

# SENTENCING HATE

## An Examination of the Operation and Effect of Section 718.2(a)(i) of the *Criminal Code*

by

Michelle S. Lawrence

Bachelor of Arts, University of Western Ontario, 1994

Bachelor of Laws, University of Victoria, 1998

Master of Law, University of Cambridge, 2002

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# APPROVAL

**Name:** Michelle S. Lawrence  
**Degree:** Master of Arts  
**Title of Thesis:** Sentencing Hate: An Examination of the Operation and Effect of Section 718.2(a)(i) of the *Criminal Code*

**Examining Committee:**

**Chair:** **Professor Neil Boyd**  
Professor of Criminology and  
Graduate Program Director  
Simon Fraser University

---

**Dr. Simon Verdun-Jones**  
Senior Supervisor  
Professor of Criminology  
Simon Fraser University

---

**Professor David MacAlister**  
Supervisor  
Assistant Professor of Criminology  
Simon Fraser University

---

**Madam Justice Anne Rowles**  
External Examiner  
Justice of the Court of Appeal  
Court of Appeal of British Columbia

**Date Defended/Approved:** July 17, 2009



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## **ABSTRACT**

Section 718.2(a)(i) of the *Criminal Code* embodies the values of a society which denounces hate crime. It deems evidence of hate-motivation to be an aggravating factor on sentence. Critics have argued that, although noble in its intent, the mechanics of section 718.2(a)(i) render it unworkable in practice. This study offers findings on the number and nature of offences to which section 718.2(a)(i) has been applied and compares these findings with the number of hate crimes reported by police. It explores the extent to which the differences between these numbers might be attributable to the manner in which section 718.2(a)(i) has been interpreted by the courts. Among the issues considered in this study are the nature of the evidence on which the courts may rely in making a finding of hate-motivation and the degree of hate-motivation necessary to trigger the application of section 718.2(a)(i).

**Keywords:** sentencing; hate crime; hate-motivated offences

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# 1: INTRODUCTION

It is a fundamental principle of Canadian law that an individual cannot be punished for his or her thoughts alone.<sup>1</sup> An individual who engages in criminal conduct will face more severe sanctions, however, if that conduct is the product of thoughts of bias, prejudice or hate. By operation of section 718.2(a)(i) of the *Criminal Code*, “evidence that an offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation or any other similar factor” is deemed an aggravating circumstance for the purpose of sentencing.<sup>2</sup>

Parliament enacted section 718.2(a)(i) of the *Criminal Code* in 1995 with the objective of denouncing and deterring hate crimes.<sup>3</sup> It did so notwithstanding a dearth of information about hate-motivated offences in Canada.<sup>4</sup> Subsequent scholarship has done little to fill the void. This research aims to remedy this shortcoming, at least in part, through a comprehensive and systematic review of Canadian cases in which section 718.2(a)(i) has been either considered or applied by the court on sentencing.

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<sup>1</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982*, ch. 11 (U.K.), s. 2(b). See also *R. v. Lelas* (1990), 58 C.C.C. (3d) 568 (Ont. C.A.).

<sup>2</sup> *Criminal Code*, R.S.C. 1985, c.-C-46, s. 718.2(a)(i).

<sup>3</sup> See *R. v. Mitchell*, 1996 CarswellAlta 1087 (Prov. Ct.).

<sup>4</sup> The terms “hate crime” and “hate-motivated” offences are used interchangeably. They are intended to refer to any offence for which the accused is found to have been motivated by a bias, prejudice or hate within the meaning of section 718.2(a)(i).

Included in this study are statistical data relating to the number and nature of offences to which section 718.2(a)(i) has been applied. The analysis which follows compares this number with the number of hate crimes reported by police and explores the extent to which the differences might be attributable to the manner in which section 718.2(a)(i) has been interpreted by the courts. Among the issues considered herein are the nature of the evidence on which the courts may rely in making a finding of hate-motivation, the degree of hate-motivation necessary to trigger the application of section 718.2(a)(i), the impact on sentence of a finding of hate-motivation, the role of victim impact evidence and the potential utility of offence typology to sentencing courts.

The protracted legal proceedings which arose from the prosecution of David Ahenakew on the charge of wilful promotion of hatred, contrary to section 319(2) of the *Criminal Code*, might understandably have left Canadians with the impression that hate crime legislation is difficult to enforce.<sup>5</sup> The findings of this study suggest that, at least in relation to section 718.2(a)(i) of the *Criminal Code*, Canadians may well have cause for concern.

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<sup>5</sup> This charge arose from statements that the accused made about Jewish people in the course of a speech and media interview in 2002. An acquittal was entered in 2009, after two trials and multiple appellate proceedings. See, *inter alia*, *R. v. Akenahew*, 2009 SKPC 10; [2009] S.J. No. 105 (Prov. Ct.) (QL).

## 2: LEGISLATIVE HISTORY

### 2.1 Enactment of Bill C-41

Section 718.2(a)(i) of the *Criminal Code* was enacted with the passage of *Bill C-41: An Act to amend the Criminal Code (sentencing) and other Acts in consequence thereof* (“Bill C-41”).<sup>6</sup> In a thesis submitted to the Department of Law of Carleton University in 1998, Senaka K. Suriya tracks the legislative history of Bill C-41.<sup>7</sup> It was, she reports, controversial from the outset. By reason of the inclusion of sexual orientation in section 718.2(a)(i), opponents portrayed it as gay rights legislation and characterized it as “immoral”, “unnatural” and “wrong.”<sup>8</sup> So great was the controversy that the governing Liberal Party was unable to secure support for the legislation from all of its members. Four Liberal Members of Parliament voted with the Reform Party, and against their own party, in opposition to Bill C-41.<sup>9</sup> It passed notwithstanding.

Organizations representing communities in Canada affected by hate crime were among the most visible advocates of Bill C-41. They included the B’Nai Brith of Canada, the Canadian Jewish Congress, the Toronto Mayor’s Committee on Community and Race Relations, the Urban Alliance on Race Relations,

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<sup>6</sup> *Canada Bill C-41, An Act to amend the Criminal Code (sentencing) and other Acts in consequence thereof*, 1<sup>st</sup> Sess., 35<sup>th</sup> Parl., 1994, (as passed by the House of Commons 15 June 1995).

<sup>7</sup> Senaka K. Suriya. *Combating Hate?: A Socio-Legal Discussion on the Criminalization of Hate in Canada*. (MA Thesis, Department of Law, Carleton University, 1998) [unpublished].

<sup>8</sup> *Ibid.* at 47-48.

<sup>9</sup> *Ibid.* at 48-49.

Centre de Recherche-Action sur les Relations Raciales, Equality for Gays and Lesbians Everywhere, the Coalition for Lesbian and Gay Rights in Ontario, the 519 Church Street Community Centre and the Ottawa Police Liaison Committee for Lesbian, Gay, Bisexual and Transgender Communities.<sup>10</sup> In light of the tremendous public support offered by these organizations, Bill C-41 came to be seen more broadly as “hate crime” legislation.<sup>11</sup>

In fact, Bill C-41 did not create any new hate crime offences nor alter any of the existing hate crime provisions of the *Criminal Code*. The *Criminal Code* contained, at that time, specific prohibitions against advocating genocide, public incitement of hatred and wilful promotion of hatred. Bill C-41 did not amend these provisions. Rather, it brought about ambitious sentencing reforms, of which section 718.2(a)(i) was one small part. Among the many noteworthy reforms included in Bill C-41, and unrelated to the issue of hate crime *per se*, were the creation of conditional sentencing orders and the recognition of alternative measures regimes.<sup>12</sup>

## **2.2 Purpose and principles of sentencing**

Of significance in relation to this research was the articulation in Bill C-41 of the fundamental purpose and principles of sentencing now embodied in sections 718, 718.1 and 718.2 of the *Criminal Code*. They provide as follows:

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<sup>10</sup> *Ibid.* at 49.

<sup>11</sup> *Ibid.* at 48. See also Mark Carter, “Addressing Discrimination through the Sentencing Process: Criminal Code s. 718.2(a)(i) in Historical and Theoretical Context” (2001) 44 C.L.Q. 339.

<sup>12</sup> *Canada Bill C-41, supra* note 6.

718. The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- (a) to denounce unlawful conduct;
- (b) to deter the offender and other persons from committing offences;
- (c) to separate offenders from society, where necessary;
- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or to the community; and
- (f) to promote a sense of responsibility in offenders, and acknowledgement of the harm done to victims and to the community.

718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

718.2 A court that imposes a sentence shall also take into consideration the following principles:

- (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,
  - (i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation or any other similar factor,

- (ii) evidence that the offender, in committing the offence, abused the offender's spouse or child, or
- (iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim

shall be deemed to be aggravating circumstances;

- (b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
- (c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;
- (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
- (e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

These provisions were enacted in 1995 and brought into force by Order in Council in 1996.<sup>13</sup> Section 718.2 was subsequently amended to include, among the circumstances deemed to be aggravating factors on sentence, evidence that the offender abused a person under the age of eighteen, evidence that the

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<sup>13</sup> Suriya, *supra* note 7 at 46.

offender was acting for the benefit of a criminal organization, and evidence that the offence was in furtherance of terrorism.<sup>14</sup>

### **2.3 Remedial nature of section 718.2(a)(i)**

Suriya characterizes section 718.2(a)(i) as a codification of prior case law to the same effect.<sup>15</sup> She is not alone in this view. Justice Cole reached a similar conclusion in *R. v. Froebrich*.<sup>16</sup> Indeed, prior to the enactment of Bill C-41, and in the absence of any legislative direction to this effect, Canadian courts treated evidence of hate as an aggravating factor on sentence.

The leading authority in this regard is the 1977 decision of the Ontario Court of Appeal in *R. v. Ingram and Grimsdale*.<sup>17</sup> The two accused in this case pushed the victim onto subway tracks, causing him to fracture both of his legs and severely injure his knees. He spent several months recovering in a hospital. The accused were convicted of assault causing bodily harm and sentenced to 16 and 21 months, respectively. The Ontario Court of Appeal allowed the Crown's appeal from sentence. It held that evidence of hatred, which in this case was directed at the victim's race, was an aggravating factor and that enhanced

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<sup>14</sup> *An Act to amend the Criminal Code (criminal organization) and to amend other Acts in consequence*, S.C. 1997, c. 23, s. 17; *An Act to amend the Criminal Code, the Official Secrets Act, the Canada Evidence Act, the Proceeds of Crime (Money Laundering) Act and other Acts and to enact measures respecting the registration of charities, in order to combat terrorism*, S.C. 2000, c. 41, s. 20 and *An Act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act*, S.C. 2005, c. 32, s. 25. A consolidated version of the *Criminal Code* is available on the website of the Government of Canada's Department of Justice at <<http://www.justice.gc.ca>>.

<sup>15</sup> Suriya, *supra* note 7 at 47.

<sup>16</sup> *R. v. Froebrich*, [1999] O.J. No. 1556; 42 W.C.B. (2d) 337 (Ont. Ct. Just.).

<sup>17</sup> *R. v. Ingram and Grimsdale* (1977), 35 C.C.C. (2d) 376 (Ont. C.A.).

sentences of 24 and 30 months of imprisonment, respectively, were justified on that basis.

The court articulated its reasons for the increased sentences, with particular emphasis on the repugnant nature and effect of hate crime, at para. 8 as follows:

It is a fundamental principle of our society that every member must respect the dignity, privacy and person of the other. Crimes of violence increase when respect for the rights of others decreases, and, in that manner, assault such as occurred in this case attack the very fabric of the society. ... An assault which is racially motivated renders the offence more heinous. Such assaults, unfortunately, invite imitation and repetition by others and incite retaliation. The danger is even greater in a multicultural, pluralistic urban society. The sentence imposed must be one which expresses the public abhorrence for such conduct and their refusal to countenance it.

The decision of the Ontario Court of Appeal in *R. v. Ingram and Grimsdale* has been followed in subsequent cases, including *R. v. T.A.*<sup>18</sup> and *R. v. Lelas*.<sup>19</sup>

To characterize section 718.2(a)(i) as a mere codification of pre-existing common law would ignore subsequent Supreme Court of Canada authority which found section 718.2(e), a related provision of the *Criminal Code*, to be remedial. That section was enacted, along with section 718.2(a)(i), as part of Bill C-41 and relates specifically to aboriginal offenders. In *R. v. Gladue*, on the question of whether section 718.2(e) was a codification of existing laws or remedial in nature, the court held as follows at para. 32:

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<sup>18</sup> *R. v. T.A.*, [1978] O.J. No. 1173 (C.A.) (QL) at para. 7.

<sup>19</sup> *R. v. Lelas*, *supra* note 1.



Section 12 of the *Interpretation Act* deems the purpose of the enactment of the new Part XXIII of the *Criminal Code* [in which section 718.2(e) is included] to be remedial in nature, and requires that all of the provisions of Part XXIII...be given a fair, large and liberal construction and interpretation in order to attain that remedial objective.<sup>20</sup>

In an article entitled “Addressing Discrimination through the Sentencing Process: Criminal Code s. 718.2(a)(i) in Historical and Theoretical Context,” Mark Carter argues that the reasoning of the court in *R. v. Gladue* is equally applicable to section 718.2(a)(i).<sup>21</sup>

Section 718.2(a)(i) may indeed have a remedial objective. It is difficult to reconcile the call for a broad and liberal construction, however, with the rule of strict construction applicable to penal legislation. Chief Justice Lamer articulated this rule of statutory interpretation in *R. v. McIntosh* at paras. 38-39 as follows:

The *Criminal Code* is not a contract or a labour agreement. For that matter, it is qualitatively different from most other legislative enactments because of its direct and potentially profound impact on the personal liberty of citizens. The special nature of the *Criminal Code* requires an interpretative approach which is sensitive to liberty interests.

Therefore, an ambiguous penal provision must be interpreted in the manner most favourable to accused persons, and in the manner most likely to provide clarity and certainty in the criminal law.<sup>22</sup>

Section 718.2(e) grants concessions to offenders. Section 718.2(a)(i), by contrast, creates potential for greater jeopardy. It is fundamentally different from

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<sup>20</sup> *R. v. Gladue*, [1999] 1 S.C.R. 688.

<sup>21</sup> Carter, *supra* note 11.

<sup>22</sup> *R. v. McIntosh*, [1995] 1 S.C.R. 686 as cited in Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5<sup>th</sup> ed. (Markham, ON: LexisNexis Canada, 2008) at 470.

section 718.2(e) in this respect. The rule of strict interpretation would appear to require that any ambiguities in the language of section 718.2(a)(i) be construed narrowly, and not liberally, as a result.

Regardless, section 718.2(a)(i) of the *Criminal Code* embodies the values of a society which denounces hate crime. Unless it serves to achieve the objective for which it was enacted, however, its value is wholly symbolic. The analysis which follows examines the number and nature of offences to which section 718.2(a)(i) has been considered and applied by Canadian courts in practice.

## 3: STATISTICAL DATA

### 3.1 Lack of statistical data in early scholarship

Early scholarship described hate crime as a phenomenon of troubling magnitude and severity. It did so notwithstanding a paucity of empirical evidence. Cynthia Petersen, for example, described crimes against gays and lesbians as “a social phenomena [sic] of epidemic proportions” even though there was no Canadian data to support that conclusion.<sup>23</sup> Similarly, Martha Schaffer referred to an “upsurge in hate-motivated violence” in Canada, only to acknowledge subsequently that the police did not keep accurate statistical data on hate crimes and that this perceived upsurge might be attributable to increased media and public attention and not any rise in actual crime.<sup>24</sup>

In 1995, at the request of the Department of Justice, Julian Roberts collected from police and non-governmental agencies all available data on hate-motivated offences in Canada. He reviewed the data collection practices of each agency and found considerable variability in their definitions of hate crime. Some agencies employed a broad definition that captured any offence motivated “in whole or in part, by bias,” while others used a narrow definition that included only

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<sup>23</sup> Cynthia Petersen, “A Queer Response to Bashing: Legislating Against Hate” (1991) 16 Queen’s L.J. 237 at 237. Petersen references data relating to the experience of gays and lesbians in the United States. She acknowledges that this data is deficient, however, and says at page 253 that she included it in her article solely “for the benefit of uninformed heterosexual readers who...typically respond with disbelief to the suggestion that queer-bashing is pandemic rather than episodic. Lesbian and gay readers are acutely conscious of the prevalence of heterosexist violence. They do not require statistical data to validate their lived experiences.”

<sup>24</sup> Martha Schaffer, “Criminal Responses to Hate-Motivated Violence: Is Bill C-41 Tough Enough?” (1995) 41 McGill L.J. 199 at 201.

those offences “based solely on the victim’s race, religion, nationality, ethnic origin, sexual orientation, gender or disability.”<sup>25</sup> The latter, Roberts argued, was unduly narrow and improperly excluded any offence for which hate was a partial or incidental motivator.

Roberts attempted to calculate the incidence of hate-motivated offences in Canada using extrapolation. He found that Ottawa police recorded 211 hate crimes in 1994. He assumed that two thirds of hate crimes were not reported to police. This figure, therefore, represented only one third of actual hate crimes committed in the region. He assumed also that hate crime was largely an urban phenomenon. Offences committed in Ottawa accounted at that time for seven percent of all reported offences committed in major urban centres in Canada. On the basis of these assumptions, Roberts concluded that the number of hate-motivated offences committed in 1994 was approximately 60,000.

Roberts acknowledged that his calculations are speculative. Indeed, the assumptions on which they were based are precarious. Roberts was operating in a statistical vacuum, however. He was required to make these assumptions because of a complete lack of reliable and consistent national data on which he could otherwise rely. Not surprisingly, Roberts concluded his report with recommendations for improved data collection by law enforcement agencies.

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<sup>25</sup> Julian V. Roberts. *Disproportionate Harm: Hate Crime in Canada* (Ottawa, ON: Department of Justice Canada, 1995) at 8-10.

### 3.2 Improved data collection by law enforcement agencies

In 1999, the Government of Canada identified hate crime as a research priority. It took steps to standardize and enhance data collection procedures as Roberts suggested. Among other initiatives, it developed the Hate Crime Supplemental Survey to deal specifically with the reporting of hate crimes by police.<sup>26</sup> Its efforts in this regard culminated in a series of reports, the most recent of which were released in June 2008 (the “2008 Report”) and May 2009 (the “2009 Report”), respectively.<sup>27</sup>

The 2008 and 2009 Reports are, by far, the most comprehensive empirical studies produced to date.<sup>28</sup> The 2008 Report describes and analyses the incidence and characteristics of police-reported hate crimes committed in Canada in 2006. It is based largely on data obtained from the Uniform Crime Reporting Survey and the Hate Crime Supplemental Survey. The 2009 Report does the same in relation to offences committed in 2007.

