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McGill Guide 9th ed.

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CHAPTER I

INTRODUCTION AND SCOPE OF THE REPORT

A. Introduction

In January 1965 the Minister of Justice (then the Hon. Guy Favreau, P.C., Q.C., M.P.) announced the appointment of a Special Committee to study and report upon the problems related to the dissemination of varieties of "hate propaganda" in Canada. The Committee comprised the following:

Dean Maxwell Cohen, Q.C., Chairman, Dean of the Faculty of Law, McGill University

Dr. J.A. Corry, Principal, Queens University

L'Abbé Gerard Dion, Faculty of Social Sciences, Laval University

Mr. Saul Hayes, Q.C., Executive Vice-President, Canadian Jewish Congress

Prof. Mark R. MacGuigan, Associate Professor of Law, University of Toronto

Mr. Shane MacKay, Executive Editor, Winnipeg Free Press

Prof. Pierre-Elliott Trudeau, Associate Professor of Law, University of Montreal

Mr. Harvey Yarosky of the Montreal Bar joined the Committee later as Executive Assistant to the Chairman.

The role of the Committee was advisory only. It was invited to study the general question submitted to it by the Minister; to conduct its enquiries informally and briefly; and to submit a report to him surveying the nature and scope of the hate propaganda problem in Canada in all of its various aspects and to consider and prepare recommendations for its suppression and control, if such measures were deemed to be necessary.

The Committee met to organise and outline its program of work on January 29th 1965, in Montreal. Thereafter the Committee had meetings at the following times and places:

| | |
|-------------------|-----------------|
| March 5 – 6 | Ottawa, Ontario |
| April 30 – May 1 | Montreal, P.Q. |
| June 24 – 26 | Montreal, P.Q. |
| July 9 – 13 | d'Estimé, P.Q. |
| September 24 – 25 | Montreal, P.Q. |

The Committee conducted its program of enquiry and its study through meetings and discussions, through the gathering of information, and by having special technical studies of the legal and social-psychological aspects of the problem prepared for it.

The Chairman of the Committee was invited to examine the relevant files of the Department of Justice in order to become familiar with the materials, information, ideas and correspondence present on those files and dealing with several aspects of the hate propaganda question. In addition the Committee had the benefit of the views of the then Minister, the Hon. Guy Favreau, Q.C., and the views and experience of two senior officials of the Department of Justice concerned, Mr. Elmer A. Driedger, Q.C. Deputy Minister, and Mr. T.D. Macdonald, Q.C., Assistant Deputy Minister.

The Committee interviewed and, in some cases the Chairman additionally had the benefit of extensive discussions with the following officials who, in most cases, prepared memoranda or other communications for the Committee:

The Hon. René Tremblay, Postmaster-General of Canada
The Hon. A.A. Wishart, Attorney-General of Ontario
Dr. Andrew Stewart, Chairman, Board of Broadcast Governors
Mr. J. Alphonse Ouimet, President, Canadian Broadcasting Corporation
Mr. Raymond Labarge, Deputy Minister of National Revenue, Customs and Excise Branch
Mr. W.H. Wilson, Deputy-Postmaster General
Mr. A.R. Dick, Deputy Attorney-General of Ontario
Mr. Jacques Ducros, Assistant Deputy Attorney-General of Quebec
Mr. W.C. Bowman, Q.C. Director of Public Prosecutions, Province of Ontario
Mr. W.H. Kelly, Royal Canadian Mounted Police, Chief Superintendent (as he then was)
Mr. J.W. Langford, Acting Director General of Services, Customs and Excise Branch, Department of National Revenue

The Committee also interviewed experienced police officials and senior civil servants in Ontario and Quebec charged with the responsibility of supervising prosecutions on behalf of the Attorney General of the Province; and it met, too, with representatives of the Royal Canadian Mounted Police from divisions in Ontario and Quebec as well as from Headquarters in Ottawa.

