

Submissions to:

Senate Standing Committee on
Legal and Constitutional Affairs

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Re:

Legislation on Hate Propaganda

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From:

Canadian Civil Liberties Association

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Tuesday April 22nd, 1969

Ottawa

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Like most others in this country, the ~~Canadian-Civil-Liberties-Association~~ is deeply troubled by the dilemmas which are posed in the hate propaganda problem. This issue sets two of the most cherished values of a democratic society in conflict with each other. The right of free speech runs into conflict with the right to live in dignity. Civil libertarians, of necessity, are committed to both.

We seek to protect the dignity of our minority groups against the fear and anxiety which are generated by the revival of Nazi obscenities. We seek simultaneously to preserve and perpetuate the right of all Canadians to speak their minds. Believing as we do that both of these values are vital but that none of our values is absolute, the problem with any legislative proposal is how to secure the best balance between the right to speak one's mind and the right to live in dignity. There is one additional value which civil libertarians, like most other ~~Canadians~~, are determined to safeguard. That value is social peace. In a situation of physical disorder and violence, no one can enjoy meaningfully freedom of speech or a dignified existence.

A word about the special status of freedom of speech. Even though it is not an absolute, it is nevertheless the value which distinguishes our form of government from all others. The right of free speech enables us to mobilize the support of others in order to rectify the wrongs for which we seek redress. The assumption is that unjust governments and unjust policies are not as likely to survive in an atmosphere of free public debate. In this sense, freedom of speech is central to democratic government. It is the freedom on which our whole complex of freedoms depends.

By its very nature, freedom of speech implies certain risks. In order to generate support for our grievances, we might ignite passions and tempers. In fact, our most vital social reforms have often been accompanied by bitter social tension. Herein lies the dilemma - too much tension can spawn violence; too little

tension can prolong injustice. Our problem is how and where to balance these risks. Legislation on hate propaganda dramatizes the continuing dilemma of democratic society.

The most controversial concept in the current Bill is found in Section 267 B which creates an offence for inciting "hatred or contempt" against persons because of race, ethnicity, etc. Many useful utterances in a democratic society incite what could be described, at the very least, as bitter feelings. The dividing line between creative tension and destructive hate will often be very difficult to draw. For example, if a French-Canadian nationalist were to denounce English Canadians for the exploitation of French Canada, could it be said that he was inciting "hatred or contempt" of English-speaking Canadians? If an Indian were to heap blame for his poverty upon the white man, could he be said to be inciting "hatred or contempt" for white people? If a Jew were to indict all of Germany for the atrocities of the Nazis, would he be inciting "hatred or contempt" against Germans?

Whether or not one agrees with the kinds of views which we have used in the foregoing examples, it would be unfair, unwise, and undemocratic to make them illegal. Yet, we run the risk that the formulation, "hatred or contempt", could lead to precisely such a result.

Moreover, we fear that the defences which are provided in the Section may not be adequate to protect many legitimate exercises of free speech. The defence of truth will have very little application in view of the fact that most utterances in the political arena deal with opinion rather than fact. The immunity conferred upon subjects of "public interest" gives the courts far too much power to set the framework of democratic political polemics. On the basis of what criteria and in the light of what kind of evidence will the courts determine whether a matter is in the "public interest"?

Section 267 B (1), while containing the same problem regarding the interpretation of the words "hatred or contempt" adds an additional problem in prohibiting incitements which are "likely to lead to a breach of the peace". The difficulty with this is that it punishes the speaker not only for inciting violence against others, but also for attracting violence to himself. If, to use one of our examples above, a Canadian Indian were denouncing the sins of the white man in a place where there was substantial anti-Indian prejudice and it was likely that he would be attacked for what he said, he, the Indian, might be guilty of an offence. Surely, this is a risk we do not wish to take. History has taught us that so often tomorrow's social reform grows out of today's verbal attack.

