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TAKING ACTION TO END ONLINE HATE

**Report of the Standing Committee on Justice and
Human Rights**

Anthony Housefather, Chair

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TAKING ACTION TO END ONLINE HATE

CHAPTER 1—CONTEXT OF THE STUDY

Hate speech is not only used to justify restrictions or attacks on the rights of protected groups on prohibited grounds ... 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 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 group 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.

Saskatchewan (Human Rights Commission) v. Whatcott, [2013] 1 SCR 467

With the rise of hate crimes reported to the police and the use of online platforms to promote hatred, several groups have requested that this issue be studied by Parliament.¹ Recent events in Canada and abroad have shown that online hate can have serious consequences and often precedes acts of violence. It is imperative that all governments around the world effectively address both online and offline acts of hatred. Government responses must strike the right balance between protected rights and freedoms.

In March 2019, the House of Commons Standing Committee on Justice and Human Rights (the Committee) decided to undertake a study on online hate.² The Committee was focused on a number of solutions, including, but not limited to, finding potential amendments to the *Canadian Human Rights Act*,³ the *Criminal Code*,⁴ or any other act of Parliament, that could help stem the propagation of hateful acts and the enticement of hatred on online platforms.

1 Centre for Israel and Jewish Affairs, [Press Release: CIJA Urges Action in Response to Spike in Antisemitic Hate Crimes](#), 29 November 2018; The Evangelical Fellowship of Canada, [Calling Parliament to address online hate: Letter to the Minister of Justice](#), 4 February 2019.

2 House of Commons, Standing Committee on Justice and Human Rights (JUST), [Minutes](#), 19 March 2019.

3 [Canadian Human Rights Act](#), R.S.C., 1985, c. H-6.

4 [Criminal Code](#), R.S.C., 1985, c. C-46.

CHAPTER 2—THE USE OF ONLINE PLATFORMS TO PROMOTE HATRED

The Internet and online platforms offer many opportunities and are beneficial to society in general. They offer new avenues for free expression and bring “tremendous benefits in promoting knowledge and in sharing and facilitating connections.”⁶ The Internet has also “become an important part of helping LGBTQ2SI individuals find or construct their identities.”⁷

Despite all of these benefits and opportunities, there was consensus among witnesses that online platforms and the Internet are being used to spread hate⁸ and to radicalize, recruit and incite people to hate.⁹

On social media and the internet, troubled people can find dark spaces to trade their prejudicial views and to embolden each other in hostile intentions. Finding ways to discourage, shut-down and prevent such spaces is a vital aspect of upholding human rights and of creating safe communities.¹⁰

As stated by Alex Neve from Amnesty International Canada, “[t]he rise of hate-based and hate-fuelled discrimination is on the rise everywhere, often made easier—or at least more obvious—by the new and accessible channels the online world offers.”¹¹

6 JUST, [Evidence](#), 1st Session, 42nd Parliament, 2 May 2019 (Queenie Choo, Chief Executive Officer, S.U.C.C.E.S.S.).

7 JUST, [Evidence](#), 1st Session, 42nd Parliament, 16 May 2019 (Jennifer Klinck, Chair, Legal Issues Committee, Egale Canada Human Rights Trust).

8 JUST, [Evidence](#), 1st Session, 42nd Parliament, 2 May 2019 (Queenie Choo, Chief Executive Officer, S.U.C.C.E.S.S.); JUST, [Evidence](#), 1st Session, 42nd Parliament, 28 May 2019 (Elizabeth Moore, Educator and Advisory Board Member, Canadian Anti-Hate Network and Parents for Peace, As an Individual; Avi Benlolo, President and Chief Executive Officer, Friends of Simon Wiesenthal Center for Holocaust Studies; Bradley Galloway, Research and Intervention Specialist, Organization for the Prevention of Violence).

9 See, for example, JUST, [Evidence](#), 1st Session, 42nd Parliament, 11 April 2019 (Shimon Koffler Fogel, President and Chief Executive Officer, Centre for Israel and Jewish Affairs; Imam Farhan Iqbal, Ahmadiyya Muslim Jama'at); JUST, [Evidence](#), 1st Session, 42nd Parliament, 9 May 2019 (Jasmin Zine, Professor, Sociology and Muslim Studies Option, Wilfrid Laurier University, As an Individual).

10 JUST, Brief submitted by the Evangelical Lutheran Church in Canada, [Online Hate](#), 3 May 2019.

11 JUST, [Evidence](#), 1st Session, 42nd Parliament, 11 April 2019 (Alex Neve, Secretary General, Amnesty International Canada).



Several factors contribute to the spread of online hate, such as the possibility of hiding “behind a veil of anonymity”,¹² easy “access to an audience”,¹³ and easy access to hate content.¹⁴ Witnesses also indicated that since online platforms provide a wide audience, hateful ideas that would be considered serious in the real world, appear to be validated online, and then become normalized.¹⁵ According to the former President of the Centre culturel islamique de Québec, Mohamed Labidi, “[u]nfortunately, we're witnessing a form of impunity online.”¹⁶

While online hate may be trivialized by some people and not taken seriously enough by online platforms and Internet service providers, it still constitutes hate and has devastating consequences on its victims. Often, they are subject “to humiliation and degradation, resulting in grave psychological and social consequences.”¹⁷ Online hate “undermines the well-being and sense of security of victims” as well as their “sense of belonging.”¹⁸ More generally, it increases discord in society and contributes to the marginalization of certain groups “by convincing listeners of the inferiority of the targeted group.”¹⁹ As noted by Bradley Galloway from the Organization for the Prevention of Violence, “[t]he perpetuation of associated rhetoric can create an environment where discrimination, harassment and violence are viewed by individuals as not only a reasonable response or reaction but also as a necessary one.”²⁰

12 JUST, [Evidence](#), 1st Session, 42nd Parliament, 2 May 2019 (Mukhbir Singh, President, World Sikh Organization of Canada).

13 JUST, [Evidence](#), 1st Session, 42nd Parliament, 9 May 2019 (Mohamed Labidi, Former President, Centre culturel islamique de Québec).

14 JUST, [Evidence](#), 1st Session, 42nd Parliament, 28 May 2019 (Faisal Khan Suri, President, Alberta Muslim Public Affairs Council).

15 JUST, [Evidence](#), 1st Session, 42nd Parliament, 2 May 2019 (Rev Daniel Cho, Moderator, Presbyterian Church in Canada); JUST, [Evidence](#), 1st Session, 42nd Parliament, 9 May 2019 (Mohamed Labidi, Former President, Centre culturel islamique de Québec).

16 JUST, [Evidence](#), 1st Session, 42nd Parliament, 9 May 2019 (Mohamed Labidi, Former President, Centre culturel islamique de Québec).

17 JUST, [Evidence](#), 1st Session, 42nd Parliament, 16 May 2019 (Jennifer Klinck, Chair, Legal Issues Committee, Egale Canada Human Rights Trust). See also, JUST, [Evidence](#), 1st Session, 42nd Parliament, 16 May 2019 (Morgane Oger, Founder, Morgane Oger Foundation); Brief submitted by Jane Bailey and Valerie Steeves, [Online Hate](#), 9 May 2019.

18 JUST, [Evidence](#), 1st Session, 42nd Parliament, 9 May 2019 (Mohamed Labidi, Former President, Centre culturel islamique de Québec).

19 JUST, [Evidence](#), 1st Session, 42nd Parliament, 16 May 2019 (Jennifer Klinck, Chair, Legal Issues Committee, Egale Canada Human Rights Trust). See also Brief submitted by Jane Bailey and Valerie Steeves, [Online Hate](#), 9 May 2019.

20 JUST, [Evidence](#), 1st Session, 42nd Parliament, 28 May 2019 (Bradley Galloway, Research and Intervention Specialist, Organization for the Prevention of Violence).

