

## GROUP DEFAMATION:

### IS THE CURE TOO COSTLY?

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The past season was a long summer of discontent in Canada over the issue of hate mailings. Mass dissemination of vituperative materials<sup>1</sup> continued at a pace sufficiently intensive to provoke widespread demands<sup>2</sup> for government action to halt these attacks.

The nub of the problem in group defamation, whether by mail or other mode of publication, is that the relevant law originated in the individual's remedy for assault upon his individual reputation. No way has as yet

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1. Four-page checklist of hate literature, annexed to a submission made on March 12, 1964 to The Hon. Guy Favreau, Minister of Justice, The Hon. John R. Nicholson, the Postmaster-General, and The Hon. John R. Garland, Minister of National Revenue, by the Canadian Jewish Congress, Montreal. Materials listed were reportedly distributed in the Toronto-Niagara area, and the dissemination originated with an advertisement in *The Globe and Mail*, April 1, 1963, offering free samples from a postal box in Scarborough, Ontario, to those interested in collecting Nazi propaganda leaflets as a hobby. The checklist covered materials reported to the Canadian Jewish Congress from July 2, 1963 to February, 1964, and distributed to tenants mail boxes in apartment houses, or mailed to individuals. A random list of references in parliamentary debate to hate literature mailings in eastern Canada follows: Right Hon. J. G. Diefenbaker, *Hansard*, September 10, 1964, page 7822; Mr. Marvin Gelber, July 24, 1964, page 6978; Mr. Reid Scott and Hon. Guy Favreau, September 15, 1964, page 8023; Right Hon. J. G. Diefenbaker, June 4, 1964, page 3977. See detailed description of the hate literature in *Saturday Night*, April, 1964, editor Arnold Edinborough's "This Month" editorial; "My Weirid Weekend with the Hate-mongers," Peter Sypnowich, *The Canadian Weekly*, published by the *Toronto Star*, June 13, 1964, pp. 2, 4, 15.
2. Submission to The Hon. Guy Favreau, Minister of Justice, on April 7, 1964, by National Human Rights Committee, Canadian Labor Congress. Resolution passed at the 1964 Annual Convention of the Manitoba Bar Association, June 12-14, 1964, Brandon, Manitoba, urging the Government of Canada to "take all appropriate steps to amend the Criminal Code of Canada, and all other relevant statutes to prohibit the dissemination of hate literature and effectively to bring the disseminators to justice." Bill C-43 (Mr. Orlikow), an Act to Amend the Post Office Act (Hate Literature), first reading February 20, 1964. Bill C-21 (Mr. Klein) an Act Respecting Genocide, first reading February 20, 1964. Editorials calling for action to end dissemination of hate literature appearing in *The Toronto Telegram*, July 10 and July 23, 1964. Editorial calling for testing present provisions of the Criminal Code by launching a prosecution, *The Hamilton Spectator*, June 8, 1964. Editorial article by Arnold Edinborough in *Saturday Night*, April, 1964. Article examining the question, *Dimanche Matin*, Montreal, July 12, 1964. Articles ventilating the problem but opposing legislation as a remedy: *London Free Press*, July 4, 1964; *Winnipeg Free Press*, March 21, 1964; *Maclean's Magazine*, "Argument", by Glen How, legal counsel for Jehovah's Witnesses, January 2, 1965; *Financial Post* feature by J. B. McGeachy, March 21, 1964; and address by Rev. J. R. Hord, Chairman, United Church Board of Evangelism and Social Service, reported in *Winnipeg Free Press*, January 4, 1965. In favor of legislation are: Canadian Federation of University Women resolution, adopted at its National Convention in Winnipeg, August 30, 1964, urging amendments to the Criminal Code, and calling on the Government of Canada to "examine the use of the public media of communication which seek to arouse racial antagonism"; resolution passed at National Convention of the Royal Canadian Legion, Winnipeg, reported in *Winnipeg Free Press*, March 19, 1964, urging government action against disseminators of hate literature by mail; resolution at Hamilton, Ont. Convention of National Council of Women of Canada, June 3, 1964; resolution passed by the Western Region of the Union of Nova Scotia Municipalities, meeting August 30, 1964, in Halifax, requesting the Government of Nova Scotia to ask the Postmaster-General to examine third class mail entering Nova Scotia "and any such literature which contains hate propaganda to be turned over to the proper authorities", and a similar request by The Winnipeg City Council, *Winnipeg Free Press*, March 17, 1964. See also: editorial (accompanied by illustrated reproductions of hate mailings received in Winnipeg) in *Activist*, organ of Winnipeg Junior Chamber of Commerce, July-August, 1964; address on hate literature by Hon. Guy Favreau, Minister of Justice, November 10, 1964, before Montreal B'nai B'rith; report in Canadian Jewish Congress *Inter-Office Information Bulletin No. 426* of November 13, 1964; report on public opinion survey by television program *Telepol*, reporting that 69% of those polled favored legislation to control hate literature, 26% opposed, and 5% without opinion (the poll question being, "whether dissemination of hate literature should be a criminal offence.") Hon. J. T. Thorson, retired President of the Exchequer Court of Canada, at a public meeting in Ottawa on human rights convened by the Canadian Citizenship Council, urged the Federal Government to "amend the Criminal Code to stamp out the spread of hate literature in Canada." (reported in Canadian Jewish Congress *Inter-Office Information Bulletin No. 429*, December 11, 1964). The Association of Former Concentration Camp Inmates Survivors of Nazi Oppression, Montreal, at its annual meeting urged the Canadian Jewish Congress to support the Klein Bill. Postmaster-General John R. Nicolson called for "new, wiser laws" before Vancouver Lions Club (reported in *The Winnipeg Free Press*, January 2, 1965). Reversing his previous stand, J. B. McGeachy, *Financial Post* columnist, gave qualified approval to legislative controls in *The Financial Post*, August 23, 1965.

been found to protect an unincorporated group's reputation from vituperation, without risking the breach of other basic freedoms of communication. Paradoxically, the most promising or effective prospective remedies stress either the injunction or a broader interpretation of seditious libel, both of which reach our age from the Star Chamber, stained with the stigma of repression, authoritarian censorship, and thought control. Reluctance to resort to remedies which were once used to fetter men's freedom has done much to stymie progress in this field.

Many observers have come away from a study of the field convinced that group libel belongs to the category of *damnum sine injuria*. Other recent contributors to the field are inspired by that other classic phrase, *ubi jus ibi remedium*, and hope to buttress the right with an adequate remedy. Whether there exist procedures consonant with acceptable criteria of freedom of expression, is the question students of the subject are asking today.

A new frame of reference against which the sought-after measures, whether judicial or legislative, must be examined, has come into being since World War II. The proven ability of propaganda to blind nations and unleash destructive potential was amply demonstrated during the Third Reich. In addition, recent years have witnessed increasing use of the telephone for anonymous publication of scurrilous or vituperative political allegations,<sup>3</sup> or libellous attacks on institutions.<sup>4</sup>

Balancing this, there has been a surge of legislative action in the United States aimed at improving the status of one traditional victim of group hate and prejudice, the American Negro. Beginning with the judicial legislation of *Brown v. Board of Education*<sup>5</sup> directed at restoring to the U.S. Negro full educational opportunities, and culminating in the 1964 Civil Rights Bill<sup>6</sup>, a program was evolved to erase by fiat of law prejudices long revered and deeply rooted in the hearts of a substantial minority of Americans. The climate of the times is also being strikingly altered by the unprecedented actions of Pope John XXIII and Pope Paul VI. The second and third sessions of the Ecumenical Council have moved to delete from Catholic liturgy and Catholic minds attitudes of contempt for non-Catholics, and to lift from the Jews burden of the guilt of deicide, long imposed by Catholic doctrine.

In view of the vastly augmented potentiality for destruction now open to activist propagandists, and in view of U.S. Government and Vatican legislative policies aimed at clothing all men, regardless of race or faith, with the mantle of human dignity, it may very well be that courts and legislatures will today react differently than they have in the past to causes of action concerned with group defamation, and suggested remedies.

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3. Letter to The Writer from Bruce L. Felknor, Executive Director, Fair Campaign Practices Committee, Inc., New York, dated March 8, 1965, referring to slanderous telephone messages as an organized political technique.

4. See page 25, New York Times, September 3, 1965; "U.S. action asked on phone libels" by Will Lissner, describing phone libels against The Peace Corps and "The New Mathematics".

5. 347, U.S. 438, (1954).

6. 352 H.R. 7152, approved July 2, 1964.

While the foregoing may apply with equal relevance to the group libel situation in Canada, the United States and England, one particular factor grounded in Canadian actualities must be borne in mind. Despite the strikingly enlightened decisions of the Supreme Court of Canada in such instances<sup>7</sup> there can be no doubt that sensitivity of the French Catholic community to critical, evaluative, or divergent theological views by non-Catholic sects complicates the task of those who today search for criteria to distinguish group libel from legitimate discussion of creedal differences. Thus, during parliamentary debate on hate mailings, directed against Negroes and Jews,<sup>8</sup> Gilles Gregoire, M.P. for Lapointe, directed the following question to the Minister of Justice:

Can he assure us that his department will take the same action against those distributing hate literature against Catholic French Canadians in the Province of Quebec, as mentioned this morning?

There is no doubt that Mr. Gregoire's vigilance contributed substantially to Mr. Favreau's dilemma.

