CHAPTER V

CONCLUSIONS

Our study of the problem of hate propaganda in Canada, (and elsewhere), in its factual, psychological, legal and more general dimensions, has brought us to four principal conclusions:

(1) *A serious problem.* As Chapter II of this report makes abundantly clear, over the past several years there have been a number of groups engaged in the distribution of hate propaganda in Canada. While the principal area of distribution has been the Province of Ontario, there also has been some dissemination of materials in urban centers such as Victoria, Vancouver, Winnipeg, Montreal, Moncton and Halifax as described in Chapter II. The propaganda distributed has attacked various racial, religious and ethnic groups, particularly Jews and Negroes, in abusive, insulting, scurrilous and false terms, and these pamphlets, handbooks, booklets etc., could not in any sense be classed as sincere, honest discussion contributing to legitimate debate, in good faith, about public issues in Canada. For those identifiable groups so attacked these offensive tracts have been deeply provocative and in particular the Jewish community of Canada viciously has been made the special target of the whole hate program. It is not to be wondered at that men of good-will should be repelled by these malicious and ignorant pretensions and that Canadian Jews, remembering the debasement of all Judaeo-Christian values by Nazi policy, should be especially sensitive to these abuses of the freedom that a democratic society must possess and protect.

The amount of hate propaganda presently being disseminated and its measurable effects probably are not sufficient to justify a description of the problem as one of crisis or near crisis proportions. Nevertheless the problem is a serious one. We believe that, given a certain set of socio-economic circumstances, such as a deepening of the emotional tensions or the setting in of a severe business recession, public susceptibility might well increase significantly. Moreover, the potential psychological and social damage of hate propaganda, both to a desensitized majority and to sensitive minority target groups, is incalculable. As Mr. Justice Jackson of the United States Supreme Court wrote in *Beauharnais* v. *Illinois*, such "sinister abuses of our freedom of expression..... can tear apart a society, brutalize its dominant elements, and persecute even to extermination, its minorities".

(2) *Inadequate legal remedies.* Canadian law clearly is inadequate with respect to the intimidation of and threatened violence against groups, and almost wholly lacking in any control of group defamation. There is no longer any valid legal reason for continuing to exclude "groups" from the protection of the law. The present state of the rules with respect to groups is merely a reflection of the fact that our law developed in a more individualistic age. But the twentieth

century has been marked by a growing sense of social inter-dependence, of the importance of group activity, and legal policy already has reflected this change of climate in many sectors. Most other modern states have already expanded their legal systems to provide for group intimidation and defamation.

(3) *Law: A Solution.* Democratic society no longer accepts, if it ever did accept, the notion that freedom of expression is an *absolute right* which must exist wholly independent of qualification. Our Anglo-Canadian political and legal traditions reflect generally the long struggle to free society from the absolutism of sovereign or the oligarchy of the privileged. Freedom of expression became the most conspicuous index of the movement from government by the few to self-government by the many. But even as its highest point of historical and political acceptance, freedom to speak and to publish was circumscribed by law. The prevailing view in Canada is that freedom of expression is a qualified right, representing the balance that must be struck between the social interest in the full and frank discussion necessary to a free society on the one hand, and the social interests in public order and individual and group reputation on the other hand. The Board of Review which recently upheld an interim prohibitory order of the Postmaster General against the National States' Rights Party adopted a succinct statement to this effect by the late Chief Justice of Canada, Sir Lyman Duff:

> "The right of public discussion is, of course, subject to legal restrictions; those based upon considerations of decency and public order and others conceived for the protection of various private and public interests with which, for example, the laws of defamation and sedition are concerned."

There is an evident distinction between *"legitimate"* and *"illegitimate"* public discussion, and the state has as great an obligation to discourage the latter as it has to maintain the former. Concededly there are borderline areas of delicate ambiguity between the two spheres, and the most that law can hope to accomplish is to balance the conflicting interests with as much ingenuity and wisdom as possible.

(4) *Priority to freedom of expression.* Because of these wide borderline areas where vigorous rough and tumble debate shifts into the brutal, the vicious and the illicit, the general preferences with which one approaches the task of balancing interests is of crucial importance. For the crucial issue in striking a balance between conflicting interests is the weight to be assigned to the interests in question. As a sheer matter of drafting, for example, legislation easily could be framed which would catch all instances of hate dissemination, without exception and however subtle, but this might be accomplished at the expense of including the whole borderline area within the statutory proscription, with detriment to many instances of legitimate, even if very rough, public debate.