Online hate also contributes to radicalization of people and “leads to the risk that sympathizers of hate speech will take action.”²¹ As explained by Professor Jasmin Zine, “[o]nline hate propagation creates an ideological breeding ground to inspire terrorists.”²²

Throughout the study, several witnesses pointed out the link between online hate and real-life violence, as revealed yet again by recent horrific hateful attacks on different groups.²³

As you all well know, recent years have seen a proliferation of extreme forms of hatred in online fora that encourage violence and dehumanize those who are the targets of this hate. Recent high-profile violent attacks in Canada and abroad have emphasized the reality that these sentiments do not remain online, but have tragic offline consequences as well, and that they are in need of immediate and sustained attention.²⁴—**Anglican Church of Canada**

As these horrific attacks demonstrate, hate can be lethal, and online hate can foreshadow mass violence. There is no question that the Internet has become the newest frontier for inciting hate that manifests itself disturbingly offline.²⁵—**Canadian Rabbinic Caucus**

Often, the perpetrators of this violence have been radicalized by online influences, or they have discovered a like-minded online community and through it find validation for their specific personal bigotry and hatred.²⁶—**Presbyterian Church in Canada**

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- 21 JUST, [Evidence](#), 1st Session, 42nd Parliament, 9 May 2019 (Mohamed Labidi, Former President, Centre culturel islamique de Québec).
- 22 JUST, [Evidence](#), 1st Session, 42nd Parliament, 9 May 2019 (Jasmin Zine, Professor, Sociology and Muslim Studies Option, Wilfrid Laurier University, As an Individual).
- 23 Several witnesses reminded the Committee that prior to committing these horrific hateful crimes, the killers were very active online. In the case of the mass murder of Jews in Pittsburgh, “the killer reportedly posted more than 700 anti-Semitic messages online over a span of nine months leading up to the attack.” In the mass murder of Muslims in Christchurch, the “shooter’s decision to livestream his horrific crime was a clear attempt to provoke similar atrocities.” JUST, [Evidence](#), 1st Session, 42nd Parliament, 11 April 2019 (Shimon Koffler Fogel, President and Chief Executive Officer, Centre for Israel and Jewish Affairs). See also, JUST, [Evidence](#), 1st Session, 42nd Parliament, 11 April 2019 (Geoffrey Cameron, Director, Office of Public Affairs, Bahá’í Community of Canada); JUST, [Evidence](#), 1st Session, 42nd Parliament, 28 May 2019 (Faisal Khan Suri, President, Alberta Muslim Public Affairs Council; Sinan Yasarlar, Public Relations Director, Windsor Islamic Association).
- 24 JUST, [Evidence](#), 1st Session, 42nd Parliament, 11 April 2019 (Ryan Weston, Lead Animator, Public Witness for Social and Ecological Justice, Anglican Church of Canada).
- 25 JUST, [Evidence](#), 1st Session, 42nd Parliament, 11 April 2019 (Rabbi Idan Scher, Canadian Rabbinic Caucus).
- 26 JUST, [Evidence](#), 1st Session, 42nd Parliament, 2 May 2019 (Rev Daniel Cho, Moderator, Presbyterian Church in Canada).



As rightfully pointed out by Shimon Koffler Fogel from the Centre for Israel and Jewish Affairs “[w]e cannot afford to be complacent, given the link between online hate and real world violence.”²⁷ Similarly, it was noted that “[t]he audacity and frequency with which people now spew hate online shows us that we are failing in how our system currently combats online hate.”²⁸ Throughout the study, witnesses stressed that we must recognize the urgent need for governments, civil society, online platforms and Internet service providers to take the necessary measures to counter the incitement of hatred through online platforms.²⁹

27 JUST, [Evidence](#), 1st Session, 42nd Parliament, 11 April 2019 (Shimon Koffler Fogel, President and Chief Executive Officer, Centre for Israel and Jewish Affairs). See also, JUST, Brief submitted by The United Church of Canada, [Online Hate](#), 9 May 2019.

28 JUST, [Evidence](#), 1st Session, 42nd Parliament, 28 May 2019 (Shalini Konanur, Executive Director and Lawyer, South Asian Legal Clinic of Ontario).

29 See, for example, JUST, [Evidence](#), 1st Session, 42nd Parliament, 11 April 2019 (Ryan Weston, Lead Animator, Public Witness for Social and Ecological Justice, Anglican Church of Canada); JUST, [Evidence](#), 1st Session, 42nd Parliament, 2 May 2019 (Brian Herman, Director, Government Relations, B'nai Brith Canada); JUST, [Evidence](#), 1st Session, 42nd Parliament, 9 May 2019 (Andrew P.W. Bennett, Director, Cardus Religious Freedom Institute); JUST, [Evidence](#), 1st Session, 42nd Parliament, 16 May 2019 (Jennifer Klinck, Chair, Legal Issues Committee, Egale Canada Human Rights Trust); JUST, [Evidence](#), 1st Session, 42nd Parliament, 28 May 2019 (Shalini Konanur, Executive Director and Lawyer, South Asian Legal Clinic of Ontario; Avi Benlolo, President and Chief Executive Officer, Friends of Simon Wiesenthal Center for Holocaust Studies; Faisal Khan Suri, President, Alberta Muslim Public Affairs Council).

5.5 Defining Hatred: a First Step to Tracking Online Hate

Defining hatred is an important first step for tracking online hate in a manner that can be understood and enforced uniformly.¹⁰⁰ From a legal standpoint, a clear definition of hate is also imperative as it would “draw the line between legal and illegal activity” and “[f]rom that point on, the law enforcement agencies will have a free hand to take action.”¹⁰¹ A clear definition of all types of hatred would also help preventing and countering hate by all stakeholders, including the police, Internet service providers and online platforms. A clear understanding of what constitutes hatred may also facilitate reporting.

The definition of what constitutes online hate versus offensive materials needs to be clear. All community members, not just the legal community or subject experts, need to understand what is online hate and how hate can show up online, whether it be under the guise of educational material or news; how to make a report; and what happens after reporting a hate crime. If the community does not understand the definition and process, they will be reluctant to intervene or make a report.¹⁰²

Recognizing the importance of defining hate, some witnesses recommended building upon the parameters defining hatred developed in two decisions of the Supreme Court of Canada, namely *Saskatchewan (Human Rights Commission) v. Whatcott* and *R. v. Keegstra*.¹⁰³ Others suggested that we should use the definition of anti-Semitism developed by the International Holocaust Remembrance Alliance. In that sense, Shimon Koffler Fogel from Centre for Israel and Jewish Affairs noted the following:

The international community's experience in defining anti-Semitism is an important model. The International Holocaust Remembrance Alliance, or IHRA, working definition of anti-Semitism, which is the world's most widely accepted definition of Jew hatred,

100 See, for example, JUST, Brief submitted by the National Council of Canadian Muslims, Brief on Online Hate: Legislative and Policy Approaches, 9 May 2019; JUST, Brief submitted by The Evangelical Fellowship of Canada, [Online Hate](#), May 2019.

101 JUST, [Evidence](#), 1st Session, 42nd Parliament, 9 May 2019 (Seifeddine Essid, Social Media Officer, Centre culturel islamique de Québec).

102 JUST, [Evidence](#), 1st Session, 42nd Parliament, 2 May 2019 (Queenie Choo, Chief Executive Officer, S.U.C.C.E.S.S.).

103 JUST, [Evidence](#), 1st Session, 42nd Parliament, 9 May 2019 (Jasmin Zine, Professor, Sociology and Muslim Studies Option, Wilfrid Laurier University, As an Individual; Bernie Farber, Chair, Canadian Anti-Hate Network). See also JUST, [Evidence](#), 1st Session, 42nd Parliament, 28 May 2019 (Elizabeth Moore, Educator and Advisory Board Member, Canadian Anti-Hate Network and Parents for Peace, As an Individual). The Chief Commissioner of the Canadian Human Rights Commission also noted that the Committee could also look into the “hallmarks of hate developed by the Canadian Human Rights Tribunal.” JUST, [Evidence](#), 1st Session, 42nd Parliament, 30 May 2019 (Marie-Claude Landry, Chief Commissioner, Chief Commissioner, Canadian Human Rights Commission).

should be included in any strategy to tackle online hate. It's a practical tool that social media providers can use to enforce user policies prohibiting hateful content and that Canadian authorities can use to enforce relevant legal provisions.¹⁰⁴

The YWCA Canada recommended specifically to

integrate an intersectional gender equity lens and consider the gendered impacts of anti-Black racism, anti-Indigenous racism, anti-Semitism, Islamophobia and Xenophobia in any definition of “hate” and “online hate”.¹⁰⁵

104 JUST, [Evidence](#), 1st Session, 42nd Parliament, 11 April 2019 (Shimon Koffler Fogel, President and Chief Executive Officer, Centre for Israel and Jewish Affairs). See also JUST, [Evidence](#), 1st Session, 42nd Parliament, 11 April 2019 (Rabbi Idan Scher, Canadian Rabbinic Caucus).

105 Brief submitted by YWCA Canada, [Addressing Online Hate: Applying Intersectional Gender Lens](#), 10 May 2019.

Submission to the Standing Committee on Justice and Human Rights

Re: Online Hate

The Hallmarks of Hate include or allege that the target group is:

- i. powerful menace to society;
- ii. use of news reports/reputable sources to further negative stereotypes;
- iii. preys upon children, aged, the vulnerable, etc.;
- iv. responsible for the world's problems;
- v. dangerous or violent by nature;
- vi. devoid of redeeming qualities and innately evil;
- vii. banishment, segregation, or eradication of group required;
- viii. de-humanized through association with or comparison with animals, vermin, etc.;
- ix. highly inflammatory language/rhetoric used to create tone of extreme hatred/contempt;
- x. trivialization/celebration of past persecution or tragedy involving target group; and,
- xi. calls to take violent action against the target group.

