

**HATE PROPAGANDA**

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HATE PROPAGANDA\*

ISSUE DEFINITION

The controversy to which hate propaganda gives rise appears to be more vigorous than the volume and availability alone of this material would seem to justify. Although material inciting hatred and advocating racial superiority has probably always existed, the last 35 years have witnessed a controversy as to what, if anything, to do about it. This debate reveals as acutely as possible the conflict between generally accepted Canadian multicultural and egalitarian social values and the libertarian value of freedom of expression.

BACKGROUND AND ANALYSIS

A. Overview

The distribution of hate propaganda and the activities of racist groups have come in two waves since the 1960s. In the middle of that decade, anti-Jewish and anti-black hate propaganda was widespread in Canada, but especially in Ontario and Quebec. Simultaneously, neo-Nazi and white supremacist groups, based largely in the U.S., became active in Canada. The result was the 1965 Cohen Committee, upon whose recommendations to the Minister of Justice were based the 1970 amendments to the *Criminal Code* (s. 318-320) adopted by Parliament.

The second wave of racist group activity and hate propaganda has come since the mid-1970s. The Edmund Burke Society, Nationalist Party of Canada and Western Guard Party were active and the Ku Klux Klan was revived in Ontario and B.C., giving rise to

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the McAlpine inquiry into its activity in the latter province. Hate propaganda was not only anti-Jewish and anti-black, it was also anti-East Indian, anti-Catholic, anti-French and anti-Native people. The propaganda was not only in the form of leaflets or pamphlets; it has been transmitted by telephone, video cassette and the Internet. It has also attempted to pass for legitimate scholarship by appearing in the form of learned journals and books; this type of technique is best exemplified in the "Holocaust denial" literature and other forms of historical revisionism that are published for the purpose of inciting hatred. Most recently, so-called "Aryan Nations" groups based in the United States, the Heritage Front and Skinheads have all been active in Canada.

This second wave of hate propaganda and racist group activity gave rise to a flurry of reaction and a wide-ranging debate. Proposals for legislative change came from a 1982 Vancouver Symposium on Race Relations and the Law, the 1984 Report of the Special House of Commons Committee on Visible Minorities (*Equality Now!*), the 1984 Report of the Canadian Bar Association's Special Committee on Racial and Religious Hatred, the 1985 Report of the Special Committee on Pornography and Prostitution in Canada (Fraser Committee) and the Law Reform Commission of Canada's 1988 *Report on the Recodification of the Criminal Law*.

The second wave has brought prosecutions of perpetrators of racial hatred. Jim Keegstra, Donald Andrews and Robert Smith were all convicted of intentionally communicating hatred in violation of s. 319(2) of the *Criminal Code*: these convictions were upheld by the Supreme Court of Canada. Ernst Zundel was convicted of wilfully spreading false news by publishing "Holocaust denial" literature in violation of s. 181 of the *Criminal Code*: this provision was later struck down by the Supreme Court of Canada. John Ross Taylor and the Western Guard Party were twice found in contempt of court for refusing to comply with a Human Rights Tribunal order under s. 13 of the *Canadian Human Rights Act* that they cease communicating hate messages by telephone; the Supreme Court of Canada upheld this provision. There have been other cases under both the *Criminal Code* and the *Canadian Human Rights Act*.

The law in place at the federal level will now be briefly described. The arguments for and against applying legal sanctions to hate propaganda will be canvassed.

## B. Federal Legislation

### 1. Criminal Code

#### a. Present Law

Most of the discussion of hate propaganda has centred on s. 318-320 of the *Criminal Code*. These sections, adopted by Parliament in 1970, were based in large part on the 1965 Cohen Committee recommendations, although there were some significant differences.

Under s. 318 of the *Criminal Code*, everyone who advocates or promotes genocide is guilty of an offence punishable by five years' imprisonment. The term "genocide" is defined to mean killing members of an identifiable group or deliberately inflicting on an identifiable group conditions of life calculated to bring about the group's physical destruction. Section 318(4) of the *Criminal Code* defines an "identifiable group" as any section of the public distinguished by colour, race, religion or ethnic origin. The Cohen Committee Report would have added to these provisions of the *Criminal Code* in that it recommended a third element in the definition of genocide - the deliberate imposition of measures to prevent births within an identifiable group. In addition, the Cohen Committee would have included "language" and "national origin" within the definition of "identifiable group."