Similar problems are contained in Section 267 C. For an analysis of these dangers, we reproduce the words of Prof. Walter Tarnopolsky:

"The dangers inherent in the new offences proposed by Bill S-49 are even more serious when one considers Section 267 C. It provides that a publication, copies of which are kept for sale or distribution may be seized under warrant issued by a judge 'who is satisfied by information upon oath that there are reasonable grounds for believing' such publication is 'hate propaganda', i.e. a 'writing, a sign or visible representation that advocates or promotes genocide or the communication of which by any person would constitute an offence under Sub-section 2, Section 267 B'. The owner and author of the publication seized may appear to be heard, but 'if the court is satisfied that the publication is hate propaganda' it may order its forfeiture. Booksellers beware! Clearly, all copies of 'Mein Kampf' would have to be moved if kept only for sale for members of a Political Science class. What about Alan Paton's 'Cry the Beloved Country'? Doesn't it wilfully promote hatred against the dominant white race in the Union of South Africa? What about the writings of James Baldwin? Is it not possible that some judges would be 'satisfied' that some of his works constitute wilful promotion of hatred against white Americans?.....it is not absolutely clear that defences set out in Section 267 B (3) would be available to prevent forfeiture under Section 267 C.

Furthermore, this defence under Section 267 B (3) is available only when an accused can also prove that on reasonable grounds he believed the statements to be true. Who is it that must prove in forfeiture proceedings that on reasonable grounds he believed them to be true? Is it the owner of the book or the author? What about the defence of the truth? What would be required to show that the statements contained were true?"

Thus, it is clear that Sections 267 B and C involve great risks to the free speech of a wide variety of people, many of whom have no resemblance to the Nazis or hate mongers who sparked this Bill. Are these risks justified by the evidence of trouble or potential trouble to the target groups and the social peace of this country? The Cohen Committee, itself, has declared that the hate-mongering problem in Canada cannot be described "as one of crisis or near crisis proportions". Thus, we face no "clear and present danger".

What of potential dangers? In our view, while we do have a problem of discrimination and inequality in this country, the breeding ground for extremism is not very fertile. We believe that this is verified by our experience with human rights legislation.

Almost invariably, when the Ontario Human Rights Commission, one of our most active government bodies in the field of race relations, has uncovered an act of discrimination, the discriminator has surrendered. Out of several thousand complaints only about fifty have required public Boards of Inquiry. In these instances, the establishment of public hearings into the discriminatory conduct led only twice to the accused being prepared to fight on. In every other case, the accused settled with the Ontario Human Rights Commission and made amends for the acts of discrimination. The comments of Dr. Daniel G. Hill, Director of the Ontario Human Rights Commission are worth noting:

"...there has been an overwhelming disposition on the part of most of the accused to settle with the Commission after a Board has been announced. the majority of people with whom we deal prefer to settle or demonstrate acts of good faith".

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The fact that those who practice racial discrimination have capitulated so readily suggests that, despite our problems, the Canadian public is essentially receptive to human rights and antagonistic to racial discrimination. If this were not so surely we could expect greater resistance from our racial discriminators. Thus, we can more readily accept Dr. Hill's conclusion:

"...the Canadian public is relatively immune to extremist, anti-Semitic and other 'hate' materials".⁴

Being non-absolutists, if we were satisfied that the social climate of this country were presently and potentially more conducive to the revival of Nazi strength, we might have no serious objection to Sections 267 B and C in their present form. Nor would we object very strongly if we believed that these sections would restrict only the invective of the hate monger without endangering the utterances of others. It is always a question of balancing risks. In our view, the social climate in this country does not warrant taking all of the risks which we have indicated to the free speech of non Nazi groups in this community.

Moreover, we are not satisfied that the provision with which we are dealing would provide such adequate protection to the target group. Even if, or especially if, legal action were somehow confined to the Nazi element that precipitated the introduction of this Bill, we fear the consequences for the target group which is supposed to be protected. So long as truth and reasonable belief in the truth of the impugned statements are defences to one of the charges, we can expect the hate mongers and Nazis to get into the witness box and harangue the court with their anti-Semitic invective. With the assistance of the proposed legislation, there would be a judicial forum to propagate racist obscenity. In consequence, we might anticipate a far larger audience for ethnic hate than any which the hate monger is at present able to command.

The only provision of this Bill to which there could be no serious objection on our part is the principle contained in the proposed Section 267 A prohibiting the promotion and advocacy of genocide. We find it difficult to conceive of a situation where any social benefit would result from the right to advocate genocide. That being the case, it is our view that in such situations freedom of speech might undergo some modification because of our social interest in securing the right to live in dignity for the target group and the maintenance of peace and harmony for the entire community. We note, of course, that no defence of truth or reasonable belief in the truth is available on a charge of advocating genocide.