The Current online reality

Given the challenges of having criminal charges laid, let alone successfully prosecuted for online hate speech, the repeal of s. 13 of the CHRA in 2013 effectively removed the primary means that had been used to that point to attempt to control Internet-based hate propaganda.

The advent of US-based social media platforms such as Facebook, Twitter, and Youtube in Canada has taken place in what I believe is wrongly perceived by these corporations as being largely free of legal obligations to enforce terms of service prohibiting discrimination or harassment or address the issue of hate speech generally.

Instead, these companies have largely attempted to outsource the issue of identifying and dealing with hate propaganda onto their users suggesting that the ability of a user to report a post or video that the company may or may not do anything about washes the company's hands of any further responsibility. Indeed, given US-based interpretations of the First Amendment as permitting virtually uncontrolled hate speech, it may not be surprising that a 2017 expose by the UK Guardian newspaper revealed that Facebook not only would not address the problem of Holocaust denial on its platform generally, it would ignore domestic law making such content illegal in the countries where Facebook operates unless there was a serious threat of prosecution.⁵

In general, without action on the part of the federal government or the Canadian Human Rights Commission to address the problem of online hate, social media companies will continue to take what amounts to a hands off approach or intervention only in specific instances where the cost of inaction is too high from a public relations standpoint. I say this with confidence stemming from extensive reporting of hate activity to Facebook/Twitter/Youtube with limited long-term impact at best.

FACT PATTERN

Case Headline — *A Toronto man is accused of advocating genocide and promoting hate online through Twitter, Facebook, and emails.*

THE ACCUSED

A former lawyer is accused of advocating genocide and promoting hatred in email and on the internet, including a *Twitter* account and *Facebook* posts.

Deepesh Raman has pleaded not guilty to the charges. The charges stem from a series of hateful social media posts and emails he allegedly sent to public figures and media organizations that call for death to Jews, homosexuals, Westerners and Christians.

Raman's position is that he did not commit any of the alleged offences. Raman asserts that he did not create the social media accounts, including some under a user with the same name @deepeshraman, and denies putting out any information to the public to incite hatred. The accused argues, in the alternative, that even if he did express such opinions online, they should be considered "*personal opinions*" that are a reaction to news events.

The accused maintains that any written statements attributed to him were private conversations, while the Crown argues they were public statements.

The accused argues that the postings in evidence are simply people having discussions in an open forum, as distasteful and disturbing as that may be. Besides, Raman points out that in Canada people are allowed to express contrary opinions.

Deepesh Raman denies all criminal wrongdoing, including sending any hateful email, or that he was behind the *Twitter* account bearing his name or any other name.

THE CROWN

The Crown prosecutor's position is that the accused, "*can hate people from an identifiable group,*" but the accused's "*comments take a 'great leap' from engaging in political discourse to actively encouraging others to carry out violent acts.*"

In Crown documents, it states that the accused's, "*entire social media footprint is riddled with evidence of his belief that those of Jewish descent and homosexuals should be exterminated, including in Facebook chats. Further, his hard devices — his computer, two USB drives and his cellphone are likewise full of such sentiment.*"

Upon arrest, Raman's cellphone was searched and the police discovered the image of a tiger that was also found on the Twitter page @deepeshraman. The Crown argues that "*the defendant has the same image as the wallpaper on his cellphone.*"

The Crown prosecution has cited several examples of how Deepesh Raman allegedly committed the offence of advocating genocide and promoting hate in tweets, posts, and emails sent to public officials and media outlets.

One 2014 email attributed to Raman contained the suggestion that “*bombs, viruses and cyberwarfare*” are the “*best punishment*” to be delivered across America, Britain and Canada. Besides, it is argued by Crown that Raman sent the email to “*several individuals in power nationally and internationally who would have the practical ability to execute a campaign of genocide.*” Another email sent to a Toronto MP called for bombs and viruses to be used against “*rotten, defective, genetic garbage called Jews and homosexuals.*”

The Crown also referenced an email sent Oct. 22, 2014, the day Cpl. Nathan Cirillo was shot and killed while standing guard at the National War Memorial on Parliament Hill in Ottawa. The assailant, Michael Zehaf-Bibeau, also attacked the Parliament, where he died in a shootout. Bibeau indicated his actions for “*Iraq.*” The Crown alleges that Raman titled his email “*Great news from Ottawa.*”

On Twitter in January 2015, a user named @deepeshraman — tweeted: “*The more Jews/Zionists & their Western allies are hurt, killed, the better. Death to Americans, British, Canadians and Jews.*” Another tweet said: “*Many more Jews to Be Exterminated Along with Useless Christians.*” The Crown prosecutor characterizes such examples as, “*clear, concise calls to action.*” The Twitter account in his name had a handful of followers. But the Supreme Court of Canada has noted the danger of posting information and opinion openly online. Besides, the Crown asserts that “*there are many who could access that information. Further ... the statements were made, not in the context of a private communication but rather, in the context of a Twitter account, accessible by many users.*” Finally, the Crown submits evidence of a tweet posted on Jan. 28, 2015, that stated, “*time for Hezbollah to exterminate each and every man, woman and child from that illegal state called Israel.*”

The use of the internet to spew vitriol and to fear-monger by men charged with violent crimes has been the subject of much attention recently. The U.S. man accused of shooting 11 Jews to death in a synagogue, the U.S. man who attempted to bomb critics of the U.S. President, the Australian man responsible for the recent New Zealand massacres, and the Canadian man who carried out the Québec City massacre all reportedly vented online before allegedly committing their crimes.

The Crown also alleges that over nine years Raman has sent hateful emails under an alias. The Crown alleges that “*Mr. Raman used these emails to send diatribes of his own, long-held hateful beliefs to members of identifiable groups, members of government, media outlets and others knowing that their transmission was illegal and would cause discord*” and, “*thus, he could disseminate his views, and blame another for their dissemination.*”

The Crown cites several examples: In July 2014, the Liberal Party of Canada reported receiving threatening emails containing hateful messages and imagery signed by this alias. The prosecution alleges Raman wrote and sent the messages, which he denies.

Finally, there is no evidence Raman carried out any violent acts beyond promoting what the Crown prosecution has called, “*his hateful views to the world.*” The Crown acknowledged that “*although there were threats of violence, there were no instances of actual physical violence*” concerning the alleged actions by the accused.

Crown Witness # 1 — Police Detective A. Seeker

Detective A. Seeker a 10-year veteran of the Toronto Police Cyber Crimes Unit (TPCCU) connected the dots between a *Facebook* page that the TPCCU had been monitoring, which had been posting praise for various anti-Semitic organizations and actions, and a series of tweets that were sent in January 2015.

A year earlier, Detective Seeker had fielded several complaints from the downtown *Toronto Liberal Party of Canada* campaign office to the TPCCU about angry racist messages with a threatening tone from a “*DRBIGKITTY*” and a “*CAT DR*” sent to the campaign manager and the candidate. The Detective also had dealt with complaints about several hateful messages sent to a Toronto MP. These messages called for bombs and viruses to be used against “*rotten, defective, genetic garbage called Jews and homosexuals.*” and were sent from “*dr angry*” but used VPN software that made the origin untraceable at the time.

In 2015, Detective Seeker had started tracking tweets by “*@deepeshraman*” following another online hate crime investigation the TPCCU was conducting into a J. Kumar who maintained an active *Facebook* and *Twitter* presence including following “*@deepeshraman*” on *Twitter*. The Detective was able to identify several emails between J. Kumar and Raman that were full of hateful messages and discussed the same things as in other emails sent by Raman to other parties. Detective Seeker was able to confirm this connection to other emails sent to other parties by Mr. Raman later in the investigation.

Detective Seeker was struck by an image of a tiger sitting between a stylized D and a stylized R that was included on both the *Facebook* page and in the tweets from “*@deepeshraman*”. Detective Seeker was able to identify only one Deepesh Raman in the Toronto area through a quick online search of the name, identifying a Deepesh Raman as living in a Bay Street condo. During Detective Seeker’s investigation into J. Kumar, this address was confirmed in older emails between Kumar and Raman that were recovered from J. Kumar’s computer. A search of the *Ontario Land Registry* confirmed the condo’s sole owner as Deepesh Raman.

Following a tweet by Raman on January 27 and then another on January 28, 2015, Detective Seeker was able to secure a warrant from a judge to search Mr. Raman’s condo and arrest him. Acting on the warrant, Detective Seeker proceeded to the condo where he informed the concierge he was on official police business and gained access to the building. When he knocked on the door, Mr. Raman answered. The detective was able to see a computer and two USB drives on the dining table as he entered the apartment. He arrested Raman who came quietly, without resisting arrest but refused to answer any of Detective Seeker’s questions after consulting his defence attorney by phone as he was being arrested. Detective Seeker seized Raman’s cell phone as he placed Raman into a squad car to be driven back to 52 Division for holding and questioning. He noted that the cellphone wallpaper was a tiger set between a stylized D and R.