Under s. 319(1) of the *Criminal Code*, anyone who communicates statements in a public place and thereby incites hatred against an identifiable group where such incitement leads to a breach of the peace is guilty of an indictable offence punishable by two years' imprisonment or a summary conviction offence. Section 319(2) makes it a crime to communicate, except in private conversation, statements that wilfully promote hatred against an identifiable group. Section 319(7) defines "communicating" to include communicating by telephone, broadcasting or other audible or visible means. "Public place" is defined to include any place to which the public has access as of right or by invitation, express or implied. "Statements" include words spoken or written or recorded electronically, electromagnetically or otherwise and also include gestures, signs or other representations.

No prosecution under s. 319(2) can be instituted without the consent of the provincial Attorney General. Any person charged under s. 319(2) of the *Criminal Code* has available four special defences set out in s. 319(3). These defences are: 1) that the communicated statements are true; 2) that an opinion or argument on a religious subject was expressed in good faith; 3) that the statements were relevant to a subject of public interest and were on reasonable

grounds believed to be true; and 4) that in good faith the statements were meant to point out for removal matters tending to produce feelings of hatred of an identifiable group.

The Cohen Committee recommendations differed from these provisions of the *Criminal Code* in that they did not include that s. 319(2) should require the wilful promotion of hatred to be communicated in other than a private conversation. The Cohen Committee would not only have included in s. 319(2) the wilful promotion of hatred of an identifiable group, but also the promotion of “contempt” for such a group. Finally, the Cohen Committee recommended that only defences 1 and 3, and not defences 2 and 4 under s. 319(3) of the *Criminal Code* be open to a prosecution under s. 319(2).

Section 320 of the *Criminal Code* provides for the order by a judge of seizure and confiscation of hate propaganda, on reasonable grounds. Hate propaganda is defined in s. 320(8) as any writing, sign or visible representation advocating or promoting genocide, or the communication of which would be an offence under s. 319(2). It merely needs to be shown that the material is hate propaganda for it to be seized - it does not have to be shown to be dangerous. The consent of the provincial Attorney General is required before these seizure and confiscation provisions can be used. The Cohen Committee did not recommend that this type of *in rem* proceeding be adopted but merely urged that it be studied.

#### b. Reform Proposals

Much of the discussion of the use of the *Criminal Code* against hate propaganda has centred on s. 319(2). Following the 1979 Ontario Court of Appeal decision in *R. v. Buzzanga* and *Durocher*, which found that in order to be convicted an accused must specifically have intended to incite hatred by distributing handbills, the debate has largely focused on the word “wilfully” in defining the offence of inciting hatred in s. 319(2). For a conviction, it would not be enough to show that the incitement of hatred was the result of the distribution of material; it would have to be shown that the accused’s state of mind had indicated an intent to promote hatred. The individuals in *Buzzanga* were two Franco-Ontarians involved in a French language school dispute, who, to encourage their supporters, had distributed an anti-French handbill.

The 1982 Vancouver Symposium on Race Relations and the Law, the Special House of Commons Committee on Visible Minorities, the Government of Canada in its response to *Equality Now!*, the Canadian Bar Association Special Committee on Racial and Religious Hatred and the Special Committee on Pornography and Prostitution have all urged that the word “wilfully”

be dropped completely from s. 319(2) of the *Criminal Code*. The Law Reform Commission recommended that this offence be replaced by one called “stirring up hatred,” whereby anyone who publicly stirred up hatred against an identifiable group would be guilty of a crime.

Another issue that has garnered much attention centres on the four special defences available to an accused charged under s. 319(2) of the *Criminal Code*. Both the House of Commons Committee on Visible Minorities and the Government of Canada in its response to *Equality Now!* proposed that the *Criminal Code* be amended to ensure that the burden to adduce all elements of these special defences resides with the accused throughout a criminal prosecution. The Canadian Bar Association Special Committee on Racial and Religious Hatred urged that special defences 2 and 3 be dropped thus leaving available to an accused only the two defences of “truth” and “efforts to remove feelings of hatred towards an identifiable group.” The Law Reform Commission recommended that the defences be deleted as unnecessary in light of its formulation of the offence of “stirring up hatred.”

