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HATE PROPAGANDA: THE CONDITION OF THE LAW IN CANADA AND ELSEWHERE — A BRIEF SURVEY

In this Report we are concerned to determine the proper scope of legal protection in Canada for groups of people distinguished by religion, colour, race, language, ethnic or national origin. With few exceptions, such attention as Canadian Law has traditionally paid to religious, racial or national minorities has not borne directly on the issues that concern this Committee.⁽⁸⁾ On the rare occasions when our law has taken such groups into account it has made no very precise distinctions among such phrases as "groups", "classes of subjects" or "citizens", "bodies of persons", "parts of the population", "sections of the public", etc. We have chosen for the sake of simplicity to use the categorization "groups", and to designate particularly by that term the readily identifiable groups referred to above.

Our law has not attempted to meet head on the fundamental human problem of "prejudice" against groups. For inasmuch as group prejudice remains primarily a state of mind, the law has tended to leave correction of prejudice to other forms of social control — religious and social pressures, customs and conventions of decency and fair play and so on. Legal technique has been limited generally to the control of the more undesirable external manifestations of bigotry — violence and intimidation, discrimination in education, employment, housing and public places, and defamation.⁽⁹⁾

In the twentieth century legislation has been slowly expanding in the control of externalized prejudice, and of this there is no better example than in the evolving legal policy towards discrimination against "groups". Although over the years there had been a few cases in which Canadian courts had struck down restrictive covenants on the sale or occupation of land that were discriminatory in character, yet in general judicial and legislative control of group discrimination had been haphazard. However, since the Second World War the legislatures of all but three Canadian provinces have become convinced of the necessity of anti-discrimination legislation. The pattern of such legislation in Ontario (which has in many instances served as the model for legislation in other provinces) is a good indication of the ever-increasing provincial concern in this area.

(8) The Committee is not unaware of the Canadian Bill of Rights (Stats. Can. 1960, ch. 44) and the Saskatchewan Bill of Rights (R. S. S. 1953, ch. 345, as amended by 1956 ch. 67), but this legislation does not have direct significance for the control of hate propaganda.

(9) For a valuable summary of this development, see Jowell, *The Administrative Enforcement of Laws Against Discrimination*, 1965 Public Law, 119-186.

In 1944 Ontario enacted the Racial Discrimination Act, which prohibited the publication or display of any notice or other presentation expressive of racial or religious discrimination. In 1950 it amended the Labour Relations Act to ban discrimination in collective agreements and also the Conveyancing and Law of Property Act to nullify restrictive covenants. In 1951 it enacted a Fair Employment Practices Act. In 1954 the Fair Accommodation Practices Act was passed to prohibit discrimination in any place to which the public is customarily admitted, and the scope of this legislation has been since extended.

In 1958 Ontario established an Anti-Discrimination Commission to publicize the existing human rights legislation, and in 1962, when all of the human rights legislation was consolidated into the Ontario Human Rights Code, the Commission (whose name had been changed the previous year to the Ontario Human Rights Commission) was given the additional task of administering and enforcing the Code. The primary aim of the Commission is to obtain the cooperation of and compliance by any violator of the Code, and the authorized procedures therefore move, as necessary, from investigation through conciliation to a public board of inquiry, with full opportunity for settlement at every stage. A cease and desist order from the Minister of Labour, on the recommendation of a board of inquiry (with consequent penal sanctions for failure to comply) is used only as a last resort, and up to now no prosecutions have been found necessary.

The terms of reference of this Committee direct us to a consideration of prejudice and propaganda as expressed through the medium of hate materials. For purposes of this Report the analysis of the legal control of hate propaganda against groups will be divided into the areas of "*group intimidation*" and "*group defamation*", and according to whether the incitement to hatred, which in every case characterizes hate propaganda, is or is not coupled with a threat of physical violence to members of the groups attacked. We make no distinction among the various modes of expression of hate propaganda (oral, written, or representational, and including communication through broadcasting, the mails, and the press) except where they are made by the existing law.

1. The Legal Control of Group Intimidation in Canada

Except probably in the one instance of sedition, Canadian law does not take cognizance of violence or threats of violence (which we are here collectively calling "*intimidation*") against groups as such, and members of a group are protected by the criminal law as *individual persons* rather than protected as a group. They have, as *individuals*, all the protection of the Criminal Code against intentional violence — protection such as that against culpable homicide (s. 194 ff.), bodily harm (s. 216 ff.), kidnapping and abduction (s. 233 ff.), and assault (s. 230 ff.), together with those against counselling (s. 22), attempting (s. 24 and 406), inciting (s. 407), or conspiring to commit (s. 408) such offences. They are protected from violence and threats of violence which are intended to compel them to

abstain from doing anything they have a lawful right to do or to do anything they have a lawful right to abstain from doing (s. 366), and also from threatening communications of all kinds, including those by telephone and radio (s. 316).

Because of the apparently comprehensive protection afforded to individuals by Canadian law, it has not been deemed necessary heretofore to protect groups as such. Thus although Canada is a signatory of the United Nations Convention on Genocide and is bound thereby to implement anti-genocide measures in its domestic legislation, Canadian law so far has not been amended in accordance with the Convention.

It has been argued, of course, that existing provisions of the Criminal Code, particularly those relating to murder, already protect individuals from most of the acts defined as genocide by the Convention. But the intent to destroy a racial, religious, ethnic or national group, which is an essential ingredient of the genocidal act, is not an element of any existing offence in Canadian law. Moreover, technical arguments against Canadian implementation do not take into account the educational value of such legislation. It is significant that most of the other 65 ratifying states had existing provisions in their domestic law against murder and yet this did not deter many of them from incorporating the Convention into their domestic law.

