

## Chapter Four—Human Rights Laws

The law has not always protected people against discrimination. Some forms of discrimination were even written down as laws! For example, people of Chinese origin on Canada's west coast experienced discrimination when they faced special taxes and the law denied them equal opportunities and equal status.

A decision by the Supreme Court of Canada in 1939 made it legal for business owners to refuse to provide service to black people. In this case, a tavern in Montreal had refused to serve black people. Mr. Christie, who had been refused service because he was black, sued the tavern saying he had been humiliated and his reputation had been damaged. Four of the five judges decided that the tavern owner was free to deal with a member of the public however she or he wanted. As late as 1961, the Alberta Court of Appeal said that a motel owner could refuse to rent a room to a black person.<sup>1</sup>

Section 1 of the Act to Prevent the Employment of Female Labour in Certain Capacities stated that “No person shall employ in any capacity any white woman or girl or permit any white woman or girl to reside or lodge in or work in or, serve as a *bona fide*

customer in a public apartment thereof only, to frequent any restaurant, laundry or the place of business owned, kept, or managed by any Chinaman.”

The Constitution of 1867 did not mention equality rights at all. It was not until after World War II that modern human rights laws began to spread. In 1944, Saskatchewan created the first human rights Legislation: The Saskatchewan *Bill of Rights*. Next, Ontario developed the first *Human Rights Code* and established the first Human Rights Commission. By 1975, every province in Canada had established some human rights laws and a commission to make sure that the laws were followed.

### ***The Alberta Human Rights Act***

This Act is Alberta’s version of human rights law. The Act was written in 1972 and changes were made to it in 1980, 1996 and 2009. The Act disallows discrimination in four areas:

- **employment and employment advertising;**
- **tenancy;**
- **services customarily available to the public; and**
- **notices.**

The Act disallows discrimination that happens because of the following factors:

- race;
- physical disability;

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- ancestry;
- religious beliefs;
- mental disability;
- place of origin, which means where you come from;
- colour;
- marital status, which means whether you are married or not;
- source of income, which means where you get your money from;
- gender, which means whether you are male or female;
- age (actually, age discrimination is allowed for certain things);
- family status, which means what kind of family you come from; and
- sexual orientation.

In order for the Act to apply, a complaint must fall within the four areas and the grounds listed above.

### ***Employment***

The Alberta Act says that every person must be treated equally in her or his job. The Act does not allow employers to refuse to hire someone because of his or her race, religious beliefs, colour, gender, physical disability, mental disability, marital status, family status, age, ancestry, place of origin, source of income, or sexual orientation. For example, an employer cannot refuse to hire an individual because he is married or because she is female. An employer cannot refuse to hire an individual because of his or her race or nationality.

Employers must make sure that the workplace has no harassment or discrimination. If they do not do this, they may be held legally responsible.

### ***Tenancy***

Tenancy refers to the rental of residential or commercial accommodation. Nobody can be denied accommodation because of race, gender, colour, religious beliefs, physical or mental disability, ancestry or place of origin, marital status, family status, source of income or sexual orientation. Everybody must be treated equally regarding the amount of rent, leases, rules and regulations.

Studies on the housing of minorities in Canada show that racial discrimination is common.<sup>2</sup> A study in Regina, Saskatchewan in 1982 showed that most treaty Indians who tried to find a place to live were refused by a landlord at least once.<sup>3</sup> A study by the Quebec Human Rights Commission in 1989 showed that 30 percent of black people looking to rent a place to live were turned down three or more times, but only 12 percent of whites were turned down three or more times.<sup>4</sup>

Landlords have an obligation to ensure that their procedures and policies are fair.

Example:<sup>5</sup>

Ms. Kostanowicz was a single mother with a fifteen-year-old son. In April 1991 Ms. Kostanowicz was looking for an apartment for her and her son. She filled out an application form for an apartment. At the time Ms. Kostanowicz was attending school and receiving social assistance. When she phoned the landlord to see if she would get an apartment, he told her she would not. When she asked the reason he said he did not rent to people who were getting social assistance. Ms. Kostanowicz complained to the Ontario Human Rights Commission.

*The Board of Inquiry decided that Ms. Kostanowicz was discriminated against because she was getting social assistance. The board ordered the landlord to pay Ms. Kostanowicz \$2000 for hurting her feelings. The board also said that people should not be discriminated against because their source of income.*

### ***Services Usually Available to the Public***

Programs and services provided by businesses, local organizations, and municipalities are particularly important because they affect all people on a daily basis. The Supreme Court of Canada has defined "services" as "restaurants, bars, taverns, service stations, public transportation and public utilities." Services have been held to include schools.<sup>6</sup> Everybody should be allowed to visit and use hospitals, shops, restaurants, etc.. Once again, the

Alberta Act disallows discrimination in this area based on race, gender, physical or mental disability, religious beliefs, colour, ancestry or place of origin, marital status, source of income, sexual orientation or family status. For services, however, age discrimination is allowed.

Example:<sup>7</sup>

Monika Hudek has a slight hearing impairment. She started work with The Big Muffin as a counter server. After three weeks on the job, the manager fired her and said she was not working out. He did not say why. Ms Hudek alleged that she was fired because of her hearing problem.

