

**Hate Motivation as an Aggravating Factor on Sentence:
An Overview of the Legal Landscape**

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In 1995, Parliament enacted Bill C-41, which came into force September 2006. The Bill amended the sentencing provisions of the *Criminal Code* by enumerating specific aggravating and mitigating factors to be considered by a judge imposing sentence. Pursuant to those amendments, sentencing judges are required under section 718.2(a)(i) to consider “evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation or any similar factor” as an aggravating circumstance.

Section 718.2(a)(i) was introduced in response to a reported upsurge in offences motivated by enmity towards racial and religious minorities and other vulnerable groups in Canada.¹ The section reflects Parliament’s recognition of the serious nature of hate-motivated offences,² and codifies the common law principle that such offences must be denounced through the imposition of harsher penalties.

While hate motivation is now firmly established as an aggravating factor on sentence, identifying and sentencing hate-motivated offences remains a challenging exercise. The cases that have addressed the sentencing of hate-motivated offences afford some useful guidance in this regard. This paper provides a brief overview of the law in relation to the sentencing of hate-motivated offences, followed by a chart summarizing the reported cases in which hate motivation has been established as an aggravating factor.

(1) Hate Motivation as an Aggravating Factor: Basic Principles

The Crown bears the onus of proving the existence of any aggravating circumstance beyond a reasonable doubt.³ As such, before a sentencing judge can apply section 718.2(a)(i), he or she must be satisfied on the criminal standard of proof that the offence was motivated by hate, prejudice or bias against an enumerated or analogous group. In assessing whether this aggravating factor has been established, there are several points to bear in mind.

¹ Hon. Allan Rock, *House of Commons Debates (Hansard)*. 40th Parl., 2nd Sess (June 15, 1995) at 36th Parl., 2nd Sess. at 13923 – 13925.

²In this paper, I use “hate-motivated offences” and “hate crimes” to refer to offences motivated by bias, prejudice or hate. Except where otherwise indicated, these terms should be read interchangeably.

³*R. v. Gardiner* [1982] 2 S.C.R. 368; section 724(3)(e) of the *Criminal Code*.

First, the offender’s motivation need not rise to the level of “hate”. “Bias” or “prejudice” will also suffice. This distinction may be significant, given that the Supreme Court has set an extremely high threshold for a finding of “hatred” as it relates to section 319(2) of the *Criminal Code*.⁴ In the sentencing context, an offence motivated by lesser forms of intolerance will still amount to an aggravating circumstance under section 718.2(a)(i).

Second, section 718.2(a)(i) creates a relatively broad class of potential victims, particularly when compared to the hate propaganda sections of *Criminal Code*. Under section 318(4) of the *Code*, hate propaganda offences must be directed against, “any section of the public distinguished by colour, race, religion or ethnic origin or sexual orientation.” Section 718.2(a)(i) contains these same categories, but also includes language, sex, age, mental or physical disability, and any “similar” group to which the section does not specifically refer. Thus far, section 718.2(a)(i) has only been applied in cases involving hate motivation based on race/nationality,⁵ sexual orientation,⁶ religion,⁷ and sex.⁸ There do not appear to be any cases in which an offence has been aggravated by hate, bias or prejudice based on something other than the factors specifically listed in section 718.2(a)(i).⁹

Third, there must be a direct relationship between an offender’s hatred, bias or prejudice against an identifiable group and the commission of the offence at issue. Where an offender’s prejudice, bias or hatred is incidental to the commission of the offence and causally unrelated to

⁴ *R. v. Keegstra*, [1990] 3 S.C.R. 697 per Dickson C.J. at para. 116; *R. v. Andrews* (1988), 65 O.R. (2d) 161 per Cory J.A. (as he then was) at p. 179, *aff’d* [1990] 3 S.C.R. 870.