It is now necessary to examine in some detail the Canadian law on two types of crimes: "seditious offences" and offences involving "breach of the peace" — since these have a direct bearing on the adequacy or not of existing legal measures to control hate propaganda. The law on sedition is set out in sections 60-62 of the Criminal Code:

60. (1) Seditious words are words that express a seditious intention.
- (2) A seditious libel is a libel that expresses a seditious intention.
- (3) A seditious conspiracy is an agreement between two or more persons to carry out a seditious intention.
- (4) Without limiting the generality of the meaning of the expression "seditious intention", every one shall be presumed to have a seditious intention who
 - (a) teaches or advocates, or
 - (b) publishes or circulates any writing that advocates,
 the use, without the authority of law, of force as a means of accomplishing a governmental change within Canada.
61. Notwithstanding subsection (4) of section 60, no person shall be deemed to have a seditious intention by reason only that he intends, in good faith,
 - (a) to show that Her Majesty has been misled or mistaken in her measures,

- (b) to point out errors or defects in
 - (i) the government or constitution of Canada or of a province,
 - (ii) the Parliament of Canada or the legislature of a province, or
 - (iii) the administration of justice in Canada,
- (c) to procure, by lawful means, the alteration of any matter of government in Canada, or
- (d) to point out, for the purpose of removal matters that produce or tend to produce feelings of hostility and ill-will between different classes of persons in Canada.

62. Every one who

- (a) speaks seditious words
- (b) publishes a seditious libel, or
- (c) is a party to a seditious conspiracy, is guilty of an indictable offence and is liable to imprisonment for fourteen years.

These sections in large measure codify the common law with respect to the three crimes of speaking "seditious words", publishing "a seditious libel", and being a party to a "seditious conspiracy", all of which have as their common constituent a "seditious intention." Traditionally the most important of these crimes has been "seditious libel" which consists of the communication of defamatory matter in written form.

"Seditious intention" at common law was described by the famous English criminal jurist Sir James Fitzjames Stephen as follows:

"A seditious intention is an intention to bring into hatred or contempt, or to excite disaffection against the person of, Her Majesty, her heirs or successors, or the government and constitution of the United Kingdom, as by law established, or either House of Parliament, or the administration of justice, or to excite Her Majesty's subjects to attempt otherwise than by lawful means, the alteration of any matter in Church or State by law established, or to incite any person to commit any crime in disturbance of the peace, or to raise discontent or disaffection amongst Her Majesty's subjects, or *to promote feelings of ill-will and hostility between different classes of such subjects (emphasis added)*.

There were, therefore, five kinds of seditious libels at common law: (1) those against the person of the Monarch, the Government, or Constitution, or Parliament or the administration of justice; (2) those against the existing order of Church and State; (3) those in disturbance of the peace; (4) those which raise discontent or disaffection among the citizenry; and (5) those which provoke ill-will and hostility between various classes of citizens. Obviously it is the fifth kind which is most relevant to the subject of hate propaganda.

The prevalent judicial interpretation of seditious libel in the early part of the nineteenth century was that any promotion of disaffection among citizens, whether or not accompanied by direct incitement to violence and breach of the

peace, was sufficient for conviction. But later the English courts became increasingly loath to find seditious intention in the absence of incitement to violence, and the two leading English cases in the twentieth century unequivocally adopt incitement to violence as the essential ingredient of sedition.

In Canada the leading decision on the meaning of sedition is *Boucher v. The King*, decided in 1949-50. In that case the Supreme Court of Canada held that the intent to promote feelings of ill-will and hostility between different classes of subjects is not in itself sufficient to constitute a seditious intent, but what is required further is an intent to bring about a disturbance of, or resistance to, established authority.

The policy consideration which led the Court to this conclusion, in accord with the later English cases, was the desire not to limit unduly freedom of speech. As it was expressed at the time by Mr. Justice Rand:

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

The effect of the Court's adoption of this value judgment was to protect freedom of expression in all cases except where it was employed to foment tumult or violence.

The case, however, leaves some reason for doubt as to whether the intended disorder must be directed at the institution of government as such. The better opinion would seem to be that there is to be no distinction in this context between direct and indirect challenges to the authority of the State and that an incitement to violence directed against a group is also criminally seditious. This was the opinion of Mr. Justice Rand, who declared that what the Code forbade was “language which, by inflaming the minds of people in hatred, ill-will, discontent, 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*” (emphasis added).

On this interpretation of the *Boucher* case, classes of Her Majesty's subjects may be adequately protected as groups, under the existing Canadian law of seditious libel, from violence or threats of violence against them, whether or not the violence is directed primarily against them. But on any interpretation the protection to groups extends only to situations where the prosecution can prove that violence was intended. It does not cover a situation where the prosecution cannot prove the intention, or where the threat of violence comes by way of reaction from the persons villified, or where there is incitement to hatred short of violence.

The law dealing with the various forms of breach of the peace makes a further, though limited, contribution to the protection of groups. Unlawful assemblies are prohibited by Code sections 64 and 67 and riots by sections 65 and 66:

64. (1) An unlawful assembly is an assembly of three or more persons who, with intent to carry out any common purpose, assemble in such a manner or so conduct themselves when they are assembled as to cause persons in the neighbourhood of the assembly to fear, on reasonable grounds, that they

- (a) will disturb the peace tumultuously, or
- (b) will by that assembly needlessly and without reasonable cause provoke other persons to disturb the peace tumultuously.

(2) Persons who are lawfully assembled may become an unlawful assembly if they conduct themselves with a common purpose in a manner that would have made the assembly unlawful if they had assembled in that manner for that purpose.

(3) Persons are not unlawfully assembled by reason only that they are assembled to protect the dwelling house of any one of them against persons who are threatening to break and enter it for the purpose of committing an indictable offence therein.

65. A riot is an unlawful assembly that has begun to disturb the peace tumultuously.

66. Every one who takes part in a riot is guilty of an indictable offence and is liable to imprisonment for two years.

67. Every one who is a member of an unlawful assembly is guilty of an offence punishable on summary conviction.

The additional offence of causing a disturbance is defined by section 160:

160. Every one who

- (a) not being in a dwelling house causes a disturbance in or near a public place,
 - (i) by fighting, screaming, shouting, swearing, singing or using insulting or obscene language,
- is guilty of an offence punishable on summary conviction.