*The Human Rights Panel decided that Ms Hudek was discharged because of her disability. The Big Muffin was ordered to pay her money for lost wages and the manager was ordered to undergo an educational session regarding discrimination.*

### ***Signs and Notices***

The Alberta Act prohibits the publication, issue or display of statements, publications, notices, signs, symbols or emblems that indicate discrimination or that are likely to expose people to hatred or contempt. An individual cannot post notices or publish statements (e.g., in a magazine or newspaper) that discriminate

against certain groups of people, or that expose certain groups of people to hatred.

### ***General Exceptions to the Prohibition Against Discrimination***

#### **Bona Fide Occupational Requirement**

Human rights acts in Canada allow discrimination in certain employment situations. It may be considered to be a bona fide occupational requirement, which means that the discrimination might be considered to be necessary for the safe, efficient, and economical performance of the job. For example, in Alberta, an employer can discriminate against an employee because of the employee's age if this discrimination is necessary for the job's safe, efficient, and economical performance.

Here is an example of discrimination that was allowed:<sup>8</sup>

*In a case in Prince Edward Island, a bus driver who was over the age of 65 was not allowed to work anymore. The bus driver complained that he was being discriminated against because of his age. A Board of Inquiry held that a requirement that a school bus driver be less than 65 years of age was reasonably necessary to the efficient, economical and safe performance of the job.*

***You be the Judge!***

*If you were a member on the Board of Inquiry in this case what would you decide? What else could the Board of Inquiry have done?*

◆ **Have you ever felt discriminated against because of your age? In recent years, many people have debated whether to lower the voting age. Discuss the reasons why the voting age should be changed and why it should not.**

◆ **Are senior citizens discriminated against? In what ways?**

**Reasonable Accommodation**

Generally, the term “reasonable accommodation” refers to the responsibility of one person or group to adapt or adjust facilities, services or employment requirements to meet the needs of an individual or group protected by human rights legislation. For example, certain restaurants and shops may be required to make their facilities wheelchair accessible. However, an individual’s right not to be discriminated against must be balanced against the right of the employer or service provider to conduct business in a safe and cost-effective manner.<sup>9</sup>

***The Purpose of the Act***

The *Alberta Human Rights Act* is a different kind of law than the *Criminal Code of Canada*. Unlike the *Criminal Code*, which

has punishment for one purpose; Because the Act is not meant to punish people, the victims usually are not awarded with large amounts of money. For example, in a case of sexual harassment the Board can order the employer to:

- ◆ apologize;
- ◆ establish a sexual harassment policy;
- ◆ post signs that say sexual harassment is illegal;
- ◆ pay an individual for lost wages and psychological harm;<sup>10</sup> or
- ◆ reinstate an employee to a position.

**If you were appointed to hear a workplace case of sexual harassment, what kinds of remedies would you think might be effective? For example, do you think a fine may be effective in changing the employees' behaviour?**

### ***The Canadian Human Rights Act***

The *Canadian Human Rights Act* is similar to the provincial legislation, but only applies to federal government departments, agencies, Crown corporations, chartered banks, national airlines, and other industries that are regulated by the government of Canada. The Act says it is illegal to discriminate because of race, national or ethnic origin, colour, religion, age, sex, marital status,

family status, pardoned conviction (when you have been convicted of a crime but have now been forgiven by the Canadian legal system), physical or mental disability or sexual orientation.

Example:<sup>11</sup>

*Leon H., a black employee, worked for the Canada Employment and Immigration Commission. Someone else working at the Commission sent him an envelope that contained a type-written form called "Employment Application for [offensive racist word]". The form contained questions that the complainant found offensive, humiliating and discriminatory. This single incident was enough to conclude that Leon been harassed because of his race. The Canadian Human Rights Tribunal also decided that the employer had not done everything it could to stop the harassment from happening or lessen its effects after the fact.*

### ***The Canadian Human Rights Commission, the Telephone and the Internet***

Section 13 of the *Canadian Human Rights Act* makes it a discriminatory practice to use the telephone to communicate hatred against people. To fall under section 13, the communication by telephone (or internet) must be repeated and likely to expose a person or people to hatred or contempt because they belong to an identifiable group.

The Canadian Human Rights Commission works the same way as the provincial Human Rights Commissions. It will

investigate a suspected case of discrimination and try and reach some sort of agreement before naming a Human Rights Tribunal to hear the case.

