Hate Propaganda — The Amendments to the Criminal Code

Stephen S. Cohen*

Part I. INTRODUCTION 741

Part II. CIVIL LAW ON GROUP HATRED 741
A. England 741
B. The United States 746
C. Canada 748
D. Ought There to be a Civil Remedy for Group Libel? Herein Concerning What Form it Would Take 749
E. Other Remedies Used by European Countries 752

Part III. ADEQUACY OF THE CRIMINAL LAW IN DEALING WITH HATE LITERATURE 753
A. United States 753
B. England 758
C. Canada — The Situation Before Bill C-3 was Enacted 761

Part IV. BACKGROUND AND HISTORY OF ANTI-HATE LAW 767

Part V. ANALYSIS OF BILL C-3 771
A. S. 267A — Genocide 771
B. Promotion of Hate in a Public Place 773
C. Wilful Promotion of Hatred 774
D. Seizure of Hate Literature 779

Part VI. SUMMARY — HEREIN CONCERNING THE UTILITY OF THE NEW ANTI-HATE LAW AND OTHER RELATED ITEMS 783

* B.A., LL.B., presently a student at law with the firm of Norman, Lipson and Lavine in Toronto.

Part I — Introduction

There are many poignant questions which come to mind when one is confronted with hate propaganda. Ought not there be a law which outlaws propaganda? What useful purpose is there in allowing hate propaganda to be seen or heard by the Canadian public? That its only purpose is to promote feelings of ill-will and hostility against a particular minority in Canada is beyond doubt. What rights does any member of the defamed group have against the promoters of the propaganda?

Today we do have legislation which is specifically enacted to deal with hate propaganda and its originators and promoters. However, before delving into the amendment to the Criminal Code passed by the House of Commons on April 13, 1970 and its history, it would not be amiss to examine what chance of success a member of a minority group would have against a hatemonger who defamed the group, if he instituted a private suit.

Part II — Civil Law On Group Hatred

A. *England*

The law with regard to a civil cause of action for "group libel" or "group defamation" really begins with the old English case of *R.* v. *Osborn.*[1] That was an action in Criminal Court, the Crown alleging a libel by the defendant in that Osborn accused "...certain Jews, lately arrived from Portugal, and living near Broad Street..."[1a] of having murdered a woman and her child because the father of the child was a Christian. As a result of the libel, these Jews were attacked and hurt by people who believed the libel. The defendant argued that the group allegedly libeled was uncertain and therefore there was no case of actionable libel.

The court, however, found Osborn guilty, not of libel but of publishing something tending to incite the public to break the peace. In another report of the case[2] the Court emphatically stated that the case is not by way of libel but for breach of the peace. This distinction is relevant as the court states that while the "group" is too uncertain to sustain a libel suit, it is not so in an action for breaching the peace. The only criterion for the latter crime being that the peace was disturbed, something easily proved from

---

[1] (1732), Barn, K.B. 166, 94 E.R. 425.

[1a] In a discussion of *R.* v. *Osborn* in *In re Bedford Charity*, 36 E.R. 717.

[2] 25 E.R. 584.

the facts of that case. In *R.* v. *Osborn*, the case of *R.* v. *Orme*[2a] was distinguished. In the latter case, there was a libel suit against several ladies but against no one particular lady. The action was dismissed, the libeled persons being too vague. That case was distinguished from the Osborn case on the ground that the charge in the latter case was totally different from the charge in the former.

The next case relevant to the issue of a cause of action for group libel, oddly enough, was also a criminal case. In *Gathercole's Case*,[3] the defendant was charged with four counts of libel, specifically against the Seaton Nunnery. Aldersen B. directed the jury as follows:

> A person may without being liable to prosecution for it, attack Judaism... or even any sect of the Christian Religion (save the established religion of the country), because it [the established religion] is a part of the Constitution of the Country.[4]

The headnote of that case reads:

> A person has a right to discuss the Roman Catholic religion and its institutions, but he has no right in doing so to libel individual members.[4a]

The first English case which specifically dealt with a civil cause of action for group defamation was *Eastwood* v. *Holmes*.[5] In that case the plaintiff, being a dealer in antiques alleged he was libeled by the defendant who wrote that certain supposed pilgrims' signs sold by antique dealers were forgeries. As a result the plaintiff could not sell any pilgrims' signs he had obtained to sell. Willes J. non-suited the plaintiff because he said the libel was not of the plaintiff personally. Willes J. said in an often quoted paragraph:

> [a]ssuming the article to be libellous, it is not a libel on the plaintiff; it only reflects on a class of persons dealing in such objects; ...If a man wrote that all lawyers were thieves, no particular lawyer could sue him unless there is something to point to the particular individual,...[6]

But it is an important fact that Willes J. also found for the defendant on the distinct and separate ground that there was no libel at all because what was written was protected by the privilege of fair comment on a matter of public interest, and was so written without malicious overtones.

[2a] (1700), 1 Ld. Rayn. 486, 91 E.R. 1224.
[3] (1838), 2 Lewin 237, 168 E.R. 1140.
[4] *Ibid.*, at p. 1145.
[4a] *Ibid.*, at p. 1140.
[5] 175 E.R. 758.
[6] *Ibid.*, at p. 759.

The result of the case is that if a group is libeled, a single member of the group may sue the libeler for damages only if it can be shown that the libel referred to the individual plaintiff personally and not simply as a member of the group. This view is supported by the case of *Browne* v. *Thompson & Co.*[7] In that case Bishop Browne and six other Roman Catholic clergymen sued the the defendant as owner of an Irish newspaper for libel. The court held they were entitled to succeed not on a group basis but rather as individuals. The Lord President stated:

> The only other matter that was dealt with by Mr. Murray was the question of individual and collective action... I think it is quite evident that if a certain set of people are accused of having done something and if such accusation is libellous, it is possible for the individuals in that set of people to show they have been damnified, and it is right that they should have an opportunity of recovering damages as individuals.[8]

The law of England on the question of a civil suit for group defamation was settled by the House of Lords in 1944. In *Knupffer* v. *London Express Newspaper Ltd.*[9] the plaintiff, who was a Russian, was allegedly libeled by the defendant newspaper, in an article denouncing a group known as the "Young Russian Party". The plaintiff was a prominent member of the party's branch in England of which there were only twenty-four members. The plaintiff was not specifically named in the article.

In the Court of Appeal MacKinnon L. J. stated the law of group libel as follows:

> ...the primary rule of law is that when defamatory words are written or spoken of a class of persons, it is not open to a member of that class to say that they are written or spoken of him.[10]

As authority for this proposition he quotes Willes J. in *Eastwood* v. *Holmes*. There are, in MacKinnon's opinion, two exceptions to the primary rule of law which would allow a member of a defamed class to bring a civil action. The first exception is satisfied:

> ...when the class is so small or so completely ascertainable that what is said of the class is necessarily said of every member of it,...[11]

The second exception to the general rule occurs when the words purporting to refer to a class in fact refer to one or more individuals.

---

[7] [1912] S.C. 359 (Ireland).
[8] *Ibid.*, at p. 363.
[9] [1944] A.C. 116 (H.L.) aff'g [1943] K.B. 80 (C.A.).
[10] [1943] K.B. 80, at p. 83.
[11] *Ibid.*, at p. 84.

On the facts of the case, the plaintiff fell within the general rule but could not bring himself within the exceptions and therefore lost on appeal.

Goddard L. J. took a different tack. He stated that;

> ...the real question is whether the words are capable of supporting the innuendo that they were written of and concerning the plaintiff.[12]

The question as to the membership or size of the attacked group is irrelevant, the relevant question being:

> Is the article an attack on the policy or objects of a society or association, or is it an attack on an individual?[12a]

In the house of Lords, the decision of the Court of Appeal was upheld but the House specifically disapproved of the view taken by Mackinnon L.J., while taking a line which was consistent with Goddard's L.J. opinion. Viscount Simon L.C. held,

> ...it is an essential element of the cause of action for defamation that the words complained of should be published 'of the plaintiff'.[13]

Further on he says,

> [t]here are two questions involved in the attempt to identify the appellant as the person defamed. The first question is a question of law — can the article, ... be regarded as capable of referring to the appellant? The second question is a question of fact. Does the article, in fact, lead reasonable people who know the appellant, to the conclusion that it does refer to him?[14]

Lord Atkin stated that:

> ...it is a mistake to lay down a rule as to libel on a class, and then qualify it with exceptions. The only relevant rule is that in order to be actionable the defamatory words must be understood to be published of and concerning the plaintiff.[15]

Lord Russell of Killowen put it this way:

> The crucial question in these cases in which an individual plaintiff sues in respect of defamation of a class or group of individuals is whether... the defamatory words were published of the individual plaintiff... It is not... the case of a defined primary rule with defined exceptions to the rule.[16]

A judgment to the same effect was given by Lord Porter. The Court found that the alleged defamatory statement clearly referred to the "Young Russians" but not to the individual plaintiff and therefore found for the defendant.

---

[12] *Ibid.*, at p. 88.
[12a] *Ibid.*, at p. 90.
[13] [1944] A.C. 116, at p. 118.
[14] *Ibid.*, at p. 121.
[15] *Ibid.*
[16] *Ibid.*, at p. 123.

In *Dowding* v. *Ockery*,[17] the headnote of the trial judgment reads:

> Where a publication contains words, admittedly defamatory, reflecting on members of an indeterminate class (all persons who express dissent from a particular legislative proposal) without anything to direct the mind of the reader to the particular plaintiff, the words are as a matter of law not capable of referring to the plaintiff.[18]

On appeal to the Full Court, the plaintiff lost, the court substantially agreeing with the trial judge. The trial judge in analysing the *Knupffer* case drew two conclusions:

> Where the libel is of a determinate class, each member of the class may sue; the size of the class is irrelevant except to the extent that the larger the class, the more difficult it may be to prove that it is in truth a determinate class. Secondly, where the libel is of an indeterminate class, an individual member can not sue unless he can prove that he, *as an individual* was aimed at in contradistinction to the other members.[19]

This case breaks no new ground in group libel civil suits, but merely extends the *Knupffer* decision so that the plaintiff, who is a member of a group which is defamed must prove:

1) he was a member of the defamed group;

2) that the defamation when read in the light of the surrounding facts referred to the plaintiff personally, and

3) that the defamation in fact would lead a reasonable man to believe the defamatory remarks were directed at the plaintiff personally.

It goes without saying that if the group is indeterminate and no single plaintiff, *i.e.*, a member of the group, is singled out personally, the plaintiff would not have a cause of action for libel. If, however, the surrounding circumstances pointed unmistakeably to the plaintiff being libeled in a personal capacity even if he were not named, he would have a cause of action but not under any group libel rubric.

There has been no movement to enact legislation to overrule the hard line taken against a civil cause of action for group libel in England. In 1948, the Committee on the law of defamation, *i.e.*, the Porter Committee,[20] devoted only three paragraphs to group libel. Their attitude may be summarized by quoting from the report:

> Much as we deplore all provocation to hatred or contempt for bodies or groups of persons with its attendant incitement to violence, we cannot

---

[17] [1962] W.A.R. 110.
[18] *Ibid.*
[19] *Ibid.*, at p. 115.

> fail to be impressed by the danger of curtailing free and frank — albeit, hot and hasty — political discussion and criticism. No suggestion has been made to us for altering the existing law which would avoid the prohibition of perfectly proper criticisms of particular groups or classes of persons. The law of seditious libel still exists as an ultimate sanction and we consider that the law as it stands affords as much protection as can safely be given.[20a]

In 1965, England's attitude to hate propaganda was modified by the passing of the *Race Relations Act*.[20b] This will be discussed in the context of Canada's new anti-hate law.

B. *The United States*

The United States' law on a civil cause of action for group defamation is the same as that of England. In *Noral* v. *Hearst Publications* (1940) [21] the plaintiff alleged he was defamed by the defendant in an article stating that the Workers Alliance members and their officials diverted membership dues to further Communistic agitation. The plaintiff was an official of the libeled organization but in all there were over 165 officials. The plaintiff was never personally mentioned. The court held:

> The complainant must fail because the publication does not defame any ascertainable person.[22]

The court in considering freedom of the press held:

> 'It is far better for the public welfare that some occasional consequential injury to an individual, arising from general censure of his profession, his party or his sect, should go without remedy than that free discussion on the great questions of politics, or morals, or faith should be checked by the dread of embittered and boundless litigation'.[23]

In *Golden North Airways* v. *Tanana Publishing Co.*[24] the appellant company operated a nonschedule airline in Alaska. It sued the respondent newspaper for libel, alleging that all nonscheduled airlines in Alaska were defamed and therefore every member of the group of nonscheduled airlines could sue, although none of them was mentioned specifically. The court did not quarrel with the law as stated by the appellant but on the facts the jury

---

[20] Report of the Committee on the Law of Defamation, Right Honourable Lord Porter - Chairman, (London, 1948).

[20a] *Ibid.*, p. 11, par. 31.

[20b] 1965 Statutes of England, c. 73.

[21] 104 P. 2d., 860 (District Court of Appeal Second District California).

[22] *Ibid.*, at p. 862.

