

HATE CRIME FAQs

1. What constitutes a hate crime?

The term “crime” refers to a *criminal* offence. Consequently, we must look at the *Criminal Code* to determine what constitutes a hate crime.

There are two principle types of hate crimes found under the *Criminal Code*:

- I. **Hate propaganda**, commonly referred to as **hate speech** ([sections 318 to 320.1](#))
- II. **Mischief relating to religious property** ([section 430\(4.1\)](#))

For its part, hate propaganda is divided into three offences: **advocating genocide** ([318\(1\)](#)), **public incitement of hatred** ([319\(1\)](#)), and **willful promotion of hatred** ([319\(2\)](#)).

- **Advocating genocide** is defined as either promoting the killing of members of an identifiable group or advocating the deliberate infliction on the group of conditions of life calculated to lead to its physical destruction.
- **Public incitement of hatred** involves the communication, by any audible or visible means, of oral, written, or recorded statements, gestures, signs or other visible representations, in any place to which the public have access as of right or by invitation, of hatred against any identifiable group, where the communication is likely to lead to a breach of the peace.
- **Willful promotion of hatred** is the act of promoting hatred by any audible or visible means, against any identifiable group, through oral, written, or recorded statements made other than in private conversation.

In addition, section [718.2\(a\)\(i\)](#) of the *Criminal Code* requires that any court imposing a sentence consider whether the offender 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 gender identity or expression, or on any other similar factor**”. In concluding “yes,” the Court is essentially finding that a hate crime was committed on the basis of one of the listed grounds.

2. How are people charged with having committed a hate crime?

Contrary to popular belief, people are not charged with having committed a hate crime. If an individual has committed a hate crime, he or she will be charged:

- under one of the four provisions listed above (318(1), 319(1), 319(2), or 430(4.1)), or
- under any other provision of the *Criminal Code*, with the caveat that evidence will be presented to the effect that the motivation behind the crime was hateful in nature (see: 718.2(a)(i)).

3. Are there special defenses available when charged with a hate crime?

Section 319(3) outlines defenses available to a defendant charged with the **willful promotion of hatred** (only). A defendant cannot be convicted of this offence where:

- (a) the defendant establishes that the statements communicated were truthful;
- (b) the defendant was expressing an opinion or argument on a religious subject or based on a belief in a religious text, in good faith;
- (c) the statements were relevant to public interest in the context of a discussion for the public benefit, and the defendant reasonably believed them to be true;
- (d) the defendant's intention was to point out, in good faith, matters that produce feelings of hatred towards an identifiable group for the purpose of removing them.

4. How are people convicted of having committed a hate crime?

In criminal law, the elements of the offence – the *actus reus* (guilty act) and the *mens rea* (criminal intent) – taken together, must be proven by the Crown beyond a reasonable doubt. In addition, the absence of any possible defense must also be proven beyond a reasonable doubt for there to be a conviction.

With regards to the **hate propaganda** offences, this essentially means that the Crown must prove beyond a reasonable doubt that the defendant committed the act in question and either intended to commit the acts or foresaw that genocide or hatred, as the case may be, would be a certain result of the communication. In order to determine whether speech conveys hatred, Courts must consider the **social and historical context of the speech** (Mugesera v Canada (Minister of Citizenship and Immigration), 2005 SCC 40).

With regards to **mischief relating to religious property**, the Crown must prove to that same standard that the defendant committed the act in question, and intended to do it.

In all situations, where the defendant tries to raise a defense, the Crown must prove beyond a reasonable doubt that the defense is implausible.

There is, however, one exception. As noted above, section 319(3)(a) allows the defendant to prove that the hateful statements made were true. In this sense, the *Criminal Code* actually infringes on the presumption of innocence under s.11(d) of the Canadian Charter of Rights and Freedoms (*Charter*) since the defendant must prove his or her innocence in order to avoid conviction as opposed to the Crown proving that his or her defense fails.

In R v Keegstra [1990] 3 SCR 697, the majority of the Supreme Court held that this infringement was a reasonable limit on the presumption of innocence and was justified under s.1 of the *Charter*. According to the Court, the alternative situation would have led to acquittals any time a reasonable doubt existed as to the falsity of an accused's statement. This was found to be an irrational situation: to accept such a result would have meant agreeing that a small possibility of truthfulness outweighed the harm caused through the willful promotion of hatred.

Consequently, once the Crown proves that the defendant willfully and intentionally promoted hatred, the defendant may be convicted even if there is a reasonable doubt as to whether his or her statements were false.

With regards to a crime which the Court finds was motivated by hate (section 718.2(a)(i)), the elements of the crime must again be proven beyond a reasonable doubt; however the hateful motive does not need to be proven to this extreme since this motive is not one of the elements of the offence.

5. How else is hate speech regulated?

Various pieces of federal legislation prohibit different forms of hate speech:

- The *Canadian Human Rights Act (CHRA)*: [Section 12](#) of this Act, which applies generally to the federal government, Crown corporations, and federally-regulated corporations, prohibits the publication of discriminatory images (but not texts). Of note, Section 13 of the *CHRA*, which prohibited the spread of hate speech via the telephone or the Internet and applied broadly to all persons in Canada, was repealed in 2013 following significant criticism.
- The *Broadcasting Distribution Regulations*: [Section 8](#) of the Regulations prohibits the broadcasting of “any abusive comment or abusive pictorial representation that, when taken in context, tends to or is likely to expose an individual or group or class of individuals to hatred or contempt on the basis of race, national or ethnic origin, colour, religion, sex, sexual orientation, age or mental or physical disability.”
- The [Customs Act](#) and [Customs Tariff](#): Importation of material suspected of constituting hate propaganda is prohibited under Customs Tariff item 9899.00.00. The Canada Border Services Agency’s policy on hate propaganda can be found [here](#).