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<sup>26</sup> Canadian Centre for Justice Statistics, *Hate Crime in Canada: An Overview of Issues and Data Sources* (Ottawa, ON: Statistics Canada, 2001).

<sup>27</sup> Canadian Centre for Justice Statistics, *Hate Crime in Canada 2006* by Mia Dauvergne, Katie Scrim & Shannon Brennan. (Ottawa, ON: Statistics Canada, 2008) and Canadian Centre for Justice Statistics, *Police-reported Hate Crime in Canada, 2007* by Phil Walsh & Mia Dauvergne. (Ottawa, ON: Statistics Canada, 2009). See also Canadian Centre for Justice Statistics (2001), *supra* note 26; Canadian Centre for Justice Statistics, *Hate Crimes Study: Summary Results of Consultations* (Ottawa, ON: Statistics Canada, 2002); Canadian Centre for Justice Statistics, *Hate Crime in Canada* by Warren Silver, Karen Mihorean & Andrea Taylor-Butts. (Ottawa, ON: Statistics Canada, 2004); Canadian Centre for Justice Statistics, *Criminal Victimization in Canada, 2004* by Marie Gannon & Karen Mihorean. (Ottawa, ON: Statistics Canada, 2005); and Statistics Canada, *Criminal Justice Indicators 2005* by Marie Gannon, Karen Mihorean, Karen Beattie, Andrea Taylor-Butts & Rebecca Kong. (Ottawa, ON: Statistics Canada, 2005).

<sup>28</sup> Extensive data collected by the B.C. Hate Crime Team was published in Craig S. MacMillan, Myron Claridge, & Rick McKenna, “Criminal Proceedings as a Response to Hate: The British Columbia Experience” (2002) 45 *Crim. L.Q.* 419. Unfortunately, however, this data is limited to offences committed in British Columbia for the period of 1995-1999.

Included in the 2008 and 2009 Reports are calculations of the number of hate-motivated offences committed in Canada as well as an examination of the key characteristics of these offences. Of particular significance for the purposes of this research are the findings that police services covering 87% of the population recorded only 892 hate-motivated offences in 2006 and 785 hate-motivated offences in 2007. These numbers are less than, but still relatively consistent with, those reported in an earlier pilot survey conducted by Statistics Canada for 2001-2002. In that pilot survey, a total of 928 hate-motivated offences was reported by police services covering 43% of the population.

The number of hate-motivated offences identified in the 2008 and 2009 Reports is nonetheless substantially less than that estimated by Roberts, even if one assumes, as he did, that only one third of hate crimes are reported. It is also significantly less than the more than 260,000 hate-motivated offences reported by victims in each of the 1999 and 2004 General Social Surveys.<sup>29</sup> For ease of comparison, these figures are listed in Table 1 below.

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<sup>29</sup> As reported Canadian Centre for Justice Statistics (2001), *supra* note 26, and Canadian Centre for Justice Statistics (2005), *supra* note 27.

**Table 1: Number of hate-motivated offences reported by data source**

<b>Data source</b>	<b>Number</b>
<b>Academic analysis</b>	
Estimated by Julian Roberts 1994	<b>approximately 60,000</b>
<b>Victim-reported offences</b>	
General Social Survey 1999	<b>272,732</b>
General Social Survey 2004	<b>more than 260,000<sup>30</sup></b>
<b>Police-reported offences</b>	
Statistics Canada Pilot Survey 2001-2002 <sup>31</sup>	<b>928</b>
Uniform Crime Reporting Survey and Hate Crime Supplemental Survey 2006 <sup>32</sup>	<b>892</b>
Uniform Crime Reporting Survey and Hate Crime Supplemental Survey 2007 <sup>33</sup>	<b>785</b>

The authors of the 2008 Report attribute some of the disparity between victim-reported hate crimes and police-reported hate crimes to the differences in the perspectives of victims and police. They say that the former is more likely to be subjective in nature, whereas the latter is more likely to be informed by law and policies. This statement invites the question of whether, for similar reasons, a disparity exists between the number of police-reported hate crimes and the number of offences characterized as such by the courts.

### **3.3 Need for data on conviction rates**

Unfortunately, there is not yet any reliable data concerning the number of offences successfully prosecuted as hate crimes in Canadian courts. As a

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<sup>30</sup> Exact number not included in any of the reports considered in this study.

<sup>31</sup> From police services covering 43% of the population.

<sup>32</sup> From police services covering 87% of the population.

<sup>33</sup> *Ibid.*

consequence, there is no way of ascertaining conviction rates. This is perhaps not surprising. The true conviction rate for any given year could only be determined by reviewing the police, Crown and court files for all police-reported hate crimes in that year and determining the outcome of each case. The time and resources required to do so would be tremendous, even if one limited that review to a random sample of relevant offences.

This study set out to ascertain the number and nature of offences characterized by the courts as hate-motivated through more time-efficient and cost-effective means. Its objective was to gain insight into the prevalence of hate crime generally and also to collect baseline data on which conviction rates could be calculated. It sought to achieve this objective through a review of published court decisions in which section 718.2(a)(i) of the *Criminal Code* was considered and applied by the courts on evidence of hate-motivation.

### **3.3.1 Methodology**

#### **3.3.1.1 Databases**

The cases reviewed in this study were identified through searches of electronic databases of published court decisions. There does not yet exist in Canada a single database of all published court decisions. Instead, there are a collection of databases administered by private publishing companies and research institutes. For the purposes of this review, searches were undertaken of four databases; namely, the BestCase, Quicklaw, CanLII and WestlaweCARSWELL databases (“Databases”).



The purported scope of coverage for each of the Databases is listed in Table 2. It was not assumed that the Databases were complete within their purported scope of coverage. Indeed, there is always potential for human error. The purpose of searching four Databases, rather than just one, was to minimize the risk of any such error influencing the outcome of the research.

**Table 2: List of databases and scope of coverage**

Database	Scope of Coverage
BestCase	all reported cases; and all unreported cases since 1976
Quicklaw	all reported cases since 1970
CanLII	coverage varies by court
WestlaweCARSWELL	all reported cases since 1977; all unreported cases since 1986; and all cases published by Carswell law reports since its inception (which, in the case of the <i>Criminal Reports</i> , is 1946)

Table 2 refers to both reported and unreported cases. The latter includes cases which, although produced in written form, are not included in any published case reporter. It does not refer to, and the Databases do not otherwise include, cases in which judgment was delivered orally, unless a written transcript of the judgment was subsequently transcribed and posted in the Databases. It is not known how many decisions were delivered orally and remain excluded from the Databases. Given the serious nature of hate crime, the stigma attached to a finding that an offence was motivated by bias, prejudice or hate, and the consequent impact on sentence, one might reasonably expect that decisions involving hate-motivated offences would be published.

Nonetheless, the fact remains that the Databases are not comprehensive.<sup>34</sup> The figures generated in this study likely understate the actual number of relevant cases as a result. Regrettably, there is no way of knowing even the percentage by which they might fall short. This is a significant shortcoming of the methodology adopted for this study and a limitation inherent in any research design based exclusively on published court decisions.<sup>35</sup>

### 3.3.1.2 Searches of Databases

The Databases employ unique search engines and Boolean inquiry syntax. Specific search terms were formulated for each Database with the object of capturing all decisions involving offences for which the court considered and/or applied section 718.2(a)(i) of the *Criminal Code*. Initial searches sought to identify cases in which the section number itself, or variations of it, appeared in the text of the judgment. Reproductions of the images of each of the search screens, with the initial search terms set out therein, are included in Appendix A. Subsequent searches were conducted using the key words within the section

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<sup>34</sup> This is evident from the fact that at least two hate-motivated offences discussed in the secondary literature were not located in the Databases. These cases are *R. v. Peers and Foos* (1999), Vancouver 100463 (B.C. Prov. Ct.) and *R. v. Cook* (2003), Victoria 125195-D, (B.C. Prov. Ct.).

<sup>35</sup> As part of her research toward a Master of Arts degree, sociology student Marianne D. Krawchuk canvassed court registries across Canada in order to ascertain the circumstances by which judgments come to be published in electronic databases. She concluded that a case is likely to involve a written judgment if it is perceived by the judge to be significant, either because it sets a legal precedent or deals with an important legal issue. Krawchuk claims that the decisions available on online databases are not representative as a result. Her argument may hold true in regard to the factual aspects of the cases. It is not likely to apply to the legal aspects, however, given the doctrine of *stare decisis*. That doctrine binds courts to judicial precedents and ensures a degree of uniformity in the law as a result. See Marianne D. Krawchuk, *The Use of Custody Under the Youth Criminal Justice Act: A Review of Section 39, Prohibitions on the Use of Custodial Sentences* (M.A. Thesis, University of Manitoba Department of Sociology, 2008) [unpublished].

itself so as to detect any cases in which the court referred to the substance of section 718.2(a)(i) but not the section number.

Searches of the Databases were conducted at various times between April 15 and May 15, 2009. Duplicate cases were identified by reference to the unique action number and/or neutral citation assigned to the case by the court registry in which it was heard. The remaining cases, along with any potentially relevant cases cited in them, were reviewed and all false positives (those being cases in which section 718.2(a)(i) of the *Criminal Code* is mentioned but not considered or applied by the court) were excluded from further analysis.

### **3.3.1.3 Coding of cases**

#### **Categorical Variables**

Each of the relevant cases was coded using the same coding procedures and the same categorical variables as those employed in the 2008 and 2009 Reports. These variables are reproduced in the tables set out in Appendix B. They include type of motivation, type of violation, location of offence, age of victim, age of offender and relationship of victim to offender. These variables were not modified, even though they may be unduly narrow in scope, so that direct comparisons could be undertaken subsequently. Additional categorical variables were added relating to disposition and typology.

The unit value assigned to each case was a function of the number of offences found by the court to have been motivated by bias, prejudice or hate within the meaning of section 718.2(a)(i). Offences were counted, not cases.

The precise number of offences in any given case was calculated in accordance with the Uniform Crime Reporting counting procedures.<sup>36</sup>

The appellate history, if any, of each of the potentially relevant cases was determined using the case citator tools available in the Databases. All cases were coded and classified according to the decision of the highest appellate court.

### **3.3.2 Findings**

#### **3.3.2.1 Disposition**

Searches of the Databases produced a total of 46 cases in which section 718.2(a)(i) of the *Criminal Code* was considered and/or applied by the court in relation to offences committed from the date of the coming into force of section 718.2(a)(i) in 1996 to the end of 2007. These cases involved a total of 57 offences. Section 718.2(a)(i) was considered and applied in relation to a total of 30 offences. It was considered, but not applied, in relation to the remaining 27 offences.

A summary of these findings is set out in Table 3. They are based on the express statements of the court. Where no such statements were made, cautious inferences were drawn from the reasons for judgment.

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<sup>36</sup> The Uniform Crime Reporting procedures provide that crimes of violence are counted according to the number of victims, that crimes of property are counted by the number of offences and that multiple offences are counted according to the most serious offence only. See Canadian Centre for Justice Statistics, *Uniform Crime Reporting Version 1.0: Reporting Manual* (Ottawa, ON: Statistics Canada, 2002).

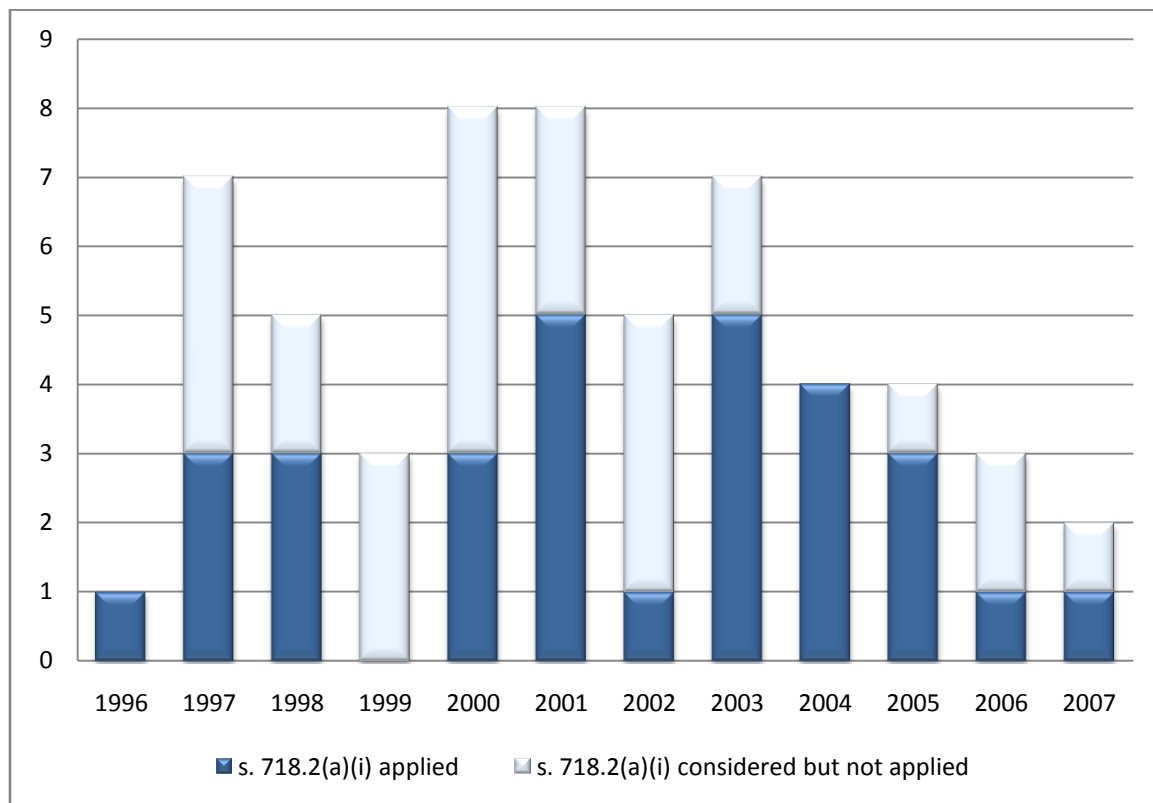
**Table 3: Number of cases and offences by disposition, 1996-2007**

<b>Disposition</b>	<b>Cases</b>	<b>Offences</b>
s. 718.2(a)(i) applied	25	30
s. 718.2(a)(i) considered but not applied	21	27
<b>TOTAL</b>	<b><u>46</u></b>	<b><u>57</u></b>

### 3.3.2.2 Date of offence

The number of offences in relation to which section 718.2(a)(i) was considered and/or applied in each year is set out in Figure 1. The date of each offence was extrapolated from the surrounding facts in those cases where it was not referenced expressly.

**Figure 1: Number of offences in relation to which section 718.2(a)(i) was considered and/or applied, 1996-2007**



It was assumed, for the purposes of this research, that judicial proceedings for offences committed in or before 2007 are complete. This may be an optimistic assumption, especially in relation to offences committed in the latter part of 2007. It is not likely to influence the results significantly, however, given the *Charter* right of Canadians to receive, and the corresponding obligations on the Crown and the courts to provide, a trial within a reasonable time.<sup>37</sup> Unfortunately, the Databases do not include, and the searches cannot identify as a result, any ongoing prosecutions or appellate proceedings. This is a further shortcoming in the methodology of this study.

No cases were found in the Databases in relation to offences committed in 2008 and 2009. Charges arising from such offences may still be before the courts. These years were excluded from further analysis for that reason.

### **3.3.2.3 Type of motivation**

One half of the hate-motivated offences identified in this study were found to have been the product of bias, prejudice or hate based on race or ethnicity. Intolerance based on actual or perceived sexual orientation accounted for 21.7% of offences, while religious intolerance accounted for 16.7% of offences. The exact number of offences by type of motivation is listed in Table 4. A breakdown by percentage is depicted graphically in Figure 2.

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<sup>37</sup> *Canadian Charter of Rights and Freedoms*, *supra* note 1, ss 11(b). See also, *inter alia*, *R. v. Morin*, [1992] 1 S.C.R. 771 and *R. v. Godin*, 2009 SCC 26.

**Table 4: Number of hate-motivated offences by type of motivation, 1996-2007**

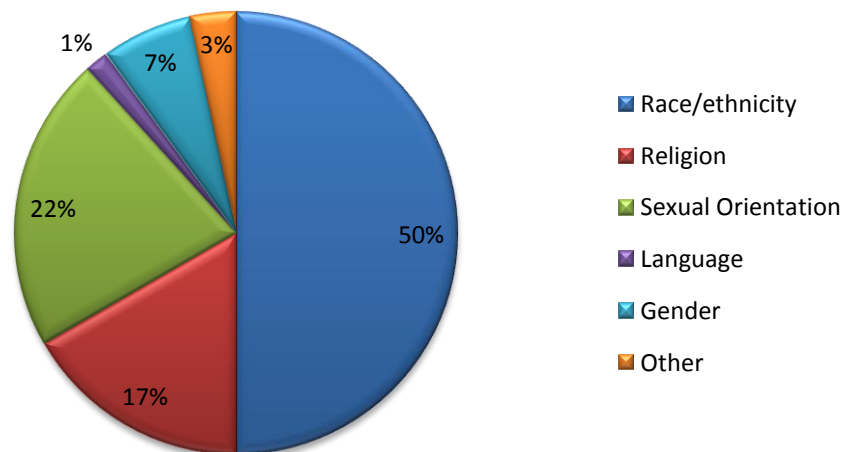
Type of Motivation	Offences	Percentage
<b>Race/ethnicity</b>	<b>15</b>	<b>50</b>
Black	8	26.7
South Asian	1	3.3
East/Southeast Asian	3	10
Caucasian	1	3.3
Multiple races/ethnicities	1	3.3
Unknown	1	3.3
<b>Religion</b>	<b>5</b>	<b>16.7</b>
Jewish	3	10
Muslim (Islam)	2	6.7
<b>Sexual Orientation</b>	<b>6.5</b>	<b>21.7</b>
Homosexual (lesbian or gay)	6.5	21.7
<b>Language</b>	<b>0.5</b>	<b>1.7</b>
French	0.5	1.7
<b>Gender</b>	<b>2</b>	<b>6.7</b>
Female	2	6.7
<b>Other</b>	<b>1</b>	<b>3.3</b>
Sexual lifestyle	1	1
<b><u>TOTAL</u></b>	<b><u>30</u></b>	<b><u>100</u></b>

Two aspects of Table 4 require explanation. Firstly, the categories of sexual orientation and language include units of less than one. These figures are intended to reflect the dual nature of the motivation at play in the case of *R. v. Amr*.<sup>38</sup> In this case, one offence was found to be motivated by a bias, prejudice or hate based both on sexual orientation and language. One half was allocated to each category for this case, rather than one, so as to not overstate the total

<sup>38</sup> *R. v. Amr*, 2006 ABPC 8; [2006] A.J. No. 92 (Prov. Ct.) (QL).

number of offences under consideration in this study. Secondly, one offence is included in the category of “other”. This offence relates to the case of *R. v. J.S.*, wherein the court applied section 718.2(a)(i) on the basis of the offender’s dislike of a particular “sexual lifestyle.”<sup>39</sup> Neither section 718.2(a)(i) nor the Uniform Crime Reporting system includes a specific category for “sexual lifestyle”.

