

Incorporating a Standalone Hate Crime Section into the *Criminal Code of Canada*

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Canada was built upon the tenets of democracy, equality, multiculturalism, pluralism, and human rights, which are evident in the supporting statutes such as the *Canadian Multiculturalism Act* (2021), the *Constitution Act* and the *Canadian Charter of Rights and Freedoms* (2021). However, the Criminal Code of Canada (CC) is lacking a key section which would align and reinforce these fundamental principles: a standalone hate crime section. The public understands the magnitude and impact of hate crime, and the necessity to defend its citizens and ideals with a robust legislative response. The CC requires a standalone hate crime section because hate crimes terrorize communities and threaten Canadian values and legislation underpinning those principles. A standalone section would provide a national definition of hate crime, which in turn has a number of key benefits: creates consistency; enables accurate/reliable data collection; increases intelligence to ensure community safety; allows for knowledgeable prevention and policy strategies; provides a snapshot of community coexistence and victimization rates; increases public trust; and allows those charged with the responsibility of protecting its citizens from hate crimes to perform their job with confidence. Canada must deliver what citizens expect – a legislative means to shield them from hate crimes.

Background

Current Criminal Code Sections Dealing with Hate Crime

The CC has only a few sections that address hate crime. These sections include three related to hate propaganda (ss 318-320), one focused on mischief to property and one sentencing provision. The lone section dealing with acts of hate is section 430 (4.1), which focuses solely on mischief to property, where the mischief is motivated by hate towards an identified group. Furthermore, section 718.2 (a) (i) is an offender sentencing guide which occurs after a conviction where the evidence shows the crime was motivated by hate. It is important to note that this is not a charge section for police or the prosecution, and has no impact on hate crime reporting or collection of statistics. The following are the CC sections relating to hate:

Section 318; Advocating Genocide <https://laws-lois.justice.gc.ca/eng/acts/c-46/page-68.html#docCont>

Section 319 (1) Public Incitement of Hatred <https://laws-lois.justice.gc.ca/eng/acts/c-46/page-69.html#docCont>

Section 319 (2) Wilful Promotion of Hatred <https://laws-lois.justice.gc.ca/eng/acts/c-46/page-69.html#docCont>

Section 320 Seizure of Materials Containing Hate Propaganda
<https://laws-lois.justice.gc.ca/eng/acts/c-46/page-69.html#docCont>

Section 430 (4.1), Mischief to Religious Property, Educational Institutions, Etc.
<https://laws-lois.justice.gc.ca/eng/acts/c-46/page-91.html#h-122977>

Section 718.2 (a) (i); Sentencing

<https://laws-lois.justice.gc.ca/eng/acts/c-46/page-189.html#docCont>

Hate Crime Defined

Currently, no standard definition of hate crime exists for Canadian police, government, academia, non-government organizations, or the community. Identifying and defining hate crime is often varied, done unilaterally and occurs in isolation. The hate crime definition advocated for in this report is:

A hate crime is a criminal offence committed against a person or property, which is motivated, in whole or in part, by the suspect's hate, bias, or prejudice towards an identifiable group based on, real or perceived race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, gender identity or expression, or any other similar factor.

Reasons to Incorporate a Hate Crime Section into the CC

1/Hate Crimes Terrorize and Psychologically Harm Individuals and Communities

Individual Effect. There is widespread recognition that the impact of hate crime on individual victims are significant, and indeed more harmful than their non-hate motivated counterparts. The individual effects include feelings of suspicion, injustice, social withdrawal, threat, depression, suicidal ideation, disenfranchisement, avoidance of public spaces, fear, anxiety, vulnerability, distrust, the normalization of hate crime, a necessity to increase personal security, concealment of identity, post-traumatic stress, being unsafe, anger, rejection of themselves, loss and longer emotional recovery times. (American Psychiatric Association, 2021; Chakraborti, Garland & Hardy, 2014; Cogan, 2002; Paterson, Walters & Fearn, 2018).

Community Impact. What further distinguishes hate crime from other crimes is their community impact. Hate crimes terrorize communities because victims are indiscriminately selected by perpetrators based upon their identity to deliver a message of hate. This manifests psychological distress, decreased feelings of safety and security, and the implicit warning that the community is unwanted (American Psychological Association, 2021). They are, in short, “message crimes.” As Fashola (2011) illustrated, hate crime’s damage extends beyond the individual victim, and elicits collective emotions from the community such as clinical post-traumatic stress disorder, fear for personal safety, concern for family, fear of going out, while simultaneously restricting guaranteed and fundamental freedoms of association and movement. The American Psychiatric Association (2021) described additional community effects such as disturbing thoughts, fear, detachment, anger, and sadness. Moreover, The University of Sussex (2018) discovered community responses of increased security consciousness, avoidance of public places and vulnerability.