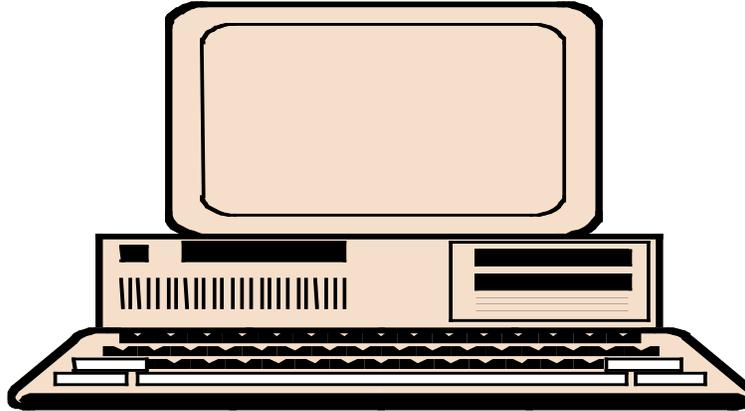
Section 13 of the *Canadian Human Rights Act* was first used against a man named John Ross Taylor<sup>12</sup> and the Western Guard Party. In 1979, the Canadian Human Rights Commission ordered Taylor and the Western Guard Party to cease communicating telephone messages, which were likely to expose named individuals and members of the Jewish religion to hatred. The ruling was not obeyed, and as a result, the Federal Court made two findings of contempt. These findings were accompanied by one-year jail sentences and fines totaling \$10,000.

Section 13 was also used in a case against a group called the Heritage Front.<sup>13</sup> The Heritage Front was broadcasting messages over the telephone attacking people who had recently come to Canada as immigrants as well as Jews, lesbians, and gay men. The Canadian Human Rights Commission investigated and appointed the Canadian Human Rights Tribunal to hear the case. The Tribunal ordered the group to stop communicating hate messages over the telephone. When some group members refused to obey, they were sent to jail.

The Internet has become a powerful way to communicate information to the world. Unlike the telephone, it allows people to

transmit information to tens of millions people all at once. Also, it is very difficult to control because the Internet goes into any country without any problem. Some people say that the Internet should be censored. Others say that we should not censor hate messages but should try to eliminate it with good education and positive messages of tolerance.<sup>14</sup>

Section 13 of the *Canadian Human Rights Act* was changed in 2001 to clarify that it applies to the Internet and there have been cases in which the Canadian Human Rights Commission has received complaints about hate messages on the Internet.



**If you have access to the internet, search for some groups that are currently fighting discrimination. Below are some sites for you to start with:**

◆ **Canadian Ethnocultural Council (CEC)**

**[www.web.net/~cec/about.htm](http://www.web.net/~cec/about.htm)**

◆ **Racism: Stop it! International Day for the Elimination of Racial Discrimination — [www.march21.com](http://www.march21.com)**

◆ **Nizkor Project**

**<http://www.almanac.bc.ca/>**



- 1 *King v Barley* (1961), 35 Western Weekly Reports (New Series)  
240.
- 2 Allan Melenchuk, *Toward Intercultural Understanding: An Anti-  
Racist Training Manual* (Calgary, Weigl Educational Publishing,  
3 1993) at 70 (hereinafter Melenchuk).
- 4 Melenchuk at 71.
- 5 Melenchuk at 72.
- 6 *Kostanowicz v Zarubin* (1994), 28 Canadian Human Rights Reporter  
D/55 (Ontario).
- 7 June Larkin, *High School Girls Speak Out* (Toronto: Second Story  
Press, 1994) at 13.
- 8 *Monika Hudec v Terry Larko and The Big Muffin* Alberta Human  
Rights and Citizenship Commission, October 22, 1997.
- 9 *MacDonald v Regional Administrative School Unit No. 1* (1992), 16  
Canadian Human Rights Reporter D/409.
- 10 Russell Zim and Patricia Brethour, *The Law of Human Rights in  
Canada* (St Aurora: Canada Law Books Inc., 1996) at 14-16.
- 11 *Alberta (Department of Education) v Alberta (Human Rights  
Commission)* 1986, 9 Canadian Human Rights Reporter D/4979  
(Alberta Court of Appeal), affirming (sub. nom. *Alberta (Department  
of Education) v Deyell*) (1984), 8 Canadian Human Rights Reporter  
D/3668 (Alberta Court of Appeal).
- 12 Canadian Human Rights Commission, *Harassment Casebook*, 1993,  
at 9.
- 13 *Canada (Human Rights Commission) v Taylor*, [1990] 3 Supreme  
Court Reports 892.
- 14 *Canada (Human Rights Commission) v Heritage Front* (1993), 68  
Federal Trial Reports 161 (Trial Division).
- 15 Karen Mock, “Hate and the Internet” Human Rights Forum,  
Summer/Fall 1997.

## CHAPTER FIVE—CRIMINAL AND CIVIL REMEDIES

In addition to the provincial human rights codes mentioned in Chapter 4, there are several other Canadian laws that may apply in cases of discrimination. The actions of the wrongdoer may fall under the *Criminal Code of Canada*, or the person may sue the wrongdoer. Both remedies are discussed below.

### **Civil Law**

Civil law involves three main areas: contracts, torts (personal injury) and property rights. In a civil case, an injured person, the "plaintiff", sues the "defendant", a wrongdoer, for damages (money) or some other remedy. The most common purpose of a civil lawsuit is to allow the plaintiff to claim money damages to help repay her or him for injury or loss which she or he has endured. Canadian law generally requires that an individual who sues another must do so on the basis of a legal reason, called a "cause of action", such as a breach of contract. In a civil case, the victim may seek money damages from the wrongdoer as well as an employer who might be involved. A civil suit requires obtaining legal advice, which may be expensive. Legal aid (free legal representation) is not available for most civil suits.