Through the cooperation of the Department of External Affairs and the Department of Justice the Committee received extensive materials and reports on legislation in a considerable number of countries dealing with so-called "genocide" and its advocacy, "group libel", "incitement to hatred" and similar offences or related activities. Some of this information appears in the proceedings of the Standing Committee on External Affairs of the House of Commons which sat during two successive sessions of Parliament in 1964-1965 and which held hearings on certain private members' bills dealing with "genocide", "group libel", "incitement", the mailing of hate materials, etc. (See Appendix IV). The Committee has had the advantage also of being able to study the several valuable submissions to the External Affairs Committee and all the related documentation and discussion that is to be found in the Proceedings of the Committee when it held the hearings referred to.

Two studies were authorized by the Committee to assist it with its investigations and these are now included as appendices to the present Report. Professor Mark R. MacGuigan, a member of the Committee, prepared an extensive historical-analytical survey of sedition and related offences in the common law world with particular reference to the United Kingdom, Canada and the United States. (See Appendix I). Professor Harry Kaufmann, Associate Professor of Psychology, University of Toronto, presented to the Committee a valuable survey of the recent research and bibliography in the field of hate propaganda and group conflict as that literature and research has evolved over the past generation, particularly since the end of World War II. (See Appendix II).

The Committee was also aware of the valuable activities of those members of the House of Commons who had given thought to the problem of the control and suppression of hate propaganda and who presented private members' bills to the House of Commons. These bills were in most, if not all, cases considered by the Standing Committee on External Affairs of the House. (See Appendix No. IV). Equally our Committee had the benefit of the extensive analysis of hate propaganda distributed through the mails made by The Hon. Mr. Justice Dalton C. Wells, of the Ontario Court of Appeal. As Chairman of a Board of Review appointed under Section 7 of the Post Office Act, he rendered a detailed opinion on the question of materials that may be defined as "scurrilous" within the meaning of Section 153 of the Criminal Code. Such materials and those transmitting them may be forbidden the use of mails by way of an appropriate order of the Postmaster General issued under Section 7 of the Post Office Act. (See Appendix VI).

To all of these studies, discussions, interviews and documentation there must be added the general knowledge that the members of the Committee brought to their work both in a technical sense and otherwise. Every member of the Committee has had some personal or professional experience with the kind of problems posed by the dissemination of hate propaganda. To some extent, therefore, the Committee was its own research center, drawing upon personal experience and personal technical knowledge to supplement the extensive documentation, interviews and other sources of information and opinion made available to it.

B. Some Approaches to the Committee's Work

Remembering the Minister's invitation to embark on a study which would not take too long to complete, but nevertheless a study which was to be as thorough as possible, the Committee decided that, in the interests of effective operation, no public hearings would be held, or briefs solicited, over and above the variety of submissions already on file with the Minister of Justice and to which the Committee had access. The Committee examined the Department's files in detail and became familiar with the relevant materials therein.

Equally, it was clear, both from the Minister's instructions and from preliminary discussions among members of the Committee, concerning the course of the

Committee's work program, that a detailed social science investigation, covering the sociological or social-psychological nature of hate propaganda and related activities would involve the Committee in a degree of detail that did not seem to be necessary. Indeed, in view of the increasing public concern about such propaganda, it seemed unnecessary to belabour the notoriously offensive character of "hate materials". At the same time there was a sufficiently significant body of findings in the field of group relations and "extremist" hate activities and propaganda to make it desirable to indicate the scope of these studies. Some indication of the Committee's activities in getting a grasp of this recent research will be evident from what is said in Chapter III of this Report, and, also and more extensively, from the study prepared for the Committee by Professor H. Kaufmann of the Department of Psychology of the University of Toronto, and attached to this Report as Appendix II. The bibliography assembled by Professor Kaufmann indicates how extensive in recent years have been the research interests of social psychologists, sociologists, legal scholars and others in these areas¹.