## CIVIL DEFAMATION

In a much quoted article on the subject of group defamation,<sup>9</sup> *Ortenberg v. Plamondon*<sup>10</sup> is referred to as the "often-cited but never followed case". This case, in which renewed interest is now being shown,<sup>11</sup> is referred to in neither the *Canadian Abridgement*, nor the *Canadian Encyclopedic Digest*. Yet is held to be a striking exception to the general problem of particularizing the plaintiff, a difficulty which constitutes the major stumbling block in bringing a civil action in group defamation.

In *Ortenberg v. Plamondon*, the entire Jewish community of Quebec City, numbering 75 families in the year 1914, was held to be small enough in relation to the city's total population of Quebec, then given as 80,000, to ground a defamation action on behalf of the minority community. This case provides a weak reed on which to peg hopes for a conviction involving identical charges directed today against Negroes or Jews by mail, once its details are examined.

Plamondon, a lecturer in Quebec City in 1914, had made charges that the religious books (Talmud) of the Jews counsel Jews to murder and rob Christians, commit adultery with Christian women, and commit acts of ritual murder. Narrowing down the scope of his charge, the lecturer stated:

Even in St. Rochs, Sunday labor is performed by the Jews. There is a factory at 115 or 117 St. Joseph Street, where parties worthy of belief have told me, with righteous indignation, regular labor is performed every Sunday of the year.

7. Eq.: *Boucher v. R.* (1951) S.C.R. 265.

8. *Hansard*, June 5, 1964, page 3977.

9. Reisman, "Democracy and Defamation—Control of Group Libel", 42 Col. L. Rev. 727, at p. 766.

10. (1914) 35 Can. L.T. 262.

11. Article by Melamet, *Canadian Jewish Chronicle*, Montreal, vol. 50, No. 12, September 25, 1964, with reference to a book on the case by W. E. Greening, a Montreal labor historian reportedly shortly to be released.

The factory was understood to refer to a clothing factory.

Ortenberg was a Jewish clothier, resident in the St. Rochs suburb of Quebec specifically referred to in Plamondon's lecture. In his judgment, Cross, J. stated that the appellant lived across the street from the home of the respondent, "where a crowd of youth came to applaud" and, adds the judge, the same crowd could, without moving from the spot, but simply by turning, "jeer at the Jew". If this did not sufficiently particularize the plaintiff, the element of damage, another familiar stumbling block in defamation actions, was adequately provided in that Ortenberg was attacked by having a stone thrown through a window in his home. He pleaded loss of a portion of his trade, valued by him at \$500. He was awarded damages of \$50.00 against the lecturer and \$25.00 against the publisher of the lecture.

The *Ortenberg* decision is unique in that recovery was allowed by the court for a member of a group (called a "restricted collectivity") which numbered 200 or more. It is the sole exception to the apparently prevailing view of Canadian courts (inferred from the absence of case reports to the contrary) that no particular plaintiff is hurt, or can show anything but the most speculative claim for damages, when a large group is defamed. Thus, in *Germain v. Ryan*<sup>12</sup> an insult to French Canadians in general, made within hearing of English-speaking persons in a Québec merchant's store, was held to give rise to no cause of action because of the size of the group defamed. In the United States, on the average, any number over twenty is too large. Two American writers, commenting on the issue of the size of the defamed class, say:

The courts have brought into existence, by their interpretations of this key element, the unchecked and wholesale defamation of groups, or even worse, of whole classes.<sup>13</sup>

However, despite the general reliance on *Ortenberg v. Plamondon* as proving the possibility of a successful civil action arising from defamation of a large collectivity, the case on close reading reveals itself to be the traditional exception that proves the rule. It borders very closely on those instances in which defamation of a class is held to be a cloak for defamation of an unnamed individual. This probably accounts for the reference in the reasons for judgment to *Le Fanu v. Malcomson*<sup>14</sup>, in which general statements regarding Irish factory owners were held to refer to the particular plaintiff.

Further confirmation of the suspicion that *Ortenberg v. Plamondon* did not really turn on the issue of group libel is found in the reasoning advanced by Cross, J. He grounded his judgment on "an action on the case for maliciously acting in such a way as to inflict loss on the plaintiff".<sup>15</sup> He referred to Article 1053 of Quebec's Civil Code dealing with maliciously caused damage, and quoted from *Encyclopedia of Laws of England*, by

12. *Germain v. Ryan* (1918) 53 Que. S.C. 543.

13. "Group Defamation, U.S.A.", J. J. Brown and C. L. Stern, 13 Cleveland-Marshall L.R. 12.

14. (1848) 1 H.L.C. 637.

15. p. 273.

Wood-Reuton, on "words causing damage as a head of damage where the words need not be defamatory, nor need they injure the reputation of the plaintiff".<sup>16</sup>

In an attempt to defeat the procedural obstacles that beset any common law defamation action launched by a member of a class, Reisman<sup>17</sup> suggested applying the techniques developed by the growing science of market research to the study of the social effects of defamation. He suggests that by gauging probable responses to various types of defamatory material, nominal or punitive damages keyed to a concept of deterrence rather than restitution, could be established. What is actually involved is shifting the remedy from civil to criminal law, a trend which it will later be shown is the choice generally favored by most observers for the entire problem of group defamation.

In this article, Reisman, after pointing to the disadvantages of civil defamation and criminal libel as satisfactory shields, finds the most useful remedy to be an injunction, such as is embodied in Manitoba's "Marcus Hyman Law"<sup>18</sup>, the only group defamation provision to be found in the statutes of any province today. This amendment, drafted by E. A. Brotman, Q.C., came into force on April 7, 1934 and was inspired, according to legislative debate as reported in *The Winnipeg Free Press*, February 12 and April 14, 1934, by the activities of the Brown Shirt Nationalist organization in Winnipeg. During discussion in the house, Manitoba Independent Labor Leader John Queen indicated that a recent raid by Winnipeg police on the headquarters of the Brown Shirt organization, had revealed evidence of a "seditious conspiracy".

On October 30, 1934, an action for group defamation under the new amendment was commenced by Winnipeg barrister W. V. Tobias, against William Whittaker (identified in *The Winnipeg Free Press*, February 14, 1935, as "leader of the Brown Shirted Fascists"). Whittaker was editor of *The Canadian Nationalist*, which in its October 30, 1934 edition, published two articles: "The Murdering Jew, Jewish Ritual Murder" and "The Night of Murder . . . Secret of the Purim Festival". The record of the unreported trial, the sole action brought under the group defamation section in its 31 year history, indicates that an interim injunction granted on November 4, 1934, was made "perpetual" on February 13, 1935, restraining the defendant

. . . from continuing, writing, printing, or causing to be printed, circulating, distributing, or otherwise publishing the libel on the Jewish race and on those professing the Jewish creed, contained in the issue of *The Canadian Nationalist*, Volume 2, Number 6, or any similar libels injuriously affecting those belonging to the Jewish race or professing the Jewish creed.

16. Second ed., p. 828.

17. *Op. cit.*, note 9, p. 767.

18. The Defamation Act, R.S.M. 1954, s. 20. Subsection 1 reads: "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, shall entitle 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." Subsection 4 limits the number of actions to be brought in respect of one libel, to a single action.

The defendant (his printers, originally named as defendants, had been dropped from the case when they tendered apologies and pleaded ignorance of the newspaper's contents) had his defence struck out when he failed to comply with the judge's order for a re-examination. His defence denied his connection with the newspaper and articles in question, and in the alternative, claimed that the publication was privileged as being in the public interest, that the statements were not libellous, and that circulation had been completed before the action was instituted.

So, in its first (and only) test at bar, the Manitoba group defamation section proved effective.

In May, 1964, Toronto barrister and former member of parliament, Arthur Maloney, Q.C., prepared a written opinion<sup>19</sup> embodying his reaction to a suggestion that a Marcus Hyman type amendment to Ontario's Libel and Slander Act<sup>20</sup> might make possible successful prosecution of disseminators of hate mail then active in Ontario. Maloney's reaction raised a constitutional issue not before mentioned during the history of the Manitoba section, to the effect that such an amendment might be unconstitutional on the grounds:

. . . since freedom of speech and freedom of press is involved, legislative jurisdiction upon such classes of subjects belongs to the Parliament of Canada under the peace, order and good government clause and under the criminal law subsection in the British North America Act, and that a provincial legislature has no power to legislate in relation to such classes of subjects.

In this connection, it is significant that the most assiduous proponent of federal government action in the group defamation area has tended to ignore the whole field of provincial civil legislation, and has chosen in its submissions<sup>21</sup> to deal exclusively with the federal area of amendments to the Criminal Code.

On the practical side, Mr. Maloney had this to say regarding the Marcus-Hyman amendment:

I also question whether in the attempt to enforce the provisions of this bill serious procedural problems will have to be faced. Assuming that these problems are overcome and an injunction obtained, the subsequent enforcement of such an injunction may be one of serious difficulty. I should call to your attention the historical fact that the injunction procedure against freedom of speech and of press are similar to the old form of licensing statutes which were not re-enacted after the beginning of the 18th century.

One of the most onerous requirements in any civil defamation suit is the proof of damage. If courts would accept a more imaginative rather than a literal interpretation of the damage requirement, it might be possible

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19. Opinion dated May 28, 1964, prepared by Arthur Maloney, Q.C., of Maloney and Hess, Barristers and Solicitors, Toronto, and submitted to Sydney M. Harris, Q.C., Barrister, National Chairman of the National Joint Community Relations Committee, Toronto. Referred to in *Hansard*, July 24, 1964, p. 5978.

20. R.S.O. 1960, c. 211.

21. Canadian Jewish Congress evidence submitted before the House of Commons, Seventh Session, 21st Parliament, 1952-53, Special Committee on Bill No. 93, "An Act Respecting the Criminal Law", reported in *Minutes of Proceedings* for March 3, 1953; submission of September 3, 1961, to Hon. E. Davie Fulton, Minister of Justice, by Canadian Jewish Congress; and Canadian Jewish Congress Submission referred to in Note. 1.

to sue successfully where the damage suffered fails to meet the more strict, classical definitions.