**Figure 2: Percentage of hate-motivated offences by type of violation, 1996-2007**



#### **3.3.2.4 Type of violation**

Of the 30 offences which the courts found to have been motivated by bias, prejudice or hate within the meaning of section 718.2(a)(i) of the *Criminal Code*, the vast majority were crimes of violence. Figure 3 shows that a total of 21 offences involved violent crime, while only three involved property crime. All of

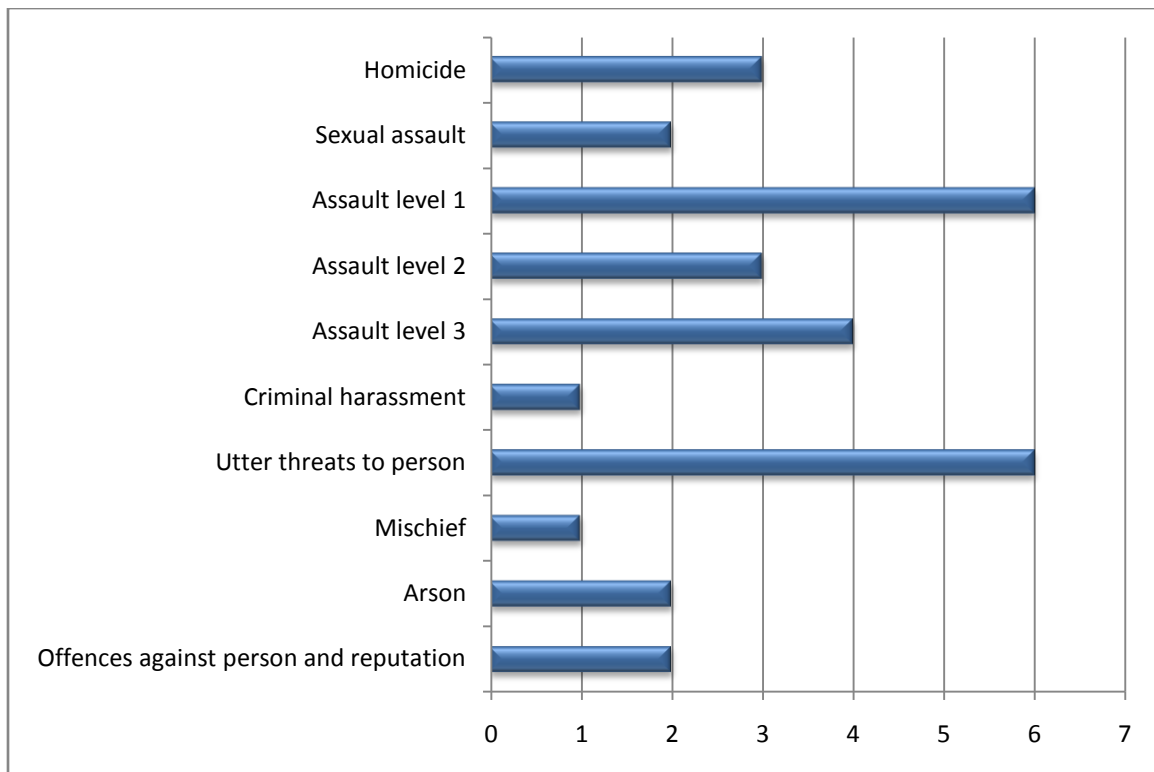
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<sup>39</sup> *R. v. J.S.*, 2003 BCPC 442.



the latter were directed at properties associated with the Jewish faith.<sup>40</sup> The remaining two offences are included under the category of “Offences against the person and reputation” and relate to convictions for public incitement of hatred contrary to section 319 of the *Criminal Code*.

**Figure 3: Number of hate-motivated offences by type of violation, 1996-2007**



The term “Assault level 1” in Figure 3 relates to the offence of simple assault. “Assault level 2” refers to the offences of assault with a weapon and assault causing bodily harm. The term “Assault level 3” is limited to the offence of aggravated assault.

<sup>40</sup> *R. v. El-Merhebi*, [2005] R.J.Q. 671; [2005] Q.J. 110 (Crim.Ch.) (QL); *R. v. Sandouga*, 2002 ABCA 196, 217 D.L.R. (4th) 303 (Alta. C.A.); and *R. v. Soles*, [1998] O.J. No. 5061; 40 W.C.B. (2d) 343 (Ont. Ct. Just.).

### 3.3.2.5 Location of offence

Table 5 lists the Census Metropolitan Areas within which offences were committed. Of the 30 hate-motivated offences considered in this study, 20 offences were committed in one of these geographical regions. These findings support the view that hate crime is largely an urban phenomenon, although not to the extent assumed by Roberts in his analysis.

**Table 5: Number of hate-motivated offences by Census Metropolitan Area, 1996-2007**

Census Metropolitan Area	Offences	
	(Number)	(%)
Vancouver	5	16.7
Calgary	1	0.3
Edmonton	3	10.0
Regina	1	0.3
London	3	10.0
Toronto	4	1.3
St. Catherines-Niagara	1	0.3
Montreal	1	0.3
Quebec	1	0.3
Non-Census Metropolitan Area	10	33.3
<b>TOTAL</b>	<b>30</b>	<b>100</b>

Nine of the remaining 10 offences were committed in smaller communities across Canada, including Merritt and Squamish in British Columbia, Dartmouth in Nova Scotia and Grand Banks in Newfoundland. One offence was tried in Ontario but the location was neither listed nor apparent from the information provided in the reasons for judgment.

### 3.3.2.6 Age of victim and offender

Unfortunately, very little information was available in the reasons for judgment about the ages of victims. As set out in Table 6, this information was not included in more than three quarters of the cases reviewed in this study. It was not a relevant statistic in the three cases involving property crimes or the two cases of public incitement of hatred.

**Table 6: Number of victims and offenders by age group, 1996-2007**

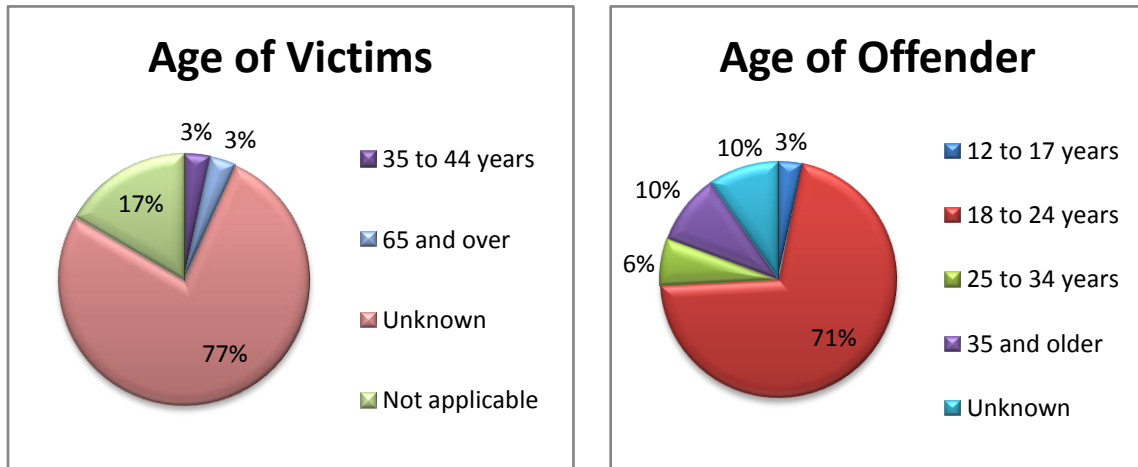
Age Group	Victims		Offenders	
	(number)	(%)	(number)	(%)
12 to 17 years	0	0.0	1	3.2
18 to 24 years	0	0.0	22	70.9
25 to 34 years	0	0.0	2	6.5
35 to 44 years	1	3.3	1	3.2
45 to 54 years	0	0.0	1	3.2
55 to 64 years	0	0.0	1	3.2
65 and over	1	3.3	0	0.0
Unknown	23	76.7	3	9.7
Not applicable	5	16.7	0	0.0
<b>TOTAL</b>	<b>30</b>	<b>100</b>	<b>31</b>	<b>100</b>

By contrast, the age of the offender was included in all but three of the cases under review. Table 6 lists the various age groups in which offenders fell. It includes a total of 31 offenders, as compared to 30 victims, as one case involved an offence committed by two individuals against one victim.<sup>41</sup> Figure 4 offers a graphic depiction of the relative percentages by age group. It is apparent

<sup>41</sup> *R. v. M.D.J.*, 2001 BCPC 250; [2001] B.C.J. No. 2110 (Prov. Ct.) (QL).

from the data set out therein that the vast majority of these offenders were between the ages of 18 and 24 years at the time of the offence. Only one case involved an offender below the age of 18 years.

**Figure 4: Percentage of victims and offenders by age group, 1996-2007**



### 3.3.2.7 Relationship of Victim to Offender

The data regarding the relationships between the victims and offenders is included in Table 7. Of note is the fact that 76.7% of victims were strangers to the offender, while 16.7% were acquaintances. For the purposes of this research, the category of “stranger” was interpreted to include, in the case of property crime, any lands or buildings to which the offender did not have lawful access and, in the case of public incitement of hatred, any community of which the accused was not a member.

In no case did the court characterize the victim as a friend of the offender. Given the nature of hate-motivated offences, it is unlikely that a victim and offender would be friends of each other. Indeed, this category of relationship

included in the 2008 and 2009 Reports may not be particularly relevant to hate crimes. However, a further category ought to have been included to capture relationships between victims and offenders which might once have been amicable. In the case of *R. v. J.V.*, one of the victims was the former girlfriend of the offender.<sup>42</sup> This victim could not properly be described as a “friend” of the offender. She likewise was not a stranger. The offence was included in the category of “acquaintance” in Table 7. Although this category falls short of capturing the true nature of the relationship, it was considered to be the best of the limited pool of options otherwise available.

**Table 7: Number of hate-motivated offences by relationship, 1996-2007**

Relationship of Victim to Offender	Offences	
	(Number)	(%)
Friend	0	0.0
Stranger	23	76.7
Acquaintance	5	16.7
Unknown	2	6.7
<b><u>TOTAL</u></b>	<b><u>30</u></b>	<b><u>100</u></b>

### 3.4 Conviction rates calculated on the basis of findings

As set out above, police services covering 87% of the population reported 892 hate-motivated offences in 2006 and 785 in 2007. Assuming the data is representative of the remaining 13% of police services, the national incidence of hate-motivated offences increases to 1025 for 2006 and 902 for 2007.

<sup>42</sup> *R. v. J.V.*, [2006] O.J. No. 2392 (Ct. Just.) (QL).

Searches of the Databases undertaken in the course of this study found that the courts considered the application of section 718.2(a)(i) in relation to only three 2006 offences and only two 2007 offences. Of these, one offence in each year was found to have been motivated by bias, prejudice or hate within the meaning of that section. Particulars of the offences are listed in Table 8.<sup>43</sup>

It is not possible to engage in any meaningful discussion of these cases, or the manner in which they are similar to or different from the body of hate crimes reported by police, given that so few appear to have been prosecuted. The sample size is simply too small. However, if the number included in the Databases is taken as reflective of the number of cases considered by Canadian courts, it would appear that less than one percent of offences characterized by the police as hate crimes were successfully prosecuted and sentenced pursuant to section 718.2(a)(i) in each of 2006 and 2007.

Admittedly, the Databases are not comprehensive and the searches may not have been exhaustive. Even so, unless the courts rendered written reasons for judgment (or did not refer to section 718.2(a)(i) in the reasons for judgment which it did render) in less than one percent of cases, there would appear to be a large and very troubling disparity between the number of hate-motivated offences known to police and those successfully prosecuted and sentenced as such by

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<sup>43</sup> Additional searches of the Databases were undertaken in order to identify any cases of offences contrary to sections 318 (advocating genocide), 319(1) (public incitement of hatred), 319(2) (wilful promotion of hatred) and 430(4.1) (mischief against religious property), committed in either 2006 or 2007 and in which section 718.2(a)(i) was not considered or applied. None were identified.

the Crown. Further research is necessary to confirm and explain this apparent shortfall.

**Table 8: Particulars of 2006 and 2007 offences in relation to which section 718.2(a)(i) was considered and/or applied**

Case	Disposition	Off. Date	Type of Motivation	Type of Viol.	Location	Ages Victim / Offdr.	Relation
<i>Stevovic</i> <sup>44</sup>	s. 718.2(a)(i) applied	2006	Gender (woman)	Utter threats to person	Vancouver	u/k / 18-24	Strangers
<i>Jean</i> <sup>45</sup>	s. 718(a)(i) considered but not applied	2006	Gender (woman)	Sexual assault	Nanaimo	18-24 / 25-34	Strangers
<i>Hurley</i> <sup>46</sup>	s. 718(a)(i) considered but not applied	2006	Race/ ethnicity - Aboriginal	Assault level 3	Vancouver	u/k / u/k	Acquaintances
<i>Gholamrez-azdehshirazi</i> <sup>47</sup>	s. 718.2(a)(i) applied	2007	Religion – Muslim (Islam)	Assault level 3	Edmonton	u/k / 45-55	Acquaintances
<i>Warren</i> <sup>48</sup>	s. 718(a)(i) considered but not applied	2007	Language (French)	Assault level 2	Kingston	u/k / u/k	Strangers

Members of the B.C. Hate Crime Team stated, in an article published in 2002, that insufficient evidence in relation to identity accounts for as many as

<sup>44</sup> *R. v. Stevovic*, 2007 BCPC 264; [2007] B.C.J. No. 1834 (Prov. Ct.) (QL).

<sup>45</sup> *R. v. Jean*, 2007 CarswellBC 3525 (Prov. Ct.), aff'd 2008 BCCA 465; 2008 CarswellBC 2964 (C.A.).

<sup>46</sup> *R. v. Hurley*, 2008 BCSC 986; [2008] B.C.J. No. 1407 (S.C.) (QL).

<sup>47</sup> *R. v. Gholamrezazdehshirazi*, 2008 ABPC 198; [2008] A.J. No. 726 (Prov. Ct.) (QL).

<sup>48</sup> *R. v. Warren*, 2008 CarswellNat 784 (Canada Court Martial).

90% of police-reported hate crimes not proceeding to prosecution.<sup>49</sup> This fact alone might explain the low conviction rate. It certainly would not be a surprising finding, given that so few offenders are known to their victims.

Rigidity in the rules of evidence and the law itself also may be a factor, particularly in relation to those offences which can otherwise be proven. The analysis which follows will consider the manner in which section 718.2(a)(i) of the *Criminal Code* has been interpreted by Canadian courts. It will review the scope of section 718.2(a)(i), the evidence which the courts have accepted in proving an offence was motivated by bias, prejudice or hate as well as the degree of motivation which they require to trigger the application of the section.

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<sup>49</sup> MacMillan et al, *supra* note 28.



## **4: JUDICIAL INTERPRETATION**

### **4.1 Scope of section 718.2(a)(i)**

#### **4.1.1 Hate in the generic sense**

Section 718.2(a)(i) stipulates that evidence of bias, prejudice or hate will be deemed an aggravating factor on sentence if it is based on “race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation or any other similar factor”. This language was interpreted by the Alberta Court of Queen’s Bench, in *R. v. Goodstoney*, as being applicable only to hate crimes *per se*.<sup>50</sup> The accused in that case was convicted for her part in the killing of a woman who became involved with the accused’s ex-boyfriend. Section 718.2(a)(i) was found to be inapplicable because the sentiment which motivated the killing was hate “in the generic sense” and not “in the hate crime sense.”<sup>51</sup>

#### **4.1.2 Hate based on “other similar factors”**

As set out in Table 4, with one exception, all of the cases identified in this study involved one or more of the categories of bias, prejudice or hate enumerated in section 718.2(a)(i). That exception is the case of *R. v. J.S.*<sup>52</sup>

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<sup>50</sup> *R. v. Goodstoney*, [2005] A.J. No. 1454 (Q.B.) (QL).

<sup>51</sup> *Ibid.* at para. 111.

<sup>52</sup> *R. v. J.S.*, *supra* note 39.

The offence in *R. v. J.S.* is referred to above, although it warrants further discussion. The facts are troubling. The accused in this case was part of a group of young men who went to Stanley Park in Vancouver, British Columbia, for the express purpose of finding and assaulting a “peeping tom”. The court described this group as a “thug brigade stalking human prey for entertainment in a manner very reminiscent of Nazi Youth in pre-war Germany.”<sup>53</sup> The accused and his cohort encountered the victim that particular night. The victim was a homosexual man in an area of the park where homosexual men reportedly met for sexual encounters. He was naked at the time. The accused’s group attacked the victim and inflicted a savage beating. The victim died as a result of his injuries.

The matter came before Judge Romilly of the Provincial Court of British Columbia (Youth Court) for sentencing. He concluded, notwithstanding an apparent concession by the Crown to the contrary, that section 718.2(a)(i) was applicable. His reasons are set out, at para. 50, as follows:

The attack and beating of Mr. Webster [the victim] was in fact a “hate crime” as set out in section 718.2(a)(i) of the *Criminal Code*. I am aware that the Crown has conceded that since J.S. has stated that they went to the park looking for “peeping toms” or “voyeurs,” and that he did not know that this area was frequented by homosexuals, she has no way of establishing that his was a “hate crime.” I disagree.