However, although the principle contained in this Section is not objectionable some of the detailed provisions may constitute an unnecessary risk to freedom of speech. For example, Section 267 A (e) would make it an offence to advocate "forcibly transferring the children of the group to another group" with the intent of destroying the group. Could it be argued that the proposals to impose integrated education upon the children of Doukhobors or Indians, for example, might fall within this prohibition? The risk contained in this sub-section is that a court might be persuaded that the proposal to transfer children in such a way is intended to "destroy" a culture, i.e. a group. Clearly, whatever one thinks of compulsory integrated education the advocacy of it in such circumstances should not constitute a criminal offence. In our view, the concept of genocide should be limited to physical destruction.

As we have indicated, there is not enough evidence of danger to the social peace or to the target groups to warrant taking the risks to freedom of speech inherent in the balance of the Bill. Prior to the publication of the Cohen Report, there were other ~~recommendations~~ recommendations for dealing with the problem of hate propaganda. In this connection, we refer to submissions which had been made in 1953 by the Canadian Jewish Congress and in 1965 by the Canadian Labour Congress. At that time, those organizations proposed legislation which would make it illegal to publish statements which were designed to incite violence or disorder against groups and their members because of the group's race, religion, colour, ancestry, nationality, place of origin, ethnicity, or language. Clearly, the formulation "violence or disorder" runs fewer risks to useful social debate than the formulation "hatred or contempt".

The proposal was made as an extension to the concept of sedition which already ⁵ appears in the Criminal Code. Some years ago judicial decision defined sedition in such a way that only government authority was protected from the incitement to violence and disorder. In view of the fact that inter-racial violence is a ~~tactic often employed~~ tactic often employed by totalitarians in their quest for power, there might be no serious objection to the extension of sedition in this way.

Another reason for our reluctance about the Bill in its present form grows out of

~~our conviction that there are alternate weapons available to contain the extremists.~~
We believe that the emphasis should be directed not primarily at outlawing the words of the hate monger, but rather at improving the social context in which he seeks to operate. Our efforts should be focused essentially upon further immunizing the Canadian public from the message of the hate monger.

In this connection, we recommend strengthening human rights legislation and administration around the country. A stronger program against discriminatory deeds will weaken the impact of bigoted words.

Before looking at specific measures by which we can strengthen our general human rights activities, let us examine something of the character of our inter-group situation.

The key racial problems in today's Canada arise less from extremist name-calling than from basic inequality. Generations of discrimination have left us a legacy of inequality.

Note, for example, the observations of sociologist Rudolph Helling regarding his survey on minority groups in Windsor, Ontario:

"Only a few Chinese are employed outside of the traditional food and personal service areas".

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Yet Helling also points out:

"The majority of the Chinese are relatively poor".

On Negroes, Helling says: "...Negroes are underrepresented in skilled and technical occupations....There are few other occupations with apprenticed skills which employ Negroes".

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John Porter's classic analysis "The Vertical Mosaic" points up this basic inequality:

"The immigrants of non-British or non-U. S. origin get into the economic elite scarcely at all. ...As far as ethnic background is concerned, it is clear that preference for recruitment to the economic elite is for English-speaking people of British origin".

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It is trite knowledge in Canada that this holds true even in the Province of

Quebec with its overwhelming French population. A minority of Anglo-Saxons continues to occupy the central positions of economic power in the private sector of Quebec's economy. Porter also points out that the Jews, one of the most "highly educated" groups in the country, "are scarcely represented at the higher levels of Canada's corporate institutions".

In the case of Canada's native Indian population, inequality has reached a deperate state. Recent surveys tell us that in Canada:

"Seventy-five percent of Indian families live on an annual income of \$2,000 or less; forty-seven percent on \$1,000 or less. Indians require welfare at ten times the national average and their pre-school children are dying at eight times the national average".

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In the words of a recent Indian submission to government:

"Unhappily we must report that the last 100 years have visited an unimaginable deterioration in the life of the Indians of this country. A once proud and industrious people have suffered a degree of poverty, unemployment, disease, mortality, and discrimination out of all proportion to its members".

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The welfare of our target groups and the ultimate social peace of this country are far more threatened by these conditions of inequality than all of the hate literature compiled in the Cohen Report. Indeed, we note that the Cohen Report itself has indicated the need for Canadians to address themselves to these problems. Unfortunately, however, the Bill before us purports to deal with the less vital aspects of the problem.