It is our opinion that the Canadian people already have made the decision that as among conflicting values, preference must always be given to freedom of expression rather than to legal prohibitions directed at abuses of it. This is not to say that freedom of expression is regarded as an absolute, but only to insist that it will be esteemed more highly and weighted more significantly in the legislative scales, so that legal markings of the borderline areas will always be such as to permit liberty even at the cost of occasional license. But at some point that liberty becomes licence and colours the quality of liberty itself with an unacceptable stain. At that point the social preference must move from freedom to regulation to preserve the very system of freedom itself.

(5) *Specific Conclusions:* The four general conclusions above became, therefore, two specific ones. First: there should be new legislation in Canada because of the present deficiencies in the law, so as to forbid the following: (a) advocacy of genocide, (b) incitement to hatred of groups that is likely to occasion breach of the peace, and (c) group defamation. Second: the legislation should be so drafted as to permit the maximum freedom of expression consistent with its purpose and the needs of a free Society. It is necessary to comment on these specific conclusions in some detail:

a. Genocide.

In our opinion there should be Canadian legislation to prevent any advocacy of genocide. So abhorrent is such advocacy that it can have no standing whatever as argument in a democratic society.

For purposes of Canadian law we believe that the definition of genocide should be drawn somewhat more narrowly than in the international Convention so as to include only killing and its substantial equivalents – deliberately inflicting conditions of life calculated to bring about physical destruction and deliberately imposing measures intended to prevent births. The other components of the international definition, viz., causing serious bodily or mental harm to members of a group and forcibly transferring children of one group to another group with intent to destroy the group we deem inadvisable for Canada – the former because it is considerably less than a substantial equivalent of killing in our existing legal framework, the latter because it seems to have been intended to cover certain historical incidents in Europe that have little essential relevance to Canada, where mass transfers of children to another group are unknown. We consider that the groups to be protected against genocide should be readily identifiable groups, distinguished by religion, colour, race, ethnic or national origin.

To our minds it is hard to exaggerate the importance of Canadian legislation against advocacy of genocide. Clearly, it would be the fulfilment of an international obligation Canada undertook as a signatory to the Genocide Convention.

It would be an emphatic public declaration of our total commitment to the elimination of this most inhuman manifestation of prejudice and a reassurance to any minority groups in our midst that promoting such a concept in public discussion is beyond the pale. At the same time it would be one more potent instrument in the education of the people of Canada as to the awful consequences of racism and prejudice.

But because existing Canadian law already forbids most substantive aspects of genocide in that it prohibits homicide or murder vis-a-vis individuals, and because it may be undesirable to have the same acts forbidden under two different legal categories, we deem it advisable that the Canadian legislation which we urge as a symbol of our country's dedication to the rights set out in the Convention should be confined to "advocating and promoting" genocide, acts which clearly are not forbidden at present by the Criminal Code.

Canadian law generally has not gone to the length of prohibiting mere intellectual advocacy of a forbidden act, but has contented itself with proscribing conduct which incites to illegal action in a present, immediate way. However, we are convinced that, in the one case of the urging of physical violence against identifiable groups, to the point of genocide, there is no social interest whatever in allowing advocacy or promotion of violence even at the highest level of abstract discussion. It is odious and unacceptable at any level.

We would stress the difference between advocacy and promotion of revolution against constituted authority in the state and the advocacy of annihilation of identifiable groups for no reason other than that they are what they are. We would concede as a philosophical argument that there may be a genuine social interest in not totally excluding advocacy and promotion of violence against state authorities, in that otherwise there would be little possibility of overthrowing tyrannical governments.

But the case is wholly different with respect to the advocacy and promotion of violence against identifiable groups, which are defined, not by their political power, but by natural facts such as race or colour, or fundamental personal choices such as religion. The serious discussion, even at the most abstract level, of genocide as a conceivable political or social policy, is simply not tolerable in a civilized community; it has no social value whatever.

This is not open to the objection that can be urged against the jurisprudence of many American courts in cases involving freedom of expression, viz., that there is no substantial public interest in permitting certain kinds of utterances – the lewd and obscene, the profane, the libellous, and the insulting or fighting word – for these categories beg the question as to what is lewd, obscene, profane, etc., since often there is no readily ascertainable consensus as to their definition or application. There can, however, be no misunderstanding as to what is meant by "*genocide*", for it can be defined precisely – as the Convention

has done – in a manner that leaves no room for uncertainty. There is, therefore, no ambiguity and no begging of the question in the stand we take namely, that any form of advocacy or promotion of genocide is outside the bounds of legitimate public discussion. In our opinion there is no need for any exempting clause in the application of legislation against advocacy of genocide, because there is no social interest in protecting any variety of such advocacy. The prohibition should be absolute because the act is wrong absolutely, i.e., in all circumstances, degrees, times, and ways.