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I am of the opinion that this crime was motivated by "bias, prejudice or hate based" on a factor similar to sexual orientation and is covered by this section of

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<sup>53</sup> *Ibid.* at para. 34.

the Criminal Code. It strikes me that this section contemplates hatred against "peeping toms" and/or "voyeurs" as being within its purview, since in my opinion such activity represents a sexual lifestyle which some may consider deviant, but is a sexual lifestyle all the same.

I have been advised that the media has been describing the incident as a "gay-bashing" with no foundation for saying so. On this point I find it incredible that the accused and his friends who were obviously in the habit of visiting the park to "beat up" peeping toms" and "voyeurs" were so naïve that they did not notice that this area was frequented by gays. In any event a gay person was "bashed" by the accused and his friends in an area reputedly frequented by gays, and in that regard I fail to see why it cannot be regarded as a "gay bashing."

[Emphasis added]

Judge Romilly's decision in *R. v. J.S.* appears to be the only case available to date in which the court has articulated an analogous ground for the application of section 718.2(a)(i). It is, however, a case of limited precedential value. In *R. v. Cran*, a related case involving an adult co-accused of J.S., Justice Humphries of the British Columbia Supreme Court commented to the effect that Judge Romilly erred in law in his application of section 718.2(a)(i).<sup>54</sup> She wrote at paras. 8-10 of her judgment as follows:

With the greatest of respect to the youth court judge who referred to this as a hate crime, I can only say that I am not aware of any authority in the Criminal Code or otherwise which would allow this court to declare a particular crime "a hate crime."

I am aware that the death of Aaron Webster [the victim] has had a significant effect on the gay community. However, there was no evidence before

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<sup>54</sup> *R. v. Cran*, 2005 BCSC 171; [2005] B.C.J. No. 215; 63 W.C.B. (2d) 542 (B.C.S.C.).

the court of Mr. Webster's sexual orientation, other than what might be inferred from his presence at the Second Beach parking lot. As well, there was no evidence before the court that Mr. Cran's motive for attacking Mr. Webster was his sexual orientation. In order to consider such a motivation as an aggravating factor on sentence, I must be satisfied beyond a reasonable doubt that such a motive has been proven.

There is also no basis on the evidence before the court to equate "peeping toms and voyeurs" to gay people in the mind of Ryan Cran in the absence of evidence and in the face of evidence to the contrary.

The court's conclusion is premised on a strict construction of the language of section 718.2(a)(i). It is apparent from the excerpts reproduced above that the court was unwilling to apply section 718.2(a)(i) in the absence of evidence linking the group targeted by the accused to one of the groups listed in section 718.2(a)(i).

In the earlier case of *R. v. Kulak*, the Provincial Court of British Columbia indicated that it would have applied section 718.2(a)(i) to offences motivated by a bias, prejudice or hatred of environmental groups, if the evidence had established a connection in the minds of the five accused between the individual victims and the groups targeted by them.<sup>55</sup> The accused in this case were loggers who assaulted environmental protestors thought to be responsible for work stoppages in their area. It is doubtful that such a liberal interpretation of section 718.2(a)(i) would prevail in future cases, given the outcome in *R. v. Cran*. Justice Humphries' interpretation is more strict in its construction of the provision.

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<sup>55</sup> *R. v. Kulak*, 2001 BCPC 13; [2001] B.C.J. No. 448 (Prov. Ct.) (QL).

### 4.1.3 Application of common law

A strict construction of section 718.2(a)(i) does not necessarily limit the circumstances in which a court may treat evidence of bias, prejudice or hate as an aggravating factor in sentencing. The court retains broad discretion in sentencing to take into consideration evidence of hate-motivation, even if the target of the hatred is not included in section 718.2(a)(i). They have done just that in cases where section 718.2(a)(i) was found to be otherwise inapplicable.

In the case of *R. v. Cornakovic*, for example, the accused was found to have been motivated in his attack on a family court judge by “an abiding bias or prejudice against Judges.”<sup>56</sup> His motivation in this regard was considered as an aggravating factor in sentencing. Although it fell outside the scope of section 718.2(a)(i), it was found to be “closely allied” to the aggravating factors recognized in that section.<sup>57</sup>

## 4.2 Proving motive

### 4.2.1 Practical challenges

In cases involving section 718.2(a)(i) of the *Criminal Code*, the Crown must prove that the offender was motivated to act on the basis of particular beliefs to the standard of proof beyond a reasonable doubt.<sup>58</sup> Some commentators have suggested that this requirement may be so inherently difficult to meet as to

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<sup>56</sup> *R. v. Cornakovic*, [2004] O.J. No. 4081; 67 W.C.B. (2d) 340 (Ont. Ct. Just.) at para. 66.

<sup>57</sup> *Ibid.*

<sup>58</sup> *Criminal Code*, *supra* note 2, s. 724(3)(e). See also *R. v. Gardiner* (1982), 68 C.C.C. (2d) 477 (S.C.C.) as cited in Carter, *supra* note 11, and *R. v. Munson*, 2001 SKQB 542 at para. 24 wherein the court affirmed that section 718.2(a)(i) cannot be applied on the basis of suspicion alone.

render section 718.2(a)(i) inoperable for practical purposes.<sup>59</sup> The fact that section 718.2(a)(i) has been applied in so few cases in the years following its enactment lends some credence to this view.

Indeed, motive is difficult to ascertain.<sup>60</sup> A finding of motive necessarily involves an inquiry into the mind of the offender. In the absence of direct evidence, the court must draw inferences on the basis of the surrounding evidence. It is limited in this regard to evidence found to be admissible in court. Evidence on which a police officer might rely to ascertain motive in the course of an investigation may not be available to the sentencing court.

Of greater significance in cases involving section 718.2(a)(i), however, is the impact of sections 2(b) and 2(d) of the *Charter of Rights and Freedoms* and the protections afforded by them to freedom of expression and freedom of association, respectively.<sup>61</sup> The court has the extraordinary, if not impossible, task of determining whether, or to what extent, a criminal act was the product of a particular belief. However abhorrent the beliefs of an accused may be, the court must exercise great care to ensure that the punitive aspects of section 718.2(a)(i)

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<sup>59</sup> See Sean Robertson, "Spaces of Exception in Canadian Hate Crimes Legislation: Accounting for the Effects of Sexuality-Based Aggravation in *R. v. Cran* (2005) 50 C.L.Q. 482 wherein the author cites Martha Schaffer, "Criminal Responses to Hate-motivated Violence: Is Bill C-41 Tough Enough?" (1995) 41 McGill L.J. 199 and J. Morsch, "The Problem of Motive in Hate Crimes: The Argument Against Presumptions of Racial Motivation" (1991) J. Crim. L & Criminology 659 in support of this proposition. Both publications predate the coming into force of Bill C-41.

<sup>60</sup> Clayton C. Ruby, C.M. Breese Davies, Delmar Doucette, Sarah Loosemore, Jessica Orkin & Caroline Wawzonek, *Sentencing*, 7<sup>th</sup> ed. (Markham, ON: Lexis Nexis, 2008) at 5.30-5.42.

<sup>61</sup> *Canadian Charter of Rights and Freedoms*, *supra* note 1, s. 2. For an articulation of the argument that hate crime laws impede freedom of speech and belief, see Jeff Jacoby, "Punish crime, not thought crime" and Melanie Phillips, "Hate crime: the Orwellian response to prejudice", in Paul Iganski, ed., *The Hate Debate: Should Hate Be Punished as a Crime?* (London, UK: Profile Books, 2002) at 114-22 and 123-131, respectively.

are applied only where these beliefs motivated the criminal act and not on the basis of the beliefs alone.

No significant scholarship has yet been produced concerning the nature of the evidence which the courts have accepted in order to prove motive in such cases. Carter considered the matter in his 2001 article, but concluded that it was “too early” to undertake such research.<sup>62</sup> Sean Robertson prepared a list of potentially relevant evidence in a 2005 article, called “Spaces of Exception in Canadian Hate Crimes Legislation: Accounting for the Effects of Sexuality-Based Aggravation in *R. v. Cran*.”<sup>63</sup> However, his analysis is prescriptive. It is not based on a review of existing case law.

#### **4.2.2 Evidence relevant to motive**

All of the cases identified in this study were reviewed for the purposes of identifying and classifying the evidence found by the court to be relevant to motive for the purposes of section 718.2(a)(i). The results are discussed below. For ease of reference, they also are summarized in Table 9 (Evidence related to the circumstances of the offence), Table 10 (Evidence related to the circumstances of the offender), and Table 11 (Evidence related to the circumstances of the victim). Citations for the cases listed therein are included in the Reference List at page 105.

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<sup>62</sup> Carter, *supra* note 11.

<sup>63</sup> Robertson, *supra* note 59.

#### 4.2.2.1 Circumstances of the Offence

**Table 9: Evidence related to the circumstances of the offence**

Circumstances of the Offence	
<i>Actus Reus</i>	Offence is of a hateful nature (i.e. public incitement of hatred) ( <i>Nicholson</i> )
Date of offence	Offence takes place on or around an anniversary of significance ( <i>Soles</i> )
Location of offence	Victim occupies the property, which was the target of the offence ( <i>El-Merhebi, Miloszewski. Cf Trusler.</i> )

#### ***Actus reus***

In *R. v. Nicholson*, Judge Pendleton of the Provincial Court of British Columbia found that the *actus reus* of the offence was sufficient to trigger the application of section 718.2(a)(i).<sup>64</sup> That case involved a conviction for promoting hatred contrary to section 319(b) of the *Criminal Code*. The accused was a member of various white supremacist groups. He issued private communications in relation to the work of these organizations that the court characterized as “offensive, odious, monotonous and repugnant.”<sup>65</sup> However, the accused’s particular beliefs in these private communications were not the subject of the court’s censure. Instead, his conviction was based on public comments and communications posted on the Internet and distributed by mail and in which the accused was found to have espoused hatred. Section 718.2(a)(i) was held to be applicable, given the “hateful nature” of the offence itself.<sup>66</sup>

<sup>64</sup> *R. v. Nicholson*, 2002 C.L.B. 2049; 57 W.C.B. (2d) 234; 2002 CarswellBC 3592 (Prov. Ct.).

<sup>65</sup> *Ibid.* at para. 10.

<sup>66</sup> *Ibid.* at para. 5.



Judge Pendleton thus found that the criminal act was sufficient to prove motivation based on bias, prejudice or hate for the purposes of section 718.2(a)(i). If he is correct in his analysis, section 718.2(a)(i) would be applicable to convictions for offences contrary to section 319, and likely also section 318 (advocating genocide) and section 430(4.1) (mischief against religious property). The latter are offences of an equally “hateful nature”. In fact, in order to obtain a conviction pursuant to section 430(4.1), the Crown must show that the commission of the mischief was “motivated by bias, prejudice or hate based on religion, race, colour or national or ethnic origin.” A *prima facie* reading of this language suggests that the evidence required to prove *mens rea* for an offence contrary to section 430(4.1) would satisfy section 718.2(a)(i) as well.

#### **Date of offence**

If motive is not apparent from the *actus reus* alone, then it must be inferred from the circumstances of the offence. One circumstance of potential relevance may be the date of the offence. This was found to be the case in *R. v. Soles*.<sup>67</sup>

The accused in *R. v. Soles* pled guilty to charges arising from his vandalism of a Jewish cemetery on April 25, 1998. However, he denied that his conduct was motivated by racial hatred. He claimed not to have known that the cemetery was Jewish. The court found “overwhelming evidence” to the contrary. It was assisted by the evidence of an expert in the field of anti-Semitism and neo-Nazism to the effect that incidents of neo-Nazi activity increase in and around the

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<sup>67</sup> *R. v. Soles*, [1998] O.J. No. 5061; 86 O.T.C. 4 (Gen. Div.).

anniversary of Hitler's birthday on April 20.<sup>68</sup> The expert noted that the offence also coincided with the 50<sup>th</sup> anniversary of the formation of the State of Israel and the Warsaw Ghetto uprising - which events have a tendency to provoke anti-Semitic behaviour on the part of neo-Nazi adherents.

### **Location of offence**

Evidence regarding the location of the offence and the character of any buildings or monuments situated on the property has also been found to be relevant to motive in cases involving section 718.2(a)(i). The fact that the accused targeted a Jewish cemetery contributed to a finding of racial hatred in *R. v. Soles*. Similarly, the court in *R. v. Miloszewski* placed significance on the fact that the accused persons' attack of the victim took place on the grounds of a Sikh Temple.<sup>69</sup>

Location is not, however, a determinative factor. In *R. v. Trusler*, the Ontario Court of Justice refused to apply section 718.2(a)(i) on this basis without further corroborating evidence.<sup>70</sup> The accused in that case was convicted of mischief after he tried to burn a flag of Israel erected in front of a Jewish High School. The court summarized the available evidence, at paras. 49-50, as follows:

... I have evidence that show[s] a person in the very early morning hours on the way home from a bar, who is likely intoxicated, walk by a school that was on his way home and by a school that he had walked by on numerous occasions, that he took down the Israeli

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<sup>68</sup> *Ibid.* at para. 19.

<sup>69</sup> *R. v. Miloszewski*, [1999] B.C.J. No. 2710 (Prov. Ct.) (QL), aff'd 2001 BCCA 745; [2001] B.C.J. No. 2765 (C.A.) (QL).

<sup>70</sup> *R. v. Trusler*, 2006 ONCJ 390; [2006] O.J. No. 4303 (Ct. Just.) (QL).

flag, that he tried to light it on fire and as soon as someone walked by he puts it out and continues home.

I have no other evidence to consider before me.

The court held that evidence supported the inference of “Mr. Trusler’s conduct being incredibly stupid” as much as any other inference that might reasonably have been drawn.<sup>71</sup> It was noted in the reasons for judgment that none of the witnesses who testified on behalf of the Crown could speak to any words, comments or gestures made by the accused at the time of the offence.

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<sup>71</sup> *Ibid.*

#### 4.2.2.2 Circumstances of the Offender

**Table 10: Evidence related to the circumstances of the offender**

Circumstances of the Offender	
Words spoken by offender	Offender makes derogatory comments prior to the commission of the offence ( <i>J.V.</i> )
	Offender makes derogatory comments, or the group in which the offender was a part makes such comments, prior to or in the course of the offence ( <i>Amr, Bungay, D.S.K., Gabara, Hockin, J.V., Nash, Stevovic, Van-Brunt, Vrdoljak, M.D.J. Cf Arsenault, Meier and Warren</i> where words alone were not sufficient for application of s. 718.2(a)(i).)
	Offender makes derogatory comments after the offence ( <i>Amr, Howald, Lankin, Miloszewski, Sandouga, Stevovic, J.V., Demers, M.D.J.</i> )
	Offender makes admissions as to motive ( <i>J.S., Demers</i> )
Items in offender's possession ( <i>Soles, Vrdoljak</i> )	Offender has a style of dress or tattoos interpreted by experts to be expressions of bias, prejudice or hate
	Offender possesses articles (on person or in residence) interpreted by experts to be expressions of bias, prejudice or hate
	Offender possess hate literature
Conduct of offender	Offender has history of disrespect for members of victim's group ( <i>Stevovic</i> )
	Offender acted in response to perceived harms perpetrated on the offender or the community of which he is a part ( <i>J.V., El-Merhebi, Gholamrezazdehshirazi, Sandouga</i> )
	Offender acted without provocation ( <i>Nash, Miloszewski, Demers, M.D.J.</i> ), with disproportionate force ( <i>Howald</i> ) or in a manner degrading to victim ( <i>Lefebvre. Cf Smith</i> )
Group in which offender is a member	Offender is a member of a racial, religious or ethnic group different than that of the victim ( <i>Miloszewski</i> )
	Offender holds membership in a hate group ( <i>Nash, Miloszewski, Vrdoljak</i> )
	Offender acts at the time of the offence as part of a hate group ( <i>Nash</i> )

#### Words spoken by offender

The courts have been inconsistent in their treatment of evidence relating to the words spoken by the offender or the group in which the offender was acting at the time of the offences. In several cases, derogatory comments made

by the offender were found to be relevant in prompting a finding of hate-motivation. In some cases, they were determinative. In other cases, words alone were found to be insufficient to prove motive.

In *R. v. Arsenault*, for example, the Ontario Court of Justice refused to apply section 718.2(a)(i) on the sentencing of an accused who made derogatory comments, such as “fucking faggot” and “fucking queer,” about the victim in the course of an assault.<sup>72</sup> These comments were characterized as “just one part of the whole incident” and not evidence on which the court could base a finding of motive.<sup>73</sup> Similarly, a Canada Court Martial, in *R. v. Warren*, held that an expression of anti-French sentiment uttered during the assault was insufficient to prove that the accused was motivated by a bias, prejudice or hate within the meaning of section 718.2(a)(i).<sup>74</sup>

These decisions stand in sharp contrast to the decision of the Saskatchewan Court of Appeal in *R. v. D.S.K.*<sup>75</sup> In that case, the court held that section 718.2(a)(i) was applicable solely on the basis of remarks made by the accused.<sup>76</sup> This difference in approach may be attributable to the substance of the words spoken. The utterances were not mere slurs, but instead revealed a particular purpose. The accused in this case was an Aboriginal youth. He

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<sup>72</sup> *R. v. Arsenault*, [2000] O.J. No. 2179 (Ct. Just.) (QL).

<sup>73</sup> *Ibid.* at 10.

<sup>74</sup> *R. v. Warren*, 2008 CarswellNat 784 (Canada Court Martial).

<sup>75</sup> *R. v. D.S.K.*, 2005 SKCA 18; [2005] S.J. No. 97 (C.A.) (QL).

<sup>76</sup> See also *R. v. Gabara* (1997), 217 D.L.R. (4th) 303, [1997] B.C.J. No. 3090 (Prov. Ct.) (QL) in which Judge Sundhu (as he then was) made a similar finding. The victim in this case was of Asian descent. The accused entered the victim's store and called him "George". The victim asked the accused to call him by his proper name, in response to which the accused said, "Are you a Canadian?...If you are a Canadian then you should be able to take whatever people call you...If you don't like it get out the country, get the fuck out of the country." The accused slapped the victim after being directed to leave the store.

savagely attacked and beat the victim after luring him into a bathroom at a house party in Regina. The evidence established that, in the course of the attack, the accused and others acting with him said words to the effect that the “Native Syndicate does not fuck around” and “This is what happens to white boys who come into the ‘hood’”.<sup>77</sup> The victim in this case was Caucasian.