Hate crime is often considered to be what Roberts (1995) refers to as a “special crime” as

the reach and impact extends beyond the individual, disseminating outward, fragmenting, and damaging our society. Likewise, Perry and Alvi (2011) demonstrated that a range of emotions reverberated into the community such as shock, anger, fear/vulnerability, feelings of inferiority, insubordination, behavioral changes (dress, attending public places, sticking to one's group) and the normalization of hate crime. Furthermore, hate crimes threaten peaceful coexistence and can lead to community conflict on a broader scale. (The Organization for Security and Co-operation in Europe, 2021).

The wide-ranging impact of hate crimes manifests disproportionate harm to individuals and communities, thus requiring a focused legislative response with the incorporation of a standalone hate crime section.

2/Hate Crimes Undermine the Values and Core Legislation of Canada and Partner Countries

In addition to terrorizing society and psychologically damaging individuals, hate crimes contradict and thus undermine statutes defending Canada's core values. Perry and Alvi (2011) and the Canadian Race Relations Foundation (2020, March) assert that hate crimes attack values of tolerance, inclusion, and the very core of Canadian democratic ideals. Perry and Alvi highlight a New York State Bill from 1990 exemplifying hate crimes effects on society, which include eroding the core principles that promote an open and tolerant society, and weakening pluralism. The Bill was explicit, that hate crimes must be named and prosecuted due to their severity.

Hate crime assails freedom and security, marginalizes human rights, erodes multiculturalism, subjugates equality, removes dignity, and emboldens hate mongers. Hate crimes are oppressive to all communities, and are a direct attack on the nation's values, core legislation and international commitments that protects fundamental rights and freedoms. A standalone hate crime section is an appropriate and measured response to hate crime, as it institutionalizes and proclaims that Canadians, and their core values, are worth legislative protection. Examples of legislation that hate crimes attack and marginalize are listed in Appendix A.

3/Provide a Standard, National Definition of Hate Crime for Canada

The problem. Responding to and managing hate crimes is persistently impeded because no common definition exists for institutions and organizations in Canada. The definitions that do exist contain a variety of characterizations, and in some jurisdictions no definition is used at all - leaving researchers, academics, government, and police to identify, define and interpret it unilaterally and independently. This lack of standardization elicits confusion and frustration from the community, and subsequent inertia in policy development and response by government. To illustrate, the federal Department of Justice (Roberts, 1995) noted as early as 1990 that there is considerable variety in definitions used by police services in Canada. Moreover, Statistics Canada (Janhevich, 2001) stated there is little consensus as to what constitutes a hate crime, as definitions from a variety of organizations describe a wide variety of behavior. The author stated that academic disciplines classify and define hate crime differently, that its motivation has several interpretations, and no centralized system for data collection exists. Likewise, a Statistics

Canada representative (W. Silver, personal communication, 2021, July 8) indicated that little has changed, stating that the hate crime data collection methodology of non-government organizations is varied. Furthermore, Janhevich and Roberts (1995) discovered that the variability in definitions, with police, NGOs, and academia, contribute to the difficulty in determining the actual amount of hate crimes that occur in Canada. The International Association of Chiefs of Police (2021) recommend the development of shared definitions to facilitate consistency, equity and efficacy. Dr. Karen Mock (2006) recommended in the report to the Ontario Attorney General and Minister of Community Safety and Correctional Services that adopting a standard definition of hate crime is required to ensure a consistent, standardized response, shared understanding, and a trustworthy baseline to gauge trends in reported hate crimes. Additionally, the Ontario Association of Chiefs of Police (Thompson, Ismail and Couto, 2020, pp 33) recommended police services use a common definition of hate crime, stating, “A standard definition will better enable consistent classification and data collection of hate/bias motivated crimes and incidents.” The authors continued and asserted that a standard definition and recording of hate crimes, safeguards communities from their enduring effects. Similarly, hate crime expert and director of The Centre on Hate, Bias and Extremism at Ontario Tech University, Dr. Barbara Perry, concurs that no uniform definition of hate crime exists in Canada (B. Perry, personal communication. 2021, June 23). Moreover, Janhevich noted that the Canadian Association of Chiefs of Police endorsed a definition in 1998 that included the same groups outlined in 718.2 CC; however, the endorsement was not mandated, and conformity has still not been established across police services. Roberts argued that a national standardized approach is warranted. For decades the research has conveyed a consistent message asserting that a national and standardized definition is beneficial to society, and that without one, the information and knowledge gaps, inertia, confusion, and frustration will persist.