Detective Seeker returned to Mr. Raman’s Bay Street condo and entered after being admitted by the concierge once he explained the situation and produced the search warrant. Detective Seeker then searched Mr. Raman’s condo and seized a computer that had a screensaver of a rotating image of a tiger sitting between a stylized D and R. A forensic digital search revealed that Raman had sent the email messages to the Liberal Party of Canada. The Detective also found the message to the MP. In Detective Seeker’s opinion, the most egregious email was entitled “*Great News from Ottawa*” and sent October 22, 2014, the day Cpl. Nathan Cirillo was shot and killed in Ottawa.

FACT SHEET

Crown Witness # 2 — Crown Informant J. Kumar

J. Kumar was arrested by Detective Seeker following an extensive 2-year investigation into an online hate forum called “*DESTROY THE INFIDELS*”.

J. Kumar actively participated in this online, members-only forum focused on Holocaust denial, anti-Israel sentiment, anti-semitism, anti-Christian, anti-Western, and anti-homosexual hate. J. Kumar was charged under the *CCC* with 2 counts s. 319(1) *Public Incitement of Hatred* and with 2 counts s. 319(2) *Wilful Promotion of Hatred* after a meeting of several of the forum members at a community centre and a second meeting at a Toronto Public Library where he and several group members accessed the forum using TPL computers.

In exchange for testifying against Mr. Raman, the Crown has agreed to reduce J. Kumar’s charges to 1 count under s. 319(2) on summary conviction.

J. Kumar will testify that he has known Mr. Raman for about 10 years and that for the last 5 years they have been acquaintances who started to develop a tighter relationship through this online forum. Years of emails and forum posts between himself and Mr. Raman contained similar content as the email Mr. Raman sent to a Toronto MP as well as the various tweets authored by @deepeshraman. J. Kumar will testify that Mr. Raman actively promoted and instigated hatred toward the groups who were the target of their online communications. J. Kumar will also testify that the content of Mr. Raman’s emails, *Facebook* posts, and tweets, all directly and publicly prompted and provoked others, like J. Kumar himself, to act toward and/or call for the destruction of Jews, homosexuals, Westerners, and Christians. He will also testify that Mr. Raman had bragged about emailing the Liberal Party of Canada to “*encourage those tree hugging idiots to tighten up their immigration policies and take a stronger stance against any Canadian involvement with Israel or legal rights enjoyed by homosexuals*”. After Liberal Party of Canada volunteers hung up on Mr. Raman twice in one day back in 2014, J. Kumar will testify to Mr. Raman’s email rants and his stated intention to scare political parties into paying attention to his calls to action through strongly worded emails full of hateful and genocidal language. J. Kumar recalls the content of the emails in question and a conversation he had with Mr. Raman at a coffee shop about their purpose.

J. Kumar will testify that in various forums he had known Mr. Raman to use at least two or three different online aliases when he wanted to openly advocate and promote genocide and/or hate crimes and that each alias contained the initials D and R, and that one had contained the words BIGKITTY.

FACT SHEET

Defence Witness # 1 — Deepesh Raman

Mr. Raman maintains that he did not send the emails outlined in the fact pattern and/or the Crown witness fact sheets. He argues that freedom of expression is a key democratic value and fundamental freedom, as is privacy, particularly privacy of personal communication between individuals regardless if this is online or offline.

Mr. Raman's position is that he did not commit any of the alleged offences. Mr. Raman asserts that he did not create the social media accounts, including some under a user with the name *@deepeshraman*, and denies putting out any information to the public inciting or promoting hatred or intending to directly advocate genocide.

The accused argues, in the alternative, that even if he did express such opinions online, they should be considered "*personal opinions*" that may have been reckless reactions to news events. The accused maintains that any written statements attributed to him were private conversations. The accused argues that the online postings in Crown evidence are simply people having discussions in an open forum, as distasteful and disturbing as that may be to others, he may have been offensive, but that is not the same as intending to promote the extreme form of hate necessary to trigger s. 319 offences. In addition, Mr. Raman points out that in Canada people can express contrary opinions. Mr. Raman argues he did not actively support or instigate hatred, rather only encouraged like-minded people to voice their own opinions already held. Mr. Raman argues that new forms of Internet-based communication amount to changed circumstances justifying reconsideration of the *Keegstra* precedent limiting free speech.

Mr. Raman denies all criminal wrongdoing, including sending any emails or posting online any comments intended to incite hate, wilfully promote hate, or advocate genocide. Mr. Raman denies that he was behind the *Twitter* account bearing his name or any other name.

Mr. Raman is also angry at what he feels is a betrayal by his friend J. Kumar for testifying against him in order to save himself.

When government actors are allowed to decide which opinions can be expressed and which cannot, an open, vibrant and diverse society quickly breaks down. This now includes online expression. Similarly, when our court system is used to silence those with unpopular views or those who oppose powerful actors, we all lose the opportunity to hear all sides of an issue and come to our own conclusions. Freedom of expression is the right to speak, but also the right to hear. Informed political debate requires that this right be strongly protected, and it is only through free expression that individuals can take action to ensure that our governing institutions, private companies, and individual citizens are held accountable.

It isn't always easy to speak up for free expression. It is often those with unpopular or radical views that are silenced or have their freedom of expression threatened. However, freedom of expression is so core to our democracy that we must stand up to defend the rights of individuals whose opinions we abhor. Think about the Voltairian concept of free speech, "*I disapprove of what you say, but will defend to the death your right to say it.*" This must also include online content and discourse. I argue for the repeal of hate speech and obscenity laws because they are vague, may catch too much speech, may chill free expression and lead to self-censorship, may create hate speech martyrs, and may ultimately backfire by elevating the hate speech to a level unattainable but for the criminalization. This is especially the case with online expression.

We must work to make sure that our courts are not used by those with power and wealth to silence the views of those with less resources or unpopular or offensive views. The right to protest is also closely linked to the value we place on freedom of expression, both online and offline.

Social media platforms provide unprecedented opportunities for citizens, political candidates, activists, and civil society groups to communicate, but they also pose new challenges for democracy. One key challenge is the rise of controversial or offensive speech online. The wrong response by government to this type of speech can undermine democratic participation and debate. I believe that having the government intervene would lead to more problems. Policing hate speech online should be left to private entities like *Facebook* and *Twitter* to better enforce their own terms of use and service. As the service providers they need to do more, not police or the courts. Ideally from a pro-free speech perspective, social media companies—much like private universities—would aspire to the *Canadian Charter of Rights and Freedoms*, and at a minimum not discriminate against political speech based on viewpoint and content.

The Internet has become a powerful tool for expression. It gives individuals the potential to send messages worldwide, and opens up new avenues for debate and dialogue. The Internet does not respect national boundaries; attempts to regulate content online, by governments or individuals, are fraught with challenges where the costs of restricting online expression far outweigh its benefits. The widespread adoption of online media has empowered individuals to develop new forms of expression, reach new audiences and quickly disseminate information around the world. From emails and blogs, to *YouTube* and *Twitter*, new digital technologies are enabling people who otherwise might not have been heard to express themselves and engage in far-flung conversations that were once near impossible.

I believe that the Internet is a vital part of a modern democracy and a commitment to free expression is essential. The anonymity that the Internet can provide can also allow marginalized or traditionally silenced groups and individuals a chance to be heard. The legal regulation of the Internet is a modern challenge and we must ensure freedom of expression and personal privacy are preserved as this area continues to develop. I thoroughly support the *Keegstra* dissenting opinion's caution about the negative impacts of the over-criminalization of speech. The Canadian government's attempts to address online criminal activity have sometimes threatened free expression, anonymity and personal privacy, with efforts to engage in surveillance or monitoring of the internet posing a significant threat to individual freedoms and a rise in self-censorship.

Upon arrest, Raman's cellphone was searched and the police discovered this image of a tiger that was also found on the Twitter page @deepeshraman.



Criminal Code (R.S.C., 1985, c. C-46)

CHARGES

2014 emails — 1 Count of Wilful Promotion of Hatred and 1 Count of Advocating Genocide

2015 Twitter posts — 1 Count of Wilful Promotion of Hatred and 1 Count of Advocating Genocide

Alias emails — 1 Count of Wilful Promotion of Hatred

APPLICABLE LAW

Advocating genocide

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.

Definition of genocide

(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.

Definition of identifiable group

(4) In this section, **identifiable** group means any section of the public distinguished by colour, race, religion, national or ethnic origin, age, sex, sexual orientation, gender identity or expression, or mental or physical disability.

Wilful promotion of hatred

319 (2) Every one who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of

- (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or
- (b) an offence punishable on summary conviction.