[23] *Ibid.*, at p. 863 quoting from *Ryckman* v. *Delavan*, 25 Wend. N.Y. 186 at 199.

[24] 218 F. 2d., p. 612.

found at trial that the article did not refer to *all* the nonscheduled airlines. As a result the appellant had no cause of action. The court stated the law in this way:

> A libel directed at a group may form the foundation of an action by an individual if the group is small enough so that the person reading the article may readily identify the person as one of the group ... [h]owever, if the group is so large that there is no likelihood that a reader would understand the article to refer to any particular member of the group it is not libelous.[25]

The way this court states the law is not unlike Mackinnon L.J.'s first exception to his general rule in the *Knupffer* case. The gist of the action by a plaintiff who is a member of a defamed group is still that he was defamed as an individual.

The final U.S. case worthy of note on this subject is *Fowler* v. *Curtis Publishing Co.*[26] This was a case of a civil action brought by Fowler, a taxi cab company owner and Howery, a taxi cab driver on behalf of 59 other drivers charging the defendant company with publishing a libelous article defaming taxi drivers in the District of Columbia. The article portrayed cab drivers as ill-mannered, brazen and contemptuous of their patrons. The defendants however won the case, the court saying that Mr. Fowler as an owner was not defamed and Mr. Howery as a driver was not defamed personally. The court held:

> In case of a defamatory publication directed against a class, without in any way identifying any specific individual, no individual member of the group has any redress.[27]
>
> The only exception involves cases in which the phraseology of a defamatory publication directed at a small group, is such as to apply to every member of the class without exception.[28]

A similar statement of the American law is to be found in *Peay* v. *Curtis Publishing Co.*[29] In that case the plaintiff won her libel suit, which arose out of the same article as that in the Fowler case. However as part of the article, published by the defendant, there was a photograph of a cab driver who was in fact the plaintiff Muriel Peay. The court distinguished the Fowler case by saying that by the defendant's inserting of her photo in the article she was sufficiently identified as one of the cab drivers defamed.

---

[25] *Ibid.*, at p. 618.
[26] 78 F. Supp. 303 (District Court of U.S. for D.C.).
[27] *Ibid.*, at p. 304.
[28] *Ibid.*, at p. 305.
[29] *Ibid.*

C. *Canada*

In 1913, a case arose in Quebec which might have been the foundation of a different attitude towards civil remedies for group libel. The facts in *Ortenberg* v. *Plamondon*[30] were as follows: the case involved a libel action by two merchants of St. Roch against Mr. Plamondon, claiming that as a result of a lecture delivered by the defendant entitled "The Jew" the plaintiff's business suffered because the plaintiff was Jewish. The plaintiff was not specifically named in the lecture.

At trial, the action was dismissed, the court saying:

> [t]he defendant, in his lecture, incriminates only the Jewish race... without attacking the plaintiff in particular,...[31]

The plaintif therefore had no civil recourse against the defendant. This is in line with what was then established authority, and what was to be solidified further thirty years later by the House of Lords.

On appeal to the Quebec Court of Appeal the decision was reversed in the plaintiff's favour. At first glance then it appears that the Quebec Court of Appeal recognized the right of a member of a defamed group to sue the libeler and succeed though the individual plaintiff was not specifically named in the libel. However the Court goes out of its way to state this action on which the plaintiff succeeded was not one of group libel, though there were at the time 75 Jewish families in Quebec and the lecture was aimed at Jews in general.[31a] Cross J. said:

> I, however, consider that it would be a mistake to test the appelant's right of recovery in his action by rules applicable only to actions of defamation or libel. The declaration in this case discloses a wider cause of action, namely that of an action in damages for words maliciously spoken,...[32]

Mr. Justice Cross merely applied article 1053 of the Quebec Civil Code.[32a] Furthermore, it is not altogether clear but it might be inferred from the judgment of Cross J. that the plaintiff was

---

[30] (1913), 24 D.L.R. 549 reversed by (1915), 24 B.R. 69 and 385.

[31] (1913), 24 D.L.R. 549, at p. 551, this being the translated version of the judgment originally given in French.

[31a] Mr. Justice Carroll said «La collectivité juive de Québec se compose de 75 familles,... sur une population de 80,000 âmes. Ce n'est pas le cas d'une injure adressée à une collectivité assez nombreuse pour qu'elle se perde dans le nombre». (1915), 24 B.R. 69, at p. 75.

[32] (1915), 24 B.R. 385, at p. 388.

[32a] Mr. Justice Carroll, without referring specifically to a. 1053 C.C. says that what transpired was «de la diffamation personnelle», and accordingly awarded damages. (1915), 24 B.R. 69, at p. 77.

referred to by strong implications. The view this author takes of this case is bolstered by the case of *Germain* v. *Ryan*[33] where the Quebec Court held that in a civil defamation suit no action lies for a libel directed against a group when the size of the group is so large and indeterminate, that it cannot be said the libel was specifically directed at an individual personally.

D. *Ought There To Be A Civil Remedy for Group Libel? Herein Concerning What Form it Would Take*

The question of what the law is *vis à vis* civil suits by members of defamed groups is settled. There is yet to determine why the law is as it is and why there has been very little movement to change it.

One reason the civil group libel laws have not developed, is due to the fact that in the western hemisphere, especially the U.S., the individual, not the group, predominates. As a result the law of defamation was conceived as protection for the individual, the same way as the law of assault and battery protects the individual. Therefore,

> ...discovery of an adequate defense for groups must cope ... with the customary refusal of American [and Canadian] law to appreciate the role of groups in the social process.[34]

The courts are also afraid that if they recognize such civil suits, they will be exposing the courts to a floodgate of fraudulent, vexacious, and frivolous litigations. Furthermore, there is a problem of status to sue. The courts have long recognized that a corporation is a legal entity which may sue or be sued, but at the same time have refused to allow unincorporated groups to sue or be sued, the primary problem with the "group" being how to define its limitation.

Still other jurists have argued that the criminal law and not the civil law is the proper weapon to deal with hate directed against a collectivity.

These criticisms however are not universal.[35]

There are those who argue that there should be a civil remedy for group defamation. Wilner points out that:

---

[33] (1918), 53 C.S. 543.

[34] Reisman, *Democracy and Defamation: Control of Group Libel,* (1942), 42 Col. L. Rev. 727, at p. 731.

[35] For a good discussion *contra* see Wilner, *The Civil Liability Aspects of Defamation Directed Against a Collectivity* (1942), 90 U.Pa.L. Rev. 414.

> In view of the strong public policy against defamation expressed in the cases where actual damage need not be shown, it is not readily comprehensible why this same policy should cease when a 'class' rather than a natural person is the nominal addressee of the identical charges.[36]

Furthermore, whereas a group may have no legal identity, certain groups should nevertheless have the right to be free from interference with their social if not legal status.

In addition there is a way to overcome the fear of fraudulent suits and the fear of multiplicity of actions. The law could allow representative suits by the groups.

The courts could avoid the equally important hurdle, of how to fix monetary damages by awarding only costs to the plaintiff (group) and having as its principal remedy the injunction. The use of an injunction would solve the procedural criticisms, including that of multiplicity.[37]

The use of an injunction is not unknown in Canadian law. The Defamation Act of Manitoba,[37a] which was originally enacted in 1934, provides the injunctive remedy for group libel.

The section reads:

> 19(1). The publication of a libel against a race or religious creed likely to expose persons belonging to the race, or professing the religious creed, to hatred, contempt or ridicule and tending to raise unrest or disorder among the people, entitles a person belonging to the race or professing the religious creed, to sue for an injunction to prevent the continuation and circulation of the libel; and the Court of Queen's Bench may entertain the action.
>
> 19(2). The action may be taken against the person responsible for the authorship, publication or circulation of the libel.
>
> 19(3). The word "publication" used in this section means any words legibly marked upon any substance or any object signifying the matter otherwise than by words exhibited in public or caused to be seen or shown or circulated or delivered with a view of its being seen by any person.
>
> 19(4). No more than one action shall be brought under Subsection (1) in respect of the same libel.

The section had a dismal life during its 36 years in the statutes of Manitoba. It has only been invoked once in the case of *Tobias* v. *Whittaker* in 1934 where the plaintiff was successful. The fact that this section has been a dead letter is attributable to the fact that such a section might be *ultra vires* the Provinces. Another factor

---

[36] *Ibid.*, at p. 424.
[37] *Supra*, n. 34.
[37a] R.S.M. 1970, c.D. 20 s. 19.

might be that a plaintiff, suing as a member of a defamed group, wants more than the cessation of the material which is libelous. He wants monetary damages for the hurt he suffered because of the libel. However, to date, the courts have been unwilling to give such a plaintiff monetary damages because of a theory which has been elevated to an unspoken presumption which presumes that when groups are the victims of libelous actions, individuals within the group cannot be hurt simply because he is a member of the defamed group. Needless to say this presumption has been rebutted by scientific psychological experimentation. However, because the courts have not yet seen the light, it is not worth anyone's while or expense to sue.

Nor has the injunction only been recommended as a suitable remedy in civil actions. There was a movement to amend Bill C-3 in the House of Commons led by the Honourable Member from Greenwood Mr. F. A. Brewin. In the House of Commons on Nov. 17, 1969 he made a speech in favour of Bill C-3 [37b] but suggested an amendment to it. He wished to change the remedy under the Bill from jail and or fine to that of an injunction through a cease and desist order. He pointed out that in the "Goodyear" Case the Supreme Court of Canada held that the injunctive remedy is a proper means of enforcing criminal law. His reasons were that the injunction is more flexible because it would apply not only to an accused but also his agents or servants. Mr. Brewin moved for an amendment to Section 267B of Bill C-3 giving the court an injunctive power.[38] Part of this amendment read,

> ...the court may... make an order in lieu of or in addition to the penalty set out in Subsection (2) [of S. 267B] requiring such person to cease and desist from proceeding with or continuing or making any communication prohibited by the act and the order so made may be enforced as if it were made by the superior court of any province.[39]

Mr. Brewin in commenting on the advantage of his amendment being flexible said:

> ...it should be open to the courts to say. 'We will not brand you as a criminal, will not send you to jail, not even fine you but will obtain from you an understanding not to repeat the offence.' ...if a court comes to the conclusion that the offence was committed out of ignorance it could say 'go and sin no more'... On the other hand where there is deliberate propagation of material designed and calculated to arouse

---

[37b] House of Commons Debates, 1969, Vol. I, 2nd Sessions, 28th Parl., pp. 887-890.

[38] House of Commons Debates, 1970, Vol. VI, 2nd Session, 28th Parl., p. 5661.

[39] *Ibid.*

> hatred there could be a warning that it must not be repeated. Then, if it were repeated the full power of prison for contempt should be used where there is a deliberate repetition of the offence.[40]

The amendment was soundly defeated by a vote of 169 to 15, notwithstanding that, at least in this author's opinion, the change proposed provided an admirable remedy.

It would seem therefore despite its excellent potential to combat hate and its disseminators the injunction as the proper remedy is rejected in both the civil and criminal spheres.

E. *Other Remedies Used by European Countries*

The possible remedies to fight hatemongers does not necessarily have to be limited to monetary damages and or injunction.

In France, a Civil Law jurisdiction, there is a different kind of remedy afforded to a plaintiff who succeeds in a group libel suit. In addition to costs and monetary damages, the court may order the publication of the entire judgment in a certain number of newspapers of the plaintiff's choice at the defendant's expense. This remedy has the very dramatic effect of conveying to the same public who heard the hate message, the fact that the conveyor of that message is an outlaw in the literal sense of the term, that the courts frown on what was said and that the hatemonger was found guilty in the eyes of the law and should therefore not be listened to. The nemesis of the remedy is that the Defendant pays the cost of stifling what he had previously advocated. However, realistically speaking, this author does not see that this remedy will be incorporated into Canadian jurisprudence either at common law or by statute law.

The other remedy worthy of note simply because of its uniqueness, was mentioned in the *Cohen Report*.[41] It is found in the Penal Code of the Netherlands 1934 Article 137(d)(3) which reads,

> 'Anyone guilty of any of the offences herein described [i.e., group libel] and committing them in the course of carrying out his occupation, may be deprived of the right to pursue his occupation if less than five years have elapsed since his last final conviction for a similar offence.'

The very short answer to the question asked at the beginning of the inquiry, i.e., "What rights does any member of the defamed group have against the promoters of the propaganda?", is that civilly he has *none*. What rights should he have? Perhaps none in

---

[40] *Ibid.*

[41] *Report of the Special Committee on Hate Propoganda in Canada*, Maxwell Cohen - Chairman, (Ottawa, 1965) at p. 287.

view of the passage of Bill C-3 which was enacted with a view to combatting hate and its perpetrators. But this author is still persuaded that a civil action for group defamation, is so framed as to allow representative actions coupled with the injunctive remedy would be an effective weapon against hate. It is not enough to point to the failure of S. 19 of the Manitoba Defamation Act without delving further to discover the true reason for its failure as a useful law.