The courts have declined to apply section 718.2(a)(i) in cases where the derogatory comments of the accused were made after the completion of the offence. The case of *R. v. Hurley* is illustrative.<sup>78</sup> The accused was convicted of assaulting the victim in retaliation for an earlier confrontation involving the accused’s spouse. In the course of a police interview, the accused used the word “chug” in reference to the victim’s Aboriginal heritage. Justice Griffin of the British Columbia Supreme Court held that this comment, although reprehensible in nature, could not be accepted as proof of motive because it was made after the assault had already concluded.

The court’s decision in this regard is consistent with the earlier decision of the Alberta Court of Appeal in *R. v. Wright*.<sup>79</sup> In that case, the accused assaulted a taxi driver and stole his wallet. At the time of arrest, the accused made disparaging comments about people of the victim's ethnicity. The court declined to apply section 718.2(a)(i) for the reasons set out at para. 10 as follows:

In order for s. 718.2(a)(i) to be invoked, there must be proof beyond a reasonable doubt that the offence was motivated by one of the listed factors. The objective of

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<sup>77</sup> *R. v. D.S.K.*, *supra* note 75 at para. 41.

<sup>78</sup> *R. v. Hurley*, *supra* note 46.

<sup>79</sup> *R. v. Wright*, 2002 ABCA 170; [2002] A.J. No. 892; 303 A.R. 371 (C.A.).

that sub-section is to impose increased penalties on those who offend because of their beliefs, but not to impose such penalties for merely holding the beliefs. The comments of Houlden J.A. in *R. v. Lelas* (1990), 58 C.C.C. (3d) 568 at 574 (Ont.C.A.), referring to the common law principles that underlie s. 718.2(a)(i), are applicable here:

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

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

Indeed, the courts must take care to ensure that the words of the accused are referable to motive and not mere expressions of belief. For the reasons set out above, the application of section 718.2(a)(i) in cases of the latter type would be tantamount to a punishment of thought and a violation of an accused's *Charter* right to freedom of expression.

This task of ascertaining motive on the basis of words spoken is considerably less difficult where those words are part of an admission. This was the case in *R. v. Demers*.<sup>80</sup> The victim was dressed as a drag queen for a Gay Pride event. Among the evidence tendered at the sentencing hearing was the

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<sup>80</sup> *R. v. Demers*, [2006] A.J. No. 1204 (Prov. Ct.) (QL).

statement of the accused, made to police in response to direct questioning about his motivation, that he assaulted the victim because he was gay.

The task is also less difficult if the accused's comments are corroborated by extrinsic evidence of an underlying bias, prejudice or hatred against the victim's group. In *R. v. Stevovic*, for example, the accused was convicted of uttering threats to a female victim.<sup>81</sup> A psychiatric report tendered by the Crown included comments to the effect that the accused believed himself to have been wrongly convicted because, among other things, "the judge was a girl and the prosecutor was a girl". More importantly, it revealed a history of disrespectful conduct toward women. The court found that this evidence, coupled with the absence of any other plausible explanation for his conduct, gave rise to a "compelling inference" that the offence was motivated by a bias, prejudice or hate based on gender.<sup>82</sup>

#### **Items in the offender's possession**

Inferences as to the accused's motivation for an offence may be drawn from evidence of items in the offender's possession. Justice Taliano of the Ontario Court of Justice (General Division) held that the evidence adduced by the Crown in *R. v. Soles* left "no doubt in [his] mind" as to the accused's motivation for vandalism of a Jewish cemetery.<sup>83</sup> In addition to the above-mentioned evidence relating to the date and location of the offence, the Crown tendered evidence of various items found on the accused's person and in his residence.

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<sup>81</sup> *R. v. Stevovic*, *supra* note 44.

<sup>82</sup> *Ibid.* at para. 35.

<sup>83</sup> *R. v. Soles*, *supra* note 67, at para. 11.



These items included tattoos of symbols of the Nazi regime, a photograph of Adolf Hitler, articles bearing the swastika and a Confederate flag. An expert explained the significance of the items to the court and the view that a person in possession of them is likely to be an ardent supporter of the neo-Nazi movement.<sup>84</sup>

Similar items were found to be relevant to motive in the case of *R. v. Vrdoljak*.<sup>85</sup> There were three accused in this case. All three were before the court for sentencing, although one accused subsequently brought a successful appeal from conviction on the issue of identity.<sup>86</sup> The matter involved the assault of a black victim and various bystanders in, and near, a bus in Toronto. The accused were described as having a skinhead appearance and Nazi-inspired tattoos. One accused was found to be in possession of racist lyrics. The court concluded, on the basis of this evidence, that the accused were “affiliated with the racist skinhead movement and the ideology of hatred and hostility towards blacks, Jews and other minorities that is associated with that movement.”<sup>87</sup> It inferred motivation for the assaults from this evidence together with evidence that the accused specifically targeted the black victim and chanted the words “white power” as they fled the scene.

The police may not be so fortunate as to locate such items on the person of the accused at the time of arrest. Not all hate mongers will express their views through their appearance nor carry with them the literature of a particular hate

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<sup>84</sup> *Ibid.* at paras. 11-17.

<sup>85</sup> *R. v. Vrdoljak*, [2002] 53 W.C.B. (2d) 254; [2002] O.J. No. 1332 (Ct. Just.) (QL).

<sup>86</sup> *R. v. Kulbashian*, [2003] O.J. No. 2835 (C.A.) (QL).

<sup>87</sup> *R. v. Vrdoljak*, *supra* note 85, at para. 2.

group. Moreover, not all police agencies will have the time or resources necessary to execute search warrants on the premises of suspects under investigation for hate-motivated offences.

### **Conduct of offender**

Evidence of a lack of provocation on the part of the victim appears to be of some significance in cases of assault.<sup>88</sup> It is perhaps obvious that such evidence could explain the assault or otherwise give rise to reasonable doubt as to a claim of motive based on bias, prejudice or hate.<sup>89</sup> At the same time, however, evidence of provocation does not automatically preclude the application of section 718.2(a)(i).

For example, the case of *R. v. Howald* involved provocation by the victim in the form of a drunken sexual advance in a prison cell.<sup>90</sup> The court found that the assault was motivated by bias, prejudice or hate based on sexual orientation and applied section 718.2(a)(i) notwithstanding this evidence. Its conclusion was premised on a finding that the accused used excessive force to repel that victim and made insulting comments about the victim. The accused told police that he hoped he had “killed the f-ing faggot”.

In addition to the degree of force used by the accused, the court may look at the very nature of the offender’s conduct. This was the case in *R. v. Lefebvre*.<sup>91</sup> The accused was convicted of sexual assault of a female prostitute.

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<sup>88</sup> See *R. v. Nash*, [2002] O.J. No. 3843 (Ct. Just.) (QL); *R. v. Miloszewski*, *supra* note 69; *R. v. Demers*, *supra* note 80 and *R. v. M.D.J.*, *supra* note 41.

<sup>89</sup> See, *inter alia*, *R. v. Castro-Andino*, 1998 CarswellBC 3017 (S.C.).

<sup>90</sup> *R. v. Howald*, [1998] O.J. No. 3121; 39 W.C.B. (2d) 246 (Ont. Gen. Div.).

<sup>91</sup> *R. v. Lefebvre*, [1998] J.Q. No. 985 (C.Q.) (QL).

The evidence relied on by the Quebec court in applying section 718.2(a)(i) is described in summary form at para. 33 of the judgment as follows:

Comme facteur aggravant, la Cour considère d'abord que l'agression a été motivée en partie par la haine et le mépris du sexe féminin (art. 718.2 a) I)). C'est en fait la seule conclusion plausible à laquelle le Tribunal peut en venir en constatant l'humiliation que les accusés ont fait subir à la victime (Lefebvre lui a uriné dessus en riant et Côté s'est masturbé et lui a éjaculé sur le visage) et la violence inouïe dont il ont fait preuve lors de l'agression.

Such evidence is not always determinative. The Ontario case of *R. v. Smith* involved the sentencing of an accused convicted for making, possessing for the purpose of distribution, and distributing obscene materials. Included in these materials were visual images and videos of simulated sexualized violence against women.<sup>92</sup> They were described by the court in the following terms at paras. 5-9:

Mr. Smith uses film and special effects enhanced by computer editing to make the visual materials. In them, women in a state of nudity or semi-nudity, are shot, stabbed, stalked, executed by bow and arrow, or shown in combat with swords and knives...

The impugned films fuse sex and violence. In them, the male assailant is portrayed as being competent and a successful individual who can silence women with his violence, leave them on sexual display, and walk away without consequence.

The women in these films are easily manipulated, and in some instances, shown as being complicit in the violence. Because they are portrayed as "bad women" by being sexually loose; or attempting to use

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<sup>92</sup> *R. v. Smith*, [2002] O.J. No. 5018 (Sup. Ct. Just.) (QL).

their sexuality to control men, violence against them is portrayed as being justified.

...

The short stories portray the brutal rape and killing or sexualized killing of women in the most graphic terms. Generally, the same formula has been applied. The stories reinforce the myth that women enjoy being raped; that they enjoy their victimization.

The Crown argued that the offences were motivated by a bias, prejudice or hatred of women. The court held to the contrary, finding that there was “no evidence” on this point.

Also of relevance to a finding of hate-motivation within the meaning of section 718.2(a)(i) has been evidence that the accused acted out of revenge or in retaliation to a perceived wrong committed on him directly or on the community of which he is a part. The case of *R. v. J.V.*, discussed above, is illustrative of the former.<sup>93</sup> The case of *R. v. El-Merhebi* is an example of the latter.<sup>94</sup> In it, the accused admitted to having targeted a Jewish elementary school for his act of arson because he considered Israelis to be responsible for the death of a Palestinian leader. A similar finding was made in *R. v. Sandouga*, wherein the accused threw a Molotov cocktail at a Jewish synagogue.<sup>95</sup> He blamed the Jewish community for the conflict occurring at that time in the Middle East.

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<sup>93</sup> *R. v. J.V.*, *supra* note 42.

<sup>94</sup> *R. v. El-Merhebi*, *supra* note 40.

<sup>95</sup> *R. v. Sandouga*, *supra* note 40.

### **Group in which offender was a member**

In *R. v. Miloszewski*, the sentencing judge took into account evidence that the accused were members of a community different from that of the accused.<sup>96</sup> Such a circumstance would appear to be an obvious prerequisite to the application of section 718.2(a)(i). It is difficult to imagine many circumstances in which an individual might be motivated by a bias, prejudice or hate of a group of which he or she is a member.

In its decision on the appeal from sentence of two of the accused in *R. v. Miloszewski*, the British Columbia Court of Appeal considered membership in a hate group to be a more compelling factor.<sup>97</sup> As mentioned above, the accused in this case were convicted for their part in the killing of an elderly, Indo-Canadian caretaker on the grounds of the Guru Nank Sikh Temple. They were described by the court as members of a “loosely knit Neo-Nazi, skinhead, racist grouping of likeminded individuals with common views.” Membership in this particular group was apparently contingent on one beating up “an East Indian or a Nigger or a Nip.”<sup>98</sup>

One accused argued on appeal that he was entitled to a lesser sentence than that passed down to the other accused because he participated in the killing to a lesser extent. The court rejected this argument. In an oft-quoted passage, found at para. 27 of the judgment of Justice Lambert, the court held as follows:

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<sup>96</sup> *R. v. Miloszewski*, *supra* note 69. The reasons of the sentencing judge in this case were complimented by Court of Appeal as “comprehensive” and the sentences which he imposed as “fit sentences for this despicable crime cruelly committed by a gang of racial bigots in pursuit of their racist aims”.

<sup>97</sup> *Ibid.*

<sup>98</sup> *Ibid.* at 5.

On the question of participation it is important to understand that in a gang crime committed together by a like-minded group of racial bigots together carrying into effect their deplorable aims there is no room for nice distinctions about degrees of participation.

The accused’s culpability was measured thus by his involvement in a hate-motivated group. The decision of the Saskatchewan Court of Appeal in *D.S.K.*, to base a finding of hate-motivation on evidence of the words of the accused, as well as those of the group in which he was a part, is consistent in principle with this conclusion.<sup>99</sup>

#### 4.2.2.3 Circumstances of the victim

**Table 11: Evidence related to the circumstances of the victim**

<b>Circumstances of the Victim</b>	
Group in which victim is a member	Victim is an actual or perceived member of a particular group ( <i>Nash, Miloszewski Gholamrezazdehshirazi, D.J., J.S., Demers. Cf Jean.</i> )
	Victim was only member of identified group within the larger group present at the time of the offence and the only person within that larger group targeted by the offender ( <i>Van-Brunt, Vrdoljak</i> )
Activities of victim	Victim engaged in activities associated with members of victim’s group ( <i>Amr, Demers</i> )

#### **Group in which victim was a member**

The courts have found that membership on the part of the victim in, or an association with, the targeted group is a necessary prerequisite to the application of section 718.2(a)(i). The victim need not be an actual member of that group,

<sup>99</sup> See also *R. v. Nash*, *supra* note 88.

however. It is sufficient that the victim is perceived as such by the accused.<sup>100</sup> Section 718.2(a)(i) was applied in *R. v. Amr* in part on the basis of a bias, prejudice or hatred of gay men. The court did so even though the victim was heterosexual.

Membership in a particular group will not trigger the application of section 718.2(a)(i) by itself. The *R. v. Jean* case involved the sentencing of an accused for the sexual assault of a prostitute.<sup>101</sup> The Crown argued that the accused's sentence ought to be increased because it was motivated by a hatred of women. Its argument in this regard was based solely on the gender of the victim and that of the victims of offences of which the accused had previously been convicted. Judge Saunderson held that this evidence was insufficient for the application of section 718.2(a)(i). He added that section 718.2(a)(i) would not apply in any event as it did not contemplate the motivation operating in this case. That motivation was described as a desire on the part of the accused to dominate his victims.

### **Activities of the victim**

Evidence relating to the activities of the victim at the time of the offence may assist the court in understanding the perspective of the accused and the extent to which he or she associated the victim with a particular group. The court noted in *R. v. Amr*, for example, that the accused encountered the victim in a men's bathroom at a nightclub in a state of partial undress.<sup>102</sup> The victim's

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<sup>100</sup> See *R. v. Amr*, *supra* note 38.

<sup>101</sup> *R. v. Jean*, *supra* note 45.

<sup>102</sup> *R. v. Amr*, *supra* note 38.

circumstances could be explained by the fact that he was wearing a Halloween costume, which had to be removed in order for him to urinate. However, this fact appears not to have been known to the accused at the time.

### **4.3 Degree of Motivation**

The nature of the evidence required by a court may be informed in part by the sentencing judge's understanding of the degree of hate-motivation necessary to trigger the application of 718.2(a)(i). A court may require a more significant body of evidence if it views section 718.2(a)(i) as requiring the bias, prejudice or hate to have been the sole motivating factor for the crime. Likewise, the court might be satisfied by less evidence if hate needs only to have been a partial motivating factor.

#### **4.3.1 No consistent test**

In a 2001 article, entitled "Sentencing in Cases of Hate-Motivated Crime: An Analysis of Subparagraph 718.2(a)(i) of the *Criminal Code*", Julian V. Roberts and Andrew J.A. Hastings considered the case law that emerged in the years following the enactment of section 718.2(a)(i). They found a considerable amount of variation in the degree of motivation required by the court to justify an enhanced sentence.<sup>103</sup> Their findings in this regard were confirmed by this study.

Indeed, there does not yet appear to be any authoritative statement in the jurisprudence on the question of the degree of hate -motivation required for the application of section 718.2(a)(i). Most of the cases that do consider the issue,

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<sup>103</sup> Julian V. Roberts & Andrew J.A. Hastings, "Sentencing in Cases of Hate-Motivated Crime: An Analysis of Subparagraph 718.2(a)(i) of the *Criminal Code*" (2001-2002) 27 Queen's L.J. 93.



either expressly or by implication, appear to favour an interpretation that requires evidence of only partial motivation on the basis of bias, prejudice or hate. A list of the relevant cases, along with an excerpt of the courts' decisions in this regard, is set out in Table 12.

**Table 12: Degree of hate-motivation required by the courts**

Case <sup>104</sup>	Degree of Motivation
<b>Motivated solely by bias, prejudice or hate</b>	
<i>Sockalingam</i> 2001, Ont. Ct. Just.	The term “motivated” in section 718.2(a)(i) was interpreted as meaning “ <b>caused by, or is the reason behind</b> ” the offence.
<i>M.D.J.</i> 2001, B.C. Prov. Ct.	"...[A]fter considering all of the circumstances, I have come to the conclusion, based on the evidence, that this event was motivated by a bias, prejudice or hatred [sic] of homosexuals. There is <b>no other conclusion</b> that can be reached..."
<b>Bias, prejudice or hate was a significant motivating factor</b>	
<i>Baxter</i> 1997, Ont. Prov. Ct.	"I read this section as requiring a <b>predominant feature</b> of the offence being ‘motivated by bias, prejudice or hate’."
<i>Nash</i> 2002, Ont. Ct. Just.	Section 718.2(a)(i) was applied on evidence that "racial motivation was a <b>significant contributing factor</b> "
<i>Gholamrezazdehshirazi</i> 2003, Alta. Prov. Ct.	"Thus, his personal bias... played a <b>significant role</b> in the assault." Section 718.2(a)(i) was applied on that basis.
<b>Motivated in part by bias, prejudice or hate</b>	
<i>Gabara</i> 1997, B.C. Prov. Ct.	Section 718.2(a)(i) was applied on evidence that “ <b>an element</b> ” of the motivation was bias, prejudice or hate.
<i>Howald</i> 1998, Ont. Sup. Ct. (Gen. Div.)	Section 718.2(a)(i) was applied on evidence that the offence was “ <b>energized in part</b> ” by bias, prejudice or hate.
<i>Sandouga</i> 2002, Alta. C.A.	Section 718.2(a)(i) was applied on evidence of “a <b>link</b> between the bias, prejudice or hate and the decision to commit the crime” and “a <b>clear link</b> between his enmity towards or prejudice... and his commission of the crime.”
<i>Vrdoljak</i> 2002, Ont. Ct. Just.	Section 718.2(a)(i) was applied on evidence that the offence was “ <b>motivated at least in part</b> ” by bias, prejudice or hate.
<i>Van-Brunt</i> 2003, B.C. Prov. Ct.	"The Court [in Vrdoljak] concludes that it must be established beyond a reasonable doubt that the offence was motivated <b>at least in part</b> by bias, prejudice or hate based on the victim's race or colour. I agree with that conclusion."
<i>Hockin</i> 2005, Ont. Ct. Just.	Section was application on the basis that "offence appears to have been motivated <b>in relation to</b> ..." bias, prejudice or hate.
<i>J.V.</i> 2006, Ont. Ct. Just.	Section 718.2(a)(i) was applied on evidence that the accused’s “bias against homosexuals was <b>part of</b> his motivation.”

