years After Aaron Webster’s Death, What’s Changed?” *The Tyee* (17 November 2011), online <theyee.ca/News/2011/11/17Homophobic-Hate-Crimes>.

¹⁷² *Woodward*, *ibid.* at 24. The complainant’s injuries were life altering and rendered him incapable of caring for himself or living independently for the rest of his life. The court sentenced Woodward to six years imprisonment.

¹⁷³ *J.V.*, *supra* note 96.

¹⁷⁴ *Ibid.* at para. 14, 24. Prior to the killing, J.V. made numerous references to the victim as turning dyke on him and other negative comments about the homosexual lifestyle. An officer posing as another prisoner asked J.V. why he was charged with first degree murder and he replied “Don’t know, fucking goofs, dykes, slutties, choke’em, stomp’em, fuck’em, deserve it” at para. 36.

¹⁷⁵ *Ibid.* The Court found the accused “made the decision to get dressed, retrieve a knife from the kitchen of his home, drive to an area near Ms. L.W.’s home, walk to her home, slash the tires of her vehicle to perhaps prevent any potential escape, smash the bay window, enter the residence and attack L.W. in an apparent cold calculated jealous rage that was motivated by his belief that Ms. L.W. had left him to pursue a lesbian relationship” at para. 49.

¹⁷⁶ *Ibid.* at para. 50.

2.3 Against Aboriginal People

In examining the slurs against Aboriginal people, the term “chug”,¹⁷⁷ while not a commonly used slur, particularly in the prairies, is increasing in its usage particularly in British Columbia¹⁷⁸ and courts are accepting it as a racial slur. In *R. v. Green*¹⁷⁹ (2008), the British Columbia Provincial Court in Vancouver found that the accused was affronted and agitated after hearing “chug” used against her and her group of friends.¹⁸⁰ The British Columbia Supreme Court in Port Alberni in *R. v. Hurley*¹⁸¹ (2008) also accepted “chug” as a racial slur against Aboriginal people. The court notes at the time of arrest the accused:

...used a racial slur to describe the victim, calling him a “chug”. This racial insult was nothing less than an attempt to dismiss or minimize the assault by degrading and dehumanizing the victim. It was reprehensible.¹⁸²

In a s. 718.2(a)(i) context, the Saskatchewan Court of Appeal held that the term, “Sharkies”, was a racial slur specifically against Aboriginal people.¹⁸³ Clearly, the courts have recognized the connections between slurs and hate-motivated violence although there is a spectrum in the weighing of the evidence. For instance, courts tend to accept slurs occurring prior or during a

¹⁷⁷ The term “chug” is an accepted racial term by the British Columbia courts and is a growing racial slur as discussed by Beth Hong, “Native youth take on language stereotypes” *The Thunderbird* (20 April 2011), online <<http://thethunderbird.ca/2011/04/20/native-youth-take-on-language-stereotypes/>> [*Thunderbird*]. The Urban Dictionary, a web-based dictionary that contains more than seven million definitions, firstly defines “chug” as a racist slur for Native Americans, see: <<http://www.urbandictionary.com/define.php?term=chug>>. In a non-Aboriginal application, the modern European gang slang definition of chug is “good-looking” noted Lindsay Johns, “The secret world of gang slang” *The London Evening Standard* (1 November 2010), online <<http://www.thisislondon.co.uk/lifestyle/the-secret-world-of-gang-slang-6530868.html>>. Merriam-Webster encyclopedia states the first known use of the term “chug” was in 1848 referring to “a dull explosive sound made by or as if by a laboring engine”, online <<http://www.merriam-webster.com/dictionary/chug?show=0&t=1386183492>>.

¹⁷⁸ *Thunderbird*, *ibid*.

¹⁷⁹ *R. v. Green*, 2008 BCPC 25, [2008] B.C.J. No. 271 [*Green*].

¹⁸⁰ *Ibid.* at para. 10, 66. The court notes “chug” as a derogatory street vernacular term used to refer to First Nations people.