Part III — Adequacy Of The Criminal Law In Dealing With Hate Literature

A. *United States*

For the most part the criminal law of the United States has been inadequate to deal effectively with hatemongering. The basis of the inadequacy lies in the U.S.' passion to uphold and preserve certain freedoms guaranteed in their Constitution of which two are freedom of speech and freedom of the press. But in their fervour to so preserve these cherished freedoms, many U.S. jurists have forgotten that freedom is not synonymous with licence; that speech is not free in any absolute sense; that the United States has laws against defamation and slander and these laws are not seen as violating freedom of speech. This attitude is important for Canadian law as well because while the hate law was being debated between 1965 and 1970, the strongest opponents of it based their opposition on that fact that it was an undue extension of the state into the right of free speech for Canadians.

The case of *Schenck* v. *U.S.*[42] is important because in that case Holmes J. enunciated his famous "clear and present danger" test later to be picked up by the majority of the Supreme Court of Canada in "the Boucher" cases. In *Schenck* v. *U.S.* a document was sent to men who were drafted for World War I urging them not to go to war. As a result the accused Schenck was charged under the Espionnage Act. The accused argued that what he did was protected by the guarantee of free speech under the first amendment to the Constitution. In dismissing the appeal Holmes J. said:

> The character of every act depends upon the circumstances in which it is done. The most stringent protection of free speech would not protect a man from an injunction against uttering words that may have all the effect of force. The question in every case is whether the words used

[42] 249 U.S. 247.

> are used in such circumstances and are of such a nature as to create a *clear and present danger* that they will bring about the substantive ends that Congress has a right to prevent.[43]

This test has been the ruin of the effectiveness of the Criminal Law to combat group hatred. By the use of this test, prosecutions for group libel are restricted to situations of incipient violence. But the professional hatemonger refrains from appeals to violence, seeking rather to plant the slow germinating but hardy seeds of hatred, and such an approach taken by a hatemonger is not within the legal definition of clear and present danger.[44]

In *Chaplinsky* v. *State of New Hampshire*,[45] Murphy J. limited the scope of free speech. He said:

> Allowing the broadest scope to the language and purpose of the 14th amendment, it is well understood that the right of free speech is not absolute at all times and circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any constitutional problem. These include the lewd and obscene, the profane and libelous and the insulting words which by their very utterance inflict injury or tend to incite an immediate breach of the peace. *It has been well observed that such utterances are no essential part of any exposition of ideas and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.*[46] (Emphasis added.)

Under this line of reasoning it is readily observed that hate literature could not possibly violate the freedom of speech that the framers of the U.S. Constitution wished to guarantee almost 200 years ago.

In 1920 the next case worthy of note arose in Texas. *Drozda* v. *State*[47] was a case of criminal libel. One ground of appeal was that the alleged libel was of such indefinite and general character that it could not support a charge of libel. The court held that:

> A government or other body politic, a corporation, *religious system, race of people,* or a political party are not subject to criminal libel... A man who scurrilously attacks the Smiths, Johnsons, Joneses or the *Jews, Gentiles* or *Syrians*... could not be successfully haled into court and convicted of libel of any particular person, unless there be something in such article why by fair interpretation thereof tended to bring into disrepute some particular person or persons.[48] (Emphasis added).

---

[43] *Ibid.*, at p. 249.

[44] Leary, *Protection from Group and Class Defamation by Extremists*, 40 Los Angeles Bar Bulletin 23, at p. 27.

[45] 315 U.S. 766.

[46] *Ibid.*, at p. 769.

[47] 218 S.W. 765.

[48] *Ibid.*, at p. 766.

The court adopted the line of reasoning used to dismiss civil actions brought by a member of a defamed group.

This view is supported by *People* v. *Edmondson*.[49] The defendant was charged under a New York State criminal libel statute alleging he libeled "all persons of the Jewish religion."

The court reviewed the notable English and American cases on group libel and concluded:

> ...it would seem, [that] a natural person or a corporation or association of persons, that is a limited group, the members of which can be particularized can be the subject of a criminal libel.

On the basis of authorities considered it was decided that;

> ...such an indictment cannot be sustained under the laws of this state [New York] and that no such indictment as the one based on defamatory matter directed against a group so large as "all persons of the Jewish religion" has ever been sustained in this or any other jurisdiction.[50]

At the same time the court said that it did not doubt the defamatory nature of the publications it also held that those same publications had been circulated for a number of years and "have never provoked a breach of the peace in this community, nor, in spite of their virulence are they apt to." [51]

The U.S. courts have in my opinion, misconstrued the inherent difference between criminal and civil libel. All the bogey-men plaguing the courts with regard to civil libel suits are not present in a criminal trial. The parties in the latter are not just private individuals. One party represents the state which represents the people. Because the libel here is criminal in nature, the fact that the corpus of the victim may be indefinite is irrelevant. The court in the *Edmondson* case did not deny the defamatory nature of the libel and did not deny that there was a victim. But relying on authority, *i.e.*, civil group libel case, it dismissed the action because the victim was amoeboid. The better reasoning would have been to put aside authority based on civil cases and adopt the reasoning of Murphy J. in the *Chaplinsky* case.

An interesting sideline in the *Edmondson* case was the fact that when the case arose, motions were made by attorneys for the American Committee on Religious Rights and Minorities, The American Jewish Committee, The American Jewish Congress, the Human Relations Committee of the National Council of Women and the American Civil Liberties Union asking to intervene as *amicus curiae* and to file briefs. These briefs, while denouncing the defendant's act, nevertheless in order to safeguard free speech

[49] 4 N.Y.S. 2d., 257.
[50] *Ibid.*, at p. 260.
[51] *Ibid.*, at p. 268.

and free press asked the court to dismiss the charges. These groups pointed out that it is wiser to bear with the hatemonger than to extend the criminal law so that in future it might become too oppressive. The court evidently agreed. It held:

> We must suffer the demagogue and the charlatan, in order to make certain that we do not limit or restrain the honest commentator on public affairs.[52]

In *Kunz* v. *People of State of New York*[53] a majority of the Supreme Court of U.S. decided that a New York City by-law requiring a public speaker to get a licence from the police commissioner was unconstitutional, as it violated freedom of speech. Mr. Justice Jackson dissented. The appellant spoke without a permit, denouncing the Jews and the Roman Catholics, at Columbus Circle in New York City. He was originally granted a permit but had it revoked by the police commissioner because he had ridiculed and denounced other religious beliefs at previous meetings. Jackson J., while adhering to Holmes J's. "clear and present danger" test decided this test was inapplicable to what Kunz was doing and therefore would have upheld the by-law. He said:

> We should weigh the value of insulting speech against its potentiality for harm. Is the court [majority] when declaring Kunz has the right he asserts serving the great end for which the 1st amendment stands? The purpose of constitutional protection of free speech is to foster peaceful interchange of all manner of thoughts, information and ideas.[54]

He also said that:

> In streets and public places all races and nationalities and all sorts and conditions of men walk and mingle. Is it not reasonable that the city protect the dignity of the persons against fanatics who take possession of its streets to hurl into its crowds defamatory epithets that hurt like rocks?[55]

Jackson J. realized that the greatest harm done by hatemongers is not just the breaches of the peace that may be provoked but the attack on individual's dignity, respect and status in the community in which he lives through lies and insults directed at a group of which these individuals are members. This attack is real and its effect is just as real, the blows "hurting like rocks."[56]

---

[52] *Ibid.*

[53] 340 U.S. 290; 71 Sup. Ct. Rep. 312.

[54] 71 Sup. Ct. Rep. 312, at p. 319.

[55] *Ibid.*, at p. 325.

[56] For a further explanation of the role of free speech in the United States see *Feiner* v. *People of New York* 71 Sup. Ct. Rep. 303, 340 U.S. 315, and *Niemotko* v. *State of Maryland* 71 Sup. Ct. Rep. 325, 340 U.S. 268.

Some states in the U.S. have experimented with group libel laws. The constitutionality of these laws was tested in *Beauharnois* v. *Illinois* in 1952.[57] The Illinois law prohibited any person from exhibiting any lithographs which portrayed lack of virtue of a class of citizens. By a 5:4 decision the Supreme Court of the U.S. upheld the validity of the Illinois' group libel law and Beauharnois' conviction under it. Frankfurter J. delivered the majority opinion. He pointed out that despite the broad language of the 1st amendment, speech is not absolutely free. This view was supported by the *Chaplinsky* case. Frankfurter J. realized the inherent distinction in a criminal group libel case from that of a civil group libel situation. He put it this way:

> But if an utterance directed at any individual may be the object of criminal sanctions, we can not deny to a state power to punish the same utterance directed at a defined group unless we can say that this is a wilful and purposeless restriction unrelated to the peace and well being of the state. While the Illinois law may not destroy group hatred, yet the states should be allowed as far as possible to combat it by any policy they may choose to experiment with.[58]

The dissenting justices centered their dissents around the possible horrible consequences that might evolve if free speech were so drastically curtailed. For example Black J. said:

> As a result of this refined analysis [majority opinion] the Illinois Statute emerges as a group libel law. This label may make the court's holding more palatable for those who sustain it but the sugar-coating does not make the censorship less deadly.[59]

Douglas J. while conceding that free speech is not absolute in that for example a man may not yell 'fire' in a theatre, yet he felt that speech should be given as wide a scope as possible as seen from its preferred status in the U.S. Constitution.

Jackson J. pointed out that the U.S. Supreme Court never sustained a federal criminal libel act but held:

> Group libel statutes represent a commendable desire to reduce sinister abuses of our freedoms of expression. While laws or prosecutions might not alleviate racial or sectarian hatreds, I should be loath to foreclose the States from a considerable lattitude of experimentation in this field. Such efforts, if properly applied do not justify frenetic forebodings of crushed liberty.[60]

Despite this liberal attitude he feared that the Illinois law did not give the accused sufficient safeguards and so dissented.

---

[57] 343 U.S. 250; 72 Sup. Ct. Rep. 725.
[58] 72 Sup. Ct. Rep. 725, at p. 731.
[59] *Ibid.*, at p. 738.
[60] *Ibid.*, at p. 754.

Black J. summed up the minority view in the U.S.A. on how to fight group hatred, if indeed it should be positively fought at all, when he said:

> If there be minority groups who hail this holding as their victory, they might consider the possible relevancy of this ancient remark: 'Another such victory and I am undone.'[61]

The U.S. has adopted a "sticks and stones" attitude towards group libel. The *Beauharnois* case exists in a vacuum. Its effect on other states to enact similar legislation is *nil.* At a symposium held in the 1960's in the United States,[62] the U.S. position with regard to hatred directed at groups was reviewed and the conclusion was that it was unsatisfactory. The problem of group hatred will not disappear if the U.S. continues to bury its head in the sand. In that same symposium Clark J. of the U.S. Supreme Court said that group hatred will not be eliminated by laws but only when the three "I's" have been wiped out: Intolerance, Ignorance, Ignobility. The conclusion of the symposium was that legislation was needed to fight hate and its peddlars. In the U.S., it may fairly be concluded that the Criminal Law is as sterile as the civil law to deal with group defamation.

B. *England*

In England, the criminal law with regard to group libel began with the case of *R.* v. *Osborn* in 1732.[63] The gist of the action in that case was not libel directed at a group but rather libel which occasioned a breach of the peace. The fact that a group was the victim of the libel was really irrelevant to the charge on which Osborn was convicted.

One hundred and seventy years later, a case arose which supported those who maintained that *R.* v. *Osborn* was simply a case of breach of the peace and not one of criminal responsibility for a libel directed at a group. In *Wise* v. *Dunning*[64] the appellant Wise, a Protestant Lecturer held meetings in public places in Liverpool, causing large crowds to assemble and block certain avenues. In his speeches he insulted the Roman Catholic religion. There were a substantial number of Roman Catholics in Liverpool. The natural consequences of his speeches was to cause breaches of

---

[61] *Ibid.*, at p. 740.

[62] *Symposium on Group Defamation*, 13 Cleveland-Marshall Law Review, pp. 1-117.

[63] See notes 1 and 2, *supra.*

[64] [1902] 1 K.B. 167.

the peace. He openly stated that he intended to hold more meetings. As a result the local magistrate bound him over in recognizance to be of good behaviour. On appeal the Court of Appeal held that the magistrate had acted correctly. It therefore appears that a court may bind over, to be of good behaviour, anyone who, in making public speeches, uses language, the natural consequences of which is that listeners will breach the peace although he does not directly invite anyone to breach the peace.

In 1948 the Porter Committee was set up to examine the law of defamation as it then was. In its report it devoted only three paragraphs to group defamation and concluded that the law should not change and that the offence of criminal sedition was adequate to deal with group defamation.[65]

The next chapter in England's fight against group hatred occurred in 1963, with the case of *Jordan* v. *Burgoyne*.[66] Colin Jordan was the self-styled leader of the neo-Nazi party in England and he began to activate his party around the same time that John Beattie and George Lincoln Rockwell were active in Ontario and U.S. respectively.

Jordan was charged under S. 5 of the Public Order Act 1936 which read:

> Any person who in any public place or at any public meeting uses threatening, abusive or insulting words or behaviour with intent to provoke a breach of the peace or whereby a breach of the peace is likely to be occasioned, shall be guilty of an offence.