<sup>104</sup> Citations for the cases listed in Table 12 are included in the Reference List at page 105.

#### 4.3.2 Endorsement of partial motivating factor test

As set out in Table 12, the applicable test was characterized - in at least two cases - as requiring hate-motivation to be the sole causal factor for the offence. Justice Cleary of the Ontario Court of Justice interpreted the term “motivated” in section 718.2(a)(i), at para. 10 of his judgment in *R. v. Sockalingam*, as follows:

*Sockalingam*, as follows:

What does 'motivated' mean? Motivated can be looked at as meaning caused by, or is the reason behind, in this case, the assault. It is perhaps telling that the legislature did not use some other word - for example, did not use "caused by" or "the result of" or "involved".<sup>105</sup>

The accused in this case assaulted a liquor store employee. The employee had refused to serve the accused because he was intoxicated. In the course of the assault, the accused directed racial slurs at the victim. The court held that section 718.2(a)(i) was inapplicable because the assault was “not motivated or started by” the fact of the victim’s racial or ethnic background.

A similar approach was adopted by the B.C. Provincial Court in *R. v. M.D.J.* In applying section 718.2(a)(i), Judge Burdett commented to the effect that there was “no other conclusion” which the court could have reached other than a finding that the offence was motivated by bias, prejudice or hate. Implicit in the court’s comments is the view that an ulterior motive, whether found to have

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<sup>105</sup> *R. v. Sockalingam*, [2001] O.J. No. 5999 (Ct. Just.) (QL).

driven the accused in whole or in part, would have rendered section 718.2(a)(i) inapplicable.<sup>106</sup>

In an article, entitled “Criminal Proceedings as a Response to Hate: The British Columbia Experience,” authors Craig S. MacMillan, Myron G. Claridge and Rick McKenna argue that section 718.2(a)(i) of the *Criminal Code* ought not to be interpreted by the courts as requiring evidence that the offence was motivated solely by bias, prejudice or hate.<sup>107</sup> They write as follows:

It can ... be extremely difficult to determine whether or not an offender was motivated by bias, prejudice or hate. In some instances, there are a number of possible motivating factors that may be present. Moreover, there has been some debate whether a crime must be solely motivated by bias, prejudice or hate for it to be a “hate crime”. In our view, a hate crime can be motivated in whole or in part by bias, prejudice or hate. This is not a novel concept in sentencing, since judges have always taken into account numerous aggravating and mitigating factors at the time of sentencing. To suggest that, for the purpose of sentencing, an offence is only a “hate crime” if it is established that bias, prejudice or hate is the sole motivating factor simply would be inappropriate and inconsistent with sentencing practices. Sentencing proportionality requires that all aggravating and mitigating factors be taken into account at the time of sentencing, and the presence of bias, prejudice or hate indicators are clearly relevant to such an exercise.<sup>108</sup>

This excerpt was cited with approval by Justice Fairgrieve of the Ontario Court of Justice in *R. v. Vrdoljak*<sup>109</sup> and Judge Watchuk of the B.C. Provincial

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<sup>106</sup> See also *R. v. Stevovic*, *supra* note 44.

<sup>107</sup> MacMillan et al, *supra* note 29.

<sup>108</sup> *Ibid.* at 452.

<sup>109</sup> *R. v. Vrdoljak*, *supra* note 85, at para. 5.

Court in *R. v. Van-Brunt*.<sup>110</sup> Regrettably, these cases have received only modest judicial consideration to date. It is not clear whether the broad approach advocated by MacMillan et al. will be adopted by other courts. While some courts have used language which suggests a similar interpretation of section 718.2(a)(i), none have taken up the issue expressly.

### 4.3.3 Alternative approaches

#### Significant contributing factor test

The argument of MacMillan et al. is premised on the existence of only two possible interpretations for section 718.2(a)(i), one in which hate is the *sole* motivating factor and the other in which hate is only a *partial* motivating factor. Their argument overlooks a viable alternative interpretation, that being an interpretation that requires hate to be a “significant contributing factor” in relation to motive.

This was the language used by the Ontario Court of Justice in *R. v. Nash*<sup>111</sup> and the Alberta Provincial Court in the subsequent decision of *R. v. Gholamrezazdehshirazi*.<sup>112</sup> The approach taken by the courts in these two cases is consistent with an earlier decision of the Ontario Provincial Court in *R. v. Baxter*. In that case, the court required proof that the bias, prejudice or hate was the “predominant feature of the offence.”<sup>113</sup>

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<sup>110</sup> *R. v. Van-Brunt*, 2003 BCPC 559; [2003] B.C.J. No. 2336 (Prov. Ct.) (QL) at para. 46.

<sup>111</sup> *R. v. Nash*, *supra* note 88.

<sup>112</sup> *R. v. Gholamrezazdehshirazi*, *supra* note 47.

<sup>113</sup> *R. v. Baxter*, [1997] O.J. No. 5811 (Prov. Div.) (QL).

Roberts and Hastings expressed criticism of that case, and others like it, arguing as MacMillan et al do, that an undue emphasis on motivation and an excessively high evidentiary threshold would defeat the purposes of section 718.2(a)(i) and render it inoperable. In fact, it may simply limit the application of 718.2(a)(i) to fewer cases than these authors would prefer.

The liberal interpretation favoured by these authors would stretch the reach of section 718.2(a)(i) to include any case in which bias, prejudice or hatred was an element. This may have been the objective of Parliament. However, it would be inconsistent with the rule of strict construction applicable to penal legislation. Of course, the rule of strict construction is not absolute, even in relation to penal legislation. The courts must reconcile that rule with the requirements of the *Interpretation Act*, which mandate a purposive interpretation.<sup>114</sup> In this way, the significant contributing factor test offers a viable alternative between two apparent extremes.

### **Proportionality test**

A further alternative for the courts to consider involves the application of the proportionality principle. It provides, as set out in section 718.1 of the *Criminal Code*, that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. This principle would suggest that the degree to which a sentence is increased pursuant to section 718.2(a)(i) should be a function of the degree to which it is found to be motivated by bias, prejudice or hate within the meaning of that provision.

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<sup>114</sup> *Interpretation Act*, R.S.C. 1985, c. I-21, s. 12.

A test based on proportionality would allow the courts to take into account any evidence of bias, prejudice or hate without the necessity of determining, as a preliminary matter, whether it was the sole or even a significant motivating factor. More importantly, they could take into account evidence of other contributing causes, such as the disinhibiting effects of some drugs and alcohol, within the framework of a proportionality analysis. The latter has been found to have played a role in many of the cases considered in this study and yet little regard has been paid to its impact on motive, perhaps to avoid taking the case outside of the purview of section 718.2(a)(i).

It may be that sentencing courts already apply the proportionality principle in cases involving section 718.2(a)(i). However, they have yet to do so expressly. This is unfortunate. A lack of clarity and consistency in the interpretation of legal tests, and the nature of the evidence relevant to those tests, leads to unpredictability. This offends the requirements of certainty in the *Charter*.<sup>115</sup> It also leads to inefficiencies in the criminal justice system as litigants are left to guess as to how a court might respond in any given case. The analysis set out above makes clear that, in relation to section 718.2(a)(i), the law is in need of either clear appellate direction or the influential decision of a lower court which others might be persuaded to follow.

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<sup>115</sup> *Canadian Charter of Rights and Freedoms*, *supra* note 1, s. 7. See also *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code*, [1990] 1 S.C.R. 1123 and *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606.

## **5: SENTENCE ENHANCEMENT**

Parliament chose not to stipulate in section 718.2(a)(i) any particular amount by which a sentence ought to be enhanced on the basis of evidence of hate-motivation. It likewise did not prescribe a form of sentence nor a minimum term in such cases. Rather, Parliament left the question of the degree of sentence enhancement to the discretion of the sentencing court, saying only in section 718.2 that the sentence “should” be increased if the aggravating factor of hate-motivation is found to be present.<sup>116</sup>

A review of the cases identified in this study was undertaken in order to identify the manner in which this discretion has been exercised, and the extent to which sentences have been increased, on the application of section 718.2(a)(i). The results of this analysis are set out below.

### **5.1 No clear rule for degree of sentence enhancement**

Unfortunately, none of the cases reviewed in this study included express statements as to the ultimate impact of hate-motivation on the sentence of an accused. There is no reference to a general rule or approach to the matter of sentence enhancement under section 718.2(a)(i). At most, there is a suggestion of a potential double-sentence rule emerging from some of the appellate authorities as well as an apparent preference for sentences of imprisonment.

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<sup>116</sup> *Criminal Code*, *supra* note 2, s. 718.2(a).



### 5.1.1 A double-sentence approach

Prior to the enactment of Bill C-41, in the 1990 decision of *R. v. Lelas*, the Ontario Court of Appeal doubled the sentence of an accused after concluding that the lower court failed to take into account the aggravating effect of hate-motivation.<sup>117</sup> The accused in this case was sentenced initially to a term of imprisonment of six months for vandalism of a synagogue, *inter alia*. The appeal court substituted a term of incarceration of 12 months on evidence that the offence was motivated by racial bias.

Although they have never explicitly endorsed a “double sentence” rule, appeal courts in Canada have implemented just that in at least two cases. In *R. v. Sandouga*, the Alberta Court of Appeal effectively doubled the sentence of the accused by increasing it from a term of imprisonment of one year plus probation to a term of two and one-half years.<sup>118</sup> A similar result was arrived at by the Saskatchewan Court of Appeal in the 2005 decision of *R. v. D.S.K.*<sup>119</sup> It too doubled the sentence of the accused in light of evidence that the offence was racially motivated. The accused’s sentence of imprisonment in this case was increased from a term of imprisonment of two years less one day to a term of four years.

In *R. v. Bungay*, the Newfoundland Provincial Court referred to *R. v. Lelas* as a case in which the court doubled the ultimate sentence based on hate-

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<sup>117</sup> *R. v. Lelas*, *supra* note 1.

<sup>118</sup> *R. v. Sandouga*, *supra* note 40.

<sup>119</sup> *R. v. D.S.K.*, *supra* note 75. See also Candice Grant, “*R. v. Keshane*: Case Commentary” (2008) 71 Sask.L.Rev. 153 in which the author questions why the court did not take into account the mitigating circumstance of the offender’s aboriginal background.

motivation.<sup>120</sup> Unfortunately, however, it is not clear whether the decision was applied by the sentencing judge so as to double the sentence of the accused before him. No comments to that effect are included in, and the analysis of the sentencing judge is not apparent from, the reasons for judgment.

Otherwise, there is no reference in any of the cases to a “double-sentence” rule and no basis on which to conclude that section 718.2(a)(i) has been applied consistently in this way. This is unexpected, given the precedential value of *R. v. Sandouga* and *R. v. D.S.K.* in their respective jurisdictions and their influential value elsewhere. The decisions of these courts offer some authority nonetheless for a double-sentence approach to sentence enhancement in cases involving hate-motivation.

### **5.1.2 A preference for imprisonment**

Judge Sundhu held in *R. v. Gabara* that the facts of the case, “and for the protection of persons of racial minority or to protect persons from offences in which there is an element of racism or prejudice,” required a sentence of incarceration.<sup>121</sup> It would appear that this view is shared by other courts. Although none of the cases reviewed in this study include any express comments to the effect that jail is required in cases of hate-motivation, imprisonment was ordered (either in the form of a jail sentence or a conditional sentence order) in all but one of the cases in which section 718.2(a)(i) was applied.

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<sup>120</sup> *R. v. Bungay*, [2004] N.J. No. 101 (Prov. Ct.) (QL).

<sup>121</sup> *R. v. Gabara*, *supra* note 76, at para. 39. Evidence of hate-motivation did not preclude the granting of a conditional sentence order in that case. Indeed, conditional sentence orders were granted in other cases of hate-motivated offences, including *R. v. Nash*, *supra* note 88, *R. v. Nicholson*, *supra* note 64 and *R. v. M.D.J.*, *supra* note 41.

That exception is the case of *R. v. Hockin*, in which the Ontario Court of Justice issued a suspended sentence with probation of 12 months for the offence of uttering threats.<sup>122</sup> Included in the probation order was a requirement that the accused attend for counselling in cultural sensitivity.

### **5.1.3 Judicial discretion in sentencing**

Strict rules on sentencing - whether in the form of a double-sentence approach or a mandatory term of imprisonment – have the potential to compromise other constitutional values, not least of which is the *Charter* right of Canadians to be free from cruel and unusual punishment.<sup>123</sup> A mandatory minimum, whether imposed by Parliament or developed by the courts at common law, may result in sentences that are unduly harsh for those accused persons with compelling mitigating circumstances. In this respect, judicial discretion serves the interests of justice. It affords the courts the flexibility necessary to tailor a sentence to the specific circumstances of the offence and the offender.

Judicial discretion ought not to operate at the expense of transparency. It is not surprising that no clear rule for sentence enhancement has emerged in relation to section 718.2(a)(i) given that hate-motivation is just one factor that sentencing courts must weigh alongside any additional aggravating factors and against any competing mitigating factors. In those cases where the impact has a specific and measurable impact, however, the courts should be encouraged to expressly articulate the degree of that impact.

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<sup>122</sup> *R. v. Hockin*, 2005 ONCJ 383; [2005] O.J. No. 3893 (Ct. Just.) (QL).

<sup>123</sup> *Canadian Charter of Rights and Freedoms*, *supra* note 1, s. 12.

## 5.2 Potential limits on sentence enhancement

### 5.2.1 No requirement that maximum sentence be ordered

Judge Stewart noted in his 1999 decision in *R. v. Miloszewski* that none of the precedents he reviewed called for a maximum sentence on the application of section 718.2(a)(i).<sup>124</sup> The results of this study support that conclusion. Apart from the decision of Judge Romilly in *R. v. J.S.*, the courts have yet to impose a maximum sentence for a hate-motivated offence.

In *R. v. J.S.*, the accused was sentenced to a term of custody of three years and a supervision order, this being the maximum sentence available to the court under the *Youth Criminal Justice Act*.<sup>125</sup> However, for the reasons set out above, the case is of limited precedential value.

### 5.2.2 Impact of two-year maximum for other hate crimes

In *R. v. Presseault*, Justice Vauclair of the Court of Quebec (Criminal and Penal Division) expressed concern at the “relatively light maximum sentence” applicable to the offence of wilful promotion of hatred contrary to section 319(2) of the *Criminal Code*.<sup>126</sup> He held, at paras. 37-38, as follows:

It is clear that these words describe a crime whose manifestations can only be abhorrent, as in the case involving Presseault. Nonetheless, as horrible as these words may be, they constitute nothing more than the offence for which Parliament limited imprisonment to a term not exceeding two years.

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<sup>124</sup> *R. v. Miloszewski*, *supra* note 69.

<sup>125</sup> *R. v. J.S.*, *supra* note 39.

<sup>126</sup> *R. v. Presseault*, 2007 QCCQ 384; [2007] Q.J. No. 72 (C.Q.) (QL).

This maximum sentence may be surprising because, once the evidence for this crime has been adduced and the defences rejected, it has all the makings of a serious and pernicious crime that undermines the very basis of our democratic way of life. In this light, the sentence prescribed by statute may seem to be paradoxical. The Court may not, however, disregard Parliament's intention to impose a relatively light maximum sentence, which constitutes [the] benchmark for establishing the objective gravity of the offence.

The court's observations in this regard call into question the expectations of Parliament for the ultimate impact of section 718.2(a)(i) on the sentences of hate-motivated accused. It might be difficult for the Crown to argue for a significant increase in sentence so long as a hate crime as serious as wilful promotion of hatred (and public incitement of hatred) garners a maximum prison sentence of only two years. Section 718.2(b) mandates that sentences "be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances." The relatively modest maximum sentence in section 319 might operate thus as a potential limit or ceiling on the degree of sentence enhancement appropriate under section 718.2(a)(i).<sup>127</sup>

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<sup>127</sup> Regardless of the potential impact of the unusually modest sentence available under section 319, Parliament might consider amending the provision to bring this maximum sentence in line with that of other hate crimes in the *Criminal Code*. The maximum sentences available for the offences of advocating genocide and mischief against religious property are significantly higher. The maximum sentence for the former is imprisonment for a period of five years. The latter may result in a sentence of up to ten years imprisonment.

## 6: VICTIM IMPACT

### 6.1 Potential utility of victim impact evidence

Crimes motivated by bias, prejudice or hate are egregious in their impact on the victim, the community with which he or she is identified, and society at large. Indeed, sentence enhancement is often justified on this basis.<sup>128</sup> The B.C. Hate Crime Team in its publication, *End Hate Crime*, describes the nature of the harm perpetrated by hate offenders as follows:

Targeted individuals symbolize the group and all members of the group are possible victims. Through malicious and violent behaviour, perpetrators communicate to targeted individuals and groups that they are not welcome in the community or neighbourhood.