Public place is defined in section 130 (b) as including "any place to which the public have access as of right or by invitation, express or implied".

The difference between the offences of riot and unlawful assembly is that for a riot the peace must actually be disturbed through physical violence, whereas for an unlawful assembly a mere threat to the public peace is sufficient. It is not necessary for unlawful assembly that the assembly be for an unlawful purpose, but only that there should be reasonable grounds for believing the peace to be

endangered. It is, however, necessary for unlawful assembly, as opposed to causing a disturbance, that there should be proof of a common purpose in *at least three persons* in the assembly, whereas for causing a disturbance, misconduct by *only one person* is necessary.

At common law there appears to have been no offence in the participants in an assembly where an actual or threatened breach of the peace resulted from the hostility of the by-standers rather than from the intention of the participants. The only action which law enforcement authorities could take at common law to deal with conduct which was likely, though not intended, to cause a breach of the peace was to require the participants to be bound over to keep the peace and be of good behaviour. For although they could not be punished for their conduct, they could be compelled to behave more circumspectly in the future. The power to order a defendant to enter into a recognizance to keep the peace and be of good behaviour still exists in the Code in Section 717, but by subsection (1) of that section it can be requested only by a person "who fears that another person will cause personal injury to him or his wife or child or will damage his property"; and so it is no longer possible for a public official whose interest is in the public peace alone to cause a person to be bound over to keep the peace.

Today, however, section 64 (1)(b) specifically provides for liability where the threat to the peace comes from those other than the participants and even where the resulting events are beyond their intention. The "insulting language" clause of section 160 would appear to have the same effect and it creates an offence where there was none at common law. Indeed, it is possible that section 160 (a)(i) creates liability even in the absence of any likelihood of breach of the peace: i.e., that "causing a disturbance" is something less than "breach of the peace" and that the mere acts of "fighting, screaming, shouting, swearing, singing or using insulting or obscene language", without more, fulfil the requirements of "causing a disturbance." On this interpretation it seems likely that section 160 would confer on groups as well as on individuals protection against spoken public insults even where there was no threat to the peace from anyone.

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

The remaining point to be noted in this section is that Canadian law no longer knows any restriction upon organizations or associations which are dedicated to group intimidation. After the Winnipeg Strike of 1919, which saw the city paralyzed for more than a month, a section was added to the Criminal Code proscribing "unlawful associations." Besides forbidding the use of force to achieve governmental change, the section made illegal any organization "which teaches, advocates, advises or defends the use of force, violence, terrorism, or physical injury to person or property, or threats of such injury, in order to

accomplish such change, or for any other purpose." It was made an offence to belong to such an organization and its property was made subject to seizure and forfeiture. However, the stringency and potential abuse of this legislation did not command support and it was repealed in 1936 in response to the strong public opinion against it.

This Canadian "unlawful association" legislation, although essentially aimed at the use of force against the State, was broad enough to include "group intimidation" as well, but in our opinion there would be no justification for resurrecting it today even for the limited objective of proscribing such intimidation. There are other ways of dealing with the problem without putting freedom of association in further peril again. It is enough for the law to prohibit all acts of group intimidation; it is not necessary for it to go beyond actual illegal conduct except through the well-established categories of attempt, conspiracy, counselling and incitement, nor could it do so without virtually establishing a new legal category of "guilt by association."

2. The Legal Control of Group Defamation in Canada.

The traditional legal protections against defamation have been the civil law of libel and slander and the criminal law of defamatory libel. We must therefore examine this body of law to see what protections, if any, have been given to groups, first at common law, and second by statute.

At common law the civil law of defamation provides no protection at all against group defamation. At common law a person who has been defamed as a member of a group has legal recourse only as an individual, i.e., for recovery he must be able to show that the defamatory words were published of and concerning him. The two "group" situations in which plaintiffs in Canada have been successful in so proving have been the case where the reference to a group is merely a cloak for an attack on an easily identifiable individual or the case where the group defamed is a very limited class and identification of the plaintiff by inference is not difficult. Aside from one Quebec case decided under that Province's Civil Code where it was held that a group of 75 Jewish families out of a total population of 80,000 was sufficiently ascertainable to be protected against defamation, usually at common law no group larger than twenty has been considered a sufficiently limited class. In effect, the common law in no case protects groups from defamation; even when it protects small groups, it is on the principle that the members have been directly and personally defamed as individuals.

A statutory modification of the common law was enacted in Manitoba in 1934 and now appears as section 20 of the Manitoba Defamation Act:

20. (1) The publication of a libel against a race or religious creed likely to expose persons belonging to the race or professing the religious creed to hatred, contempt or ridicule, and tending to raise unrest or disorder among 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.

(2) The action may be taken against the person responsible for the authorship, publication, or circulation, of the libel.

(3) The word "publication" used in this section shall be interpreted to mean any words legibly marked upon any substance or any object signifying the matter otherwise than by words, exhibited in public or caused to be seen or shown or circulated or delivered with a view of its being seen by any person.

(4) No more than one action shall be brought under subsection (1) in respect of the same libel.

This statute provides the equitable remedy of injunction rather than the more usual common-law remedy of monetary damages, and the use to which this remedy is here put has given rise to the question whether this legislation is *ultra vires* the Province as trespassing on the federal criminal law power, since the injunction procedure as applied to restrain defamation appears to be in substance, though not in form, a criminal remedy. In the only case tried under the legislation the constitutional point was not raised and a permanent injunction was granted to the individual plaintiff against an editor and a publisher for libelling the Jewish race and creed. There is also a requirement in Manitoba law that the name of the printer, publisher or advertiser be placed on every poster, leaflet or brochure distributed in the Province, and this greatly facilitates the bringing of an action in an appropriate case.