The variety of hate crime definitions used by Canadian institutions is highlighted when one looks solely at policing. According to Statistics Canada (2020), in 2019 there were 137 standalone municipal police services, 36 First Nations self-administered services, 3 provincial police services and 1 federal police service (The Royal Canadian Mounted Police with 672 detachments). A uniform definition is not used by all 177 agencies; some have no definition at all.

The solution. Incorporating a standalone hate crime section into the CC will provide police, government, academia and non-government institutions, for the first time, a standard, national hate crime definition. Benefits include enhanced understanding, increased reporting, improved research capability, improved police investigations, accurate data collection, enhanced identification of communities at risk, more accurate victimization rates and informed policy and resource decisions to mitigate threats, and augment enforcement and prevention strategies. Furthermore, a standardized hate crime section will lead to judicial decisions accompanied with case law. This case law will provide a sharper interpretation of hate crime, guiding its application for police, government, academia and community groups.

The section.

Everyone commits a hate crime who, commits an offence under the Criminal Code which is motivated, in whole or in part, by the suspect's hate, bias, or prejudice towards an identifiable group based on real or perceived race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, gender identity or expression, or any other similar factor, is guilty of an (summary or indictable) offence.

4/Accurate and Reliable Hate Crime Data

Consistent and reliable police reported hate crime statistics would be collected if there was a standalone hate crime section, as it would be automatically coded for Uniform Crime Survey Reporting (UCR2) and data collection for Statistics Canada. Currently, it is challenging to collect data because no standalone hate crime section exists, resulting in varied definitions; unconventional, decentralized, and mixed data collection efforts; insufficient information; diverse interpretations and consequently, unreliable analysis. To illustrate, when general crime is investigated by police, the reports are titled with the specific *CC* sections, numerically coded and documented in compliance with Statistics Canada, UCR2. (W. Silver, personal communication, 2021July08). Unfortunately, because the *CC* does not include a standalone hate crime section, hate crimes are labeled as the *CC* sections investigated, such as an assault, mischief, arson, or uttering threats; consequently, hate crime is potentially not recorded or codified, unless a concerted effort by the police agency and Statistics Canada is made. Moreover, recording hate crime is not mandated, and relies heavily on individual police services to do so.

Although Statistics Canada's Canadian Centre for Justice and Community Safety Statistics do use a standard definition endorsed by the Canadian Association of Chiefs of Police, this definition is only applicable to statistical data collection and reporting and does not apply to operational activities. Since it is not operational and not in the *CC*, police can consistently use different definitions. (W. Silver, personal communication, 2021, August). With just under 200 police agencies in Canada, this results in varied, inconsistent, and unorthodox data collection methods, unreliable hate crime data, or no data at all. Therefore, the breadth and depth of hate crimes in Canada is obscured and often misinformed. Furthermore, Statistics Canada (W. Silver, personal communication, 2021July08) indicated that a hate crime section, coded within UCR2, would allow non-criminal hate motivated incidents to also be documented. This would provide additional information as to the extent of hate in Canada and spur an informed response. To demonstrate the data disparity, according to the Statistics Canada 2019 report (Moreau, 2021), a 2014 general social survey (GSS) revealed that Canadians self-reported victimization of 330,000 hate crimes in a year. This is in stark contrast to the 1,295 hate crimes reported to police in that same year. Incorporating a standalone hate crime section in the *CC* would narrow the data gap, and enable, for the first time, accurate and reliable identification, and collection of hate crime data, and provide a more informed and efficient foundation for data analysis and subsequent policy development.

5/Reliable Hate Crimes Statistics Identify Social Risk, Victimization and Assist Strategic Responses

