

NAVIGATING THE LEGAL LANDSCAPE

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Hate speech, freedom of
expression, discrimination
and harassment in the
workplace amid
polarization in Canada

TOPICS

- Context
- Hate speech
- A brief overview of
 - Discrimination in services
 - Discrimination and harassment in employment
- Off-duty comments of employees on social media
- Case studies
- Resources

TORONTO STAR

How Toronto law partners — divided over the Middle East war — find common ground

In these two outspoken advocates, there's a microcosm of all the tension that has engulfed the Jewish and Muslim communities in recent weeks, but they still manage to make it work.

Updated Nov. 28, 2023 at 10:32 a.m. | Nov. 26, 2023 | 4 min read



Howard Levitt and Muneeza Sheikh may not agree on the conflict in the middle east but they do agree that people shouldn't face consequences for speaking out about it.

R.J. Johnston Toronto Star / Toronto Star

CONTEXT

- Increase in reported Antisemitic, anti-Muslim and anti-Palestinian hate crimes
- Increase in reports of Antisemitism, Anti-Palestinian racism and Islamophobia
- Protests, including on university campuses
- Pressure on individuals, foundations and grantees to speak out about the conflict in Israel and the Occupied Territories
- Concerns about silencing of voices



Toronto

Unprecedented tensions lead to 'staggering' hate crime increase: Toronto police chief

Toronto police chief said antisemitism makes up 40% of all hate crimes reported in 2023

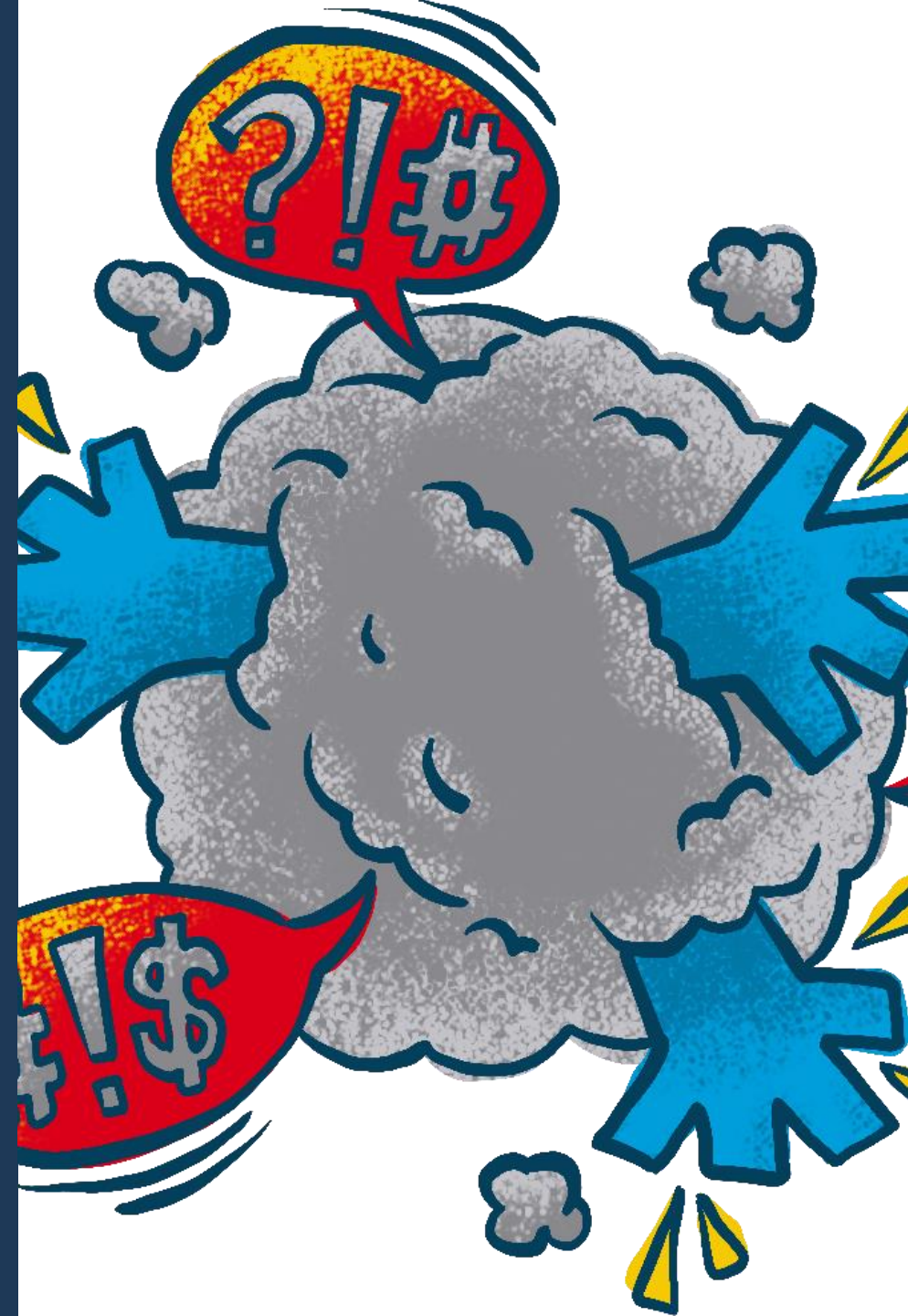
CBC News · Posted: Nov 23, 2023 10:34 AM EST | Last Updated: November 23, 2023



Toronto Police Chief Myron Demkiw provided an update Thursday on the city's hate crime statistics.

