

Malcolm Ross: truth, hatred, and the teacher.

by

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B. A. (English), Washington State University, 1970

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Malcolm Ross: Truth, Hatred, and the Teacher

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ABSTRACT

On April 21, 1988, David Attis, a Jew, filed a complaint with the New Brunswick Human Rights Commission against School District 15 in Moncton, New Brunswick. He claimed that Malcolm Ross, a teacher employed by the school district, had violated Section 15 (1) of the New Brunswick Human Rights Act through statements and publishing books that were “anti-Jewish, racist, bigoted and discriminatory”. Chapter one states the problem and the governing contexts – pedagogic, historical and legal, within which the Malcolm Ross case may be understood.

While chapter two discusses and refutes the antisemitic arguments found in Malcolm Ross’ four books, chapter three chronicles the legal response to Malcolm Ross in New Brunswick: the decision and order of the Human Rights Board of Inquiry, Ross’ appeal to the New Brunswick Court of Queen’s Bench and, finally, to the New Brunswick Court of Appeal. Chapter four is an analysis of five significant court decisions that may well influence the Supreme Court of Canada when it hears the Ross case on appeal from the New Brunswick Court of Appeal’s decision.

Chapter five analyzes the Ross case within a series of contexts. First, the argument is made that Ross’ Holocaust denial is post-Holocaust Nazism. Second, in what is called the New Brunswick context, it is argued that the two judicial decisions subsequent to the Board of Inquiry’s Order are flawed with the exception only of the dissent in the appellate court’s majority decision. Third, the other five significant decisions indicate two general perspectives in understanding Holocaust denial: a) the civil liberties perspective and b) the post-Holocaust perspective. It is argued that the first is dangerously naive and misinformed while the second more closely understands the antisemitism of Holocaust denial as a lethal threat to Jews, all minorities, and democracy. Fourth, because teachers are role models, it is argued that the pedagogic context forbids irrationality and hate-mongering.

Chapter six concludes that the Supreme Court of Canada ought to uphold the appeal of the New Brunswick Court of Appeal's decision. Malcolm Ross should not be allowed to teach in the public school system.

DEDICATION

This is for Estika Hunning - with thanks.

This is for John Ashworth and Doctors Nicholas and Helene Mair.

This is, however, especially for Eve, Nicholas, and Alexandra.

QUOTATIONS

And the families learned, although no one told them, what rights are monstrous and must be destroyed: the right to intrude upon privacy, the right to be noisy while the camp slept, the right of seduction or rape, the right of adultery and theft and murder. These rights were crushed, because the little worlds could not exist for even a night with such rights alive.

The Grapes of Wrath, John Steinbeck

This reconciliation with Hitler reveals the profound moral perversity of a world that rests essentially on the nonexistence of return, for in this world everything is pardoned in advance and therefore everything cynically permitted.

The Unbearable Lightness of Being, Milan Kundera

“You teach the teachers of our teachers.”

Professor Yehuda Bauer - on combatting Holocaust denial.

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Chapter 1

The Problem and the Major Contexts of the Malcolm Ross Case.

Statement of the Problem.

For a number of years, Malcolm Ross, a public school teacher employed by School District 15 in New Brunswick (since July 1992, District 2) has attacked Jews and Judaism through his publications and public statements. The genesis of his attacks is to be found in an established idiosyncratic Christian mythology about Jews. Most recently, this has been augmented by a newer form of antisemitism based on Holocaust denial. On April 21, 1988, David Attis, a Jew whose children were students in District 15, filed a complaint with the New Brunswick Human Rights Commission against District 15. This led to a Board of Inquiry which found that District 15 had violated section 5 of the New Brunswick Human Rights Act. Ross appealed the Board's decision to the Court of Queen's Bench and, subsequently, appealed that decision to the New Brunswick Court of Appeal. Ultimately, Malcolm Ross won back in this appellate court everything he lost in the Board of Inquiry decision. In October 1994, the Supreme Court of Canada decided it would hear an appeal by David Attis of the New Brunswick Court of Appeal's decision.

The Ross case poses a number of ethical and legal questions regarding the responsibilities of a public school* teacher and the system within which he works. The very fact of this system's public nature along with the fact that the teacher is paid out of the public purse are significant. Should Malcolm Ross have been a private school teacher who had betrayed, by his public statements and publications, the role he was hired to perform, it is doubtful that his actions would have occasioned such serious

*For a clear and thorough analysis of the constraints on a teacher employed by a denominational school, see Marie Parker-Jenkins' thesis *Rights in Conflict: The Margaret Caldwell Case*, (MA Education), Simon Fraser University, 1983.

ethical and legal debate. To date, however, Malcolm Ross' antisemitic publications and public statements have been, in various ways, the subject of eight court actions.

The Ross case posits a number of important questions:

1. Is a public school teacher a role model or exemplar for his students and their community?

2. Does being a public school teacher place a particular burden of public propriety (to which other professions may be immune) on the teacher and, therefore, on the school district?

3. Is the nature of a public school inherently coercive?

4. What is the specific nature of Holocaust denial and how is it connected to Christian antisemitism?

5. Under what circumstances does one's freedom of expression guaranteed by Section 2 (b) of the Charter of Rights and Freedoms become subordinate to another's "right to life, liberty and security of the person" under Section 7 of the Charter? In other words, how do Canadian courts balance competing rights?

Before one can begin to assess these questions, let alone their answers, one must consider the Ross case within a number of contexts.

The Governing Contexts.

The Teacher - 1. a Socratic context.

'The unexamined life is not worth living.'

One can argue that western culture has produced at least one great teacher whose life and death have done much to create the paradigm for the modern public school teacher. In Plato's "Apology" we see an unrepentant Socrates condemned to death for corrupting the youth of Athens. Socrates' defence adroitly illuminates the irrationality and the venality of his accusers. According to Northrop Frye, it also illuminates the paradigm:

Socrates remains the archetypal teacher, and the modern teacher finds that Socrates' irony is equally essential to him. He has to answer all questions with a deep reserve and elusiveness, suggesting the tentativeness of all answers, because progress in understanding is a progress through a sequence of questions, and a definitive answer blocks this progress. This is particularly true when the student himself gives the answer, which demands a very active use of irony in counteracting it. (Frye, 1988, p.20)

Although in the Laws Plato betrays* Socrates, it is this defiant image of the teacher, stubbornly insisting on his hemlock rather than recanting his life's work, that vivifies the paradigm. His death is an explicit reminder to all who would teach (and particularly to those who would teach the young) that teaching

***In the Laws, Plato "gives us a blueprint of his post-revolutionary society. There everything turns on the rigid control of the teachers, who are to have no freedom to choose what they teach, but must teach under the strictest instruction and supervision. In such a society no Socrates could exist. We should understand the full dimension of Plato's betrayal of the spirit of Socrates here: he is really assuming that those who condemned Socrates were right in principle, and wrong only, if wrong at all, in their application of it." Northrop Frye, "The Beginning of the Word", On Education, Fitzhenry and Whiteside, 1988, p. 19.**

requires courage and a commitment to the truth. Implicit in this is the notion that the truth is external, discoverable, and subject to reason and the canons of evidence. At his trial, had Socrates opted for life, then truth and reason, as we understand them, might have become dependent, historically, on strong whim, ideology, or religious doctrine. Truth might have been reduced to idiosyncrasy and reason reduced to faith. In such a case, the Socratic dictum about the “unexamined life” would have become a non sequitur.

The Teacher - 2. a rational context.

In “The Justification of Education”, British philosopher of education, Richard Peters, argues that

Man is thus a creature who lives under the demands of reason. He can, of course, be unreasonable or irrational; but these terms are only intelligible as fallings short in respect of reason. An unreasonable man has reasons, but bad ones; an irrational man acts or holds beliefs in the face of reasons. But how does it help the argument to show that human life is only intelligible on the assumption that the demands of reason are admitted, and woven into the fabric of human life? It helps because it makes plain that the demands of reason are not just an option available to the reflective (Peters, 1973, p.254)...*For belief is the attitude appropriate to what is true, and no statement is true just because an individual or a group proclaims it.*[my emphasis] For the person whose word is believed has himself to have some procedure for determining what is true. In the end there must be procedures which depend not just on going on what somebody else says but on looking at the reasons which are relevant to the truth of a statement (p.255)...*For to be educated...is to be disposed to ask the reason why of things.* (p.256)

Ross' brand of antisemitism, punctuated by Holocaust denial, is particularly antithetical to the “demands of reason” and thus, it is antithetical to education. As evidence of Ross'

convictions and intellectual animus, his antisemitism is equally the antithesis of what the public expects from its schools and its teachers. (District 2, 1992, #5003)

Holocaust denial - 1. as an irrational context

Holocaust denial, the latest and perhaps the most invidious form of antisemitism, if it is to be properly understood, requires a conceptual context to separate it from 'denial' both as a psychological term and from 'denial' as a common term meaning 'refusal, rejection, abstinence.' According to Deborah Lipstadt, author of Denying the Holocaust,

Holocaust denial...is not an assault on the history of a particular group...at its core it poses a threat to all who believe that knowledge and memory are among the keystones of our civilization. Just as the Holocaust was not a tragedy of the Jews but a tragedy of civilization in which the victims were Jews, so too denial of the Holocaust is not a threat just to Jewish history but *a threat to all who believe in the ultimate power of reason.* [my emphasis] It repudiates reasoned discussion the way the Holocaust repudiated civilized values. It is undeniably a form of antisemitism, and as such it constitutes an attack on the most basic values of a reasoned society ...*Holocaust denial is the apotheosis of irrationalism.* [my emphasis] (Lipstadt, 1993, p. 19-20)

It is necessary next to consider what Ross wrote on the dust-jacket of his 1978 publication, Web of Deceit:

The truth expressed by this book has never been denied—only suppressed—by the international conspiracy.

The destruction of western Christian civilization is an essential part of their plan to establish a one world government. Through its agencies we have been brainwashed into accepting theory as fact, lies as truth, evil as good.

The dust-jacket of Ross' Christianity vs Judeo-Christianity, 1987, echoes the above:

What is happening in our society today? Life-styles condemned by Christians in the past are being openly promoted and encouraged.

What is behind this moral revolution? This writer believes the change has come about through the planned, mysterious union of an ancient Babylonian creed with the modern emasculated Christian religion.

Read this fact-filled and horrifying exposure of Christianity's oldest and greatest enemy.

The Holocaust - 2. as the objective correlative of Holocaust denial.

T. S. Eliot's 1920 essay, "Hamlet and his Problems" provides a concept most useful in clarifying the context of Malcolm Ross' Holocaust denial. In it, Eliot argues that

The only way of expressing emotion in the form of art is by finding an "objective correlative"; in other words, a set of objects, a situation, a chain of events which shall be the formula of that *particular* emotion; such that when the external facts, which must terminate in sensory experience, are given, the emotion is immediately evoked...The artistic "inevitability" lies in this complete adequacy of the external to the emotion... (Eliot, 1920, p.100/101)

Eliot is arguing that Hamlet's emotional reactions to his father's murder are not justified by the events of the play. For Hamlet to be so troubled, angered, and confused, we must have more than Shakespeare gives us in order to justify such responses. In other words, Hamlet contains no objective correlative to justify and sustain Hamlet's emotional turmoil. However, such was not the case with the Jews of Europe. The "external" for them was

created by the various antisemitic myths* that permeate Christian mythology. Augmented by military and economic defeat that gave rise to a demagogue, these myths were powerful enough to release a civilized and highly cultured western European nation from long-held and powerful moral codes. Without these myths, the mass murder of over five million persons (including one and a half million children) would not have happened. Christian antisemitism provided the objective correlative that created and sustained the Holocaust that was to incinerate the Jews of Europe.

Today, Ross' Holocaust denial presents the same "external facts which must terminate in sensory experience" evoking immediately the kind of Jew-hatred that, according to Norman Cohn, became a "warrant for genocide". (Cohn, 1966)

Background: Malcolm Ross' Writings and the Courts.

Malcolm Ross' notoriety is based, in part, on four books he has written and published:

1. Web of Deceit - 1978
2. The Real Holocaust (The Attack on Unborn Children and Life Itself) - 1983
3. Spectre of Power - 1987
4. Christianity vs. Judeo-Christianity (The Battle for Truth) - 1987

He has also written letters to the editors of various New Brunswick newspapers and has appeared on at least one television show. In all of these cases, he has maintained the argument established in these books.

*Shakespeare's Shylock, The Merchant of Venice, and Marlowe's Barabbas, The Jew of Malta, immediately characterize, in a number of easily recognizable stereotypes, this particularly Christian image of the Jew. It seems clear that once any hatred transcends its theological myth and finds a home in popular literature, it has become part of the cultural baggage as well.

In response to David Attis' complaint, the New Brunswick Minister of Labour, Mike McKee, established a Board of Inquiry under the aegis of The Human Rights Act. However, before the Board could commence its hearings, a number of court actions ensued:

1. The Board of School Trustees, District 15, applied to the Court of Queen's Bench of New Brunswick to quash the order establishing the Board of Inquiry. Subsequently, on January 19, 1988 the order was quashed.

2. On September 8, 1989, the New Brunswick Court of Appeal reversed the previous court's order quashing the Board of Inquiry.

3. On October 26, 1989, Ross applied to the Supreme Court of Canada for Leave to Appeal from the judgement of the Court of Appeal of New Brunswick. On November 27, 1989, the Supreme Court of Canada dismissed Ross' Leave to Appeal.

4. On January 30, 1990, the Court of Queen's Bench dismissed Malcolm Ross' application for an order permitting him to examine for discovery the New Brunswick Minister of Labour, the New Brunswick Human Rights Commissioner, and Brian D. Bruce, the one man Board.

5. On February 22, 1990, the Court of Queen's Bench dismissed Malcolm Ross' attempt to order a judicial review of the Board's jurisdiction.

6. On September 6, 1990, the New Brunswick Court of Appeal dismissed Malcolm Ross' attempt to reverse the two previous decisions (see above).

7. On August 28, 1991, the Board of Inquiry (Brian D. Bruce) ordered (among other things) that Malcolm Ross' employment as a teacher be terminated and, should he not be able to find a non-teaching position with District 15 in eighteen months, his employment with the District be terminated. As well, Malcolm

Ross, while employed by District 15, was enjoined from publishing or writing for publication (a 'gag' order) any of the type of ideas stated in his previous publications.

8. On December 31, 1991, the New Brunswick Court of Queen's Bench quashed the Board's order instructing changes by the Department of Education. It also quashed the Board's 'gag' order. However, it upheld the Board's ruling regarding Malcolm Ross' termination as a teacher, including the conditions under which he could be hired for a non-teaching position.

9. On December 20, 1993, the New Brunswick Court of Appeal quashed all the remaining orders of the Board of Inquiry.

10. In October 1994, the Supreme Court of Canada announced that it will hear the appeal, by David Attis, of the decision by the New Brunswick court of Appeal.

Organization of thesis.

This thesis consists of six chapters. The first deals with the facts of the Malcolm Ross case and an overview of the important contexts within which these facts have particular ethical, legal, and historical significance. Chapter two deals with the particular and consistent themes of Ross' writings that situate his position not as an idiosyncratic one but as a specific and a particularly virulent form of Christian antisemitism. It also deals with the more general (and, perhaps, more dangerous) threat to historical analysis posed by Holocaust denial which, according to Professor Yehuda Bauer,* is "the only new form of antisemitism that the post-Holocaust world has produced." Chapter three deals with the legal history of the Ross case in

*This quote is taken from notes made at a speech - "From Holocaust to Hope-Perspective After Fifty Years" - given in Vancouver, B.C. by Professor Yehuda Bauer. Professor Bauer is Professor of Holocaust Studies at the Institute of Contemporary Jewry, and chairman of the Centre for the Study of Anti-Semitism at the Hebrew University of Jerusalem. The speech was given at Beth Israel Synagogue, 4350 Oak Street at 7:30 pm on November 2, 1994 under the auspices of the Canadian Friends of Hebrew University.

New Brunswick as it has progressed from the Human Rights Board of Inquiry to the Court of Queen's Bench and then to the New Brunswick Court of Appeal. Chapter four is an analysis of five cases whose decisions ought to be of importance for the Supreme Court when it finally hears the appeal of Attis v. School District 15 (1991). Chapter five contains an analysis of the Ross case within the following contexts: i) the judicial context within New Brunswick, ii) the national judicial context, iii) the context of Holocaust denial, iv) the civil liberties context, v) the post-Holocaust context, and, finally, v) the pedagogic context. Chapter 6 concludes this thesis with recommendations about why and how the law and the courts ought to respond to public school teachers who publicly and persistently deny that the systematic murder of over five million Jewish men, women, and children (the Holocaust) occurred.

Discussion.

The Malcolm Ross case has portentous, albeit subtle, significance for our understanding of the nature and purpose of public education; for our understanding of the nature and purpose of historical inquiry; and for our understanding of the limits on freedom of expression which are justified by a free and democratic society. Above all, however, the Ross case ought to ask an intellectually complacent public if it can withstand the assault on truth and reason mounted by Malcolm Ross and his supporters. For such an assault ought not to be viewed as if it were within the context of a paternally patient nation whose democratic pith requires it to tolerate the whimsical, the absurd, the outrageous, and the hateful as a minimal expression of its faith in tolerance. Rather, Malcolm Ross' publications and public statements, as a public school teacher, ought to be understood, generally, as antithetical to education and, specifically, as a cynical assault on the nature and purpose of public education in Canada. Could any publicly funded system of education remain benign, serious, and competent while employing a teacher whose vigorous public assertions are seen as the "apotheosis of irrationalism"? However, the serious (perhaps mortal) threat posed by Ross to

public education in Canada and, consequently, the equally serious threat he poses to the strength of a free and democratic Canada must be seen and understood within the contexts of the Holocaust. And before even this can be attempted, it will be necessary for us all to deal with the Holocaust as a Jewish genocide sustained by a particular strand of Christian myth that is as powerful and subtle now as it ever was in the Weimar Republic.

Chapter 2**Malcolm Ross' books: substance and rebuttal.**

Fool: Prithee, nuncle, keep a schoolmaster that can teach thy Fool to lie. I would fain learn to lie.

King Lear: I, iv.

I tried to teach...that there are two threats to reason, the opinion that one knows the truth about most important things and the opinion that there is no truth about them...

Only the search back to the origins of one's ideas in order to see the real arguments for them, before people became so certain of them that they ceased thinking about them at all, can liberate us.

Allan Bloom, Giants and Dwarfs, "Western Civ", 1990, p. 18 & 20.

Malcolm Ross' four publications to date (August 1994) are Web of Deceit, (1978); The Real Holocaust: The Attack on Unborn Children and Life itself, (1983); Christianity vs Judeo-Christianity: (The Battle for Truth), (1987); and Spectre of Power, (1987). He has also written a number of letters to newspapers and has appeared on local television to discuss the views which appear in these books. Each book is published by the Stronghold Publishing Company, Limited. Anyone who wants to get them has access to them through public and university libraries.

I will not attempt a detailed reconstruction of his arguments. Instead, I will emphasize Malcolm Ross' essential points, and deal with four lies about the Holocaust which he, and other deniers propound: 1. that there were no gas chambers; 2. that the number of murdered Jews is vastly overestimated; 3. that Anne Frank's diary is a forgery; and 4. that the official Red

Cross statistic supports their lie about the number of Jewish deaths.

Web of Deceit (1978).

Three quarters of this book's cover contains an illustration, the central piece of which is a diamond-shaped spider's web with a spider sitting at its centre. At the the top of the diamond is a Star of David. At the right corner is a money-bag with a dollar sign on it. At the left corner is a hammer and sickle. The bottom of the web is submerged in what seems to be a mound of human skulls and some human bones. Above this web to the left is a small black cloud on top of which perches a white cross. Two lightning bolts rooted in the cloud's base, zig-zag their way to both sides of the spider's web on either side of the Jewish star. A black line divides this illustration from the bottom quarter of this cover which contains the title, itself caught in a spider's web. Malcolm Ross's name appears underneath this.

As his title suggests, the central thesis of Web of Deceit is Ross' argument that a conspiracy exists whose sole purpose is world domination and the destruction of Christian civilization. According to Ross, this conspiracy is a highly organized group made up of communists, international financiers, Zionists, many in the Church, the education system, the mass media, and the government of Canada. Furthermore, "it controls nearly all the mass media and propaganda machines of the world..." (Ross, 1978, p.3)

For Ross, this conspiracy poses an extremely serious threat as it is the most sinister secret organization ever conceived in the mind of Man...(p.1) A deadly poison has been injected in the bloodstream of our national life...(p.2) Our racial composition is being changed for the first time in our history.(p.2/3)

It began with Professor Adam Weishaupt in 1776 who, according to Ross, organized a group called the Illuminati, which, in turn, "devised the Plan to destroy Western Christian Civilization." (p.4) Ross also cites the Abbe Barruel (1797) and

John Robison (1798) (p.5) as having warned against the Illuminati, some of whom were "Itzig, Friedlander, and Meyer Amschal, the founder of the House of Rothschild." (p.5) Furthermore, various manifestations of this conspiracy are to be found in organizations such as "the Jacobin Clubs and the Communist League"; (p.6) "the Fabian Society" (1884); (p.6) "Christian Socialism" (p.7) as taught by John Ruskin; Zionism; (p.7) "the notorious "Bilderburger Group" (1954); (p.7) and the Trilateral Commission (p.7) among others.