The psychological trauma experienced by victims and their group, whether the offence or incident is criminal in nature or not, can be overwhelming. Victims who change their behaviour will not decrease the likelihood of repeat attacks. That realization leads to a sense of fear, isolation and vulnerability. Victims may be reluctant to come forward because of one or many fears. They include immigration issues, being compromised, retaliation, and law enforcement and

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<sup>128</sup> The notion that hate crimes deserve harsher sanctions because they are more injurious in their effect is said by Paul Iganski to have “firmly entered into the discourse of defenders of hate crimes laws.” See Paul Iganski, “Hate crimes hurt more, but should they be more harshly punished?” in Paul Iganski, ed., *The Hate Debate: Should Hate Be Punished as a Crime?* (London, UK: Profile Books, 2002) at 132. Iganski questions whether sociological research supports this view. Cf. Frederick M. Lawrence, *Punishing Hate: Bias Crimes under American Law* (Cambridge, MA: Harvard University Press, 1999) at 161-175 wherein the author makes a compelling case for sentence enhancement for hate-motivated offences on the basis of expressive punishment theory.

their response. Victims may also be wary of coming forward because of cultural and language barriers.<sup>129</sup>

This view is echoed in the works of many academics and legal commentators.<sup>130</sup> Among these is Frederick M. Lawrence. In *Punishing Hate*, he describes some of the psychological and physiological effects reported by victims of hate-motivated offences (which he describes as bias-motivated offences) as follows:

A bias crime ... attacks the victim not only physically but at the very core of his identity. It is an attack from which there is no escape. ... This heightened sense of vulnerability caused by bias crimes is beyond that normally found in crime victims. Bias crime victims have been compared to rape victims in that the physical harm associated with the crime, however great, is less significant than the powerful accompanying sense of violation. The victims of bias crimes thus tend to experience psychological symptoms such as depression or withdrawal, as well as anxiety, feelings of helplessness, and a profound sense of isolation.<sup>131</sup>

It is hoped that such research has informed the views of the Crown in the establishment of policies for the prosecution of hate-motivated offences. This appears to be the case in the province of Ontario. An excerpt from the Crown Counsel policy manual for that province was reproduced in *R. v. Demers*, at paras. 95-99, as follows:

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<sup>129</sup> British Columbia Ministry of Attorney General, *End Hate Crime: B.C. Hate Crime Team Roles and Responsibilities* (Victoria, BC: B.C. Hate Crime Team, 2008) at 14.

<sup>130</sup> See Leslie J. Moran, "The Emotional Dimensions of Lesbian and Gay Demands for Hate Crime Reform" (2004), 49 McGill L.J. 925 at 933-938. The works cited by Moran include Jack Levin & Jack McDevitt, , *Hate Crime* (Cullompton, UK: Willan Publishing, 2005)<sup>131</sup> Frederick M. Lawrence, *Punishing Hate: Bias Crimes under American Law* (Cambridge, MA: Harvard University Press, 1999) at 40.

<sup>131</sup> Frederick M. Lawrence, *Punishing Hate: Bias Crimes under American Law* (Cambridge, MA: Harvard University Press, 1999) at 40.

[F]irstly, there is the impact on the individual. Hate crimes have a tremendous impact on the individuals who are victimized. In addition to the psychological and emotional harm caused by hate crime and its repercussions on identity and feelings of self-worth of the victim, the degree of violence involved in hate-motivated offences is normally much more extreme than in non-hate crimes.

Secondly, impact on the target group. Hate crime has a general terrorizing effect on the target group to which the victim belongs, because its occurrence makes them all feel vulnerable to victimization.

Thirdly, impact on other vulnerable groups. Hate crimes have a negative impact on other vulnerable groups that share minority status or identify with the targeted group, especially if the hate motivation is based on an ideology or a doctrine that covers a number of groups that live within the community.

And fourthly, impact on the community as a whole. This perhaps is the greatest evil of hate crime. Hate crime can end up dividing people in society. In a multicultural society like Canada, where all groups are to live together in harmony and equality, hate crime is an anathema.

Any occurrence of hate crime is a negation of the fundamental values of Canada.<sup>132</sup>

## **6.2 Actual use of victim impact evidence**

The B.C. Hate Crime Team advises police investigators to seek victim impact statements from victims as well as from community groups, as individuals within these organizations may be able to provide useful information concerning such matters as the frequency and impact of hate-motivated offences against members of their identified group. Indeed, the potential utility of victim impact

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<sup>132</sup> *R. v. Demers*, *supra* note 80.



evidence at sentencing is well-documented in the existing literature.<sup>133</sup> Little is known, however, about the weight that the courts attach to evidence of victim impact, and the consequences of such offences generally, in the sentencing of hate-motivated offences.<sup>134</sup> Accordingly, an analysis was undertaken in the context of this study to assess the extent to which the courts have made use of such evidence in cases involving section 718.2(a)(i). The results are set out below.

### **6.2.1 Number of cases in which the court referenced victim impact evidence**

The courts referred to evidence of victim impact in only 13 of the 25 cases identified in this study as involving offences motivated by bias, prejudice or hate within the meaning of section 718.2(a)(i). In some cases, the evidence was referred to explicitly. In others, the provision of victim impact evidence to the court was implied from the fact that the substance of such evidence was included in the court's general discussion of the facts and consequences of the offence.

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<sup>133</sup> See Julian V. Roberts & A. Edgar, *Victim Impact Statements at Sentencing* (Ottawa, ON: Department of Justice Canada, 2006); Julian V. Roberts & Edna Erez, "Communication in Sentencing: Exploring the Expressive Function of Victim Impact Statements" (2004), 10 *International Review of Victimology* 223; and Tim Roberts, *Assessment of Victim Impact Statement Program in British Columbia* (Ottawa, ON: Canada Department of Justice, 1992).

<sup>134</sup> Robertson, relying ostensibly on the work of Roberts and Hastings, argues that the focus of section 718.2(a)(i) of the *Criminal Code* on motive to the exclusion of the consequences of hate-motivated offences on victims is problematic and that sentence enhancement should be tied to the effects of the crime on the victim. See Robertson, *supra* note 59. This view is not legally viable to the extent it might result in the sentencing court assessing blameworthiness on the basis of unforeseeable consequences.

**Table 13: Number of cases involving hate-motivated offences in which the court referenced victim impact evidence, 1996-2007**

Victim impact evidence	Cases
No reference to evidence of victim impact	12
Some reference to evidence of victim impact	13

In those cases wherein the court was explicit in its reference to victim impact evidence, it appears that the evidence was adduced *viva voce* (either in the context of the preceding trial or at the sentencing hearing) or tendered in the form of written statements. In one case, the court accepted the representations of Crown Counsel as to information conveyed to him by the victim.

Victim impact evidence may have been adduced in some, or all, of the 12 cases in which it was not referenced in the reasons for judgment. It is open to the sentencing judge to consider such evidence but not refer to it expressly. An examination of the court and Crown files of each of these cases, as well as a review of a transcript of proceedings, would be required to determine whether evidence of victim impact was in fact available to the court at the time of sentencing.

Otherwise, the limited use of victim impact evidence might be attributable either to the Crown failing to obtain the evidence from victims or the victims failing to provide it. It appears that the Crown in *R. v. Nash* did not communicate at all with the victim in that case.<sup>135</sup> The court noted that Crown Counsel was not in a position to advise it on the simple and obvious question of the suitability of a

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<sup>135</sup> *R. v. Nash*, *supra* note 88.

no-contact order. In *R. v. Gabara*, by contrast, the efforts of Crown Counsel to obtain victim impact evidence proved futile, as the victim did not wish to draw attention to himself through further participation in the judicial process.<sup>136</sup> In the case of *R. v. Van-Brunt*, meanwhile, the Crown was forced to proceed with the entire prosecution without any involvement on the part of the victim.<sup>137</sup>

### 6.2.2 Nature of victim impact evidence referenced by the courts

The nature of the victim impact evidence referred to by the courts in the cases involving section 718.2(a)(i) is discussed below. It is also summarized for ease of reference in Table 14.

**Table 14: Nature of victim impact evidence referred to by the courts in cases involving hate-motivation, 1996-2007**

Victim impact evidence	
Evidence of impact on direct victims	physical injuries
	economic loss
	psychological harm, including heightened fear and distrust
Evidence of impact on community of which victim is a member	psychological harm to community members, including heightened fear and distrust and revived memories of past hate crimes
	security precaution taken by community members in response to perceived threat of increased violence
Evidence of impact on community of which accused is a member	stereotyping, suspicion and mistrust by victim's community of the community of which the accused is a member
	disharmony and disruption in community relationships
Evidence of impact on society	diminishment of personal security and the full expression of identity

<sup>136</sup> *R. v. Gabara*, *supra* note 76.

<sup>137</sup> *R. v. Van-Brunt*, *supra* note 110.

### 6.2.2.1 Impact on victim

Evidence provided by direct victims, or those closely connected to them, included descriptions of the victims' injuries and economic loss as well as feelings of heightened fear and distrust arising from the fact that the offence was motivated by prejudice. The latter was summarized in the case of *R. v. Gholamrezazdehshirazi*, at paras. 9-10, as follows:

...In addition to the physical pain, [the victim] fears what will happen when the offender is released because his crime was racially or religiously motivated. He has had many sleepless nights, and is constantly vigilant for his own safety. The attack changed his attitude towards patients and his willingness to help those who are unfortunate.

His wife shares his concern about the offender returning to endanger their family.<sup>138</sup>

The victim in that case was the dentist of the accused. The accused was found to have been motivated in his attack by a bias, prejudice or hatred of Muslims.

Similar evidence was provided by the victim in *R. v. Demers*.<sup>139</sup> He was the subject of an assault found by the court to have been motivated by a prejudice against homosexuals. The statement which the victim read to the court in that case is reproduced at para. 48. In it, the accused stated, in relevant part, as follows:

Ever since the incident, I have become extremely nervous and scared and depressed. I'm constantly looking behind my back feeling like someone else is planning an attack just like before.

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<sup>138</sup> *R. v. Gholamrezazdehshirazi*, *supra* note 47.

<sup>139</sup> *R. v. Demers*, *supra* note 80.

When I'm surrounded by heterosexual men, I constantly have thoughts that they are planning to beat me up...

...[M]y friends have complained that I'm not as fun anymore because I will not go out to the straight bars no longer. They find it hard because I'm constantly trying to avoid situations that may get me hurt again - I will not be myself and dress the way I want.

Soon after the incident, I became so depressed, I started to drink every day and I quit my job as I did not know how to deal with the emotional trauma that I went through...

The judgment reported for *R. v. Demers* is essentially a transcript of the proceedings at sentence. It records the above-noted victim impact statement read by the victim as well as a series of questions which the court permitted the victim to put to the accused. It is apparent from his questions that the victim required assurances that the accused had overcome his homophobia.<sup>140</sup>

#### **6.2.2.2 Impact on community of which victim is a member**

Evidence provided by community groups spoke to similar feelings of fear and distrust, although at a broader level. These sentiments were described by the court in *R. v. El-Merhebi*, on the basis of victim impact evidence provided by the Quebec Director General of B'nai Brith and a worker at the Jewish school which the accused targeted for his arson, at para. 9 as follows:

Their statements describe the traumatic fall-out of this fire, both at the school and in the wider Jewish community. An atmosphere of fear now prevails, and many worry that other Jewish institutions will be targeted. Some parents have even withdrawn their

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<sup>140</sup> *Ibid.* at paras. 220-233.

children from the Jewish school as a protective measure.<sup>141</sup>

Members of the Jewish community likewise filed victim impact statements in *R. v. Soles* in which they conveyed an ongoing fear for their safety.<sup>142</sup> Some said that they were afraid to go alone to the cemetery that the accused had vandalized. The court noted that, for others, the vandalism revived memories of Nazi atrocities in Europe.

The court in *R. v. Sandouga* was provided with information in victim impact statements about the steps taken by the Jewish community in response to the accused's act of arson on its synagogue, including the installation of security systems, security guards and heightened security procedures.<sup>143</sup> Regrettably, a sense of fear persisted within the community despite these protective measures, as noted by the court as follows at paras. 21-22:

Congregants continue to be concerned about a repeat incident....Even with the greatest security precautions, everyone who frequents a place of worship that has been targeted and firebombed, and perhaps every adherent of the same religion, would feel uneasy about their personal safety. Sandouga committed a dangerous and unlawful act of religious intimidation that has a widespread and profound effect. His actions detrimentally alter the way in which all adherents of the Jewish religion gather to worship.

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<sup>141</sup> *R. v. El-Merhebi*, *supra* note 40.

<sup>142</sup> *R. v. Soles*, *supra* note 67.

<sup>143</sup> *R. v. Sandouga*, *supra* note 40.

### 6.2.2.3 Impact on community of which accused is a member

An offence motivated by bias, prejudice or hate may impact not only the community of which the victim is a member but also the community of which the accused is a part. This point was thoughtfully raised by a representative of the Jewish community in *R. v. Sandouga*.<sup>144</sup> Included in the judgment, at para 23, is the following excerpt from the victim impact statement as follows:

Because the accused and now convicted vandal was from the Arab community it caused more stress on the already troubled relationship that is in place between our respective groups. This incident set back some of the progress that has been made and only through the dogged determination and efforts of community leaders has there been renewed cooperation.

The court affirmed this sentiment, saying that hate-motivated offences invite “stereotyping, suspicion and mistrust.”<sup>145</sup> They also “encourage disharmony among religious groups and disruption in community relationships, at a time when communication and understanding are most needed.”<sup>146</sup>

### 6.2.2.4 Impact on Canadian values

The sentencing judge in *R. v. Miloszewski* commented on the impact of the accused’s crime on Canadian values.<sup>147</sup> He did not appear to do so on the basis of any specific victim impact evidence but, instead, on his own observations. In particular, the court held as follows at para. 34:

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<sup>144</sup> *Ibid.*

<sup>145</sup> *Ibid.* at 24.

<sup>146</sup> *Ibid.*

<sup>147</sup> *R. v. Miloszewski*, *supra* note 69.

In addition to the direct impact on [the victim's] family and friends and on the Sikh community, it is also evident to me that all Canadians have suffered the loss of a decent and charitable person. Every Canadian has a personal heritage that may be seen as different in the eyes of another. For this reason the loss of [the victim] is a diminishment of the right of every Canadian to personal security and the full expression of their identity.

Indeed, there would seem to be little need for victim impact evidence on the corrosive effect of hate crimes on multiculturalism and Canadian values. Judicial notice can reasonably be taken of such an obvious and incontrovertible fact.

### **6.3 Effect of victim impact evidence**

It is not known what, if any, effect the evidence of victim impact has had on the ultimate sentences handed down by the courts in the cases under review in this study. None of the judgments include any hint, let alone express statement, as to the significance of the evidence. However, even if victim impact evidence has no direct bearing on the ultimate sentence of an accused, it has a compelling and legitimate role in the criminal justice process for the benefit of victims. It is thus regrettable that the courts have referred to such evidence in only 13 of the 25 cases in which section 718.2(a)(i) was applied.

The victim in *R. v. Gabara* conveyed his feelings of vindication as the criminal justice system proved to work in his favour and would hopefully send a message to the accused about his behaviour.<sup>148</sup> It is not known whether other victims have been similarly satisfied. One would hope that not only would the

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<sup>148</sup> *R. v. Gabara*, *supra* note 76.



law denounce hate crimes through provisions like section 718.2(a)(i) but also the criminal justice system would contribute, if only in this modest way, to the healing of victims. It can do so through a process which inspires their confidence and restores their sense of security in the Canadian mosaic. The participation of victims in sentencing, coupled with an acknowledgement by the courts of the impact of an offence, would serve this objective.

## **7: OFFENCE TYPOLOGY**

### **7.1 No viable criminological theory**

In *Punishing Hate*, Nathan Hall argues that criminological theory has failed in its attempts to explicate the phenomenon of hate crime. Many criminologists rely on Mertonian strain theory to explain hate crimes even though there is only modest empirical support for this theory. Hall argues that, if strain theory was indeed a viable explanation, one would expect to find only the displaced and disadvantaged within society committing hate-motivated offences. In fact, the offending population includes individuals from both disadvantaged and privileged communities. It is for this same reason that competing theories based on the protection and preservation of power within society are equally flawed.<sup>149</sup>

### **7.2 Offence typology**

In the absence of any viable criminological theory, offence typology is instructive. Jack Levin and Jack McDevitt constructed such a typology for hate crime in particular. They did so using information gathered primarily from the case files of the Boston Police Department for 1991 and 1992.<sup>150</sup> Their initial typology was created in 1993. It was subsequently modified in collaboration with

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<sup>149</sup> Hall, *supra* note 130.

<sup>150</sup> Jack McDevitt, Jack Levin & Susan Bennett, "Hate Crime Offenders: An Expanded Typology" (2002) 58 *Journal of Social Issues* 303 at 307-309. A useful summary of this typology is included in Phyllis B. Gerstenfeld, *Hate Crimes: Causes, Controls and Controversies* (Thousand Oaks, CA: Sage Publications, 2004) at 72-77.

Susan Bennett in 2002. This modified version of the typology includes the following four categories:

1. Thrill-seeking crimes

The category of “thrill-seeking crimes” includes hate crimes committed by offenders who are “just bored and looking for some fun”<sup>151</sup>. Most of these offenders are young and operate in small groups. They generally do not harbour strong feelings of bias, prejudice or hate. They offend because they fear rejection from the larger group in which they operate or desire the accolades which might come from their peers as a result of the crime. Thrill-seeking crimes constituted the majority of the hate crimes that Levin et al identified.

2. Reactive (defensive) crimes

The category of reactive or defensive crimes involves cases in which the offender reacts to a triggering event. This offender is different from those who commit thrill-seeking crimes in that he tends not to leave his own community to seek out a victim. Instead, the victims enter the offender’s environment and by their actions, or their presence alone, cause the offender to feel as though his territory has been invaded or his economic interests threatened. These crimes constituted one quarter of the hate crimes identified by Levin et al.

3. Mission crimes

Mission crimes involve offences perpetrated by those who seek to eradicate or eliminate their targeted victims. This offender characterizes the

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<sup>151</sup> McDevitt et al, *supra* note 150, at 307.

victims as evil and justifies his crimes accordingly. Although rare, this type of hate crime is particularly insidious. In her summary of the Levin et al typology in *Hate Crimes: Causes, Controls and Controversies*, Phyllis Gerstenfeld cites the 1989 shooting of 14 Canadian women by Marc Lepine at L'Ecole Polytechnique in Montreal as an example of a mission crime.

#### 4. Retaliatory crimes

This category of hate crime captures cases in which the offender acted in revenge of a reported or rumoured incident of hate against his own group. These types of crimes constituted 8% of the offences which Levin et al identified.

Gerstenfeld reports in her text that the Levin et al typology is the most complex of all available typologies for hate crime. She cites independent research consistent in its results and notes that the typology has been adopted by law enforcement agencies in the United States.<sup>152</sup> Gerstenfeld is nonetheless cautious in her endorsement, claiming that not all offences fit neatly into its four categories. In addition, given that the typology is based on data taken from a single city and that the data is now dated, the potential utility and transferability of the typology is uncertain.