Defences

(3) No person shall be convicted of an offence under subsection (2)

- (a) if he establishes that the statements communicated were true;

- (b) if, in good faith, the person expressed or attempted to establish by an argument an opinion on a religious subject or an opinion based on a belief in a religious text;
- (c) if the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true; or
- (d) if, in good faith, he intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred toward an identifiable group in Canada.

Definitions

(7) In this section,

communicating includes communicating by telephone, broadcasting or other audible or visible means;

identifiable group has the same meaning as in section 318;

public place includes any place to which the public have access as of right or by invitation, express or implied;

statements includes words spoken or written or recorded electronically or electro-magnetically or otherwise, and gestures, signs or other visible representations.

or public wrong from another person whom he *believes*, on *reasonable grounds*, to be obliged to remedy that wrong or grievance. This section requires that the person who publishes the defamatory matter believes that this material is true, that it is relevant to the remedy being sought, and that it does not exceed what is reasonably sufficient in the circumstances.

PROVING PUBLICATION BY ORDER OF LEGISLATURE / Directing verdict / Certificate of order.

316. (1) An accused who is alleged to have published a defamatory libel may, at any stage of the proceedings, adduce evidence to prove that the matter that is alleged to be defamatory was contained in a paper published by order or under the authority of the Senate or House of Commons or a legislature of a province.

(2) Where at any stage in proceedings referred to in subsection (1) the court, judge, justice or provincial court judge is satisfied that the matter alleged to be defamatory was contained in a paper published by order or under the authority of the Senate or House of Commons or a legislature of a province, he shall direct a verdict of not guilty to be entered and shall discharge the accused.

(3) For the purposes of this section, a certificate under the hand of the Speaker or clerk of the Senate or House of Commons or a legislature of a province to the effect that the matter that is alleged to be defamatory was contained in a paper published by order or under the authority of the Senate, House of Commons or legislature of a province, as the case may be, is conclusive evidence thereof. R.S., c. C-34, s. 280.

CROSS-REFERENCES

Defamatory libel is defined in s. 298 and see cross-references under that section concerning related offences, special procedural provisions and other defences or excuses. This section relates back to the defence set out in s. 307.

SYNOPSIS

This section provides a means by which a person, charged under s. 300, may prove that the matter alleged to be defamatory, was contained in a paper published by order or under the authority of the Senate or House of Commons or provincial legislature. (See s. 306(b).) The accused may raise s. 306(b) at any stage of the proceedings and, if the court is satisfied that the section applies, he shall direct a verdict of not guilty and discharge the accused. A certificate of the Speaker or clerk of the Senate, House of Commons or provincial legislature, to the effect that the matter alleged to be defamatory was contained in a paper published by order or under the authority of any of the bodies specified in s. 306(b), is conclusive evidence of facts contained in that certificate.

Verdicts

VERDICTS IN CASES OF DEFAMATORY LIBEL.

317. Where, on the trial of an indictment for publishing a defamatory libel, a plea of not guilty is pleaded, the jury that is sworn to try the issue may give a general verdict of guilty or not guilty on the whole matter put in issue on the indictment, and shall not be required or directed by the judge to find the defendant guilty merely on proof of publication by the defendant of the alleged defamatory libel, and of the sense ascribed thereto in the indictment, but the judge may, in his discretion, give a direction or opinion to the jury on the matter in issue as in other criminal proceedings, and the jury may, on the issue, find a special verdict. R.S., c. C-34, s. 281.

CROSS-REFERENCES

Defamatory libel is defined in s. 298 and see cross-references under that section concerning related offences, special procedural provisions and other defences or excuses. Note however, in particular, that the plea of justification in cases of defamatory libel is dealt with in ss. 311, 607(2), 611 and 612. Under s. 612(3), where the accused is convicted, the court may consider, in pronouncing sentence, whether the offence was aggravated or mitigated by the plea. Section 584(1) provides that no count for publishing a defamatory libel is insufficient by reason only that it does not set out the words that are alleged to be libellous. However, under s. 587(1)(e), particulars may be ordered further describing any writing or words that are the subject of the charge. Under s. 584(2), a count for publishing a libel may charge that the published matter was written in a sense that, by innuendo, made the publication thereof criminal and may specify that sense without any introductory assertion to show how the matter was written in that sense. Under s. 584(3), it is sufficient to prove that the matter was libellous, with or without innuendo.

SYNOPSIS

This section describes the kinds of verdicts that may flow from the trial on an indictment for publishing a defamatory libel. When the accused pleads not guilty to such an indictment, the jury may give a general verdict of guilty or not guilty on the whole matter. The judge is not empowered to direct the jury to find the accused guilty merely on the basis of proof of publication of the defamatory libel. The jury may, if the judge has exercised his discretion to give an opinion or direction to the jury on the matter in issue, find a special verdict.

Hate Propaganda

ADVOCATING GENOCIDE / Definition of "genocide" / Consent / Definition of "identifiable group".

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.

(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.

(3) No proceeding for an offence under this section shall be instituted without the consent of the Attorney General.

(4) In this section, "identifiable group" means any section of the public distinguished by colour, race, religion, national or ethnic origin, age, sex, sexual orientation, gender identity or expression, or mental or physical disability. R.S., c. 11 (1st Supp.), s. 1; 2004, c. 14, s. 1; 2014, c. 31, s. 12; 2017, c. 13, s. 3.

CROSS-REFERENCES

"Attorney General" is defined in s. 2. Section 583(h) provides that a count in an indictment is not insufficient by reason only that it does not state that the required consent has been obtained. [As to notes concerning sufficiency of consent, see s. 583.]

The accused may elect his mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515, although the accused is eligible for release by the officer in charge under s. 498.

This offence may be the basis for an application for an authorization to intercept private communications by reason of s. 183.

Procedure for an *in rem* proceeding against hate propaganda, which includes material advocating genocide, is set out in s. 320. The offences in relation to inciting hatred and hate

propaganda are set out in s. 319. The offence of publishing false news is in s. 181. The offence of defamatory libel is dealt with in ss. 297 to 317.

SYNOPSIS

This section describes the offence of advocating or promoting genocide. 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, in whole or in part. An identifiable group is defined as any section of the public distinguished by colour, race, religion, national or ethnic origin, age, sex, sexual orientation, or mental or physical disability. The offence is indictable, and may be prosecuted only with the consent of an Attorney General and is punishable by imprisonment not exceeding five years.

ANNOTATIONS

In *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 100, 197 C.C.C. (3d) 233, 30 C.R. (6th) 39, the Supreme Court of Canada held that this provision does not require proof that genocide had in fact occurred. The act of incitement has to be direct and public. The guilty mind required is an intent to directly prompt or provoke another to commit genocide. In this case, the applicant's public speech contained a deliberate call for the murder of Tutsis, which was sufficient to make a finding that he had attempted to incite citizens to act against one another. This finding and the fact that the applicant was aware of ethnic massacres that were taking place was sufficient to make out the necessary *mens rea*.

PUBLIC INCITEMENT OF HATRED / Wilful promotion of hatred / Défences / Forfeiture / Exemption from seizure of communication facilities / Consent / Definitions / "communicating" / "identifiable group" / "public place" / "statements".

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 guilty of

- (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or
- (b) an offence punishable on summary conviction.

(2) Every one who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of

- (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or
- (b) an offence punishable on summary conviction.

(3) No person shall be convicted of an offence under subsection (2)

- (a) if he establishes that the statements communicated were true;
- (b) if, in good faith, the person expressed or attempted to establish by an argument an opinion on a religious subject or an opinion based on a belief in a religious text;
- (c) if the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true; or
- (d) if, in good faith, he intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred toward an identifiable group in Canada.

(4) Where a person is convicted of an offence under section 318 or subsection (1) or (2) of this section, anything by means of or in relation to which the offence was committed, on such conviction, may, in addition to any other punishment imposed, be ordered by the presiding provincial court judge or judge to be forfeited to Her Majesty in right of

the province in which that person is convicted, for disposal as the Attorney General may direct.

(5) Subsections 199(6) and (7) apply with such modifications as the circumstances require to section 318 or subsection (1) or (2) of this section.

(6) No proceeding for an offence under subsection (2) shall be instituted without the consent of the Attorney General.

(7) In this section,

"communicating" includes communicating by telephone, broadcasting or other audible or visible means;

"identifiable group" has the same meaning as in section 318;

"public place" includes any place to which the public have access as of right or by invitation, express or implied;

"statements" includes words spoken or written or recorded electronically or electromagnetically or otherwise, and gestures, signs or other visible representations. R.S., c. 11 (1st Supp.), s. 1; 2004, c. 14, s. 2.

CROSS-REFERENCES

"Attorney General" is defined in s. 2. Section 583(h) provides that a count in an indictment is not insufficient by reason only that it does not state that the required consent has been obtained. [As to notes concerning sufficiency of consent, see s. 583.]