The Russian revolution which brought the Communists to power was, according to Ross, funded by the 'Conspiracy' (Ross' spelling):

Jacob Schiff, the head of the banking house of Kuhn, Loeb, & Co. of New York sent a telegram to a communist rally in the Carnegie Hall, New York, on the 23rd March, 1917, sending his regrets for his "inability to celebrate with the friends of Russian freedom the actual reward of what we had hoped for and striven for these long years." Schiff's grandson told the New York columnist Cholly Knickerbocker that "the old man sank about \$20,000,000 for the final triumph of Bolshevism in Russia."...Schiff's name will appear in connection with all three branches of the Conspiracy. (p.12)

However, the Conspiracy was obviously betrayed by Stalin "who was not playing along with the Conspiracy's game" (p.13) and, therefore, Ross says that "evidence suggests [Hitler] was financed [in Germany] by the Conspiracy in order to destroy the nationalistic Stalin..." (p.13) Next, according to Ross,

Hitler invaded Poland...to protect the national sovereignty of Poland and the Press raged against Hitler. However the Soviet Union invaded East Poland only days later, but the Press wasn't nearly so upset. Somewhere along the line peace must have been made between Stalin and the Conspiracy. (I am aware this is a terrible way to present history, but as this is not

a history lesson, and as I am only attempting to present an alternative argument, I am taking certain license.) [my emphasis] (p.13)

Unfortunately, Malcolm Ross does not specify the argument to which his is an alternative. One might assume it is in response to certain conventional interpretations of history and the facts which support them, although, in light of Ross' vagueness, it would be unwise to speculate on any of his alleged "alternative argument" since he admits to "taking certain license" which, in itself, is, regrettably, undefined. Therefore, instead of attempting to understand the why of his argument, which, of itself, would be to indulge in the same sort of "alternative argument...taking a certain license", I will attempt to understand the way of it instead.

This chapter's epigraphs both allude to a teacher's stock-in-trade as well as to his first discipline: the truth. The first epigraph, from King Lear, is ironic. Lear's fool tries in vain to show Lear his own foolishness but the old man will have none of it. Thus, the irony, if not effective on Lear, is certainly effective for the audience, both in Shakespeare's day and today. Neither Shakespeare nor his audiences could accept, nor can any contemporary audience accept as rational, any statement (other than an ironic one) which alleges that lying is an important method, a curricular consideration, or a value which must be taught. Instead, lying is understood now, as it was then, as a generally grievous fault which must be confronted. As the central irony indicates, lying is certainly not something in which a teacher indulges. The second epigram, a statement by Allan Bloom, reflects the Socratic notion of true wisdom. Socrates believed* that the starting point for wisdom occurred only when the individual could admit to himself that he knew that he did not know. To do otherwise was to ape the fool. Bloom's point

*Perhaps the best example of this argument is to be found in "Socrates' Defence" (Apology) in which Socrates defends his life's work from the accusation that he is "corrupting the minds of the young" of Athens. He was found guilty and put to death. See The Collected Dialogues of PLATO, ed. Edith Hamilton & Huntington Cairns, Bollingen Series LXXI, Princeton University Press, 1961.

chastens the teacher – it is a reminder that he must not be a demagogue, but rather, risk the search, with his students, for “the truth about the most important things” without a guarantee of finding it. Equally, the teacher must be committed to an optimistic humility that permits the search always to continue within the limits of reason. Northrop Frye has characterized this search (see Chapter one) as one which demands “a deep reserve and elusiveness, suggesting the tentativeness of all answers, because progress in understanding is a progress through a sequence of questions...” In Web of Deceit there is nothing akin to the encouragement to reason that is found in Shakespeare, Bloom and Frye. Instead, this book is full of the credos of hate. It is a set-piece and of a kind:

Indeed, the negro is one of the most unfortunate tools of the Conspiracy. Everywhere he is placed in the limelight and made to compete in a culture not of his making. In the United States forced busing and far reaching integration policies are causing racial tensions which often erupt in racial violence. That there are racial differences must be faced, but why, in a world that is always advocating ‘detente’, cannot blacks and whites live separately and at peace? Why are we being forced to mix against the wishes of both groups? And yet this is the policy promoted by Education, the Church, the Press, and the Government, and to disagree is considered to be the very height of prejudice. Could not the Hidden Hand of the Conspiracy be at work even in this? [my emphasis] (p.22/23)

At the heart of Malcolm Ross’ argument is the belief that Zionism is the life force of the Conspiracy:

One thing that cannot be avoided is the presence of large numbers of Khazar-Ashkenazim “Jews” in all three branches of the Conspiracy. Lest this be construed as an attack against all Jews, I would remind you that among those who have suffered most because of Zionism has been a large number of Jews and many Orthodox Jews violently

oppose[sic] the claims of this sinister quasi-religious movement.

Having established that this is not a racial attack on an identifiable minority, for the benefit of the reader and of our Trilateralist Commissioner of Human Rights and of all who would hurl the Hate Literature Bill, I will attempt to give evidence that the movement we know as Zionism is nothing more than a move to centralize the leaders of the Conspiracy in the richest and most politically strategic area of the world and to work for the total destruction of Christian Society.[my emphasis] (p. 40)

The set-piece, of course, is the well-worn story that the Jewish people exist as a direct, potent, and extremely malicious threat to all Christians – the Conspiracy.* Ross' writing is punctuated with the well-worn cliches that are the code of the antisemite:

Because of their business acumen and their ability to work together they gained control of the finances of the countries where they went, especially in the small German states. They settled in ghettos to prevent intermarriage...

Meyer Amschal, founder of the House of Rothschild, was one of a group of Khazars which joined the Illuminati and gained control. From this time on our economy came to

*“...it is undeniable that Christianity would appear on the stage of history as a *negation* of Judaism in a much deeper sense than its pagan predecessors; that its theological polemics against Judaism were to be vital to its own identity far more than was the case for any other religion or culture. No other religion, indeed, makes the accusation that Christianity has made against the Jews, that they are literally the *murderers* of God. No other religion has so consistently attributed to them a universal, cosmic quality of evil, depicting them as children of the Devil, followers of Antichrist or as the ‘synagogue of Satan’. The fantasies concerning Jews which developed in medieval Christendom, about their plotting to destroy Christianity, poison wells, desecrate the host, massacre Christian children or establish their world domination, represent a qualitative leap compared with anything put forward by their pagan precursors. Such charges, beginning with deicide, are peculiarly *Christian*, though in the twentieth century they have been taken up by Islam as well as by secular political religions such as Nazism or Bolshevism which have exploited the fiction of a Jewish world conspiracy.” Antisemitism: The Longest Hatred, Robert S. Wistrich, Thames Mandarin, 1991, xviii – xix.

be more and more under the control of International Finance. [my emphasis] (p. 43)

To bolster this argument, Ross relies on one of the most infamous and venomous antisemitic mantras, the Protocols of the Elders of Zion - a forgery that has been called a "warrant for genocide" by Norman Cohn.* Ross' tone apes the academy. It remains, however, a suggestive and patronizing whine.

Perhaps by this time there may be at least a thought in your mind that there is A Plan at work in the world. A document exists which seems to be an obvious blueprint of such a Plan, but it has been denounced as a forgery by the Press and Zionism. But the fact remains that whatever its origin the details outlined in this document are coming to pass...it was evidently seized by Czarist Secret Police at Basle, Switzerland, in 1897, at a Zionist Convention. [my emphasis] (p,43/44)

However, before introducing the protocols (he does not give them all, nor does he mention this), Ross states: "You decide whether or not they are forgeries." (p.45) He does not state how the reader is to do this.

Ross' arguments do not rely on an assessment of competing theories. They do not rely on rationality. Instead, he relies on lies, fallacies, and the myth** about the Jew inherited

*Warrant For Genocide: The myth of the Jewish world-conspiracy and the *Protocols of the Elders of Zion*, Norman Cohn, Harper and Row, Publishers, New York and Evanston, 1966.

**I am using William Nicholls' definition of myth as it is associated with religion: "When scholars who study religion use the word...they mean a story or a group of images in which religious energy and emotion are invested. The story tells the members of the community who they are, giving the community its identity and distinguishing it from others. The myth is the charter of a religious community, the energy center by which it lives. Usually the myth explains such ultimate mysteries as the creation of the world, the struggle between good and evil, and the way human beings can be saved in the future." Christian Antisemitism: A History of Hate, William Nicholls, Jason Aronson, Inc., Northvale, New Jersey, London, 1993, p. 3.

and sustained by certain features of Christianity.* However, Malcolm Ross, like James Keegstra and Ernst Zundel, realizes that the biggest challenge he has to face in his efforts to foment hatred against Jews is the fact of the Holocaust. Thus, the reader of Web of Deceit is faced with the incredible suggestion that first, "The leaders of the Nazi movement may well have been part of the Conspiracy" (p.52), and second, that the Holocaust may not have happened...

I would ask the reader to reassess his opinion of the way the Germans treated the Jews during World War II in light of the information given below. This is only a fragment of the information available which seems to indicate that we have once more been the victims of the Conspiracy propaganda machine.

The magic figure "six million" is the general response when people are asked how many Jews did the Germans kill from 1939-1945. This number is used to prove the evils of "Racism" should anyone mention such a thing. The number is also used to arouse sympathy for the Jews and it causes many people to raise thankful hearts that the Jews have at last been established in Israel. But what if the facts just do not back this extreme number, and in fact reduce it instead to thousands? (p.52/53)

The "fragment" to which Ross refers is an article by Richard Harwood titled "Did Six Million Really Die?" which, according to Ross, "produces evidence that if studied would explode the myth of the Six Million." (p.53) However, according to Deborah Lipstadt in Denying the Holocaust:

Given the pamphlet's wide distribution, there was significant public curiosity about the identity of both the author and publisher. Richard E. Harwood was described as a writer who specialized in the political and diplomatic aspects of World War II and who was "at present with the

*See, for example, John 8: 37-44 and Matthew 27:24 in the New Testament.

University of London.” It did not take the British press long to discover that this was false. The University of London told the Sunday Times that Harwood was neither a staff member nor a student and was totally unknown to it...In fact Richard Harwood was a pseudonym for Richard Verrall, the editor of *Spearhead*, the publication of the mBritish right-wing neofascist organization the National Front. *Did Six Million Really Die?* is identical in format, layout, and printing with *Spearhead*. Neither the National Front nor Verrall denied that he was the editor of the pamphlet. In 1979, in a letter to the *New Statesman*, Verrall, who had a degree in history from the University of London, responding to articles on the Holocaust, reiterated the pamphlet’s basic arguments and defended its conclusions against attacks that had appeared in the British press. He did so despite the fact that most of his conclusions had already been shown to be false.* (Lipstadt, 1993, p.104)

It is important, at this point, to pursue Verrall (Harwood’s) argument as it is Ross’ as well. In his letter to the *New Statesman* (reprinted in Gita Sereny’s article in the *New Statesman*, Nov. 2, 1979), Verrall claims:

As for the testimonies, so-called “witnesses” testified at Nuremburg that gas chambers were in operation at Belsen, Buchenwald and Dachau. Fifteen years later the Institute of Contemporary History in Munich admitted that no such things existed in those camps. “Gas chambers” had only been used in Poland. That revision reduced to nothing the thousands of “testimonies” and “proofs” of gassings in Germany. Why, therefore, should we accept “testimonies” about Auschwitz or other Polish camps when testimonies about Belsen and Dachau have proved to be worthless lies? (Sereny, 1979, p.670)

*They are sometimes called revisionists, a title they rather like since it can connote a sincere and a rational re-assessment of contemporary historical interpretation. However, Malcolm Ross, James Keegstra, Richard Harwood (Verrall), Arthur Butz, and Ernst Zundel, among others, can only be mad if they believe what they state and publish about the Holocaust. If they are not mad, they must admit to being liars.

For Sereny, there are two reasons why legitimate historians must respond to the Holocaust deniers:

first...they are by no means motivated by an ethical or intellectual preoccupation with the historical truth, but rather by precise political aims for the future. As all political philosophies have needed their precursors, and parties their prophets, so they require a model, a hero, and it is of course Hitler whom they need to serve in that role. But, because people in general are good rather than evil, it must be a Hitler shown to have been not only powerful, but moral...

There is one thing only for which there was no reason of war; no precedent; no justification. One thing of pure evil, and this they cannot afford to accept: the murderous gas-chambers in occupied Poland, the attempt to exterminate the Jews.

The second reason why we must come to grips with both the substance and detail of the neo-Nazi claims is that sometimes mistakes have been made, have been given immense publicity, and become part of holocaust lore. At the risk of offence, we must correct and explain these mistakes, in order that they cannot be exploited again.

The likes of Derrall and Butz have shown a considerable talent for mixing truth with lies, by repetitive injecting of some truth into all lies, and lies into truth. They make astute use of human errors (and of latent prejudice). [my emphasis] (Sereny, 1979, p.670)

One of the errors about the Holocaust stems from the belief of many that concentration camps in Germany were set up with gas chambers as mass murder facilities. It is true that the camps in Germany had used gassing* (usually the exhaust from gasoline or diesel engines) as a method of murdering since about 1938/39. (Lifton, 1986, p.51) It is also true that it was at these camps that Hitler first tested his idea of using euthanasia to get

***For a detailed discussion on the genesis of these camps in Germany, see Robert Jay Lifton's The Nazi Doctors: Medical Killing and the Psychology of Genocide, Basic Books, Harper/Collins, 1986.**

rid of what became known as “life unworthy of life” (lebensunwertes Leben). (Lifton, p.21) Eventually, according to Sereny, these camps came to include German criminals, political prisoners, religious and sexual ‘deviants’, with, finally, Poles, Russians, “and the Jews - in that order - at the bottom.” (Sereny, p.671) It is also true, argues Sereny, that

Millions of people died in these concentration-plus-labour camps: some - the most publicized - by torture, brutality or hideous medical experiments. But far more of them died from sickness and disease.

These were the camps that all Germans knew about and dreaded. *These* were the corpses found by the horrified allied armies as they entered Germany. *These* made the photos and films we have principally seen. These emaciated skeletons, some still somehow upright, some lying on bunks in stupor, still others piled in naked, tumbled heaps ready for burning - these are the images that haunt us...

And then there was Auschwitz, and later Majdanek: the *only* two, where the Nazis combined enormous labour installations and nearby facilities for extermination...But it is important for those of us interested in the truth to recall that Auschwitz, despite its emblematic name, was not primarily an extermination camp for Jews, and is *not* the central case through which to study extermination policy. (Sereny, p.671)

It is important to note that the camp system as such included the death camps, concentration camps, labour camps, murder camps, ghetto camps, and transit and assembly camps. Of all these, there were only four death camps, all situated in Poland - Chelmo, Belzec, Sobibor, and Treblinka.*

In 1962, Dr. Martin Broszat, the Director of the Institute

*For a map showing the “main camps in the Third Reich and the Nazi-occupied territories” see Leni Yahil’s The Holocaust: The Fate of European Jewry, p. 358-59, Oxford University Press, 1990.

for Contemporary History in Munich, wrote a letter to the weekly *Die Zeit* in which he was trying, according to Sereny,

to set the record straight. What Broszat was trying to do, he explains

was to hammer home, once more, the persistently ignored or denied difference between concentration and extermination camps; the fundamental distinction between the methodical mass murder of millions of Jews in the *extermination* camps in occupied Poland on the one hand, and on the other the individual disposals of *concentration* camp inmates in Germany - not necessarily, or even primarily Jews - who were no longer useful as workers. (,p.670)

Thus, according to Sereny,

Auschwitz, the most-cited [concentration camp], was a complex, transitional example. There are reasons why the worst names are least cited; one, complex in its roots, is that the Third Reich tried to present its (marginally) less hideous face towards the West, and the western armies never reached the territory of the death-camps. And well-run extermination camps leave few survivors to tell their stories.

The situation therefore presents some possibilities for confusion to pseudo-historians and neo-Nazi apologists. And they are assisted further by the fact that events of such magnitude lend themselves to dramatic 'use', are therefore used, and not-infrequently misused. In turn the Derralls and Butzes [and Malcolm Ross] can allege that all such misuses are part of a 'Zionist' conspiracy. (Sereny, p.672)

Since the foundation of Malcolm Ross' thesis about the Jewish Conspiracy rests on denying the Holocaust by trivializing it and impugning the sheer number of murdered Jews, it is necessary to deal with two important types of evidence: German eyewitnesses and the captured German documents attesting to the intent and scope of this Holocaust. Although there is a

staggering body of historical evidence dealing directly and indirectly with the Holocaust, I shall rely only on the following two sources to exemplify these two types of evidence.

The German eyewitness.

In 1985, Claude Lanzman published the text of his film *Shoah* (Pantheon Books, New York). It has the same title as the film and is subtitled "An Oral History of the Holocaust". Among the many survivors and witnesses that Lanzman interviews is former SS Unterscharfurer, Franz Suchomel, who worked at the Treblinka death camp. Lanzman asks Suchomel about his first day in the camp:

What was Treblinka like then?

Treblinka then was operating at full capacity.

Full capacity?

Full capacity! The Warsaw ghetto was being emptied then. Three trains arrived in two days, each with three, four, five thousand people aboard, all from Warsaw. But at the same time, other trains came in from Kielce and other places. So three trains arrived, and since the offensive against Stalingrad was in full swing, the trainloads of Jews were left on a station siding. What's more, the cars were French, made of steel. So that while five thousand Jews arrived in Treblinka, three thousand were dead in the cars. They had slashed their wrists, or just died. The ones we unloaded were half dead and half mad. In the other trains from Kielce and elsewhere, at least half were dead. We stacked them here, here, here, and here. Thousands of people piled one on top of another on the ramp. Stacked like wood. In addition, other Jews, still alive, waited there for two days: the small gas chambers could no longer handle the load. They functioned day and night in that period. (Lanzmann, 1985, p.53) ...So Stadie, the sarge, showed us the camp from end to end. Just as we went by, they were opening

the gas-chamber doors, and people fell out like potatoes. Naturally, that horrified and appalled us. We went back and sat down on our suitcases and cried like old women.

Each day one hundred Jews were chosen to drag the corpses to the mass graves. In the evening the Ukrainians drove the Jews into the gas chambers or shot them. Every day!

It was in the hottest days of August. The ground undulated like waves because of the gas.

From the bodies?

Bear in mind, the graves were maybe eighteen, twenty feet deep, all crammed with bodies! A thin layer of sand, and the heat, You see? It was hell up there.

You saw that?

Yes, just once, the first day. We puked and wept.

You wept?

We wept too, yes. The smell was infernal because gas was constantly escaping. It stank horribly for miles around. You could smell it everywhere. It depended on the wind. The stink was carried on the wind. Understand?

More people kept coming, always more, whom we hadn't the facilities to kill. The brass was in a rush to clean out the Warsaw ghetto. The gas chambers couldn't handle the load. The small gas chambers. The Jews had to wait their turn for a day, two days, three days. They foresaw what was coming. They foresaw it. They may not have been certain, but many knew. There were Jewish women who slashed their daughters' wrists at night, then cut their own. Others poisoned themselves.

They heard the engine feeding the gas chamber. A tank engine was used in that gas chamber. At Treblinka the only gas used was engine exhaust. Zyklon gas - that was Auschwitz.

Because of the delay, Eberl*, the camp commandant, phoned Lublin and said: "We can't go on this way. I can't do it any longer. We have to break off." Overnight, Wirth** arrived. He inspected everything and then left. He returned with people from Belzec, experts. Wirth arranged to suspend the trains. The corpses lying there were cleared away. That was the period of the old gas chambers. Because there were so many dead that couldn't be gotten rid of, the bodies piled up around the gas chambers and stayed there for days. Under this pile of bodies was a cesspool three inches deep, full of blood, worms and shit. No one wanted to clean it out. The Jews preferred to be shot rather than work there. (p.54-56)...

Was Treblinka glum without the trains?

I wouldn't say the Jews were glum. They became so when they realized...I'll come to that later; it's a story in itself. The Jews, those in the work squads, thought at first that they'd survive. But in January, when they stopped receiving food, for Wirth had decreed that ,there were too many of them...There were a good five to six hundred of

*Dr. Irmfried Eberl (1910-1948) presents an interesting example of how the Nazi murder apparatus had always sought, and received, the cachet of a medical response to Jews. According to The Nazi Doctors, page 124: "Eberl was appointed commander of Treblinka at the camp's opening in July 1942. An engineer from T4 [the office number - Tiergartenstrasse 4 - out of which, eventually, the entire camp system was administered] had helped construct the gassing apparatus; and the personnel, as in the other death camps in Poland, came heavily from SS men earlier involved with "euthanasia." Ukrainian guards with dogs were a new feature. The fact that Eberl was the only physician known to have headed a death camp suggests that the Nazis had good reason to feel that he was indistinguishable from a nonphysician in his attitude towards killing Jews. It could also mean that the Nazis were at the time considering wider use of doctors as commandants of death camps, thereby extending the principle of medicalized killing.

"If Eberl was a test case, he failed. An SS inspection visit to Treblinka a few weeks after the arrival of the first transport exposed a chaotic situation. Decaying corpses were piled up as new trains arrived, giving incoming Jews an all too clear idea of what awaited them, and making them difficult to handle; trains could not keep their schedule as one was held up behind another. Eberl was dismissed in short order."

**Christian Wirth was the SS officer responsible for supervising the construction of the first Nazi gas chamber. See The Nazi Doctors, page 71.

them in Camp 1.

Up there?

Yes. To keep them from rebelling, they weren't shot or gassed, but starved. Then an epidemic broke out, a kind of typhus. The Jews stopped believing they'd make it. They were left to die. They dropped like flies. It was all over. They'd stopped believing. It was all very well to say...I... we kept on insisting: "You're going to live!" We almost believed it ourselves. If you lie enough, you believe your own lies. Yes. But they replied to me: "No, chief, we're just relieved corpses." (p.146/147)

The German documents.