¹⁸¹ *R. v. Hurley*, 2008 BCSC 986 (CanLII).

¹⁸² *Ibid.* at para. 23. The court did not find the attack as hate-motivated but did consider the slur when taking “into account in considering whether or not Mr. Hurley truly had remorse for the attack” at para. 23.

¹⁸³ *R. v. Merasty*, [1999] S.J. No. 899. The Saskatchewan Court of Appeal dismissed the appeal from a conviction for second degree murder. The victim had insulted the accused and others with racial epithets against Aboriginal people prior to being shot and killed. The racial slurs included the complainant stating he wanted “no Sharkey party” at para. 17. Sharkeys was a bar frequented primarily by First Nation and Métis people and therefore, the term “Sharkey” was used as a derogatory racial slur at para.16. The accused appealed on the grounds that the trial judge did not put the defence of provocation to the jury. The Court of Appeal disagreed.

crime as a pattern of behavior that reveals motivation. It becomes more complex when the slurs occur after the offence or at the time of arrest. From the jurisprudence examined, the courts acknowledge a one-time slur is likely not sufficient evidence. However, as the intensity and repetition of the slurs occur, the more weight is given as evidence of motivation. Interestingly and rightly, the courts do not confine slurs to terms that are widely known as offensive and as such, are responsive and flexible to the context, community standards and changing evolution that words undergo within society.

6.3.3 Denial and Justification

The courts are often offered an explanation by the defendant of being motivated by something other than hatred such as having personal, alcohol or anger issues. However, the accused's connections to racist groups or belief in racist ideologies have been used as evidence for rejecting the accused's denial and finding the actions as hate-motivated.

3.1 Group Membership

An accused's membership in a racist organization is relevant evidence that is "strong but inconclusive evidence"¹⁸⁴ of a hate-motivated crime. Identifying as a "skin head", even if not a member of a racist organization, can also be used as evidence of motivation. For instance, in *R. v. Simms and Swanson*¹⁸⁵ (1990), a case prior to the enactment of s.718.2(a)(i), the Alberta Court of Appeal sentenced two accused, one being an avowed member of 10 racist organizations and the other, while not a member of any organization, self-identified as a skin head.¹⁸⁶ The accused believed the complainant identified a S.S. Nazi living in Canada in a radio broadcast.¹⁸⁷ The Court of Appeal found the crimes were motivated by hatred as both accused:

was motivated by the philosophy espoused by the groups with which the learned Provincial Court Judge found the Respondents were associated. That philosophy

¹⁸⁴ *Miloszewski, supra* note 88, *Addressing Discrimination, supra* note 68 at 424, 423 "membership in racist organizations will be important evidence."

¹⁸⁵ *Miloszewski, ibid.* The lower court had sentenced Simms to sixty days in prison, an avowed member of 10 racist organizations. The Court of Appeal increased the sentence to 12 months incarceration. Swanson, a self identified skinhead and co-accused, had his five month sentence increased by the Alberta Court of Appeal to 18 months.

¹⁸⁶ *R. v. Simms and Swanson*, [1990] A.J. No. 1050, (1990), 60 C.C.C. (3d) 499 (C.A.) [*Simms and Swanson*].

¹⁸⁷ *Ibid.* The two accused were drinking together with a number of other people when Simms became incensed because his library research had uncovered a newspaper article stating the complainant had, 30 years earlier, been a radio broadcaster and had played a tape which supposedly identified a person living in Canada as a member of the S.S. It was alleged that as a result of the broadcast, the person had committed suicide.

not only condoned but extolled violence against those whom the groups perceived to be opposed to their philosophy, ideals and goals and the Respondents adopted that philosophy.¹⁸⁸

In this case, the courts did not separate the blameworthiness of the accused that was a member of a racist group from the accused that self-identified to a racist philosophy.