b. Disturbance of the Peace Through Incitement to Hatred of Groups

With respect to incitement to hatred or contempt of identifiable groups, where linked with disorder, we also conclude here that new legislation is necessary. It is readily apparent that it should be unlawful to arouse citizens deliberately to violence against an identifiable group, and in our understanding of Canadian law this already may be proscribed by the present rules in the Code governing sedition (although this is not absolutely certain). But the social interest in the preservation of peace in the community is no less great where it may not be possible for the prosecution to prove that the speaker actually *intended* violence against a group, or where the wrath of the recipients is turned, not against the group assailed, but rather against the communicator himself, and the breach of the peace takes a different form from that which he was *likely to intend.* In neither case, of course, do we wish to suggest that the attackers who themselves commit a breach of the peace should not be criminally liable, and there is little doubt that they are already liable under existing criminal law. But the gap in the law today derives from the fact that it does not penalize the initiating party who *incites* to hatred and contempt with a likelihood of violence, whether or not intended, and whether or not violence takes place.

To our minds the social interest in public order is so great that no one who occasions a breach of the peace, whether or not he directly intended it, should escape criminal liability where the breach of the peace is reasonably foreseeable, i.e., likely; and we believe that this should be the law regardless of whether the incitement to hatred or contempt against an identifiable group is spoken, written, or communicated in any other way.

We recognize that such legislation may pose some dangers for legitimate freedom of expression, in that, if unqualified, it would make it possible for any unreceptive audience by their negative or violent response to determine whether or not the speaker addressing them would be liable to go to jail. But we believe that such dangers can be minimized by drafting the legislation narrowly in the following respects: (1) its application should be restricted to statements communicated in a "public place"; (2) the statements must be such as to create "hatred or contempt" of an "identifiable group", so that the speaker must be the author of his own misfortune and not merely the victim of a hostile crowd; (3) the "identifiable group" that is protected must be limited to sections of the

public distinguished by religion, colour, race, or ethnic or national origin, so that sharp attacks on such other groups as political parties will clearly be outside the prohibitions of the legislation; and (4) the statements must be of such a character as to be "likely" to lead to a "breach of the peace". We firmly believe that such qualifications will protect fully all legitimate discussion.

c. Group Defamation.

The "sticks-and-stones" assumptions of our criminal law traditionally have tolerated few exceptions, and group defamation has not been one of them. Even the recognized offence of defamation of an individual has a somewhat tenuous place in our present criminal law, for often it is applied in practice only in situations where the libel gives rise to a threat to the peace. There is some justification for this limitation in the light of the civil remedy available to an injured party, but group defamation is in no way parallel in this respect, for it is as unrecognized generally by civil as by criminal law.

We do not think however, that a civil remedy for group defamation is an adequate solution. A civil action for damages likely would be unworkable, because the law could not permit an indefinite number of members of the defamed group to bring actions nor could it tolerate a limited number of suits that would lead to a scramble to sue first among the group members. A civil action for an injunction as provided in Manitoba might be workable, but when enacted by the provinces it could raise constitutional issues of some difficulty. As federally enacted (if within federal criminal law jurisdiction), it would raise issues of the desirability of prior restraints on expression and of depriving the defendant of the traditional protection of a jury, since injunctions are heard and determined by a judge alone. No civil statute can create a moral standard equivalent to that of criminal law.

We therefore have come to the conclusion that there is needed a criminal remedy for group defamation that would prohibit the making of oral or written statements or of any kind of representations which promote hatred or contempt against any identifiable group. Identifiable group we propose to define (as above) as any section of the public distinguished by religion, colour, race, language, or ethnic or national origin.

We have concluded that this new offence is desirable even though we realize that it goes beyond what has hitherto been thought by many to be the proper sphere of criminal law, for such group defamation requires no breach of the peace and no showing of likely injury to the reputation of any person. In effect, it sets out as a solemn public judgment that the holding up of identifiable groups to hatred or contempt is inherently likely to dispose the rest of the public to violence against the members of these groups and inherently likely to expose

them to loss of respect among their fellow men. We are convinced that the evidence justifies this policy judgment and that in our present stage of social development the law must begin to take account of the subtler sources of civil discord.

