TECHNOLOGICALLY-FACILITATED VIOLENCE:
HATE PROPOGANDA CASE LAW

A. OFFENCE ELEMENTS

Hate Propaganda

Public incitement of hatred

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.

Willful promotion of hatred

(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.

Forfeiture Confiscation

(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.

Exemption from seizure of communication facilities

(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.

Consent

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

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.

B. SELECTED CASE LAW

I. ALBERTA

i. 2006 ABPC 360

In **2006 ABPC 360**, which was a preliminary hearing, Sgt. C, a police hate crime investigator, had been monitoring a publicly available white supremacist website. Postings on that website led Sgt. C to Mr. B's website, a white supremacist website for Canadians in western Canada. Mr. B's website was publicly available, was not password protected and contained various pages containing articles, downloads, links, and a forum. Sgt. C had the technological crime's unit make a copy of the sections of the website that were publicly available. Using that information Sgt. C applied for and obtained a search warrant and seized two of Mr. B's computer towers. The hard drives of these towers contained information linking Mr. B to the Canadian white supremacist website as an administrator and participant in the forum.

Mr. B argued that the police had breached the Criminal Code by intercepting private communications from Mr. B's computer when they searched the hide drives of the towers. The court held that the emails that were not published on the website were private communications, but the public postings of emails and other content on the public sections of the website were not intended to be private. Further, the court held that the evidence the police obtained from the warrant were copies of the emails saved in file folders on the computer by Mr. B and the police had not intercepted the communication contemporaneously, thus not breaching the Criminal Code.

In determining jurisdiction, the court found the physical location of the server that stores a websites data is not determinative of jurisdiction (the server was located in the United States in this case), but that Canadian courts have jurisdiction where there is a real and substantial link

between the offence and this country. Evidence showed that Mr. B used the computers in Canada to access the website, communicate with other users, and monitor and upload content.

The court held that there was sufficient evidence that could meet the provisions of hate propaganda: communication that willfully (intentionally posted the information) promoted hatred against an identifiable group (Jewish people, homosexuals, Black people) and communication not in a private conversation (on a publicly available website targeting other Canadians that was accessed by others). The court looked at four sections of the website: the articles section, the links, downloads, and the forum section and held that there was sufficient evidence that could support a reasonable inference that Mr. B was willfully promoting hatred and to commit him to stand trial.

II. BRITISH COLUMBIA

i. 2017 BCSC 551

In **2017 BCSC 551**, Mr. T, a 70-year-old man, was convicted of two counts of willfully promoting hatred. He had brought a constitutional challenge but the court dismissed that application in **2017 BCSC 259**. Mr. T hosted a website with anti-Semitic content. He agreed to take down the website following the conviction but did not renounce his views or express remorse for publishing the content. The fact that Mr. T had no previous criminal conviction, had contributed to the community, including working with youth and running for political office, and was not a member of a white supremacist or other racist group was taken into consideration during sentencing as mitigating factors. Aggravating factors included the use of the internet to spread his views, which provides a wider audience, the considered and deliberate actions of Mr. T, and his lack of remorse for his action. He was sentenced to a six-month conditional sentence served in the community plus two years of probation, was ordered to remove his website permanently from the internet, and was prohibited from posting anything on the internet for the duration of the conditional

sentence, and was prohibited from posting anything about Jewish people for the duration of his probation.

Also see: 2008 BCSC 215; 2008 BCSC 216.

ii. 2008 BCSC 215

In **2008 BCSC 215** and **2008 BCSC 216**, Mr. N was convicted of willfully promoting hatred against Black people, Jewish people, and homosexuals on a website he controlled and maintained, and on forums of other websites extolling similar views. He unsuccessfully argued that British Columbia courts did not have jurisdiction because the data of the website was contained on servers in the United States, that the content of his website was simply humour, and that this was a case of malicious prosecution. The website had Mr. N's personal contact information listed as the registrant of the website and contained a photo of Mr. N and a description saying the website was "for expressing [his] views, and for linking to the sites of likeminded individuals." The website was publicly available and did not have any privacy protections that would limit who could view the content. Mr. N was sentenced to four months incarceration and three years of probation. He was prohibited from accessing the internet, having internet services in his residence, attending establishments who primarily offer internet services or possessing a device that can access the internet during his probation and was ordered to forfeit the computer equipment used in the course of the offence.