In comparison, in *J.R.B.*¹⁸⁹ the court expressed its opinion that individuals are less blameworthy if they are not organized racists.¹⁹⁰ In this way, the court distinguished the accused from other cases involving organized racists as there was “no evidence that the Accused acted with any other person or organization in mind.”¹⁹¹

When the accused physically present as a skinhead, the courts often look to additional evidence as shown in *Miloszewski*¹⁹² discussing the group characteristics of the accused’s as skinheads including, but not limited to, shaved heads, manner of dress including flight jackets and footwear, racist music, penchant for violence and displaying a Nazi flag.¹⁹³

The courts have increasingly recognized the growth and evolution of skinheads transforming from a “working class solidarity” and “fashion statement” to those that expert, Dr. Karen Mock, describe as accepting “the white supremacist ideology of racial hatred” and “racist skinhead movement” tied to supremacist, Nazi ideology.¹⁹⁴ The courts careful consideration of these distinctions is apparent in *Vrdoljak*, trial level, in its discussions of witness’s perceptions of the accused as skinheads based only on their shaved heads and military clothing.¹⁹⁵ At trial, witnesses identified the accused as skinheads and the court carefully noted that it “is used in a completely neutral sense” as a “convenient shorthand” to “the physical appearance of the people being referred to” until the Crown proves “because of their shared ideology, an association with each other in the context of allegations that a number of people acted in concert” for “a joint

¹⁸⁸ *Ibid.*

¹⁸⁹ *J.R.B.*, *supra* note 161.

¹⁹⁰ *Ibid.* at para. 32.

¹⁹¹ *Ibid.*

¹⁹² *Miloszewski*, *supra* note 88. See also: the appeal of L.E.N. and Synderek in *R. v. Miloszewski*, 2001 BCCA 745, [2001] B.C.J. No. 2765 para. 27 [*Miloszewski Appeal*].

¹⁹³ *Miloszewski*, *ibid.* at para. 77.

¹⁹⁴ *Vrdoljak Voir Dire*, *supra* note 67 at para. 9.

¹⁹⁵ *Vrdoljak Trial*, *supra* note 67 at para. 2.

attack on a black man” and to the issue “as to whether an individual accused regarded the alleged black victim with a violent animus or hostility because of that person’s race.”¹⁹⁶

In the *voir dire*¹⁹⁷ on the admissibility of evidence tendered by the Crown to establish the three accused as racist skinheads, the expert evidence of Dr. Mock noted the Celtic cross has become a popular symbol of the neo-Nazi and white supremacist groups. Although “oi” is, at first instance, a non-sinister Cockney term meaning “hey” or “hi”, however, racist rock music is often called “oi” music. “88” is code for an assigned numeric figure to each letter of the alphabet with H as the eight letter. This means the number “88” signifies “HH” or “Heil Hitler” which is a common symbol of the neo-Nazi, white supremacist movement. The number 14 stands for the 14 words used by David Lane of The Order, an American white supremacist group. 14 refers to the 14 words in the sentence “We must secure the existence of our people and a future for white children.”¹⁹⁸

Other evidence offered included a tattooed spider on an accused elbow and another spider in a web on the other elbow as well as stylized swastika with words “White Power” and skull and crossbones tattoo.¹⁹⁹ Dr. Mock testified the spider indicates a readiness to kill and the spider in a web tattoo, particularly if on the elbow or hand and can mean time served in jail. Dr. Mock further testified the swastika with the words “White Power” is a known symbol of the white supremacist movement of skinheads and the particular skull and crossbones tattoo in this case appeared to be from the Stormfront web site which is a well known site for white supremacists.²⁰⁰

The *voir dire* concluded “the accused were racist skinheads with a common ideology that predisposed them to act violently in concert against the alleged victim.”²⁰¹ The tattoos and racist lyrics in combination with the skinhead appearance ultimately led the court to conclude that “all

¹⁹⁶ *Vrdoljak Trial, ibid.* at para. 2, 8. The court said the presence of the motivation would be relevant to the identity of the accused. However, identity of Vrdoljak became less of an issue as he admitted he had an altercation with the black man at para. 9. Vrdoljak was found guilty on two counts of assault and Kujtkowski and Kulbashian were found guilty of one count of assault.