A person usually cannot sue another person in a civil law suit because of discrimination but can take his or her case to a provincial human rights commission. This is normally the appropriate place for dealing with complaints of discrimination. Someone who has been discriminated against can sue for psychological injuries that have resulted because of the discrimination.

**Example:**

*An Aboriginal high school student is being teased and taunted by some bullies because of his race. He has become too scared and nervous to concentrate in class. His grades are dropping and he even considers dropping out of school. Although he has told the principal and a teacher, nothing has been done. This student may be able to pursue a lawsuit based on the psychological injury he has suffered as a result of the discrimination.*

***CAN YOU THINK OF ANY OTHER EXAMPLES OF DISCRIMINATION WHICH MAY CAUSE A PERSON TO SUFFER PSYCHOLOGICAL INJURY?***

**Physical Injury**

A person may be able to sue on the basis of discrimination if there has been any actual physical injury or if there has been some "reasonable apprehension of physical injury". A "reasonable apprehension of physical

injury" means that a person must honestly believe that another may actually physically harm him or her.

Example:<sup>1</sup>

*An employee of a restaurant grabbed a plate from a black customer's hand while indicating that a "Negro" was not allowed to eat in the restaurant. The court held in this case that the customer was entitled to damages for physical injury, because grabbing the hand was considered a form of touching and therefore constituted battery.*

### **Damages**

If the plaintiff is successful in a lawsuit, the court will order the person responsible for any damage caused to pay the plaintiff money to make up for this harm. There are different kinds of damages that may be awarded in a civil action. Each kind of damage is assigned an amount of money to be paid. General damages are the most commonly awarded damages in a discrimination suit. These refer to damages such as pain, suffering and mental anguish. These types of damages are difficult to calculate and it is often up to a judge to decide what the amount will be.

### **Wrongful and Constructive Dismissal**

A complainant who has experienced harassment at work might sue because the employment situation became so unbearable that he or she had to resign. Everyone has the right to work in a safe environment. If a person is forced to quit his or her job because of harassment or anything that makes his or her work environment unbearable, it is called constructive dismissal.

In some cases, a victim of harassment may feel that he or she has been fired for complaining about sexual or racial harassment or for refusing to comply with sexual requests. In that case, he or she might be able to sue for wrongful dismissal.

In a case of wrongful or constructive dismissal, the victim may be able to win money damages. This is because the court treats the situation as if the person was not given proper notice that he or she was being fired.

Example:<sup>2</sup>

*A restaurant cook was forced to quit work because of how uncomfortable the restaurant manager made her feel while working. The manager subjected the cook to sexual harassment which included making sexual remarks, repeated propositions and repeated touches. The Alberta Board of Inquiry determined that this was a case of constructive dismissal and awarded the complainant \$5,471.24 for lost wages, \$429 for loss of benefits and \$1,500 for mental distress.*

## **Criminal Law**

The *Criminal Code of Canada* contains laws that deal with behaviour and actions that we as a society consider inappropriate. It defines what a person can and cannot do with respect to other people and their property. The *Criminal Code* also deals with penalties that a person will suffer if he or she breaks the law. The main purpose of criminal law is to protect society and keep our community safe and peaceful. It establishes a standard of behaviour

for Canadians. The federal government creates laws if it thinks that a certain behaviour is harmful to society. The *Criminal Code of Canada* is our main source of criminal law.<sup>3</sup>

Changes are constantly being made to the *Criminal Code* to reflect society's present needs. Criminal law reflects social changes and growth. What society considers to be criminal behaviour changes over time. The government can add new laws, change existing laws, or get rid of laws altogether. The *Criminal Code* is constantly being revised and changed.

The people who form the government do not always agree on what should constitute a crime. Nonetheless, they do agree that certain criteria must be met before a law can be considered a crime. The Law Reform Commission of Canada, which was a group of people who made suggestions to the government as to what laws there should be, suggested that the following conditions must exist before something is considered to be criminal:

- the action must be considered wrong;
- the action must cause harm to other people, to society, or to those who need protection;
- the harm must be serious in both nature and degree; and
- the harm must be best dealt with by using criminal law.<sup>4</sup>

Individuals must be held responsible for their acts and are subject to punishment if convicted. The punishment for crimes will vary from small fines to long terms of imprisonment.

The *Criminal Code* is very specific about how it defines a crime—you need to prove both the criminal act (*actus reus*) and the mental act (*mens rea*). The terms are Latin; *actus reus* means a “guilty act or deed” and *mens*

*rea* means a “guilty mind.” For *actus reus* to exist it must be proven that the person committed the act or caused the event.<sup>5</sup> *Mens rea* focuses on the mental state of the accused and requires proof that the accused intended to commit a criminal act.

Criminal law differs from civil law, because criminal law involves protecting the public, while civil law involves disputes between individuals. In criminal law, the "Crown" is the Prosecutor acting on behalf of the victim rather than the victim acting for his or her own cause. This is because we view crimes as wrongs against society as a whole, not simply private matters between two people. Our government pays for Crown prosecutors. In a civil case, the individuals must pay for their own lawyer.