Accurate collection and evaluation of hate crime data allows precise gauging of community risk and victimization, and assists governance, resourcing, and informed policy decisions. To illustrate, Statistics Canada (2017) asserted that crime statistics are instrumental for analysis, and that the UCR2 measures crime for policy makers, as well as public and private researchers; provides important information for resource planning and program development; and informs decision making regarding police resources and interprovincial comparisons. Likewise, the Government of Canada (2019) asserted that for any anti-racism effort to succeed, better and more consistent tracking, data measurement and collection is necessary. Furthermore, Statistics Canada (Janhevich, 2001) enumerated five reasons for the accurate collection of police reported hate crime statistics: (1) to accurately assess the magnitude of the problem, (2) to evaluate the criminal justice response and need for resources, (3) to respond to its disproportionate harm, (4) to create a social indicator of intercommunity existence, and finally, (5) to address the current criminal justice system agenda and priorities. Incorporating a standalone hate crime section into the *CC* is a straightforward, effective and efficient solution to these challenges. Alternatively, with unreliable hate crimes data, governments, academia, police and the community at large will continue to be misinformed as to the true state of relations between communities, the risk to marginalized groups, true victimization rates and potential threats to society. As an example, in 2019 B'nai Brith reported 2207 hate incidents while Statistics Canada reported 296 for the same community. Similar patterns arise for many communities. With these gaps and inconsistencies, it would appear falsely that Canada's First Nations and minority communities are minimally victimized by hate crimes. This correlates with Roberts (1995) and Thompson (2020) who asserted that hate crimes may be one of the most underreported crime types in society. Consequently, important opportunities to prevent, appropriately resource and investigate hate crimes, and create safer communities and build trust, will be lost. Therefore, a standalone hate crime section within the *CC* allows for consistent, reliable, and accurate data collection. It will provide efficacy, reliability and credibility that can assist to identify risks, victimization trends and strategic responses, and will support more effective resource allocation and research/policy decisions for government, academia, community organizations, and police.

6/Hate Crime Legislation Increases Public Trust

A standalone hate crime section included in the *CC*, and the ability to have reliable hate crime data demonstrates that the government takes hate crime seriously and will work to protect identified communities. This important recognition creates community trust in government and engenders a sense of community safety, security, and goodwill. To illustrate, Abella and Troper (2012, pp. xiv) described how the European Jewish people were prohibited from immigrating into Canada between 1933-1948 due to xenophobic propaganda and opinion, and that ban contributed to the death of many at the hands of Nazi Germany. After the war, the Canadian Jewish community lobbied for *CC* legislative additions. The authors noted that although education is important, to wait for hate mongers and racists to forgo prejudice and intolerance,

racism would never be overcome, and legislation is sometimes necessary to protect vulnerable communities. Similarly, today, targeted groups such as the Muslim community are demanding (i.e., National Council of Canadian Muslims) the government strengthen hate crime laws to protect its citizens. This is especially timely due to dramatic increases in hate crimes against the Islamic and Asian community in 2020-2021 (United Nations, 2021; Vancouver Police Service, 2021). Additionally, there was a 37 % increase in hate crimes in 2020 as reported by Statistics Canada (2021), rising from 1951 incidents in 2019 to 2669 incidents in 2020. The largest increase was race or ethnicity where it almost doubled from 884 incidents in 2019 to 1594 incidents in 2020.

The inclusion of a standalone hate crime section would communicate to vulnerable communities that they are valued and deserve better protection by way of legislation. Furthermore, The U.S. National Center for Hate Crime Prevention Education Development Center (2000) asserted in their police training that an appropriate response to hate crimes assists in building community trust, and if the response is inadequate, trust is depleted. Codifying hate crime within the CC and recording it into UCR2 for data collection, analysis and subsequent policy/resource decisions is a necessary response in generating community confidence. Furthermore, The International Association of Chiefs of Police stated through the Lawyers Committee for Civil Rights Under the Law (2019) that their goal on hate crime was to strengthen trust in the communities they police, and enhance prevention, investigation, and reporting of hate crimes. More importantly, they asserted that an increase in hate crime statistics demonstrates an increased trust in police, as community members have confidence to report. A standalone CC section generates familiarity, understanding and application of the hate crime section by important stakeholders. This increases trust from the community, which increases reporting and consequently, preventative and enforcement measures by police and government. Inversely, without a standalone hate crime section mistrust will persist due to the multitude of hate crime definitions/interpretations and varying data collection methods. For example, one community may believe a crime was hate motivated, whereas a government institution, using a different definition/interpretation, records it as a non-hate event. This results in community confusion, frustration, anger, distrust, and the erosion of relationships between police, government, and community. The addition of CC hate crime section brings consistency, reliability, and thus, increased trust, as government is viewed to take hate crimes more seriously, including a commitment to its eradication, enforcing hate crime legislation, and achieving a sense of safety, security, and inclusiveness for all Canadians. With the assistance of a hate crime section, The Government of Canada can accomplish their stated commitment of protecting Canadians from hate crimes (2021).