Similarly the admixture of legal and social questions in the "hate" field, and the tendency of many studies to discuss techniques of social control and social correction of hate behaviour and hate propaganda, made it desirable to survey the law and administration not only in Canada but in countries such as the United Kingdom and the United States. For here similar legal traditions and not dissimilar social conditions would provide important historical, technical and broad social perspectives and contrasts. It was for this reason, and because of his special competence, that Professor MacGuigan, although a member of the Committee, was asked to undertake a survey of the legal problems related to "hate" incitement and "group defamation"; his study appears as Appendix I and necessarily influenced the detailed legal analysis that is set out in Chapter IV of the Committee's Report.

The Committee considered its terms of reference to include all legal aspects that might be relevant to a Canadian system of correction or control should the facts seem to warrant such recommendations. Such a view, of course, made it necessary to have some limited interest in those non-criminal legal aspects essentially under provincial jurisdiction. Since at least one Canadian Province -- Manitoba -- had enacted legislation as early as 1934 attempting to deal with "group libel", essentially through restraining orders, this was an experience which the Committee could not ignore. Nevertheless, for obvious reasons the Committee's primary focus tended to be directed to areas within federal jurisdiction wherever legal controls were involved and essentially this meant a concentration on the criminal law. This explains the very considerable preoccupation in this Report with certain technical problems of Canadian criminal law and related United Kingdom and United States legislation and judicial decisions. At the same time the

¹ See also the recent study prepared by UNESCO and surveying the literature in this field: E.E. Davis, *Attitude Change: A Review and Bibliography of Selected Research, Reports and Papers in the Social Sciences*, No. 19, 1964.

Committee has tried to avoid, as with the social-psychology references, any overly technical presentation of the criminal law questions it has had to consider.

The Committee had three possible courses before it as its study of the problems of hate propaganda began to develop: It could have concluded that given the facts in Canada today no change in the law was required. It could have decided that existing law with minor changes would offer a sufficient remedial response to the situation. It could have concluded that new legislation by way of amendments to the substantive criminal law were necessary. In addition, the Committee would have to consider that if legislative changes were to be made in the field of criminal law were there also certain other administrative and procedural changes necessary, affecting the authority of the Board of Broadcast Governors and the Canadian Broadcasting Corporation, and of significance also to the Post Office and its Regulations, and to the Regulations under the Customs Act governing the importation into Canada of Printed or other materials?

The Committee decided, therefore, that should it come to the conclusion that changes in the law were necessary it would seek also to find some unifying concept and terminology which would eliminate the present pattern of having different administrative standards in the Departments and agencies referred to, which heretofore have governed their activities and decisions whenever "hate" materials, propaganda or related problems posed issues that required decision. Indeed, very early in the Committee's studies it became evident that there were several Federal departments and agencies involved. There was not only the general position of the Department of Justice, with its overriding interest in such legislation, but also there were the Board of Broadcast Governors and the Canadian Broadcasting Corporation, the Department of National Revenue, Customs and Excise Branch, and the Postmaster General -- all involved in some degree with the hate propaganda problem. Yet each of these arms of government was guided by not only the existing general law as set out in the Criminal Code but also by regulations which vested a discretion in the Minister or department or agency concerned to prevent the importation or the dissemination of certain types of information or materials or in the case of broadcasting, spoken words, and other possible representations. Clearly some unity of legal policy and administrative practice might be desirable so as to eliminate the varying standards that may have developed over the years in controlling the mailing, the importation, or the broadcasting of such materials or propaganda.

Finally the Committee was aware of the fact that although the Federal Government alone was responsible for the enactment of the relevant criminal legislation controlling or correcting hate propaganda and materials, their use and dissemination, it was in general the provincial authorities who would in fact have to bear the burden of enforcement. For these reasons the views of provincial officials in Ontario and Quebec were solicited since these were the two largest provinces concerned and Ontario the place of the most intensive of the "hate propaganda" activities in

Canada. Indeed, experience with enforcement problems was generally at the provincial level and some feeling for this enforcement experience was necessary to insure the realism with which the Committee wished to approach its studies, findings and recommendations.