⁵ See, e.g., *R. v. Bradley*, 2009 ONCA 175; *R. v. D.S.K.*, [2005] S.J. No. 97 (C.A.); *R. v. Lankin*, [2005] B.C.J. No. 10 (Prov. Ct.); *R. v. J.R.B.*, [2004] N.J. No. 101 (Prov. Ct.); *R. v. Van-Brunt*, [2003] B.C.J. No. 3226 (Prov. Ct.); *R. v. Nash*, [2002] O.J. No. 3843 (Ct. Jus.); *R. v. Vrdoljak et al.*, [2002] O.J. No. 1332 (Ct. Jus.); *R. v. Sockalingam*, [2001] O.J. No. 5999 (Ct. Jus.); *R. v. Upson*, [2000] N.S.J. No. 361 (Prov. Ct.); *R. v. Miloszewski et al.*, [1999] B.C.J. No. 2710 (Prov. Ct.); *R. v. Burdi*, [1997] O.J. No. 554 (C.A.); *R. v. Gabara*, [1997] B.C.J. No. 3090 (Prov. Ct.)

⁶ See, e.g., *R. v. Amr*, [2006] A.J. No. 92 (Prov. Ct.); *R. v. J.V.*, [2006] O.J. No. 2392 (Sup. Ct.); *R. v. M.D.J.*, [2001] B.C.J. No. 2110 (Prov. Ct.); *R. v. Demelo*, [1999] O.J. No. 3952 (Prov. Div.); *R. v. Howald*, [1998] O.J. No. 3121 (Gen. Div.)

⁷ See, e.g., *R. v. Gholamrezazdehshirazi*, [2008] A.J. No. 726 (Prov. Ct.); *R. v. Sandouga*, [2002] A.J. No. 1042 (C.A.); *R. v. Soles*, [1998] O.J. No. 5061 (Ct. Jus.)

⁸ *R. v. Lefebvre*, [1998] A.Q. no 985 (C.C.Q.)

⁹ In *R. v. Kulak*, [2001] B.C.J. No. 448 (Prov. Ct.), the Crown unsuccessfully argued for the application of section 718.2(a)(i) in the sentencing of five loggers who pleaded guilty to mischief and assault against a group of environmental protestors. The sentencing judge, without considering whether membership in an environmental group could constitute a “similar factor” under section 718.2(a)(i), rejected the Crown’s suggestion that the offence was motivated by hatred against members of the environmental group to which the victims belonged.

the targeting of the victim, his or her discriminatory beliefs are not to be weighed in aggravation of sentence. *R. v. Baxter*¹⁰ provides an example of this principle. In that case, the offender was arguing with his girlfriend when the victims, both visible minorities, intervened. Baxter proceeded to assault the two victims while directing racial epithets at them. The judge found that, although racism was a feature of the offence, the assault was not motivated by bias or prejudice; rather, the offender, who was drunk and suffered from a personality disorder, simply “lost control.”¹¹

However, an offence need not be exclusively motivated by hate, bias or prejudice before it can be treated as a hate crime for sentencing purposes. While *R. v. Baxter* suggests that hate must be the “predominant feature” of the offence,¹² the bulk of the authorities supports the view that offences motivated “in part” by hate, bias or prejudice will trigger the applicability of section 718.2(a)(i).¹³

Finally, an individual who *knowingly participates* in a hate crime will likely be sentenced as a hate-motivated offender, even if he or she was not personally motivated by hatred. In *R. v.*

¹⁰ *R. v. Baxter*, [1997] O.J. No. 5811 (Prov. Div.)

¹¹ For further examples of cases where sentencing judges have declined to apply section 718.2(a)(i), on the basis that the offender’s hate, bias or prejudice was unrelated or incidental to the commission of the offence, see:

- *R. v. Wright*, [2002] A.J. No. 892 (C.A.): The appellant robbed and severely beat a taxi driver, rendering him mentally and physically disabled. Upon his arrest, Wright made a racist comment about persons of the victim’s ethnicity. The Alberta Court of Appeal held that the sentencing judge erred in its fining that the slur amounted to an aggravating factor. The offender’s derogatory remarks were made hours after the robbery and there was no basis to believe that his racist views motivated the commission of the offence.
- *R. v. Arsenault*, [2000] O.J. No. 2179 (Ct. Jus.): The offender was convicted of assault and threatening death. Arsenault was intoxicated when he attacked the victim. The offence was unprovoked. In the course of the assault, Arsenault addressed the victim using anti-gay slurs. The judge declined to find that the offence was motivated by hatred, stating that “the words used were just one part of the whole incident, but not the motivating factor.”
- *R. v. Bates*, [2009] A.J. No. 696 (Q.B.): The offender pled guilty to a manslaughter that occurred in the course of an armed robbery. The victim of the robbery was killed when the firearm carried by Bates’ co-accused accidentally discharged. In a subsequent conversation with an undercover police officer, Bates referred to the victim as “just another Paki.” The sentencing judge found that, “Notwithstanding the racial or ethnic slur uttered by Bates [...] I do not find that this is evidence that the offence was motivated by prejudice.”