Turning now to the English common-law control of defamation through criminal law (which still obtains in England though not in Canada), we find some degree of protection for groups. An English case in 1732, *R. v. Osborne*, established the principle that criminal proceedings will lie against a libeller of a group where the tendency of his words is to lead to a breach of the peace, either on the part of the group libelled or on the part of the general public against the group libelled. In no subsequent case has the common law extended the scope of group protection. Therefore, this case at most provides protection against intimidation, i.e. where the libeller in words lead to a breach of the peace, rather than against defamation *per se*.

Not only is the English common-law protection limited to defamations which incite to breach of the peace, but it has never been established that it applies to large indeterminate groups. Indeed in the *Osborne* case the group libelled was "certain Jews lately arrived from Portugal and living near Broad Street," and in subsequent cases of successful prosecution the group libelled has always been equally ascertainable.

The Canadian law on defamatory libel is contained in the Criminal Code, of which the more important relevant provisions are as follows:

248. (1) A defamatory libel is matter published, without lawful justification or excuse, that is likely to injure the reputation of any person by exposing him to hatred, contempt or ridicule, or that is designed to insult the person of or concerning whom it is published.
(2) A defamatory libel may be expressed directly or by insinuation or irony
- (a) in words legibly marked upon any substance, or
 - (b) by any objects signifying a defamatory libel otherwise than by words.
249. A person publishes a libel when he
- (a) exhibits it in public,
 - (b) causes it to be read or seen, or
 - (c) shows or delivers it, or causes it to be shown or delivered, with intent that it should be read or seen by the person whom it defames or by any other person.
250. Every one who publishes a defamatory libel that he knows is false is guilty of an indictable offence and is liable to imprisonment for five years.
251. Every one who publishes a defamatory libel is guilty of an indictable offence and is liable to imprisonment for two years.
259. 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.
261. No person shall be deemed to publish a defamatory libel where he proves that the publication of the defamatory matter in the manner in which it was published was for the public benefit at the time when it was published and that the matter itself was true.

The definition of the offence is given in sections 248 and 249 and the ordinary offence is prohibited by section 251. The offence of publishing a libel known to be false, established by section 250, is however, a more serious and a rarer offence. Sections 255 through 265 provide, in certain special circumstances, for exemptions from liability, called privileges, which generally parallel those available in defamation suits at civil law; hence there are privileges regarding reports of the proceedings of courts and of Parliament; fair comment on public meetings; public persons and works of art or literature; answers to necessary

inquiries, etc. The defences of public benefit in section 259, and of truth coupled with public benefit in section 261, are among the more important exemptions from liability.

However, the defining words in section 248 preclude any protection for groups, even the limited protection recognized at common law, for a defamatory libel is defined as one "that is likely to injure the reputation of *"any person"* (emphasis added), and the definition of "person" is not wide enough to include an unincorporated group. Of course, the members of a group are still protected as individuals against a libel in collective form, but to establish the publisher's liability it would be necessary for the prosecution to show that the libel exposed *every member of the group individually* to "hatred, contempt or ridicule."

There are two sections in the Code concerning the spread of falsehoods which have some relevance for group defamation, sections 166 on false news and 315 (1)⁽¹⁰⁾ on false messages:

166. Every one who wilfully publishes a statement, tale or news that he knows is false and that causes or is likely to cause injury or mischief to a public interest is guilty of an indictable offence and is liable to imprisonment for two years.
315. (1) Every one who, with intent to injure or alarm any person sends or causes or procures to be sent by letter, telegram, telephone, cable, radio, or otherwise, information that he knows is false is guilty of an indictable offence and is liable to imprisonment for two years.

Both of these sections have only very limited application to hate propaganda for two reasons. First, both require the Crown to prove that the libeller knows that the matter is false (as does section 250, which proscribes the publishing of a libel known to be false): not only is this a heavy burden for the Crown to meet, but it is undoubtedly true that many purveyors of group libel are sick or misguided men who thoroughly believe in the truth of their statements. Second, both apparently apply only to straight matters of "fact" and would have no application to any matters of opinion.

A further problem with regard to the false news provision is the requirement that "injury or mischief to a public interest" must be caused or be likely to be caused. There is no authority to support the view that defamation of an identifiable group would be considered "injury or mischief to a public interest". In fact a Quebec court has held that the offence under section 166 is substantially the same as that of sedition and that therefore the test of liability should be the same, viz., an incitement to violence against constituted authority. In the absence

(10) See also 316 dealing with threatening letters and telephone calls where the language does not cover the group hatred or group incitement problem.

of a contrary decision by a higher court, the applicability of section 166 to the dissemination of hate propaganda is therefore highly doubtful.

The statutory offence of "public mischief" is too narrowly drawn in the Code to have any application to the dissemination of hate propaganda, since section 120 restricts it to "every one who, with intent to mislead, causes a peace officer to enter upon an investigation". However, at common law this offence had a much wider meaning, and was applied in an English case in 1936 to convict the printer and publisher of a newspaper which published statements reflecting on the Jewish community as a whole.⁽¹¹⁾ Ostensibly section 8 of the Canadian Criminal Code, which provides that "no person shall be convicted of (a) an offence at common law", renders such a prosecution impossible here, but there is a possibility that the common law interpretation of public mischief could still find its way into Canadian criminal law through the offence of common-law conspiracy, which is retained by section 408(2). Section 408(2) provides:

408. (2) Every one who conspires with any one
 (a) to effect an unlawful purpose, or
 (b) to effect a lawful purpose by unlawful means,
 is guilty of an indictable offence and is liable to imprisonment for two years.

Though it might seem to be poor legislative policy to make illegal the conspiracy to perform an act which would not itself be illegal if actually performed, judicial dicta in the English House of Lords have openly advocated such a position. This question has not been decided in Canada.

A final relevant and important provision of the Criminal Code is section 153, which renders criminal the mailing of obscene and scurrilous matter:

153. Every one commits an offence who makes use of the mails for the purpose of transmitting or delivering anything that is obscene, indecent, immoral or scurrilous, but this section 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.

Section 151 (4) exempts reports of judicial proceedings and *bona fide* legal and medical publications.