Also see: 2017 BCSC 259 (s. 2b Charter challenge); 2016 BCSC 1895 (admissibility of expert evidence); 2015 BCSC 1185 (constitutional validity of Criminal Code s. 319(2)); 2014 BCPC 69 (Application To amend bail conditions) [2002] 57 WCB (2d) 234 (BCPC).

iii. [2002] 57 WCB (2d) 234 (BCPC)

In **[2002] 57 WCB (2d) 234 (BCPC)**, Mr. N pleaded guilty to willfully promoting hatred against Jewish, Asian, Black, non-white and persons of mixed race or ethnic origin. Mr. N was a member of the KKK and Knight Rider and the New Order of Knights, in which he had a leadership role and recruited new members. He engaged in extensive private and public communications using the internet to communicate with other members that contained offensive and repugnant content. He was convicted of willfully promoting hatred on the material that was published publicly on bulletin boards and webpages. He was sentenced to a one-year conditional sentence and one year of probation, as well as a prohibition from using any device capable of accessing the internet and being in contact with white supremacist organizations during his custodial sentence and probation. He had previously been sentenced to a nine-month custodial sentence for weapons offences in which his role in white supremacist groups was considered an aggravating factor in the sentencing of that case, which factored into the decision to order a conditional sentence rather than a custodial one in this case.

III. ONTARIO

i. 2017 ONCJ 565

In **2017 ONCJ 565**, a 17-year-old youth offender, Mr. G pleaded guilty to inciting hatred, mischief, uttering threats, possession of weapons dangerous to public peace and failing to comply with his youth sentence for spray painting hateful messages on six different places of worship, including the home of a female religious leader. His messages targeted Christians, Jewish, Muslim and Black people. When he was arrested, he was on probation for a previous weapons related offence and the police found several weapons in Mr. G's possession. Mr. G had gained his views by reading content on the internet, and used the internet to plan his attack, and identify and locate the targeted religious buildings. He also had a YouTube account and other social media accounts that contained hateful messages and symbolism. His attacks had a significant impact on both the

individuals who attended those places of worship and the larger community. One person stated, "the graffiti brings back all the horror and trauma I lived through [during the Holocaust]." Another wrote, "I felt anger, discomfort and a momentary loss of belonging to my own home. I was thinking how this message was damaging to the community sense of belonging and insulting to my religion." At the time of his arrest Mr. G had a strong identification with white supremacy, including having visible tattoos with racist symbolism on his body, maintaining irrational racist beliefs, and having no desire to seek counselling or other supports. The court dismissed the Crown's application to sentence Mr. G as an adult in part because of the progress he had made while in youth detention such as attending counselling and engaging in educational and work programs.

In the sentencing decision, **[2017] OJ No 7024**, the court stated Mr. G's actions were "so counter to the shared values of this community that it creates fear and anger, not only in those targeted, but in the community as a whole. The actions were intended by [Mr. G], apparently, to get others to share in his hatred, but they achieved the opposite effect. It brought the community together in outrage."[1] Mr. G was sentenced to one year custodial sentence, one month of which to be served under community supervision, and a two year probation order with ancillary orders including a curfew, an order to attend counselling, a forfeiture of the weapons and spray paint used in the offence, a firearms prohibition, a DNA order, no contact orders with certain individuals, prohibition from being near the buildings he defaced or other mosques or synagogues, a weapons prohibition, a prohibition from accessing the internet without consent to provide all devices and passwords to the police, a prohibition from accessing websites where the predominant theme is anti-Muslim, anti-Semitic, racist, or the promotion of white supremacy,

[1] At para 11.

and an order to write an essay on one Muslim, one Jewish and one Black Canadian. The judge in this case noted that Mr. G had gained his views solely from the internet and as such that the internet restrictions were necessary.

iv. [2006] 72 WCB (2d) 128 (ONCA)

In **[2006] 72 WCB (2d) 128 (ONCA)**, the Court of Appeal restored the trial level acquittal of Mr. E who had been selling CD's that promoted hatred against specific groups at a bar that was hosting an event for white supremacists. There was no evidence that he had actually sold a CD to anyone. The original charge of the willful promotion of hatred focused on the content of the lyrics on the CD's and in the lyric sheets, which the defence conceded contained hateful speech. The Court held that there was no evidence that would prove beyond a reasonable doubt that Mr. E transmitted the statements in the music and in the lyric sheets to another person. The Crown raised the argument that the content of the covers of the CDs also promoted hatred for the first time on appeal. The judge at the Superior Court of Justice had mistakenly thought that the defence had also conceded that the CD covers promoted hatred against the identifiable groups and set aside the acquittal and ordered a new trial. At the Court of Appeal, the court concluded that the trial judge could not have convicted the appellant because there was not sufficient evidence to support he had communicated the statements contained in the CD or the lyrics sheets to another person, which was the focus of the original conviction.