¹² *R. v. Baxter*, *supra* note 10 at para. 18.

¹³ See, e.g., *R. v. Vrdoljak et al* [2002] O.J. No. 1332 (Ct. Jus.) at para. 6; *R. v. Van-Brunt*, [2003] B.C.J. No. 3226 (Prov. Ct. at para. 47; *R. v. J.V.*, [2006] O.J. No. 2392 (Sup. Ct.) at para. 50; *R. v. Demelo*, [1999] O.J. No. 3952 (Prov. Div.) at paras. 5, 14; *R. v. Howald*, [1998] O.J. No. 3121 (Gen. Div.) at para. 3.

D.S.K.,¹⁴ a Caucasian victim was beaten and stabbed by *D.S.K.* and four other Aboriginal men. During the assault, one attacker informed the victim that they were members of the “Native Syndicate”, and another stated, “This is what happens to white boys who come into the ‘hood.’” *D.S.K.* pleaded guilty to aggravated assault and was sentenced to two years less a day. The Crown appealed the sentence, arguing, among other things, that the sentencing judge failed to consider the hate-motivated character of the offence. While the Saskatchewan Court of Appeal accepted that *D.S.K.* himself had not been motivated by racial hatred, the Court allowed the appeal and increased *D.S.K.*’s sentence from two to four years imprisonment, stating as follows:

The fact remains [. . .] that [*D.S.K.*] participated with others in an assault in which, to his apparent knowledge, one or more of the others were so motivated. This is of less consequence than if he himself had been motivated to act on this basis. Still, it constitutes an aggravating circumstance, one the trial judge should have taken into account and acted upon.¹⁵

(2) Evidence and Indicia of Hate-Motivated Offences

In some cases, the hate-motivated character of an offence may be apparent from the facts of the offence; in other cases, the motivation for the offence may not be as readily discernible. The following categories of evidence (and the specific examples cited) have all been relied upon by sentencing judges in cases where hate motivation was ultimately found to constitute an aggravating factor.

(i) Statements made by the offender before or during the offence (slurs, references to stereotypes, etc.)

- Offender yelling, “nigger, nigger, you’ve got to die” during attack. (*R. v. Bradley*)
- Offender telling victim to “get the fuck out of Canada.” (*R. v. Gabara*)
- Victim of a gang assault informed, “This is what happens to white boys who come into the ‘hood.’” (*R. v. D.S.K.*)
- Offender addressing victim as “nigger.” (*R. v. J.R.B.*, *R. v. Van-Brunt*)
- Offender calling victim a “French fag.” (*R. v. Amr*)

¹⁴ *R. v. D.S.K.*, [2005] S.J. No. 97 (C.A.)

¹⁵ *Ibid.* at para. 44.

- Offenders yelling, “White Power” while fleeing the scene. (*R. v. Vrdoljak*)
- (ii) Statements made by the offender after the offence (racist denigration of victim, affirmation of hate-based motive for the offence, etc.)
- Anti-gay references to victim’s perceived lesbianism after arrest. (*R. v. J.V.*)
 - After assault, offender telling police, “I hope I killed the fucking faggot.”
 - Offender telling police that Muslims had to worry about him because they had taken away his land and his country. (*R. v. Gholamrezazdehshirazi*)
 - After arrest, offender informing several inmates that he “beat up some freak.”
 - After learning that victim had died, offender expressing pride to friends over “killing a Hindu.” (*R. v. Miloszewski*)
- (iii) Offender’s membership in hate groups or adherence to hate-based ideology (established through offender’s tattoos, clothing, paraphernalia, etc.)
- Offenders had shaved heads, wore combat boots and were self-described skinheads/white supremacists. (*R. v. Miloszewski*)
 - Offenders had shaved heads and white supremacist/neo-Nazi tattoos. A “racist manuscript” was found in the possession of one offender. The significance of the manuscript and the offenders' tattoos was explained through expert testimony. (*R. v. Vrdoljak*).
 - Offender was a member of the Ku Klux Klan. (*R. v. Upson*)
 - The offender was in possession of a photograph of Hitler and cards bearing white-supremacist symbols and slogans. Articles inscribed with swastikas and other Nazi insignia were found in the offender’s home. An expert testified as to the significance of these various items. The offender was also on a mailing list to receive racist publications. (*R. v. Soles*)
 - Expert evidence was called to demonstrate that the offenders were neo-Nazi skinheads. (*R. v. Nash*)
- (iv) The type of property destroyed or vandalized

