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**CRIMINAL CODE AMENDMENTS**  
**BILL C-250**  
**(HATE PROPAGANDA)**

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*By Bruce W. Long B.A., LL.B. (Counsel)*

**A. INTRODUCTION**

A Private Members' Bill was introduced in 2002 to the House of Commons as Bill C-250, *An Act to amend the Criminal Code (hate propaganda)*. Bill C-250 was given third reading on September 17, 2003. The Bill died in December 2003, but was re-introduced into the House of Commons on February 2, 2004, and received second reading in the Senate on February 20, 2004. Bill C-250 seeks to add sexual orientation as an "identifiable group" which will receive additional protection from hate propaganda. This *Church Law Bulletin* comments on Bill C-250 from the standpoint of its impact on churches and religious charities in Canada.

**B. THE CONTEXT FOR LEGISLATIVE AMENDMENT**

Bill C-250 does not extend legal protections to anyone who has been legally unprotected up to this time. It only expands legal protections that are already in place. Some of the existing legislative provisions presently available to victims of hate propaganda are:

- a) Section 320.1 of the *Criminal Code* provides for the seizure of hate propaganda;

- b) Section 22 of the *Criminal Code* makes it an offence to encourage another person to commit an assault or to damage the property of anyone;
- c) Section 718.2 of the *Criminal Code* provides that a sentence should be increased if it was motivated by prejudice based on sexual orientation;
- d) The *Canada Post Act* authorizes the seizure of anyone's mail if there are grounds to believe that person is publicly promoting hatred;
- e) The *Customs Act* prohibits the importation of hate propaganda into Canada;
- f) The *Canadian Human Rights Act* and provincial Human Rights Codes prohibit discrimination based on sexual orientation;
- g) Section 298 of the *Criminal Code* prohibits published matters which may expose a person to hatred, contempt or ridicule.

The foregoing provisions would lead one to conclude that there is already adequate legal protection for people in Canada who are identified by sexual orientation. Whether the legislative amendments to the *Criminal Code* are in fact necessary in order to ensure that sexual orientation does not become a basis for hate propaganda will remain a matter of discussion. However, the impact of Bill C-250 on churches and religious organizations will be significant.

### C. THE PROPOSED AMENDMENTS

Bill C-250 adds to the present definition of an "identifiable group" by including any section of the public distinguished by sexual orientation. It further adds to section 319(3)(b) of the *Criminal Code* (the "Code") by providing for the defence of expressing an opinion based on a belief in a religious text. However, the relevant sections of the *Code* affected by the proposed changes must be viewed in their entirety in order to understand the commentary that follows.

Sections 318 and 319 of the *Code* follow with the relevant sections shaded and the proposed amendments underlined for ease of reference.

Hate Propaganda

Section 318 - Advocating genocide

- (1) Every one who advocates or promotes genocide is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.
- (2) In this section, "genocide" means any of the following acts committed with intent to destroy in whole or in part any identifiable group, namely,
  - (a) killing members of the group; or
  - (b) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction.
- (3) No proceeding for an offence under this section shall be instituted without the consent of the Attorney General
- (4) In this section, "identifiable group" means any section of the public distinguished by colour, race, religion (or) ethnic origin or sexual orientation.

Section 319 - Public incitement of hatred

- (1) Every one who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace is guilty of
  - (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or
  - (b) an offence punishable on summary conviction.
- (2) Every one who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of
  - (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or
  - (b) an offence punishable on summary conviction.
- (3) No person shall be convicted of an offence under subsection (2)
  - (a) if he establishes that the statements communicated were true;
  - (b) if, in good faith, he expressed or attempted to establish by argument an opinion on a religious subject or an opinion based on a belief in a religious text;
  - (c) if the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true; or
  - (d) if, in good faith, he intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred toward an identifiable group in Canada.
- (4) Not applicable
- (5) Not applicable
- (6) No proceeding for an offence under subsection (2) shall be instituted without the consent of the Attorney General.
- (7) In this section,

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

“identifiable group” has the same meaning as in section 318;

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

“statements” includes words spoken or written or recorded electronically or electromagnetically or otherwise, and gestures, signs or other visible representations.

Clearly, the “communicating” offence in subsection 319(1) will be resorted to with much greater frequency than the “promotes hatred” offence in subsection 319(2), as the latter is an unlikely charge to result from a religious or educational discussion about sexual orientation.

Media reports indicate that the proposed changes to the *Code* will exempt anyone expressing an anti-same sex perspective based on a religious text. The Bill’s author has repeatedly assured the public that religious leaders will continue to have this protection as a result of the exemption in subsection 319(3). However, even a cursory examination of subsection 319(3) clearly indicates that this protection only applies to someone charged with the “promotes hatred” offence under subsection 319(2), not in relation to the “communicating” offence under subsection 319(1). Further, the “promotes hatred” offence has an additional legal safeguard in subsection (6) which requires the consent of a Provincial Attorney General. In contrast, the “communicating” offence in subsection 319(1) requires only that a peace officer have reasonable and probable grounds or that a private citizen is able to convince a Justice of the Peace to commence the criminal process. What follows from these observations is that free speech, or “communicating” about sexual orientation within a church or religious organization will not be protected.