The other issue that has aroused considerable controversy is the requirement for the provincial Attorney General's consent to a hate propaganda prosecution. This is a provision on which the Cohen Committee did not make a firm recommendation but which it merely urged be considered. The 1982 Vancouver Symposium on Race Relations and the Law, the Special House of Commons Committee on Visible Minorities, the Government of Canada in its response to *Equality Now!*, and the Special Committee on Pornography and Prostitution agreed that the requirement for the consent of the Attorney General for a prosecution under s. 319(2) of the *Criminal Code* should be removed. A majority of the Canadian Bar Association's Special Committee on Religious and Racial Hatred concluded that the requirement for the Attorney General's consent should be retained to prevent frivolous or vexatious hate propaganda prosecutions. The Law Reform Commission deferred any recommendations about the requirement for the Attorney General's consent until the release of its Working Paper on the powers of the Attorney General.

The Special Committee on Pornography and Prostitution recommended in its April 1985 Report that the definition “identifiable” groups in s. 318(4) of the *Criminal Code* should be broadened to include sex, age and mental or physical disability insofar as it applies to s. 319 of the *Criminal Code*. This same recommendation was also made by the Report of the Law Reform Commission in order that these provisions of the *Criminal Code* would be consistent with the prohibited grounds of discrimination set out in s. 15 of the *Canadian Charter of Rights and Freedoms*. The Commission expressed the view in its Working Paper on Hate Propaganda that this

recommended amendment would not catch pornography. Bill C-54, dealing with pornography, received first reading on 4 May 1987. It contained an amendment to s. 318(4) of the *Criminal Code* to include “sex” within the definition of an identifiable group. This bill died on the Order Paper with the dissolution of Parliament on 1 October 1988.

## 2. *Canadian Human Rights Act*

### a. Present Law

In 1977, Parliament adopted the *Canadian Human Rights Act*, which, in addition to the now-familiar provisions for dealing with proscribed discriminatory acts, included s. 13, making it a prohibited discriminatory practice to use the telephone to communicate race hatred. To fall under s. 13, the communication by telephone or telecommunications facility must be repeated and it must be likely to expose a person or persons to hatred or contempt in that they belong to an identifiable racial, national, ethnic or religious group or a group defined by reason of age, sex, family or marital status, disability or pardoned conviction. Unlike the *Criminal Code's* hate propaganda provisions, it is not necessary to prove specific intent to succeed in showing the discriminatory practice and there are no special defences available to a respondent to such a complaint.

As in other cases before Human Rights Commissions, attempts are made to investigate and conciliate complaints under s. 13 of the Act before a Human Rights Tribunal is named. Once a Tribunal is named, it holds a hearing and comes to a finding which is binding on all parties. The Tribunal cannot enforce its own findings and orders; if these are not followed, they have to be filed with the Federal Court and enforced by contempt proceedings before that body.

### b. Reform Proposal

The Special House of Commons Committee on Visible Minorities recommended that, since the Canadian Human Rights Commission has experience with problems of racism and racial discrimination, it should be given jurisdiction to deal with hate propaganda no matter how disseminated - by telephone, by mail, by radio or television and whether exported or imported. In its response to *Equality Now!*, the Government of Canada indicated it would give serious consideration to this recommendation and consult widely as to its practicality.



### C. Arguments For and Against Hate Propaganda Legislation

The arguments in favour of hate propaganda legislation are as follows:

1. Rights are never absolute - in Canada they are exercised under law - legal intervention is justified in some circumstances.
2. Unlike the U.S. First Amendment libertarian position, the *Canadian Charter of Rights and Freedoms* is imbued with egalitarian rights, as set out in s. 15, which must be read in tandem with the libertarian rights of s. 2.
3. Canada is a multicultural society - this multiculturalism is accepted as a basic constitutional norm and as such is set out in s. 27 of the *Canadian Charter of Rights and Freedoms* - this constitutional norm must be read in tandem with the libertarian rights of s. 2 of the Charter.
4. Numerous reports and legislative enactments indicate a consensus as to the legitimacy of using the law against hate propaganda.
5. Many other Western liberal democracies have anti-hate propaganda legislation.
6. Canada must fulfil its international obligations by enacting hate propaganda legislation. The *Convention on the Prevention and Punishment of the Crime of Genocide*, the *International Covenant on Civil and Political Rights* and the *International Convention on the Elimination of all Forms of Racial Discrimination*, to all of which Canada is a signatory, oblige Canada to combat racism and the advocacy of genocide and racial superiority.