In addition, hate speech – as well as other forms of discrimination – may also be regulated at the provincial level. While not considered “crimes,” hateful acts may constitute offences under provincial human rights codes.

6. How do the Courts balance free speech and hate speech?

Freedom of expression, a fundamental freedom guaranteed under section 2(b) of the *Charter*, has been defined broadly by the Courts and in theory includes the right to express hate. Nevertheless, the right, like all other rights protected by the *Charter*, may be limited under Section 1 of the *Charter* (the reasonable limits clause) if deemed justifiable in a free and democratic society.

Freedom of expression is grounded in three values: truth, democracy, and individual autonomy. Where not rooted in these values, jurisprudence shows that freedom of expression tends to be more easily limited under section 1.

In [R v Keegstra \[1990\] 3 SCR 697](#), the Supreme Court held that hate speech, while protected under section 2(b) of the *Charter*, could not be justified in a free and democratic society. Consequently, section 319(2) of the *Criminal Code* – the offence of willful promotion of hatred – was found to be **constitutional**.

In coming to this conclusion, the Court:

- distinguished the Canadian *Charter* from the U.S. Bill of Rights, noting the express limitations clause contained in the *Charter* as well as the *Charter's* protections of equality rights and multiculturalism;
- highlighted the severe harm caused by promoting hatred of an identifiable group, including both individual and societal harm;
- noted Canada's commitment to international law ;
- found that the best way to protect the values central to freedom of expression was to reject hate propaganda;
- found that the *Criminal Code* provision was rationally connected to Parliament's goal of preventing the spread of racism;
- found that the *Criminal Code* provision was not overbroad and that to require actual proof of hatred resulting from the communication would severely hinder Parliament's goals;
- and found that despite alternative means of responding to hate speech, criminalizing it was acceptable.

7. Is the balance between free speech and hate speech similar in the United States?

Short answer: NO.

Courts in the United States tend to view restrictions on hate speech as violations of the First Amendment right to free speech. Where Canadian courts tend to give greater weight to values of equality and social justice, US courts tend to find that the offence felt by a particular group targeted by hate speech does not outweigh the fundamental right to freedom of speech. Instead of limiting hate speech, the American preference is to promote the right of “counterspeech,” that is, the sharing of opposing views to fight off the hateful speech.

In *Schenck v United States, 249 U.S. 47 (1919)*, the United States Supreme Court held that only where speech is intended to result in a crime, **and** where there is a “**clear and present danger**” that a crime will consequently occur, may speech be legally suppressed.

In 1952, the United States Supreme Court appeared to head in a different direction when it upheld an Illinois criminal statute banning certain types of group defamation (*Beauharnois v Illinois, 343 US 250*). However, since then, case law has weakened this holding to the point where it is now largely seen as having been overruled. Today, the “clear and present danger” test continues to be the constitutional standard in the United States. This explains why extremist marches and protests, for example, are protected under the First Amendment.

8. Why are so many campus events with controversial speakers getting cancelled by administration?

This is a loaded question with many possible answers. Freedom of thought and the free exchange of ideas are meant to be central to the university mission. Nevertheless, where free speech threatens the university environment in one way or another, campuses are increasingly interventionist. This appears to be particularly true when the speaker or event is related to a more right-wing policy stance (ex: [the Jordan Peterson and Faith Goldy event at Ryerson University](#); [an anti-abortion rally at University of Alberta](#)).

Here are some potential reasons being **given by university administration** for the cancellation of an event featuring a controversial figure:

- Ensuring that students (and staff) feel safe on campus
- Potential for hate speech (speaker or the group planning the event is known to promote or incite hatred)
- High cost of added security for controversial speakers

Here are other some potential reasons, generally denied by university administration:

- Fear of reprisal or pressure from important donors
- Pressure from students groups and the public following media exposure
- Protecting the university image (fear of violence erupting on campus that could tarnish the university's reputation, or of being seen as offering a channel to a controversial speaker)

In addition, one may argue that there is a general lack of understanding by student organizers (and to some extent by supervising professors) of the limits of free speech in Canada as opposed to the United States. Consequently, controversial speakers who have been known to incite hate but yet get platforms on American university campuses are invited by student leaders to Canadian campuses.

9. How do you report a hate crime?

As a criminal offence, hate crimes should be reported to your local police.

Hate speech directed at you which does not meet the criminal definitions may be reported to human rights commissions.

10. What about hate crimes on campus?

Again, as a criminal offence, hate crimes should be reported to the local police.

Hate speech directed at you which does not meet the criminal definitions may be reported to human rights commissions. Universities will also often have policies that protect

students and staff alike from hateful acts; in these cases, internal recourses may also be available.

11. Where can I find reports on hate crimes in Canada?

For a recent report on Hate Crime, please see [this Statistics Canada report](#).