- 43 gravestones overturned in a Jewish cemetery. (*R. v. Soles*)
 - Firebomb hurled through the window of a Jewish elementary school. (*R. v. El-Merhebi*)
 - Molotov cocktail thrown at a Jewish synagogue. (*R. v. Sandouga*)
- (v) The nature of the graffiti or vandalism
- Building spray-painted with phrases including, “Jews suck”, “Final solution”, “Burn in Hell Jews”, and “Six Million Wasn’t Enough.” (*R. v. Creaghan and Lyle*)
- (vi) The significance of the offence date
- On April 25, 1998, the offender overturned graves and vandalized a building in a Jewish cemetery. An expert witness testified that Hitler’s birthday was April 20, and neo-Nazi activities typically heighten around this date. As well, the expert informed the Court that the year of the incident marked the fiftieth anniversary of the State of Israel and the Warsaw Ghetto Uprising, both of which have been known to rouse anti-Semitic activity. (*R. v. Soles*)
- (vii) The victim’s real or perceived membership in a minority group
- The offender knew the victim was a lesbian. (*R. v. Demelo*)
 - The offender believed that the two victims were involved in a lesbian relationship. (*R. v. J.V.*)
 - The victim was an ethnic minority, and the offenders would have known as much. (*R. v. Miloszewski*)
- (viii) Targeting of the victim to the exclusion of non-minorities
- The only person assaulted was a visible minority; the Caucasian men who intervened were not attacked by the offender. (*R. v. Sockalingam*)
 - The offender chose the only black person on the bus to antagonize. (*R. v. Vrdoljak*)

- The offender attacked the victim, a black man, but ignored his Caucasian friends. (*R. v. Van-Brunt*)
- (ix) Absence of an alternative motive (*R. v. Bradley*, *R. v. Nash*, *R. v. Amr*, *R. v. M.D.J.*, *R. v. Vrdoljak*, *R. v. Van-Brunt*, *R. v. Lefebvre*).

It should be noted that, in cases where hate motivation has been established as an aggravating factor, more than one of the foregoing indicators is usually present. In fact, a number of cases suggest that racial slurs or epithets uttered by the offender may be inadequate to establish the hate-motivated character of an offence, unless there is further evidence of hate motivation (e.g. the offender is a member of a white supremacist organization).¹⁶ That being said, a trial judge might well infer hate motivation based upon the use of derogatory slurs, when those slurs are taken together with the absence of any apparent other motivation for the offence.¹⁷

(3) The Impact of Hate Motivation on the Sentencing Determination

While section 718.2 of the *Code* requires sentencing judges to consider the presence of hate motivation as an aggravating factor, the section says nothing about *how much* this factor should affect the quantum of sentence. The sentencing caselaw provides limited assistance in this respect, since sentencing judges do not typically identify (in concrete terms) the extent to which hate motivation has impacted upon their ultimate disposition.

R. v. Lefebvre,¹⁸ a decision of the Court of Quebec, is the only reported case in which a sentencing judge has quantified the impact of his or her finding that an offence was motivated by hatred. Lefebvre was convicted of sexual assault causing bodily harm and uttering death threats, after he and a friend brutally assaulted a prostitute and then left her abandoned, partially unclothed, by a riverbank. The Court imposed a total sentence of eight years imprisonment, and calculated this sentence as follows: seven years for the sexual assault, two years concurrent for the threatening, and one year to be served consecutively as a result of the finding that the offence

¹⁶ See, e.g., *R. v. Baxter*, *R. v. Arsenault*, *R. v. Wright*, and *R. v. J.B.*, *infra* note 11.