Some discriminatory actions may be criminal. Discrimination itself is not a *Criminal Code* offence, however certain actions that result from discriminatory attitudes may be *Criminal Code* offences. In this chapter, we will address various *Criminal Code* sections that deal with different types of discrimination.

### **Hate Propaganda<sup>6</sup>**

“Hate motivated activity” is a phrase used to indicate any action, material or organization which promotes bias against identifiable groups (e.g., Jews, Black people).<sup>7</sup> Hate crimes include, but are not limited to the circulation of material that promotes hatred.

Racism and hate propaganda have long been a part of Canadian history. Early European settlers promoted ideas that Aboriginal people were inferior and uncivilized.<sup>8</sup> In addition to continued promotion of hatred

against First Nations people, there is evidence of "anti-Semitism" (i.e., hatred against Jewish people) in the early days of Canada.

Organized racist activity in Canada became a concern in Canada in the early 1920's when the Ku Klux Klan began to establish themselves in western Ontario.<sup>9</sup> The Ku Klux Klan is an organization of people that promotes hatred primarily against Black people, but also against Catholics and Jews.<sup>10</sup> As more and more people began to migrate to Canada after World War I, the backlash against minority groups and people from other countries also increased.<sup>11</sup>

When the distribution of hate propaganda increased in the late 1950's and 1960's, a special committee was created to examine the problems relating to hate propaganda and to make recommendations. The Special Committee on Hate Propaganda (commonly referred to as the Cohen committee) presented its report on the existence of hate propaganda in Canada and in 1965 urged the government to include hate propaganda laws in the *Criminal Code*. The committee took eleven months to make its findings. They found that hate propaganda, although not too severe in Canada, was sufficiently serious to require government action. The first anti-hate criminal laws were enacted in 1970.

A second wave of racist activity took place in the mid-1970's. Groups such as the Nationalist Party of Canada, the Edmond Burke Society and the Western Guard Party were active, and the Ku Klux Klan was revived.<sup>12</sup> Hate propaganda was transmitted through leaflets, pamphlets, the telephone, and video cassettes. New computer technologies made it possible to send hate messages over the Internet. Legal action has since been taken against individuals who are involved in hate group activities and who perpetuate

their hate through literature. A couple of the more famous cases are *Keegstra* and *Zundel*.

### ***The Criminal Code***

There are two sections of the *Criminal Code* that deal with hate propaganda. The first is section 318, which prohibits advocating genocide and the second is section 319, which prohibits the deliberate promotion of hatred.

**SECTION 318—Genocide:** Genocide is the killing or destruction of an identifiable group of people. Identifiable group is defined as any section of the public distinguished by colour, race, religion, or ethnic origin. There are no reported cases in Canada dealing with this section of the *Criminal Code*.

**SECTION 319—Promotion of Hatred:** The *Criminal Code* prohibits anyone from inciting (i.e., stirring up) public hatred against an identifiable group. In order for a person to be found guilty of doing this,

(a) his or her statements must be made in a public place. "Public place" is defined to include any place to which the public has a right to enter or is allowed to enter by invitation.

(b) the statements must also be likely to lead to a breach of the peace. A "breach of the peace" exists whenever "harm is actually or likely to be done to a person or in his/her presence to his/her property, or a person is in fear of being so harmed through an assault ... or some other disturbance".<sup>13</sup>

***Keegstra Case***

In the *Keegstra* case,<sup>14</sup> the Supreme Court of Canada emphasized that the term “hatred” refers to an emotion that is intense and extreme in nature and is associated with detestation and slander, which is a false statement with the intention of hurting someone. Hatred is an emotion that if exercised against members of an identifiable group, suggests that those individuals are to be despised, scorned, denied respect and made subject to ill-treatment because they belong to a particular group. A number of cases have been brought to court regarding public incitement of hatred.

**SECTION 181—False News:** The *Criminal Code* makes it illegal to spread false news that is likely to cause mischief, which is the "destruction or damage of property; the interference with the lawful use or enjoyment of property",<sup>15</sup> or injury to a public interest. This section was found to be unconstitutional in a case called *R. v. Zundel*.<sup>16</sup> In this case, Mr. Zundel was accused of spreading false news when he published a pamphlet suggesting that the Holocaust was a myth. At trial, Mr. Zundel was convicted. He appealed his conviction. One argument made by Mr. Zundel was that the section violated his *Charter* right to freedom of expression. The crown prosecutor argued that even if the *Criminal Code* section violated people’s freedom of expression, it could be justified because it protected Canadian society from mistruths being promoted as truths. Ultimately, the Supreme Court said that section 181 of the *Criminal Code* is no longer a valid law because it infringed Mr. Zundel's *Charter* right to express his beliefs.

### **Difficult to Prove**

Hate crimes are hard to prove and there have only been a few times when people have been charged under our hate laws, but there are other crimes that often fit the bill. For example, many kinds of harassment are prohibited by other criminal laws. Serious acts of violence against people or property, or threats of violence fall under the *Criminal Code*. Relatively minor acts such as spitting may also be considered to be assaults.<sup>17</sup>

"Assault" is defined as the intentional application of force or the threat of force without the victim's consent.<sup>18</sup> Assault may be motivated by hate. If a person has experienced any kind of assault, a complaint should be made to the police. The harasser will usually be given a criminal record if found guilty.

