

318. (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. R.S., c. 11 (1st Supp.), s. 1.

CROSS-REFERENCES

"Attorney General" is defined in s. 2. Section 583(h) provides that a count in an indictment is not insufficient by reason only that it does not state that the required consent has been obtained. [As to notes concerning sufficiency of consent, see s. 583.]

The accused may elect his mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515, although the accused is eligible for release by the officer in charge under s. 498.

This offence may be the basis for an application for an authorization to intercept private communications by reason of s. 183.

Procedure for an *in rem* proceeding against hate propaganda, which includes material advocating genocide, is set out in s. 320. The offences in relation to inciting hatred and hate propaganda are set out in s. 319. The offence of publishing false news is in s. 181. The offence of defamatory libel is dealt with in ss. 297 to 317.

SYNOPSIS

This section describes the offence of advocating or promoting genocide. Genocide is defined as the act of killing members of an identifiable group or of deliberately inflicting conditions on an identifiable group calculated to bring about the destruction of that group, in whole or in part. An identifiable group is defined as any section of the public distinguished by colour, race, religion or ethnic origin. The offence is indictable, and may be prosecuted only with the consent of an Attorney General and is punishable by imprisonment not exceeding five years.

PUBLIC INCITEMENT OF HATRED / Wilful promotion of hatred / Defences / Forfeiture / Exemption from seizure of communication facilities / Consent / Definitions / "communicating" / "identifiable group" / "public place" / "statements".

319. (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;

(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) Where a person is convicted of an offence under section 318 or subsection (1) or (2) of this section, anything by means of or in relation to which the offence was committed, on such conviction, may, in addition to any other punishment imposed, be ordered by the presiding provincial court judge or judge to be forfeited to Her Majesty in right of the province in which that person is convicted, for disposal as the Attorney General may direct.

(5) Subsections 199(6) and (7) apply with such modifications as the circumstances require to section 318 or subsection (1) or (2) of this section.

(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. R.S., c. 11 (1st Supp.), s. 1.

CROSS-REFERENCES

"Attorney General" is defined in s. 2. Section 583(h) provides that a count in an indictment is not insufficient by reason only that it does not state that the required consent has been obtained. [As to notes concerning sufficiency of consent, see s. 583.]

Where the prosecution elects to proceed by indictment on either of these offences then the accused may elect his mode of trial pursuant to s. 536(2). Where the prosecution elects to proceed by way of summary conviction then the trial of this offence is conducted by a summary conviction court pursuant to Part XXVII. The punishment for the offence is then as set out in s. 787 and the limitation period is set out in s. 786(2). In either case, release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498.

Procedure for an *in rem* proceeding against hate propaganda is set out in s. 320. The offence of advocating genocide is in s. 318. The offence of publishing false news is in s. 181. The offence of defamatory libel is dealt with in ss. 297 to 317.

SYNOPSIS

This section creates two offences involving the inciting or promoting of hatred against an identifiable group.

In subsec. (1), the offence is committed if such hatred is incited by the communication, in a public place, of words likely to lead to a breach of the peace.

In subsec. (2) the offence is committed only by the wilful promotion of hatred against an identifiable group through the communication of statements other than in private conversation.

Subsection (3) creates defences to the offence where it is established that the statements are true, that they amount to the good faith expression of an opinion on a religious

subject, that they are reasonably believed to be true and are published with respect to a matter of public interest and to the public good, or that they are published in a good faith effort to identify hate engendering matters in order to have them removed. The wording seems to place the onus of establishing only the first of these four defences on the accused.

Both offences created in this section may be prosecuted by indictment or summarily, and are punishable, on indictment, to a term of imprisonment not exceeding two years. The offence in subsec. (2) may only be prosecuted with the consent of an Attorney General.

Subsections (4) and (5) specify that where a person is convicted of offences under this section or s. 318, the means of communication by which the offence is committed may be forfeited to the Crown, with the exception of communication facilities and equipment as described in s. 199(6) and (7).

Subsection (7) defines “communicating” to include audible or visible means, defines “identifiable group” as in s. 318, defines “public place” to include places in which the public has access by right or by express or implied invitation, and defines “statement” to include spoken, written or recorded words, and gestures, signs, or other visible representation.

ANNOTATIONS

Subsec. (2) – “Wilful” in this subsection means with the intention of promoting hatred and does not include recklessness. The offence would therefore be made out only if the accused had as their conscious purpose the promotion of hatred against the identifiable group or if they foresaw that the promotion of hatred against that group was certain or morally certain to result and communicated the statements as a means of achieving some other purpose: *R. v. Buzzanga* (1979), 49 C.C.C. (2d) 369, 101 D.L.R. (3d) 488 (Ont. C.A.).

This definition of the term “wilful” was approved by the Supreme Court of Canada in *R. v. Keegstra*, [1990] 3 S.C.R. 397, 61 C.C.C. (3d) 1, 1 C.R. (4th) 129. In that case, the court also considered the meaning to be attached to the other elements of the offence. The term “promotes” indicates active support or instigation. The term “hatred” connotes emotion of an intense and extreme nature that is clearly associated with vilification and detestation. It is an emotion that, if exercised against members of an identifiable group, implies that those individuals are to be despised, scorned, denied respect and made subject to ill-treatment on the basis of group affiliation.

It constitutes misdirection to instruct the jury that if they found that the accused in his actions was aware that there was a danger that his conduct would cause the promotion of hatred against an identifiable group and knowing this he chose to persist in his conduct then the jury could make a finding of wilfulness. At most, the jury should be instructed that they may consider the risks known to the accused: *R. v. Keegstra* (1991), 63 C.C.C. (3d) 110, [1991] 4 W.W.R. 136, 114 A.R. 288 (C.A.).

Although this subsection infringes freedom of expression, as guaranteed by s. 2(b) of the Charter, it constitutes a reasonable limit on that right and is therefore valid legislation: *R. v. Keegstra, supra*.

Subsec. (3)(a) – Reversing the burden of proof to the defence that the statements were true as provided for in this paragraph while infringing the guarantee to the presumption of innocence in s. 11(d) of the Charter is a reasonable limit and therefore valid: *R. v. Keegstra, supra*. See also *R. v. Keegstra*, [1996] 1 S.C.R. 458, 105 C.C.C. (3d) 19, 39 Alta. L.R. (3d) 305.

Subsec. (3)(d) – It would seem that this defence was simply provided out of an abundance of caution since it would be rare that a person could successfully invoke this exemption where it was shown that he wilfully promoted hatred: *R. v. Buzzanga, supra*.