According to Gerald Reitlinger, "Himmler's[*] one and only public allusion to the extermination of Jewry..." (Reitlinger, 1957, p.279) was made in a speech at Posen (now Poznan, Poland) on October 4, 1943:

I want to talk to you quite frankly on a very grave matter. Among ourselves it should be mentioned quite frankly and yet we will never speak of it publicly...I mean the evacuation of the Jews, the extermination [Ausrottung] of the Jewish race. It is one of the things it is easy to talk about. 'The Jewish race is being exterminated', says one party member, it is quite clear, it is in our programme - elimination of the Jews; and we are doing it, exterminating them. And then they come, eighty million worthy Germans, and each one has his decent Jews. Of course, the others are vermin, but this one is an 'A1' Jew. Not one of those who talk this way has witnessed it, not one of them has been through it. Most of you must know what it means when a hundred corpses are lying side by side or five hundred or a thousand. To have stuck it out and at the

*By this time, Heinrich Himmler was the undisputed leader of the SS. For more details of this speech see Nuremberg Document PS 1918; IMT XIX p. 98.

same time - apart from exceptions caused by human weakness - to have remained decent men, that is what has made us hard. This is a page of glory in our history which has never been written and is never to be written. (p.278)

In a lecture* at Northwestern University, Holocaust historian Lucy S. Dawidowicz, noted that the text of Himmler's speech eventually got into SS files and, after the war, into the hands of the Allies:

The Western allies - the United States, England, and France - agreed from the start to make these captured German documents available to the scholarly community. Never before had historians had such a total and unhindered access to the official records of a state. In fact, the superabundance of captured German documents has presented to the historian a problem nearly as severe and crippling as the lack of documentation altogether, since the behemoth proportions of these seized papers conspire against man's frailty and the limits of his time...

The captured German documents comprise the records of federal, regional, and local government agencies, of military commands and units, as well as of the National Socialist Party, covering a period ranging from 1920 - 1945. After the war they were brought to the United States and housed in a depot at Alexandria, Va., where they were

*Professor Dawidowicz' lecture, along with those given by Eli Wiesel, Dorothy Rabinowitz, and Robert McAfee Brown, was sponsored by the Department of History at Northwestern University. These lectures were a direct response to the publication in 1977 of Arthur Butz's *The Hoax of the Twentieth Century* which, in essence, denies the extent of the Holocaust as part of an effort to deny it altogether. Butz was then a tenured professor of electrical engineering at Northwestern. According to Lacey Baldwin Smith, Chairman of the History Department at Northwestern, "It is also the task of the scholar to set the record straight. There are always those who, for reasons of their own, seek to deny or distort or subvert the evidence, and from the start the Holocaust has had its apologists, its distorters, and its deniers. There is only one way of answering the prejudice, misrepresentation and confusion perpetrated by those who traffic in untruth, and that is to set good scholarship against bad so that everyone can judge the evidence for himself." See The Dimensions of the Holocaust: Lectures at Northwestern University, Northwestern University Press, Evanston, Illinois, 1977, page 1.

sorted, classified, and microfilmed. They have since been returned to the Federal Republic of Germany. Sixty-seven *Guides to German Records Microfilmed at Alexandria, Va.*, prepared under the direction of the Committee for the Study of War Documents of the American Historical Association, have been published by the National Archives, comprising about 7,500 pages. An average page covers almost 2,000 frames of film, which means that the captured German documents now available on microfilm from the National Archives total about **fifteen million pages.*40** [my emphasis] (Dawidowicz, 1977, p.21/22)

When Malcolm Ross asks: “But what if we have been lied to? What if the facts just do not back this extreme number [six million], and in fact reduce it instead to thousands?” He relies on Richard Harwood (Verrall) as his authority. Had he relied on Raul Hilberg, he may not have been so coy about the numbers.

In his essay “The Statistic”, Hilberg admits that, regarding an actual number of Jews murdered by the Nazis “exactness is impossible”. (Hilberg, 1989, p.156) He notes that the ‘six million’ count comes from the testimony of SS Major Dr. Wilhelm Hottl who was referring to a “conversation he had with Adolf Eichmann in Budapest at the end of August 1944.” (p.155) The figure of six million was adopted by the “International Military Tribunal, in its judgement of September 3, 1946...without mention of Hottl.” (p.155)

*In a footnote on page 76 of The Dimensions of the Holocaust, Elliot Lefkowitz states: “In 1978, following the publicity generated by Arthur Butz’s book, Robert Wolfe, director of the Modern Military Branch of the National Archives, organized a small exhibit of Nazi records in the building’s lobby. These documents were designed to show the preparation for and execution of the Final Solution, as well as Hitler’s role in it. For a description of the key documents in the exhibit, see Chicago Sun-Times, May 28, 1978, p. 78.” In another footnote on page 79, Lefkowitz notes: “Yad Vashem is the world’s main repository of Holocaust-related materials. YIVO [Yiddish Scientific Institute, New York] has the largest collection of Holocaust-related materials in the United States. For a summary of the holdings of Yad Vashem and YIVO, see Beverly Yusim, “Resources for the Study of the Holocaust”, in *Encountering the Holocaust*, ed. Sherwin and Ament, pp. 479 - 80. “Resources for the Study of the Holocaust” also lists archives and libraries throughout the world with large Holocaust collections (pp. 473 - 85).

At his trial in Jerusalem, Eichmann's answer "settled on 5 million victims." (p.155) Eichmann* ought to have had a good idea as he was in charge of the mass round-up and transportation of Europe's Jews to the concentration camp system.

According to Hilberg:

Any assessment based on additions must reflect the origins and meanings of the numbers found in wartime documents. The most important characteristic of the large majority of these figures is that they stem from an actual count of the victims. There was a reason for this phenomenon. The head count was the basis for bureaucratic accountability; numbers were essential to orderliness. By and large, the figures can be grouped into three categories: (1) deaths as the result of privation, principally hunger and disease in ghettos, (2) shootings, and (3) deportations to death camps. The division is natural, because it corresponds to a jurisdictional segmentation in the bureaucratic apparatus. One component handled ghettoization, another shootings, a third transport, and each made records of its sphere of activity.

The statistics of privation were kept by Jewish councils and reported to German supervisory organs that utilized the figures to decrease rations and space...

Statistics for shootings were produced by the SS and Police units, especially the so-called Einsatzgruppen

*Leni Yahil, in The Holocaust: The Fate of European Jewry, Oxford University Press, 1990, p. 104, states that "The treatment of the Jewish problem is associated with Adolph Eichmann, who was to become a symbol of the mass murder of the Jews, figuring as the loyal henchman of the master butchers of the Third Reich and as the moving spirit behind the bureaucratic organization of the "Final Solution." In October 1939, according to Lucy Dawidowicz, Eichmann "took over the desk for Emigration and Evacuation, coded IV-D-4, which in a later reorganization became Jewish Affairs and Evacuation Affairs, coded IV-B-4. From this office he would schedule, organize, and manage the deportation of the European Jews to the death camps. In 1938, "emigration" was a euphemism for "expulsion." Once war began, "evacuation" became a euphemism for "deportation," which, in turn, signified transportation to a place of death." See The War Against the Jews: 1933 - 1945, Bantam Books, Toronto, 1986, page 106.

of the RSHA.*...

Einsatzgruppe situation reports were consolidated daily in the Reich Main Security Office for distribution to privileged recipients...

The third set of statistics, dealing with deportations, is numerically the largest category. Again, there was occasion for meticulous counting. In western countries, the Reich, and Slovakia, transports were planned with lists. In Belgium, France, and Italy, the rosters of names, made up in transit camps, have largely survived intact. For Yugoslav Macedonia and Greek Thrace, which were under Bulgarian domination, and also for Hungary, there is more than one set of statistics. In Poland the railway administration sometimes admonished its personnel to report the number of deportees by train, so that the Security Police could be billed accordingly...

The keystone among all of these German records is a recapitulation by the statistician of the SS, Dr. Richard Korherr, about the "final solution of the European Jewish question." The sixteen-page document, dated March 23, 1943, summarizes the situation as of December 31, 1942. A six-page supplement, confined to deportation statistics, deals with the first three months of 1943. (p.156-158)

Hilberg arrives at the final figure for Jews murdered by the Third Reich in "a breakdown by country, with the borders of 1937. Converts are included in the toll, and refugees are counted with the countries from which they were deported." (p.170) Hilberg's approximate total from a tally of seventeen countries is 5, 100, 000. (p.171)

In further attempting to deny the Holocaust, Malcolm Ross attacks the authenticity of Anne Frank's diary:

Millions of young people have been brought up to see the horror of the Jewish ordeal through *The Diary of Anne Frank*. It has gone through fifty impressions

*Reichs-Sicherheitshauptamt - Reich Security Main Office. See G. Reitlinger's The SS: Alibi of a Nation: 1922 - 1945, Da Capo Press, Inc., New York, 1957, ix.

and has been made into a successful Hollywood film. Harwood asserts, "With its direct appeal to the emotions, the book and the film have influenced literally millions of people, certainly more throughout the world than any other story of its kind. And yet only seven years after its initial publication, a New York Supreme Court case established that the book was a hoax." (p-19)

In 1959 an article by the Swedish journal *Fria Ord* brought out the truth. In the *American Economic Council Letter*, 15th April, 1959, the article was condensed as follows: "History has many examples of myths that live a longer and richer life than truth, and may become more effective than truth.

"The Western World has for some years been made aware of a Jewish girl through the medium of what purports to be her personally written story, *Anne Frank's Diary*. Any informed literary inspection of this book would have shown it to have been impossible as the work of a teenager* [my emphasis].

"A noteworthy decision of the New York Supreme Court confirms this point of view, in that the well known American Jewish writer, Meyer Levin, has been awarded \$50,000 to be paid him by the father of Anne Frank as an honorarium for Levin's work on the *Anne Frank Diary*.

Mr. Frank, in Switzerland, has promised to pay to his race kin, [my emphasis] Meyer Levin, not less than \$50,000 because he had used the dialogue of Author Levin as it was and 'implanted' it in the diary as being his daughter's intellectual work." (Ross, 1978, p.54/55)

*Although Mr. Ross is quoting *Fria Ord*, I find this a particularly odd example for him, as a public school teacher, to use. One can only suppose that Mr. Ross actually believes that the writing in *Anne Frank's diary* is far superior to any student writing he has ever known his colleagues to have read or graded. In fact, one must suppose him to mean that *Anne Frank's diary* exemplifies such a superior quality of writing that it remains, categorically, beyond the reach of an adolescent girl's potential. I have been teaching English in the public school system for over eighteen years; however, I cannot begin to share Mr. Ross' cynicism via *Fria Ord* as I have had a number of potential Annes in my classes. Those who sponsor high school writing contests throughout Canada and the world would also, I suppose, find *Fria Ord's* (and Malcolm Ross') conclusion to be specious - at best.

According to Deborah Lipstadt in Denying the Holocaust, the main reason to attack the authenticity is, again, to attack the reality of the Holocaust:

By instilling doubts in the minds of young people about this powerful book, they hope also to instill doubts about the Holocaust itself...

When Otto Frank was liberated from Auschwitz and returned from the war, he learned that his daughters were dead. He prepared a typed edition of the diary for relatives and friends, making certain grammatical correction, incorporating items from the different versions,* and omitting details that might offend living people or that concerned private family matters, such as Anne's stormy relationship with her mother. He gave his typed manuscript to a friend and asked him to edit it. (Other people apparently also made editorial alterations to it.) The friend's wife prepared a typed version of the edited manuscript. Frank approached a number of publishers with this version, which was repeatedly rejected. When it was accepted the publishers suggested that references to sex, menstruation, and two girls touching each other's breasts be deleted because they lacked the proper degree of "propriety" for a Dutch audience. When the diary was published in England, Germany, France, and the United States, additional changes were made. The deniers cite these different versions and different copies of the typescript to buttress their claim that it is all a fabrication and that there was no original diary. They also point to the fact that two different types of handwriting - printing and cursive writing - were used in the diary. They claim that the paper and the ink used were not produced until the 1950s and would have been unavailable to a girl hiding in an attic in Amsterdam in 1942.

But it is the Meyer Levin affair on which the deniers have most often relied to make their spurious charges.

*Anne had rewritten the first volumes of her diary; as well she had written a series of short stories called *Tales From the Secret Annex*.

Levin, who had first read the diary while living in France, wrote a laudatory review of it when Doubleday published it. Levin's review, which appeared in the *New York Times Book Review*, was followed by other articles by him on the diary in which he urged that it be made into a play and film. In 1952 Otto Frank* appointed Levine his literary agent in the United States to explore the possibility of producing a play. Levin wrote a script that was turned down by a series of producers. Frustrated by Levin's failures and convinced that the script would not be accepted, Frank awarded the production rights to Kermit Bloomgarden, who turned, at the suggestion of American author Lillian Hellman, to two accomplished MGM screenwriters. Their version of the play was a success and won the 1955 Pulitzer Prize.

Levin, deeply embittered, sued, charging that the playwrights had plagiarized his material and ideas. In January 1958 a jury ruled that Levin should be awarded fifty thousand dollars in damages. However, the New York State Supreme Court set aside the jury's verdict, explaining that since Levin and the MGM playwrights had both relied on the same original source - Anne's diary - there were bound to be similarities between the two.**

Since it appeared that another lawsuit would be filed, the court refused to lift the freeze that Levin had placed on the royalties. After two years of an impasse, Frank and Levin reached an out-of-court settlement. Frank

*When Otto Frank died in 1980, Anne's diary was given to the Netherlands State Institute for War Documentation where, according to Lipstadt "forensic science experts analyzed Anne's handwriting, paying particular attention to the two different scripts, and produced a 250-page highly technical report of their findings...The conclusions of the forensic experts were unequivocal: The diaries were written by one person during the period in question...The final result of the institute investigation was a 712 page critical edition of the diary containing the original version, Anne's edited copy, and the published version as well as the experts' findings." - Denying the Holocaust, p. 235. For further information about this, see H. J. J. Hardy, "Document Examination and Handwriting Identification of Text Known as the Diary of Anne Frank: Summary of Findings," *Diary of Anne Frank*, p. 164. (footnote on page 271 - Lipstadt).

**See New York Law Journal, Feb. 27, 1959 cited in Barnouw, "The Play," p. 80. (note footnote on page 270 - Lipstadt).

agreed to pay fifteen thousand dollars to Levin, who dropped all his claims to royalties and rights to the dramatization of the play. (Lipstadt, p.230-232)

The Red Cross statistic.

According to Malcolm Ross, not only were the estimates of the number of Jews living in German occupied territory wrong, but

The facts seem to show clearly that there were not the commonly held nine million Jews in German held territory, but more like three million and not all these died! (Ross, 1978, p.55)

Ross then quotes Harwood (Derrall) who, in turn, quotes a Swiss newspaper:

In 1955, another neutral Swiss source *Die Tat* of Zurich (19th January, 1955) in a survey of all Second World War casualties based on the figures of the International Red Cross, puts the "Loss of victims of persecution because of politics, race or religion who died in prisons and concentration camps between 1939 and 1945 at **300,000**, not all of whom were Jews, and this figure seems the most accurate assessment." (p.28) [my emphasis] (Ross, 1978, p.55/56)

The Real Holocaust: The Attack on Unborn Children and Life Itself.

The predominant image on the front cover of this book (1983) is that of a man in the right foreground throwing small coffins into a pit. Two, perhaps three, kings on camels appear in the left background travelling to the reader's right. Above them is an outlined cross which seems to be emitting light. Just behind the man is a fence, perhaps of metal, which divides the area in which the man is standing from the background. Behind

the man, to the reader's right and to the man's left, is the edge of a brick building. It is on the opposite side of the fence from the man. The word 'clinic' is on this building's corner. To the man's right and the reader's left the metal fence bears a sign:

**WELCOME
TO HEROD'S
ABORTION CLINIC**

The man is wearing a formal outfit: laced shoes, striped trousers, a formal coat with tails, extended cuffs and cuff-links, and a three- buttoned vest. While with his right hand he has just thrown a small coffin into the hole situated just below the sign on the metal fence, he has another small coffin tucked under his left arm and supported by his left hand. The man is a caricature of the Jew as seen by the antisemite.* His beard is black and full. His lips are fleshy. His nose is long and hooked. His ears are big. His expression is impassive and, considering what he is doing, the residual impact of the entire image is fraught with cynicism. In the lower right hand corner are the following lines:

**Fewer and fewer will escape if we can keep
Christians from listening to the Wise Men!**

Below these lines is Malcolm Ross' name.

According to Ross, he is writing this second book...to show that the insistence upon all women having the right to abortion on demand did not evolve from our Christian heritage and the love of freedom; nor from the legitimate struggle for women's rights; but was thrust upon our society by a powerful anti-God Force which hates and fears our Race, our Civilization, and most of all, the Religion of Christ. This conspiracy has been too well documented to be seriously denied.(Ross, 1983, p.7)

*These caricatures are of a kind. For more examples, see Robert S. Wistrich's Antisemitism: The Longest Hatred, Thames Mandarin, 1992. See as well Norman Cohn's Warrant For Genocide: The myth of the Jewish world-conspiracy and the Protocols of the Elders of Zion, Harper and Row, Publishers, New York and Evanston, 1966.

Throughout this modest sized book (about 52 pages) Malcolm Ross excoriates humanists, sex education in the public school system, the National Abortion Rights Action League, and Planned Parenthood among other items for promoting the right of a woman to choose to have an abortion. However, this little text, like its precursor, is merely another attack against Jews by virtue of its Holocaust denial. For example, Ross accuses

...the Humanists [of promoting] Holocaust Studies which propagate stories of alleged German atrocities in World War II. (p.17)

These Holocaust studies, argues Ross, talk about the six million “who allegedly died in such “Death Camps” as Auschwitz, Dachau, and Buchenwald.” (p.18) Ross then relies on “revisionist historians” (p.18) like Arthur Butz who argues, according to Ross, that the claims for the Holocaust “constitute the greatest hoax of the Twentieth Century.” (p.19) Furthermore, Ross then states

The International Red Cross three-volume report on German Concentration Camps (Geneva, 1947), found no evidence of genocide. The evidence confirms that Jewish casualties during the Second World War can only be estimated in thousands, surely enough grief for the Jewish people; and far less than the German people themselves...

The first “Holocaust,” with its possible imaginary mass slaughter, has been used to create a false sense of guilt in Christian nations by making them feel that their Christian heritage did nothing, really, to keep them from committing acts of vicious cruelty, and has been called , “A sneak attack on Christianity.” [my emphasis] (p.19)

Ross then stipulates

The purpose of this booklet is not to debate the existence of the Death Camps in Nazi Germany, but to discuss the “Death Camps” that do exist in every nation in the Christian World. These hospitals and abortion clinics constitute no

sneak attack on Christianity, but rather a full-scale frontal assault on Western Christian Civilization. (p.19)

However, Ross continues to cast doubt in his less than coy way with phrases such as “the atrocities that were supposed to have happened forty years ago...” (p.19) and suggestions that “the horrifying “Death Camps,” [are seen] through the haze of emotional preconceptions...” (p.20) Furthermore, “victims [of the concentration camps] were removed and buried or burned in ovens, so we are told.” (p.21) Further on, Ross continues in the same vein.

The title of chapter 14 is “COMPARISON: ALLEGED DEATH CAMPS VS. ABORTION CLINICS”. In this chapter, Ross states:

Let us look at the methods of execution alleged to have been committed in the so-called Death Camps in Nazi Germany and at the methods of execution being committed in hospitals and abortion clinics. (p.20/21)

In chapter 17, Ross suggests

Future generations may well learn that the Holocaust of World War II never occurred; or at least was grossly exaggerated. (p.26)

In chapter 19, titled COMPARE THE “HOLOCAUSTS” Ross states that “The Nuremberg War Crimes trials will doubtless be recognized some day as a travesty of justice.” (p.28) suggesting that the confessions which incriminated the “officers of the S.S. Leibstandarte Adolf Hitler” (p.28) were obtained through torture. Again, the implication about the Holocaust as a hoax perpetrated by Jews is obvious.

By chapter 25 - WHAT ARE THE HUMANISTS DOING TO US? - Ross' rhetoric becomes more strident - and threatening. Referring to Christians as sheep who have been conditioned by the likes of B. F. Skinner (see page 15), Ross warns:

Remember the sheep.

They succumbed to the Humanists' lies and allowed two World Wars to destroy the flower of our Race. Now through abortion, they are willing to sacrifice the BUDS of our Race.

They have opened the floodgates of immigration, diluting our blood while slaughtering those of our Race by the millions. In fact, the White Race's proportion of the world's population is steadily declining.[my emphasis] (p.37)

In chapter 28 - THE BEST NEWS EVER! - Ross again associates Jews with Satan:

Satan also had his chosen ones. This Conspiracy of Darkness has as its aim the destruction of the Church of God and the moral decay of mankind. Christ said of them, If the light that is in thee be darkness, how great is that darkness." (Matt. 6:23.) He went on to say to those who followed these evil teachings, [Jews] "You are of your father the devil, and you want to do the desires of your father. He was a murderer from the beginning. Whenever he speaks a lie, he speaks from his own nature; for he is a liar and the father of lies." (John 8:44.) (p.42)

Christianity vs Judeo-Christianity: (The Battle For Truth) - 1987

The top of the front cover of this booklet has a black cross displayed within a white foreground that is outlined as if sharp rays of white light are radiating from the cross. All this is set against a black background taking up about one third of the cover. At the bottom of the white foreground, in large white letters outlined in black, is the beginning of the word 'Christianity'; however, only the first five letters - 'Christ' - are within this white foreground. The rest are written in white and

are set against the black background. Two thirds of the page is grey and contains the hyphenated word 'Judeo-Christianity'. "Judeo-" is written above "Christianity". Equidistant between the words "Christianity" and "Judeo-Christianity" is the abbreviation "us". In the bottom right is a black cross in which the top of the vertical section is separated from the bottom by the vertical points of the Star of David while the two ends of the horizontal section are separated by the twin horizontal points of the Jewish Star. Immediately below this cross is the name of Malcolm Ross.

On the title page (page 1) Ross states that the booklet is

A Prepared Lecture by Malcolm Ross, Executive Director of the Maritime Branch of the Christian Defence League of Canada, and author of *Web of Deceit* and the anti-abortion book *The Real Holocaust*. (Ross, 1987, p.1)

By 1990, this booklet had gone through five printings.