**SECTION 264—Criminal Harassment:** The *Criminal Code* deals with criminal harassment. This section is often referred to as the “stalking provision”. Under this section, anyone who repeatedly communicates with another person in a way that makes that person fear for his or her safety can be charged. The provision says that you cannot harass another person by repeatedly communicating with a person or by watching where she or he lives or works. You are not allowed to threaten the victim’s friends or family.

Examples of criminal harassment include:

- incessantly phoning the victim at home;
- phoning a victim's family, employers and others;
- leaving things outside of women's homes like teddy bears, flowers, etc.; or
- following women on the street.

**Example:**<sup>19</sup>

*The accused made repeated calls to an institution that attempted to combat racism and on each occasion made various threats to the employees at the institution. Over a period of two months the accused made well over 20 threatening calls to the institution. He was charged with criminal harassment.*

Someone who writes racist or sexist graffiti on the walls, on a locker or on a desk may not be charged with spreading hate propaganda but they could be charged with mischief under the *Criminal Code*.

**Example:**<sup>20</sup>

*The accused and a companion took cans of spray paint and used them to paint swastikas on a nearby synagogue, a Hebrew school, and an automobile. The accused, 22 years old, was involved in several white supremacist groups, and subscribed to the teachings of Ernst Zundel, who claims that the Holocaust is a hoax. The accused was charged with mischief to property.*

***Sentencing Provisions***

In 1996, the *Criminal Code* was changed so that judges could impose more severe penalties where crimes are motivated by hate.<sup>21</sup> When the judge

convicts the person and sentences him or her, the fact that the crime was motivated by hate may factor into the type of sentence he or she receives. The government added this new sentencing provision to make it easier to combat hate crimes. This section of the *Criminal Code* says that when a crime is motivated by hate then the court must give the offender a harsher penalty.

**Section 718.2** Other sentencing principles—A court that imposes a sentence shall also take into consideration the following principles:

(a)(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,...

Karen Mock, National Director for the League for Human Rights of B'nai Brith, points out that although there is a need for criminal laws to protect society against hate mongers, education is the best solution.<sup>22</sup> She asserts that the best way to combat racism and hate propaganda is through increased efforts to provide multicultural, anti-racist and human rights education.

*What things can you think of to help combat racism and hate propaganda in your school and community?*

## WEBSITES

**Lawroom**— [www.schoolnet.ca/lang\\_soc/law](http://www.schoolnet.ca/lang_soc/law)

**Erasing the Hydra of Hate** (Canadian Human Rights Commission)—  
<http://www.chrc.ca/cgi-bin/cgiwrap/chrc/chrcgame/>

**The Nizkor Project**— <http://www.almanac.bc.ca>

## Notes

- <sup>1</sup> Allan Melenchuk, *Toward Intercultural Understanding: An Anti-Racist Training Manual* (Calgary, Weigl Educational Publishing, 1993) at 59 (hereinafter Melenchuk).
- <sup>2</sup> *Splett v Sum's Family Holdings Ltd.* (1988), 13 Canadian Human Rights Reporter D/119 (Alberta Board of Inquiry).
- <sup>3</sup> Other criminal laws are found in *The Narcotic Control Act, The Food and Drug Act, The Customs Act* and *The Income Tax Act*.
- <sup>4</sup> Dwight Gibson & Terry Murphy, *All About the Law*, (Toronto: Nelson-Canada, 1996) at 63 (hereinafter Gibson and Murphy).
- <sup>5</sup> Steven N. Spetz and Glenda S. Spetz, *Take Notice* 2d Ed. (Toronto: Copp Clark Pitman Ltd., 1985) at 36.
- <sup>6</sup> For more information on hate literature see Ed Webking, *Freedom of Expression: Hate Literature*, (Alberta Civil Liberties Research Centre, 1995).
- <sup>7</sup> Jacquelyn Nelson & George Kiefl, *Survey of Hate-Motivated Activity* (Federal/Provincial/Territorial Working Group on Multicultural and Race Relations in the Justice System, 1995).
- <sup>8</sup> Karen Mock, "Combating Racism and Hate in Canada Today: Lessons of the Holocaust" in B'nai Brith Canada and the Nizkor Project, *Hate and the Internet—Selected Readings* (hereinafter Mock).
- <sup>9</sup> At this time the Ku Klux Klan was most popular in Saskatchewan, signing up close to 40,000 members. There are a number of theories as to why Saskatchewan's clan was so powerful. For more information on this and the history of hate groups in Canada, see Warren Kinsella, *Web of Hate* (Toronto: Harpers Collins Publishers Ltd., 1995).
- <sup>10</sup> B'nai Brith Canada, *Is Your Child a Target? Guidelines for Parents and Teachers on the Dangers of Hate Group Recruitment in Canada* (B'nai Brith League for Human Rights) (hereinafter *Is Your Child a Target?*).
- <sup>11</sup> *Is Your Child a Target?*
- <sup>12</sup> Philip Rosen, "Hate Propaganda", Current Issue Review, September 1995.
- <sup>13</sup> *Tremear's Criminal Code* (Toronto: Carswell, 1997) at 79.
- <sup>14</sup> *R v Keegstra* (1990), 3 Canadian Rights Reporter (second edition) 193 (Supreme Court of Canada).
- <sup>15</sup> Gibson and Murphy at 650.
- <sup>16</sup> *R v Zundel* (1987), 19 Canadian Rights Reports (second series) 193 (Supreme Court of Canada).
- <sup>17</sup> Glenn A. Gilmour, "Hate Motivated Violence" in League for Human Rights of B'nai Brith Canada *Symposium on the Legal Remedies for Hate Crimes* (Toronto, 1994) at 2.
- <sup>18</sup> *Criminal Code* R.S.C. 1985, c. C-46, s.265 (1).
- <sup>19</sup> *R v Karalapillai*, [1995] Ontario Judgments No. 2105 (Queen's Bench).
- <sup>20</sup> *R v Lelas* (1990), 41 O.A.C. 73.
- <sup>21</sup> Although this was not included in the *Criminal Code* until 1996, judges had previously adjusted sentences accordingly when the crimes were motivated by hate.