The field of tort is a constantly expanding one, and while Canadian experience provides small grounds for anticipating any immediate application, a radical suggestion made by two American commentators is nevertheless worth citing. It takes whatever validity it may possess from the greater readiness of American courts to give serious consideration to grounds of mental cruelty in a variety of causes, most frequently matrimonial.

Emotional distress is suggested as containing "the metal of forging a powerful weapon" to defeat the procedural snares that render group defamation so unproductive a head of action.<sup>22</sup> The proponents trace its source to the concept of a "right to privacy", first referred to in an article on relief in defamation cases:

. . . modern enterprise and invention have, through invasions upon his privacy, subjected him (man) to mental pain and distress far greater than could be inflicted by mere bodily injury.<sup>23</sup>

This is now extended to its present recognition as a well-established legal protection of individual freedom:

One, who, without privilege to do so, intentionally causes severe emotional distress to another, is liable for the emotional distress and bodily harm resulting.<sup>24</sup>

When this new tort is wedded to the principle of foreseeability in negligence, a union emerges which recognizes as a "compensable injury the intentional or negligent infliction of mental suffering".<sup>25</sup> There follow in Brown and Stern's article citations of cases in which recovery is sought by individual plaintiffs for the mental suffering involved in being forced to witness the murder of a parent, an illicit solicitation for sexual intercourse, a creditor's stream of threatening letters, and a landlord's threats designed to evict a tenant.

Unfortunately, the authors bridge the gap from the individual to the group-plaintiff by the simple expedient of opining that this ground "should be molded and modified into an action designed to protect group defamation victims".

This begging of the major question hardly provides a basis acceptable to Canadian courts, and the whole concept of mental suffering and cruelty sounds more at home in Reno divorce actions than Canadian civil actions.

The United States may provide a more receptive atmosphere for such novel approaches as Professor Reisman's market researching on the impact of group libel, and Brown and Stern's concept of the mental cruelty action. Plaintiffs seeking redress in Canadian courts would hardly do well to resort to such grounds.

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22. Brown and Stern, *supra*, Note 13, at pp. 27-32.

23. Warren and Brandeis, "The Right to Privacy", (1890) 4 Harv. L. Rev., 193.

24. *Restatement of Torts*, (1948) supp., par. 46.

25. Brown and Stern, *supra*, Note 13.

A recent survey of developments in group defamation in England<sup>26</sup> concludes:

. . . if the reputation of an individual or other legal person is not damaged . . . is there a case for establishing liability for such statements? It is surely another reminder of the fact that not every cause of complaint gives rise to a cause of action. Some friction in daily life is inevitable . . .

How can the Jews of the Negroes commence group defamation actions when the only entities recognized by the common law as having a right to sue are individuals, corporations and registered trade unions? *Markt v. Knight*<sup>27</sup> is authority for the view that a group or unincorporated association of persons cannot sue because they are not legal entities. Officers or members of an association cannot bring an action for defamation of the association, a point decided in *Jenkins vs. John Bull Ltd.*<sup>28</sup> On this aspect of the complex issue involved in particularizing the plaintiff, the criminal offence of defamatory libel meets the same stumbling block as a civil action. *Ex parte Genest v. R.*,<sup>29</sup> a Canadian case, makes it clear that the definition of "person" in the Criminal Code is not sufficiently wide to include an unincorporated group which has no legal entity. The same stumbling block provides a defence to defamers of groups in the United States.<sup>30</sup>

The leading modern case<sup>31</sup> on this subject established that "a class of persons cannot be defamed as a class, nor can an individual be defamed by a general reference to a class to which he belongs". Lord Porter, who delivered the judgment in this case, later headed the Porter Committee,<sup>32</sup> which recommended that "the existing law should not be changed so as to bring group defamation within the scope of a civil action".<sup>33</sup> The Committee explained that it felt ultimate protection in criminal sanctions were adequate:

The most widespread and deplorable examples of Group Defamation at the date at which we commenced our sittings were directed against the Jews; but complaints were also made to us of unfounded vilification of particular trades. It is, we think, symptomatic of Group Defamation that the subject matter varies with current internal and external political trends. Much as we deplore all provocation to hatred or contempt for bodies or groups of persons with its attendant incitement to violence, we cannot 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 exists as an ultimate sanction and we consider that the law as it stands affords as much protection as can safely be given.<sup>34</sup>

26. D. R. Fryer, "Group Defamation in England", 13 *Cleveland-Marshall L.R.*, p. 51.

27. (1910) 2 K.B. 1021, at p. 1040.

28. Quoted in Fryer's article, Note 25, in which parts of a statement of claim in a libel action brought by officers of the Salford Civic League "on behalf of themselves and all other members of the said league" were struck out as regards the members of the league other than the officers. Report in *The Times*, (London), April 20, 1910.

29. (1933) 71 Que. S.C. 385.

30. "Unorganized groups bound together by common race, religion or national origin having no separate economic interest apart from that of its members, lacking an identifiable objective, which loss of public confidence might hamper, are normally incapable of coming to court and defining legally cognizable interests that have been injured by a defamation." Staff Report to the Committee on the Judiciary, House of Representatives, 88th Congress, 1st Session, February, 1963, p. 2.

31. *Krupfer v. London Express Newspaper Ltd.* (1944) A.C. 116.

32. Committee on the Law of Defamation, 1948, cmd. 7536.

33. *Halsbury's Laws of England*, 3rd ed., vol. 24, p. 5, par. 6, note U.

34. Porter Committee Report, *supra*, note 32, paras. 30-32.



These views were supported by *The Times*, which thought that:

. . . the great majority of people in this country will undoubtedly agree that, while conduct of that kind is to be deplored, the present law of seditious libel "affords as much protection as can safely be given", since an extension might savour too much of political prosecution and seriously hamper free and legitimate discussion.<sup>35</sup>

The *Manchester Guardian*, on the same day, wrote:

On Group Defamation . . . the Committee takes the wise line that it cannot be made an offence without curtailing free and frank political discussion. (There is always in the background the law of seditious libel if the peace is seriously threatened). On this subject, too, the best considered American opinion concurs. Examples of group libel laws abroad are a warning, not a recommendation.

Whether the Porter committee represents the common law's last word on easing group defamation into a civil action tort, remains to be seen. Perhaps if experience can show how spurious is the Committee's reliance on seditious libel (Canadian ramifications of which will be explored later), it may at its next confrontation with the problem decide differently. One detects in the Committee's comment more than a token of the spirit which Dean Rostow of the Yale Law School attacked when he wrote:

Men often say that one cannot legislate morality. I should say that we legislate hardly anything else. All movements of law reform seek to carry out certain social judgments as to what is fair and just in the conduct of society.<sup>36</sup>

A Canadian opinion representing the same line of thought, contained in an interview with former Supreme Court Justice Ivan C. Rand quotes him as saying:

We are in danger of becoming fanatical about individual rights. . . We must accept either 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 . . . In this country we are obsessed with the notion that any departure from tradition is fraught with danger. The first objective in this country should be a reconciliation of clashing demands and ideals. When we achieve this objective, we shall be making headway, but we mustn't be in too much of a hurry: advances are slow to become part of tradition.<sup>37</sup>

These thoughts represent a substantial departure from Justice Rand's views in *Boucher v. R.*<sup>38</sup> which will be referred to below. This alteration in view might conceivably be paralleled by similar change in view if another British Parliamentary Committee were to be instructed once again to review group defamation in the common law.

## POSTAL AND CUSTOMS REGULATION

Control of group libel through civil tort actions, then, provides little hope for success in the present state of the law. Before turning to criminal libel legislation, which today is the favored prospective remedy, a word

35. October 21, 1948.

36. *The Sovereign Prerogative*, 1962, p. 79, quoted in an address by Dean W. F. Bowker, Q.C. of the University of Alberta Law School, in his paper on anti-discrimination legislation, Canadian Bar Association, National Convention, Banff, 1963.

37. *Hansard*, July 24, 1964, reference by Marvin Gelber, M.P. to *Toronto Daily Star* report on Dean Rand's retirement as Dean of Law School, University of Western Ontario.

38. *Supra*, note 7.

should be said about prospects for control of the most effective and far-reaching forms of group defamation, hate-mailings, within the framework of regulations of the Post Office Act,<sup>39</sup> and the Customs Act.<sup>40</sup>

Section 7 of the Post Office Act grants to the Postmaster-General unfettered power to prevent mailings of any material he considers to be obscene, blasphemous or seditious. Happily, the Postmaster-General may evade the complex issue of determining whether mail in question is obscene, blasphemous or seditious, since the statute empowers him to prohibit delivery of mail directed to or deposited by a person who, on reasonable grounds, is believed to be committing any offense by means of the mails. Such a prohibition is subject to an appeal to a Board of Review of three nominated by the Postmaster-General, which may revoke or confirm the order, or subsequently revoke it when the Board is satisfied no further wrongful use may be made of the mails. The Board, whose decision is not subject to further appeal, may require an undertaking to be given by the person against whom the order was originally made that he will not further use the mails for the purposes which originally gave grounds for imposing the bar.

Such an interim prohibitory order was made by the Postmaster-General, Hon. J. R. Nicholson, refusing use of the Canadian mails to the National White American Party of Birmingham, Alabama, and the National States Rights Party, two United States disseminators of hate mail in Canada.<sup>41</sup> This action, well within the scope of Section 7 of the Post Office Act, was not initiated without some misgivings, evident in reasons given a few months earlier by the Canada Post Office, Domestic Mails Division, for not taking such action.