What Jordan did was to read a speech at Trafalgar Square which defamed the Jewish race. Because much of the audience was Jewish, it became unruly and a breach of the peace occurred. The Court of Quarter Sessions acquitted Jordan. The court admitted that his speech was insulting but the court said that it would not lead the ordinary reasonable man to commit a breach of the peace.

The Crown appealed and its appeal was allowed. The true test under S. 5 was not whether a "reasonable audience" would be provoked by the speaker to breach the peace. Rather, a speaker must take his audience as he finds it and the true test therefore is whether his speech would provoke the audience in front of him. As a matter of fact the court found his speech would so provoke his audience and convicted him. Lord Parker C. J. said:

> The defendant argued... if he is convicted, then there is some inroad into the doctrine of free speech. It is nothing of the sort. A man is entitled to express his own views as strongly as he likes, to critize his opponents

---

[65] See note 20, *supra*.
[66] [1963] 2 W.L.R. 1045.

> ...and to do anything of that sort. But what he must not do is... threaten,... be abusive, [or] insult them [his opponents].[67]

Those who oppose legislation meant to combat hatemongers argue such a case as this creates a "heckler's veto." If a speaker intends to speak on a topic unpopular with a sufficient number of people who attend and disrupt the speaker to such an extent as a breach of the peace occurs, that speaker is caught under S. 5 of the Public Order Act though his topic may be as objectively harmless as one can imagine. But it must be remembered that to sustain conviction under this section the speaker must use abusive or insulting words. The drawbacks of the Public Order Act were that it did not apply to libelous as opposed to slanderous actions and it did not apply to slanderous actions not in a public place.

In 1965 the Public Order Act of 1936 was repealed by the enactment of a new statute entitled the Race Relations Act. Section 6 of that act specifically deals with group defamation in a criminal context. Since its enactment S. 6 has been before the English Courts for comment and interpretation.

R. v. *Britton* [68] was a case involving the meaning of "distribution" as it appeared in ss. 6(1)(a); 6(2) of the Race Relations Act.

S. 6(1)(a) reads in part as follows:

> A person shall be guilty of an offence under this section if, with intent to stir up hatred against any section of the public in Great Britain distinguished by colour, race, or ethnic or a national origin he publishes or distributes written matter which is threatening, abusive or insulting.

S. 6(2) provides in part:

> ...'publish' and 'distribute' mean publish or distribute to the public at large or to any section of the public not consisting exclusively of members of an association of which the person publishing or distributing is a member...

The court held that having pamphlets which could be said to promote class disruption by defaming a minority group was not a distribution within the meaning of ss. 6(1)(a); 6(2), when such pamphlets were on the porch of a home.

Another recent English decision involving S. 6 of Race Relations Act is *Thorne* v. *B.B.C.*,[69] a decision of the English Court of Appeal. The plaintiff sued the defendant for an injunction restraining the continuance of alleged propaganda against Germans by the defendant. There was no allegation that the plaintiff in a personal

---

[67] *Ibid.*, at p. 1048.
[68] [1967] 1 All E.R. 486.
[69] [1967] 2 All E.R. 1225 (Eng. C.A.).

capacity had been defamed although he was of German origin. In addition Thorne had sued without the consent of the Attorney General.

The Court of Appeal unanimously held for the defendant and the injunction was refused.

Lord Denning M. R. held that S. 6 of the Race Relations Act creates only a new criminal offence for which the proper remedy is a prosecution by or with consent of the Attorney General. S. 6(3). This prerequisite the plaintiff did not have and so his case failed.

Dankwerts L. J. found two problems in the plaintiff's path. The first being prior consent from the Attorney General and the second being that no *civil* remedy is given to an individual under S. 6. Even if there was, the plaintiff alleged no wrong to himself personally.

Finally Winn L. J. says that it is clear from ss. 1(4), 3, 6, that Parliament did not intend that any individual might by force of the Act attack any other citizens for alleged infringements of S. 6 of the Act which creates a criminal offence. The Race Relations Act of England is just five years old and its overall effect on hate literature and those responsible for it remains to be seen. And yet the very fact that such an Act was passed in England, the pillar of freedom, the birthplace of Parliament and home of the Magna Carta is enough to rebut any criticism of an anti-hate Act on grounds of violation of freedom of speech.

C. *Canada — The Situation Before Bill C-3 was Enacted*

Was the state of the criminal law of Canada before the passage of the anti-hate bill able to deal adequately with the problem of hate literature? The fact that a new piece of legislation was passed to deal specifically with hate dissemination speaks for itself.

The reason why Bill C-3 was needed was not that certain sections of the Criminal Code did not have the potential to deal with this problem but that judicial interpretation had so confined these sections as to make them sterile in this area.

It was thought before the decisions in the *"Boucher"* cases [70] that the sedition sections, now ss. 60-62 in the Canadian Criminal Code, especially ss. 60(4)(b) and 61(d) might be used to prosecute hatemongers. However the Supreme Court of Canada has by a majority, so narrowly defined and limited these sections as to make them inapplicable. Boucher, a Jehovah's Witness was con-

[70] [1950] 1 D.L.R. 657 (Boucher) 1; [1951] 2 D.L.R. 369 (Boucher) 2.

victed in the lower courts of seditious libel by the publication in Quebec of a pamphlet entitled "Quebec's Burning Hate for God, Christ and Freedom."

When the case reached the Supreme Court of Canada, the learned justices adopted different lines of reasoning. Rinfret's C.J.C. judgment dealt for the most part with the trial judge's direction to the jury. In the remaining part of his judgment he dealt with the law of seditious libel in Canada. He concluded that the promotion of ill-will between Canadians in bad faith was a seditious libel. Speaking of freedom of speech he noted that,

> ... to interpret freedom as license is a dangerous fallacy. Obviously pure criticism or expression of opinion, however severe or extreme, is, to be invited. But there must be a point where restriction on individual freedom of expression is justified on the ground of reason,...[71]

Rinfret C.J.C. had just mirrored what Frankfurter J. had said around the same time in the *Beauharnois* case. This same view of freedom of speech was supported by Duff, C.J.C., who held in *Reference Re Alberta Legislation*[72] that,

> The right of public discussion is, of course, subject to legal restrictions; those based upon considerations of decency and public order, and others conceived for the protection of various private and public interests with which, for example, the laws of defamation and sedition are concerned. In a word freedom of discussion means to quote the words of Lord Wright in *James* v. *Commonwealth* 'freedom governed by law'.

Rinfret C.J.C. did not believe that advocacy of force as described in S. 60(4)(b) was a necessary ingredient to an action for seditious libel.

Kerwin J., as he then was, on the other hand, believed that the main element necessary for a conviction under S. 60 was an intention to incite people to violence or to create a public disorder.

Taschereau J., as he then was, while agreeing with the disposition of the case, *i.e.*, ordering a new trial, expressly disapproved of Kerwin J's. opinion. He did not believe that incitement to violence was a necessary part of a seditious intention.

The trial judge, in instructing the jury, defined seditious intention as "the publication or distribution of a pamphlet, or of a harmful, injurious writing which may provoke hate and discord amongst the different classes of His Majesty's subjects."[73] Nothing was said about incitement to violence.

---

[71] [1950] 1 D.L.R. 657, at p. 666.
[72] [1938] S.C.R. 100, at p. 133.
[73] [1950] 1 D.L.R. 657, at p. 673.

Taschereau J. felt,

> ... there being no definition in our Code, of sedition and seditious libel that it was clearly intended by Parliament to accept the English common law definition as it existed in 1892.[74]

Rand J. who played the key role in the *Boucher* decisions was of the opposite opinion. He said that there was no authority which held that the mere tending to create discontent among the King's subjects but not tending to issue in illegal conduct constitutes sedition. Speaking of parts (4) and (5) Stephen's definition of sedition which purported to state the common law definition, Rand J. said they,

> ... signify ... the use of language which, by inflaming the minds of people into hatred ... is intended, or is so likely to do so as to be deemed to be intended to disorder community life, *but directly or indirectly in relation to Government in the broadest sense:* ... (Emphasis added).[75]

What Rand J. meant was that for the crime of sedition as opposed to the crime of public mischief, the denouncing of a segment of society must be aimed directly or indirectly at government. This definition of sedition effectively sterilizes it for use against hate-mongers who seldom talk against the Government in any way but speak solely against their target group.

In *Boucher* (1) Estey J. agreed with Rand J. and they both would have quashed the conviction.

The result of *Boucher* (1) was that a new trial was ordered. However, on a rehearing, the Supreme Court of Canada granted Boucher an acquittal. In *Boucher* (2) the full court sat. Rinfret's C.J.C. judgment was the same as in *Boucher* (1). Kerwin J. adopted what Rand J. had said in *Boucher* (1). He said:

> The intention on the part of the accused which is necessary to constitute seditious libel must be to incite the people to violence against constituted authority or to create a public disturbance or disorder against such authority.[76]

Taschereau J. was persuaded to change his mind and adopted as his definition of sedition a situation where the writing complained of must in addition to being calculated to promote ill-will between subjects be intended to produce disturbance or resistance to the lawfully constituted authority.

Kellock and Estey J.J. followed the same line of reasoning as that adopted by Rand J. in *Boucher* (1).

---

[74] *Ibid.*, at p. 677.
[75] *Ibid.*, at p. 683.
[76] [1951] 2 D.L.R. 369, at p. 379.

Locke J. also concurred with Rand J.

Cartwright with whom Fauteux J. (as they then were) agreed, also did not accept as a definition of seditious intention "the promotion of ill-will and hostility between Canadians" without a qualification which was that,

> ...it must further appear that the intended or natural and probable consequence of such promotion of ill-will and hostility is to produce disturbance of or resistance to the authority of lawfully constituted Government.[77]

Mr. A. Brewin, a distinguished lawyer and Member of Parliament made this comment on the *Boucher* cases:

> It may now be taken therefore as the settled law of Canada that an intent to create hostility and ill-will between different classes of subjects is not enough to constitute the crime of sedition. In addition the intended or probable consequences of the promotion of ill-will must be to produce a disturbance of or resistance to the authority of lawfully constituted government...[78]

It is settled therefore since the *Boucher* cases that a conviction could not be had for the publication and distribution of hate literature under the sedition sections of the Criminal Code. The *Boucher* cases especially *Boucher* (2) define the law of sedition so that it approximates the 'clear and present danger test' as expounded by Holmes J. in *Schenck* v. *U.S.*[79]

In 1964, The Right Honourable John Diefenbaker received a sample of hate propaganda. He raised this fact in Parliament and in fact asked the then Minister of Justice, Guy Favreau, if the law against sedition adequately dealt with the problem. The Minister did not directly answer the question. However Mr. Gelber the Honourable Member from York South in 1964 referred to the Boucher case and especially to Mr. Justice Rand's decision. It was his (Mr. Gelber's) contention that Rand J's. view of sedition as put forth in *Boucher* had later changed and as proof he quoted from Mr. Rand as a Supreme Court Judge in *Boucher* (1) and Mr. Rand the Dean of University of Western Ontario Law School, upon his retirement. Mr. Justice Rand said:

> Freedom of thought and speech and disagreement in ideas and beliefs on every conceivable subject are of the essence of our life. The clash of critical discussion on political, social and religious subjects has too deeply become the stuff of daily experience to suggest that mere ill-will as a product of controversy can strike down the latter with illegality.[80]

---

[77] *Ibid.*, at p. 409.

[78] Brewin, Case Comment on *Boucher* v. *The King* 29 Can. Bar Rev. 193, at pp. 195-196.

[79] 249 U.S. 47.

[80] House of Commons Debates, 1964, Vol. VI, p. 5978.

The second quote is from Dean Rand, (as he then was). He said:

> We are in danger of becoming fanatical about individual rights. We must either accept the rule of reason or the rule of passion — of hatred. I sometimes wish we could forbid the importation of these hatreds from other countries.[81]

Mr. Gelber went on to say that although the common law definition of sedition might have dealt with the problem, the *Boucher* case and S. 8 of the Criminal Code which abolishes common law offences negates its utility.[82]

It was thought that s. 166,[82a] concerning the spreading of false news was applicable, but if *R.* v. *Carrier*[83] represents the law with regard to S. 166 of the Code it too is a dead letter in this area. In that case the accused was initially charged with seditious libel based on a document similar to that in the *Boucher* case. The accused demurred and the Crown abandoned its case because of the then recent decision in *Boucher* (2). The Attorney-General of Quebec then charged Carrier on the same facts with publishing false news under S. 136 of the Code which became S. 166. The accused then entered a plea of *autrefois acquit* and his plea was sustained by the Quebec Court of King's Bench, Criminal Side. The result of the case is that an acquittal under the sedition section automatically bars a conviction under S. 166. This is an unfortunate result in view of the fact that 1) the offences appear in different parts of the Code, 2) the penalties are dissimilar and 3) the offences themselves are dissimilar.[84] The other problem with S. 166 is that the Crown must prove the hatemonger *knows* the literature he publishes is false and as has been pointed out,[85] this is almost impossible because most of these hatemongers really believe in the truth of what they say. Furthermore S. 166 would only cover hate literature but not oral statements made by the hatemonger.