Because so much of legitimate public debate is admittedly persuasive in intention and often cast in negative statements as well as in positive ones, and also because stereotyping seems to be an inevitable method of generalizing about groups, we realize that to recommend legislation against group defamation, without providing adequate safeguards for proper public discussion, could raise in question our very commitment to the essential democratic value of free expression. On the other hand, we do not believe that our liberties would be endangered by the mere fact of novel legislation provided that effective defences are included. In other words, it is our view that the test as to whether our recommendations about group defamation adequately safeguard free expression will be whether the exemptions we suggest leave sufficient latitude for the fullest legitimate public discussion however rough and tumble it may be.

It has appeared to us that at a minimum we must provide the principal defence already present in the Criminal Code in Section 259 for the offence of defamatory libel against an individual:

> No person shall be deemed to publish a defamatory libel by reason only that he publishes defamatory matter that, on reasonable grounds, he believes is true, and that is relevant to any subject of public interest, the public discussion of which is for the public benefit.

The test thus established as a defence to defamatory libel is public benefit and *reasonable* belief in the truth of the assertion. In the words of Mr. Justice Brennan of the Supreme Court of the United States even "erroneous statement is inevitable in free debate, and.... it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need... to survive' ". We are also desirous of keeping the other defences established by the Criminal Code for defamatory libel, but we believe that by limiting the scope of the offence to the *wilful promotion* of hatred or contempt against "identifiable groups" we can exempt legitimate reporting of information without the necessity of spelling out in detail all the defences contained in Sections 255 through 266 of the Code.

It is, however, in our opinion, insufficient protection for legitimate debate merely to allow the same defences for group defamation as for individual defamation. Generalizations about groups play a more vital role in public discussion than do statements about individuals. There may be no public benefit whatever even from true disclosures about individuals, whereas there will almost always, if not always, be a public benefit to be derived from *true* statements about groups. In our opinion, therefore, it is necessary to provide the unqualified defence of truth in order adequately to protect all legitimate dialogue from legal

restraints.(17) Indeed this is the traditional common-law defence to civil actions of defamation and has recently been established by the United States Supreme Court as a defence for criminal defamation in all cases where discussion of public affairs is involved.

The two defences of unqualified truth, and reasonable belief in the truth coupled with public benefit, provide considerable, and we believe adequate, latitude for legitimate public examination of all matters of concern to it, from the rough and tumble of the political hustings to the riposte of more elegant forms of dialectical needling. There may even be those who believe that we have gone too far in attempting to protect free expression, or that it is undesirable that courts should be charged with the responsibility of finding "truth". To the first we would reply that we have stated from the outset the priority and preference which we believe the Canadian people rightly attach to the freedom of expression, and that it is vital to give the benefit of any doubt to liberty rather than to repression. To the second we would answer that we believe that one of the main effects of the exemptions we recommend will be to keep from the courts all cases where the statements are true patently in fact or could on "reasonable grounds" be thought to be true. Hence while courts often will function in practice as inhibitions on reckless prosecution they will also have the power and the duty to place the burden of proving truths on the accused libeller, where it belongs. Indeed this conclusion must follow since the burden of proof before the Court must rest upon those who allege the truth of the statement complained about.

In those cases where it is apparent to men of good will that the statements are an abuse of legitimate public discussion, we believe that Canadian courts will have little difficulty in so finding and in dealing summarily with malicious or fraudulent or abusive documentation. For there can be little truth in abuse as such. We are strengthened in this opinion by the example of the Post Office Boards of Review which entertained the defence of truth raised at their hearings and had no difficulty in finding that the claim to truth was entirely spurious. Indeed the first Board wrote of the statements there in question that "their abusive quality is heightened by the knowledge that they are, in the face of obvious facts and repeated demonstrations of their falsity, represented as the 'truth'." For these reasons also and so as not to severely encumber the prosecution with the necessity of adducing evidence against palpable falsehoods, we have decided to recommend that the burden of proving the truth of abusive statements should be placed upon the persons charged rather than resting upon the prosecution to disprove. For the accused was first an accuser and his accusations must be for him to prove.

In our view these exemptions adequately protect the public interest in all legitimate discussion without reducing to impotence the substantive recommendation for the control of abusive statements defaming any identifiable group.

(17)Mr. Hayes, while agreeing with these conclusions and recommendations would have wished the recommendations to go further by excluding truth as a defence.

The history of law and opinion as concurrent developments is replete with instances, as A.V. Dicey long ago indicated, not only where law reflected the state of opinion but where a fluid opinion was itself crystallized by law. This generation of Canadians is more sensitive to the dangers of prejudice and vicious utterances than ever before. Such public opinion, therefore, should now be prepared to crystallize these sensitivities, fears and doubts into positive statements of self-protecting policy – namely statements of law.