The arguments against hate propaganda legislation are as follows:

1. Libertarian rights, such as freedom of expression, are not divisible. Once they begin to be restricted, it is difficult to draw the line as to where such limitations on freedom stop.
2. The prosecution of hate propagandists enables them to use the courtroom as the medium to further disseminate their ideas. If they are convicted or found to have committed a prohibited discriminatory act, they may go on to make use of their martyrdom to further their cause.
3. Once enacted, hate propaganda legislation may be abused and used against those to whom it was not originally intended to apply.
4. At the present time, the purveyors of hate propaganda are of only marginal importance and have little impact on the body politic; hence no legislative measures or, at least, no strengthened laws are needed to deal with them.

5. Allowing purveyors of hate propaganda to distribute their material freely has a cathartic or safety valve effect.

## PARLIAMENTARY ACTION

Following the tabling of the Cohen Committee Report on Hate Propaganda on 14 April 1966, Senator Connolly tabled Bill S-49, which received first reading on 6 November 1966 and proceeded no further. On 9 May 1967, Senator Deschatelets tabled Bill S-5, which received first reading on that day. On 21 November 1967 the bill received second reading and was referred to the Special Senate Committee on the *Criminal Code* (Hate Propaganda). The Committee held hearings but did not report.

Senator Martin introduced Bill S-21 on 9 December 1968, when it received first reading; it subsequently died on the Order Paper. On 27 October 1969 the Minister of Justice (Mr. Turner) introduced Bill C-53, which, after Committee study in both Houses, received Royal Assent on 11 June 1970.

## CHRONOLOGY

- 9 December 1948 - U.N. General Assembly adopted the *Convention on the Prevention and Punishment of the Crime of Genocide*.
- 3 March 1953 - In an appearance before the Special House of Commons Committee studying the *Criminal Code* amendment bill, the Canadian Jewish Congress urged that a specific criminal offence relating to hate propaganda be adopted by Parliament.
- January 1965 - Minister of Justice Guy Favreau named a Special Committee under the Chairmanship of Dean Maxwell Cohen to report to him on hate propaganda.
- 24 March 1965 - Beginning on 18 November 1964, the Standing House of Commons Committee on External Affairs conducted a study of Private Members' Bills dealing with hate propaganda and the advocacy of genocide, and asked in its Report that its mandate be extended into the new session of Parliament.
- 21 December 1965 - U.N. General Assembly adopted the *International Convention on the Elimination of All Forms of Racial Discrimination*.

- 14 April 1966 - The Minister of Justice tabled in the House of Commons the Cohen Committee Report, which he had received on 10 November 1965.
- 16 December 1966 - U.N. General Assembly adopted the *International Covenant on Civil and Political Rights*.
- 11 June 1970 - Parliament adopted and Royal Assent was given to amendments to the *Criminal Code*, based largely on Cohen Committee recommendations, to deal with the advocacy of genocide and hate propaganda.
- 14 July 1977 - Parliament adopted and Royal Assent was given to the Canadian *Human Rights Act*, including a provision dealing with the communication of racial messages by telephone.
- 17 September 1979 - The Ontario Court of Appeal acquitted two Franco-Ontarians (Buzzanga and Durocher) of charges under s. 319(2) of the *Criminal Code* because they had not specifically intended to spread hatred.
- 30 April 1981 - The McAlpine Committee presented its Report on the activities of the Ku Klux Klan to the B.C. Minister of Labour. It recommended that the *Criminal Code* be strengthened and that the B.C. *Human Rights Code* be amended to deal with the advocacy of race hatred.
- 7 July 1981 - The B.C. Legislature adopted the *Civil Rights Protection Act*, based in part on McAlpine Report recommendations.
- 22-24 April 1982 - The Symposium on Race Relations and the Law held in Vancouver adopted recommendations on strengthening the hate propaganda provisions of the *Criminal Code*.
- 28 March 1984 - The Special House of Commons Committee on Visible Minorities included a number of hate propaganda recommendations in its Report *Equality Now!*
- April 1984 - Patrick Lawlor Q.C. presented his Report on Group Defamation to the Ontario Attorney General.
- 25 May 1984 - The Manitoba Human Rights Commission published a revised draft Human Rights Code containing a hate propaganda provision.