S. 248[85a] of the Criminal Code, *i.e.*, concerning criminal defamatory libel, is inapplicable because it is aimed only at individuals and not groups. The relevant part of that section reads "that is likely to injure the reputation of any *person*."

---

[81] *Ibid.*

[82] See Hage, *The Hate Propaganda Amendment to the Criminal Code*, 28 Faculty Law Review, 63, at p. 64.

[82a] Now section 177 of the 1971 version of the Criminal Code.

[83] (1953) 16 C.R. 18.

[84] See Schmeiser, *Civil Liberties in Canada*, (London, 1964).

[85] See note 82, *supra.*

[85a] Now s. 262 of the 1971 version of the Criminal Code.

The section of the Code dealing with riots and unlawful assembly is of little assistance because it can be used only where there are two people in addition to the speaker who can be proved to have assembled with intent to carry out a common purpose; a Nazi operating on his own can not be reached.

Mr. Hage in his recent article on the utility of Bill C-3,[86] already enacted into law, pointed out that the section of the Code which comes closest to meeting the problem of the vocal hatemonger is s. 160(a)(i) [86a] which reads:

> Everyone who not being in a dwelling house causes a disturbance in or near a public place by fighting, screaming, shouting, swearing, singing or using insulting or obscene language is guilty of an offence punishable on summary conviction.[86a]

However, to sustain a conviction under this section, the disturbance must actually have been caused by the hatemonger. Short of this, he can say whatever he wants.

Dean Tarnopolsky placed much faith in S. 160's ability to deal effectively with oral group libelous statements.[87a] He believes S. 160 renders S. 267B of the new amendment to the Criminal Code superfluous.[87a] He sees the evil to be remedied is not the defamation of groups but the threat to public order. It should not matter what occasions the breach of the peace except to fix the fault. Furthermore he cannot see how the use of language which incites hatred against a collectivity could not be insulting and obscene.

The Cohen report summarized the utility of the Code as follows:

> [A] group seems to be protected by the Code provisions on "breach of the peace" only from oral insults in public places and where the insults are so strong as to be likely to cause a breach of the peace (1) either against the group or (2) by the group itself, in reaction to the insult.[88]

John J. Robinette and Arthur Maloney, have stated in opinions asked for by the Canadian Jewish Congress that the Criminal Code provisions as they were before Bill C-3 could not adequately control hatemongering, and accordingly the Canadian Jewish Congress made certain proposals to the Cohen Committee.[89]

---

[86] *Supra,* n. 82, at p. 63.

[86a] Now s. 171(a)(i) of the 1971 of the Criminal Code.

[87] Tarnopolsky, *Freedom of Expression* v. *Right to Equal Treatment,* (1967) U.B.C.L. Rev. - C. de D., p. 43.

[87a] Now Part of s. 281 of the 1971 version of the Criminal Code.

[88] The Cohen Report, at p. 41.

[89] *Contra,* n. 87. Gropper, *Hate Literature: The Problem of Control* (1965), 30 Sask. B.R. 181, at p. 198.

In addition to the Criminal Code provisions, s. 7 of the Post Office Act grants to the Postmaster-General wide powers to prevent mailing of any material he reasonably believed to be obscene, blasphemous or seditious. s. 7 provides for a review of the Postmaster General's interim prohibitary order. In 1964 and 1965 the Postmaster General invoked s. 7 against a publication put out by an American organization called the National States Rights Party. The latter appealed and lost. Despite the apparent success of s. 7 there are many practical reasons why s. 7 is inadequate to curb hate through the mail, not the least of which is detection of hate propaganda in the first place. With regard to mailing of hate propaganda, S. 153 [89a] of the Criminal Code makes it an offence to mail matter which is obscene, indecent, immoral or scurrilous. But it too has been a dead letter in this area.[90]

The Cohen Commission could find nothing in the Criminal Code which would make advocating and promoting genocide a crime.[91] Dean Tarnopolsky takes issue with this finding of the Commission as well and asks why advocating and promoting genocide is not covered by ss. 22, 407(a), and 408(1)(a) [91a] and the homicide sections of the Code. The short answer is that the code for the most part deals with offences against individuals, for example S. 248 [91b] discussed above. The section on murder deals with a crime against persons not groups. Furthermore, it is my contention that the sections mentioned by Dean Tarnopolsky are not subtle enough to catch the professional hatemonger who advocates genocide by such diabolical means as sterilization of the entire male population of the target group.

Part IV — Background And History Of Anti-Hate Law

The anti-hate law was born in June of 1970 when after being given 3rd reading and being passed by the House of Commons Bill C-3 was given Royal assent. Its conception really began as far back as 1953. In that year a delegation of the Canadian Jewish Congress appeared before a joint committee of the House of Commons and Senate on the revision of the Criminal Code. The delegation asked for a revision of the sedition section so as to negate

---

[89a] S. 164 of the 1971 version of the Code.
[90] Hage, *supra*, n. 82, at p. 65.
[91] The Cohen Report, at p. 62.
[91a] See now ss. 22, 422 and 423 of the 1971 version of the Criminal Code.
[91b] s. 262 of the 1971 version of the Criminal Code.

the Supreme Court's interpretation of sedition in the *Boucher* cases. Nothing was done however for ten years until about 1963, *when there was an overt revival of Nazism in Canada, U.S. and England,* and especially in Ontario as far as Canada was concerned. During that interval, the attitude of the Canadian Jewish Congress was to fight hatemongers passively, using the "quarantine" method. However, from 1963 on they dropped that tactic because it had obviously failed to check the spread of anti-semitism. It began to work for legislation at the Federal level to deal with this problem. Legislation had to be Federal, since in *Saumur* v. *A.-G. Quebec* [92] the Supreme Court of Canada decided that freedom of religion and of speech is a matter coming within a class of subjects given exclusively to the Federal Government either by virtue of 91(27) of the B.N.A. Act, the criminal law power or the P.O.G.G. clause.[92a] This was the assumption underlying the decision of Hartt J. in *R.* v. *Beattie.*[93] In that case, a provision prohibiting any person from using any language in a city park likely to stir up hatred against any section of the public distinguished by colour, race, religion or ethnic origin, contained in an amendment to a municipal by-law was held to be an invalid exercise of the power to prevent infringement on the enjoyment of the park-using public or to provide for the protection of parks. The provision was not in its pith and substance park protection. Hartt J. did say however that the by-law drafted in a more restricted way so that its scope would be clearly confined to the legitimate object of park protection could well have brought about a different result.

The strong lobbying for an anti-hate law was reflected in the House of Commons as early as 1964. In that year Mr. Orlikow asked the Minister of Justice, (Guy Favreau),

> Has the Minister given consideration to the hate literature which is now being distributed in various cities? Does the government consider that there is at the present time legislation which will prohibit this kind of literature being distributed through the mails...?[94]

To which the Minister responded,

> ...the possibility of amending the Criminal Code was referred to the criminal law section of the conference of uniformity of legislation in Canada in 1962. It reported that while the objective sought to be attained was eminently desirable, no recommendation was made because no formu-

---

[92] [1953] 2 S.C.R. 299.

[92a] The Peace Order and Good Government Clause.

[93] [1967] 2 O.R. 488.

[94] House of Commons Debates, 1964, Vol. I, p. 132.

> la devised would deal adequately with the problem without affecting the general freedom of expression of opinion in an adverse way.[95]

The Government then moved to find the right formula. It set up a committee to study hate directed against collectivities under the chairmanship of Dean Maxwell Cohen of McGill University's Law Faculty. The Cohen Committee published its report in 1965. It concluded that:

> However odious, the behaviour of these groups and however offensive the materials they distribute, the Committee believes that none of the organizations represent today [1965] a really effective political or propaganda force and that in any case, very few individuals as such are invelved.[96]

But is would nevertheless be unwise to ignore them because though few in number, they represent a *potential* danger that cannot be measured by statistics alone. The Cohen Committee therefore recommended that legislation should be passed and set out the framework which, with minor changes, has become the present amendment to the Criminal Code. In 1966 Bill S-49 was introduced in the Senate. It never reached the discussion stage in that year. In 1967 it was re-introduced as Bill S-5 but again it melted into obscurity. In 1968 the Liberal Party under Mr. P. E. Trudeau realized a substantial victory at the polls. Mr. P. E. Trudeau was a member of the Cohen Committee in 1965 and so it is not surprising that from 1968 on the movement to pass an anti-hate law gained momentum rapidly. By February 1969 the Senate heard deputations for and against the anti-hate bill which was then Bill S-21. In the spring of 1969, the Senate passed Bill S-21 with various changes. It included "religion" as a criterion under the definition of "identifiable group" and it reserved to the Attorney-General of the Province the right to approve the initiation of prosecutions. In the fall of 1969 the Bill entered the House of Commons as Bill C-3, a Government Bill. When it came before the House for third reading on April 13, 1970 the vote was 89 *pro* and 45 *contra*, the total number of M.P.'s voting being 134, with 127 being conspicuously absent that day. After a motion to get the Bill referred to the Supreme Court for an opinion on its constitutionality, which failed, the Bill became law in June 1970 when it was given Royal Assent.

During the time between 1964 and 1968, there were other Bills introduced by Private Members, which were designed to deal with hate. In 1964 Bill C-21, re-introduced as Bill C-30 in April 1965 was

---

[95] *Ibid.*, at p. 133.

[96] The Cohen Report, at p. 14.

put forth as a possible solution to fight those who advocated genocide. It would have provided the death penalty for anyone who with intent to destroy an ethnic or religious group in whole or part, kills a member of that group. There would be a ten year jail penalty for anyone who with the same intent mentioned above hurt a member of the group or intentionally inflicted on the group conditions of life calculated to bring about its physical destruction. Publishing hate literature would bring a five year jail term and finally there were 3 possible penalties for aiding and abetting anyone to commit any one of the aforementioned crimes, the penalties varying in degree in direct proportion to the severity of the crime.

In 1965 an amendment to the Post Office Act was suggested by Bill C-43. It would have amended s. 7 so as to create an offence of using the mails to distribute literature intended to bring hatred, ridicule or contempt against any group by reason of race, national origin, religion or colour but exempted from this provision anyone who used the mail pursuant to S. 151(4) [96a] of the Criminal Code. Mr. Nicholson, the Postmaster-General in 1965 said this concerning Bill C-43 at the time it was given second reading in the House:

> I will admit frankly that in searching for a solution to this problem we are on the horns of a dilemna. If on the other hand we do not take effective action against these nefarious traffickers in hate literature this traffic is likely to continue. On the other hand, if we do take strict measures to shut off the use of the mails to those who deal in hate literature we shall almost certainly prejudice the rights and freedoms of the majority of Canadians who use our mail for decent purposes.[97]

He also pointed out that were Bill C-43 to be enacted it would drive hate-peddlars underground by forcing them to resort to the use of first class mail which the postal authorities have no power to open.

In that year Bill C-16 was also before the House of Commons. It would have repealed S. 60 of the Criminal Code and would have substituted a section which would include in the definition of seditious intention "anyone who wilfully promotes hatred or contempt against any group of persons or any person as a member of any group in Canada." In fact this was a legislative attempt to reverse the *Boucher* decision.

Another attempt at modifying the Code was Bill C-117, which also appeared in 1965. That Bill was designed to modify S. 248(1) [97a]

[96a] See s. 162 of the 1971 version of the Criminal Code.

[97] House of Commons Debates, 1964, Vol. IX, p. 9158.

[97a] S. 262(1) of the 1971 version of the Criminal Code.

of the Code by adding to the definition of defamatory libel, group defamatory libel. Sections S. 251*A* was to be added to give the court power to remand a defendant charged under the new S. 248(1) for observation for at least thirty days to see if he were mentally ill. If the court did not see fit to so remand the accused and if he were subsequently convicted under S. 248(1) of group defamatory libel then then the court had to remand him before passing sentence.

Part V — Analysis Of Bill C-3 New Sections 267 A, B, C Of The Criminal Code [97b]

A. S. 267A - Genocide (s. 281.1 of the 1971 Criminal Code).

Section 267A makes it a crime for anyone to advicate or promote genocide. This has been the least controversial section of the new law. The Cohen Report had pointed out that:

> ...although Canada is a signatory of the United Nations Convention on Genocide and is bound thereby to implement anti-genocide measures in its domestic legislation, Canadian law so far has not been amended in accordance with the Convention.

At least one notable jurist took issue with that statement,[99] but for the most part it can be said that there was only a trickle of opposition to S. 267A. The Cohen Report said the prohibition against advocating or promoting genocide should be absolute because the act is wrong absolutely. That statement is hard to argue with. Even Mr. Wooliams, the Member from Calgary North who was the bitterest opponent of Bill C-3, did not oppose the Genocide section. In fact during its life in the House, Mr. Wooliams introduced an amendment to Bill C-3 that would have eliminated all but the Genocide section.

There were some modifications made to S. 267A between its inception and final passage. One such modification concerned the very important section which defines "identifiable groups", *i.e.*, S. 267A(4). When Bill C-3 was still in the Senate as Bill S-5, this subsection had excluded from the definition the adjectives "religion, language and national origin." Language and national origin did not find their way back into the section because of the tense situation Canada was experiencing while Quebec was taking a new hard look at its role as a Canadian Province. The deletion of these words was to avoid rocking the boat.