While it too is a repeat in tone and style of his earlier antisemitic attacks, it is necessary to deal with three specific lies.

The Red Cross Report

The first deals with the Red Cross report on the Second World War to which Holocaust deniers like to refer. On page 29, in footnote 106, Ross states:

The International Red Cross three-volume report on German Concentration Camps (Geneva, 1947) found no evidence of genocide. Because Christians are now learning to count, there is tremendous pressure to keep this information from getting out. Threats and prison terms, physical abuse and blackmail, are common reactions. [my emphasis] (p.29)

Volume 1A (General Activities) of the Report of the

Committee of the Red Cross on its activities during the Second World War (September 1, 1939-June 30, 1947) is divided into four parts. Part four is called "Civilians" and is, in turn, divided into eight parts. Part VI. (of part four) is titled "Special Categories of Civilians". It, in turn, is divided into four parts - A,B,C, and D. Part A is called "Jews". It begins on page 641:

Under National Socialism, the Jews had become in truth outcasts, condemned by rigid racial legislation to suffer tyranny, persecution and **systematic extermination**. No kind of protection shielded them; being neither PW nor civilian internees, they formed a separate category, without the benefit of any Convention. The supervision which the ICRC was empowered to exercise in favour of prisoners and internees **did not apply to them**. In most cases, they were, in fact, nationals of the State which held them in its power and which, secure in its supreme authority, **allowed no intervention on their behalf**. These unfortunate citizens shared the same fate as political deportees, were deprived of civil rights, were given less favoured treatment than enemy nationals, who at least had the benefit of a statute. They were penned into **concentration camps and ghettos**, recruited for forced labour, subjected to **grave brutalities and sent to death camps**, without anyone being allowed to intervene in those matters which **Germany and her allies considered to be exclusively within the bounds of their home policy.**[my emphasis]

It should be recalled, however, that in Italy the measures taken against the Jews were incomparably less harsh...

The Committee could not dissociate themselves from these victims, on whose behalf it received the most insistent appeals, but for whom the means of action seemed especially limited, since in the absence of any basis in law, its activities depended to a very great extent upon the good will of the belligerent States.

The Committee had in fact, through the intermediary

of the German Red Cross, asked for information concerning civilian deportees “without distinction of race or religion”, which was plainly refused in the following terms: **“The responsible authorities decline to give any information concerning non-Aryan deportees.”** [my emphasis] (Red Cross, 1948 (a), p.641/642)

On pages 642 and 643, the Red Cross’ description of the changing number of Jews in the Nazi ‘showcamp’ of Theresienstadt (Terezin) indicate, in retrospect, both its and the world’s naivete in dealing with Germany. The Red Cross was allowed to visit only this camp. The first visit occurred in June 1944*. At that time

The Jewish elder in charge informed the delegate, in the presence of a representative of the German authorities, that thirty-five thousand Jews resided in that town and that living conditions were bearable.[my emphasis] (1948 (a), p.643)

However, “[i]n view of the doubt expressed by the heads of various Jewish organizations as to the accuracy of this statement” (p.643), the Red Cross, “[a]fter laborious negotiations, much delayed on the German side” (p.643) was allowed two delegates to visit Theresienstadt on April 1945. While confirming the “favourable impression gained on the first visit” (p.643) its delegates noted “that the camp strength now amounted only to 20,000 internees...” (1948 (a), p.643) According to the Red Cross:

They were therefore anxious to know if Theresienstadt was being used as a transit camp and asked when the last departures for the East had taken place. The head of the Security Police [SIPO – Sicherheitspolizie] of the Protectorate stated that the last transfers to Auschwitz had occurred six months previously, and had comprised

It is important to remember that *the great majority of Jews* who were to be murdered by the Germans *had already been murdered before the Red Cross visited Theresienstadt.

10,000 Jews, to be employed on camp administration and, enlargement. This high official assured the delegates that no Jews would be deported from Theresienstadt* in the future. (1948 (a), p.643)

From the vantage of our present historical knowledge and understanding of the methods and infrastructure of the entire German Holocaust bureaucracy, it is easy to squirm at the apparent naivete of the Red Cross Report. Phrases and words like “departures for the East”, “transfers”, “Auschwitz” “high official assured” are all too familiar to anyone who has read the history of the Holocaust. At this point, it is important to understand that the Holocaust was without precedence and that we are, as humans, fundamentally optimistic (a claim that today may be more difficult to make). It seems obvious that the welter of sometimes conflicting reports received by agencies like the International Red Cross as well as by various governments eventually denoted the pattern of genocide perpetrated by Germany which today we call the Holocaust.

A particular example (and perhaps the most poignant one) of the type of information getting out to the Red Cross and, indeed, the world is to be found in the report on “The Extermination Camps of Auschwitz (Oswiecim) and Birkenau in Upper Silesia”. The report was made on April 25, 1944 by two Jews who had escaped from Auschwitz on April 7, 1944: Rudolf Urba and Alfred Wetzler. In his 1964 book, 44070: The Conspiracy of the Twentieth Century (originally titled I Cannot Forgive), Urba (with Alan Bestic) recounts his capture, his eventual internment in Auschwitz-Birkenau camp complex, and his escape. Of particular interest here is a conversation he recounts with the Papal Nuncio at a monastery near Svaty Jur near Bratislava (in the former Czechoslovakia). After having been thoroughly cross-examined on his report by the Papal Nuncio, the Nuncio said he would “carry your report to the International Red Cross in Geneva” (Urba, 1964 p.256) The Urba-Wetzler Report

***Theresienstadt was located in the former Czechoslovakia.**

eventually made it to the American and British Governments*, the Pope, and, “on July 5th, [to] Professor Karl Burckhardt, President of the International Red Cross...”(Urba, p.257)

However, even though some of the world leaders and the Red Cross knew what was happening at Auschwitz anywhere from six months to a year before the Red Cross made its second inspection of Theresienstadt, the Red Cross could only monitor what it saw, record what it was told and try to effect as much change for the better as it could within these circumstances:

...enquiries as a matter of principle concerning the Jews led to no result, and continual protests would have been resented by the authorities concerned and might have been detrimental both to the Jews themselves and to the whole field of the Committee’s activities. In consequence, the Committee, while avoiding useless protest, did its utmost to help Jews by practical means, and its delegates abroad were instructed on these lines.(1948 (a), p.642)

Given our present knowledge of the Holocaust, the Red Cross’

*From the Executive Office of the President, War Refugee Board, Washington, D.C. (November 1944) came acceptance of the Urba-Wetzler Report:

“IT IS A FACT beyond denial that the Germans have deliberately and systematically murdered millions of innocent civilians – Jews and Christians alike – all over Europe. This campaign of terror and brutality, which is unprecedented in all history and which even now continues unabated, is part of the German plan to subjugate the free peoples of the world.

“So revolting and diabolical are the German atrocities that the minds of civilized people find it difficult to believe that they have actually taken place. But the governments of the United States and of other countries have evidence which clearly substantiates the facts...

“The Board has every reason to believe that these reports present a true picture of the frightful happenings in these camps. It is making the reports public in the firm conviction that they should be read and understood by all Americans.” – 44070: The Conspiracy of the Twentieth Century, R. Urba & A. Bestic, Star & Cross Publishing house, Inc., P.O. Box 1708, Bellingham, WA 98227, 1989, pages 280/281.

On page 257 of this book, Urba writes: “On July 7th, [1944] Mr. Anthony Eden, Britain’s Foreign Secretary, announced in the House of Commons that “700,000 to 1,000,000 Hungarian Jews” were in the process of extermination, information, I understand, which he gathered from my report.”

Today, Rudolf Urba is Associate Professor of Pharmacology and Therapeutics in the Faculty of Medicine at the University of British Columbia.

reports on the fate of Jews in various countries was ominous, as in the case of Greece in which it notes that

55,000 Jews in Salonica [were] the victims of racial legislation. In July 1942, all men between eighteen and forty-five were registered, and the majority were enrolled in labour detachments...in May 1943, these workers were sent to Germany...(1948 (a), p.645)

In its report on Slovakia, the Red Cross is direct and unequivocal:

Many thousands of Jews had been forced to leave the country and enlist in what was called "labour service", but which in fact seems to have led the greater number to the extermination camps. (1948 (a), p.645)

The same is true of its report on Rumania:

During the period in September 1940, when the "Iron Guard", supported by the Gestapo and the German SS, had seized power, the Jews had been subjected to persecution and deportation to death camps. ('48(a), p.653)

In its second volume called "The Central Agency for Prisoners of War", the Red Cross deals with the fate of the POW's. In Part II - "National and Special Selections", the Red Cross report deals with their fates in the belligerent countries. In its section on Yugoslavia, the Red Cross notes:

Although, at the outbreak of the war, Yugoslavia despite its 15 million inhabitants included only 70,000 Jews, the Section [the Yugoslav section of the Red Cross] received a large number of enquiries from Jewish next of kin in all parts of the world*. Enquiries about Jews residing in the provinces occupied by Germany were

*Leni Yahil's The Holocaust:The Fate of European Jewry lists the following camps, and their functions, in greater Yugoslavia: Danica, Djakua, Sabac, Nis, and Jadouno were murder camps; Jasnovac[sic] and Sajmiste were concentration camps. See pages 358-359.

unfortunately fruitless.

Three Jewish camps were known to be situated in Serbia. The detainees, who had been quartered there temporarily, were afterwards taken to an unknown destination, and nothing further was ever heard of them. In addition, a large number of Jews interned in Croatia were deported to Auschwitz, Kattowitz and other concentration camps. No news was ever received from them again. (Red Cross, 1948 (b), p.251)

Similarly, the Red Cross' section on Hungary states:

In March 1944, when the situation on the Eastern front became more and more threatening, Germany went ahead with the military occupation of Hungary, which was followed on October 15 of the same year, by the setting up of the "Arrow-head Cross" (Croix flechees) regime. These events inaugurated a period of political persecution, during which more than 15,000 political prisoners and several hundred thousand Jews were deported...the Agency received no information...from Germany in respect of the deportees... [my emphasis] (Red Cross, 1948 (b), p.271)

The Red Cross section called CID (*Civils internes divers* or Sundry Civilian Internees Section) was set up in 1940

to assemble all searches for persons who had been interned by police regulations...{and who} did not benefit by treaty protection and further, had no Protecting Power.(1948 (b), p.299)

They were mostly Jews. In 1943, this section became concerned only with German and Austrian Jews and other 'stateless' persons:

In these circumstances, the data on which the Section worked were inevitably very vague. Nothing was known about the destination of the convoys in which the persons under enquiry had been included. Equally, there

was no indication of the date of their arrest, and there were no responsible organizations from which to seek information...

The CID also dealt with the transmission of messages to or from Jewish internees. Thousands of messages went out, but the replies received were very few.

...Almost the whole of its [the CID's] work was concerned with Jews, and it is common knowledge that neither Germany, nor countries under German control would give any information on these people. [my emphasis] (1948 (b), p.299/300)

Given this very small sampling of information available to any who wish to find it and read it, it would be torturing credulity to believe that Malcolm Ross could not, had he wanted to, have searched this out himself. Yet, Malcolm Ross* argues

 *In an article called "Thoughts on the Holocaust" published in the NAAWP (National Association for the Advancement of White People) News, David Duke, the former leader of the KKK argued:

"The Holocaust is the rock upon which Israel rests. Chronic Holocaust propaganda was the main justification used in the expropriation of Palestinian land to make way for the Jewish state. It has also been a crowbar used to pry billions in reparations from Germany and billions in aid from the United States. Finally, it is the specter used to silence any serious criticism of Israel.

"So exactly what is the 'fact of Dachau'? No doubters of the Holocaust question the fact that, at the end of the war, there was very little food and fuel in the camps and that there were accompanying epidemics. The victorious Allied armies bragged in the winter of 1944-45 that they completely smashed the major transportation systems of the Third Reich. There were severe food shortages all over Germany during this period. Finding a large number of emaciated and diseased bodies no more proves any deliberate extermination policy than the fact that there were many victims of the Chicago fire proves that the city administration deliberately set the blaze.

"There are probably a thousand different articles on the horror of the Holocaust in America's print media every month. In such an avalanche of emotionally-charged material, it is certainly difficult for anyone to calmly and deliberately analyze and evaluate the content of what is being said. One thing is certain. Every word written about the horrors of the Holocaust speeds money to Israel and muffles any criticism of a foreign policy that often flies in the face of our own national interest. It stifles much of the legitimate criticism of the men who dominate America's media, men who also happen to be of the same people as those of the Holocaust, and blunts any sympathies for the Palestinian victims of ethnic persecution."

See David Duke, Evolution of a Klansman by Michael Zatarain, Pelican Publishing Co., Inc., Gretna, Louisiana, USA, 1990, page 261.

that the Holocaust did not happen. In so doing, he shares the company of Nazis. At this point, the only rational explanation of Malcolm Ross' reliance on the typical lies of the Holocaust denier would have to be founded on an incipient madness, stupidity, or his malice towards Jews. None of these argues for his teaching children in the coercive environment of the public school.

Spectre of Power (1987).

The cover is divided into thirds. The top third contains the title. The middle third depicts what might be a flag motif. The entire third is a solid red with a design centred both vertically and horizontally. It appears to be three white flames: the two outside ones licking up, out and then in on the middle one that goes straight up. Each flame ends in three pointed fingers of flame. However, the design is vague enough to be seen as an impressionistic fleur-de-lis; as a devil's crown, etc. The last third contains near its upper left corner a cross with six straight lines radiating out from it over 360 degrees. On the bottom and over to the right is Malcolm Ross' name.

On the back cover of this book is a list of books divided by a banner-like phrase announcing BOOKS BANNED IN CANADA immediately after which is a small line on top of which is a check. This banner divides the back cover in half diagonally. In the top left half is a list of seven books. With one exception, before each is a line with a check mark as at the end of the dividing banner-like phrase. This list reads from top to bottom: THE BATTLE FOR TRUTH, THE CONTROVERSY OF ZION, HOAX OF THE TWENTIETH CENTURY, THE JEWS AND THEIR LIES, KNOW YOUR ENEMIES, THE NAMELESS WAR, and NEW TESTAMENT, which has no check mark in front of it. The same design exists in the bottom right half. This list reads from top to bottom: THE REAL HOLOCAUST, THE RULERS OF RUSSIA, SECRET SOCIETIES AND SUBVERSIVE MOVEMENTS, THE TALMUD UNMASKED, THE ULTIMATE WORLD ORDER, WORLD REVOLUTION, THE ZIONIST FACTOR.

At least two of these titles are Ross' books reviewed in this

thesis. However, I found all of Malcolm Ross' texts readily available at the public library and through inter-library loans.

In chapter one, Malcolm Ross gives his reasons for writing Spectre of Power:

I am not writing this book to gain personal sympathy. My adversaries are the experts in gaining sympathy and creating false guilt! I am writing this to inform you that contrary to nearly all published reports, I am not a hate-monger; and I will try to explain the media bias against me. I feel this is my duty as a Christian and as a Canadian who, although having been cleared by every exhaustive investigation, is still being constantly threatened and harassed by Zionist, media, and government action.

...Powerful Jewish organizations have been pressuring the government for years to take action against me.

...The uncomfortable question is, Why are people being persecuted for their sincere efforts to find the truth?

...could it be something more sinister? Could it be they are afraid that a huge Bubble of Lies they have blown up might be pricked by the sharp pin of Truth? Might it possibly be that the great influence they exert is in danger of being exposed as an empty threat? What if we should find out we are standing in awe of an illusion, a Spectre of Power, which would simply disappear under the glorious Light of the Sun of Righteousness? (Ross, 1987, p.1/2)*

Spectre of Power deals with Ross' perception that he is a victim of Zionist propaganda, Ross warning about the international Jewish conspiracy, Ross defending himself against

***In chapter eight of Spectre of Power, Ross asks: "...Why are the Church's teachings of nearly two millenia suddenly "hate literature"?"**

"I trust the powers that be will notice that nowhere in this book have I denied the Holocaust, questioned the methods of extermination, nor cast doubt on that magic number. This will no doubt frustrate the media who has found it so convenient to lump all my writings under the horrific heading of "Holocaust denial." Today holocaust denial, or even the questioning of some details of the aforesaid tragedy, has replaced the "unpardonable sin" as the ultimate blasphemy." page 88.

the charges that he is a hate-monger, Ross, by innuendo, denying the Holocaust, and Ross commenting on the changed nature of the Church since the Holocaust. However, according to James A. Beverley*, chapter seven “is perhaps the most dangerous and sinister section of his writings.” (Beverley, 1990, p.11)

In Web of Error, Professor Beverley provides a coherent and annotated rebuttal to much of Malcolm Ross’ lies and half truths. With regard to chapter seven, he notes that

...Mr. Ross quotes with apparent approval past Catholic leaders who have advocated limiting Jewish freedom in incredible ways. Ross seems to bless the following ideas: (a) the finances of Jewish people should be controlled by the State, (b) one should not talk to Jews, (c) it is doubtful that Jews should hold public office, (d) the number of Jewish immigrants should be monitored carefully, (e) Jews should wear a distinguishing mark, and (f) Jewish books should be prohibited. If Ross does not advocate such action against the Jewish people, let him publicly repudiate this agenda. (Beverley, 1990, p.11)

A perusal of this chapter clearly indicates why Professor Beverley called it both “dangerous” and “sinister”. In his second sentence, Malcolm Ross states: “The Popes and Councils insisted that the lives of Jews who lived peaceably be spared...” (Ross, 1987, p.73)[my emphasis - later Ross quotes Pope Innocent IV to aver “...that Christian pity only accepts them [Jews] out of mercy and patiently bears coexistence with them...] (p.78/79) Soon after this, Ross states:

Perhaps we find it difficult to understand today the

*James A. Beverley, Professor of Theology and Ethics at the Ontario Theological Seminary responded to the writings of Malcolm Ross in a public lecture he twice gave in February, 1990, at St. Paul’s United Church in Riverview, New Brunswick and at Mount Allison University in Sackville, New Brunswick. See Web of Error: An Analysis of the Views of Malcolm Ross, J. A. Beverley, published by the Department of Religious Studies, Mount Allison University, Sackville, New Brunswick, 1990.

passion with which the early Church Fathers defended the Christian Faith and the fiery rhetoric these saints of the Church used in warning Christians against those who would in any way dilute our Faith or blaspheme against our Lord and Saviour...Might one imagine how horrified they would be if they knew that the promoters of this were in many instances followers of the religion they felt most dangerous to Christian piety?[my emphasis] (p.73/74)

Next, Ross quotes the anti-Jewish slanders found in the Gospels of Matthew and John in which Christ accuses some Jews of being the spawn of the Devil, the children of a murderer. (p.74) Relying on St. John Chrysostom as well as on innuendo and inference, Ross argues:

He says of their synagogue, it is a place of "shame and ridicule...the domicile of the devil, as is also the souls of the Jews." He calls their religion "a disease." He attacks those who support Jewish influence in the Church and on Judgement Day Christ will say to Judaizers, "Depart from Me, for you have had intercourse with My murderers." Perhaps his most controversial statement is "He who can never love Christ enough will never have done fighting against those (Jews) who hate Him." These are strong words, but they indicated the dread the early Church had of being infiltrated by Judaism. Were they right or wrong? It was the accepted teaching of the Church until post-Holocaust times. (p.75)

The tone of Ross' analysis of some of these anti-Jewish utterances of the early Christian Church continues to threaten:

Saint Gregory the Great, who ruled the Church for part of the early seventh century, has been considered one of the most important saints of the church. His terms for Jews and Judaism were almost always harsh. He referred to Judaism as a "superstition" and warned that it would "pollute" Christian Faith and "deceive with sacrilegious seduction" the simple Christians. Indeed,

he went even further and declared Judaism a “disaster.” At that time Judaism was regarded as being burdened with *perfidia*, a distorted faith, a disbelief. Such terminology has been banished in the Catholic Church during the post-Holocaust dialogue. (p.77)

In short order (as Beverley stated) Ross suggests, by inference and by appeal to the authority of some of the “Church Fathers”, that

1. Jews be restricted from “public office and [using] their position to do injury to Christians.” (p.77)
2. that, according to St. Thomas Aquinas, “The Jews must...wear a distinguishing mark...” (p.78) and
3. that [according to St. Thomas Aquinas] “The Jews may not retain what they have appropriated through usury...The Jews live in eternal servitude on account of their guilt...” (p.78) Relying further on Aquinas, Ross suggests “that measures be taken to limit their [the Jews’] action in society and to restrict their influence. He [Aquinas] felt it would be contrary to reason to allow them to exercise the powers of government in a Christian state.” (p.78) Furthermore, Ross quotes from title LXVII of the Fourth Lateran Council’s *On Jewish Usury*: “Desiring, therefore, to make some provision for Christians in this matter, lest they be cruelly burdened by the Jews, we legislate by synodal statute...” (p.77)
4. that because of Jewish ingratitude for Christian charity towards them, “It is small wonder Christian States were wary about receiving countless Jewish refugees?” (p.78)
5. that because “Many of the popes and leaders of the Church believed the Talmud was responsible for Jewish unbelief and for their views of Jesus and Christians...the Talmud was often ordered to be publicly burned.” (p.79)

6. that, according to “The famous Pope Gregory VII, the renowned Hildebrand,...’what is it to set Christians beneath Jews, and to make the former subject to the latter, except to oppress the Church and to exalt the Synagogue of Satan...” [my emphasis] (p.77)

Ross not only relies on some of the anti-Jewish statements made by the Catholic Church over the past two thousand years, he finds a fellow traveller in Martin Luther, and particularly, in Luther’s book The Jews and Their Lies. Quoting Luther, Ross reminds his audience that the Jews are a

condemned people [whose schools are] the Devil’s nest in which self-praise, vanity, lies, blasphemy, disgracing God and man, are practiced in the bitterest and most poisonous way as the Devils do themselves...the Devil is the God of this world. (p.80)

Furthermore (and yet again), quoting Luther, Ross presents the Jews as children of the Devil:

“...By my word, I am far too weak to be able to ridicule such a satanic breed. I would fain do so, but they are far greater adepts at mockery than I and possess a God who is master in this art; it is the Evil One himself.” Luther has been blamed as the “spiritual father” of Nazism. Actually his “final solution” for the Jews was the same as many Nazis who claimed the only solution was deportation. He wrote, “Therefore deal with them harshly as they do nothing but excruciatingly blaspheme our Lord Jesus Christ, trying to rob us of our lives, our health, our honour and belongings...For that reason I cannot have patience nor carry on an intercourse with these deliberate blasphemers and violators of our Beloved Saviour.” [my emphasis] (p.81)

Next, and with cynical timing, Malcolm Ross connects Luther’s anti-Jewish statements with the rise of the German Nazis:

Why did this Reformer who loved his Lord and his country write such a vicious booklet about the Jews? And why, I wonder, did the German people, nearly four hundred years later, elect a government that felt much the same way? (p.81)

Ross' wondering, like his open question, remains significantly coy. It is significant because Malcolm Ross has now changed his tone. He no longer speaks in the pleading yet taunting tone of one who fears Canada's hate laws, or the title 'antisemite'. He is no longer the champion of freedom of expression, nor the protector of debate about 'unpopular notions', nor the defender of fetuses. Neither does he praise Jesus. Instead, chapter seven reads like a death threat against the Jewish people. Malcolm Ross' voice has taken on the low growl of the mob. He now dresses his argument in jackboot prose. He throws away the disguise of the victim for the skull and cross bones of the SS. Thus, the antisemitism of some of the Church Fathers transmutes through Luther to Himmler's Posen speech where, amid the images of "corpses...lying side by side or five hundred or a thousand..." the Reichsfuehrer SS could claim that murderers "remained decent men" because of their murders. And, where, in a prescient sentence that anticipated the world of Malcolm Ross' Holocaust denial, Heinrich Himmler had the practical sense to say: "This is a page of glory in our history which has never been written and is never to be written."