This department has always taken the view that it would not be in the public interest for the Post Office to decide, on its own initiative, what expressions of opinion should be permitted to pass through the mails . . . If we were to make an independent decision in one instance we accept the principle of passing judgment and this could lead to the development of censorship based on the personal opinions of postal officials which, we feel, is something which would not be acceptable in a democratic country. In our opinion, decisions as to whether propaganda is subversive, seditious or otherwise should be made by the courts. If the Courts decide that the material concerned contravenes the law, this department will then support the action taken by the law enforcement officials, by prohibiting the use of mails to the distributors.<sup>42</sup>

An interesting constitutional aspect arises here. Recourse to the courts seems to be favored in the U.S. as the ultimate remedy in defense of civil liberties. It was generally presumed that the Canadian tradition favored recourse to Parliament. Yet here we see a statutory agency seeking to shift responsibility to the courts.

It would appear that the misgivings entertained by the Post Office over its role as censor might be lightened were the Post Office Act to con-

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39. R.S.C. 1952, c. 212.

40. R.S.C. 1952, c. 58.

41. *Hansard*, September 28, 1964.

42. Letter to the author from F. Pageau, Director of Postal Rates and Classification, Domestic Mails Division, Canada Post Office, Ottawa, June 17, 1964.

tain the same provision for right of appeal to a court or judge, as is available under Section 45 of the Customs Act. Where goods are classified as prohibited under that Act<sup>43</sup> persons affected may appeal to the Tariff Board and then to the Exchequer Court. Sections 158 to 166 of the Customs Act lay down procedures to be followed where seizure or forfeiture has been incurred under authority of the Deputy Minister, reposing with the following courts the power to render decisions: In Quebec, a Judge of the Superior Court; in Newfoundland, a Judge of the Supreme Court; in the Yukon Territory, a Judge of the Territorial Court; in the Northwest Territories a stipendiary magistrate; in any other province, a judge of the county or district court. These sections provide for further appeal to a Court of Appeal, as such court is designated in Section 2 of the Criminal Code.

Thus it would seem that protests voiced<sup>44</sup> over the inability of the Post Office to ban hate mailings from the United States while the Customs officials successfully seized books classified as obscene, were satisfactorily answered by this action of the Postmaster-General. It should be noted that this discretionary power was exercised only following intensive protests.

The National States Rights Party appealed to the Postal Board of Review in November. The Postmaster-General, on October 28, 1964, reported on the composition of the Board of Review.<sup>45</sup> The Chairman named was Mr. Justice Dalton Wells of the Court of Appeal of Ontario, and the two other members were Mr. Roderigue Bedard, Q.C., Associate Deputy Minister of Justice, and Mr. G. Douglas McIntyre, of the Department of National Revenue. Both in the composition of the Board of Review, and in the inability of the Postmaster-General to reply in advance to a question in the house as to whether hearings would be public or in camera, (they were public), one detects the abundant caution with which this board has been constituted, and the fact that such hearings must have been without precedent in the experience of the government. It would

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43. Specific reference for the purpose of this article would be to item 1201 under Schedule "C", which reads: "books, printed paper, drawings, paintings, printed photographs, or representations of any kind of a treasonable or seditious or of an immoral or indecent character."

44. See: Edinborough, "Censorship", *Saturday Night*, Toronto, May, 1964, containing a lengthy list of books prohibited under item 1201 in an instruction issued September 22, 1958, by George Nowlan, then Minister of National Revenue; Edinborough, "This Month", *Saturday Night*, Toronto, April, 1964, complaining that books are effectively (but in his opinion unjustifiably) banned from entry to Canada, while "mass mailings of hate literature—printed material of vilest sort" are not barred from the mails; Inter-Office Information No. 408 of the National Joint Community Relations Committee, Toronto, March 20, 1964, Page 2, alleging "Scurrilous and vile anti-Semitic matter has been inspected and passed through the Canadian Customs in quite recent weeks"; Canadian Jewish Congress submission (*supra*, note 1) alleging: "The advice given us (by several Postmasters-General in succession) was "to bring the alleged objectionable material to the attention of the Attorney General of the province in which it originates. If the Attorney General is of the opinion that the material contravenes the provisions of the Criminal Code he can take definite and effective action through the Courts to prevent its further distribution." (This seems a barren suggestion when the material originates in the United States and is anonymous.) The following persons, in letters to the writer, have all concurred, with varying degrees of certitude, that no materials yet examined provide reasonable grounds for a successful prosecution: E. L. Martin, Supt., Officer in Charge, Criminal Investigation Branch, Royal Canadian Mounted Police, Ottawa, July 10, 1964; Magistrate Charles O. Blick, Chairman, Board of Commission of Police, Toronto, July 28, 1964; T. A. MacDonald, Assistant Deputy Minister of Justice, Ottawa, writing regarding Ontario Attorney General's Department, September 30, 1964; and W. C. Bowman, Director of Public Prosecutions, Department of The Attorney General, Ontario Government, July 3, 1964.)

45. *Hansard*, October 28, 1951, p. 9521.

almost appear that the Post Office hoped to clothe its Board of Review with the irreproachable judicial dignity that clothes the appeal procedures laid down in the Customs Act.

On February 11, 1965, the Board of Review reported its decision<sup>46</sup> back to the Postmaster-General advising that the interim prohibitory injunction should be made permanent. The reasons advanced are an interesting further demonstration of the circuitous route travelled. The offensive literature is condemned as scurrilous, and the Criminal Code's Section 153 is invoked to justify the ban which, the authors concede, "lacks the binding power of a judgment".

A second interim injunction granted against "Natural Order", another organization accused of disseminating anti-Semitic pamphlets, was appealed to a second Post Office Board of Review in June, 1965. The individual defendants, David Stanley, of Toronto originally, but latterly of Vancouver, and John Ross Taylor, of Gooderham, Ontario, were also defendants in the previous Board of Review. The second interim order was made final, and on August 21, 1965 The Toronto Telegram (p. 1) carried a public confession of error and disavowal of anti-semitism by David Stanley.

A leading American case on the postal aspect of group defamation first raised a question as to the nature of the mailing privilege.<sup>47</sup> The judgment contained the following view:

There is no substantial question of liberty or freedom of speech involved in this case. The unrestricted use of the mails is not one of the fundamental rights guaranteed by the Constitution—with this comprehensive control over the subject which Congress undoubtedly possesses, it is idle to say the liberty of the citizen and his freedom of speech in the proper sense of those terms are denied or abridged by a statute forbidding the deposit in the mails of anything upon the exposed surface of which appears language scurrilous, defamatory, or threatening or calculating and obviously intended to reflect injuriously upon the character or conduct of others. Liberty and freedom of speech under the Constitution do not mean the unrestrained right to do and say what one pleases at all times and under all circumstances, and certainly they do not mean that contrary to the will of Congress one may make of the post office establishment of the United States an agency for the publication of his views of the character and conduct of others . . . The very idea of government implies some imposition of restraint in the interest of the general welfare, peace, and good order. The statute under consideration is a part of a body of legislation which is being gradually enlarged, and which is designed to exclude from the mails that which tends to debauch the morals of the people, or is contrived to despoil them of their property or is an apparent, visible attack upon their good names.

In a 1944 comment on this case<sup>48</sup>, the following views are expressed:

If Congress can prohibit the use of the mails to material containing libellous, defamatory and scurrilous statements appearing on the outside wrappers, then it can also prohibit the use of the mails to matter containing libel and defamation which is not apparent from an inspection of the envelope or the wrapper. Libel and defamation would in this respect be treated like obscene matter. In Section 335 of the Criminal Code Congress has prohibited the mailing of material on which lewd, lascivious or obscene matter appears, from the mails.

46. Minutes of Proceedings and Evidence No. 38, Standing Committee on External Affairs, March 12, 1965.

47. *Warren v. U.S.* 183 Fed. 718, 720-1 (C.C.A. 8th, 1910).

48. Perlman and Ploscowe, "False Defamatory Anti-Racial and Anti-Religious Propaganda and the Use of the Mails", 4 Law. Guild Rev. 13-14, January-February, 1944, p. 22.

This would seem to provide the relevant theoretical rejoinder, from proponents of wider Post Office Department powers, to the censorship qualms once again aired by the Postmaster-General in the House of Commons<sup>49</sup> when he said, in reply to a question in parliament by D. Orlikow, M.P.:

Perhaps we should look back on history. It will be recalled that the privacy of the royal mails has always by law and practice been sacrosanct . . . In time of peace post office officials have never had the right to act as censors, to open deliverable letters and, more important, to decide what is objectionable or unacceptable correspondence. I believe that we in this house must make very sure that any action we may take to suppress the transmission of hate literature is not likely to result in a situation where government officials, with no trained jurists to guide them—would be called upon to exercise censorship of the mails and to impose their ideas of morality upon the public at large. I believe that legislation which would permit such a situation would be striking a blow at the very roots of our freedom of speech and expression. If today we decide it is illegal to express an opinion about a religious sect or group, then tomorrow why should we not make it illegal to attack a political party or to question the authority of the government? If there is one thing I have learned in the few months I have been Postmaster-General, it is that the post office is really a service organization; it is in the business of carrying the mails expeditiously. It is not our responsibility or our business to decide what opinions are legal or illegal. Surely that is a matter for the courts. And when the courts have made the decisions as to what is right or wrong and what should or should not be distributed, then I can assure you, Mr. Speaker, the post office will exert every reasonable effort to carry that decision into effect when it has to do with the use of Her Majesty's mails.