[97b] Now see ss. 281.1, 281.2 and 281.3 of the 1971 version of the Criminal Code.
[98] The Cohen Report, at p. 37.
[99] Dean Tarnopolsky, Dean, Faculty of Law — University of Windsor.

However the word "religion" presented a different problem. Mr. MacGuigan was then apprehensive that the deletion of "religion" as a criterion of identifiable group might exclude important minority groups from the law's protection.

The Canadian Jewish Congress also considered it to be a serious omission that "religion" was deleted from the section. It felt there were no apparent reasons for not including religion within the section and very good reasons for its inclusion. Statistics taken in 1961 showed 32% of the Canadian Jewish population were accounted to be Jewish by religion only or by ethnic origin. The rest were content to be identified with both categories. What emerges from these facts is that however they may differ on the question of ethnic origin, Jews clearly constitute a "religious" group.

Another change was made in S. 267A(2) where the word "means" was substituted for the word "includes" after the word "genocide". This was done in order to restrict the definition of genocide to two particular acts, namely what are now ss. (a) and (b) of S. 267A(2).

It is clear that this section unlike the law heretofore would catch the hatemonger who advocated genocide by sterilization of the entire male population.

There is no doubt either that the definition of "Genocide" is wider than that suggested by the Cohen Report. This has led to the criticism by Dean Tarnopolsky that the section is ambiguous. He felt that construed literally, S. 267A would make the advocacy of any war an offence, as war is an act committed to destroy a group of persons. That is too superficial an examination of the section. In the first place S. 267A(4) defines identifiable group as "any section of the *public*" (Emphasis added) and a reasonable argument can be made which would limit public to the Canadian public. This view is reinforced by section 267B 7(a) which defines "public place" as any place where the *public* have access. In the second place, the person advocating war must have *intent* to destroy in whole or in part an identifiable group. A person advocating war may have many other intents, not including the aforementioned, to advocate war; for example, to regain possession of land, to free political prisoners, and they would not be caught under S. 267A. In addition, those who do wish to engage in war with intent to kill the enemy have no intent to kill members of an identifiable group within the meaning of S. 267A(4) as national origin is not a criterion of identifiable group. Thirdly there is the built-in safeguard that to launch a prosecution under this section, a condition

precedent is the consent of the Attorney-General of the Province. More will be said of this requirement later and fourthly there is the operation of the War Measures Act which if re-activated may suspend the operation of S. 267A.

Though the section may be wider than perhaps is necessary, even to meet the requirement under the U.N. Convention, the section has little if any potential for abuse and positively in no uncertain terms puts the stamp of disapproval on all those advocating what can only be described as the most heinous and horrible crime imaginable.

B. *Promotion of Hate in a Public Place*

Section 267B [99a] has been one of the main targets for those who attack the law as a violation of the freedom of speech, assembly and association guaranteed in the Bill of Rights. Mr. John Turner the Minister of Justice when Bill C-3 was enacted into law said that the Bill was designed to create three new offences. First the offence of advocating or promoting genocide; second the offence of public incitement of hatred likely to lead to a breach of the peace, and thirdly, the wilful promotion of hatred. S. 267B deals with the latter two offences. Dean Tarnopolsky found S. 267B(1) to be superfluous in view of S. 160(a)(i) [99b] of the Code. However the two sections are not the same. The former has a preventive clause built in while the latter has not. S. 160(a)(i) requires that actual disturbance be caused by an accused. S. 267B(1) however allows the police to arrest anyone they on reasonable and probable grounds believe to be communicating statements ... *likely* to lead to a breach of the peace. This section however is not drafted so wide as to allow the police to arrest any speaker when they do not like what he is saying. There are four distinct parts to the section and all must be satisfied if a conviction is to be obtained. (1) The speaker must communicate statements in a public place; (2) he must incite hatred; (3) against an identifiable group; (4) such incitement must be likely to lead to a breach of the peace.

However, an attack is made on the section because it creates what has been dubbed a "heckler's veto". The audience by their behaviour decides whether any speaker violates the section. Prof. Arthurs believes there should be a division made between a speaker who has violence as his object and the speaker who is the victim

[99a] Now section 281.2 of the 1971 version of the Criminal Code.
[99b] *Supra*, n. 86a.

of a violent audience. No such distinction was made by Lord Parker in *Jordan* v. *Burgoyne, supra,* when he said that a speaker takes his audience as he finds it. If however S. 267B(1) is superfluous because of S. 160(a)(i) might not the same criticism be made of the latter section. The language of S. 160 is "Everyone who... *causes* a disturbance" whereas S. 267B(1) reads "Everyone who... *incites* hatred. In the former case the accused must have actually caused the disturbance whereas in the latter the accused must have actually incited hatred. If S. 267B(1) creates a heckler's veto surely Section 160(a)(i) does the same yet no one has criticized S. 160(a)(i) on this ground.

Mark MacGuigan takes the opposite view of S. 267B(1). While agreeing in principle that the law must not allow the audience to determine the criminality of any speech or assembly, he believes the four criteria built into the section are adequate safeguards.

The section is broad enough to cover a member of a minority group speaking in a public place so as to incite hatred against a majority group, for example a Jehovah's Witness speaking out against the Roman Catholic religion in Quebec. At first blush then the section seems open to abuse because presumably it would prevent anyone who is a member of a minority group from airing legitimate grievances in public. However on closer examination it is found that this is not the case. What the law is aimed at is preventing the spread of hate. There is a vast difference in putting forth legitimate grievances and speaking so as to incite hate. Furthermore by S. 267B(7)(b), "Identifiable group" has the same meaning as it has in S. 267A(4). That definition does *not* include a group distinguished by politics, language or national origin. Therefore a minority who spoke out so as to incite hate against members of these groups would not be caught by 267B(1) although inciting hate against the Government undoubtedly would come under S. 60, *i.e.,* sedition.

C. *Wilful Promotion of Hatred*

S. 267B(2) describes the offence of wilfully promoting hatred against an identifiable group *other than in private conversation.* (Emphasis added). That section should be read in conjunction with S. 267B(3) which spells out four distinct and separate defences to a charge under S. 267B(2). Shortly, the defences under S. 267B(3) are (1) absolute truth of statements; (2) *bona fide* opinions on a religious subject; (3) public benefit; (4) *bona fide* pointing out *for the purpose of removal,* matters tending to pro-

duce ill-will towards an identifiable group. If these four defences are seen as safeguards towards what might otherwise be a law too wide in scope, then there are two additional safeguards as well. The first is found in S. 267B(2) itself. The crown in any prosecution under S. 267B(2) must prove beyond a reasonable doubt that the accused *wilfully* promoted hate. The fact that inadvertently, a person may have done so would not suffice. The other safeguard appears in S. 267B(6) where in order to prosecute under subsection (2), the consent of the Attorney General is necessary.

Mr. MacGuigan did not deny that S. 267B(2) cuts into freedom of speech but he argues convincingly that this is a necessary intrusion. He further contends that this legislation provides safeguards which were not present at common law. The common law, in its criminal aspect never allowed truth as a defence to a defamation charge. This legislation specifically does so allow. The Canadian Jewish Congress pointed out that while truth is a defence here, it is not in other areas of the criminal law, for example sedition, scurrility or obscenity. Mr. Otto, another Member of Parliament took issue with the fact that truth was made a defence. He believed it will make the legislation ineffective and that in addition it was unnecessary in view of the public benefit defence. This criticism is not well founded as most statements of hate do not feed on truth but rather thrive on lies. For example some hate propaganda accused Jews of drinking the blood of Christian babies. This lie has been thrust upon gullible receivers of such trash for hundreds of years. Surely the defence of truth of such a statement could never successfully be invoked.

It is to be noted that the Race Relations Act of England does not allow for a defence of unqualified truth nor is there a public benefit test.

The defence that most people charged under S. 267B(2) will rely on in the end is S. 267B(3)(c), the public benefit test. Commenting of this defence one writer said:

> By far the most important of these conditions [defences] is the rest of public benefit. What is public benefit? When is promoting hate justifiable? There are a number of racial groups in Canada experiencing strained relationships, English and French, Portugese and Italian, Jews and Arabs, Indians and Whites. Each is served by its own press. In the past each has printed comments that would qualify as promoting contempt. Under the bill [C-3] each would have to rely for protection on the 'public benefit' clause.

The writer went on to argue that,

> ...public opinion is always changing and with it public benefit. What was regarded as an exercise of free speech could be today a criminal act.[100]

It is just this type of situation that the defence of public benefit is designed to protect. However the editorial comment concerning the changing attitudes of the public begs the question because the act is designed to fight hate and its aim is to prevent the spread of hate ever being for the public good. However statements made in the *reasonable* belief of their veracity, in order to *benefit* the public or a legally recognizable section thereof should be protected.

It may be argued that the section represents a loophole in that hatemongers such as John Beattie or Collin Jordan are so demented that they really believe that what they say is true and that they are the saviours of the people thereby procuring for them a public benefit. No court, in my opinion, would interpret this section so naively. The courts would not apply a subjective but rather an objective test to this defence. It would ask whether a reasonable man in the accused's position would believe in the truth of the statement. In most cases the answer to that question would determine the applicability of that defence without requiring the court to discuss whether or not the statements were made for a public benefit. The defence of public benefit is modelled after S. 259 of the Criminal Code where that defence is provided to an action of Criminal defamatory libel. Section 267B(3)(b) is the most straightforward of the defences and therefore deserves the least amount of comment. What it is designed to exempt from prosecution is *bona fide* interchanges of ideas on religious topics. Inter-faith debates would come under this defence but it is broader in scope than that. It would protect any individual discussing a religious point but he must do so *bona fide*, which probably means without malice. It is hard to see how, if this defence proved successful, a person could ever be *wilfully* promoting hatred anyway and so this defence may be unnecessary.

As S. 267B(3)(c) has a model in the code, so does S. 267B(3)(d) which is patterned after S. 61(d) which is a defence to sedition under S. 60. This article is a prime example of statements qualifying under this defence. The key words in this defence are "for the purpose of removal". The section also requires a *bona fide* intent though in view of the key words just mentioned, the inclusion of good faith seems superfluous. This section may also be included in the public benefit section which exempts from prosecution statements made by a person for the public benefit. Surely an article which

---

[100] Toronto Globe & Mail, Thurs. Feb. 26, 1970.

reproduces hate literature, but only for the purpose of inquiring how best to deal with it as a problem, is for the public benefit as well as tending to point it out in order to remove such hate literature from the public.

One area yet to be defined by the courts will be the exact scope of the phrase "other than in private conversation" in S. 267B (2). This is important because statements made in private conversation no matter how full of hate they are, are not illegal under S. 267B (2). The key word in the phrase is "private". If three or more people engage in a hate debate in a private home, are participants liable under this section? Does "private" encompass the quantity of people involved or is it also concerned with place and time.

Mr. Hage believes that the word private will be interpreted as it has been in S. 149A [100a] of the Code as "any act committed by no more than two people not in a public place". If this very narrow scope is applied in S. 267B (2) then what you say in your own home may be liable to criminal prosecution if said before two or more people and if what you said wilfully promoted hate against an identifiable group. It was this fear which prompted Professor Arthurs to say "if the law has no place in the bedrooms of the nation it should have no place in its parlours or meeting halls". With all due respect to Professor Arthurs however what he said is a *non sequitur*. The new law on homosexuality has kept the law out of the nations bedrooms only under very limited circumstances, where it was felt what two consenting male adults decide to do in private is not to the public detriment. However, Parliament, which is the spokesman for the nation, in its infinite wisdom has decided that hatemongering is so detrimental to the public, *i.e.*, to those who are so gullible or misguided as to believe the lies, and to the target groups which feel the pain of such verbal poisoned arrows, that it has decided that the law does in this case have a right to enter the "halls and meeting places" of the nation. Mr. Trudeau has said:

> ... the most basic (of the ideals of society) is the freedom and dignity of the individual. If we as individuals do not have the opportunity to stand erect, to retain our self-respect, to move freely throughout our country then we will not have made use of the law as we should.[101]

It is this principle that justifies such an intrusion as there is under S. 267B (2).

There is a very practical fact to keep in mind when considering S. 267B(2). It will be very rare that anyone making statements

---

[100a] See s. 158 of the 1971 version of the Criminal Code.

[101] Toronto Globe & Mail, April 20, 1970.

of group hate will be caught in his own home. The problem of proof will as a practical matter be insurmountable. More often than not section 267B(2) will apply where A speaks to B, C and perhaps a few other sympathetic listeners on a street corner or a bar where there is not likely to be a breach of the peace. Someone overhearing A, may report the incident the result of which, *if the Attorney General consents* may lead to a prosecution under the section. The greatest safeguard to the potential abuse of police powers under S. 267B(2) is the consent of the Attorney General requirement under S. 267B(6). More will be said of this section further on.