Where the prosecution elects to proceed by indictment on either of these offences then the accused may elect his mode of trial pursuant to s. 536(2). Where the prosecution elects to proceed by way of summary conviction then the trial of this offence is conducted by a summary conviction court pursuant to Part XXVII. The punishment for the offence is then as set out in s. 787 and the limitation period is set out in s. 786(2). In either case, release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498.

Procedure for an *in rem* proceeding against hate propaganda is set out in s. 320. The offence of advocating genocide is in s. 318. The offence of publishing false news is in s. 181. The offence of defamatory libel is dealt with in ss. 297 to 317.

SYNOPSIS

This section creates two offences involving the inciting or promoting of hatred against an identifiable group.

In subsec. (1), the offence is committed if such hatred is incited by the communication, in a public place, of words likely to lead to a breach of the peace.

In subsec. (2) the offence is committed only by the *wilful* promotion of hatred against an identifiable group through the communication of statements other than in private conversation.

Subsection (3) creates defences to the offence where it is established that the statements are true, that they amount to the 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 respect to a matter of public interest and to the public good, or that they are published in a good faith effort to identify hate engendering matters in order to have them removed. The wording seems to place the onus of establishing only the first of these four defences on the accused.

Both offences created in this section may be prosecuted by indictment or summarily, and are punishable, on indictment, to a term of imprisonment not exceeding two years. The offence in subsec. (2) may only be prosecuted with the consent of an Attorney General.

Subsections (4) and (5) specify that where a person is convicted of offences under this section or s. 318, the means of communication by which the offence is committed may be

forfeited to the Crown, with the exception of communication facilities and equipment as described in s. 199(6) and (7).

Subsection (7) defines "communicating" to include audible or visible means, defines "identifiable group" as in s. 318, defines "public place" to include places in which the public has access by right or by express or implied invitation, and defines "statement" to include spoken, written or recorded words, and gestures, signs, or other visible representation.

ANNOTATIONS

Subsections (1) and (2) – "Wilful" in this subsection means with the intention of promoting hatred and does not include recklessness. The offence would therefore be made out only if the accused had as their conscious purpose the promotion of hatred against the identifiable group or if they foresaw that the promotion of hatred against that group was certain or morally certain to result and communicated the statements as a means of achieving some other purpose: *R. v. Buzzanga and Durocher* (1979), 49 C.C.C. (2d) 369 (Ont. C.A.).

This definition of the term "wilful" was approved by the Supreme Court of Canada in *R. v. Keegstra*, [1990] 3 S.C.R. 397, 61 C.C.C. (3d) 1. In that case, the court also considered the meaning to be attached to the other elements of the offence. The term "promotes" indicates active support or instigation. The term "hatred" connotes emotion of an intense and extreme nature that is clearly associated with vilification and detestation. It is 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.

"Promotes" means actively supports or instigates and requires more than mere encouragement. "Hatred" connotes emotions of an intense and extreme nature that is clearly associated with vilification and detestation. Only the most intense forms of dislike fall within the ambit of this offence. This offence does not require proof that the communication caused actual hatred. In determining whether the communication expressed hatred, the court must look at the understanding of a reasonable person in context. Although this requires the trier of fact to engage in a subjective interpretation of the communicated message to determine whether "hatred" was what the speaker intended to promote, it is insufficient that the message be offensive or that the trier of fact dislike the statements. The analysis must focus on the speech's audience and on its social and historical context. The speech is to be considered objectively having regard to the circumstances in which the speech was given, the manner and tone used and the persons to whom the message was addressed. In considering the *mens rea*, subsec. (1) requires something less than the intentional promotion of hatred while subsec. (2) requires the accused to have had, as a conscious purpose, the promotion of hatred against the identifiable group, or foresight that the promotion of hatred against that group was certain to result and nevertheless communicated the statements. In many instances, the *mens rea* will flow from the establishment of the elements of the criminal act of the offence: *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 100, 197 C.C.C. (3d) 233.

It constitutes misdirection to instruct the jury that if they found that the accused in his actions was aware that there was a danger that his conduct would cause the promotion of hatred against an identifiable group and knowing this he chose to persist in his conduct then the jury could make a finding of wilfulness. At most, the jury should be instructed that they may consider the risks known to the accused: *R. v. Keegstra* (1991), 63 C.C.C. (3d) 110 (Alta. C.A.).

"Willfully" includes willful blindness: *R. v. Harding* (2001), 40 C.R. (5th) 119 (Ont. S.C.J.), affd 160 C.C.C. (3d) 225 (Ont. C.A.), leave to appeal to S.C.C. refused [2003] 3 S.C.R. viii, 167 C.C.C. (3d) vi.

Although this subsection infringes freedom of expression, as guaranteed by s. 2(b) of the Charter, it constitutes a reasonable limit on that right and is therefore valid legislation: *R. v. Keegstra*, *supra*.

New forms of Internet-based communication do not amount to changed circumstances justifying reconsideration of *Keegstra*, *supra*. This provision remains constitutional: *R. v. Topham* (2017), 345 C.C.C. (3d) 542 (B.C.S.C.).

In *R. v. Krymowski*, [2005] 1 S.C.R. 101, 193 C.C.C. (3d) 129, the Crown particularized the identifiable group as being "Roma". The evidence showed that the accused referred to "gypsies" as the object of their hatred. To make out the offence, however, there was no need to prove any interchangeability between the specific hateful terms employed and the name by which the target group was identified in the information. The relevant questions to be asked were whether the Crown had proved beyond a reasonable doubt that the accused made some or all of the statements alleged in the information and whether the statements made, as a matter of fact, promoted hatred of the Roma. Moreover, dictionary definitions presented to the trial judge showed that "gypsy" can refer to an ethnic group properly known as "Roma", "Rom", or "Romany". The trial judge could therefore have taken judicial notice of that fact and then considered it, together with the rest of the evidence, to determine whether there was proof beyond a reasonable doubt that the accused did in fact intend to target Roma.

Subsection (3)(a) – Reversing the burden of proof to the defence that the statements were true as provided for in this paragraph while infringing the guarantee to the presumption of innocence in s. 11(d) of the Charter is a reasonable limit and therefore valid: *R. v. Keegstra*, *supra*. See also *R. v. Keegstra*, [1996] 1 S.C.R. 458, 105 C.C.C. (3d) 19.

Subsection (3)(d) – It would seem that this defence was simply provided out of an abundance of caution since it would be rare that a person could successfully invoke this exemption where it was shown that he wilfully promoted hatred: *R. v. Buzzanga and Durocher*, *supra*.

WARRANT OF SEIZURE / Summons to occupier / Owner and author may appear / Order of forfeiture / Disposal of matter / Appeal / Consent / Definitions / "court" / "genocide" / "hate propaganda" / "judge".

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

(2) Within seven days of the issue of the warrant under subsection (1), the judge shall issue a summons to the occupier of the premises requiring him to appear before the court and show cause why the matter seized should not be forfeited to Her Majesty.

(3) The owner and the author of the matter seized under subsection (1) and alleged to be hate propaganda may appear and be represented in the proceedings in order to oppose the making of an order for the forfeiture of the matter.

(4) If the court is satisfied that the publication referred to in subsection (1) is hate propaganda, it shall make an order declaring the matter forfeited to Her Majesty in right of the province in which the proceedings take place, for disposal as the Attorney General may direct.

(5) If the court is not satisfied that the publication referred to in subsection (1) is hate propaganda, it shall order that the matter be restored to the person from whom it was seized forthwith after the time for final appeal has expired.

(6) An appeal lies from an order made under subsection (4) or (5) by any person who appeared in the proceedings

(a) on any ground of appeal that involves a question of law alone,

(b) on any ground of appeal that involves a question of fact alone, or

(c) on any ground of appeal that involves a question of mixed law and fact,

as if it were an appeal against conviction or against a judgment or verdict of acquittal, as the case may be, on a question of law alone under Part XXI, and sections 673 to 696 apply with such modifications as the circumstances require.

(7) No proceeding under this section shall be instituted without the consent of the Attorney General.

(8) In this section,

"court" means

- (a) in the Province of Quebec, the Court of Quebec,
- (a.1) in the Province of Ontario, the Superior Court of Justice,
- (b) in the Provinces of New Brunswick, Manitoba, Saskatchewan and Alberta, the Court of Queen's Bench,
- (c) in the Province of Newfoundland and Labrador, the Supreme Court, Trial Division,
- (c.1) [Repealed. 1992, c. 51, s. 36.]
- (d) in the Provinces of Nova Scotia, British Columbia and Prince Edward Island, in Yukon and in the Northwest Territories, the Supreme Court, and
- (e) in Nunavut, the Nunavut Court of Justice;

"genocide" has the same meaning as in section 318;

"hate propaganda" means any writing, sign or visible representation that advocates or promotes genocide or the communication of which by any person would constitute an offence under section 319;

"judge" means a judge of a court. R.S., c. 11 (1st Supp.), s. 1; 1974-75, c. 48, s. 25; 1978-79, c. 11, s. 10; R.S.C. 1985, c. 27 (2nd Supp.), s. 10; c. 40 (4th Supp.), s. 2; 1990, c. 16, s. 4; 1990, c. 17, s. 11; 1992, c. 1, s. 58; 1993, c. 28, Sch. III, s. 31 (repealed 1999, c. 3, s. 12); 1998, c. 30, s. 14(d); 1999, c. 3, ss. 12, 29; 2002, c. 7, s. 142; 2015, c. 3, s. 49.