C. The Scope of Freedom of Speech

The task before the Committee was to decide whether to recommend restrictions on people saying what they like on matters that attract their attention. The responsibility is a heavy one. Freedom of expression is a main cornerstone of our way of life and there is a strong presumption that putting limits on it is a weakening of our way of life. In any serious discussion of placing such limits, the case for restraints must be shown to be very strong indeed.

The securing of individual freedom of expression and action has been a persistent aspiration in the western world since the 16th century. In the 18th and 19th centuries, many progressive western countries made constitutional provision for protecting individual freedom. Because social progress seemed to be going hand in hand with the liberating of the individual from legal and social restraints in that period, people came to talk of individual freedom as if it were an absolute right subject to no limits at all.

Recent history, particularly in this century, has shown that individual rights cannot be supported in absolute terms. An unlimited right to do what we like fosters anarchy and thus imperils organised social life. Indeed, each of us is a creature of the society in which he grows up, and without an organised working society to nurture and protect us, we could not be human beings or individuals at all. It is just as important to our way of life to maintain a healthy society (which always imposes by custom and law some limits on what each of us may do) as it is to maintain individual freedom of expression and action. Yet if we do not maintain a society that is tolerant of vagaries and differences we shall not maintain individual freedom of expression and action; in such a situation, constitutional guarantees will be of little avail.

In the nineteenth century, it was very widely believed that *laissez faire*, allowing each person to do as he himself saw fit in economic matters would ensure the greatest possible economic and social welfare for everyone. Governments left business and industry severely alone. Now at the mid-twentieth century, we have imposed an enormous range of legal restrictions on what a man — or a corporation — may do with his own. Some of these restrictions may be unwise, damaging, or excessive. There is a great difference of opinion on what legal regulation of economic matters there should be. The essential point is that almost everybody now agrees that absolute and unlimited freedom in economic matters is damaging to, and can even be destructive of, society. There must be limits.

Similar changes of attitude towards freedom of expression have been taking place. First, we have come to understand that no society has ever been able to permit unlimited freedom of individual expression. In orderly societies, there have always been some laws against libel and slander, violent abuse of the gods, incitement to immediate violence, and so on. More than that, very few of even the most impassioned advocates of freedom of expression have ever supported it as an unlimited right. Whatever is thought of these judgments today, the eloquent champions of freedom of religion and conscience, freedom of speech and writing, in 17th century England, like John Milton and John Locke, denied such freedoms to atheists, Roman Catholics and Mohammedans on the ground that they could not be trusted to be loyal to the English crown, the English way of life, and English society. Whether or not they were right in these judgments, it is generally true that no more freedom of speech is advocated by responsible persons than what they think compatible with the stability of the society that seems good to them.

The most influential of the framers of the constitution of the United States were profound believers in individual freedom. In the famous Bill of Rights in that constitution, a succession of clauses forbade the making of laws that abridged freedom of religion, freedom of speech, freedom of the press, freedom of public meeting, and so on. Reading these clauses by themselves one might conclude that, for example, an absolute right of freedom of speech was conferred. But the Supreme Court of the United States, in its interpretation of the Bill of Rights, until recently at least, has, in effect, inserted the word "reasonable" in each of these clauses. Individual rights are to be protected, but they are each of them subject to reasonable restraints, reasonable from the point of view of the stability and welfare of the society. Similar restrictions on an unlimited freedom have been imposed in Britain and Canada.

A development of recent years with more direct relation to the problem facing the Committee is the recognition in many jurisdictions in the Western world that freedom to do what you like with your own often imposes intolerable burdens and indignities on minority groups identified by race, creed, or colour. Hence the widespread introduction of laws forbidding discrimination in employment practices and in access to accommodations offered to the public such as hotels and restaurants.