Chapter 3**The Judicial Response to Malcolm Ross in New Brunswick**

On April 21, 1988, David Attis filed a complaint with the New Brunswick Human Rights Commission against School District* 15:

"I am a Jew and three of my children are enrolled as students within District #15.

I have reason to believe that Malcolm Ross, a teacher employed by the School Board, made racist, discriminatory and bigoted statements to his students during the 1976-77 school year. I have reason to believe that the School Board knew of this, yet it merely transferred Malcolm Ross to another school.

Malcolm Ross has written at least two books (i.e. *Web of Deceit* and *Spectre of Power*) and has made widely published statements (eg. Miramichi Leader, October 22, 1986, page 5) that are anti-Jewish, racist, bigoted and discriminatory and that deny that six million Jews died during the Nazi Holocaust.

On April 22, 1987, the School Board failed to pass a motion condemning bigotry and racism. On March 15 or 16, 1988, Ray Maybee, a member of the School Board, publicly stated that Malcolm Ross' opinions were well documented and he had done his homework, thus appearing to support Mr. Ross' discriminatory views. Furthermore, when the School Board reprimanded Malcolm Ross on March 15, 1988, it referred to his views merely as controversial rather than discriminatory and the reprimand applied only to his future actions, not his past actions.

By its own statements and its inaction over Malcolm Ross' statements in class and in public, the School Board had condoned his views, has thus provided a racist and anti-Jewish role model for its students, has fostered a climate where students feel more at ease expressing anti-Jewish views, and has thus reduced the credibility of the content of its official history curriculum, thus depriving Jewish and other minority students of equal opportunity within the educational system that the School Board provides as a service to the public.

I believe that the School Board has thus furthered the aims of the Ross' in our society. I would like to give a couple of examples:

***In July 1992, School District 15 became School District 2.**

i) Several students at the Magnetic Hill School intend to present a petition to the Premier of New Brunswick in support of Malcolm Ross. When asked if they concurred with Ross' views, the students replied that they didn't know.

ii) My eldest daughter, a grade 6 student at Beaverbrook School was invited by a friend to attend a gymnastic exhibition at Magnetic Hill School. She was reminded by a classmate that she shouldn't go there because that is 'where the teacher who hates Jews' (sic) works. She attended nevertheless.

I have reasonable cause to believe that the Board of School Trustees of District #15 has violated Section 5 of the Human Rights Act." (*Attis v. Board of School Trustees, District 15, 1991, p.2,3*)

Section 5(1) of the New Brunswick Human Rights Act states:

"No person, directly or indirectly, alone or with another, by himself or by the interposition of another, shall

(a) deny to any person or class of persons any accommodation, services or facilities available to the public, or

(b) discriminate against any person or class of persons with respect to any accommodation, services or facilities available to the public,

because of race, colour, religion, national origin, ancestry, place of origin, age, physical disability, mental disability, marital status or sex." (*New Brunswick Human Rights Code, 1979, c.8, s.1, p.9*)

In response to David Attis' complaint, a Board of Inquiry (Brian D. Bruce) was established, pursuant to Section 20 of the *Human Rights Act*, R.S.N.B. 1973, c. H-11 (the *Act*) by the Honourable Mike McKee, Minister of Labour for the Province of New Brunswick. Brian D. Bruce is a tenured professor of law at the University of New Brunswick Faculty of Law who has "heard numerous labour arbitrations in the past few years and [whose] services have been sought by many." (*Ross v. Board of School Trustees, District 15, February 22, 1990, p.8*) According to Judge Alfred Landry of the New Brunswick Court of Queen's Bench, Professor Bruce "is a professional and experienced adjudicator." (p.14) Moreover,

Since the establishment of the New Brunswick Human Rights Commission in 1967, only nineteen Boards of Inquiry, including this one, have been appointed. Thirteen different chairmen were appointed. Seven acted only once, while six (including Brian Bruce) were appointed twice. None served more than twice. (Ross v. Board of School Trustees, January 30, 1990, p.8)

As a result of several court challenges by Ross, the New Brunswick Teachers' Federation, and by School District 15 to the jurisdiction of this Board of Inquiry, hearings into this matter did not begin until December 1990 (8 - 16) followed by hearings from April 22, 1991 to May 9, 1991. The Board heard eleven witnesses. The Inquiry's proceedings fill 23 volumes totalling 3981 pages.

The Evidence

According to the Board, Malcolm Ross was employed by School District 15 "as a teacher at Birchmount School from September 1, 1971 to June 1976 and at Magnetic Hill School from September 30, 1976 to the present [August 1991]." (Attis, p.14) As early as 1978 the School Board was aware that Ross' publications were "causing public comment...[and] controversy". (p.16) On three occasions in 1978, April 26, May 9, and May 17, Mr. Julius Israeli had contacted the School Board regarding his concerns about Malcolm Ross' continued employment. In fact, he wanted the School Board to dismiss Ross. A May 17, 1978 article in The North Shore Leader about an ATU commentary by Reverend Gary McCauley noted that McCauley was calling for Ross' dismissal and was rejecting the 'right to free speech' argument that had already surfaced. In addition to these letters and article, Mr. Noel Kinsella, Chairman of the Human Rights Commission, "expressed concern over the writings of Malcolm Ross" (p.16) and wanted his classroom performance to be supervised. In addition, Kinsella "referred to the importance of protecting free speech versus suppressing the work of Malcolm Ross". (p.16) In this same article, Chairperson of the School Board, Nancy Humphrey, stated that the School Board accepted that Malcolm Ross could do what he wanted on his own time. In

the same year, The Moncton Transcript ran two articles dealing with Ross and the free speech issue while The Moncton Times published letters by Ross and Israeli "in which each accused the other of distorting "the facts." (p.16)

The controversy seemed to die down until a 1983 letter by Ross caused the Human Rights Commission to contact the Superintendent of School District 15 to ensure that Ross was still being monitored. By 1986, the Ross issue was again creating a public debate. Carl Ross, the Chairman of the School Board, stated that the School Board was receiving between ten to twenty letters a week on the Malcolm Ross issue. According to Professor Brian Bruce, an October 22, 1986 letter by Ross to The Miramichi Leader "is very relevant because it provides a clear summary of Malcolm Ross' opinions and dispels any uncertainties as to the interpretation to be placed on his earlier writings." (p.17)

This letter also caused the School Board, after a series of meetings, to monitor Ross' classroom at least three times a week as well as to review his classroom materials. Also in 1986, in a letter to Mr. Julius Israeli, New Brunswick Attorney-General David Clark refused to charge Ross under the hate law, section 319 (2), of the Criminal Code of Canada. As a result of the increasing controversy over Ross, the School Board, on January 28, 1987, established a Review Committee to "review the possible impact of this issue upon the learning environment in school programs... [and expressed concern for] the positive human relations that are essential to the well being of a community..." (p.18)

For the School Board's purposes, "community" meant the Magnetic Hill school community. The Review Committee's mandate also included determining how Ross' personal views might be affecting his teaching as well as the "positive human relations" about which the School Board was concerned. Essentially, the committee found

1. That there appears to be no evidence to suggest that

Malcolm Ross is teaching his beliefs or discussing his religious theories with staff or students.

- 2. That there is not (sic) evidence to suggest that the publicity surrounding Malcolm Ross has had a negative effect on the human relations within the present school or between the school and the community. (p.19)**

However, according to Professor Bruce,

The Committee's report does not make mention of a letter addressed to the Superintendent of School District 15 dated February 3, 1987 from Charles Devona alleging that Malcolm Ross had expressed racist comments in class while at Birchmount School. Nor does the report in its conclusions address the issues raised in the substantial and well written submission to the Committee from the Atlantic Jewish Council concerning Malcolm Ross' views and their possible discriminatory effect. Finally, although the report lists allegations by two former teachers who had worked with Malcolm Ross that he had made comments of a racist nature while at Birchmount School, they are not referred to in its findings. (p.19)

In a similar vein, Professor Ernest Hodgson, an expert witness in education, criticized the Review Committee's findings.

Ernest Hodgson claimed that the composition of the Committee was flawed in that the Committee should have had a majority of independent members. Ernest Hodgson testified that the Committee had flawed the process by rejecting expert advice as to the conducting of interviews, by conducting fifty-nine interviews in four days, by reading out two rather detailed questions and asking for a response, and by improperly selecting the interview sample...Finally, he believed that the Committee had misinterpreted its mandate by only addressing the impact of Malcolm Ross' activities on the learning programs at Magnetic Hill School rather than the entire school

district. (p.20)

The first direct meeting between Malcolm Ross and the School Board took place on September 17, 1987. It was an effort, according to Carl Ross, to come to a clearer understanding of their respective positions." (p.21) According to Cheryl Reid (acting Superintendent at the time), in a letter dated April 26, 1988, Ross was "...cautioned strongly against any further publications regarding [his] views..." (p.21) at this first meeting. Ross, on the other hand, claimed that the School Board had, at this first meeting, given its "tacit approval" (p.21) for the publication of his book Spectre of Power.

Even though the Malcolm Ross case had evolved into a well documented controversy since 1978,

...two motions proposed [1987] by Audrey Lampert concerning the Ross issue *failed due to a lack of a seconder*. These motions dealt with the release of the Review Committee report and with the School Board making a public statement rejecting all forms of racism and hatemongering. [my emphasis] (p.21)

Nevertheless, by March 1988, the School Board had decided that Malcolm Ross

had inhibited its ability to manage and direct the educational process and had detrimentally affected its reputation. It also noted a negative impact on Malcolm Ross' reputation and his perceived inability to foster an atmosphere of tolerance as a public school teacher. (p.21)

The School Board warned Ross that any further publications or public discussions of his views or writings could lead to more disciplinary action and possible dismissal. Conversely, the School Board said it would view Ross' compliance as meaning the matter was closed. Ross grieved this decision without success. The School Board's warning and reprimand were kept in Ross'

personal file from March 16, 1988 until it was ordered removed in September 20, 1989. In the interim between 1988 and the Board of Inquiry's first hearings on December 8, 1990, the Malcolm Ross issue continued to command the public spotlight:

- 1. Premier Frank McKenna and Education Minister Shirley Dysart expressed their dissatisfaction with Malcolm Ross.**
- 2. Charles Simon Puxley filed a complaint with the Human Rights Commission because he believed Ross had been treated unjustly.**
- 3. Attorney-General James Lockyer said no new charges would be laid against Malcolm Ross under the hate-literature laws.**

As well, at that time the Department of Education developed both a Holocaust curriculum and a report on various programs dealing with multiculturalism.

On March 22 , 1989, the School Board adopted Policy 5006 establishing guidelines for teachers regarding individual rights and freedoms. (p.23) [and] the Minister of Education released a Ministerial statement on multicultural/Human Rights Education which was intended to set the direction for policy development by school boards to ensure that multicultural and human rights education formed "...an integral part of [the] school system." (p.25)

A September 22, 1989 letter from the School Board to Malcolm Ross asked him to comply with the provisions of Policy 5006 and reminded him of the effects his past actions had had on the running of Magnetic Hill School and the concerns these actions had on some of the parents involved with the school.

On November 21, 1989, Ross appeared on a local television program. His comments during this appearance caused the School Board, in a letter dated December 1, 1989, to reprimand

Malcolm Ross for “...publicly assailing another religious belief [Judaism] when proclaiming your own faith [in a manner which] borders on freedom and license to judge and condemn...” (p.24)
On the same day,

the School Board requested the Department of Education to provide input as to whether Malcolm Ross’ appearance constituted a breach of the Ministerial Statement of 1989. Earl Wood, Deputy Minister of Education, responded that the Ministerial Statement was not meant as a ground for disciplinary action against an individual teacher. Rather, it was meant to provide a guideline to school boards so that they might develop their own policies. Further, the letter stated that day-to-day responsibility for disciplinary action lay with the School Board. (p.24)

In 1988, Kathleen Makela filed two complaints against the Board of School Trustees, District 15, “alleging discrimination, as per Section 5 of the *Human Rights Act*”. (p.22) Although these were later withdrawn and dismissed, the third complaint, by David Attis, became the subject of the Board of Inquiry established under the *Human Rights Act* of New Brunswick. Initially, the New Brunswick Human Rights Commission requested certain records pertaining to Malcolm Ross, his students, and a copy of the Review Committee Report. However, because the School Board refused to comply with these requests, the Board of Inquiry was established on September 1, 1988. As a result of the various court challenges to the jurisdiction of this Board of Inquiry, the first hearings could not begin until December 8, 1990.

The Alleged Effects

Although other students’ testimony (p.27) generally supported that of Yona Attis and Leigh Lampert, Professor Bruce has based his understanding of the effects that Malcolm Ross has had on his students primarily on the testimony of Yona Attis, Leigh Lampert, and Ernest Hodgson. The testimony of David Attis “regarding incidents against Jewish students is for the most

**part hearsay and therefore cannot be given the same weight.”
(p.25)**

Yona Attis testified that in the Spring of 1988, prior to watching a gymnastics competition at Magnetic Hill School, she was warned by her friends not to attend because “that was ‘...where the teacher who hates Jews works’.” (p.25) She was told the teacher’s name was Malcolm Ross. While there, she was fearful for her safety and affirmed that she would continue to be so because Malcolm Ross worked there.

Although she remembered feeling different as early as grade 2 when a supply teacher at Edith Cavell School asked “the students of her class to raise their hands if they loved Jesus.”, (p.26) it was not until grade 5 that

a number of incidents began to occur. These ranged from name calling based on her religion, to the wearing of swastikas by some students, to the drawing of swastikas on her books and school bag. While in the earlier years, these events were caused by a small number of students in the school, in later years, such as when Yona Attis was transferred back to Edith Cavell School, as many as twenty students, at one time or another, participated. Another aspect of this taunting was the shouting and signalling of the “Heil, Hitler” salute in her presence. (p.26)

Two other incidents occurred that “made her feel different” (p.26) from the majority of students. These had to do with visiting entertainers at her school, a keyboard player and basketball players, who professed their belief in Christianity. She felt uncomfortable but did not want to walk out for fear of standing out. According to her, neither the teachers nor the principal seemed sensitive to her situation. (p.26) In general, Leigh Lampert’s testimony was similar to Yona Attis’. Furthermore,

Yona Attis testified that her image of Malcolm Ross was created both by the media and perhaps by her father.

Leigh Lampert also testified that his image of Malcolm Ross was largely determined by what he had heard from various media and from discussions at home. He further testified that he had read portions of Spectre of Power and had determined, for himself, that the book was anti-Semitic. (p.27)

Regarding David Attis, Professor Bruce had no doubts that he “sincerely believes that the writings and publications of Malcolm Ross are anti-Jewish, racist, bigoted and discriminatory.”³²(18.5,p.27) As well, he believed, according to Bruce, that the School Board, by failing to act on previous complaints against Malcolm Ross and by failing to condemn his views in general had, “in effect, created a discriminatory environment within which Jewish students can not be treated equally.” (p.28)

Ernest Hodgson believed that Ross’ views were bound to have had a negative impact on his students, on other students generally, and on Jewish students particularly. In effect, according to Bruce, Hodgson also held that “*teachers can have a great impact upon the students they teach*”[my emphasis] (p.28) and that

it was possible that there would be a reluctance on the part of Jewish parents to participate within the school system and that Malcolm Ross’ views could also discourage other Jewish parents from moving to the Moncton area. (p.28)

In summary, then, and, according to Professor Bruce (hereafter referred to as the Board),

The thrust of [David Attis’] complaint is that the School Board, by failing to take appropriate action against Malcolm Ross, a teacher working for the School Board who allegedly made racist, discriminatory and bigoted statements both to his students and in published statements and writings, has condoned an anti-Jewish role

model and thus breached Section 5 of the *Act* by discriminating against Jewish and other minority students within the educational system served by the School Board. (p.4)

The Decision

1. General principles of interpretation applicable to human rights legislation.

According to the Board:

The general objective of the [New Brunswick Human Rights] *Act* is a fundamental one - that of fostering respect and equal treatment for all persons without regard to the individual's race, colour, religion, national origin, ancestry, place of origin, age, physical disability, mental disability, marital status or sex. (p.31)

Furthermore, "human rights legislation has identified specific areas in which discriminatory conduct is prohibited": (p.31) hiring and employment; rental and sale of housing and property; discrimination based on public facilities with respect to accommodation, services, or facilities; discrimination with respect to notices, signs, symbols, and emblems; and discriminatory practices, wrongly designed, that exclude individuals from professional, business, or trade associations. Importantly, the Board made it clear (citing Mr. Justice McIntyre in the Simpson-Sears case at page 547) that

The courts have also now clearly established that it is the effect on the complainant and not the intent of the party accused of discriminating which is relevant in determining whether the human rights legislation has been breached. [my emphasis] (p.31)

The Board, by way of establishing a rationale for this position,

relies again on Mr. Justice McIntyre in the Simpson-Sears case:

To take the narrower view and hold that intent is a required element of discrimination under the Code would seem to me to place a virtually insuperable barrier in the way of a complainant seeking a remedy. It would be extremely difficult in most circumstances to prove motive, and motive would be easy to cloak in the formation of rules which, though imposing equal standards, could create, as in Griggs v. Duke Power Co., 401 U.S. 424 (1971), injustice and discrimination by the equal treatment of those who are unequal (Dennis v. United States, 339 U.S. 162 (1950), at p. 184). Furthermore, as I have endeavoured to show, we are dealing here with consequences of conduct rather than with punishment for misbehaviour. In other words, we are considering what are essentially civil remedies. The proof of intent, a necessary requirement to our approach to criminal and punitive legislation, should not be a governing factor in construing human rights legislation aimed at the elimination of discrimination. [my emphasis] (p.32)

The Issue

According to the Board, the “issue to be determined...is whether the School Board has discriminated against the Complainant and his children contrary to paragraph (b) of Subsection 5 (1) of the *Act*...”⁴¹ (18.5,p.32) However, before dealing with the merits of the complaint, the Board felt it necessary to answer the following questions dealing with the applicability of Section 5 of the New Brunswick Human Rights Act.

I. Is the Board of Inquiry the proper forum?

The School Board had argued that

1. The Malcolm Ross case was essentially a labour relations case and as such it should be dealt with through the

teachers' Collective Agreement and the Public Service Labour Relations Act, R.S.N.B. 1973, c. p.-25.

- 2. That "labour relations would become a nightmare" (p.33) if disputes that could be handled by these two instruments could also be handled by a board of inquiry.**

The Board responded as follows:

- 1. The requirements and objectives of the human rights legislation are not necessarily the priority of the School Board; thus, in a case such as Ross', "it is clear that the primary jurisdiction to address complaints alleging breaches of the human rights legislation is that of a board of inquiry." (p.33)**
- 2. Article 12 of the Collective Agreement recognizes the supremacy of human rights legislation over the Agreement; and c) the Supreme Court as well as other lower court decisions support this. (p.33)**

The New Brunswick Teacher's Federation was concerned that the Ross case being adjudicated by the Board could create a precedent that would "create a watershed of complaints and be very disruptive of the traditional manner of handling such issues..." (p.34) The Board dismissed this concern by reaffirming the Board's primary jurisdiction which was to deal with alleged violations of the *Act*.