The Postmaster-General further indicated that even when justified, postal censorship has its pragmatic drawbacks:

. . . namely, that it drives these people underground and they seek the protection and privacy of the first class mail, which we cannot open. We cannot under such circumstances even perform the service we are performing now, if they resort to that practice. When this happens we have a very limited course of action open to us.

There is a wide gap between barring mails to a specific mailing organization, or closing post office boxes to them, and examining the contents of sealed letters in an attempt to determine if the contents are scurrilous or otherwise defamatory. The dilemma alluded to by the Postmaster-General is a very real one, for it converts the whole issue into an economic one: the impecunious hate group reduced to using second class mails, or unwary enough to print a return address may find itself subject to an interim prohibitory injunction. The wealthier hate group, able to use first class mails, will remain beyond the reach of the law.

The issue of opening envelopes to examine their contents was raised in an unreported case in England this past year, involving charges against a former member of the Exeter branch of the National Socialist Party, who sent packets through the mails containing "words and designs of a grossly offensive nature". He was fined five pounds on each of three counts. The newspaper report of the case<sup>50</sup> does not specify if the offensive material was on the wrapper, or in the enclosures, but a subsequent news-

49. *Supra*, note 45, p. 9158.

50. *Express and Echo*, Exeter, Devon, March 19, 1964.

paper account clarifies this issue when it reports the accused winning his appeal in the Exeter Quarter Sessions against the conviction referred to.<sup>51</sup> Grounds of his acquittal were that the postal act under which he was convicted referred to offensive matter on the outside of the envelope, and not to the contents. The same accused had previously been bound over to keep the peace and fined ten pounds for a similar offense, involving mailing of hand-drawn swastikas, also apparently enclosures in sealed packets.<sup>52</sup>

The Postmaster-General of Canada has not raised the possibility of hate groups seeking postal distribution privileges for bulk distribution of un-addressed circulars to householders along delivery routes, but an application for such service was made last year by the British National Party. This scheme is new in England, the unique thing being that the circulars are not addressed to any individual householder or to any individual address, but are delivered to each house or building in the area, or possibly to every alternate or third house, as the sender requests. The practise is well-established in Canada, patronized frequently by political and commercial advertisers.

There was considerable concern by the Labor Party, then in opposition, when the scheme was introduced, and the British Postmaster-General made it quite clear that circulars advocating racial hatred would not be accepted.<sup>53</sup> Because of this restriction, one of the hatemongering organizations, the British National Party, was unable to proceed with a scheme for distribution of circulars attacking colored immigration.<sup>54</sup>

One incident involving denial of such bulk mail privileges to a British political party, occasioned the following press comment<sup>55</sup>, which sought to explain the British Labor Party's opposition to the bulk mail scheme:

Labor opposition to the scheme was inspired by the decision of a private organization to circulate leaflets against nationalisation, and thus potentially harmful to the interests of the Labor Party. This attitude reeks of political censorship pure and simple. The principle of freedom of communication must be upheld, and it must apply as much to the household delivery service as to any other service. It is disturbing to think that the Labor Party has attempted, fortunately without success, to whittle down this right.

Restrictions imposed by the British General Post Office under this scheme would not cover dissemination of hate literature in sealed or even in open envelopes where the circulars are individually addressed.

American legislation, embodying a cumbersome procedure available to individuals for barring "morally offensive mail" at the request of the recipient, was passed by the House of Representatives July 21, 1964,<sup>56</sup> but as of September 30, 1964, remained in the Senate Post Office and Civil Service Committee, both of which planned "no action on it at this writing".<sup>57</sup>

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51. *Op. cit.*, May 1, 1964.

52. *Op. cit.*, December 13, 1964.

53. *Hansard*, Imperial Parliament, Commons, January 29, 1964.

54. *Liverpool Echo*, February 1, 1964.

55. *Yorkshire Post*, May 4, 1964.

56. H. R. 319—Protection of Postal Patrons from Morally Offensive Mail Matter.

57. Letter to the writer from A. L. Frazer, Chief Clerk, United States Senate, September 30, 1964.

## CRIMINAL LAW

Remedies in criminal law rest on the tendency of libel to promote breaches of the peace. This could come about in two ways: either through direct response to the exhortatory nature of the appeal to members of the public involving an assault on the object of vilification; or by the violent reaction of those vilified leading to assault upon the disseminators of the libel.

Strong and repeated submissions have been made since 1961 by the Canadian Jewish Congress<sup>58</sup> seeking amendments to the Criminal Code that would enable court action to be taken against disseminators of hate literature labelling groups.

The stress has been on the Criminal Code because of the proven inability of defamation actions in tort to deal with a group plaintiff. Less explicit has been the conviction that federal legislative amendment would prove more effective than provincial legislation. This latter point was contradicted in the United States House of Representatives Staff Report on proposed federal libel legislation,<sup>59</sup> where it was suggested that the (then) 48 states provided<sup>60</sup> separate laboratories for experimental legislation. This was cited in opposition to federal legislation. In Canada, according to a recent study of civil liberties,<sup>60</sup> experience has proven that provincial legislation, more likely influenced by local prejudices, is less to be relied on in this field than federal legislation. The volume quotes retired McGill Law School Dean Frank Scott to the effect that human rights are less likely to be curtailed by the Federal Parliament than by provincial legislature, because Ottawa is more representative of the country as a whole.

The views of the Canadian Jewish Congress, originally submitted to the government as long ago as 1953, were recently examined, at the suggestion of Opposition Leader John Diefenbaker, by two independent barristers, John J. Robinette, Q.C., and Arthur J. Maloney, Q.C. of Toronto. The original Congress proposals, together with the opinions of the two lawyers, were then discussed in detail in parliamentary debate.<sup>61</sup> The following digest is based on the record in *Hansard* for that date, as well as the original submissions.

A major suggestion in the Congress submission is that something in the nature of a compromise with the classic definition of sedition should be restored. The classic (and now discarded) definition refers to language calculated to promote feelings of ill will and hostility between different classes of Her Majesty's subjects. Currently, it is only language showing an intent to result in an attack on the authority of the government that qualifies as seditious. The Canadian Jewish Congress urges that language

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58. Minutes of Proceedings and Evidence, No. 2, before House of Commons Special Committee on Bill 93, "An Act respecting the Criminal Law and All Matters Pertaining Thereto", March 3, 1953, pp. 55-59; subsequent suggestions made to Ministers of Justice Hon. Stuart Garson, Hon. Davie Fulton, Hon. Donald Fleming, Hon. Lionel Chevrier, and Hon. Guy Favreau.

59. Committee on the Judiciary, House of Representatives, 88th Congress, First Session, February, 1963.

60. D. A. Schmeiser, *Civil Liberties in Canada*, Oxford, 1964, p. 35.

61. *Hansard*, July 24, 1964, p. 5978.

going beyond mere ill will and hostility but calculated to incite violence against different classes (without necessarily threatening the State's authority), be brought under the definition of sedition, and incorporated in a new section to be known as Section 62A, to read as follows:

Everyone who publishes or circulates or causes to be published or circulated, orally or in writing, any matter intended or calculated to incite violence or provoke disorder against any class of persons or against any person as a member of any class in Canada, shall be guilty of an indictable offence and liable to imprisonment for two years.

It is worthy of note that the penalty for all other seditious offences is stated as fourteen years.

The Canadian Jewish Congress is strongly convinced that incitement to violence against classes of Her Majesty's subjects, without going further and requiring that this hostility result in an attack upon the authority of the government should be grounds for an indictment under the Criminal Code. In its first appearance before a Parliamentary Committee, the organization's delegation included one member<sup>62</sup> who went further, and urged restoration of the more embracing "ill will and hostility" constituent of sedition, which he called "the pristine glory of what we felt was the common law".

Reisman<sup>63</sup> refers to this element in the following words:

The individualistic temper of the 19th century, the philosophy of *laissez faire*, reinforced in the field of libel by memories of the Star Chamber, pre-revolutionary abuse, and the Sedition Act of 1798, the faith in the rationality of discussion and a feeling justified by national security, that talk and writing was pretty unimportant, the apparent lack of class conflict on the European scale until the 20th century . . . these factors . . . not only killed seditious libel, but have contributed to the slow but complete desuetude of criminal libel not involving attacks upon the state.

By unravelling Reisman's account of the desuetude into which seditious libel has fallen, we might reconstruct the contemporary set of circumstances that might conceivably make restoration of the wider definitions of this head of crime, palatable to a more enlightened age. We have indeed moved away from the 19th century's reliance on *laissez faire*, as a social panacea; we no longer repose absolute faith in the efficacy of rational discussion, having noted how passions may be stirred by irrationality; we have a healthier respect for the impact of speech and writing, amplified by communications, and technology, as part of the arsenal of a combatant; no part of the world has so strong a sense of national security as prevailed a century ago; and class and other conflicts did, in fact, materialize in the twentieth century, on an unprecedented scale. If the absence or obverse of these factors, once accounted for the desuetude into which seditious libel as a remedy had fallen, their re-emergence might be cited in justification of a demand for restoration of the older, broad view of sedition, although the Canadian Jewish Congress brief makes no such official demand.

62. H. M. Myerson, Q.C., Montreal.

63. *Supra*, note 9, p. 746, M.I.