CROSS-REFERENCES

The procedure in this section resembles the *in rem* procedure for obscene publications in s. 164 and thus see notes under that section respecting procedure. The procedure for obtaining a normal search warrant to obtain evidence of commission of an offence is set out in ss. 487 and 487.1. The procedure for shutting down a hate-propaganda site on the internet is set out in s. 320.1.

SYNOPSIS

This section authorizes a judge of a court as defined in subsec. (8), with the consent of an Attorney General, to issue a warrant to seize copies of any publication where *reasonable grounds exist for believing* that the subject publication is hate propaganda and that copies are kept for sale or distribution in premises located within the court's jurisdiction. Hate propaganda means writings, signs or representations that advocate or promote genocide or which would constitute the incitement or promotion of hatred against an identifiable group contrary to s. 319. Subsection (2) requires the judge to issue a summons to the occupier of the premises that have been searched within seven days of the issuance of the warrant, requiring him to show cause why the seized copies should not be forfeited. The owner and author of the publication may appear and oppose forfeiture. Subsections (4) to (6) describe the procedure for forfeiture, restoration and appeal.

ANNOTATIONS

A warrant may be issued under the general search warrant provision, s. 487, although the investigation relates to hate literature offences: *R. v. Keegstra* (1984), 19 C.C.C. (3d) 254 (Alta. Q.B.), rev'd on other grounds 43 C.C.C. (3d) 150 (C.A.).

WARRANT OF SEIZURE / Notice to person who posted the material / Person who posted the material may appear / Non-appearance / Order / Destruction of copy / Return of material / Other provisions to apply / When order takes effect.

320.1 (1) If a judge is satisfied by information on oath that there are reasonable grounds to believe that there is material that is hate propaganda within the meaning of subsection 320(8) or computer data within the meaning of subsection 342.1(2) that makes hate propaganda available, that is stored on and made available to the public through a computer system within the meaning of subsection 342.1(2) that is within the jurisdiction of the court, the judge may order the custodian of the computer system to

- (a) give an electronic copy of the material to the court;
- (b) ensure that the material is no longer stored on and made available through the computer system; and
- (c) provide the information necessary to identify and locate the person who posted the material.

(2) Within a reasonable time after receiving the information referred to in paragraph (1)(c), the judge shall cause notice to be given to the person who posted the material, giving that person the opportunity to appear and be represented before the court and show cause why the material should not be deleted. If the person cannot be identified or located or does not reside in Canada, the judge may order the custodian of the computer system to post the text of the notice at the location where the material was previously stored and made available, until the time set for the appearance.

(3) The person who posted the material may appear and be represented in the proceedings in order to oppose the making of an order under subsection (5).

(4) If the person who posted the material does not appear for the proceedings, the court may proceed *ex parte* to hear and determine the proceedings in the absence of the person as fully and effectually as if the person had appeared.

(5) If the court is satisfied, on a balance of probabilities, that the material is available to the public and is hate propaganda within the meaning of subsection 320(8) or computer data within the meaning of subsection 342.1(2) that makes hate propaganda available, it may order the custodian of the computer system to delete the material.

(6) When the court makes the order for the deletion of the material, it may order the destruction of the electronic copy in the court's possession.

(7) If the court is not satisfied that the material is available to the public and is hate propaganda within the meaning of subsection 320(8) or computer data within the meaning of subsection 342.1(2) that makes hate propaganda available, the court shall order that the electronic copy be returned to the custodian and terminate the order under paragraph (1)(b).

(8) Subsections 320(6) to (8) apply, with any modifications that the circumstances require, to this section.

(9) No order made under subsections (5) to (7) takes effect until the time for final appeal has expired. 2001, c. 41, s. 10; 2014, c. 31, s. 13.

CROSS-REFERENCES

"Judge" and "court" are defined in s. 320(8). No proceedings under this section shall be instituted without consent of the Attorney General in view of the combined operation of subsec. (8) and s. 320(7). Appeal rights are governed by s. 320(6).

SYNOPSIS

This section provides a procedure for shutting down sites on the Internet that contain material falling within the definition of hate propaganda. The procedure commences with an order made by a judge (defined in s. 320(8)) upon the judge being satisfied by information on oath

of the matters set out in subsec. (1). Proceedings under this section cannot be instituted, however, without the consent of the Attorney General, in view of the combined operation of subsec. (8) and s. 320(7). Under the order, the custodian of the computer system must give an electronic copy to the court, ensure that the material is no longer stored on and made available through the computer system and provide information to identify and locate the person who posted the material. The judge must then cause notice to be given to the person who posted the material in accordance with subsec. (2). The person is then given an opportunity to show cause why the material should not be deleted from the computer system. If the person does not appear, the court may proceed *ex parte*. If the court is satisfied that the material is available to the public and is hate propaganda or data that makes hate propaganda available, the court may order the custodian of the computer system to delete the material (subsec. (5)) and destroy the electronic copy (subsec. (6)). If the court is not so satisfied, the electronic copy of the material is returned to the custodian and the order under subsec. (1) is terminated (subsec. (7)). Appeal rights are as provided for in s. 320. No order made under subsec. (5) to (7) takes effect until the time for final appeal has expired.

ANNOTATIONS

See *Citron v. Zundel* (2002), 41 C.H.R.R. D/274, a case concerning the Internet decided under s. 13 of the *Canadian Human Rights Act*, which proscribes telephonic communication of hate messages as a discriminatory practice if there is repeated communication of "any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination."

direct vs circumstantial / credibility & relevance

testimony exhibits
real evidence
documents/photos
models/demonstrations

F

+

E

=

Trial
Theory
(Story)

raise
doubt
B.R.D

Law

Accepted | Disputed

Build Fact
Ladder

AR + MR = offence

Simultaneous
&
Voluntary

CAH Direct Witness Cross Witness

ROLE PREPARATION FOR CROWN AND DEFENCE LAWYERS

As a **defence lawyer** you represent the accused.

As a **crown attorney** you represent the government and the public.

During the trial, lawyers for both sides give:

- Opening and closing statements;
- Direct examination of your own witnesses; and
- Cross-examinations of the other side's witnesses.

The crown will make its opening statement and call its witnesses first. The defence goes next with its opening statement and witnesses.

The defence gives its closing arguments first. The crown goes second.

PREPARATION:
LAWYERS

HOW TO PREPARE AN OPENING STATEMENT:

- Become familiar with your witnesses' fact sheets.
- Select which facts should be included in the opening statement. Include the central facts to your case that are not likely to be challenged by the other side.
- Stick to facts. The facts are what will paint the picture for the judge.
- Check with the lawyer writing the closing arguments for your side, to make sure that both the opening and closing arguments are very similar, and cover the same facts.
- When giving the opening arguments, try to speak in short, clear sentences. Be brief and to the point.
- Have notes handy to refresh your memory.
- Remember that the opening statement is very brief but gives an overview of your case.

HOW TO PREPARE FOR DIRECT EXAMINATION:

- Write down all the things that your side is trying to prove.
- Read the witness' testimony carefully, several times over.
- Make a list of all the facts in the witness' testimony that help your case.
- Put a star beside the most important facts that you must make sure that your witness talks about. For example an important fact for the Crown might be if your witness saw the actual crime take place.
- Create questions to ask the witness that will help the witness tell a story:
- Start with questions that will let the witness tell the court who s/he is ("What is your name? What do you do? How long have you worked in that job?")
- Move to the events in question ("What were you doing on the night in question? Where were you? When did you first hear there was a problem?")
- Move to more specific questions ("What did you see? What did you do after that happened?")
- Remember not to ask leading questions.
- When your witness is on the stand, do not be afraid to ask a question twice, using different words, if you do not get the answer you were expecting.

HOW TO PREPARE FOR CROSS-EXAMINATION:

- Make a list of all the facts in the witness' testimony that hurt your case.
- If there are a lot of facts that don't help your case, can you find a way to challenge the witness' credibility? For example can you show that the witness made a mistake or has a reason for not telling the truth?
- Put a star beside the facts you must make the witness talk about.
- Write short leading questions that move towards the key points you want to make.
- Depending on what the witnesses' say you might need to come up with different questions on the spot during the trial.