II. Is public education in the public schools a service?

The question of whether or not the public school system of New Brunswick falls within the scope of Subsection 5 (1) of the Human Rights Act because it is an "accommodation, [part of some] services or facilities available to the public" is important. The Board relied on the New Brunswick Court of Appeal which argued that a liberal interpretation of Subsection 5 (1)

would...undoubtedly bring public education within its purview. To hold otherwise would seem...to frustrate the legislative intent of the *Human Rights Act* and its preamble and amount to a rejection of the broad purposive approach to the interpretation of anti-discrimination legislation adopted by the Supreme Court of Canada. (p.34)

III. For the purposes of Section 5, is the School Board a person?

Based on the Board's understanding of the *Interpretation Act*, R.S.N.B. 1973, c. 1-13, s. 38, a school board would be considered a person for the purposes of the *Human Rights Act*. This would be consistent with the spirit of the *Act*. Furthermore, Subsection 3(1) of the *Act* uses the phrase "or other person" as an appositive referring to "employer, employers' organization". (p.36) Finally, in another case involving the Newfoundland *Human Rights Code*, the same interpretation with respect to 'person' is supported in the case of Memorial University of Newfoundland v. Rose et al. (1990). (p.36)

IV. Is the complainant a person for the purposes of Section 5?

Subsection 17 of the *Act* states

Any person claiming to be aggrieved because of an alleged violation of this Act may make a complaint in writing to the Commission in a form prescribed by the Commission.
(N.B.Human Rights Act, sub.17, p.15)

The New Brunswick Court of Appeal recognized that David Attis' complaint was consistent with his parental responsibilities in that he was attempting to protect them from discrimination. Further, as he and his children are Jews, and, as such, are the subjects of the discrimination, the Court and the Board accepted the complainant as a person for the purposes of Subsection 5.

U. Does Section 6 restrict the scope of Section 5?

According to Subsection 6(2) of the *Act*

Nothing in this section interferes with, restricts, or prohibits the free expression of opinions upon any subject by speech or in writing.

Question U is crucial to our understanding of the Ross case. Indeed, it is crucial to our understanding of the balance which must be struck amongst competing constitutional claims. Initially, it was argued that Subsection 6(2)

prevents the application of Section 5 to situations in which teachers are exercising their right to freely express their opinions as was Malcolm Ross through his published writings and public statements. (Attis, p.37)

The Board rejected this argument for the following reasons:

- 1. It noted that Subsection 6(2), “nothing in this section”, means that this caveat applies to this section only and not to the *Act* in general.**
- 2. Decisions in other jurisdictions in which there are similar provisions to Subsection 6(2) support the conclusion that the caveat concerning the restriction is limited to the scope of the subsection.**
- 3. To apply Subsection 6(2) to other provisions of the *Act* would substantially restrict and limit the applicability of these sections contrary to the broad purposive approach to interpretation which the courts have adopted. [my emphasis] (p.38)**

In other words, if Subsection 6(2) applied throughout the *Act*, the *Act*, insofar as it was intended to prevent unjust discrimination, would be useless. In such a situation, free expression would be

the blunt instrument used to justify any particularly aggressive hatred and free expression would become merely an ideology that would not recognize its potential victims nor their rights under the *Act*.

VI. Does Section 3 restrict the scope of Section 5?

Subsection 3(1) of the *Act* states

No employer, employees' organization or other person acting on behalf of an employer shall

(a) refuse to employ or continue to employ any person, or

(b) discriminate against any person in respect of employment or any term or condition or employment,

because of race, colour, religion, national origin, ancestry, place of origin, age, physical disability, mental disability, marital status, sexual orientation, or sex. (N.B.Hum.Rights Act, p.5)

Here the Board is addressing an argument raised by counsel that Malcolm Ross' pronouncements and publications are, in essence, expressions of his religious beliefs. Initially, the Board dismissed this argument *prima facie* on the grounds

that there was no evidence presented by Malcolm Ross that his religion requires him to write in the manner that has written...[and even though] His writings suggest that he is writing out of some religious conviction...there was no direct evidence of this and no argument made as to his beliefs meeting the tenets of any particular religion. (Attis, p.38)

However, the Board felt the need to demonstrate clearly the

relationship between Sections 3 and 5 of the *Act*. Because both sections protect against discrimination on the basis of religion, the potential exists for the legitimate religious belief of one individual to threaten another's protection against religious discrimination. It would then be necessary to strike a reasonable balance between the two rights. To do so, according to the Board, requires us to understand the reasonable limits that generally apply to all freedoms. The Board, in quoting Rinfret J. dissenting in Boucher v. The King, noted particularly that

...freedom as licence is a dangerous fallacy....there must be a point where restriction on individual freedom of expression is justified and required on the grounds of reason, or on the ground of the democratic process and the necessities of the present situation. It should not be understood...that persons subject to Canadian jurisdiction 'can insist on their alleged unrestricted right to say what they please and when they please, utterly irrespective of the evil results which are often inevitable. (p.39)

The Board recognized that the issue of freedom of religion is analogous to the general restraints on freedom of expression outlined in Rinfret's 1951 dissent. Further, the Board avowed that when "religious beliefs take the form of an attack and condemnation of those following another religion, this passes well beyond a legitimate freedom of religion and the protection otherwise provided by the *Act*." (p.39) Citing Dickson J., in Taylor et al. v. Canadian Human Rights Commission et al. (1991) as well as the board of inquiry in the Suzanne Dufour et al. decision (1989), (p.39-40) the Board argued that in both international and Canadian jurisdictions the law has recognized a limit to the free expression of religious beliefs and values when the free expression of these values denigrates, victimizes, or becomes coercive. The Board concludes that the paradox of the conflicting sections can only be solved, at least in the Malcolm Ross case, by considering "the circumstances of the particular case in order to reach a reasonable balance between competing rights." (p.40)

VII. Is an employer liable for the actions of its employees for the purposes of Section 5?

The Board acknowledged that the complaint lodged under the *Act* is two-pronged. First, the complaint alleged that Malcolm Ross, because of his statements and publications, had poisoned the educational environment for both David Attis and his children. Second, because the School Board has failed to properly discipline Ross and because it had failed to properly address discriminatory incidents between students, it had condoned Ross' views and, consequently, it had further poisoned the educational environment. David Attis' complaint names the School Board as the respondent. Question VII arises out of the principle of vicarious liability in tort law in which a third party may be held legally responsible for the actions of another; for example, an employer may be held responsible for the harassment of one of his employees by another, especially if it can be proved that the employer, who was aware of this harassment, did nothing to prevent it. Counsel argued that the principle of vicarious liability is not applicable within the context of Section 5 of the *Act*.

In response, the Board argued that this issue seems to have been resolved by Mr. Justice LaForest in the Supreme Court of Canada decision in Brennan v. Canada and Robichaud (1987), 75 N.R. 303. According to the Board

Mr. Justice LaForest found that the intention of the federal human rights legislation was to make employers statutorily liable for the discriminatory acts of their employees and was not dependent upon theories of employer liability developed in the context of criminal or quasi-criminal conduct or upon vicarious liability as developed under the law of tort. (p.41)

Quoting from that decision, the Board emphasized the following:

“Hence, I would conclude that the statute [Canadian Human Rights Act] contemplates the imposition of liability on

employers for all acts of their employees ‘in the course of employment’, interpreted in the purposive fashion outlined earlier as being in some way related or associated with the employment. It is unnecessary to attach any label to this type of liability; it is purely statutory. However, it serves a purpose somewhat similar to that of vicarious liability in tort, by placing responsibility for an organization on those who control it and are in a position to take effective remedial action to remove undesirable conditions. [the Board’s emphasis] (p.42)

The Board also noted that Mr. Justice LeDain agreed with Mr. Justice LaForest. It therefore concluded that there was no reason why the legal understanding of the employer–employee relationship under the Canadian Human Rights Act would be any different under the New Brunswick Human Rights Act. Finally, the Board also noted that if the School Board were found to be liable under Section 5 of the Act, “any remedial action may have a detrimental effect on Malcolm Ross.” (p.43)

VIII. Was there “discrimination” for the purposes of Section 5?

For its definition of ‘discrimination’ the Board relied on Mr. Justice Dancise in Saskatchewan Human Rights Commission and Canadian Odeon Theatres Ltd. (1985), 18 D.L.R. (4th) 93, at page 115:

Discrimination in a human rights context is exclusion, restriction or preference of treatment based on one of a number of protected characteristics the result of which is the prevention or impairment of the exercise of human rights and freedoms guaranteed in the code. (p.43)

The Board defined the education of students in the broad context which includes not only the curriculum but also “the more informal aspects of education that come through interchange and participation in the whole school environment.” (p.43–44) This, argued the Board, is consistent with the intent

(the purposive approach) of the Act. The Board then noted that Section 5 of the Act requires that the educational services supplied by the School Board be “available to all students without discrimination based on religion and ancestry amongst other grounds.” (p.44)

Next, the Board averred the necessity for the complainant “to show a prima facie effect that would be a logical result of a discriminatory action.” (p.44) This effect, said the Board, can be demonstrated in the following way:

- 1. through an assessment of the credibility of the complainant’s evidence.**
- 2. the determination of whether this effect is a “reasonable reaction” (p.44) given the circumstances. For the purposes of the Board, “reasonable reaction” meant the reaction of a reasonable adult, or, of a reasonable child of that age.**
- 3. if these two conditions have been met, “one must then look to the party who has allegedly discriminated to provide evidence or argument as to any reason or cause for the actions, that have been called into question not being found in breach of the Act.**

With regard to 1. and 2. above, the Board accepted the effects (p.25-29) of the discrimination on the complainant and found both Yona Attis and Leigh Lampert “to be very credible” (p.46) witnesses. However, before the Board could render its decision, it had to determine “whether the alleged discriminatory actions could reasonably have caused these effects and, if so, whether there is reasonable cause to excuse the otherwise discriminatory actions.” (p.46) In other words, the Board had to understand Malcolm Ross’ actions and the School Board’s, insofar as they constituted discrimination prohibited under Section 5 of the *Act*, within the context of his profession - a teacher, and

within the context of the School Board's responsibility to provide an educational environment as free of discrimination as was reasonably possible. To do this, the Board considered these actions within the following categories:

- 1. Malcolm Ross' actions on school property;**
- 2. Malcolm Ross' actions while off school property;**
- 3. The School Board's actions.**

1. Malcolm Ross' actions on school property.

Although reference was made to several incidents in which Malcolm Ross was purported to have made discriminatory statements while in the classroom or while on school property, the Board did not attach weight to them because they constituted hearsay evidence about events that happened at least twelve years prior to the Board of Inquiry's mandate. No evidence of any discriminatory comments made by Ross in the interim was presented. This was also supported by the Review Committee Report of 1987 and the Board was willing to accept its findings regardless of its flawed procedures. The Board concluded that there was "no evidence of any direct classroom activity by Malcolm Ross on which to base a complaint under Section 5 of the Act. (p.47)

2. Malcolm Ross' actions while off-duty.

Because the majority of evidence presented dealt with Malcolm Ross' alleged discriminatory actions while he was off-duty, it was necessary for the Board to deal with the notion of the teacher as a role model. The Board accepted "the fact that teachers are role models for students whether a student is in a particular teacher's class or not." (p.47) The Board argued that aside from the teacher's responsibility to teach the curriculum,

teachers play a broader role in influencing children through

their general demeanour in the classroom and through their off-duty lifestyle...[thus] a teacher's off-duty conduct can fall within the scope of the employment relationship. (p.47)

Although there is a natural reluctance for most employers to involve themselves in the private lives of their employees, the right to discipline employees, when it is alleged that their off-duty conduct can have a negative influence on the employer's operations, is, according to the Board, established in law.

For example, in Peterson v. British Columbia School District No. 65 - Cowichan, [1988], Madam Justice McLachlin, in discussing the effect of teacher misconduct on students, stated:

The danger of students being influenced by inappropriate role models is another type of harm. Loss of respect with a consequent diminution (sic) of teaching effectiveness may cause harm to the school community. Yet another type of harm which may be perpetrated by retention of a teacher found guilty of misconduct, is a public loss of confidence in the educational system. (p.48)

In Etobicoke Board of Education v. Ontario Secondary School Teachers' Federation (1982) it was argued that teachers had to be seen "not only to teach students, but to practice, within reasonable limits that which they teach." (p.48) This onus on teachers, it was argued, stems from the "special relationship created by his employment." (p.48) Similarly, in Abbotsford School District 34 Board of School Trustees v. Shewan and Shewan (1986), Mr. Justice Bouck argued that a teacher

... is an important member of the community who leads by example. He or she not only owes a duty of good behaviour to the school board as the employer but also to the local community at large and to the teaching profession. An appropriate standard of moral conduct or behaviour must be maintained both inside and outside the classroom. (p.49)

The Board was sensitive to the argument that such a view could lead to a 'witch-hunt' mentality in assessing teachers' statements and attitudes - particularly on controversial issues. In response, the Board noted that only discriminatory statements that were public and that "may adversely impact on the school community" (p.49) may constitute misconduct. Furthermore, it averred that private communications by a teacher outside a teacher's professional setting were not caught by the concept of the teacher as a role model. It further noted that Chief Justice Dickson, in his decision in John Ross Taylor et al. v. Canadian Human Rights Commission et al., supported this notion:

I am open to the view that justifications for abrogating the freedom of expression are less easily envisioned where expressive activity is not intended to be public, in large part because the harms which might arise from the dissemination of meaning are usually minimized when communication takes place in private, but perhaps also because the freedoms of conscience, thought and belief are particularly engaged in a private setting. (p.51)

Further, and in the same sense, the Board noted that

The *Act* [New Brunswick Human Rights Act] does not prohibit a person from thinking or holding prejudicial views. The *Act*, however, may affect the right of that person to be a teacher when those views are publicly expressed in a manner that impacts on the school community or if those views influence the treatment of students in the classroom by the teacher. (p.50)

Having made the point that the public communication of discriminatory ideas may be a basis for misconduct, especially in the case of a teacher in the public school system, the Board's next task was to assess Malcolm Ross' public statements and his publications for evidence of what David Attis called a violation of Section 5 of the *Act* which prohibits, among other things, discrimination based on religion and ancestry. To this end, the

Board considered the following:

1. Malcolm Ross' publications:

- a) Web of Deceit
- b) The Real Holocaust
- c) Spectre of Power
- d) Christianity vs. Judeo-Christianity

2. a letter to the editor of The Miramichi Leader, October 22, 1986

3. a television interview given in 1989.

The Board also acknowledged that the extensive media coverage of Ross' writings and statements was generally accurate insofar as they reported his views.

The Board concluded, without hesitation that Malcolm Ross' published writings and statements "are *prima facie* discriminatory against persons of the Jewish faith and ancestry...[and] are innumerable and permeate his writings." (p.52) It noted that one of Ross' techniques was to quote "other authors who have made derogatory comments about Jews and Judaism." (p.53) The Board was mindful that its task was not to decide whether or not Ross' writings and comments were caught by the hate literature provision (section 319) of the *Criminal Code*. The focus of the Board, it reiterated, was to determine "whether these attacks by a school teacher have led to discrimination in the provision of services by the School Board." (p.53) The Board was also careful to note that

The writings and comments of Malcolm Ross cannot be categorized as falling into the scope of scholarly discussion which might remove them from the scope of section 5. The materials are not expressed in a fashion that objectively summarizes findings and conclusions or propositions. While the writings may have involved some substantial research, Malcolm Ross' primary purpose is

clearly to attack the truthfulness, integrity, dignity and motives of Jewish persons rather than the presentation of scholarly research. As an example, much reference was made in evidence to the comments in Malcolm Ross' books regarding the numbers killed in the Jewish Holocaust. The facts as to the actual numbers killed was[sic] not questioned in a scholarly fashion but rather portrayed in a fashion so as to buttress Malcolm Ross' position that there is a Jewish conspiracy to take over the world. (p.54)

Finally, the Board concluded that Ross' public statements and writings

...have continually over many years contributed to the creation of a poisoned environment within School District 15 which has greatly interfered with the educational services provided to the Complainant and his children [and]...it is the conclusion of this Board of Inquiry, on the balance of probabilities, that the actions of Malcolm Ross have violated Subsection 5(1) of the *Act* and there is no reasonable cause to excuse the discriminatory effect of these actions. (p.54,55)

3. The School Board's actions.

Having found that Ross' public statements and writings "over many years" have led to discriminatory actions that have violated Subsection 5(1) of the *Act*, and, having found that the *Act* imposes upon the School Board a "liability for any breaches of Section 5 by its teachers." (,p.55) it follows that "the School Board is in breach of Section 5." (p.55) At this point, the Board felt it necessary to address David Attis' allegations that

1. The School Board discriminated against him and his children directly for not taking appropriate disciplinary action against Malcolm Ross.
2. As a result of this inaction, David Attis argued that the

School Board must be seen as having condoned Malcolm Ross' actions.

- 3. The School Board "failed to properly control discriminatory actions by students against the complainant's daughter and other Jewish children." (p.55)**

In order to address these allegations, the Board categorized the School Board's actions as follows: a) disciplining of Malcolm Ross; b) Review Committee Report; c) failure to pass two motions; d) i. control of discriminatory incidents in the school environment; and ii. reaction to the Human Rights Commission.

- a) Regarding his disciplining, the Board noted that**

The most striking impression from a review of the School Board's handling of the Malcolm Ross issue is the reluctance of the School Board to become involved and the slowness of its response. (p.56)

The Board also noted that the School Board, in its evidence, posited the following reasons for its apparently slow response:

- i) letters and comments from both the provincial government and the Human Rights commission stressing Ross' right to free expression.**
- ii) numerous reviews and delays by various Attorneys-General in deciding whether or not to prosecute Ross under the hate literature provision (319) of the Criminal Code.**
- iii) the absence of any evidence that Ross was expressing his views in the classroom.**
- iv) next, and without a hint of the slightest irony, the School Board asserted (according to the Board)**

that Malcolm Ross was viewed as a very competent and capable teacher. (p.56)

- v) finally, the School Board argued that David Attis had not directed his concerns directly to the School Board and, as a result, it had been unable to deal with them.**

With respect to a and b above, the Board agreed that the School Board had received “conflicting signals” from the the provincial government and the Human Rights Commission. Furthermore, it noted that only in March 1988 did the School Board receive advice from its counsel, Clyde Spinney, indicating that legal precedent allowed the School Board to control the off-duty conduct of its employees when this conduct adversely affected the employer. However, the Board noted that this precedent had been established as early as 1982 in Fraser v. Public Service Staff Relations Board in the Federal Court of Appeal and upheld by the Supreme Court of Canada in 1986. According to the Board,

The court held that, although direct evidence of performance was usually necessary, impairment could be inferred where the civil servant’s occupation was both important and sensitive and the substance, form and context of the criticism was extreme. [my emphasis] (p.57)

The Board concluded that Ross’ discriminatory actions constituted an impairment of his fitness to teach children. It also concluded that his “criticism of the Jewish religion was extreme.” (p.57)

Although the Board found that the School Board’s inaction was not maliciously conceived, as it were, in spite of its knowing that legally it could have acted more judiciously, the Board found that from the complainant’s point of view, this was indeed the impression. Such an impression, from David Attis’ perspective, was certainly not allayed when the School Board

described Malcolm Ross' writings as "controversial" rather than discriminatory. Here, again, the Board noted that a more competent legal approach would have cast a wider net and thus might have avoided creating the impression that the School Board was "unsympathetic" (p.58) to David Attis' concerns:

it was not necessary for the School Board to refer to Malcolm Ross' writings as discriminatory. An employer, in imposing disciplinary action, will normally characterize the reasons for disciplinary action as widely as possible so as to avoid any relevant actions being excluded as a basis for the disciplinary action. (p.58)

Malcolm Ross' television interview (December 1989), about two months after the School Board removed his letter of reprimand (September 1989), is another example cited by the Board of the School Board's insensitivity to the public's perception that indeed the School Board might seem to be supportive of, if not somewhat complicitous in, Ross' discriminatory actions. Ross, it seems, had desisted from such acts in the interim between the letter of reprimand being placed in his file (March 1988) and its removal. Here, the Board noted that Malcolm Ross was sent a copy of the School Board's newly developed policy (5006) which "was intended to ensure that students were provided with a positive and safe learning environment which taught respect for individuals' rights and freedoms."*(p.23) The Board noted further the fact that Ross would again begin his antisemitic polemics in such a public forum as television only two months after the letter of reprimand had been removed from his file would seem to indicate to the complainant that the School Board had abandoned its attempts to stop Ross' discriminatory actions. In fairness, the Board also noted that the School Board had sent "a rather strongly worded

*In August 1992, School District 2 (an amalgamation of Districts 14 & 15) adopted Policy 5003: "The District 2 Board of School Trustees shall, along with its entire staff, provide an acceptable learning environment that teaches respect for individual rights and tolerance for individual differences." The intent was: "To provide District 2 students with a positive learning and safe school environment that teaches an understanding of and respect for individual rights, as well as tolerance for individual freedoms enumerated in the Canadian Charter of Rights and Freedoms."

letter to Malcolm Ross, together with a copy of Policy 5006, making it very clear as to what the intent of this policy was...” (p.59) when the letter had been removed. Given all this, the Board concluded that the publicity surrounding the Malcolm Ross case for almost a decade meant that the School Board

...was very much aware of the situation in the community. In such situations it is not sufficient for a school board to take a passive role. A school board has a duty to maintain a positive school environment for all persons served by it and it must be ever vigilant of anything that might interfere with this duty. (p.60)

b) Regarding the Review Committee Report, the Board recognized that, in some ways, the Committee was hamstrung by financial considerations and thus was not “perfect”; however, it also recognized that the Committee’s report was never meant to be more than an internal examination of the Ross issue. As well, the Board did not fault the School Board for the structure of the Committee. The Board, however, did agree with Ernest Hodgson when he said the Review Committee’s report did not address the questions it should have addressed. (p.60) Specifically, the Board faulted the Committee for seeming to limit its inquiry to whether or not Malcolm Ross had “ever stated his views in class or whether students could recall talking about his views with other students outside of the classroom.” (p.60) The Board noted that the Committee “did not actively encourage the wider community” (p.61) served by District 15 to participate. Particularly, the Board noted that the Committee “did not appear at all to address the very well prepared brief submitted by the Atlantic Jewish Council.” (p.61) which would lead David Attis to conclude that the School Board was neither sincere nor interested in dealing with his concerns and those of a minority of the school community. The Board concluded that the Review Committee very much “gave the impression, as a committee, of being an ostrich with its head in the sand.” (p.61)

c) Regarding the School Board’s failure to pass two motions with respect to the Ross issue, the Board found the evidence