Such prospects are dimmed by the universally respectful hearing accorded Rand, J., in his reasons for judgment in *Boucher v. R.*,<sup>64</sup> a watershed decision in civil rights in Canada, which established that mere incitement to hostility between population elements without raising challenges to constituted authority is not and has never constituted a breach of the Canadian Criminal Code. Relevant portions of this much-praised judgment read as follows:

The crime of seditious libel is well known to the Common Law. Its history has been thoroughly examined and traced by Stephen, Holdworth and other eminent legal scholars and they are in agreement both in what it originally consisted and in the social assumptions underlying it. Up to the end of the 18th century it was, in essence, a contempt of words of political authority or the actions of authority. If we conceive of the governors of society as superior beings, exercising a divine mandate, by whom laws, institutions, and administrations are given to men to be obeyed, who are, in short, beyond criticism, reflection or censure upon them or what they do implies either an equality with them or on accountability by them, both equally offensive. In that lay sedition by words and the libel was in written form. But constitutional conceptions of a different order making rapid progress in the 19th century have necessitated a modification of the real view of public criticism; and the administrators of what we call democratic government have come to be looked upon as servants, bound to carry out their duties accountably to the public . . . and just as in the 17th century the crime of seditious libel was a deduction from fundamental conceptions of government, the substitution of new conceptions, under the same principle of reasoning, called for new conclusions . . .

As early as 1839 in *Rex v. Veale* 9 C. & P. 431, Littledale, J. in his charge to the jury, laid it down to the jury that "you are to consider . . . whether they meant to excite the people to take the power into their own hands, and meant to excite them to tumult and disorder; the people have a right to discuss any grievances they have to complain of but if they do, must not do it in a way to excite tumult", which Stephen in Vol. 2, of his *History of the Criminal Law* at page 375 sums up: "In one word, nothing short of direct incitement to disorder and violence is a seditious libel. The definition of seditious intention as formulated by Stephen, summarised, is (1) to bring into hatred or contempt, or to excite disaffection against the King, or the Government or Constitution, of the United Kingdom, or either House of Parliament or the administration of justice; or (2) to excite the King's subjects to attempt, otherwise than by lawful means, the alteration of any matter in Church or State by law established; or (3) to incite persons to commit any crime in general disturbance of the peace; or (4) to raise discontent or disaffection among His Majesty's subjects; or (5) to promote feelings of ill-will and hostility between the different classes of such subjects . . .

There is no modern authority which holds that the mere effect of tending to create discontent or disaffection among His Majesty's subjects or ill-will or hostility between groups of them, but not tending to issue in illegal conduct, constitutes the crime, and for these reasons.

Freedom in thought and speech and disagreement in ideas and belief, on every conceivable subject, are the essence of our life. The clash of critical discussion on political, social, and religious subjects has too deeply become the stuff of our daily experience to suggest that mere ill-will as a product of controversy can strike down the latter with illegality. A superficial examination of the word shows its insufficiency: What is the degree necessary to criminality? Can it ever, as mere subjective condition be so? . . .

. . . Similarly, in discontent, affection and hostility: As subjective instruments of controversy, they and the ideas which arouse them are part of our living which ultimately serve us in stimulation, in the clarification of thought and, as we believe, in the search for the constitution and truth of things generally.

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64. (1951) S.C.R. 265, at pp. 285-289.

Although Stephen's definition was adopted substantially as it is by the Criminal Code Commission of England in 1880, the latter's report in this respect, was not acted on by the Imperial Parliament, and the Criminal Code of this country, enacted in 1891, did not incorporate its provisions. The latter omits any reference to definition except in section 133 to declare that the intention includes advocacy of the use of force as a means of bringing about a change of government and by section 133A that certain actions are not included. What the words in (4) and (5) must in the present day be taken to signify is the use of language which, by inflaming the minds of people into hatred, ill-will, disaffection, 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; Phillimore, J., in *R. v. Antonelli*, 70 J.P.4, "seditious libels are such as tend to disturb the government of this country . . ."

The baiting of denouncing of one group by another or others without an aim directly or indirectly at government, is in the nature of public mischief: *R. v. Leese & Whitehead* 85 Sol. Jo. 252.; and incitement to unlawful acts is itself an offence.

Against this tide, Toronto M.P., Marvin Gelber, sponsored Bill C-16, entitled: "An Act to Amend the Criminal Code (Disturbing the public peace)," which had its first reading on April 8, 1965. His explanatory note frankly avows his intention to reinstate the excluded conception of sedition, and justifies it with the following argument:

The Victorians viewed society as a sum total of individuals whose rights are protected by law. The present day view of the modern state is that of a plural society composed of individuals and also groups and associations through which members express themselves. The same individual is associated at the same time with different combinations of people in his church, in his trade union, his political party, his ethnic group, his service club, his veterans club, his school and his sports organization. He meets Canadians with similar and also dissimilar backgrounds and interests. Our law must take groups into consideration as well as individuals and the purpose of this Bill is to recognise this added need of a peaceable society. The command of the great common law is that you must keep the peace. The *Criminal Code* of Canada must in future say this even better than it does.

"The distinction between sedition and treason consists in this: that though the ultimate object of sedition is a violation of the public peace, or at least such a course of measures as evidently engenders it, yet it does not aim at direct and open violence against the laws or the subversion of the constitution." (Bouvier's Law Dictionary).

To effect his purpose, Mr. Gelber would add to the definition of "seditious intention" as given in Section 60 of The Criminal Code, the willful promotion of "hatred or contempt against any group of persons or any person as a member of any group in Canada."

The *Boucher* decision has been compared to the similar American "clear and present danger" doctrine enunciated by Holmes, J.<sup>65</sup> as follows:

The question in every case is whether the words 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 evils that Congress has a right to prevent.

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65. *Schenk v. United States* (1917) 249 U.S. 47, at p. 52.

In a concurring interpretation of this doctrine by Brandeis, J., in the *Whitney* case<sup>66</sup> requisites for interfering with free speech under this heading are stated to be that the situation must be an emergency, and the danger apprehended so imminent that it may:

befall before there is opportunity for a full discussion. Even imminent danger, when not wedded to a relatively serious evil, is insufficient to justify suppression. The fact that the speech is likely to result in some violence or in destruction to property is not enough to justify its suppression. There must be the probability of serious injury to the state.

Eleven years after he had appeared at the Special Commons Committee where the Canadian Jewish Congress first presented its views, and one of its spokesmen asked for reinstatement of the older version of seditious libel, Professor Bora Laskin took the trouble to clarify the record and dissociate himself from this portion of the submission.<sup>67</sup>

Again, on May 29, 1964, the Canadian Jewish Congress urged upon the Minister of Justice the advisability of partially reversing this trend and adopting its compromise definition of sedition.<sup>68</sup> They cited in support a statement of the British Home Secretary, Mr. Henry Brooke, speaking in Parliament on measures against race hatred<sup>69</sup> to the effect that he "had reminded the House of the existence of the Common Law misdemeanor of sedition", adding that "this, of course, extends to the stirring up of hatred or hostility on the grounds of race as well as on other grounds."

Counterbalancing this is Mr. Maloney's opinion that following the *Boucher v. R.* decision, there can be no successful prosecution of the publisher of hate mailings under Sections 60-62 of the Criminal Code. He goes further in raising doubts that the literature he has seen could be held to promote breaches of peace or violence against Jews.<sup>70</sup>

Mr. Maloney also feels that public mischief involved in baiting of one group by another does not constitute that mischief contemplated under Section 120 of the Criminal Code as presently enacted. Mr. Robinette agrees that it is too narrow for application to hate literature, applying only to situations where a person, with intent to mislead, has caused a police

66. *Whitney v. California* (1927) 274 U.S. 347, at pp. 377-378.

67. Professor Laskin, in the 1953 submission referred to above stated: "... the sedition section carries a penalty of fourteen years imprisonment but we suggest that retaining the element of incitement to violence, constituting that as an offence, but withdrawing it from the sedition section, would more closely tie it up also with what was more commonly the understanding of the common law offence of public mischief, and that is why it appears in the form in which we have it, punishable by imprisonment for two years."

In a letter to the writer of this article, dated, September 30, 1964, Professor Laskin clarifies the distinction between the proposed offence of incitement to violence against groups, and the scope of sedition expanded from the narrow confines to which the *Boucher* decision has relegated it. He wrote: "I did not feel then, nor do I feel now, that any constitutional or other protection should be given to incitement to violence. I have stoutly maintained that it is unwise to go beyond incitement to violence. The only qualification that I would countenance is an amendment to the Criminal Code, Section 166 that will define Public Interest to embrace hostility against a group of a particular race or nationality or ethnic origin, or color or religion."

68. Letter from Canadian Jewish Congress, Executive Vice-President, Saul Hayes, Q.C., to the Hon. Guy Favreau, Minister of Justice, May 29, 1964.

69. *Hansard*, Imperial Parliament, Commons, May, 1964.

70. Letter from Arthur Maloney, Q.C., of Maloney & Hess, Toronto, to S. Harris, Q.C., National Chairman of Joint Community Relations Committee, Toronto, dated May 28, 1964, citing letters and pamphlets of the National White American Party.

officer to enter upon an investigation by that person projecting suspicion on some other person, by falsely reporting an offense to have been committed, or by falsely accusing another person of committing an offense.

Messrs. Maloney and Robinette raise other possibilities, only to discard them. These include applying Criminal Code sections 248 (defamatory libel), 366 (intimidation), 407 (inciting persons to commit indictable offences), 408 (2) (dealing with criminal conspiracies), and 153 (mailing obscene or scurrilous material.) Apparently the Canadian Jewish Congress earlier shared their view, for none of these sections is held in their briefs to provide a cure. On the specific subject of Section 153, the Congress did raise a question in its May 12, 1964 brief as to whether judicial interpretation of the word scurrilous would be wide enough to curb hate mailings, but avoided a detailed analysis at that time of the utility of this section because other avenues besides mails are used for distribution of the offensive materials. Returning to this subject in its letter of May 29, 1964 to the Minister of Justice, the Congress did suggest the following amendment to the Section 153 prohibition on use of mails for anything scurrilous, immoral, obscene or indecent:

. . . material a principal purpose of which is to promote hatred of or hostility against a group of persons by reason of their particular race, nationality, or ethnic origin, color or religion.