So, in our public discussion and settled practice, there is very little support for individual freedom as an absolute right to be protected at all costs at all times and in all circumstances. The most that can be said is that there is a strong presumption in favour of freedom of expression, stronger than in any other of the important civil liberties. But this presumption can be rebutted by showing that certain kinds of expression in words or writing will, in certain circumstances, imperil seriously vital community interests. This will not often be easy to show and there is likely to be disagreement on whether exercise of the particular freedom proscribed would, in fact, imperil vital community interests. The best example of this agonizing doubt perhaps is the restriction of freedom of speech in time of war. It

is highly likely that in Canada – and in the United States and Britain – we have imposed restrictions on freedom of expression in wartime beyond what was really necessary to protect vital community interests. But the risk that excessive restraints may be adopted does not justify refusal to consider whether certain kinds of circumstances call for some restraint.

In every instance that is to be studied, it will be necessary to balance a variety of individual interests against a range of social and community interests. It will be necessary to ask in what degree the freedom of expression in question enriches the life of the speaker, contributes to the liberation and enlargement of other minds and encourages responsible discussion of the community interest. It will be necessary to judge whether the expression strikes at the vitals of organized society or only seeks to reshape some of its features. Even if it is designed to disrupt the society, is it likely to come close to its purpose? How vulnerable are people to the appeal? Is the social structure itself, in some peculiar and adventitious way, exposed to disrupting shock by free expression in this particular form at this particular time?

In a number of ways, we are less confident in the 20th century that the critical faculties of individuals will be brought to bear on the speech and writing which is directed at them. In the 18th and 19th centuries, there was a widespread belief that man was a rational creature, and that if his mind was trained and liberated from superstition by education, he would always distinguish truth from falsehood, good from evil. So Milton, who said "let truth and falsehood grapple: who ever knew truth put to the worse in a free and open encounter".

We cannot share this faith today in such a simple form. While holding that over the long run, the human mind is repelled by blatant falsehood and seeks the good, it is too often true, in the short run, that emotion displaces reason and individuals perversely reject the demonstrations of truth put before them and forsake the good they know. The successes of modern advertising, the triumphs of impudent propaganda such as Hitler's, have qualified sharply our belief in the rationality of man. We know that under strain and pressure in times of irritation and frustration, the individual is swayed and even swept away by hysterical, emotional appeals. We act irresponsibly if we ignore the way in which emotion can drive reason from the field.

The readiness with which millions can be reached with messages of every kind is a changed circumstance of importance. Radio, television, motion pictures, the pervasiveness of print are new elements in the 20th century which the classic supporters of free speech never had to reckon with. Their arguments from the 17th century to the 19th century assumed scattered isolated readers or a small literate audience within the range of a man's natural voice. They had not to consider the impact of speech associated with colour, music and spectacle on the feelings of great multitudes of people.

Society itself has changed greatly in the last century. The simple society of the past was more homogeneous. Until the 20th century, very few people in a society had to rub shoulders with others of strange voice, dress and customs. Nowadays, the mobility of populations expose most of us to the unfamiliar, inviting us to react adversely to the unfamiliar in times of stress.

Times of stress are common, if not endemic, in our complex society. Society changes rapidly and incessantly, imperilling or threatening disruption of the security of one group today and another tomorrow. Social interaction and change is complex. Often we cannot identify the causes of what goes wrong with our lives or locate the culprits who caused the disaster. In distress and frustration over our helplessness, we are relieved to find scapegoats on whom to vent our anger.

In summary, issues relating to freedom of expression are not all open to the simple solutions that would have been applied to them a hundred years ago. Those who urged a century ago that men should be allowed to express themselves with utter freedom even though the heavens fell did so with great confidence that they would not fall. That degree of confidence is not open to us today. We know that, as well as individual interests, there are social interests to be protected, and these are not always protected by unrestricted individual freedom. The triumphs of Fascism in Italy, and National Socialism in Germany through audaciously false propaganda have shown us how fragile tolerant liberal societies can be in certain circumstances. They have also shown us the large element of irrationality in human nature which makes people vulnerable to propaganda in times of stress and strain. Both experience and the changing circumstances of the age require us to look with great care at abuses of freedom of expression.