There is no legal or logical reason for the “promotes hatred” offence in subsection 319(2) to receive the benefit of five statutory defences, none of which are accorded to the “communicating” offence in subsection 319(1). The “promotes hatred” offence, which would require a vitriolic attack against an identifiable group, is a far less likely charge for a charity or religious organization to be accused of, and yet it has significant additional defences beyond the traditional criminal defences related to an act and its intention. Alternatively, a person charged with the “communicating” offence in subsection 319(1) can be convicted even if his or her statements were made in good faith, were true, benefited the public, were stated to buttress an opinion on a religious subject or were made to remove hateful feelings toward an identifiable group. This dichotomy of defences appears to be intentional and an omission which will definitely affect the free flow of discussion

about sexual orientation and related topics. It is clearly one of the more serious flaws in the proposed legislative amendments.

Another contextual inconsistency relates to the wording of the “communicating” offence, which indicates that a conviction could be based on the speculation that a breach of the peace might occur at some time – either in the present or at some time in the future. Concepts with such vagueness are unusual for a statute whose hallmarks are precision and specificity. Further, the “communicating” offence is worded in such a way that an offender need not intend to incite hatred which may simply be an unintended by-product of his or her statements. Again, the more serious “promotes hatred” offence has an extra protection, in that the statements must “wilfully” promote hatred. This would require the Crown to prove beyond a reasonable doubt that the speaker intended a certain result or knowingly desired, and promoted, a hateful course of action. Again, this statutory defence is absent for the “communicating” offence which will attract more investigative and judicial attention.

#### **D. WHAT IS SEXUAL ORIENTATION**

The media have focussed only on people identified by a same-sex orientation as the new identifiable group protected by Bill C-250. However, the term “sexual orientation” is not defined in the *Code* and its meaning cannot be garnered from its context or decided cases. Even recognized dictionaries do not provide a single definitive meaning and describe orientation variously as including a disposition, an inclination or a faculty to be coupled with actions. These broad descriptions could include polygamy, pedophilia and bestiality.

Depending on the meaning ascribed to sexual orientation, even the parents of a child who has been victimized by a child pornographer or a pedophile might be precluded from publicly criticizing the offender.

#### **E. POSSIBLE RESULTS FROM BILL C-250**

At least one judicial decision in Canada (*Owens v. Saskatchewan* (Human Rights Commission), (2002) 228 Sask.R. 148 (Sask. Q.B.)) has held that certain passages in the Bible expose homosexuals to hatred. There is no reason to believe any parallel passages in the Koran the works of Buddha or any Hindu writings would not be similarly characterized. Bill C-250 will give activists the power to enter a religious service with a

recording device and effect the arrest of a religious speaker who is speaking about the moral aspects of homosexuality. As a result, religious leaders will be unable to communicate what the Bible, the Torah, The Koran, and other religious writings teach about homosexuality.

This restriction is unfortunate inasmuch as disapproval of the sexual orientation of a person is not necessarily synonymous with inculcating hatred of that person, particularly if it is coupled with a sincere expression of compassion for that person. Further, the religious exemption provided for in section 319(3)(b) of the *Code* itself is subject to attack on the grounds that it is narrow and discriminating inasmuch as it does not allow the same protection to atheists or agnostics.

It is not difficult to envision, since there are numerous passages in the Bible and other religious writings that address sexual orientation, that those parts or even the Bible as a whole could be declared as hate literature. This result has been presaged by the finding of the Saskatchewan Queens Bench in *Owens v. Saskatchewan*. Given this judicial pronouncement, it is a grave error for the proponents of this legislation to publicly state that it in no way limits or threatens the freedom of religious texts. The judgements of several Canadian courts make it clear that the stated *Charter* freedoms of speech, conscience, opinion, expression and religion are not absolute and must yield when a minority's position is characterized as suffering from discrimination at the hands of the majority. It should be noted that academic instructors who might wish to discuss such topics as the causes of homosexuality, genetic (nature) or learned (nurture), are subject to the same parameters as the church, temple, or mosque.

## F. CONCLUSION

It is evident that many Canadians are unaware of the serious flaws and omissions in Bill C-250. The present resistance to it stems from its lack of necessity, its potential for oppression of expressions of opinion and the use of criminal sanctions to repress sincerely held beliefs of many well meaning and conscientious Canadian citizens.

If there is no acceptance of its efficacy, then Bill C-250 will lack the public support that should accompany any such drastic sanction with potentially penal consequences. The result will undoubtedly be a diminished

respect for all criminal law and for the administration of justice in Canada. Such a consequence must be avoided if the rule of law is to continue as one of the necessary strengths of our country and its culture.

In the meantime, if it passes the Senate and becomes law, churches and religious organizations may want to consider taking precaution such as avoiding public criticisms of identifiable groups or their activities, limiting opinions to private conversation, and if targeted or investigated, relying on the constitutional right to remain silent. Inasmuch as the offence is directly related to intention and motive, silence is usually preferable at initial stages.



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