¹⁹⁷ *Vrdoljak Voir Dire, supra* note 67.

¹⁹⁸ *Ibid.* at para. 12.

¹⁹⁹ *Ibid.* at para. 7

²⁰⁰ *Ibid.* at para. 11, 13.

²⁰¹ *Ibid.* at para. 44.

three accused were racist skinheads who acted in accordance with their beliefs and values...”.²⁰² Accordingly, the *Vrdoljak* decisions²⁰³ ruled the three accused were skinheads²⁰⁴ “affiliated with the racist skinhead movement and the ideology of hatred and hostility towards blacks, Jews and other minorities that is associated with that movement.”²⁰⁵

The Alberta Court of Appeal in *Sandouga*²⁰⁶ affirmed that while membership in a racist organization is an important factor in deciding whether or not the act was hate-motivated, it is not, however, a required fact, as the intent of the accused was deliberate and planned intimidation of the Jewish community. The court found that although the offender was not a member of an organized racist group and “while such an affiliation might be an aggravating factor, a lack of group support in no way detracts from the nature or seriousness of Sandouga’s crime or the extent of his culpability.”²⁰⁷

3.2 Intoxication

Many of the offences found in the *Criminal Code* are not specific-intent crimes but instead, are general-intent offences. It is generally accepted in law that intoxication is not a defence to general-intent crimes as the level of intent is minimal and is not negated by drunkenness.²⁰⁸ Some accused have submitted their actions were “just a wrongful act that was an aberration” because of the alcohol consumed before the assault.²⁰⁹ Others have claimed alcohol and personal problems were the cause of their actions. In one of the earliest cases, *Miloszeski*,²¹⁰ the court rejected alcohol consumption as an excuse. The court noted the fact that the accused were “sufficiently alert to time, place and circumstances to avoid detection by the police”²¹¹ and had

²⁰² *Ibid.* at para. 45.

²⁰³ *Ibid.*

²⁰⁴ *Ibid.* at para. 5.

²⁰⁵ *Vrdoljak Sentencing*, *supra* note 67 at para. 2.

²⁰⁶ *Sandouga*, *supra* note 112.

²⁰⁷ *Ibid.* at para. 36.

²⁰⁸ Voluntary and involuntary intoxication as a defence to sexual assault is a strongly discussed area of law. See e.g.: Janet Hiebert, *Charter Conflicts: What is Parliament’s Role?* (Montreal: McGill-Queen’s University Press, 2002) especially at 96 – 107, fn 15.

²⁰⁹ *Gabara*, *supra* note 150.

²¹⁰ *Miloszewski*, *supra* note 88.

²¹¹ *Ibid.* at para. 78.

the ability to search the area prior to the fatal assault.²¹² Moreover, the accused were aware they were on temple grounds on private property.²¹³ The accused knew the vehicles they were vandalizing would likely “be owned by members of the Indo-Canadian community” and as such, targeted these specific cars.²¹⁴

Similarly, the accused in *Trusler*²¹⁵ (2006) submitted his actions were because of alcohol and not hatred. The Ontario Court of Justice said the burning of the flag of the State of Israel at a Jewish High School was hate-motivated and could not be excused because of anger against his ex-girlfriend.²¹⁶ The court found the accused’s credibility highly suspect:

I have carefully reviewed all the evidence presented and including that of Mr. Trusler’s. Having done so, I must say that I am extremely skeptical about his evidence, particularly with respect to why this event occurred. I have reviewed his evidence and carefully considered it and I can find no logical path that takes me from Mr. Trusler being upset with his ex-girlfriend because she was talking to other men, which made him jealous, to doing damage to the Israeli flag.²¹⁷

Even if the denials appear illogical and without merit, there must be evidence of hate. A court’s rejection of the accused’s denial – no matter how strongly the rejection is made – is not sufficient for a finding of guilt. The Crown must prove the crime was motivated by hatred by providing evidence of the aggravating factor beyond a reasonable doubt.²¹⁸ In *Trusler*,²¹⁹ the Crown’s evidence from witnesses and the police was not sufficient to prove motivation²²⁰ and thus, the court held that Trusler’s actions could be attributed to being in a state of intoxication.²²¹ In contrast, three years later in 2009 the court in *Bradley*,²²² found sufficient evidence that

²¹² *Ibid.*

²¹³ *Ibid.*

²¹⁴ *Ibid.* at para. 80.