Originally section 153 was contained in the Post Office Act rather than in the criminal law, but when the first comprehensive Canadian Criminal Code was enacted in 1892 it was transferred to the Code. The word "scurrilous", which had been in the Post Office Act, was at first omitted from the Code, but was added by an amendment in 1900. There has also remained in the Post Office Act provision for administrative action by the Postmaster General

⁽¹¹⁾ *R. v Leese and Whitehead*, London Times, 1936, Sept. 19th at p. 14 and Sept. 22 at p. 11.

to deny the use of the mails to persons who may be guilty of an offence under section 153; such persons are entitled to have recourse to a Board of Review before being legally deprived of their postal privileges.

The word in section 153 of the Criminal Code which is most likely to prohibit the mailing of matter which is defamatory of a group, is "scurrilous," but it has never been judicially interpreted. It has, however, recently received an interpretation by a three-man Board of Review, headed by the Hon. Mr. Justice Dalton Wells of the Ontario Court of Appeal, appointed by the Postmaster General as a result of an appeal by the National States' Rights Party from an interim prohibitory order made on September 29, 1964, prohibiting the forwarding from Canada of all mail directed to that Party and the delivery in Canada of all mail deposited by it anywhere. (See Appendix VI)

After examining 11 issues of the periodical, "The Thunderbolt", and certain other publications of the National States' Rights Party the Board of Review found as a fact that "on an objective view, the material which we have examined may reasonably be described generally as grossly offensive and abusive of both the Jewish and Negro people in our population"; and the Board was therefore faced with the legal problem of deciding whether this was sufficient to make it "scurrilous" within the meaning of section 153. To assist it in determining this question the Board heard evidence from a linguistic expert who testified that "there are several definitions [of the word] now, and the element which is common to all of these in the twentieth century — and this coincides with my own experience of the word wherever I have seen it written — is 'abusive or insulting'. All definitions seem to contain this, both directly and by implication." The Board also examined the history of the legislation, including the Parliamentary Debates when the word was introduced into the Code, studied dictionaries, and compared the words in the French version of the Code. Since all of these sources supported the meaning of "grossly offensive and abusive," the Board came to the conclusion that this was a valid *prima facie* interpretation of "scurrilous" in section 153, and that the context in which it was found in the Code did nothing to change the ostensible meaning:

"It was argued by Mr. Stanley that the word scurrilous was limited in its meaning to writings which are obscene and sexual in their connotation because section 153 occurs in Part IV of the Criminal Code under the general heading 'Sexual Offences, Public Morals and Disorderly Conduct' and the subheading, immediately before section 150, 'Offences Tending to Corrupt Morals'. The rule of statutory interpretation is clear that such headings 'cannot control the plain word of the statute but they may explain ambiguous words' ... "We are of the opinion that the meaning of the word scurrilous, which we have discussed above, is clear and unambiguous and that it is not limited by the headings of Part IV of the Criminal Code. The extracts from the Debates of the House of Commons and the Senate at the time that the word was inserted

also indicate that Parliament did not intend scurrilous to be limited to writings of an immoral or sexual character.

"Counsel for the Board also drew our attention to the argument that the word scurrilous might be considered to be limited in its meaning by the *ejusdem generis* rule. We do not consider that the collocation of the words 'obscene, indecent, immoral or scurrilous' in section 153 constitute a genus or category which would give rise to the operation of the *ejusdem generis* rule . . . In our opinion, these words are disjunctive and indicative of different qualities. "In our opinion, the other words of the section particularly 'indecent' and 'immoral' are not limited to sexual matters and have a broad meaning. In his evidence, Professor Johnston expressed the view that the word 'indecent' was not so limited in its meaning and we have formed the same view of the word 'immoral'. Although your Interim Prohibitory Order was founded on the word 'scurrilous' as it appears in the section, it appears to us that the type of journalism exemplified by "The Thunderbolt" may quite properly be described as indecent or immoral in the sense that the souvenir issue of 'Der Stürmer' could also be described as obscene.

"We have no difficulty therefore in concluding that the material circulated by the National States' Rights Party is, on its face, scurrilous, within the meaning of section 153."

This opinion of the Board of Review, as an advisory opinion to the Postmaster General, lacks the binding power of a judicial decision, though the thoroughness of its investigation into the meaning of the word "scurrilous" and the presence of an appellate judge on the Board add considerable weight to its views. It is highly probable, that a Canadian court in interpreting section 153 would go as far as the Board of Review's opinion.

If, however, this new view of section 153 prevails, we are then faced with the problem that the exemptions from liability may be narrower here than are the exemptions with respect to seditious libel (s. 61) or defamatory libel (ss. 255-266), and may not always protect some areas of public debate. This problem was not considered fully by the Board of Review when it dealt with the broader defences raised:

"We now have to consider two general defences raised by Messrs. Stanley and Taylor. The first was that the writings were truthful and that there was a duty to warn the public of the danger in which it stood and to attract attention by the use of hardhitting and flamboyant language and for that reason the writings could not be considered scurrilous. The second was that the prohibition of the circulation of this material constituted a violation of the right of free expression of opinion and, in particular, that section 153 of the Code was now limited by the operation of the Canadian Bill of Rights . . .

"These contentions and others which Mr. Taylor advanced are, in our view, not matters of fact but expressions of opinion. They certainly cannot

be accepted as 'truth' upon which we can find any conclusion. They are opinions strongly held by Mr. Taylor and his friends, often in the face of the most obvious facts and the common understanding of mankind in the western world.

"We do not propose to deal with all the arguments of Mr. Taylor, whether those set forth above or the many similar contentions to be found in the transcript. To treat many of his contentions seriously would be to give them an importance, which they do not, in our opinion deserve.

"Almost all of his contentions are of dubious validity because they centre on the allegation of a world-wide Jewish conspiracy to dominate mankind. His arguments are based upon writings of a political and pseudo-scientific character which, so far as we are aware, have been disproved whenever they have been dispassionately examined. His opinions have not only been disavowed by the literate community of the western world but, in our opinion, properly condemned by all believers in truth and freedom. His anti-Semitic arguments are, in our view, merely the tragic reproduction of the lies of Hitlerism and the sordid expression of anti-Jewish prejudice which has disgraced our society for many centuries.