Also see: [2006] SCCA No 456 (Application for leave to appeal); [2006] 72 WCB (2d) 128 (ONCA) (appeal); [2005] 66 WCB (2d) 9 (ONCJ) (appeal); [2004] OJ No 5889 (trial).

v. [2001] 52 WCB (2d) 128 (ONCA)

In **[2001] 52 WCB (2d) 128 (ONCA),** Mr. H, a self-described Christian pastor, was convicted with willfully promoting hatred against Muslims in relation to pamphlets that he wrote and

distributed, as well as a telephone messages he created and invited people to listen to. He admitted to creating the pamphlets and recording the telephone message, which contained distorted and hateful content against Muslims. Mr. H unsuccessfully argued that his speech was a good faith legitimate expression of his religious beliefs, and that the content was in the public interest. The court held that although the pamphlets contained some legitimate religious beliefs, the content went beyond just expressing religious beliefs and stated that religious beliefs could not be used as shield to protect the willful promotion of hatred simply because some of the content contained sincerely held religious beliefs; and it was not in the public interest and Mr. H's subjective belief that it was in the public interest was not sufficient to meet the defense.

Mr. H claimed not to see what he proselytized as promoting hatred, despite the strong reactions he received against his literature and messages. The issue of whether willful blindness was sufficient to meet the mens rea requirement for the offence was raised by the defence. The court held it was and dismissed Mr. H's appeal.

Also see: [2006] SCCA No 456 (Application for leave to appeal); [2006] 72 WCB (2d) 128 (ONCA) (appeal); [2005] 66 WCB (2d) 9 (ONCJ) (appeal); [2004] OJ No 5889 (trial).

IV. Quebec

i. 2016 QCCQ 6762

In **2016 QCCQ 6762**, Mr. R was charged with inciting hatred against an identifiable group and uttering threats to cause death or bodily harms to ethnic groups for comments he made against Muslims on a Facebook discussion forum, including comments about killing Muslims. Mr. R claimed he had not understood his statements and had copied them from elsewhere. However, the judge dismissed this claim and examined the speech objectively in the circumstances and found that Mr. R repeatedly and persistently made his violent and racist statements, which were

clearly against Muslims, and convicted him of the offence. He was acquitted of uttering death threat because the court could not conclude beyond a reasonable doubt that the accused intended to intimidate or arouse fear, stating, "His comments tend to insinuate and persistently share a perception characterized by detestation, but they do not reflect a wish to sow fear and intimidate."[2]

vi. 2013 QCCQ 4285

In **2013 QCCQ 4285**, Mr. C, a 27-year-old previous criminal offender and admitted leader within the Montreal branch of the KKK, was found guilty of spreading hate propaganda through comments made on Youtube. From his online account, he subscribed to Youtube accounts which negatively portrayed people who were Jewish, Muslim, gay and lesbian, or of color. His Youtube account was shut down due to the violent nature of his comments, which included hateful comments and photos of Hitler and Nazi insignia. His home was decorated with Nazi and white supremacist propaganda. Mr. C claimed his comments were made in bad taste but not intended to spread hate. However, the court found his comments, especially considering their repetitive nature, to be made out of contempt and with the intent to spread hatred as opposed to being the product of healthy, public discussion. He was found guilty of hate propaganda and sentenced to 11 months incarceration.

Also see: 2013 QCCQ 4286 (Trial).

vii. 2007 QCCQ 384

[2] 2007 QCCQ 384 at para 70.

In **2007 QCCQ 384**, Mr. P, 27-year-old man, was operating a white supremacist website for just under a year that promoted the hatred of Black and Jewish people. The police were alerted to Mr. P when he downloaded music with hate speech. Upon searching his residence, Mr. P admitted to being the administrator of the site with the hate propaganda. The website contained language and symbolism common among white supremacist. The website provided access to a novel that is banned by Canada Customs for its hateful content, information on historic leaders of extreme rightist groups, homophobic content, violent and degrading imagery, and games involving killing Black people. He did not believe that most of the content was harming society in any way.

He pleaded guilty to hate propaganda during the trial, but did not express remorse. At sentencing the court noted: "The channel through which he disseminated his message, the Internet, can do extensive damage as it is able to reach a large audience, probably including members of the groups targeted by his remarks. Apart from the large number of times a song was downloaded, however, there are no figures to measure the number of persons reached more specifically. This factor should therefore be taken into consideration, but its gravity has been mitigated."[3] He was sentenced to six months' incarceration, three years' probation, and orders to not have contact with people who express racism or hatred, a prohibition from possessing or using devices to communicate over the internet, and a firearm ban.

V. Saskatchewan

viii. 2011 SKPC 47

[3] 2011 SKPC 47 at para 51.

2011 SKPC 47 was a preliminary inquiry to determine if there was sufficient evidence for Mr. T to stand trial. Mr. T had published material on two websites, including video and audio recordings. He admitted that he was the person who posted particular statements on a white supremacist website and that he was also the webmaster of another white supremacist website. The judge in this case held that posting material on the internet may constitute communication to the public and noted that there was evidence that Mr. T engaged with others online when communicating the impugned material. The content posted on the websites was capable of promoting hatred towards Jewish people. Mr. T was committed to stand trial on the charge of willfully promoting hatred against and identifiable group.