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<sup>152</sup> A further modified version of this typology is articulated in Jack Levin, *Violence of Hate: Confronting Racism, Anti-Semitism, and Other Forms of Bigotry*, 2<sup>nd</sup> ed. (Boston, MA: Pearson Education, Inc., 2007) at 35-64. It includes non-offenders such as "spectators" and sympathizers. Levin argues that these individuals are culpable because, even though they do not commit the offences themselves, they create the conditions necessary for others to do.

### 7.3 Testing the typology in the Canadian context

From the point of view of Canadian researchers, the question arises as to whether the Levin et al typology is applicable in the Canadian context and whether it would be useful to sentencing judges in the application of section 718.2(a)(i). It does not appear that any such analysis has yet been undertaken. Accordingly, an attempt was made as part of this study to classify those offences to which section 718.2(a)(i) was applied, using the Levin et al typology, and assess the typology itself in the process.

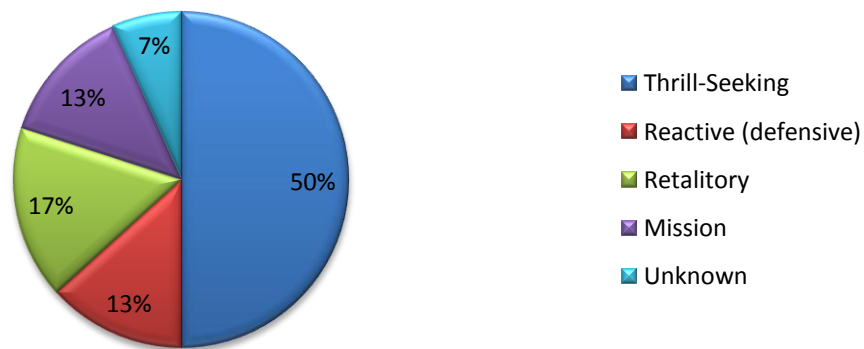
It was found that, of the 30 hate-motivated offences identified in this study, 15 could be classified as thrill-seeking crimes on the basis of the circumstances described by the courts in the reasons for judgment. The remainder were reactive (defensive), mission or retaliatory. As set out in Table 15, an almost equal number of offences fit within each of these three categories. Two offences could not be classified due to insufficient information.

**Table 15: Number of hate-motivated offences by type, 1996-2007**

<b>Type</b>	<b>Offences</b>
Thrill-seeking	15
Reactive ( defensive)	4
Mission	4
Retaliatory	5
Unknown	2
<b><u>TOTAL</u></b>	<b><u>30</u></b>

The relative percentage of each category of offence is depicted in Figure 5. Thrill-seeking offences represent 50% of the total number of hate-motivated offences. This is generally consistent with the findings of Levin et al, who found in their study that the majority of hate-crimes fit within this category.

**Figure 5: Percentage of hate-motivated offences by type, 1996-2007**



The difference in the findings of the Levin et al study and this study in relation to mission crimes is striking. Gerstenfeld described them as rare, yet they represent 13% of the offences to which section 718.2(a)(i) was applied. Unfortunately, given the limited sample size in this study, generalizations cannot be made on the basis of these findings alone. One might speculate, however, that such differences could be attributable to a misunderstanding of the category or suggestive of higher prevalence of extreme hatred and aggression in the Canadian context.

## **7.4 Shortcomings in typology**

### **7.4.1 Underlying motive may not be apparent**

What differentiates the categories in the Levin et al typology are the underlying motives of the offenders beyond that of a general bias, prejudice or hatred of an identifiable group. The proper classification of an offence within the typology thus depends on these motives being ascertainable. This is a potential shortcoming of the typology, as this information may not be apparent or readily available to third parties. Moreover, if the underlying motive of an offender is not clear, inferences must be drawn from the circumstances of the case. These inferences will necessarily be the product of subjective analysis. There is potential for variability as a result.

### **7.4.2 Offender may have more than one motive**

The Levin et al typology assumes that the offender is operating in pursuit of a single or dominant purpose. This is also a potential shortcoming. An offender may not have only one objective for his crime. He might have multiple reasons for committing the offence. In the case of *R. v. D. (J.)*, for example, the court found that the accused was motivated to commit sexual assault by a desire to violate the victim because of her sexual orientation as well as his own sexual gratification.<sup>153</sup> The latter is not accommodated within the typology and the offence cannot be properly classified as a result.

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<sup>153</sup> *R. v. D. (J.)*, 1999 CarswellOnt 3291 (Prov. Div.).

### **7.4.3 Typology does not take into account the potential influence of substance use and mental disorder**

The most significant shortcoming of the typology, however, is the fact that it fails to take into account the potential role played by substance use and mental disorder. It assumes the offender to be a rational and sober individual. This is often not the case. Substance use was a factor in relation to at least 18 of the 30 hate-motivated offences reviewed in this study. Of these, the majority (11 of the 18 offences) involved alcohol use. Mental disorder, meanwhile, was found to be a factor in at least two cases.

These results suggest that fresh consideration should be given to the degree of censure which we assign to offenders with these circumstances. Hate crime is perceived as egregious in part because the offender is seen to be engaged in deliberate conduct and acting pursuant to learned, albeit ignorant and deplorable, attitudes. Neuro-cognitive impairment, whether caused by substance use or mental disorder, may well render an accused less culpable than the mythical rational man that the law generally presumes him to be.

## **7.5 Utility of typology for sentencing purposes**

Information as to the underlying motive of an accused is of significant potential utility to a sentencing court. Although it need not be in the form of a particular category within a typology, that information can assist the court in identifying the principles of sentencing which ought to be emphasized in any given case. These principles are set out in section 718. They include denunciation, deterrence (specific and general), protection of society,



rehabilitation and restitution, as well as the promotion of a sense of responsibility in offenders and acknowledgement of the harm done to victims and to the community.

Denunciation and deterrence are cited in the vast majority of the cases involving section 718.2(a)(i). However, if an offender is found to be motivated by a desire to eliminate or eradicate a victim group, as in the case of mission crimes, the court might assign greater weight to the principle of protection of society. Likewise, it might emphasize rehabilitation if the case involves an offender who could overcome his biases and prejudices through education. These considerations may also guide the court in formulating appropriate terms for a probation order, including, for example, requirements that the accused attend for counselling in anger management or participate in treatment programs for substance abuse.

## **8: CONCLUSION**

### **8.1 Need to address question of conviction rates**

This study found that, notwithstanding as many as 785 police-reported hate crimes in 2006 and 892 such offences in 2007, section 718.2(a)(i) was applied to only one offence in each of those years. It would thus appear that hate crimes are successfully prosecuted and sentenced as such in less than one percent of cases. These findings are not wholly reliable, given that the data sources used in this study are not exhaustive. However, if they are even remotely close to the actual numbers, they suggest an appallingly low rate of conviction and sentencing under section 718.2(a)(i).

Further research is recommended to ascertain, with greater reliability, the current state of affairs with respect to the prosecution of hate-motivated offences in Canada. The only way to determine the true conviction rate would be to review the police, Crown and court files for each of the offences which the police classify and report as hate crimes. The time and resources needed to complete such a study would be significant. A representative sample could be sought to reduce costs. Regardless, the results would be of tremendous importance. They could potentially expose Canada's hate crime laws as hollow symbolism.

## **8.2 Need for appellate direction**

Low conviction rates may be the product of the peculiarities of the phenomenon of hate crime itself. It would not be surprising to find that a lack of identification evidence forestalled prosecution in many cases, given the finding in this study that victims and hate-offenders are often strangers to each other. An examination of the police, Crown and court files could identify prosecutorial roadblocks such as these in those cases that did not result in convictions.

Given the modest number of available cases, it cannot be said with any certainty that judicial interpretations of section 718.2(a)(i) have contributed to its limited application. It is nonetheless apparent that further direction, preferably from the appellate courts, is needed to avert further inconsistencies and potentially contradictory approaches. Particular regard ought to be given to the question of the degree of hate-motivation required to trigger section 718.2(a)(i).

It will be for the courts, in considering this issue, to strike an appropriate balance between the remedial objectives of section 718.2(a)(i) and the rights of an accused, not only with respect to a strict construction of penal legislation, but also to freedom of expression and association more generally. This balance may best be achieved through a test based on the principle of proportionality. Further consideration of this approach, particularly from a policy perspective, is recommended in order to fully assess its potential utility.

Regardless, as repugnant as hate crime may be, the courts ought to ensure that section 718.2(a)(i) is not interpreted in any way which might permit it to be used as a vehicle for the punishment of thought. To do so would offend

fundamental principles of Canadian law. For this reason, and so as to afford the benefit of any doubt to the side of liberty, any tests which they do establish in relation to section 718.2(a)(i) should, quite appropriately, favour the accused.

### **8.3 Need to engage victims in sentencing process**

There are compelling legal and policy arguments in favour of a strict construction of section 718.2(a)(i). To the extent section 718.2(a)(i) falls short of its desired objectives as a result, Parliament ought to consider alternate approaches. One such approach would involve a shift in focus from the ultimate sentence of the accused to the process of sentencing itself. The goal of denouncing and redressing hate crime may be served, at least in part, through victim-engagement in the sentencing process and the express acknowledgement of the injurious nature of hate crime by the Crown in their submissions at sentencing hearings and the courts in their reasons for judgment. This can occur whether or not an offence is sentenced pursuant to section 718.2(a)(i) and whether or not evidence of hate-motivation results in sentence enhancement.

It was found in this study that victim impact evidence was referred to by the courts in approximately one half of all cases involving hate-motivated offences. A review of the relevant court files is recommended to determine whether such evidence was in fact made available to the courts, and simply not mentioned, in the other cases. To the extent there is a true shortfall, additional resources may be required to support the Crown, and victims services in particular, in this regard.

In those cases where specific victim impact evidence is not available for reasons beyond its control, the Crown should ask that judicial notice be taken of the egregious harms perpetrated by hate crimes on Canadian society generally. The Crown could retain an expert to prepare a generic report for use in cases of hate-motivated offences. However, there is already a large body of academic literature available, which the Crown could draw on for support. Some of this literature is referenced above.

#### **8.4 Need to consider role of substance use and mental disorder**

The goal of denouncing hate crimes ought not to be achieved at the expense of our consideration and compassion for individuals who suffer from illness and addiction. An offender may be less culpable than the law might otherwise presume as a result of such factors. He also may be more likely to recidivate so long as any such underlying conditions remain unresolved.

Substance use and mental disorder were identified in this study as factors in as many as two thirds of the offences found to have been motivated by bias, prejudice or hate within the meaning of section 718.2(a)(i). Further research is recommended to determine the extent of any correlation between neuro-cognitive impairment – whether caused by substance use or mental disorder – and hate crime. In the meantime, these factors ought not to be overlooked or minimized in the sentencing process. Defence counsel are encouraged to obtain expert opinions as to the impact of substance use and mental disorder on their clients in the particular circumstances of each case.

## 8.5 Concluding remarks

It may still be, as Carter found in 2001, “too early” to determine whether the mechanics of section 718.2(a)(i) of the *Criminal Code* impede its application in the sentencing of hate-motivated offences. Indeed, it is difficult to fully understand and fairly assess the operation and effect of the section on the basis of 25 cases alone.

In the meantime, however, the law can continue to express our collective disdain for hate crime. The articulation of our principles and values in this regard can serve only to strength them. In this way, section 718.2(a)(i) may offer Canadians little more than hollow symbolism. It is important symbolism nonetheless and has value for this reason alone.

Appellate direction is required to bring about greater consistency in the interpretation and application of section 718.2(a)(i). Failing that, law reform may be required. However, neither will offer a complete solution to the phenomenon of hate crime. The law is an important part of any solution, but it is just one part nonetheless. It is hoped that, with the benefit of the further research recommended herein, we may identify further means by which the criminal justice system as a whole can respond in substantive and meaningful ways.

## **APPENDICES**

# Appendix A: Search Screens


## BestCase

Figure 6 displays the search screen in BestCase with the initial search terms included. It was intended that this search would generate a list of all cases which included, in the text of the judgment, the term “718.2(a)(i)”.

Figure 6: BestCase search screen with initial search terms

### Case Law Search

---

**Full/Partial Citation**   (e.g. 2001 3 S.C.R. 823)

**Case/Party Name**

**Court/Jurisdiction**

**Judge**

**Counsel**

**To limit your search, check all that apply:**

- Latest Decisions
- C.C.C.
- D.L.R.
- L.A.C.
- L.C.R.
- O.M.B.R.
- A.C.W.S. Decisions
- C.L.A.S. Decisions
- W.C.B. Decisions
- WLP Collection

**Dates Including and After:** (e.g., June 1, 1979 or 1979)

**Dates Including and Before:** (e.g., May 5, 2000 or 2000)

**Catchline term(s)**

'or' search phrase search

**Word or phrase**  718.2(a)(i)

'or' search phrase search

Words around hits  Off





## CanLII

Figure 8 depicts the search engine in CanLII with the initial search terms included. They were designed to capture all cases which include, in the text of the judgment, the term “718.2(a)(i)”.

**Figure 8: CanLII search screen with initial search terms**


The screenshot shows the CanLII search engine interface. At the top left is the CanLII logo with a red maple leaf. To the right of the logo is the text "Home" and "Canadian Legal Information Institute". Further right are the language options "Français | English". Below the logo is a list of "Databases" including Federal, British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Quebec, New Brunswick, Nova Scotia, Prince Edward Island, Newfoundland and Labrador, Yukon Territory, Northwest Territories, Nunavut, and Other Countries. Below the databases is a "Search" section with "Advanced Search" and "Database Search" options. The main search area is titled "Search all CanLII Databases" and contains a search box with the text "718.2(a)(i)". Below the search box are four numbered options: 1. full text (with a "tips" link), 2. statute name / case name / citation / docket number (with a "tips" link), 3. decision date between and, and 4. scope (with sub-options for Legislation, Courts, and Boards and Tribunals). Below the search box are three buttons: "RESET", "TIPS", and "SEARCH". To the right of the search box is a "News" section with an RSS icon and three news items: "2009.03.05 The new legislation publishing system is now live", "2009.02.03 CanLII invites you to a user meeting in Calgary", and "2009.01.30 A new beta site for legislation -- Try it!". At the bottom of the page is a footer with links for "Scope of Databases", "RSS Feeds", "Terms of Use", "Privacy", "Help", "Contact Us", and "About", followed by the text "by LexUM for the Federation of Law Societies of Canada".

## WestlaweCARSWELL

Figure 9 shows the search engine in WestlaweCARSWELL. All of the initial search terms are set out therein. They were intended to identify all criminal cases in which the term “718.2(a)(i)” was included in the text of the judgment.

Figure 9: WestlaweCARSWELL search screen with initial search terms

[Terms and Connectors Search](#) [Natural Language Search](#)

Search Cases 

[Clear Query](#)

**1 Enter your search terms:**

**Search full text for:** [Searching Tips](#)

"718.2(a)(i)"

**The results must contain:**

Any of these terms

**Search the following fields:**

Case Name:	<input type="text"/>	Citation:	<input type="text"/>
Court/Level:	<input type="text"/>	Counsel:	<input type="text"/>
Judge/Decider:	<input type="text"/>	Year:	<input type="text"/>
Headnote:	<input type="text"/>		

**2 Limit Results (optional)**

<b>By Jurisdiction:</b>	<b>By Subject Area:</b>	<b>By Carswell Law Report:</b>
All Jurisdictions <input type="button" value="▲"/>	All Subjects <input type="button" value="▲"/>	All Reports <input type="button" value="▲"/>
Alberta <input type="button" value="▼"/>	Churches and Religious Institutions <input type="button" value="▼"/>	Admin. Law Reports <input type="button" value="▼"/>
British Columbia <input type="button" value="▼"/>	Civil Practice and Procedure <input type="button" value="▼"/>	Alberta Law Reports <input type="button" value="▼"/>
Federal <input type="button" value="▼"/>	Constitutional <input type="button" value="▼"/>	B.C. Law Reports <input type="button" value="▼"/>

**By Timeframe:**

Unrestricted

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## Appendix B: Categorical Variables

**Table 16: Type of Motivation**

Race/ethnicity
Black
South Asian
Arab/West Asian
East/Southeast Asian
Caucasian
Aboriginal
Multiple races/ethnicities
Other
Unknown
Religion
Jewish
Muslim (Islam)
Catholic
Other
Unknown
Sexual orientation
Homosexual (lesbian or gay)
Other
Language
French
English
Other
Mental or physical disability
Mental
Unknown
Gender
Male

Female
Other <sup>154</sup>
Unknown

**Table 17: Type of Violation**

Violent crime
Homicide
Attempted murder
Sexual assault
Robbery
Assault level 1
Assault level 2 (with weapon or causing bodily harm)
Assault 3 (aggravated assault)
Assault against peace/public officer
Criminal harassment
Utter threats to person
Property crime
Mischief
Break and enter
Theft
Arson
Fraud
Other criminal violations
Disturb the peace
Offences against the person and reputation <sup>155</sup>
Threatening/harassing phone calls
Weapon violations
Other <sup>156</sup>

<sup>154</sup> Includes motivations not stated above, such as profession or political belief.

<sup>155</sup> Includes defamatory libel, extortion by libel, advocating genocide and public incitement of hatred.

<sup>156</sup> Includes failure to comply, offences against public order and other offences relating to the administration of justice.

**Table 18: Location of Offence<sup>157</sup>**

St. John's
Halifax
Saguenay
Quebec
Sherbrooke
Trois-Rivières
Montreal
Gatineau
Ottawa
Kingston
Toronto
Hamilton
St. Catherines-Niagara
Kitchener
London
Windsor
Greater Sudbury
Thunder Bay
Winnipeg
Saskatoon
Regina
Calgary
Edmonton
Abbotsford
Vancouver
Victoria

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<sup>157</sup> Based on Census Metropolitan Area.

**Table 19: Age of Victim**

Under 12 years
12 to 17 years
18 to 24 years
25 to 34 years
35 to 44 years
45 to 54 years
55 to 64 years
65 and over

**Table 20: Age of Offender**

Under 12 years
12 to 17 years
18 to 24 years
25 to 34 years
35 to 44 years
45 to 54 years
55 to 64 years
65 and over

**Table 21: Relationship of Victim to Offender**

Stranger
Acquaintance
Business associate
Friend
Family member

**Table 22: Disposition**

Section 718(a)(i) applied
Section 718(a)(i) considered but not applied

**Table 23: Typology**

Thrill-seeking crimes
Reactive (defensive) crimes
Mission crimes
Retaliatory crimes



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