WHAT IS HATE SPEECH?

- Hate speech (whether under criminal or human rights law) “has been **interpreted fairly strictly** in Canada in order to avoid encroaching upon lawful speech that is merely distasteful, upsetting or offensive”
 - Lex Gill for the Public Policy Forum, “The Legal Aspects of Hate Speech in Canada” (2020)
- It is a very high standard. “Hatred connotes **emotion of an intense and extreme nature** that is clearly associated with **vilification and detestation**”
 - *R v Keegstra*, 1990 CanLII 24 (SCC), [1990] 3 SCR 697;
R v Whatcott, 2023 ONCA 536 (CanLII)



THE "HALLMARKS OF HATE SPEECH"

The hallmarks include:

- The targeted group is portrayed as a **powerful menace** that is taking control of major institutions of society"
- The targeted group is portrayed as **preying upon** children, the aged, the vulnerable, etc.
- The targeted group is **blamed for the current problems** in society and the world
- The targeted group is portrayed as **dangerous or violent** by nature
- The speech conveys the idea that members of the targeted group are **evil**
- The targeted group is **de-humanized** through comparisons to and associations with animals, vermin, excrement and other toxic substances
- The messages **minimize or celebrate past persecution or tragedy** involving members of the targeted group

Warman v Kouba, 2006 CHRT 50 (CanLII); *Saskatchewan Human Rights Commission v Whatcott*, 2013 SCC 11 (CanLII)



DISCRIMINATION IN SERVICES



Dennison v Pride Toronto, 2014 HRTO 1410
(CanLII)

- Under human rights legislation, foundations have an obligation to provide a **service environment free of discrimination**
 - Foundations **provide services** to groups or organizations that **apply for grants**
 - **Access to public events** put on by a foundation may constitute a service. Foundations **should not exclude people** from attending public events based on prohibited grounds of discrimination (e.g. race, place of origin)
- Public statements about the conflict made at a foundation or grantee event or on a foundation's website may not constitute a service under human rights legislation
 - **Public statements** about opinions on **political matters** are matters at the **core of freedom of expression**

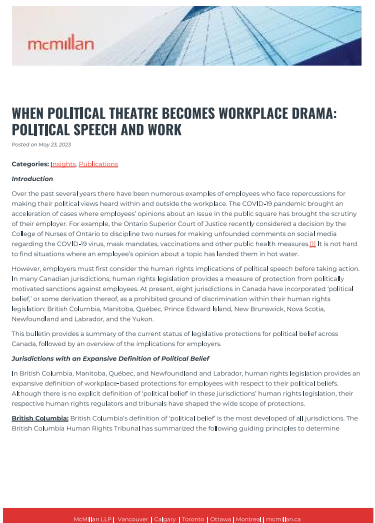
DISCRIMINATION AND HARASSMENT IN EMPLOYMENT

- Under human rights legislation, everyone has the right to be free from discrimination and harassment in employment. It includes the duty to investigate
 - Employment is **interpreted broadly**. It covers volunteers, boards of directors and independent contractors
 - **Harassment** is a **course of unwelcome physical or verbal behaviour** based on a prohibited ground (e.g. gender identity, disability). Generally, it is behaviour that persists over time, but it can include serious one-time incidents
 - A **poisoned work environment** is a form of discrimination in employment. It may be created when there is persistent unwelcome conduct or comments within the organization, which may result in a **hostile atmosphere for people from equity-deserving groups**. It can include a serious one-time incident



OFF-DUTY COMMENTS OF EMPLOYEES ON SOCIAL MEDIA

- **Disciplining or terminating an employee for their off-duty comments on social media about their political beliefs regarding the conflict in Israel and the Occupied Territories may amount to discrimination in certain provinces**
 - Political belief is a **ground of discrimination in eight provinces: British Columbia, Manitoba, Québec, Prince Edward Island, New Brunswick, Nova Scotia, Newfoundland and Labrador, and the Yukon**
 - In **British Columbia, Manitoba, Québec, and Newfoundland and Labrador**, human rights legislation provides an “**expansive definition of workplace-based protections for employees with respect to their political beliefs**”



OFF DUTY COMMENTS OF EMPLOYEES ON SOCIAL MEDIA

Circumstances justifying discipline or dismissal include:

1. The employee's conduct **harms the employer's reputation**
2. The employee's behaviour renders the employee **unable to perform their duties** satisfactorily
3. The employee's behaviour leads to refusal, **reluctance** or inability of **other employees to work with them**
4. The employee has been **guilty of a serious breach** of the *Criminal Code*, human rights legislation or policy thus rendering their conduct injurious to the general reputation of the employer and its employees, or
5. The employee's conduct **makes it difficult** for the employer to carry out its function of **efficiently managing its work and efficiently directing its workforce**



SOCIAL MEDIA POLICIES

In his book, *Social Media and Internet Law*, Paul Lomic sets out **key considerations** employers should consider when drafting **social media policies**:

- Explain **what social media is** and give examples
- Specify **who is allowed to post** on social media on the **employer's behalf** and prohibit others from doing so
- Specify that the policy **covers off-duty social networking**, and that it is best practice not to identify themselves with the employer online and not to discuss the workplace and co-workers online
- Remind employees that they **may not post content** that **may negatively impact** the employer
- Advise employees that their **use of social media** will be **monitored**
- Advise employees of any **consequences** for violating the policy (i.e. discipline, termination for cause)

CASE STUDIES

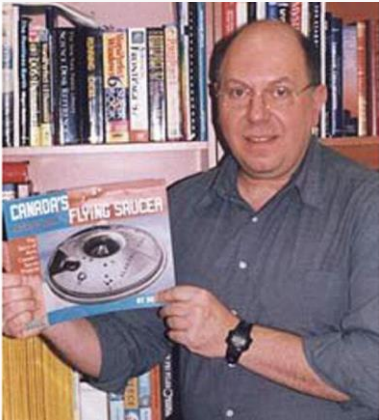
TORONTO STAR

GTA

York University fires staffer for Facebook posts seen as anti-Semitic

Nikolaos Balaskas blames 'outside special interest groups' after blaming 'Zionists' for 9/11 and millions of other deaths.

Sept. 16, 2016 | 2 min read



Nikolaos Balaskas was fired after his social media posts and comments targeted what were described as "identifiable groups."

York University

Termination for cause re an employee's off-duty social media: *York University Staff Association v York University*, 2018 CanLII 41354 (ON LA)

- Involved a laboratory technologist in York's department of physics and astronomy, Nikolaos Balaskas, who was terminated for **repeatedly posting Antisemitic content** on Facebook that violated the employer's policies on hate and racism
- The union argued that the grievor **did not intend** to act in a racist manner. Instead, he holds "**strong views about Zionism** and the state of Israel which are **genuinely held political beliefs and protected expression**, and which are not reflective of an animosity toward Jewish people"

CASE STUDIES



TDSB rejects finding that trustee breached code of conduct in criticizing antisemitic materials



Office of the Integrity Commissioner, *TDSB Board Member Code of Conduct Complaint Investigation Report (2021)*

- A Student Equity Program Advisor used an opt-in email distribution list on gender-based violence to send out an information package for teachers about the “Israeli-Palestinian conflict”. Approximately 1700 people received the mailouts.

Trustee Alexandra Lulka tweeted that she was “deeply disturbed to recently discover that virulently anti-Israel and even antisemitic materials were distributed to TDSB teachers” and was “outraged to discover that some of this material justifies suicide bombings and other forms of terrorism”

RESOURCES

1. Lex Gill for the Public Policy Forum, "[The Legal Aspects of Hate Speech in Canada](#)" (2020)
2. British Columbia's Office of the Human Commissioner, "[Hate Speech Q&A](#)"
3. Ontario Human Rights Commission, "[Taking Action to Build Awareness and Challenge Hate in Ontario](#)"
4. McMillan LLP, "[When Political Theatre Becomes Workplace Drama: Political Speech and Work](#)" (2023)
5. Paul Lomic, ed, [Social Media and Internet Law – Forms and Precedents](#), 2nd ed (Toronto: LexisNexis, 2018)
6. Office of the Integrity Commissioner, [TDSB Board Member Code of Conduct Complaint Investigation Report](#) (2021)

RESOURCES

7. Cases

- a) *R v Keegstra*, [1990 CanLII 24](#) (SCC), [1990] 3 SCR 697
- b) *R v Whatcott*, [2023 ONCA 536](#) (CanLII)
- c) *Warman v Kouba*, [2006 CHRT 50](#) (CanLII)
- d) *Saskatchewan Human Rights Commission v Whatcott*, [2013 SCC 11](#) (CanLII)
- e) *Dennison v Pride Toronto*, [2014 HRTO 1410](#) (CanLII)
- f) *University Staff Association v York University*, [2018 CanLII 41354](#) (ON LA)
- g) One to watch: [Canadian Human Rights Commission Complaint](#) filed by Jewish members of the Public Service Alliance of Canada (PSAC) against PSAC (2024)



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