- 20 June 1984 - The Government of Canada tabled in the House of Commons its response to *Equality Now!*, including provisions for dealing with hate propaganda.
- 27 August 1984 - The Canadian Bar Association Special Committee on Racial and Religious Hatred published its Report *Hatred and the Law*.
- 22 January 1985 - The Minister of Justice told the Standing House of Commons Committee on Justice and Legal Affairs that amendments to the hate propaganda provisions of the *Criminal Code* would be forthcoming in February/March 1985.
- April 1985 - The Special Committee on Pornography and Prostitution in Canada (the Fraser Committee) released its Report.
- 15 August 1986 - The Law Reform Commission of Canada released its Working Paper (no. 50) on *Hate Propaganda*.
- 4 May 1987 - Bill C-54, an Act to amend the *Criminal Code* and Other Acts in Consequence Thereof, received first reading. This bill died on the Order Paper with the dissolution of Parliament on 1 October 1988.
- 20 June 1989 - In response to a question put to him during consideration of estimates by the House of Commons Standing Committee on Justice and Solicitor General, the Minister of Justice indicated that a federal-provincial working group was considering the hate propaganda provisions of the *Criminal Code* but that proposals for change would await the decisions of the Supreme Court of Canada in the *Keegstra* and *Andrews/Smith* cases.
- 13 December 1990 - The Supreme Court of Canada in the *Keegstra* and *Andrews/Smith* cases upheld s.319(2) of the *Criminal Code* as a reasonable limit on Charter-guaranteed freedom of expression. On the same day, in the *Taylor* case the Court upheld s. 13 of the *Canadian Human Rights Act* on the same grounds.
- 27 August 1991 - The Supreme Court of Canada upheld Ernst Zundel's appeal and struck down s. 181 (wilfully spreading false news) of the *Criminal Code* as unconstitutional.
- 14-29 August 1994 - Public allegations were made that CSIS was involved through a human source in the establishment and activities of the Heritage Front. Both SIRC and the House of Commons Sub-Committee on National Security undertook investigations.
- 15 December 1994 - SIRC's report on a CSIS source inside the Heritage Front was made public. SIRC concluded that many of the allegations were untrue and the source had rendered useful service to CSIS. It

recommended that a fuller policy for the handling of CSIS sources be developed.

- 3 April 1995 - In response to a question in the House of Commons, the Solicitor General indicated that the government was considering possible ways to prevent the spread of hate propaganda on the Internet.
- 19 June 1996 - The House of Commons Sub-Committee on National Security tabled its report on the involvement of a CSIS human source in the Heritage Front.
- 2 August 1996 - The Canadian Human Rights Commission advised Ernst Zundel of its investigation of a hate message complaint about his Internet Website. (This was the first time this provision was used in this way.)
- 22 November 1996 - A Canadian Human Rights Tribunal was established to consider the complaint about Zundel's Internet Website.
- May 1997 - A Human Rights Tribunal began its considerations of the Zundel Internet Website complaint.
- April 1998 - An internet service provider in Oliver, British Columbia, who was alleged to be hosting websites promoting hate, ceased operation.
- 15 June 1998 - B'nai Brith Canada, at its annual meeting held in Ottawa, unanimously adopted a resolution urging that Holocaust denial be made a criminal offence.
- March 1999 - Participants in an international symposium on hate on the Internet, held in Toronto and organized by B'nai Brith Canada, recommended that the *Criminal Code* be amended to make the downloading and possession of hate propaganda with intent to promote hatred a criminal offence.**

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