¹⁷ Compare *R. v. Van-Brunt*, *supra* note 5, with *R. v. Wright*, *supra* note 11: In *Van-Brunt*, the offence was found to have been motivated by hatred based on the offender's use of racial slurs and the absence of any alternative motivation. In *Wright*, the Court declined to find that an unprovoked, unexplained attack accompanied by anti-gay slurs was motivated by hatred.

¹⁸ *supra* note 8

was motivated by hatred of women.¹⁹ Lefebvre's sentence was increased by roughly 15 per cent on account of his misogynist motivation.

In a number of other cases, the Crown has successfully appealed the sentence imposed at trial, on the basis that the sentencing judge failed to address hate motivation as an aggravating factor. In each of those cases, summarized below, the disparity between the original sentence and the sentence substituted on appeal is quite substantial, suggesting that significantly harsher penalties should be imposed where there has been a finding of hate motivation. (Note that, apart from *R. v. Sandouga* and *R. v. D.S.K.*, all of the following cases were decided before the enactment of section 718.2(a)(i), and therefore reflect the common law principle that hate motivation serves as an aggravating factor on sentencing.)

- In *R. v. D.S.K.*,²⁰ the Saskatchewan Court of Appeal held that the accused's participation in a group assault which he knew to be racially motivated constituted an aggravating circumstance that should have been considered by the trial judge. The original sentence of two years less one day was increased to four years imprisonment.
- In *R. v. Sandouga*,²¹ the offender pled guilty to arson after throwing a Molotov cocktail at an Edmonton synagogue. He was sentenced to 12-months custody and three years probation. On appeal, the Alberta Court of Appeal found, *inter alia*, that the sentencing judge had not sufficiently considered the hate-motivated character of the offence as an aggravating factor. The Court increased Sandouga's sentence to two and one-half years imprisonment.
- In *R. v. Lelas*,²² the offender was convicted of mischief after he spray-painted anti-Semitic slogans on a Jewish synagogue and car. The Ontario Court of Appeal, citing the racially motivated nature of the offence, increased the sentence from six months to one year imprisonment with two years probation.
- In *R. v. Simms and Swanson*,²³ the offenders were Nazi sympathizers who attacked the victim after learning that he had once aired a radio broadcast exposing a member of the community as a Nazi. The Alberta Court of Appeal found that the hate-motivated character of the assault called for "stern censure", which had not been adequately reflected in the sentences passed at trial. Simms' 60 day sentence was increased to twelve months imprisonment, and Swanson's five month sentence was increased to eighteen months.

¹⁹ *supra* note 8.

²⁰ *supra* note 5.

²¹ *supra* note 7.

²² *R. v. Lelas* (1990), 58 C.C.C. (3d) 568 (O.C.A.)

²³ *R. v. Simms* (1990), 60 C.C.C. (3d) 499 (Alta. C.A.).

- In *R. v. Atkinson et al*,²⁴ the offenders assaulted several gay men in a park, after setting out to beat up “queers” on the evening of the offence. The Ontario Court of Appeal held that the trial judge erred in failing to consider the hate-motivated nature of the offence as an aggravating factor. The sentences were increased from eight months imprisonment plus probation to two years less a day for all three offenders.
- In *Ingram and Grimsdale*,²⁵ the Ontario Court of Appeal allowed the appeal on account of the sentencing judge’s failure to consider the racially-motivated nature of a serious assault. The sentences were increased from 16 months and 21 months imposed on Grimsdale and Ingram, respectively, to two years and two and one-half years.

The appended chart summarizes reported cases in which hate motivation has been found to constitute an aggravating factor, both before and after the enactment of section 718.2(a)(i). While these cases do not quantify the impact of hate motivation on the ultimate sentence imposed, they do provide a useful starting point for identifying the appropriate sentencing range for various forms of hate-motivated offences.

²⁴ *R. v. Atkinson et al*, [1978] 43 C.C.C. (2d) 342 (O.C.A.)

²⁵ *R. v. Ingram and Grimsdale*, [1977] 35 C.C.C. (2d) 376 (O.C.A.)