²¹⁵ *R. v. Trusler* (2006) ONCJ 390, [2006] O.J. No. 4303 (Ont. C.J.) [*Trusler*].

²¹⁶ *Ibid.* at para. 21, 22. At para. 19, the accused submitted that he would have burned the Canadian flag if it had come down first.

²¹⁷ *Ibid.* at para. 32.

²¹⁸ *Ibid.* at para. 35. The court was relying upon the 1991 Supreme Court of Canada decision of *R. v. W.(D.) [D.W.]*, [1991] 1 S.C.R. 742 that underscores that even though a trier of fact may have doubts about the credibility of the accused’s story, the Crown must still prove the case beyond a reasonable doubt.

²¹⁹ *Trusler, ibid.*

²²⁰ *Ibid.* at para. 46, 47. One observing witness did not interact with Trusler and gave no evidence of any words, comments or gestures of hatred and another witness did not observe Trusler and was not aware of anything that would suggest motivation. As well, the police officer did not provide evidence regarding hate motivation at para. 47.

²²¹ *Ibid.* at para. 49, 50.

²²² *Bradley, supra* note 54 at para. 4.

“stupidity coupled with the effects of intoxication”²²³ was not an excuse for assaulting a man with his own crutches.

In *R. v. Van-Brunt*²²⁴, the accused claimed the attack was not motivated by race but was due to his alcoholism. The court disagreed as there was no evidence that he was intoxicated at the time of the offence or how much alcohol he had consumed.²²⁵ Indeed, the court ruled the accused targeted the complainant because he was the only black man in a group of white companions.²²⁶ The Newfoundland and Labrador Provincial Court upheld a similar approach in *R. v. J.R.B.* in finding that intoxication and history of a psychiatric disorder is not an excuse to “assault causing bodily harm solely because of the colour of the victim’s skin”²²⁷. Judge Porter sentenced the accused to six months for the assault “clearly motivated by hate based on race” and another six months concurrent for uttering threats “which were also racially motivated”²²⁸.

3.3 Emotion

In *Lankin*²²⁹ the Court refused to accept the actions were based on an anger management problem and held that these factors do not “make him less culpable and the offence less repugnant.”²³⁰ In contrast, other courts have accepted the accused is “simply out of control and venting anger while under the influence of alcohol”²³¹ and the offence would have occurred regardless of the ethnic and cultural background of the complainant.²³²

More often accused will offer alternative explanations for their actions to avoid the enhanced penalty under the legislation. However, the denial is undermined when the accused are members of an organized racist group with a philosophy of violence. Skin-heads, even those without group affiliation, ascribe and promote an ideology of hatred that the courts have taken into consideration in deciding whether the actions were hate-motivated. Proffered reasons of

²²³ *Ibid.*

²²⁴ *Van-Brunt*, *supra* note 92.

²²⁵ *Ibid.* at para. 38, 39, 40.

²²⁶ *Ibid.* at para. 48.

²²⁷ *J.R.B.*, *supra* note 161 at para. 14.

²²⁸ *Ibid.* at para. 35. The accused was sentenced for a total of one year that included six months concurrent for hate-motivated acts.

²²⁹ *Lankin*, *supra* note 153 at para. 45.

²³⁰ *Ibid.*

²³¹ *Sandler*, *supra* note 52 at 3, *Lawrence*, *supra* note 53.

²³² *Ibid.*

intoxication or anger are not presumed justification or excuses of actions to negate hate-motivated offences.