**“insufficient to warrant finding the actions discriminatory.”
(p.61)**

d) i. Regarding the School Board’s failure to control discriminatory incidents in the school environment, the Board found that few students were involved in such incidents. It also concluded that there was no evidence of Ross’ antisemitism directly influencing any of the students who made anti-Jewish remarks to either Yona Attis or to Leigh Lampert. However, “given the high degree of publicity surrounding the Ross publications it would be reasonable to anticipate that his writings were a factor influencing some discriminatory conduct by the students.” (p.61-62) The Board concluded that the School Board’s response, as evinced by both teachers and principals, was somewhat impressionistic:

...a more appropriate response would have been to establish an active program of identification of such problems and provision of assistance to the teacher most closely involved in trying to resolve the problem. (p.62)

Furthermore,

The *Act*, however, has given clear direction that within the school community there is an obligation to work towards the creation of an environment in which students of all backgrounds will feel welcomed and equal. (p.62)

d) ii. Regarding the School Board’s reaction to the Human Rights Commission, the Board concluded that in its resisting the release of the Review Committee Report, and, in its general defensiveness towards the Human Rights Commission, (p.63) “the School Board appeared to be actively resisting the investigation...[and seemed unprepared] to aggressively seek out and resolve the problems. (p.63)

According to the Board, while there was no intent to discriminate against David Attis, “the discriminatory effect” was inexcusable, particularly if seen from the viewpoint of a

reasonable person, and, especially if seen in the light of the School Board's "failure to address the Malcolm Ross issue in any meaningful way prior to 1988." (p.63) Finally, the Board concluded "on the balance of probabilities that the School Board has discriminated against the Complainant contrary to Subsection 5(1) of the *Act* and there is no reasonable cause to excuse the discriminatory effect." (p.63)

IX. The Remedy and the Order

Prior to outlining a remedy necessitated by the School Board's violation of Subsection 5(1) of the *Act*, the Board was careful to base such a remedy on Mr. Justice McIntyre's understanding of the objective of human rights legislation in the Simpson-Sears case:

The Code aims at the removal of discrimination. This is to state the obvious. Its main approach, however, is not to punish the discriminator, but rather to provide relief for the victims of discrimination. [my emphasis] (p.64)

The Board's remedy addressed two goals:

1. to "identify measures which the School Board and the Department of Education can take to avoid discriminatory situations developing in the school environment."(p.64)
2. to "address the specific steps which must be taken to remedy the discriminatory situation in School District 15 created through the writings and publications of Malcolm Ross." (p.64)

Regarding this first goal, the Board noted that the School Board and the Department of Education had already taken several initiatives to combat discrimination in the school environment. It noted the Department's August 1989 ministerial statement on "Multicultural/Human Rights Legislation" whose

intent was to promote tolerance, understanding and respect for all persons. As well, it noted that the Department had developed a new course - "The Holocaust" - for its history curriculum. However, the Board also recognized the problem in bureaucratic institutions of maintaining both "commitment and focus". (p.66)

Regarding the second goal, the Board emphasized the difficulty of providing relief for David Attis without being seen to punish Malcolm Ross. It found that Section 5 of the *Act* had been violated as a direct result of Malcolm Ross' public statements and his publications attacking the Jewish religion and Jewish ancestry. The Board described these attacks as extremely critical and vindictive. (p.67) Therefore, because Section 5 "strives for a discrimination-free environment" (p.67) in the school system, the Board concluded that

Malcolm Ross, by his writings and his continued attacks, has impaired his ability as a teacher and cannot be allowed to remain in that position if a discrimination-free environment is to exist. (p.67)

The Board argued that the Ross issue could not be corrected by an apology, or by Malcolm Ross renouncing his views, or by continual monitoring, or by placing Jewish students elsewhere in the school system. Thus, if it were "to provide relief" from discrimination for David Attis, it could only do so by taking measures that were somewhat punitive to Malcolm Ross. The Board concluded that the "only viable solution is that Malcolm Ross must be removed from the classroom." (p.68)

To secure the twin goals of avoiding the development of discriminatory situations in the school system generally, and of addressing the discrimination created by Malcolm Ross' statements and publications as a teacher in District 15 specifically, the Board ordered:

(1) That the department of Education:

- (a) establish an annual review process to set goals and to assess progress in the implementation of the initiatives set out in the Ministerial Statement on “Multicultural/Human Rights Education”;**
- (b) develop in collaboration with school trustees and teachers a system of periodic appraisals of the overall quality of race relations in the school environment and procedures for responding to any discriminatory situations identified;**
- (c) encourage all school boards to implement a policy which will clearly establish the commitment to each board and teachers within the board to teach respect for individual rights and tolerance of differences; and,**
- (d) review the *Schools Act* in consultation with the New Brunswick Teachers’ Association to determine whether it would be appropriate to define within it a clear statement as to the level of professional conduct expected of teachers in the Province of New Brunswick.**

(2) That the School Board:

- (a) immediately place Malcolm Ross on a leave of absence without pay for a period of eighteen months;**
- (b) appoint Malcolm Ross to a non-teaching position if, within the period of time that Malcolm Ross is on leave of absence without pay, a non-teaching position becomes available in School District 15 for which Malcolm Ross is qualified. The position shall be offered to him on terms and at a salary consistent with the position. At such time as Malcolm Ross accepts employment in a non-teaching position his leave of absence of absence**

without pay shall end.

(c) terminate Malcolm Ross' employment at the end of the eighteen month leave of absence without pay if, in the interim, he has not been offered and accepted a non-teaching position.

(d) terminate Malcolm Ross' employment with the School Board immediately if, at any time during the eighteen month leave of absence or if at any time during his employment in a non-teaching position, he:

(i) publishes or writes for the purpose of publication, anything that mentions a Jewish or Zionist conspiracy, or attacks followers of the Jewish religion, or

(ii) publishes, sells or distributes any of the following publications, directly or indirectly:

Web of Deceit

The Real Holocaust (The Attack on Unborn Children and Life Itself)

Spectre of Power

Christianity vs. Judeo-Christianity (The Battle for Truth)

Malcolm Ross appealed the Board of Inquiry's order to the Court of Queen's Bench of New Brunswick in Moncton.

Malcolm Ross' Appeal in the Court of Queen's Bench of New Brunswick

His appeal sought a judicial review of the Board of Inquiry's findings so that the Board's order could be quashed. (Ross v. Board of School Trustees, District 15, December 31, 1991, p.1) On December 16, 17, and 18, the Honourable Mr. Justice Paul S. Creaghan heard Ross' appeal. Mr. Justice Creaghan delivered his decision on December 31, 1991. He reviewed the Board of Inquiry's decision and its order in the context of Malcolm Ross' appeal and concluded that there appeared to be two issues:

- 1. Did the Board of inquiry act within its jurisdiction?**
- 2. Did the order of the Board of Inquiry violate the rights of the Applicant [Malcolm Ross] under the Charter of Rights and Freedoms so as to be of no force and effect? (p.5)**

Regarding the Board of Inquiry's jurisdiction, Creaghan, J. noted that it did not have the jurisdiction to compel the Department of Education to do anything. (p.4) Equally, the Board did not have the jurisdiction

...to make an order that directed the School Board to place restrictions on Malcolm Ross' activities outside the classroom in the event he was no longer employed by the School Board as a teacher in the classroom. (p.6)

Thus, Creaghan, J. concluded that clauses 1 and 2 (d) of the Board of Inquiry's order were quashed.

Creaghan, J. further noted that as a result of Section 21(1) of the *Act*, the decisions and orders of a Board of Inquiry are final and "the standard of curial deference that must be accorded to [the Board's] decisions...must be limited to a finding by this Court that its decisions are patently unreasonable." (p.8) In other words, unless Malcolm Ross could prove the Board's conclusions were "patently unreasonable", the Board's order, as the expression of a legitimate legal instrument, would stand.

Creaghan, J. argued that the Board was not patently unreasonable in finding that Section 5 of the *Act* would have primacy over Sections 3 and 6(2) when the matter was a question of competing rights.

Section 3 is essentially an injunction against an employer, his organization, agent or others preventing him from discriminating against an employee because of “race, colour, religion, national origin, ancestry, place of origin, age, physical disability, mental disability, marital status, sexual orientation or sex.”(New Brunswick Human Rights Act, p.5) Section 6(2) qualifies the injunction, 6(1), against various forms of discrimination: “Nothing in this section interferes with, restricts, or prohibits the free expression of opinions upon any subject by speech or in writing.” [my emphasis] (p.10)

Creaghan, J. also found it reasonable and within the Board’s jurisdiction to have dismissed a motion of non-suit (dismissal) by Malcolm Ross. He also agreed with the Board having found that under Section 5 of the *Act* an employer is liable for the actions of its employees. (Ross, December 31, 1991, p.9) Finally, having reviewed the evidence of the Board of Inquiry, Creaghan, J. concluded:

The function of this Court on review is not to determine whether these findings were correct. There was some evidence upon which the Board of Inquiry could come to the conclusions it did and I am not prepared to find that its findings were patently unreasonable as this term has been defined by the authorities binding upon me. (p.11)

Therefore, in settling the jurisdiction issue, Creaghan, J. found that clauses 2(a), (b), and (c) of the Board’s order were saved.

The next decision had to deal with whether or not the Board’s order violated Malcolm Ross’ Charter rights under Sections 7 and 2 (a) and (b). Section 7 of the Charter of Rights and Freedoms which deals with “Legal Rights” is, among other

things, a guarantee of due process for anyone charged under Canadian law. Although, Creaghan, J. noted that the Board's order did, to some extent, limit Malcolm Ross' liberty, he dismissed this part of Ross' appeal after noting the fairness of the Board's proceedings. (p.13) However, he did agree that Malcolm Ross' right to religious expression had been infringed. According to Creaghan, J., "It is with Section 2 [a & b] of the Charter that the real constitutional argument of the Applicant lies." (p.13) Section 2 states:

2. Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication...

Creaghan, J. concluded that Ross' Charter rights under Section 2 (a) and (b) had been "impinged by the finding and the order of the Board of Inquiry." (p.14) In order for him to determine if this impingement was justifiable, he had to subject the Board's order to the test explicit in Section 1 of the Charter:

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. [my emphasis]

Any Section 1 override, argued Creaghan, J., "must reflect the purpose of the Charter", (p.15) and, to understand this, he cites Chief Justice Dickson in Regina v. Oakes, (1986):

"The court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide group identity, and

faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the Charter and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.” [my emphasis] (,p.15)

The Oakes’ decision* has come to provide the two central criteria which must be satisfied before the Section 1 override of any Charter right or freedom can be justified. Using it, Creaghan, J. argued:

- 1. “First, the thrust of Section 5 of the Human Rights Act must be of sufficient importance to warrant overriding the protected constitutional rights.**
- 2. “Second, the order of the Board of Inquiry must meet the test of proportionality, that is, it must be reasonable and demonstrably justified.” (p.16)**

To assure this necessary “proportionality”, and again employing the Oakes’ formula, Creaghan, J. argued that

- i) “The order of the Board of Inquiry must be rationally connected to the objective of rectifying the cause and effect of the violation of the Human Rights Act.**
- ii) “...the order should impair as little as possible the constitutional rights in question.**

***A more detailed analysis of Regina v. Oakes will follow later in this chapter.**

iii) "...the effect of the order which limits Mr. Ross' constitutional rights must be proportional, that is, reasonable and demonstrably justified, with respect to the importance of the objective of Section 5 of the Human Rights Act."(p.16)

Creaghan, J. concluded that clauses 2 (a), (b), and (c) of the Board of Inquiry's order were thus saved (upheld) by Section 1 of the Charter. He noted, however, that, even though the Board did not have the jurisdiction to maintain clause 2(d) of the order, it would not have been saved by Section 1 as interpreted by Oakes because "there is too great an impairment of the constitutional rights in issue..." (p.17)

Thus, while Creaghan, J. found that Ross' writings were threatening enough to David Attis' daughter and to other Jewish students to justify keeping Malcolm Ross out of the classroom, denying him the right to express his views publicly, as long as he was not teaching children, was a breach of his Charter rights guaranteed in Sections 2(a) and (b) which protected his freedom of religion and expression. However, as an educational planner for District 15, he could again state publicly and publish for public consumption his antisemitic views.

Malcolm Ross appealed Judge Paul Creaghan's retention of the gag order to the New Brunswick Court of Appeal which brought down its decision on December 20, 1993.

Malcolm Ross' Appeal in the Court of Appeal of New Brunswick**The majority decision.**

Of the three justices hearing the appeal, Chief-Justice Hoyt and Associate Justice Angers concurred while Associate Justice Ryan dissented. Writing for the majority, Hoyt said that "...the Charter argument determines the appeal, [therefore] I will deal only with it." (Ross v. Board of School Trustees, District 15, December 20, 1993, p.10) Accordingly, he argued:

The issue is somewhat easier to state than to resolve. Is this sanction demonstrably justifiable in a free and democratic society? The issue is whether an individual's freedom of expression can prevail against the fear that there will be a public perception that Mr. Ross' discriminatory remarks directed against a religious or ethnic minority are being condoned. The discrimination here is aggravated because the minority is one that has been historically targeted for discrimination and because the author of the discrimination is a teacher, who might be considered a role model to students. [my emphasis] (p.11)

According to Hoyt*

...we must determine if the silencing of Mr. Ross' anti-Semitic views is such an important public objective that his constitutional rights to freedom of expression and speech can be overridden. (p.12)

For Hoyt, the proper context within which to assess Ross' Charter argument was provided by Justice McLachlin writing for the majority in Regina v. Zundel (1992)** in the Supreme Court

*Hoyt listed several cases in which teachers were disciplined for their off-duty conduct; however, he noted that none of them dealt with an alleged violation of a Charter right.

**Creaghan, J. (noted Hoyt) did not have the benefit of the Zundel decision in 1991.

of Canada:

Justification under s.1...requires a specific purpose so pressing and substantial as to be capable of overriding the Charter's guarantees. (p.13)

Reviewing the Board's findings, Hoyt is careful to note that

No connection was made between Mr. Ross' expressed views and any offensive remarks directed to Miss Attis and Mr. Lambert [sic]...If the evidence disclosed that Mr. Ross' remarks sparked or even were used to legitimize the offensive remarks made in the school yard, perhaps the sanction in the Order [of the Board] would be appropriate. (p.13)

While agreeing with the Board that a teacher was, in fact, a role model, (p.14) Hoyt argued that the evidence "never suggested that he [Ross] used his classroom or school property to further his views." (p.14)

Finally, precisely because a clear connection between Ross' public antisemitism and its effects on any students in District 15 could not be made; and, precisely because Ross' antisemitism could not be connected to "any offensive remarks directed to Miss Attis and Mr. Lambert [sic]", Hoyt concluded that there was no context within the evidence of the Ross appeal that was "so pressing and substantial as to be capable of overriding the Charter's guarantees." Thus, he allowed the appeal which quashed sections 2(a), (b), and (c) of the Board of Inquiry's Order.

In what seems like an afterthought in his penultimate paragraph, Hoyt cautions that to override Malcolm Ross' views

would, in my view, have the effect of condoning the suppression of views that are not politically popular any given time. [my emphasis] (p.14)

The dissent.

For Associate Justice Ryan, the main issue of the Ross appeal concerned the balancing of freedom of expression and religion with the prohibition against discrimination. Important as well was the question of whether or not these two freedoms are absolute. (Ryan, J., p.1) Thus, the order of the Board has, according to Ryan, no authority “if the order is contrary to a provision in the Charter.” (p.7)

The two key issues for Ryan are: 1. Is a public school teacher a role model? and 2. Can one balance conflicting freedoms (each guaranteed by the Charter) in an equitable way?

Regarding the first issue, Ryan argues:

Ross, as a school teacher is a role model to pupils in an elementary school, inside and outside the classroom. He teaches developing minds. He is a role model to children and yet, outside the classroom, he advocates prejudice. He urges discrimination. He publicly proclaims outside the classroom that which would not be tolerated if said in the classroom. He is a servant of the public. In my opinion, a teacher cannot discriminate, in the sense of show bias, inside the classroom or publicly, in such an important area as is this target in the Human Rights Act of this province. [my emphasis] (p.7)

The second issue, concerning the balancing of conflicting freedoms guaranteed in the Charter is not such a simple syllogism. For Ryan, this issue’s resolution is to be found in R. v. Oakes [1986] in which Chief Justice Dickson argued that Charter rights are not absolute and it “may become necessary to limit rights and freedoms in circumstances where their exercise would be inimical to the realization of collective goals of fundamental importance.” (p.8) Malcolm Ross’ appeal is based on the Charter right guaranteed in section 2 and Ryan is not ignorant of the irony this creates:

Inherent in the evilness of discrimination is an outright attack on the freedoms of others protected under s. 2 by persons urging their own freedoms as though there were no consequences to the exercise of them.

Therefore, as I see it, both values must be weighed. Is the competing value, that of prohibiting discrimination, sufficiently consequential in this case that the rights of free speech and freedom of religion should be qualified as ordered by the Board of Inquiry? I am of the opinion that they can be and should be, similar to situations where the right runs head on into laws dealing with libel and slander, sedition and blasphemy, restrictions on the press in order to ensure a fair trial or to protect minors or victims of sexual assault. [my emphasis] (p.9)

Ryan noted that Creaghan, J. quoted from R. v. Oakes in order to distinguish between Ross' rights in the classroom as a public school teacher and his rights as a Canadian:

...The court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the Charter and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified. [my emphasis] (p.9/10)

For Creaghan, J., these “underlying values and principles” which are the “genesis” of rights and freedoms that, in essence, define what it means to be a Canadian, are so important that they

override, within the context of the Ross case, Malcolm Ross' right to teach. However, Creaghan, J. argued that 2(d) of the Board's order - the injunction forbidding Ross from publishing, from writing for the purpose of publishing, or from selling or distributing his previous publications - violated the Oakes' test which determines the conditions which must be met before the section 1 override can be justified. Consequently, before considering Ryan's application of the Oakes' test to 2 (d) of the Board's order, we must first clarify this test.

The Oakes' test

On February 28, 1986, the Supreme Court of Canada dismissed an appeal by David Edwin Oakes against his conviction for trafficking in narcotics. Mr. Oakes had argued that section 8 of the *Narcotic Control Act* breached his constitutional right to the presumption of innocence as this section requires anyone found in possession of a narcotic to prove that he is not trafficking in that narcotic. Chief Justice Dickson (writing for the majority) had to devise a formula which could justify overriding any Charter right. However, to do so required an analysis of the fundamental values which the Charter sought to preserve and which constituted the context within which any Charter right had its legitimacy. Thus:

To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom"...The standard must be high to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.

Secondly, once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test" ...three important components [of which are]...First, the measures adopted must be carefully designed to achieve the objective. Secondly, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question...Thirdly, there must be a proportionality between the *effects* of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance"...The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society. (Regina v. Oakes, February 28, 1986, p.227/228)

In applying the Oakes' test to the Board's 2 (d) order, the so-called 'gag order', Ryan disagreed with Creaghan, J.:

...To sever the ban order from the classroom situation simply does not answer the problem in a meaningful way. It falls too short of the mark. The wrong is in the continued discrimination publicly promoted by Ross, a public servant, as a role model to children. He is known as an elementary school teacher whether in the classroom or outside of it where he is promoting discrimination and prejudice. We cannot in this age of pervasive mass communication, repetitious radio and television news and public affairs programs, underestimate the cumulative effect on young people of statements and writings made outside the classroom. They hear or see the news before and after school. To draw the line at the classroom door is an unrealistic barrier in this burgeoning age of communication. It is to this end that the original ban order of Professor Bruce should be reinstated.(Ross, December 20, 1993, p.11)

Next, Ryan applied the three criteria of proportionality - rational connection, minimal impairment, and deleterious effects - in assessing whether or not the Board's gag order was justified by section 1 of the Charter.

1. rational connection - Ryan cites seven examples of legislation that, for the best of reasons (the underlying values and principles of a free and democratic society) justify the overriding of individual rights and freedoms. These vary from (a) compelling children to attend school, to (b) laws against unjust dismissal, to (c) the legal suppression of wilful hatred against identifiable groups, to (d) a legally defined day of rest, to (e) the mandatory payment of union dues as a means of ensuring free collective bargaining and labour peace, to (f) similar American laws to protect the union shop and public welfare, to (g) again, similar American laws promoting "the efficiency of public educational services". (p.12/13) In each case, one or more objectives justify overriding one or more rights and freedoms. Ryan concludes that, for these reasons and because the [Human Rights] "Act is conciliatory in nature and without criminal sanction...The [Board's] order is therefore rationally connected to the objective of ensuring a discrimination-free environment." (p.13)

2. minimal impairment - Ryan reiterates the idea that human rights legislation is of a "near constitutional nature" (p.13) and, as such, its goals are to advance the "values of our society, imperfect as it may be." (p.14) Furthermore, he notes that "although freedom to believe is absolute, freedom to act upon one's belief is conditional and relative". (p.14) As well, he notes that the precedents for firing Ross outright exist. (p.14) That Ross is still employed by School District 15 testifies, says Ryan, to the minimal impairment he suffers in order to reduce as much as is reasonably possible the suffering of the so-called target group. According to Ryan:

A balance must be struck between Ross' freedoms, the victims' freedoms and an educational system which teaches impartiality and does not espouse prejudice,

bigotry or bias. A teacher teaches. He is a role model. He also teaches by example. Children learn by example. Malcolm Ross teaches by example. He is a role model who publishes and promotes prejudice. This is wrong. (p.15)

3. deleterious effects - According to Ryan, (and Dickson, whom he is quoting) included in "the underlying values and principles of a free and democratic society which are their very genesis [is the] inherent dignity of the human being, [the] commitment to social justice and equality and [the] respect for cultural and group identity." (p.15) Thus, allowing Malcolm Ross to speak and publish his antisemitism

...would be to trample upon these underlying values and principles...