"... we have little difficulty in rejecting the contention that the views expressed in 'The Thunderbolt' are not scurrilous because they are the 'truth'. Indeed, in our opinion, their abusive quality is heightened by the knowledge that they are, in the face of the obvious facts and repeated demonstrations of their falsity, represented as the 'truth' (P. 41).

The Board also after lengthy consideration rejected the argument that the Bill of Rights legitimated unlimited freedom of expression.

However desirable it may have been that the Board should take into account the defence of truth on the charge of scurrility, there is no statutory warrant for it, and in the absence of statutory authority it is impossible to believe that a court of law would interpret section 153 in the same way. If the Board is right in its interpretation of the word scurrilous, as it appears to be, section 153 does indeed avail to ban group defamation through the mails, but in the absence of adequate statutory exemptions for legitimate debate it may be that it could do so at the expense of legitimate freedom of expression.

In sum, then, it is evident that the Criminal Code, even on the widest interpretation, does little or nothing to protect groups from the evils of hate propaganda.

Turning from the Criminal Code to other forms of federal regulation, we find available powers with respect to the mails and broadcasting, but a curious lack of parallel powers in the customs area. The postal powers are set out in section 7 of the Post Office Act, which reads in part as follows:

7. (1) Whenever the Postmaster General believes on reasonable grounds that any person

- (a) is by means of the mails,
 - (i) committing or attempting to commit an offence, or
 - (ii) aiding, counselling or procuring any person to commit an offence,
or
 - (b) with intent to commit an offence, is using the mails for the purpose of accomplishing his object,
- the Postmaster General may make an interim order (in this section called an "interim prohibitory order") prohibiting the delivery of all mail directed to that person (in this section called the "person affected") or deposited by that person in a post office.

Subsection 2 provides for the setting up of a Board of Review at the request of the person affected by an interim prohibitory order. By subsection 6 the Board is required to submit a report with its recommendation to the Postmaster General, but the Postmaster General retains the power of final decision, with a statutory duty only to reconsider his order in the light of the report.

During 1964-65 the Postmaster General has twice invoked his power to make prohibitory orders against distributors of hate propaganda. In September of 1964 he made the order already referred to against the National States' Rights Party and in May of 1965 he made similar orders against David Stanley and John Ross Taylor, which will have the effect of causing all mail posted by or to them to be returned. Both orders have been confirmed by the Postmaster General after affirmative recommendations by Boards of Review. (12)

There is considerable doubt, however, as to the practical efficacy both of such orders and of postal detection of hate propaganda generally because of the extremely limited power of postal authorities to open first-class mail for inspection; nor indeed may third class mail be opened except for the purpose of verifying postage. Second class mail consists only of newspapers and periodicals. Effective surveillance by postal authorities is difficult and almost impossible. In the long run the postal authorities are almost wholly dependent on complaints from recipients of hate propaganda. It was such complaints, from recipients of first-class mail, that enabled them to invoke legal procedures against Stanley and Taylor.

Federal customs powers are not co-extensive with postal powers. Section 12 of the Customs Tariff prohibits "The importation into Canada of any goods enumerated, described or referred to in Schedule C", and Tariff Item 1201 in Schedule C includes among prohibited goods "books, printed paper, drawings, paintings, prints, photographs or representations of any kind of a treasonable or seditious, or of an immoral or indecent character." (13) There is no definition of "immoral or indecent", either in the regulations or in applicable judicial decisions,

(12) For copies of these orders see Appendix VI.

(13) See also Section 22(2) of the Customs Act for a further provision that may have a bearing here on Ministerial discretion.

but it is unlikely that, without the word "scurrilous", a court would interpret them as having more than a sexual connotation. There is no apparent reason why customs powers should not be co-extensive with postal powers, and a uniform legal policy concerning the two departments would seem to be highly desirable for the control of group defamation or group intimidation.

Finally, with respect to broadcasting, governmental regulations directly take account of group defamation. Section 5(1) of the *radio* regulations reads in part as follows:

- 5. (1) No station or network operator shall broadcast
 - (a) anything contrary to law;
 - (b) any abusive comment on any race or religion;

Section 5(1) of the television regulations is to the same effect (except that it adds "creed" to race and religion).

- 5. (1) No station or network operator shall broadcast
 - (a) anything contrary to law;
 - (b) any abusive comment or abusive pictorial representation on any race, religion or creed;

Infringement of either set of regulations is made a summary conviction offence by section 18 of the Broadcasting Act, which provides that "every person who violates any of....the regulations is guilty of an offence punishable on summary conviction as provided in the Criminal Code."

The provisions in these regulations seem to forbid group defamation, by the quite general terms "abusive comment," and are akin to the meaning given by the Post Office Board of Review to "scurrilous". However, they have never been judicially interpreted. It is an interesting legal question whether a person who actually utters statements defamatory of a group as defined could be guilty of being a party to an offence, since despite the phrase "any person" in section 18, these regulations apparently were designed to impose their prohibitions only on stations and networks.

In summary, aside from this limited area of broadcasting, the only specific controls on group defamation exist in provincial legislation of perhaps doubtful constitutionality and federal criminal legislation of some difficulty in definition which, even if applicable, applies only to communication by mail and if extended to its full implications may lack adequate safeguards for freedom of expression.

3. Legal Controls in the United Kingdom

The position of groups at English common law, both civil and criminal, is substantially identical with what has already been stated to be the common law in

Canada: groups are protected against outright force and intimidation but only against such defamation as is likely to lead to a 'breach of the peace.'