6.4 Summary

The sentencing provisions of s. 718.2(a)(i) require that the motivation of bias, prejudice or hatred be proven beyond a reasonable doubt. The court can rely upon expert evidence to guide them in interpreting evidence of tattoos, symbology and other characteristics of hatred. Clearly the accused cannot be penalized for beliefs as the crime must be causally and partly connected to the bias, prejudice or hatred. Slurs, level of knowledge, personal motivation, degree and changing motivation are factors for a court to consider in hate-motivated offences.

Several important broad findings may be drawn from the examined jurisprudence. When the circumstances of the offence identifies status and slurs as variables to the event, determining whether the crime was hate-motivated will be influenced by the context including the actual level of knowledge, intensity and frequency of slurs, linkages to racist groups, level of affiliation with racist ideology and the weighing of evidence of intoxication and anger. An accused with deep seeded hatred beliefs will likely exhibit more of the factors and characteristics of hatred.

Research of the reported case law has shown little interpretation or recognition of Aboriginal people as a group subjected to hatred in Canada. This failure to recognize hatred of Aboriginal people embedded in criminal offences, as shown with the lack of case law specific to Aboriginal people, is evidence of a significant gap in perceiving and understanding hatred directed toward Aboriginal people.

No one is born hating another person because of the color of his skin, or his background, or his religion. People must learn to hate, and if they can learn to hate, they can be taught to love, for love comes more naturally to the human heart than its opposite.¹ Nelson Mandela

Chapter 7: Conclusion

7.1 Final Reflections

The aim of this thesis has been to examine case law in the sentencing of bias, prejudice and hatred directed toward Aboriginal people. Despite distinct Aboriginal ways of knowledge that flourished well before European control, the ongoing effects of Canada's discriminatory laws legitimized and at times, actively encouraged bias, prejudice and hatred that continues to flourish today². As the literature review has shown, Aboriginal people have been subjected to deeply rooted racism, oppression and domination through the laws and policies of Canada³. This model of cultural dominance supports racism, violence and hatred.

The research also shows that the decision processes in deciding whether or not an action was motivated by hatred can be challenging for the judiciary.⁴ A change in legislation that is more reflective of the experiences of Aboriginal people and Aboriginal women⁵ may help address

¹ Nelson Mandela, *Long Walk to Freedom: The Autobiography of Nelson Mandela* (New York: Little, Brown & Co., 1995) at 622.

² See Chapter 1 for further discussion.

³ C. Wesley-Equimax & M. Smolewski, *Historic Trauma and Aboriginal Healing* (Ottawa: Aboriginal Healing Foundation, 2004) at 5, Wendy Moss & Elaine Gardner-O'Toole, *Aboriginal People: History of Discriminatory Laws* (Ottawa: Minister of Supply and Services Canada, 1987 revised 1991), Canada, *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back*, vol. 1 (Ottawa: Minister of Supply and Services Canada, 1996) [RCAP].

⁴ See Chapter 6.

⁵ For instance, the Supreme Court of Canada's decision of *R. v. Gladue*, [1999] 1 S.C.R. 688, [1999] 2 C.N.L.R. 252 clarified s. 718.2(e) requirements of sentencing judges to consider background and systemic factors of Aboriginal offenders. This case endorsed "healing" as a normative value in sentencing that a judge must consider and is a response to the impact of the criminal justice order on Aboriginal people in Canada. See: M.E. Turpel-Lafond,

some of the challenges the judiciary and legal order has encountered. This, however, requires the acknowledgment of the legacy of discrimination endured by Aboriginal people. It also requires the inclusion of Aboriginal women as a specific category of protection under s. 718.2(a)(i). Although, the sentencing provisions of s. 718.2(a)(i) has been in place for almost twenty years,⁶ it is in its infancy in recognizing hate-motivated crimes directed toward Aboriginal people and in particular, Aboriginal women.