There follows an exculpatory paragraph exempting from the application of the foregoing all statements examining controversial social, political, economic subjects or religious beliefs or opinions.

Whether or not an expanded interpretation of the word "scurrilous" would in itself enable the Post Office to bar the mails to the literature under review, was discussed in a statement made at the November 23-27 Post Office Board of Review hearings, by S. M. Harris, Q.C., who attended the hearings on a watching brief as counsel for the Canadian Jewish Congress. Mr. Harris suggested that the definition of scurrilous as "unjust denigration", which he had found in one dictionary, might justify barring the mails to material not necessarily couched in vulgar, coarse or offensive language. He said:

Criticism couched in decent, honest language might not be scurrilous, but when expressed in foul or disgusting terms, even true statements become scurrilous; all the more are one-sided opinions based on discredited evidence, incomplete research, out of context and incomplete quotations, to be considered scurrilous, and, therefore, unmailable.

The looseness of his criteria for assessing statements would seem to mitigate against their acceptance.

This wider view was rejected in the previously cited opinion of Mr. Robinette<sup>71</sup> who cited the more normal connotation of "scurrilous" as implying coarseness or indecency in language. Referring to Section 153,

71. Opinion of John J. Robinette, Q.C., of McCarthy and McCarthy, Toronto, Ontario, in a letter to S. Harris, Q.C., dated May 1, 1964, p. 3: "The dictionary meaning of 'scurrilous' is characterized by coarseness or indecency of language, especially in jesting or invective; coarsely opprobrious or jocular."

he maintained that "scurrilous" takes on a colour of meaning from the use with it of the words "obscene, indecent and immoral":

. . . in a penal statute, . . . the rule is that the provisions . . . will be strictly construed in favour of an accused person. . . . I do not think that it could be shown beyond a reasonable doubt that the "hate literature" is scurrilous in the sense of being couched in coarse, or indecent or gross language.

The "clear and present danger" American rule, as well as the *Boucher* decision, were presaged in *R. v. Trainor*, a 1916 Canadian case.<sup>72</sup> Here, referring to talk alleged to be treasonable in wartime, Stuart, J., held that the "courts should not, unless in cases of gravity and danger, be asked to spend their time scrutinizing with undue particularity the foolish talk in bar rooms".

A reversal of this liberal line set in during the socialist agitation accompanying post-war economic dislocation, and in *R. v. Russell*<sup>73</sup> and *R. v. McLachlin*<sup>74</sup> strike leaders were convicted of uttering seditious words on grounds since discarded by the *Boucher* decision. Legislation embodying this repressive spirit had been introduced into the Criminal Code in 1919<sup>75</sup> in a section prohibiting "Promoting Changes by Unlawful Means", (ultimately repealed in 1936.<sup>76</sup>) The section established a scale of sentences from five to twenty years for attendance at meetings of, renting premises to, or publicly supporting associations held to be unlawful. Its definition of an unlawful association encompassed the objects of bringing about economic, industrial or governmental change in Canada by force, violence, or terror, or the threat of such means, or the advocacy or defense of such means. Dean Bowker notes that a similar statute was passed by the United States Congress four years after Canada repealed hers, and still remains in force.<sup>77</sup>

Related to government suppression of free speech through the interdiction of unlawful associations, is the control of unlawful assemblies, as in England, by the Public Order Act of 1936. Motivated primarily by a desire to suppress Communist and Fascist movements, the Act was directed against:

. . . any person who in any public place or at any public meeting uses threatening, abusive, or insulting words or behavior with intent to provoke, or by which, a breach of the peace is likely to be occasioned.

The Act was invoked in 1963 in connection with provocative statements by Colin Jordan at a British Union of Fascists meeting. In the course of his decision, Lord Parker said he could not "imagine any reasonable citizen, certainly one who was a Jew, not being provoked beyond

72. (1917) 1 W.W.R. 417.

73. (1920) 1 W.W.R. 624.

74. (1924) 31 C.C.C. 249.

75. S.C. 1919, c. 4, s. 1.

76. S.C. 1936, c. 29, s. 1.

77. Dean W. F. Bowker, "Basic Rights and Freedoms—What Are They?" (1959) 37 Can. Bar. Rev. 43, at p. 45.

endurance, and not only a Jew, but a coloured man". A British commentator calls the Public Order Act a "clumsy weapon to use as presently defined",<sup>78</sup> and goes on to echo the sentiment of the Canadian Jewish Congress in urging that the "common law offense of sedition be brought up to date and placed on a statutory footing . . . and should clearly include incitement to religious and racial hatred".

In addition to the Canadian Jewish Congress submissions and Bill C-16, Parliament has had before it for consideration three other private members' bills aimed at hate literature, two of which received their first reading on February 20th, 1964 (and again on April 8th, 1965), and both of which were referred on October 23, 1964, to an inquiry by the Standing Committee on External Affairs, and one presented in June, 1965.

Bill C-21, "An Act Representing Genocide", introduced by Milton Klein, M.P., for Cartier, has been related to the hate literature discussion, though its title would seem to extend far beyond the requirements of any such desired legislation. Mr. Klein has referred to his bill in the following words:

The hope of the Bill was that public discussion will take place on the question of group libel as it affects all ethnic groups.<sup>79</sup>

The Bill aims to provide effective remedies in Canada for the United Nations Convention on the Crime of Genocide, which was approved by both houses.<sup>80</sup> The two main sections stipulate that: infliction of mental harm with the intent to destroy part of a group carries a penalty of ten years; exposing a group to hatred, contempt or ridicule by words or otherwise carries a penalty of five years; and aiding and abetting carries with it penalties of two to ten years.

These rigorous terms imposed for acts which fall short of the incitement to violence which the Congress submissions favor, have drawn some criticism in the Eastern Canadian ethnic press<sup>81</sup> as destroying prospects for gaining the sought-after Criminal Code amendments, while attempting something far more rigorous and consequently less realistic. One critic sees the Klein Bill as providing potential weapons in the struggle between French-Canadian and Anglo-Saxon cultures in Eastern Canada<sup>82</sup>. In its September 8, 1961 submission to the then Minister of Justice, The Hon. Davie Fulton, the Canadian Jewish Congress did note that while the Criminal Code provides sanctions and penalties for acts of Genocide, contracting parties, Canada among them, are bound by Article 1 of the Genocide Convention to prevent Genocide. The Congress submission continues:

It would appear then that there exists a commitment on the part of Canada by reason of its ratification of the Genocide Convention to have a look at its

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78. Fryer, *op. cit.*, *supra*, note 26, at p. 51.

79. "An M.P. Speaks His Mind", *Canadian Jewish Chronicle*, Montreal, Vol. 50, No. 2, July 17, 1964, p. 1.

80. Explanatory note to Bill C-21, 26th Parliament, 13 Eliz. II, 1964.

81. "Why Congress Did Not Support the Klein Bill," *Canadian Jewish Chronicle*, Montreal, Vol. 50, No. 8, August 28, 1964, p. 1.

82. *Ibid.*

Criminal Law so as to determine whether it can deal effectively even with such "loose talk" about future needs for concentration camps in Canada, in which one man engaged over the medium of a national T.V. network and which might well be repeated by someone who would have to be taken more seriously.

Bill C-43, introduced by D. Orlikow, M.P., is entitled "An Act to Amend the Post Office Act (Hate Literature)" and would add to Section 7 (1) of the Post Office Act as specific reference to mailed group libel as matter giving the Postmaster-General grounds for barring use of the mails (subject to the appeal procedure outlined previously). The new section suggested reads:

(1a) Every one is deemed to commit an offence within the meaning for the purpose of subsection (1), who makes use of the mails for the purpose of transmitting or delivering anything that is calculated to bring into hatred, ridicule, or contempt, any person or group of persons by reason of race, national origin, colour or religion, but this subsection does not apply to a person who makes use of the mails for the purpose of transmitting or delivering anything mentioned in subsection (4) of Section 151 of the "Criminal Code".

The exceptions alluded to are references to privilege in printing law reports, and technical legal and medical publications.

On June 15, 1965 first reading was granted to Bill C-117, submitted by W. B. Nesbitt, M.P., dealing with "group defamatory libel", adding a group defamation clause to S. 248 of The Criminal Code. Mr. Nesbitt's explanatory note reads:

Because such hate propaganda is in many cases the expression of a sick mind, the bill further proposes that any person charged or convicted of publishing such a libel shall be placed under mental observation to determine whether he is mentally ill.

Mr. Maloney suggested a somewhat different approach:

I am of the opinion that if legislation is required, there should be a new section added to the Criminal Code dealing specifically with this kind of hate literature and that an analogy should be found under Section 150 and the recent amendment dealing with "crime comics". This section contains within its safeguards which preserve our fundamental vital freedom of speech and press and it is a precedent which was recently established and to which no objection could be taken as might be taken in the case of any amendments to the sections dealing with criminal defamation or sedition or with the meaning of words "public interest".

The crime comic section has not excited such unalloyed praise as to warrant strong reliance on its efficacy. Schmeiser calls it "totally unsatisfactory" and holds that in its current formulation the section could be applied to every western or detective comic on the market, whether intended for adult or child.