7/Safety and Prevention Through Intelligence

Public trust and safety is enhanced with intelligence led activities. Disrupting hate mongers and hate organizations, augmenting community security, and preventing hate crimes are essential responsibilities of the police, which is improved by intelligence gathering. Documented investigations and analysis of hate crimes and incidents committed by individuals and groups spurred by hate ideologies, allows police to proactively identify and mitigate potential threats and identify suspects. To illustrate, Robertson (2005) asserted that intelligence is a collaborative

effort to protect civil liberties and needs to be shared. A CC hate crime section and UCR2 tracking allows for this on a national level. Furthermore, Thompson, Ismail and Couto (2020) state that recording hate incidents would assist with tracking offenders. Without a CC section and subsequent UCR2 data collection, it is difficult to collect and share reliable intelligence as definitions, interpretations and data collection methods are varied and often siloed within individual police services and regions. Furthermore, if the agency is without a hate crime strategy or supporting infrastructure to capture and share hate intelligence, no data are available. However, with a hate crime section, data capturing is automatically enabled with UCR2, and offender's hate inspired criminal history can be recorded and shared more efficiently. Adding a standalone hate crime section will enhance intelligence collection and sharing between policing agencies and enhance the safety and security of Canadians.

8/ Government Responsibility to Provide Legislation

Providing the judicial system with the proper tools and resources to perform their duties is an ethical and legal responsibility in democratic societies; this includes the necessary statutes to enforce laws important to society. To illustrate, statutes, their sections and accompanying case law act as a guide, increase awareness and enhance understanding for judicial system participants (police, prosecutors, defense lawyers and judges) to familiarize, comprehend and apply the law correctly. Without a standalone hate crime section, participants do not have the mechanisms in place to develop the comprehensive knowledge, understanding, experience and expected considerations when dealing with hate crime. This exacerbates and prolongs the community perception that the system does not care. Providing a hate crime section is a responsibility that ensures familiarity and use, enabling judicial system participants, academia and community groups to protect Canadians from hate crime.

Burden on the Crown

It is recognized that proving hate crime beyond a reasonable doubt is an added responsibility for an essential partner, the prosecutor's office. Prosecuting hate crime should only occur with a reasonable chance of conviction; if not, the prosecutor could amend the information to the non-hate offence. For example, if an assault that was hate motivated results in a hate crime charge, and the prosecutor's office believes a hate crime conviction is unlikely, it could be amended to the simple assault for prosecution. It is important to note that with the inclusion of a CC section, the hate crime statistic would have been captured on the police services records management system (RMS) and Statistics Canada UCR2 at the time of reporting and investigation. Thus, accurate and reliable data collection occurred at the time of police reporting, and community expectations are met, even without the hate crime prosecution.

Conclusion

Adding a standalone hate crime section to the CC is vital and necessary to improve safety and security for Canada's most vulnerable communities, enable academia, government, and police to do their job, and to reinforce Canada's democratic values. It is undisputed that hate crime terrorizes communities, harms individuals and is an affront to the legislation and

democratic ideals that promote pluralism, equality, freedom, and human rights. Furthermore, a standalone hate crime section in the *CC* would provide a standardized, national definition allowing institutions to collect reliable hate crime data, gather intelligence and use it to protect vulnerable communities, improve comprehension for police and government, better understand the state of inter-community coexistence, enforce hate crime laws with consistency, and work towards the creation of a safer and more inclusive society. Canadians deserve the *CC* amendment, and the institutions charged with protecting its citizens require this important legislative tool. The time to incorporate a standalone hate crime section in the *CC* has arrived.

Appendix A

The Constitution Act / Canadian Charter of Rights and Freedoms. (1982)

Section 2 Fundamental Freedoms.

Everyone has the following fundamental freedoms:

- a) Freedom of conscience and religion;
- b) Freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
- c) Freedom of peaceful assembly; and
- d) Freedom of association.

Section 7 Life, Liberty and Security of Person.

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Section 15 Equality Before and Under Law and Equal Protection and Benefit of Law.

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discriminations based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Section 27, Multicultural Heritage.

- 1 This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.
- 2 The Charter recognizes the importance of preserving and enhancing the multicultural heritage of Canadians.

Multicultural Policy 1971

Multicultural Act 1988

Based on the fundamental values that unite Canadians, such as respect for human rights, equality, and recognition of diversity

Canada's approach to multiculturalism

- 1 Combating racism and discrimination
- 2 Making Canadian institutions more reflective of Canadian society

- 3 Promoting shared citizenship
- 4 Cross cultural understanding

Citizenship Act

Provides that all Canadians, whether by birth or by choice, enjoy equal status, are entitled to the same rights, powers and privileges and are subject to the same obligations, duties and liabilities. (Justice Law Website, 2021)

Canada's International Commitments

United Nations. Universal Declaration of Human Rights

Article 1 of the Universal Declaration of Human Rights states that: All human beings are born free and equal in dignity and rights. (United Nations, 2021)

International Convention on the Elimination of All Forms of Racial Discrimination.

Under Article 4 (a): Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof. (United Nations Human Rights Office of the High Commissioner, 2021)

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