As the categories of hatred have emerged, the absence of Aboriginal people as a specific category for protection under s. 718.2(a)(i) denies the recognition of the unique legal placement of Aboriginal people in Canada. Certainly Aboriginal people and Aboriginal women are protected under s.718.2(a)(i) provisions through the generic provisions to protect categories of sex and other traits,⁷ yet there is little case law giving meaningful attention to hatred of Aboriginal people⁸. Despite the extremely high rates of violence experienced by Aboriginal people and Aboriginal women,⁹ Aboriginal people are rarely found to be victims of hate-motivated crimes.¹⁰

Whether or not incarceration for hate-motivated offences provides value to society,¹¹ in and of itself, is beyond the scope and not a topic of this paper,¹² but if the sentencing provisions remain a part of the *Code*, it only makes sense that Aboriginal people should be protected under the law.

“Sentencing within a Restorative Justice Paradigm: Procedural Implications of *R. v. Gladue*” *Justice as Healing: A Newsletter on Aboriginal Concepts of Justice* vol. 4, No. 3 (Fall 1999) at 1, online <<http://www.usask.ca/nativelaw/publications/jah-sample-articles.php>>. The Supreme Court of Canada decision was released 3 years after the provisions came into force on September 3, 1996 as the new Part XXIII of the *Criminal Code*, R.S.C. 1985, c. c-46 that also included the codification and principles of s. 718.2(a)(i) pertaining to sentencing of bias, prejudice and hate-motivated offences.

⁶ The first reading of Bill C-41 was in 1994, given Royal Assent in 1995 and came into force September 3, 1996 with Order in Council P.C. 1996-1271.

⁷ See Chapter 5 - Enumerated Groups Protected and Comparisons.

⁸ See Chapter 6 - Alberta Court of Appeal and Queen’s Bench decision in *R. v. Gray*, 2013 ABCA 237, [2013] A.J. No. 705 and 2012 ABQB 725, [2012] A.J. No. 1379.

⁹ See Chapter 3.

¹⁰ See Chapter 6 for further discussion of Aboriginal people as victims of hate-motivated offences.

¹¹ See Mark Carter, “Addressing Discrimination through the Sentencing Process: Criminal Code s. 718.2(a)(i) in Historical and Theoretical Context” (2001) 44 *Crim.L.* 399.

¹² I am not suggesting that incarceration is the only response to be given to hate-motivated offences. To the contrary, in undertaking this thesis review of hate-motivated offences, I seek to discuss the gaps of the legislation as it currently exist and its failures toward Aboriginal people. Indeed, I agree there are limitations of the legal effectiveness of s. 718.2(a)(i) and suggest further research is needed on the implementation of a “healing of hate” approach but that analysis is beyond the scope of this paper.

Specific and direct inclusion of Aboriginal women under s. 718.2(a)(i) would give attention to the individual pathology of hatred as well as provide an opportunity to start to acknowledge the wider structural processes¹³ that maintains the status quo of the normalcy of racism, violence and hatred directed toward Aboriginal people. Inclusion of Aboriginal people would provide an opportunity to challenge the systemic assumptions and support rejecting violence against Aboriginal women.

Inclusion also creates opportunities of innovation through the development of healing therapies tailored to the specific situations and needs, and in turn supports opportunities for healing within the communities. The first step in any healing process starts with recognition and naming of the harm. In this way, the starting point for addressing hatred requires identification and inclusion of Aboriginal women as a missing category of protection. Including Aboriginal people would assist in pledging resources to addressing bias, prejudice and hatred directed toward Aboriginal people.

Reviewing the current case law and causation factors, the thesis has looked closely at: proving hate-motivated offences, ideology, slurs, knowledge, degree of motivation, identity of the victim, the accused and issues surrounding denial of culpability. It also outlines recommendations for the future including the need for specific expansion of enumerated groups to encompass Aboriginal women and incorporating an interpretation definition of hatred in the *Code*. This thesis suggests that without challenging the current responses of s.718.2(a)(i), the assumptions underlying the considerations of hate-motivated crimes directed toward Aboriginal people and Aboriginal women remain hidden.