The other expert counsel consulted, John J. Robinette, approved the Congress proposal to restore incitement to violence between classes of Her Majesty's subjects, as grounds for an indictment for seditious libel.

Another Section of the Criminal Code to which the various Congress submissions refer is Section 166, dealing with spreading false news. Here the penalty for causing injury or mischief to a public interest carries a penalty of two years. The Congress suggests incorporating in the definition

of public interest the matter previously raised under seditious libel, of promoting disaffection leading to violence among or between different classes of persons in Canada. Mr. Robinette raised the objection that since the section applies to false statements, tales or news, it would not be held to cover expressions of opinion. A greater burden on the Crown would be the necessity of proving that the maker of the statement knew it to be false. In addition to these objections, Mr. Robinette pointed to difficulties in bringing home to the person charged the actual distribution of the hate literature, and in presuming that a court would find promotion of inter-group hostility coupled with incitement to violence, a likely cause of injury to a public interest. To permit a court to so find, he said, would be to put into the hands of judges and not parliament the definition of crimes. While Mr. Maloney felt the section would not be useful for the prosecutions sought, he advised that a test case be prosecuted under this section based on libellous statements in three samples of the hate-mailing shown to him.

The case history experience of Section 166 gives small grounds for comfort. It was resorted to in an unsuccessful attempt to equate the offense of causing injury to a public interest (carrying a penalty of two years) with the sedition charge (carrying a penalty of fourteen years) as revised in the *Boucher* case. The result was a dismissal on the ground of *autrefois convict* in *R. v. Carrier*<sup>83</sup>. In this case, the writings raising the charge were identical with the writings held in the *Boucher* decision, not to have constituted the offense of incitement against a constituted authority. The decision is now authority for the view that a person acquitted on a charge of publishing a seditious libel cannot afterwards be prosecuted on a charge of spreading false news, and that the words "Whereby injury or mischief is occasioned to any public interest" must contemplate a seditious intention.

Schmeiser argues that this decision renders Section 166 redundant:

If the *Carrier* case were correct, there would be no legal sanctions whatsoever against those who are shrewd enough to shift their vituperative remarks from individuals to groups, races, nationalities, or religions. The Criminal Code does not provide sanctions since the offense of defamatory libel covers only those who injure the reputation of any person and the offenses of sedition and spreading false tales would be ruled out unless the prosecution could also establish an intention to incite to violence against established authority.<sup>84</sup>

The one instance in which a conviction was won under Section 166, imposing a criminal sanction for publishing false news likely to injure a public interest, was in *R. v. Hoaglin*<sup>85</sup>, which is irrelevant to a group libel situation. Here an Alberta storekeeper, who had been prosecuted for an infraction of the Inland Revenue Law, posted a placard announcing "Americans not wanted in Canada . . . investigate before buying lands

83. (1951) 104 C.C.C. 75.

84. See Schmeiser, *op. cit.*, *supra*, note 60, at p. 213.

85. (1907) 12 C.C.C. 226.



and taking homesteads in this country." The judgment convicted the accused because the words, while not amounting to an offense under certain circumstances, discouraged immigration into Canada. No problem of particularizing the plaintiff or tracing the accused rose to complicate the issue.

Summing up, then, the present inadequacies of both Sections 62 and 166 could be cured, says the Canadian Jewish Congress, by extending both to cover incitement of hostility leading to violence between classes of subjects. In Schmeiser's view, a reversal of the *Carrier* case, dissociating the false tale section from its unfortunate marriage to seditious intention, would be a prerequisite to any useful recourse to Section 166 to cover group villification.

There remains the practical question of the utility of any criminal legislation in view of the use to which the hate peddlers may put the very laws designed to curb them.

One of the self-defeating concomitants of any form of group libel legislation was noted in a United States House of Representatives Study<sup>86</sup> as follows:

. . . publicity attending a criminal prosecution for group libel (or for mailing such matter as in proposed federal legislation) could result in a wider dissemination than that attained by the initial defamation.

This prospect was aired when Leonard W. Brockington, Rector of Queens University, testifying before the Standing Committee on External Affairs Respecting Bill C-21 and Bill C-43 expressed the view, concerning writers of hate literature:

I think most of them would shrink from trial and even shrink from identification.

This was actually not the case in the hearings before the Post Office Board of Review when the Toronto representative of the National States Rights Party of Alabama defended the banned publication "Thunderbolt", and sought to lift the interim ban imposed on it. An Ottawa columnist who has vigorously supported demands for legislation to curb hate literature, and who was present at the sessions<sup>87</sup>, delivered the following assessment:

I have already observed at the outset that now that I have come face to face with Canadian Jew-haters I am convinced that there is only one sure way in which to deal with those who would implement Hitler's program in Canada. I now have serious doubts that even a "law" would curb these Jew-haters because they'd use the "law" to go to court, where they would use the legal proceedings as an excuse to spread anti-Semitism. It is agreed that a "law" is necessary in any case if only for the educational effect it will have and from this point of view it is the only kind of education worthy of some effort.

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86. *Supra*, note 59, at p. 21.

87. Max Bookman of Ottawa. See National Joint Community Relations Committee, Toronto Inter-Office Information Bulletin, No. 429, December 11, 1964, p. 2.

Once and for all the Jewish civil rights leaders should cease their activity. The very arguments these well-intentioned gentlemen are using in opposing those of us who want a "law" with teeth against Jew-haters is identical with the arguments used by the anti-Semites. It's all well and good for the civil rights supporters to proclaim the importance of free speech and free press for all concerned, but if in the final analysis this could mean a repetition of what took place for Jews in Europe at the hands of Hitler, then, no thank you, gentlemen. If anyone thinks I'm exaggerating, then I suggest, when the next occasion arises, you sit for four consecutive days and listen to what the Canadian anti-Semites have in mind for Jews.<sup>88</sup>

The foregoing citation is a vivid illustration of the dilemma presented by the prospect of anti-hate legislation, even to vigorous proponents. The House of Representatives study also detailed further prospective backlash effects: conviction of the defamer could evoke popular sympathy and create symbolic martyrdom, the trial and defences such as truth could afford a defamer a respectable forum, the defamed group could itself become suspect for allegedly using the law to advance its own interests, and individual members of a group seeking protection of the law would not be enabled to exercise their discretion in weighing the advantages and disadvantages involved in seeking a remedy for defamation. Finally, the study stresses the fact that the standards of evidence required in a criminal matter, that of proof beyond a reasonable doubt, and the necessity for unanimity in verdict in a jury trial, raise serious doubts about the expectation of successful convictions. Although these consequences have not materialized subsequent to the decisions of the Postal Boards of Review concluded in February and August, 1965, it could be argued that the Boards' inquiry is not a trial, and the persons whose appeal was the subject of the review were placed in any jeopardy as they might be by a criminal trial.

This survey has attempted to indicate how current Criminal Code provisions and judicial interpretations render the likelihood of successful prosecutions remote.

Without some form of revision of the Code or other new legislation, there remains the cold comfort of such views as that of J. C. Martin, Q.C., in his *Annotated Criminal Code*<sup>89</sup>:

When the problem is regarded with reference to Criminal Law, it appears that the weight of authority and the weight of experience indicates that it is not advisable to combat prejudice by legislation.

Balancing this counsel is the suggestion that an analogy might be drawn to the readiness of provincial legislatures to intervene in areas of social discrimination with Fair Employment Practices legislation and Fair Accommodations legislation. How different in substance would be the action of the federal Parliament in intervening to confer on groups protection from vituperation? Would this not be merely a further step in socialized "services", this time socializing the previously individualistic basis of the plaintiff's complaint in a defamation matter?

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88. Max Bookman, "Dateline, Ottawa," *Western Jewish News*, Winnipeg, December 3, 1964, p. 1.  
89. (1955) p. 305.

Certainly, the past 20 months have seen the most thorough airing to date of the whole subject. When the ultimate conclusions of the inquiries and studies currently underway<sup>90</sup> are drawn, Canadian lawmakers will hopefully be in a confident position to risk drawing the fine line between the ordinary friction that is the condition of life in any plural society, and the sort of vilification that no group should be forced to tolerate.



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90. Appointment of a small, "Informal Committee of Experts", to study policies for fighting hate literature, and report to the Minister, was announced in Montreal on November 10, 1964, by Hon. Guy Favreau, Minister of Justice. Two appointments announced at the formation of the Committee were Dean Maxwell Cohen, McGill University Law School; and Saul Hayes, Q.C., Executive Vice-President, Canadian Jewish Congress. These appointments drew from Jehovah's Witnesses' legal counsel, Glen How, the hope that other appointments "will not all represent groups already pressing for amendments": *Macleans Magazine*, January 2, 1964. Mr. How's fears were stilled on January 11, 1965, when the following additional names were added to the committee: Shane MacKay, Executive Editor of *The Winnipeg Free Press*, Winnipeg (whose newspaper editorially objected to legislation on March 21, 1964), Rev. Gerard Dion, Professor in the Department of Industrial Relations in the faculty of social sciences, Laval University; Professor Pierre-Elliott Trudeau of the Faculty of Law, University of Montreal; Dr. James A. Corry, Principal of Queen's University, Kingston; Dr. Mark MacGuigan, Associate Professor in the Faculty of Law, University of Toronto.

The Standing Committee on External Affairs of the House of Commons held three sessions, November 18, 24 and December 3, 1964, studying the bills introduced by Mr. M. Klein, M.P., and Mr. D. Orlikow, M.P., on the spread of hate propaganda (Minutes of Proceedings and Evidence No. 34 and 35). The Committee hearings heard Mr. Leonard W. Brockington, Rector of Queens University, and leaders in academic life discussing generally, issues of group relations.