However, as a result of Nazi-Fascist activity in the midthirties which involved breaches of the peace, damage to property, and verbal abuse, Parliament passed the Public Order Act in 1936. This Act prohibited the wearing of political uniforms and the formation of military or semi-military organizations, and also extended the law relating to disorder in public. Section 5 defines an offence punishable on summary conviction:

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

Section 5 was only a territorial extension to the whole country of what had already been the law in urban areas under a series of municipal acts and ordinances. In the most important case under this section it has been held that a public speaker is responsible for the effect of his words to the particular audience he is addressing and not to a theoretical audience composed of reasonable men. It is therefore no defence for him to plead that a more reasonable audience would not likely have been stirred to a breach of the peace by his words.

The Public Order Act protected against *group intimidation*, but not against *group discrimination* or *group defamation*, and after two decades of experience with the 1936 law and a heightening of racial tensions as a result of heavy non-white immigration, both Houses of the United Kingdom Parliament recently approved certain Race Relations provisions which although not yet enacted into law, outlaw racial discrimination at all places of public resort, extend the application of the Public Order Act to distribution of written material, and proscribe defamation against racial and ethnic groups. The latter portions of the Bill are as follows:

6. (1) A person shall be guilty of an offence under this section if, with intent to stir up hatred against any section of the public in Great Britain distinguished by colour, race, or ethnic or national origin.
 - (a) he publishes or distributes written matter which is threatening, abusive or insulting; or
 - (b) he uses in any public place or at any public meeting words which are threatening, abusive or insulting, being matter or words likely to stir up hatred against that section on grounds of colour, race, or ethnic or national origins.
- (2) In this section the following expressions have the meanings hereby assigned to them, that is to say:-

“public meeting” and “public place” have the same meanings as in the Public Order Act 1936;

“publish” and “distribute” mean publish or distribute to the public not consisting exclusively of members of an association of which the person publishing or distributing is a member;
 “written matter” includes any writing, sign or visible representation.

- (3) A person guilty of an offence under this section shall be liable-
- (a) on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding two hundred pounds, or both;
 - (b) on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine not exceeding one thousand pounds, or both;
- but no prosecution for such an offence shall be instituted in England and Wales except by or with the consent of the Attorney General.

7. For section 5 of the Public Order Act 1936 there shall be substituted the following section:-

“5. Any person who in any public place or at any public meeting -

- (a) uses threatening, abusive or insulting words or behaviour, or
- (b) distributes or displays any writing, sign or visible representation which is threatening, abusive or insulting,

with intent to provoke a breach of the peace or whereby a breach of the peace is likely to be occasioned, shall be guilty of an offence.”

Two characteristics of the new Bill are particularly worth noting. First, the groups protected are sections of the public “distinguished by colour, race, or ethnic or national origin” with religion as a significant omission. It is believed by the Government, however, that despite this omission, anti-Semitic propaganda will be covered because it is said to go beyond religion and attack Jews as members of an ethnic group whether they are believers or not, and further that the omission has the positive advantage of leaving free, as heretofore, continuing controversy over all questions of a religious or doctrinal nature. Second, there is no other exception for so called legitimate debate. Public discussion on all matters involving colour, race, or ethnic or national origin is proscribed if it occurs in form which is “threatening, abusive or insulting” and if it is “likely to stir up hatred”, regardless of the merits of its content, i.e., irrespective of its truth or falsity.

4. Legal Controls in the United States

American common law is substantially identical with English common law. However, in two cases decided in 1964 the United States Supreme Court established one significant difference in that it broadened the defences which had hitherto been allowed in defamation cases. In a case on criminal defamation decided in November 1964 Mr. Justice Brennan said for the Court: (14)

“Even where the utterance is false, the great principles of the Constitution which secure freedom of expression in this area preclude attaching adverse

(14) *Garrison V. State of Louisiana*, (1964) 85 S. Lt. 209 at p. 215.

consequences to any except the knowing or reckless falsehood. Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth."

Traditionally the common law had regarded the question of truth or falsehood as irrelevant to criminal defamation, and Lord Campbell's Act in 1843 had established truth as a defence only when the publication could also be said to be for the public benefit. The new American rule recognizes where discussion of public affairs is concerned not only the defence of truth without qualification but also the defence of well-meant falsehood. Earlier last year the Supreme Court had adopted the same rule for civil defamation, though in that case the new rule was not significantly different from the common-law position, for at common law truth is a complete answer to a civil action for defamation and there are several other defences as well.

On the statutory side, there has been much American legislation against group discrimination. A score of states and many cities have made illegal discrimination in employment, accommodation and housing, and education, and have established administrative agencies to enforce the law. Many other jurisdictions, while not going so far as to make discrimination unlawful, have established commissions to deal informally with discrimination. The normal pattern of operation of American administrative agencies is similar to that already described with reference to the Ontario Human Rights Commission. In addition to State legislation, Congress passed a number of historically significant Civil Rights Acts, in 1957, 1960, 1964 and 1965.

Protection against group defamation, however, generally is lacking. There is no federal legislation, though bills to curb such defamation have been introduced in every Congress since 1947, and eleven states have various types of anti-defamation legislation. A group defamation bill which passed both Houses in New York State this year was vetoed by Governor Rockefeller. In the 1952 case of *Beauharnais v. Illinois* the Illinois legislation was upheld by the Supreme Court of the United States as not violating the free speech provisions of the Bill of Rights. *Beauharnais* was a member of a white citizens' group directed to the exclusion of Negroes from white neighbourhoods and was arrested for passing out matter which labelled the Negro an inferior being. The statute under which he was convicted made illegal any publication which by portraying the "depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion" exposed them to "contempt, derision, or obloquy." Mr. Justice Frankfurter for the majority said that "it would be out of bounds for the judiciary to deny the legislature a choice of policy, provided it is...not forbidden by some explicit limitation on the State's power," and he found that, since libellous utterances are not within the area of constitutionally protected free speech, there was no constitutional limitation on State legislation of this kind.

However, despite this blessing from the Supreme Court, most States have not enacted group defamation legislation, and aside from the *Beauharnais* case, the only other reported cases of prosecution under the Illinois statute are some cases in the early 'forties involving prosecutions of Jehovah's Witnesses. Hence the sum of United States experience with group defamation legislation is quite limited — although public discussion and legal-sociological scholarship has been substantial and valuable, probably the most extensive in the free world.