There is clearly a need to reexamine the provisions of s.718.2(a)(i) from the perspective of Aboriginal people and Aboriginal women. There is a need for s.718.2(a)(i) to reflect the unique circumstances of Aboriginal people. While some might argue that as a matter of equality an Aboriginal victim should not be treated differently from any other victim, this is a flawed approach. Treating different people the same cannot result in equality because the application of discriminatory laws and policies has long-term, intergenerational consequences for Aboriginal

¹³ Hannah Mason-Bish, "Future Challenges for Hate Crime Policy: Lessons from the Past" in Neil Chakraborti, ed., *Hate Crime: Concepts, Policy, Future Directions* (UK: Willan Publishing, 2010) 58 at 73.

people. In this way, a specific designated category of protection under s. 718.2(a)(i) would treat Aboriginal people fairly by taking into account their differences.

7.2 Healing of Hate

There can be little doubt that s.718.2(a)(i) is a mechanism of increasing sentences for hate-motivated crimes but it seems to have had very little effect in stemming hatred of Aboriginal people. However, if hatred is considered solely as an individual action with little or no linkage to the broader systemic situations, the analysis remains incomplete. An approach that encompasses the larger broad and systemic issues of hatred is needed to address the complexity of structural factors of bias, prejudice and hatred in today's society.

Encouraging future research into an integrated healing approach to hatred is not the usual approach of the criminal legal order¹⁴, however, the promises of hope through restorative perspectives and reasoning is already being used in sentencing by the judiciary. In application, Aboriginal people's knowledge in addressing racism and all of its manifestations of bias, prejudice and hatred naturally leads to a vision of healing of hatred. Seeking processes or ceremonies to resolve harms requires not only looking at the legal order failures but also the best in Indigenous traditions. This means we should not only understand the individual factors in each case but also how the hate actions are a reflection of the broader systemic issues in Canadian society. If sentencing of hate-motivated offences includes the hope for reducing further actions of hatred, society could benefit from examining healing practices. Understanding the broader and simultaneous influences may reveal that hatred is really a manifestation of systemic racism that allows and supports it. In this way, the remedy must be both individual and systemic. In other words, healing of the individual trauma and meeting the needs that the harms create is critical as it is also vital to understand the broader systemic needs for the future.

¹⁴ Mark Walters and Carolyn Hoyle, "Healing Harms and Engendering Tolerance: the Promise of Restorative Justice for Hate Crime" in Neil Chakraborti, ed., *Hate Crime: Concepts, Policy, Future Directions* (Oregon: Willan Publishing 2010) 228. The authors explore the possibilities of restorative justice (RJ) practices as a response to hate crime as either a diversionary measure (community mediation) or as additional criminal sanctions (RJ meetings). The authors suggest that RJ can help offenders to better understand their actions, learn about other cultures and identities and allow for new relationships between all participants and the larger community, at 244.

On the systemic healing side, community-building, Aboriginal community-based education and cultural revitalization are all essential to build the social-emotional net to hold people as they work through the pain and trauma and to prevent future bias, prejudice and hate-motivated crimes. Communities and peoples and nations can also take action to advance education within the people and across peoples to shift consciousness, so that systemic redress and repair can happen in transformative ways and preventative measures can be put in place. In this way, the application of Aboriginal people's healing knowledge is critical to the resolution of bias, prejudice and hatred directed toward Aboriginal people. The resilience of Aboriginal people as survivors healing through ceremony and empowerment of women, families and community are opportunities for healing of the physical, emotional, mental and spiritual essence in a new paradigm of renewal. If healing provides support for maintaining, advancing and sharing of Aboriginal knowledge and leads a shift away from hatred, it only makes sense to investigate and research further the possibilities of healing of hate. Turning toward a new paradigm of justice as healing would focus attention on Aboriginal people's own ways to develop initiatives in addressing bias, prejudice and hatred. This future and challenging research would help set the framework and understandings of hatred in new and innovative approaches.

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