HOW TO PREPARE CLOSING STATEMENTS:

- Write down your key arguments and summarize the important facts you want to stick in the judge and jury's mind.
- When delivering the closing arguments, try to speak in short, clear sentences. Be brief and to the point.
- Only summarize evidence that actually was given at trial. This may mean you have to re-write your closing arguments on the spot during the trial.
- Where a witness for the other side admitted something important to your case, point that out. For example: "The witness says she identified Mr. Smith as the man who broke into the car. However, she admitted that she was standing three blocks away from the car when she made the identification. She admitted that it was dark out. There is a real doubt that the witness actually could have identified anyone, let alone someone she had never met before, in the circumstances."
- Check with the lawyer writing the opening statements for your side, to make sure that both the opening and closing statements are very similar, and cover the same facts.



OBJECTIONS

Your script should attempt to incorporate some of the more routine characteristics of a typical criminal trial, for example, legal objections. An objection is a protest raised by counsel concerning the legal propriety of (i) a question posed by opposing counsel to the witness on the stand; or (ii) the conduct of opposing counsel during his/her examination. The following is a list of some of the most common objections heard during criminal trials in Canada.

- a. **Badgering the witness** - refusing to allow the witness to respond or behaving rudely toward the witness
 - b. **Calls for an opinion/conclusion** - question asks the witness for his/her opinion or conclusion, as opposed to his/her knowledge or information of material issues before the court - only qualified expert witnesses may provide their professional opinions or draw conclusions while on the stand
 - c. **Compound question** - two or more questions asked simultaneously by counsel
 - d. **Hearsay** - out-of-court statement uttered by someone other than the witness on the stand and presented by the witness in order to support the truth of the statement asserted; hearsay is generally inadmissible at trial; in general, witnesses may not testify about something they were told by another, with several exceptions (e.g., criminal confessions, dying declarations, excited utterances, official business documents, statements against interest, etc.)
 - e. **Irrelevant/Immaterial question** - the question posed by counsel does not possess any probative value, meaning the question does not relate to any material issue before the court; the judge may request an "offer of proof" demanding counsel explain the relevance of the question; even where relevance exists, counsel's question may be disallowed if the prejudicial effect (unfairness) of a witness's response outweighs the response's probative value
 - f. **Lack of competence** - the witness does not possess the necessary expertise or training to properly respond to the question posed by counsel; in other words, the witness is not a qualified expert in the field
 - g. **Leading the witness** - counsel conducting direct examination of a witness may not ask leading questions; only counsel conducting cross examination may ask leading questions
 - h. **Non-responsive witness** - raised by counsel questioning a witness and objecting to the lack of adequate response from the witness; the judge may direct the witness to answer the question
 - i. **Calls for speculation** - question asks the witness to speculate or estimate (guess) in the absence of certainty
 - j. **Vagueness** - question posed by counsel is vague and unclear & therefore difficult to respond to
 - k. **Privileged information** - the question calls for the witness to provide privileged or confidential (legally protected) information such as communications between solicitor and client, husband and wife, physician and patient, clergy and penitent, etc.
 - l. **Repetition** - questions posed by counsel are repetitive and are simply being used to badger the witness
 - m. **Character evidence** - question designed to elicit testimony that impugns/maligns (damages) the general character of another witness or the accused - evidence of poor character of another witness or the accused may only be introduced to rebut suggestion by opposing counsel of good character of that same witness or the accused
 - n. **Oath helping/self-serving testimony** - question designed to elicit testimony that merely bolsters (enhances) the credibility of another (oath helping) or oneself (self-serving)
 - o. **Lack of foundation** - physical exhibit or witness testimony introduced at trial while uncertainty still exists as to its authenticity, source or relevance
- Following counsel's announcement of the objection, the judge will either rule in favour of the objection ("**sustained**") or against the objection ("**overruled**"). A question that the judge has ruled to be improper ("**sustained**") is usually "**withdrawn**" by counsel who posed the question.
- p. **Inconsistent Statement**

Law Culminating Rubric – Pre-Trial & Trial

<p>Role as Prosecution or Defence Counsel at <u>Trial</u></p> <p><u>Overall Expectations</u></p> <ul style="list-style-type: none"> • explain the major concepts, principles, and purposes of law. • evaluate the effectiveness of laws in resolving conflicts. • explain the factors that make framing, interpreting, and enforcing law a complex and difficult process. • analyse the conflicts between minority and majority rights and responsibilities in a democratic society, and examine the methods available to resolve these conflicts. • compare the competing concepts of justice as they apply to justice systems. • use appropriate research methods to gather, organize, evaluate, and synthesize information and apply it to the process of legal interpretation and analysis. <p>/70 Marks</p>	<p>A Level 4 Demonstrates the following:</p> <p>Demonstrates thorough knowledge and understanding of effective advocacy skills, case materials, and role as counsel.</p> <p>Demonstrates a high degree of critical analysis, interpretation and original thought in planning a trial theory and strategy.</p> <p>Makes a clear and crisp opening / closing argument that outlines the prosecution's / defence's theory, key evidence and facts, and connection to the relevant law at trial.</p> <p>Questions witness on direct / cross examination using proper questions and trial procedure that demonstrates careful preparation. Connects witness testimony to facts / evidence / exhibits needed to prove case.</p> <p>Effective and accurate objections made.</p> <p>Uses critical listening skills, such as, identifying main ideas and supporting details, note making, assessing validity of arguments and conclusions, making inferences, evaluating implicit and explicit ideas, detecting assumptions, omissions and biases with a high degree of effectiveness.</p> <p>Excellent grasp of oral communication skills (e.g., refers to notes without script reading, correct pronunciation, grammar and sentence structure; use of persuasive language and rhetorical devices; voice projection; gestures; body language; timing / pacing).</p> <p>Demonstrates professional demeanour and active participation in role-play throughout all trial parts.</p> <p>Organizes researched ideas and information coherently and transfers knowledge and skills to a new context with a high degree of effectiveness.</p>
<p>Role as Prosecution or Defence Counsel at <u>Discovery</u></p> <p>/10 Marks</p>	<p>A Level 4 Demonstrates the following:</p> <p>Proper preparation and cooperation with co-counsel is highly evident (thoughtful and effective preparation of witness and efficient use of Discovery preparation dates).</p> <p>Executes Discovery with a high degree of skill in a way that is accurate and in agreement with the description provided for preparation (e.g., witness clearly prepared for discovery, co-counsel questions prepared, group produces the discovery transcript the class following the 20 minute discovery).</p> <p>High familiarity with case details and able to ask/answer questions and/or participate at the Discovery in character.</p> <p>Keeps questions / responses within the scope of the case in a way that demonstrates a strong sense of a trial strategy.</p> <p>Use of objections throughout the discovery.</p>

Law Culminating Rubric – Book of Arguments

<p>Prosecution or Defence Counsel</p> <p><u>Book of Arguments Contents</u></p> <ol style="list-style-type: none"> 1. <i>Case Citation</i> 2. <i>Fact T-Chart & Fact Ladder</i> 3. <i>Opening Statement</i> 4. <i>Direct Examination</i> (include a transcript of (a) your actual witness questions, (b) the anticipated response, and (c) the purpose of each question) 5. <i>Cross Examination</i> (include a transcript of (a) your actual witness questions, (b) the anticipated response, and (c) the purpose of each question) 6. <i>Closing Arguments</i> 7. <i>Exhibits / Evidence</i> (used at trial) 8. <i>Works Cited & Works Consulted</i> <p>/20 Marks</p>	<p>A Level 4 Demonstrates the following:</p> <p>Demonstrates thorough knowledge and understanding of effective advocacy skills, case materials, and role as counsel in creating the book of arguments.</p> <p>Demonstrates a high degree of critical analysis, interpretation and original thought in writing a persuasive trial theory and designing questions that effectively support that theory.</p> <p>A clear and crisp written opening and closing argument that outlines the prosecution's / defence's theory, key evidence and facts, and connection to the relevant law at trial.</p> <p>Direct and cross-examination transcript adopts proper question sequence and trial procedure that demonstrates careful preparation. Connects witness testimony to facts / evidence needed to prove case (transcript includes question sequences and the purpose and anticipated response of each question asked).</p> <p>Uses critical writing skills, such as, identifying facts in dispute and supporting details, assessing validity of arguments and conclusions, making inferences, evaluating implicit and explicit ideas, detecting assumptions, omissions and biases with a high degree of effectiveness.</p> <p>Excellent grasp of written communication skills (e.g., correct grammar and sentence structure; adoption of proper book format; use of persuasive language and rhetorical devices; etc.).</p> <p>Demonstrates professionalism and authenticity in the product created, including the preparation of exhibits / physical evidence.</p> <p>Organizes ideas and information coherently and transfers knowledge and skills to a new context with a high degree of effectiveness.</p>
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Culminating Deadlines

Deadlines		
Discovery Date and Transcript		
Book of Arguments (ALL TRIALS)		
Trial Performance		