At the moment, the Fair Employment Practices Branch of the Department of Labour has a very small full time staff with which to enforce the Canada Fair Employment Practices Act. As a result, the enforcement duties are left to labour conciliators throughout the country to handle on a part time basis. Officials of the Central Mortgage and Housing Corporation enforce the anti-discrimination provisions of the National Housing Act, also on a part time basis. In our view, part time enforcement conveys half-hearted interest. If government does not exhibit more interest, we cannot expect the community to do so. Indeed, on a number of occasions, even government officials have been found violating our human rights legislation. Recently, both the Jewish Labour Committee of Canada and the National Human Rights Committee of the Canadian Labour Congress uncovered evidence that officials of the Canada Manpower Centres were process-

ing-discriminatory job orders.

A more vigorous government initiative is required. We propose that the federal government station full time human rights staff in key centres throughout the country. The role of the staff would be to go into the community and, in cooperation with provincial agencies, ~~promote positive compliance with our fair practices law.~~ They should publish and distribute literature to employers, ~~personal managers,~~ placement agencies, Manpower Centres, builders, real estate agencies, educational institutions, churches, unions mass media, minority groups-etc. Such literature should persuasively inform all segments of our society of their rights and duties under this legislation. Government staff should initiate face-to-face meetings, conferences, and seminars in the more vital areas of our community. They should appear also at school assemblies, trade conferences, and meetings all over the country, conveying the message of human rights and racial equality.

Government human rights administrators should also embark upon "positive opportunity" programs. Without waiting for complaints, they should go to industry, minority groups, and other community leaders in an attempt to recruit voluntary cooperation for positive programs designed to increase opportunities for minority groups. This means coordinating job opportunities and minority group candidates. With the prestige of government brought to bear, there is a good chance that many employers, community leaders, and trade unionists will agree to sit down with minority group agencies and work out a program of placing people as opportunities arise. The role of government would be to open the channels of communication and bring all parties together. Subsidies should be made available to those employers willing to provide on-the-job training to compensate for deficiencies in educational background. Economic development programs should be undertaken in areas suffering from "regional disparities". The key to the success of such a program is that government must initiate. Subsidy programs and economic development opportunities will lie dormant unless someone specifically promotes their use. Government must be the catalyst.

Government must also sponsor scientific research into the difficulties and prob-

loms of intergroup relations. Out of this increased knowledge and information will grow new techniques for combatting discrimination and promoting equality in this country.

The objective is for government resources virtually to saturate this nation with a concern for human rights and racial equality. Clearly, this is not a plea for tender lectures on the merits of brotherly love. Rather, it is a call to involve the entire community in action to bring about conditions of equality. What we hope to achieve is a situation where all over the country people of different groups and backgrounds will be engaging in face-to-face cooperation to solve common problems. Such cooperative efforts involving black white Indian non-Indian Protestant Catholic, Jew employer, trade unionist, the old the young are bound to have a spill-over effect. Enlightened attitudes, acceptance of and respect for difference are more likely to emerge from enlightened behaviour actual cooperative experience.

With all segments of our community involved in activities promoting the conditions of equality and dignity the Nazi and the hate monger will be operating in a virtual vacuum. In this way we can simultaneously weaken neo-Nazi influence and strengthen human rights performance. All of this with far less risk to freedom of speech.

Respectfully submitted,

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Canadian Civil Liberties Association

NOTES:

1. "Freedom of Expression Versus the Right to Equal Treatment", Prof. W. Tarnopolsky, 1967 UBCL Rev 43 at page 61
2. Report of the Special Committee on Hate Propaganda in Canada, November 10, 1965, page 59
3. From a lecture entitled "Protecting Human Rights in Ontario" delivered by Dr. Daniel G. Hill to the University of Toronto lecture series sponsored by the School of Social Work, November 27, 1967
4. The Cohen Report, Op. Cit., page 27
5. Boucher v The King 1951 2 DLR 369
6. The Position of Negroes, Chinese and Italians in the Social Structure of Windsor, Ontario. A Report submitted to the Ontario Human Rights Commission by Rudolph A. Helling, Ph. D. Department of Sociology and Anthropology, University of Windsor, December, 1965, page 56
7. Ibid. page 12
8. "The Vertical Mosaic", John Porter, page 287
9. Ibid., page 88
10. A Brief to the Minister of Indian Affairs by the Union of Ontario Indians, January 12, 1967, page 1
11. Loc. Cit.