When S. 267B(2), read with S. 267B(3), (6) is subjected to analysis and criticism, the most that can be said of its potentially wide scope is that it is a necessary evil. This law is not really introducing something radically new into our jurisprudence. There have been laws against fraud and misrepresentation for centuries, in the English common law. This new law against group hatred would make our laws concerning fraud recognize human values as well as proprietary rights. The Canadian Jewish Congress has asked "if a defamatory statement is made deliberately about an identifiable group with no reasonable grounds to believe in its truth, where its discussion is not for the public good, what possible protection is owed to such communications of hate?"

An accused charged under S. 267B(2), in addition to the four defences outlined in S. 267B(3), in addition to the consent of the Attorney General as required by S. 267B(6), and in addition to the Crown having to prove he wilfully did the illegal act, is entitled to all the procedural safeguards of the criminal law, the most important of which is the burden which rests on the Crown to prove beyond a reasonable doubt that he did the illegal act.

Section 267B(4) provides for the disposal of hate material by the presiding judge only if and when the accused is found guilty under ss. 267A or 267B(1) or (2). Disposal is to take the form of forfeiture to the Crown in the Right of the Province for disposal by the Attorney General. There are three important aspects of this subsection. First, the section is not an example of pre-censorship because this penalty applies after an accused is found guilty of promoting hate or genocide. Second, this penalty is in addition to the other penalties provided in ss. 267A, 267B(1), and (2). Third, this penalty is not mandatory but only discretionary. Why this penalty should be discretionary may at the first instance be questionable, for after all if A has been found guilty of promoting hate against an identifiable group, through the distribution of pamphlets, it is just as important to dispose of the pamphlets as it is to

sentence the disseminator. However the reason for the discretionary nature of S. 267B(4) is because it has potentially a very wide scope. What may be forfeited is "anything by means of or in relation to which the offence was committed." Presumably the printing press which produced the pamphlets may also be forfeited. If the accused owned a car which he used when distributing the hate literature, that is too within the scope of S. 267B(4). To mitigate the potential harshness of the section, forfeiture is made discretionary, a discretion which will be exercised judicially in the courts.

S. 267B(7) is another definition section. Subsection C gives a very wide meaning to "statements." By that subsection statements include both oral and written words, tape recordings, records, hand signals or other gestures. Subsection (d) which defines "communicating" is important because it is defined so as to specifically include telephone hate messages. This probably was the result of the pre-recorded taped hate messages scheme devised by John Beattie and his henchmen whereby anyone could dial a telephone number and hear such a hate lecture. This now is outlawed by S. 267B(7)(d).

D. *Seizure of Hate Literature*

The second area of this law which has been extensively attacked is S. 267C,[101a] on the grounds that it is an unnecessary and perhaps unconstitutional attempt at precensorship. S. 267C(1) allows a judge, satisfied by information under oath, when there are *reasonable* grounds for believing that any publication which is intended to be sold or distributed freely is hate propaganda, to issue a warrant authorizing the publication's seizure. Subsection (2) states that the judge shall issue a summons to the occupier of premises where the publication was stored, to appear in court and show cause why the publication should not be forfeited. The burden of proof is squarely on the occupier once the matter has been seized by virtue of a warrant under S. 267C(1).

Subsection (3) allows the owner and author of the material seized to appear with their lawyers to oppose the forfeiture of the publication. Presumably they would be in no better position than the occupier of the premises in that they would have to discharge the burden of proving that the material should not be forfeited.

Subsection (4) allows the court to order the forfeiture of the publication in the same way it may do under ss. (4) of S. 267B,

[101a] Now s. 281.3 of the 1971 version of the Criminal Code.

but the all important difference in the two sections is that under S. 267(c)(4) no one may have been convicted of any offence within S. 267A or B whereas S. 267B(4) only applies where there has been a conviction under S. 267A or B.

S. 267C(4) only applies if the court is satisfied that the publication is hate propaganda. The question arises, by what standard must the court be satisfied? Under S. 267(c)(1) the judge must be satisfied that there are reasonable grounds. Is that standard to be applied under subsection (4)?

Subsection (5) allows the court to return the publication if the court is satisfied that the publication is not hate propaganda and the time for appeal is gone. Subsection (6) provides for an appeal from any order made under ss. (4) or (5) by any person who appeared in the proceedings. Subsection (7) provides the requirement of the consent of the Attorney General before proceedings may be instituted under S. 267C.

Mr. Hage describes the danger inherent in S. 267C in the fact that,

> ...there is a large distinction between what might be classed as hate, propaganda which is often by nature politically oriented, and what might be ruled obscene. The danger is that the law might not be used to seize 'hard core' hate propaganda but rather inflammatory *political* literature which might prove offensive to a party or person in power.[102]

Mr. Hage's reference to obscenity is due to the fact that S. 267C is modeled very closely after S. 150A of the Criminal Code which deals with the procedure of forfeiture of obscene literature. In fact subsection for subsection the words are nearly the same in ss. 150A [102a] and 267C. The procedure outlined by each section is identical, and there is no doubt that the courts will look to cases decided under S. 150A, such as there may be, in deciding cases under S.267C.

It must be pointed out that Mr. Hage's fear of S. 267C is totally without merit as his hypothesis deals with *politically* inflammatory literature. Such a publication would not be within the purview of S. 267C because under that section, only a publication which is hate propaganda may be seized. Hate propaganda is defined in S. 267C(8)(c) as any writing... that advocates or promotes genocide, as it is defined by S. 267A(2) or the communication of which... would constitute an offence under S. 267B. Both Sections 267A and B have as part of their respective offences, the term "identifiable group" which has been defined so as to exclude a group distinguished

---

[102] Hage, *supra*, n. 82, at p. 71.

[102a] Presently s. 160 of the Criminal Code.

by national origin or *politics*. Therefore an attack upon a political group could never be regarded as hate propaganda within S. 267C. Hate directed against a party or person in power would probably come within the scope of sedition under S. 60 of the Code.

There are further problems with S. 267C. Dean Tarnopolsky has asked if the defences provided in S. 267B(3) also apply to the forfeiture proceeding under S. 267C(1)? If they did not, there might occur a situation where for example books such as *Mein Kampf* might be seized as hate propaganda even where it were used only as a political science or history textbook. Were that the case, even this author would be forced to say the section intrudes too far into the realm of freedom of speech, thought and ideas.

But happily, this problem will only be at the most fictional. There are two reasons for arriving at this conclusion. One is that the consent of the Attorney General is required before instituting proceedings under S. 267C. If the books, admittedly hate propaganda were to be used as text books, probably at the university level, the Attorney General would not likely give his consent.

In the second place, to be hate propaganda under S. 267C it must be such as to constitute an offence under Section 267B. The preamble to S. 267B(3) states: "No person shall be convicted of an offence under subsection (2)..." Therefore the defences provided for in S. 267B(3) are incorporated into S. 267(c)(1) by virtue of S. 267C(8)(c). This being the case, either the public benefit test or more certainly the removal defence found in ss. 267B(3)(c) and (d) respectively would apply so that the publication even of *Mein Kampf* would not be hate propaganda for the purpose of seizure under S. 267C(1).

Were it not for section S. 267C(4) there would be a third reason why this problem would not arise. S. 267C(2) provides that the occupier need only show cause why matter seized should not be forfeited. It seems that reasonable satisfaction of this section would be that the admitted hate propaganda is being used for educational purposes and not to instill hate in anyone against anyone. However this line of argument is precluded by S. 267C(4) which forces a judge to seize material once he is satisfied that it is hate propaganda, regardless of the use that is being made of it.

Though the offence embodied in S. 267C(1) may seem harsh and unduly burdensome, it benefits from safeguards, that lessen the burdens and do away with potential abuses that might otherwise occur from a misapplication of the section. These safeguards are (1) the prior consent of the Attorney General, (2) that the defences

in S. 267B(3) are incorporated into 267C and (3) S. 267B(6) providing for an appeal to the Court of Appeal of the Province.

At different stages of this analysis, the fact that the prior consent of the Attorney General was necessary before instituting proceedings was mentioned with favour and approval. Mr. Hage says the Attorney General presumably means the Attorneys' General of the Provinces. Though Attorney General is not defined in S. 267, it is defined in the Criminal Code under s. 2(2) as the Attorney General of a Province. Therefore Mr. Hage's presumption is correct.

While the anti-hate law was in Parliament as Bill C-3 Mr. Woolliams, its chief opponent took issue with those sections requiring the prior consent of the Attorneys General. His fear was that it may be abused by being applied at their pleasure and convenience. With respect, that fear is another bogey-man. An Attorney General is a politico-legal animal. He would not dare use his consent power haphazardly or irresponsibly because as a member of the provincial parliament and cabinet he is responsible to the former and to the people who will decide whether or not to elect him to Parliament, a condition which must be fulfilled before being appointed Attorney General. At the same time he is a legal animal, probably well informed as to the chances of a conviction if he gives his consent to proceed with a prosecution.

The consent of the Attorney General is a condition precedent in ss. 267A, B(2) by virtue of B(6), and C. It is conspicuously not necessary to lay a charge under S. 267B(1). The Honourable Mr. Turner explained the reason for this distinction and the function of the Attorney General's consent. He said,

> Then there is the added protection in those two offences [i.e., 267A, and 267B(2)] that no proceeding can be taken under either offence without the consent of the Provincial Attorney General. That restriction is not placed upon the second offence of public incitement to hatred likely to lead to a breach of the peace. Where a breach of the peace is involved obviously you have a potential unlawful assembly or a potential riot and you have no time to get the consent of the Attorney General of the Province before making an arrest.[103]

He went on to say that the function of the Attorney General in the former two offences, *i.e.*, added also in S. 267C is that vexatious, frivolous and mischievous proceedings would not be available to a private citizen who wanted to undertake prosecutions. A similar provision is found in England's Race Relations Act, where lack of the prior consent of the Attorney General barred recovery to the plaintiff suing the B.B.C.

---

[103] *Supra*, n. 38, at p. 5553.

Part VI — Summary — Herein Concerning The Utility Of The New Anti-Hate Law And Other Related Items

It is my conviction that the real criticism of the Act is founded on two grounds, which are not totally distinct. The first is that the Act violates certain freedoms guaranteed under the Canadian Bill of Rights, which has been law in Canada since 1960 and has recently been given new life.[104] The second criticism is based on the argument that the new law, while meaning well is useless and then the first criticism is brought in when it is argued that the act is not only useless but potentially harmful. If these arguments are not well founded, then the nit-picking that lawyers love to indnlge in when every new piece of legislation is passed is only of secondary importance because as a codified law it will fall to the courts to decide and interpret and indulge in their infinite quest to determine that which has no existence, the intention of Parliament.

The Cohen Committee recoguized that:

> Freedom of expression is a main cornerstone of our way of life and there is a strong presumption that putting limits on it is a weakening of our way of life.[105]

Therefore it is concluded that if any restraint is to be put on freedom of speech, there must be a strong reason for doing so. Freedom of speech is to be cherished because (1) a denial of free speech would induce frustration injuring the dignity and self-esteem of individuals; (2) when we begin to suppress speech with the best intentions we may eventually suppress it with the worst intentions; and (3) unpopular ideas of today may become orthodox principles of tomorrow.[106] Yet it is admitted every by the opponents of this law that free speech is not an absolute. Mr. Graham Hughes has said,

> ... to ignore the danger inherent in the policies put forth by the hate-mongers would be to adopt a 'Fetichistic attitude to free speech'.[107]

Gale C.J.H.C. (as he then was) mirrored Rinfret's C.J.C. view of free speech when he said:

---

[104] *R.* v. *Drybones* [1970] S.C.R. 282.

[105] The Cohen Report, at p. 6.

[106] Hughes, *Prohibiting Incitement to Racial Discrimination* (1966), 16 U. of T. L.J. 361.

[107] *Ibid.*, at p. 364.

> The right to speak one's mind is not a licence to preach vilifiation and violence.[108]

He went on to say,

> ...in this situation the individual's freedom of expression must give way to the broader interests of social cohesion and racial and religious freedom.[109]

Mr. Brewin, the Honourable Member from Greenwood said in the House of Commons:

> It is recognized that I have no right to destroy my neighbour's reputation by repeating falsehoods about him. By what reasoning then can it be said that the destruction of the reputation and good name of a group of people should not also be condemned.[110]

These men, the members of the Cohen Committee and others, have recognized the need to achieve a balance between protecting individual freedoms on the one hand and safeguarding group dignity and respect on the other. There are those however who believe that this law will be decided to be unconstitutional because it conflicts with the Bill of Rights. In fact while the law existed as Bill C-3, there was a movement to have the Bill referred to the Supreme Court to rule on its constitutionality. Nothing came of it. Mr. Diefenbaker said:

> ...I think there is every reason to believe that there is a strong argument that can be advanced that freedom of speech in 1960 meant freedom to say what one would, excepting for libel, slander, sedition and blasphemy. If that be so,... then this legislation contravenes the Bill of Rights very directly and definitely.[111]

However back in 1964, when after having actually received a sample of hate propaganda, Mr. Diefenbaker said in the House,

> ...one of the great difficulties is to maintain freedom of discussion and not to deny within one's country that freedom of speech without which freedom can not exist. However in reading this [hate literature] I doubt that anyone would say that it came within the purview of freedom of speech.[112]

This law does not violate the freedoms guaranteed by the Bill of Rights. In the preamble to the Bill of Rights the Parliament of Canada is said to be affirming the principles,

---

[108] Brief of the Canadian Jewish Congress on Bill S-21 (Hate Propaganda) to the Standing Committee on Constitutional and Legal Affairs (1969), at p. 11.