- <sup>22</sup> Karen Mock, “Combating Racism and Hate in Canada Today: Lessons of the Holocaust” in B’nai Brith Canada and the Nizkor Project, *Hate and the Internet—Selected Readings* (hereinafter Mock).

## CHAPTER SIX—WAR CRIMINALS

In times of war, there are rules that countries must respect. Over the years, conventions and treaties have been created that show how warring countries should conduct themselves in their relationship with one another and in their relationship with citizens and their property. Although nations at war may use necessary force to achieve victory, they must act humanely both in the conduct of military operations and their treatment of soldiers and civilians. Even several thousand years ago there were treaties and rules surrounding the waging of war. For example, one rule stipulated that in times of conflict women and children were to be spared. Another ancient example was that wells must not be poisoned. Although these rules existed, they were not written down anywhere or systematically applied.<sup>1</sup> Many abuses still took place.

### ***War Criminals***

During the twentieth century there has been a growing recognition by the international community that individuals may be prosecuted and found responsible for international criminal acts such as crimes against peace, war crimes, crimes against humanity, apartheid, and genocide. People around the world became concerned after World War I that even in times of war there must be some rules that soldiers must follow and these rules must be written down and systematically applied. A conference was held and representatives from several countries attended the conference. A treaty called the Treaty of

Versailles was drawn up. The treaty allowed allied forces to bring people accused of violating the laws of war before a military tribunal to be punished according to the law.<sup>2</sup> The procedure was not widely used and only a small number of Germans were prosecuted before German courts following World War I.<sup>3</sup>

## **World War II**

After World War II, many thousands of war criminals were tried at hearings conducted under various tribunals. The Nuremberg trials, held in the 1940's in Germany, were the first established military hearings. The Nuremberg court handed down twelve death sentences, seven prison terms and three acquittals.<sup>4</sup> The judges included members from the United States, France, Britain, and the Soviet Union. The trials lasted for over ten months and 24 German Nazi leaders were charged with one or more of the following crimes:

- Crimes against peace, which are the waging and planning of wars of aggression contrary to international treaties and agreements;
- Crimes against humanity, including extermination, enslavement, genocide, racial and religious persecution;
- War crimes, which include murder, torture, destruction of cities, towns and villages, and the killing of prisoners of war and hostages; and
- Common plan conspiracy.

The war crimes trials had several long term effects. Crimes that had been considered moral crimes became legal crimes so that the waging of aggressive warfare was considered a crime. Inhumane acts against civilians were recognized as crimes. Individuals were held responsible for crimes they committed even when their superiors had ordered them to commit the crimes. It was determined that individuals could not argue that they were merely following orders. Finally, heads of state were held accountable for international crimes. Other war crimes trials held from 1947 to date have sometimes resulted in the conviction and prosecution of war criminals.

Very recently, the Canadian government played an important role in starting an International Criminal Court, which will be used to hear cases when people have been charged with war crimes and crimes against humanity.

### **War Criminals in Canada**

Canada has been concerned about war crimes. On August 30, 1945, Canada passed a law about the prosecution of war criminals. War criminals have not been as much of a priority in Canada as in some other countries, however. For example, the Federal Republic of Germany prosecuted some 60,000 individuals between 1947 and 1990.<sup>5</sup>

The issue of war criminals residing in Canada is still ongoing. Between 1948 and 1978, there was very little Canadian government action pertaining to war crimes. Because little effort was made to keep war criminals out of Canada, a small, but not insignificant number of war criminals became residents during this period. From time to time, as

publicity arose when war criminals were discovered or tried in other countries, efforts were made to address the issue in Canada.<sup>6</sup>

In 1984, the Law Reform Commission of Canada published a working paper in which it recommended that the government study war crimes and try to determine the type of war crimes legislation that should be drafted in Canada to replace old legislation.<sup>7</sup> In February, 1985, a Commission was established to determine officially whether there were alleged Nazi war criminals living in Canada and, if so, what could be done legally. The Commission determined that there were indeed Nazi war criminals resident in Canada and the existing legal remedies were not effective. The result was that war crimes provisions were inserted into the *Criminal Code*. In 1987, subsections 7(3.71) to 7(3.77) were added to address war crimes and crimes against humanity. War crime is defined in s. 7(3.76) as:

an act or omission that is committed during an international armed conflict, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission, and that, at that time and in that place, constitutes a contravention of the customary international law or conventional international law applicable in international armed conflicts.