5. Legal Controls in Other Countries. (15)

Most countries in Western Europe have group defamation legislation of either of two kinds, according to the comprehensiveness of the group protected. Article 137c of the Penal Code of the Netherlands is a good example of the broadest type of legislation:

Anyone deliberately and publicly expressing himself either in speech or in writing, or by means of a pictorial representation, in a manner offensive to a group of the population or a group of persons belonging partly to the population, is liable to imprisonment for a maximum of one year or to a fine of a maximum of 600 guilders.

Another translation has "in a defamatory form about" for "in a manner offensive to." The concept "a group of persons belonging partly to the population" was included to cover members of groups of a transnational character (e.g. Jews, Catholics) which as groups live only partly in the Netherlands. The group which is protected against defamation by this legislation is not defined; all that is necessary for the statute to apply is that an offensive expression refer to several persons with such group indicated collectively. Austria has similar legislation. The Federal German Republic, Greece and Norway also proscribe incitement against group hatred in such broad terms but only when it is coupled with a threat to the peace.

The more common type of group defamation legislation is that which protects only a defined class of the population. Here Section 8 of Chapter 16 of the Swedish Penal Code (1965) is typical:

If a person publicly threatens, slanders or vilifies an ethnic group having a certain origin or religious creed, he shall be sentenced for *agitation against ethnic group* to imprisonment for at most two years or, if the crime is petty, to pay a fine.

(15) For the provisions of several countries studied by the Committee see Appendix V. The Committee's sources for the law in the various countries consists mainly in material acquired from the Department of External Affairs and "*The Crime of Incitement to Group Hatred — A Survey of International and National Legislation*", (1965) by Natan Lerner.

Such legislation restricts the protected group to one definable by such concepts as race, colour, ethnic origin, and religion. Denmark, France, Norway and, in a more limited way, Switzerland, have similar enactments.

Among other countries, the Soviet Union, most of the Eastern European states and Argentina have group legislation of the Swedish type, whereas India is more in agreement with the Dutch model. A number of states, notably Argentina, the Federal Republic of Germany and Italy, have "unlawful associations" legislation, although only in the case of Argentina are the banned associations specified as ones dedicated to the promotion of religious or racial discrimination.

Many states, of course, have legislation dealing with group intimidation and group discrimination. We have already referred above to the legislation in the Federal German Republic, Greece and Norway, on incitement to violence combined with incitement to hatred. Australia retains the sedition classification, including in the definition of seditious intention in section 24A of the Crimes Act the following:

(g) to promote feelings of ill-will and hostility between different classes of Her Majesty's subjects so as to endanger the peace, order or good government of the Commonwealth.

It is evident, that however varied the social and legal tradition, the problems of group discrimination, intimidation or defamation have invited the attention of many advanced countries and that most of them have attempted by legislation to control or eliminate such practices and expressions.

6. International Legal Controls.

In 1946 the United Nations passed a resolution condemning genocide and requesting the Economic and Social Council to prepare a draft convention to deal with it. The draft convention was prepared and was adopted by the General Assembly of the United Nations in 1948. Its most relevant articles read as follows:

ARTICLE II. In the present Convention, genocide means any of the following acts committed with intent to destroy in whole or in part, a national, ethnic, racial or religious group as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

ARTICLE III. The following acts shall be punishable:

- (a) Genocide;
- (b) Conspiracy to commit genocide;
- (c) Direct and public incitement to commit genocide;
- (d) Attempt to commit genocide;
- (e) Complicity in genocide.

The Convention was signed by Canada on November 28, 1949, and was approved and "ratified" by both Houses of Parliament in 1952. The Canadian instrument of ratification was deposited with the United Nations on September 3, 1952. Sixty-six states in all have ratified or acceded to the Convention, as of 1965.

More recently a Declaration on the Elimination of all Forms of Racial Discrimination was adopted unanimously by the General Assembly on November 21, 1963, in the following terms:

ARTICLE 9:

- (a) All propaganda and organizations based on ideas or theories of the superiority of one race or group of persons of one colour or ethnic origin with a view of justifying or promoting racial discrimination in any form shall be severely condemned;
 - (b) All incitement to or acts of violence, whether by individuals or organizations, against any race or group of persons of another colour or ethnic origin shall be considered an offence against society and punishable under law;
 - (c) In order to put into effect the purposes and principles of the present Declaration, all states shall take immediate and positive measures, including legislative and other measures to prosecute and/or outlaw organizations which promote or incite to racial discrimination, or incite to or use violence for purposes of discrimination based on race, colour or ethnic origin.
- (16)

Such a United Nations declaration does not impose any specific legal obligation on the states which vote for it, but it does set a moral standard for the world. Indeed we understand that there is a widely held view that it may create a kind of quasi-legal obligation for states who vote for such a resolution, particularly where a preponderant majority of member states have given it their support. Canada voted for the resolution and it was adopted by the General Assembly unanimously. Moreover, an attempt is now being made to draw up a convention on the same subject which would be legally binding on any state which ratifies it. It is expected that

(16) See Appendix V of this Report for the text of the resolution passed by the U.N. Economic and Social Council on July 28th, 1965, entitled "Measures Taken in the Implementation of the United Nations Declaration on the Elimination of All forms of Racial Discrimination". Since the Committee completed its duties the 20th General Assembly, if the United Nations has adopted at International Convention on the Elimination of All Forms of Racial Discrimination, 21 Dec. 1965, Rev. 2106 (XX).

this draft convention on the elimination of all forms of racial discrimination will be passed by the General Assembly at the forthcoming 20th session.

7. Summation

What seems to us significant about the above study of legal controls is the wide recognition that there exists a problem for which the older concepts of law and administration are no longer adequate and that newer concepts of law and regulation are justified and do not threaten freedom of expression in a democratic society. Indeed, there is today a profound concern everywhere for human equality and dignity; and the many human rights programs, national and international, testify to this powerful trend.