[109] *Ibid.*

[110] *Supra,* n. 37b, at p. 888.

[111] *Supra,* n. 38, at p. 5682.

[112] *Supra,* n. 94, at p. 733.

> ...which acknowledge the worth and dignity of the human person and also that men remain free only when freedom is founded upon respect for the moral and spiritual values and the rule of law.[113]

Hate propaganda tries to achieve the antithesis of those principles by degrading individuals simply because they are members of the target group and for no other reason. Surely the Bill of Rights was not guaranteeing anyone the right to degrade others for a reason such as that.

Then it is argued, by opponents to the new provisions, that the way to fight hatemongers is through education and not by such a law, which is useless in any case. Dean Tarnopolsky suggested that a Canadian Human Rights Commission be set up which would co-operate with its provincial counterparts to combat hate. Professor Arthurs also would fight group hatred through a vigorous educational campaign to immunize the public, a sort of fight fire with fire policy. This would be done by a vigorously enforced Human Rights Code. There is nothing wrong with fighting hate through educational means. However, Dr. Kaufman, a psychology professor who did a paper for the Cohen Report stated:

> [T]here are grounds for questionning the wisdom of a society in relying *solely* upon the formal educative process, secular and spiritual in order to ensure full and responsible citizenship.[114] (Emphasis added).

Passing a law and using education to fight group hatred are not mutually exclusive weapons. In fact they are complimentary. One of the most important aspects of a law is its ability to create a social norm which it is hoped most people will conform to. Anti-hate legislation has a three-fold educative effect. In the first place, it establishes a restraint on hate communicators through the creation of a social climate perceived by people as being unconducive to hate messages. Secondly it creates what Dr. Kaufman calls social reality, that is a clear understanding of what is not acceptable in the society. The hate communicator would be seen as operating outside the limits of acceptability. Thirdly it would reassure minority groups that they are backed up by the majority of the society in which they live.[115] Mr. Brewin also felt that it would be an error not to realize the important educative effect in positive legal pronouncements and that it would be an error to keep legislation and education as mutually exclusive alternatives. Mr. Turner, in response to a question asking why this problem should be dealt with by the Criminal Law, said:

---

[113] Canadian Bill of Rights, 8-9 Eliz. II C. 44 (preamble).
[114] The Cohen Report, at p. 186.
[115] *Ibid.*, at p. 230.

> It [the law] tends within the conduct that is prescribed to articulate the values by which we Canadians seek to live. The criminal law is not merely a sanction or control process. It is reflective and declaratory of the moral sense of a community and the total integrity of the community. It seeks not merely to proscribe but to *educate*. It seeks to set forth a threshold of tolerance and standards of minimum order and decency.[116] (Emphasis added).

It seems that those who advocate the dealing of group hatred by educative means but oppose an anti-hate law are involving themselves in an inconsistency because of their failure to see the educative effect of an anti-hate law.

It is argued that passing an anti-hate law to deal with hatred directed at groups is like trying to kill a fly with a cannon. Perhaps minority groups are more concerned with access to socially prestigous organizations than with the rantings of a "few demented cranks". Professor Arthurs noted that during the three and one half years following the Cohen Report, the trickle of hate literature "has shrunken to the point where it is no more than a residual and putrid puddle".[117] He believed that the Canadian public can and should be trusted to "rigorously resist attempts to indoctrinate it in attitudes of hatred".[118] The Cohen Committee said:

> However odious the behaviour of these groups and however offensive the materials they distribute, the Committee believes that none of the organizations represent today [1965] a really effective political or propaganda force and that in any case very few individuals as such are involved.[119]

However it goes on to warn that it would be unwise to ignore them. Hatemongers, though few in numbers represent a *potential* danger thant can not be measured by statistics alone. Furthermore the Report negates the conclusion of Professor Arthurs concerning the ability of the Canadian public to resist hate propaganda. That fact that today the Canadian public is socially stable and economically well off relatively speaking does not thereby create immunity from hate literature. John Garrity, who worked for the Canadian Jewish Congress, as an undercover agent, infiltrated John Beattie's organization. During that time he came to know Beattie and what he stood for. He concluded:

> ...our sense of outrage has been dulled by overexposure to the sins of Nazi Germany and it's too convenient to dismiss Beattie and his henchmen

---

[116] Supra, n. 38, at p. 5557.

[117] Arthurs, Submission to the Standing Committee on Legal and Constitutional Affairs on Bill S-21, at p. 5.

[118] *Ibid.*, at p. 6.

[119] The Cohen Report, at p. 14.

> — only a dozen active members plus perhaps 100 unseen supporters — as a bunch of vicious but harmless misfits. Misfits they are but they are also the most visible part of a growing Right-wing movement in Canada which I have come to believe could represent a threat to our national stability.[120]

Dr. Kaufman says that discontent and fear can not be assumed to be absent even in a prosperous society. There is a large inarticulate body of public opinion which holds hazy and muddled views of a racist kind. Garrity corroborated this fact when he said:

> It's not Beattie himself I fear: its the uncounted Nazi sympathizers and the growing number of Right-wing organizations that display Neo-Nazi symptoms.[121]

Mr. Newman in a book entitled *The Hate Reader* describes the personality of individuals most susceptible to hate literature. They are (1) plagued by anxiety, (2) have low self-esteem, (3) have group relations which are shallow but hostile in depth, (4) have shallow personal relationships, (5) are strict conformists within their own group, (6) exaggerate non-conformity, and (7) tend to conscious suppression. A person susceptible to hate literature need not have all seven traits. He need only have some of them in any combination. It is therefore readily observed that hate literature has the potential to reach many thousands, if not more, of people in Canada. Having these traits does not automatically make these people hate readers, but it only gives them the potential to be.

John Beattie has said:

> You wait when there's a depression and the masses are looking for a scapegoat, that's when thousands will declare themselves for us.[122]

However Garrity concluded of Beattie:

> Beattie will say or do anything as long as it's legal; he knows that his position is vulnerable if he breaks the law and he is careful to stay within it.[123]

The fact that many of these people who are on the fringe, in that they could or could not become haters of groups, because they are, generally speaking, conformists would be swayed by law which most would respect as authority even though they may not wholly believe in it.

To create a social norm which will establish a public conscience and standard of behaviour in order to check the spread of prejudice

---

[120] Garrity "My 16 Months as a Nazi," 79 Macleans' Magazine 10, at p. 11 (Oct. 1/66).

[121] *Ibid.*, at p. 40.

[122] *Ibid.*

[123] *Ibid.*

is perhaps the main utilitarian function of the anti-hate law. It negates the criticism of those who label the act well-meaning but useless.

But the act fulfills another function, namely reassurance to minority groups that the majority is behind them and that as a corollary, something positive is being done by that majority to check group hatred. An incident related by the Canadian Jewish Congress and in the Cohen Report itself illustrates what potential the act will have in putting the minds of minorities at ease. On May 30, 1965 John Beattie attempted to speak in Allan Gardens. A man, Mr. D. was urged to disorderly conduct by the sight and content of all that Beattie stood for. An otherwise docile, law-abiding citizen became violent. Mr. D. was typical of many listeners that day who rioted. Many were survivors of Nazi persecutions and on interrogation, it came out that their anger and violence sprang chiefly from their impression that no official position had been taken by any governmental authority. An enforced hate law would go far to remedy this fear, which many members of minority groups have.

Some people argue the anti-hate law is doomed to failure because it will never eliminate hate. They argue that the best way to eliminate hate is to fight poverty and try to eliminate it, for when poverty disappears the cause of scapegoating, false stereotyping, and prejudice will vanish also. There is not much to quarrel about with regard to the elimination of poverty. No doubt much of group hatred would dissolve if there were no poverty. This argument was advanced by Mr. Max Saltsman, the Honourable Member from Waterloo. He labeled the act "impossible and foolish".

The argument as a whole however is not well-founded because it is based on a false premise. It assumes the function of the act is to eliminate hate. This goal is at most an ideal. It's real function is to suppress it, to check and control it so that people do not get hurt by it. Mr. Otto, the Honourable Member from York East said,

> ...it is not the purpose of the bill to abolish hatred... the purpose of the bill is to protect the individual in the group so that smearing hatred and all that overshadows the whole group will not burt the individual.[124]

The Act is attacked on the ground that it will drive the hate-monger underground, where he will never be brought to justice.

---

[124] *Supra*, n. 37b, at p. 893.

But to say this, is in fact to point to a virtue, not a vice of the act. Mr. MacGuigan dealt with this point in Parliament. He said:

> My colleague also suggested that the effect of this bill would be to drive hatred and hatemongers underground. If that were the case I submit the purpose of this bill would be fully achieved. This bill is not aimed at thought; it is aimed at speech and conduct, especially speech which goes toward unlawful conduct. If we could succeed in driving hate and hatemongers underground we should succeed in ridding the democratic dialogue of our country of this cancer.[125]

This law may never eliminate hate, but that is no reason for abandoning it. After all, a law against robbery or murder has not eliminated either of those crimes but it would be absurd to abandon them on that account.

Yet another argument against the Bill is founded on the age old debate on whether the law should legislate morality, the assumption of this argument being that an anti-hate law is a moral one in line with the laws on homosexuality, abortion, and marijuana. Mr. Otto has asked, who is to govern morality if not the lawmakers? The church, which used to have control in this area once, is ineffective today. On the other hand the power of the criminal law is awesome. If an anti-hate bill is a *purely* moral law, which idea this author firmly opposes, the criminal law can and should for the reasons already mentioned apply in this area.

Many people say the act will open a Pandora's box. They believe such an act will not drive hatemongers underground at all, but they will deliberately come out in the open to challenge the law. Arrests will ensue and because under S. 267B(3)(a) truth of the statements is an absolute defence, the hatemonger will spew his messages of hate right in court. Since the hatemonger craves and thrives on publicity, the act will present an opportunity for publicity, hatemongers dream of. If that were to happen, the law would be on the horns of a dilemma, for if the hatemonger was convicted and sent to jail he would be seen as a martyr and so gain converts for the very position that he is condemned. On the other hand if he is acquitted, he will surely warp and twist that acquittal by telling his audiences that what he said had the approval of the courts and therefore what he said was right and just, and he will almost assuredly gain converts by this means. Because of this boomerang effect it is argued that we should not play into the hatemonger's hands but rather fight him using the quarantine method.

---

[125] *Supra,* n. 38, at p. 5604.

There is documented evidence which tends to corroborate the fact that hatemongers do crave publicity and that publicity, albeit unfavourable does promote rather than stifle their cause.[126]

Though this line of reasoning is persuasive at first instance, it is not without flaws, because it concludes that the best defence against group hatred is a passive one, *i.e.*, fighting group hatemongers by the quarantine method. This method, just does not work. It has been tried but did not prevent the increased neo-Nazi activity from arising as it did around 1963-1964.

Furthermore the reduction of dissemination of hate literature that would result from an anti-hate law would far outweigh any publicity afforded to the hatemongers. The extent to which anyone would become a martyr would depend on the society in which he lived. If society is generally disgusted by such men, there should be little sympathy for them if and when they are convicted. If a hatepeddlar should be acquitted through some technicality in the law such as a matter of procedure, accurate news coverage and in addition a statement by the proper official should affirmatively tell the public why there was an acquittal and what the authorities think of the pamphlet or speech because of which the hate peddlar was charged.

Finally, there is a criticism levied which may conveniently be labeled the "passing the buck danger".

Professor Arthurs believes that it is all of society's duty to clean up hate literature but because a law has been passed, the public will think "now there is a law and the business of combatting hate is the job of police and judges".[127] Mr. Saltsman agreed. He said:

> It is all too easy to dismiss the problem of hatred by passing legislation. ...This is an illusion and one nobody should be under.[128]

The question is, do the facts bear out the fears of these men? The answer is no. As an example that people will do what they can as citizens to combat hate propaganda the following newspaper article may be cited. Hate literature had turned up in Sudbury in April of 1970. An article in the Sudbury Star gave this advice, "the way for the ordinary householder to play his part is to gather up all copies of hatemonger publications that come to his attention and burn them".

---

[126] Newman, *The Hate Reader*, (Dobbs Ferry, 1964).

[127] Arthurs, *supra*, n. 117.

[128] *Supra*, n. 38, at p. 5607.

At the beginning of this inquiry the question was asked as to what rights any member of a defamed group had against the promoters of hate propaganda directed at that group. It is submitted that the disseminator and author of such propoganda may be guilty of wilfully promoting hatred towards and identifiable group under S. 267B(2) and the publication carrying such propaganda may be seized under S. 267C(1). The consent of the Attorney General under both sections is a condition precedent but at least there is some potential action that could be taken.

In conclusion, it is submitted that this legislation is useful and necessary. To foresee trouble and take steps to forestall it, is the act of a rational man. Prevention is possible. Far too soon it is too late for cure.