Crimes Against Humanity are defined as (s. 7(3.76):

murder, extermination, enslavement, deportation, persecution or any other inhumane act or omission

that is committed against any civilian population or any identifiable group of persons, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission, and that, at that time and in that place, constitutes a contravention of customary international law or conventional international law or is criminal according to the general principles of law recognized by the community of nations.

There are many difficulties with prosecuting war criminals under the above legislation. One of the major problems is that there may be a long delay between the offence and its prosecution. For example, a person may be accused of committing war crimes during World War II, which was over fifty years ago. This is contrary to section 11(b) of the *Charter of Rights and Freedoms*, which states that a person must be tried within a reasonable amount of time. Also, it is sometimes difficult to identify the appropriate person to charge.

The Canadian government has tended to approach war crimes cases either through criminal prosecutions or deportations (this means that a person is sent out of the country). For various reasons, the new war crimes provisions in Canada have not yet been successfully used. For example, when investigating alleged World War II war crimes, the police and prosecutors are hampered in their investigations because witnesses are deceased or elderly.

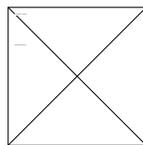
There are different problems in the prosecution of contemporary cases—war criminals from conflicts other than World War II. For example, if the government that is allegedly responsible for the war crimes or crimes against humanity is still in place, then a person who seeks prosecution of someone here in Canada may fear that relatives in the home country will be endangered as a result.

Canada prosecuted its first case in 1989 under the new *Criminal Code* provisions.<sup>8</sup> The prosecution was against a man called Imre Finta, who was accused of robbery, unlawful confinement, kidnapping, and manslaughter during World War II. The alleged offences involved the imprisonment in 1944 of over 8,000 Jews in Hungary, the theft of their valuables, the kidnapping of them with the intent to transport them to Hungary against their will and eventually causing their death. Captain Finta was eventually acquitted by the Supreme Court of Canada.

More recently, a court in Canada concluded that Wasily Bogutin became a citizen by “false representation or fraud or by knowingly concealing material circumstances.”<sup>9</sup> The court found that Mr. Bogutin was personally and directly involved in effecting the roundups of young persons for forced labour in Germany. Canadian citizens may be stripped of Canadian citizenship if they have been found to have made false representations in their citizenship applications.

### **The International Committee of the Red Cross**

The International Committee of the Red Cross played a significant role in improving conditions for soldiers and civilians in times of war. It was created after Henry Dunant, a Swiss businessman, chanced upon the Battle of Solferino in Castiglione della Peve in June, 1859. The town that Dunant was visiting was filled with casualties. The experience changed his life. From that time forward, Dunant was dedicated to finding a way to ameliorate suffering in future wars. He proposed that societies of trained volunteers be organized in all countries for the purpose of helping to care for wounded combatants in times of war.<sup>10</sup> He also proposed that countries develop an international agreement on the humane treatment of the sick and injured of war. A group of Geneva citizens joined with Dunant and formed the International Committee of the Red Cross. Following the establishment of the Red Cross, a number of conventions were drafted. These protected the condition of people wounded during a war and are called the *Geneva Conventions*. At present, these conventions are binding on almost every state in the world. The *Geneva Conventions* are part of international humanitarian law, which is law dealing with the welfare of human beings during war times.



*Call your local Red Cross Committee and find out what kinds of projects they are involved in, locally and internationally.*

### Notes

- <sup>1</sup> International Committee of the Red Cross, Study Guide of the International Red Cross and Red Crescent Movement, (Geneva: I.C.R.C., 1991) Vol. G, at 2.
- <sup>2</sup> For more information on human rights and World War I, see Alberta Civil Liberties Research Centre, *Volume III–Background to International Human Rights Law*, 1996.
- <sup>3</sup> W.J. Fenrick, “The Prosecution of War Criminals in Canada” (1989) 12(2) Dalhousie Law Journal 256 at 285.
- <sup>4</sup> M.C. Bassiouni, *Crimes Against Humanity in International Criminal Law* (London: Marinus Nijhoff Publishers, 1992) at 210.
- <sup>5</sup> Bassiouni, at 226.
- <sup>6</sup> Bassiouni, at 226.
- <sup>7</sup> (February 7, 1984) P.C. 1985-348.
- <sup>8</sup> *R v Finta*, [1993] 1 Supreme Court Reports 1138.
- <sup>9</sup> S.Bindman, “Suspected Nazi Collaborator May Lose Citizenship”, *The Calgary Herald* (23 February 1998) A7.
- <sup>10</sup> Bassiouni, at 161.