Ross remains free to leave public employment and engage fully in the exercise of his freedom of speech and religion without restraint. A restriction, therefore, that he cease his discriminatory conduct is a justifiable infringement. It is not absolute. (p.15)

Finally, to the question of whether or not a public school teacher is a role model, Ryan's answer is yes. To the question of can one balance conflicting freedoms equitably, his answer is qualified by the application of the Oakes' test and, in particular, by the legal concept of proportionality. According to Ryan, 2 (a), (b), (c), and (d) of the Board's order all meet the proportionality test. As a result, he dismissed Malcolm Ross' appeal.

Chapter 4**Analysis of Relevant Court Decisions**

The three previous decisions (outlined in the last chapter) have established the legal questions, the answers to which will ultimately decide the Malcolm Ross case. The central context (only a democracy's dilemma) within which those questions may be answered will be provided by the Charter and, in particular, the question of when a citizen's section 2 Charter rights ought to be protected and when they ought to be overridden by the section 1 caveat.

The significant portion of Section 2 of the Canadian Charter of Rights and Freedoms states:

Everyone has the following fundamental freedoms:
(a) freedom of conscience and religion; (b) freedom of thought, belief, opinion, and expression...

Section 1 states:

The Canadian *Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Because no right guaranteed by the Charter is absolute, (Oakes, p.225) it seems obvious that in balancing Malcolm Ross' guaranteed freedoms of religion and expression with David Attis' right (asserted on behalf of his children as well as himself) to send his children to a publicly funded school in which they will not be subject to religious discrimination, the Supreme Court of Canada* will make use of the Oakes' test (February 28, 1986). However, within such a legal test reside two very important contexts. The first is what I will call the Socratic or the rational

*Hereafter, any reference to the Supreme Court of Canada will be to the Court.

context. The second I will call the irrational context of antisemitism - in other words, the context of Holocaust denial.

Regarding the first context, among other considerations, the Court will have to determine whether or not a public school teacher is a role model or exemplar to his students and, if so, whether or not this restricts his public behaviour or persona and not simply his behaviour while teaching. The question, in other words, is 'when is a teacher not a teacher?' Such a question also presupposes questions like (a) what is the meaning of education and what is the connection (if at all) between education and citizenship? and (b) what is the purpose of public education in Canada?

With regard to the second context, the Court will also have to deal with Holocaust denial as a newer and as a particularly virulent form of antisemitism. This contemporary and somewhat subtle form of Jew-hatred is not usually connected to a conceptual analysis of public education. However, the fact that Malcolm Ross is a teacher,* an antisemite, and a Holocaust denier creates the coherent link between the questions concerning the Socratic or the rational context which informs our notions of public education and the irrational context of Holocaust denial that is epitomized by Malcolm Ross' antisemitism.

With regard to the central legal context which will inform the Court's decision, that of balancing Malcolm Ross' Charter rights with those of David Attis, the Court will probably rely on a number of decisions, all of which have had to deal with freedom of expression in a context which is legally germane to the Ross case. The following decisions, the first by the Ontario Court of Appeal and the next four by the Court, ought to clarify significantly, at least in part, this democratic dilemma:

***The Keegstra case, which in part has been heard by the Court (December 13, 1990), also informs this second irrational context. Formerly a Social Studies teacher in Eckville, Alberta, James Keegstra was fired on December 7, 1982 essentially for teaching what Malcolm Ross was writing and publishing. See pages 207 - 208 in A Trust Betrayed, David Bercuson & Douglas Wertheimer, Doubleday Canada Ltd., Toronto, Ontario, 1985.**

1. Zylberberg v. Sudbury Board of Education, September 23, 1988; 2. Attorney-General of Quebec v. Irwin Toy Ltd.; Moreau et al., Interveners, April 27, 1989; 3. Regina v. Keegstra et al., December 13, 1990; 4. Regina v. Butler, February 27, 1992; 5. Zundel v. Queen et al., August 27, 1992.

1. Zylberberg v. Sudbury Board of Education, September 23, 1988.

It is important to state at the beginning of my description of *Zylberberg* (both the 1986 case as well as the 1988 appeal of that case) that I do not intend to deal with the majority in the 1986 case or with the dissent in the 1988 case. Simply put, *Zylberberg* is important to the Ross case because the final appeal was upheld; and it was upheld because the court found a public school to be an inherently coercive environment.

The Zylberbergs, the Greggs, and the Coppel-Parks are families in which at least one spouse is of Jewish ancestry; the Wyers are Christian; the Envers observe the Islamic faith. Originally, the five parents sought to have section 28(1) of Ontario's Education Act declared of no force and effect because it violates section 2(a) and 15(1) of the Canadian Charter of Rights and Freedoms. In a majority decision on July 14, 1986, they lost their case. However, the majority decision of the Ontario Court of Appeal reversed the lower court's ruling and section 28(1) was found to be unconstitutional.

The relevant statutes are:

28 (1) A public school shall be opened or closed each school day with religious exercises consisting of the reading of the scriptures or other suitable readings and the repeating of the Lord's Prayer or other suitable prayers.

(10) No pupil shall be required to take part in any religious exercises or be subject to any instruction in religious education where his parent or, where the pupil is an adult, the pupil applies to the principal of the school that the pupil attends for exemption of the pupil therefrom.

(11) In public schools without suitable waiting rooms or other similar accommodation, if the parent of

a pupil or, where the pupil is an adult, the pupil applies to the principal of the school for the exemption of the pupil from attendance while religious exercises are being held or religious education given, such request will be granted.

- (12) Where a parent of a pupil, or a pupil who is an adult, objects to the pupil's taking part in religious exercises or being subject to instruction in religious education, but requests that the pupil remain in the classroom during the time devoted to religious exercises or instruction in religious education, the principal of the school that pupil attends shall permit the pupil to do so, if he maintains decorous behaviour.

The Canadian Charter of Rights and Freedoms states:

2. Everyone has the following fundamental freedoms:
 (a) freedom of conscience and religion.

Zylberberg, 1986 - Reid J. dissenting.

Reid argued that, prima facie,

A law that requires the performance of religious exercises is a restriction on freedom of religion...Some applicants object simply to having to make a choice. Others are non-religious, or members of non-Christian religions. They do not wish their children to participate. But they are reluctant to exercise their right to elect to have their child excused from the exercises. This reluctance stems from fear of the embarrassment, or the harm that might flow, from having the child "singled out" and made to feel different from his or her peers. As a result some feel compelled to refrain from electing to have their child excused. (Zylberberg et al. and the Director of Education of Sudbury Board of Education, 1986, p.726)

The majority argued that sections 28(10), (11), and (12) provide a remedy for those not wanting to take part in the school prayer; consequently, there was nothing inherently coercive about section 28(1). In response, Reid argued:

...While those who desire not to obey the rule may opt out, they must perforce seek exceptional status.

There is a difference between imposing a rule in mandatory terms and providing for exceptions, on the one hand, and providing truly alternative choices on the other. Had the object been to provide real freedom of choice, it could easily have been achieved. All that was required was to provide that there would be a time during the day when those who wished could take part in religious exercises and those who did not, need not. (p.728)

Simply put - subtle coercion is still coercion. Citing Dickson J. (as he was then) in R. v. Big M Drug Mart Ltd., (1985), Reid notes that

Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanctions, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. [Reid's emphasis] (p.729)

Reid also notes that in practical terms - that is, the reality in the classroom - even with the opportunity to opt out of the religious observance permitted by subsections (10), (11), and (12) the very environment is coercive:

In the extreme case, if all of the pupils in the class but one are Christians and willing to conform with the rule, might not the sole Mohammedan, or Hebrew, or non-believing child feel uncomfortable about the isolation involved in opting out? Or, in a probably commoner case, if most of the pupils willingly conform, might not a few whose family faith is Moslem, or Hebraic or Buddhist, feel awkward

about seeking exemption? Peer pressures, and the desire to conform, are notoriously effective with children. Does common experience not tell us that these things are so, and that such feelings might easily, and reasonably, lead some not to seek exemption, and unwillingly conform, or others to seek it, and be forced to suffer the consequences to their feelings and convictions?

If that is so, some degree of coercion exists. (p.729)

Zylberberg, (1988)* - the majority.

Dealing with the concept of religious freedom, the majority cites Dickson in *Big M Drug Mart*:

The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. (Zylberberg v. Sudbury Board of Education (Director), 1988, p.588)

Furthermore, Dickson emphasized that freedom of religion means more than that, (p.588) stipulating that it is coupled with an absence of coercion:

Freedom in a broad sense embraces both the absence of coercion and restraint, and the right to manifest beliefs and practices. (p.588)

In response to the Attorney-General's submission that "the necessity of requesting an exemption might be an "embarrassment" but was not coercive in its effect", (p.590) the majority made an important observation:

***By 1988, two of the five appellants had moved out of the school district and had discontinued their appeal. Of the remaining parents, one was Jewish, one was Moslem, and one was Catholic.**

Whether or not there is pressure or compulsion must be assessed from their [the minorities'] standpoint and, in particular, from the standpoint of pupils in the sensitive setting of a public school. [my emphasis] (p.590)

Thus, the very fact that an exemption exists, argues the majority, is discriminatory and coercive. Indeed, the coercive properties of a public school are clearly defined in an American decision cited by the minority in *Zylberberg*, (1988). In *Engel v. Vitale*, (1962), Mr. Justice Black, commenting on compulsory school prayer, stated:

This is not to say, of course, that laws officially prescribing a particular form of religious worship do not involve coercion of such individuals. When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain. (p.617)

In another American decision, *McCullum v. Board of Education*, (1948), the minority cites Frankfurter J. in a case which challenged "religious instruction given by private religious groups to pupils in public school buildings during school hours..." (p.620) According to Frankfurter,

That a child is offered an alternative may reduce the constraint; it does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain. The law of imitation operates, and non-conformity is not an outstanding characteristic of children. The result is an obvious pressure upon children to attend... [my emphasis] (p.620)

Thus, a quick perusal of the various arguments dealing with the coercive nature of a public school - from a minority and a majority perspective in both the *Zylberberg* trials - indicates that a school's essential and pervasive influence relies on

(among other things) this coercive nature.

**2. Attorney-General of Quebec v. Irwin Toy Ltd.; Moreau et al., _____
Interveniers, April 27, 1989.**

***Irwin Toy* demonstrates Parliament's concern for the protection of children from advertising which seeks to exploit them. As such, it exemplifies a significant rationale for the conditions under which section 1 of the Charter can override the freedom of expression guaranteed in section 2 of the Charter.**

According to the Attorney-General of Quebec, acting on behalf of the Office de la protection du consommateur, Irwin Toy Ltd. was broadcasting advertising messages which were in contravention of section 248 and 249 of the Consumer Protection Act, S.Q. 1978, c. 9 (R.S.Q., c. P-40.1). Section 248 provides

that subject to the regulations, no person may make use of commercial advertising directed at persons under 13 years of age. According to s. 249, in determining whether an advertisement is directed to persons under 13 years, account must be taken of the context of its presentation, including the nature and intended purpose of the goods advertised, the manner of presenting such advertisement and the time and place it is shown. (Attorney-General of Quebec v. Irwin Toy Ltd., 1989, p.577)

In response, Irwin Toy argued that sections 248 and 249 were "*ultra vires* the province or were inoperative under the Quebec *Charter of Human Rights and Freedoms...*" (p.577) The trial judge dismissed this action; however, the Court of Appeal ruled that sections 248 and 249 violated section 2 (b) of the Canadian *Charter of Rights and Freedoms* which guaranteed freedom of expression and were not saved by the override provision in section 1 of the Charter. The Attorney-General of Quebec appealed to the Supreme Court of Canada which upheld this appeal by a 3 to 2 majority.

The Majority decision – Dickson C.J.C., Lamar J. and Wilson J.

The majority, justified the importance of freedom of expression in a democracy: Freedom of expression was entrenched in our constitution and is guaranteed in the Quebec Charter so as to ensure that everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream. Such protection is, in the words of both the Canadian and Quebec Charters, “fundamental” because in a free, pluralistic and democratic society we prize a diversity of ideas and opinions for their inherent value both to the community and to the individual. [my emphasis] (p.606)

While noting that “Clearly, not all activity is protected by freedom of expression...”, (p.605) they further noted that neither content nor meaning may be used as a criterion to exclude any form of expression; (p.607) consequently this would include the expression to which Irwin Toy was claiming they had constitutional right. They then underscore a very important qualification to freedom of expression:

While the guarantee of free expression protects all content of expression, certainly violence as a form of expression receives no such protection...it is clear, for example, that a murderer or rapist cannot invoke freedom of expression in justification of the form of expression he has chosen. [my emphasis] (p.607)

Next, having concluded that the Irwin Toy ads fell within the scope of conduct protected by legislation, the majority had to decide whether the purpose or effect of the Quebec government’s action was to restrict freedom of expression. In doing so, they quoted from the decision of Dickson J. (as he then was) in R. v. Big M Drug Mart Ltd. (1985)

In my view, both purpose and effect are relevant in determining constitutionality; either an unconstitutional

purpose or an unconstitutional effect can invalidate legislation...Moreover, consideration of the object of legislation is vital if rights are to be fully protected... Thus, if a law with a valid purpose interferes by its impact, with rights or freedoms, a litigant could still argue the effects of the legislation as a means to defeat its applicability and possibly its validity. In short, the effects test will only be necessary to defeat legislation with a valid purpose; effects can never be relied upon to save legislation with an invalid purpose. [my emphasis] (p.609)

The majority then concludes that a) "If the [Quebec] government's purpose was to restrict attempts to convey a meaning" (p.609) then the section 2 rights claimed by Irwin Toy have been infringed, thus requiring a section 1 analysis to determine if this infringement is justified; and b) "If, however, this was not the government's purpose, the court must move on to an analysis of the effects of the government action." (p.609)

Purpose

In assessing the purpose of any legislation, the majority is careful to dismiss the two extremes that come to mind. They are firstly, the claim that all human activity by its nature is expressive and, therefore, any government legislation is restrictive; and secondly, the claim by a government that all its legislation is important, thus justifying any consequent infringement of rights and freedoms. They are also careful to dismiss the "theory of shifting purposes" (p.610) which could see any legislation enacted at any time used as a tool which would not have justified its framers' purpose. Quoting again from R. v. Big M Drug Mart Ltd. they argue that "Purpose is a function of the intent of those who drafted and enacted the legislation at the time, and not of any shifting variable." (p.610) Purpose, with regard to legislation, is significant in law because if it can be demonstrated that legislation is aimed

...only to control the physical consequences of particular conduct, its purpose does not trench upon the guarantee [of freedom of expression]. In determining whether the government's purpose aims simply at [the] harmful physical consequences [of freedom of expression], the question becomes: does the mischief consist in the meaning of the activity or the purported influence that meaning has on the behaviour of others, or does it consist, rather, only in the direct physical result of the activity. [my emphasis] (p.612)

Effects

The majority refers to Ford v. Quebec (A.-G.), (1988), 54 D.L.R. (4th) 577 in summarizing "the nature of the principles and values underlying the vigilant protection of free expression in a society such as ours." (p.612) These are:

(1) seeking and attaining the truth is an inherently good activity; (2) participation in social and political decision-making is to be fostered and encouraged; and (3) the diversity in the forms of self-fulfillment and human flourishing ought to be cultivated in an essentially tolerant, indeed welcoming environment not only for the sake of those who convey a meaning, but also for the sake of those to whom it is conveyed. [my emphasis] (p.612)

To this, they add:

In showing that the effect of a government's action was to restrict her free expression, a plaintiff must demonstrate that her activity promotes at least one of these principles. (p.612)

While the "precise and complete articulation of what kinds of activity promote these principles is, of course a matter for judicial appreciation to be developed on a case-by-case basis", (p.612/613) these principles provide the general context within

which all claims to freedom of expression must find themselves “in a society such as ours.”

Having determined that Irwin Toy was correct in asserting that the actions of the Attorney-General of Quebec had infringed its freedom of expression, the Oakes’ test was applied to see if such an infringement was justified.

The application of the Oakes’ test.

The first requirement of the Oakes’ test is to determine whether “an objective [of the impugned legislation] relate[s] to concerns which are pressing and substantial in a free and democratic society”. (Oakes, 1986, p.227) Here, the majority concluded that

the objective of regulating commercial advertising directed at children accords with a general goal of consumer protection legislation, *viz*, to protect a group that is most vulnerable to commercial manipulation. (Irwin Toy, p.623)

Having satisfied this first requirement of the test, they had to decide whether or not overriding Irwin Toy’s freedom of expression met the second requirement of proportionality, that is, were the means by which this first objective was to be achieved proportional to the ends being sought. To determine this, they had to apply the three criteria which determine proportionality: i) rational connection; ii) minimal impairment; and, iii) the assessment of deleterious effects.

i) rational connection: the majority concluded:

There can be no doubt that a ban on advertising directed at children is rationally connected to the objective of protecting children from advertising” (p.624) [because of their] inability... either to differentiate between fact and fiction or to acknowledge and thereby resist or treat with some skepticism the persuasive intent behind the

advertisement.” (p.624)

ii) minimal impairment: the majority concluded:

The strongest evidence for the proposition that this ban [against Irwin Toy’s ads aimed at children] impairs freedom of expression as little as possible comes from the FTC Report. Because the report found that children are not equipped to identify the persuasive intent of advertising, content regulation could not address the problem. The report concluded that the only effective means for dealing with advertising directed at children would be a ban on all such advertising because “[a]n informal remedy would not eliminate nor overcome the cognitive limitations that prevent young children from understanding advertising” (p.36). (p.626)

The majority then concludes that “protecting children from manipulation through such advertising [is] the minimal impairment of free expression [which is] consistent with...[such a] pressing and substantial goal”. (p.629)

iii) deleterious effects: according to the majority, there are none because “Advertisers are always free to direct their message at parents and other adults.” (p.630)

The Dissent – McIntyre J. and Beetz J.

McIntyre J. (writing for the dissent) agrees with the majority that “the promotion of the welfare of children is an objective of pressing and substantial concern for any government.” (p.635) However,

In my view, no case has been made that children are at risk. Furthermore, even if I could reach another conclusion, I would be of the view that the restriction fails on the issue of proportionality. A total prohibition of advertising aimed at children below an arbitrarily fixed age makes no

attempt at the achievement of proportionality. (p.636)

Finally, McIntyre J. expresses concerns that

...in this century we have seen whole societies utterly corrupted by the suppression of free expression. We should not likely take a step in that direction, even a small one. (p.636)

While recognizing that freedom of expression is not an absolute, (p.637) McIntyre J. qualifies its suppression:

Freedom of expression, whether political, religious, artistic or commercial, should not be suppressed except in cases where urgent and compelling reasons exist and then only to the extent and for the time necessary for the protection of the community. [my emphasis] (p.637)

3. Regina v. Keegstra et al., December 13, 1990

More than any other recent appeal heard by the Court, that of the former Eckville, Alberta school teacher, James Keegstra, parallels the Malcolm Ross case. Officially, Keegstra was fired from his teaching position in December 1982 because he did not teach the mandated curriculum. This charge stemmed from the numerous complaints of parents who were offended by Keegstra's antisemitism which had become the 'core' of his social studies curriculum. James Keegstra and Malcolm Ross are teachers who 'subscribe' to the same school of antisemitism.

The facts of the Keegstra case prior to it being heard by the Court are as follows:

- 1. "In 1984, Keegstra is charged under s. 319(2) (then 281.2(2)) of the *Criminal Code* with unlawfully promoting hatred against an identifiable group by communicating anti-Semitic statements to his students. He was convicted by a jury in a trial before McKenzie J. of the Alberta Court of Queen's Bench." (Regina v. Keegstra et al, 1990, p.12)**
- 2. Prior to this trial, Keegstra applied to the Alberta Court of Queen's Bench for an order quashing this charge primarily on the grounds "that s. 319(2) of the *Criminal Code* unjustifiably infringed his freedom of expression as guaranteed by s. 2(b) of the Charter. Among the other grounds of the appeal was the allegation that the defence of truth found in s. 319(3)(a) of the *Code* violates the charter's presumption of innocence. The application was dismissed by Quigley J. and Mr. Keegstra was thereafter tried and convicted."(p.12)**
- 3. Raising the same Charter issues, Keegstra appealed to the Alberta Court of Appeal which unanimously accepted his argument. The Crown**

appealed to the Supreme Court of Canada.

Before reviewing the Court's majority decision on Keegstra, it is necessary to state the key section of the Canadian Criminal Code which is at issue - section 319(2) which states:

Every one who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of

- (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or
- (b) an offence punishable on summary conviction.

(3) No person shall be convicted of an offence under subsection (2)

- (a) if he establishes that the statements communicated were true;
- (b) if, in good faith, he expressed or attempted to establish by argument an opinion upon a religious subject;
- (c) if the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true; or
- (d) if, in good faith, he attempted to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred towards an identifiable group in Canada.

Regarding the language used in section 319 (2) and (3):

“communicating” includes communicating by telephone, broadcasting or other audible or visible means;

“identifiable group” means any section of the public distinguished by colour, race, religion or ethnic origin;

“public place” includes any place to which the public have access as of right or by invitation, express or implied;

“statements” includes words spoken or written or recorded electronically or electro-magnetically or otherwise, and gestures, signs or other visible representations.

Review of the Judgements of the Alberta Courts.

According to Quigley J., the context for a particularly Canadian understanding of freedom of expression is to be found in four principles stated in the preamble to the *Canadian Bill of Rights*:

(i) an acknowledgement of the supremacy of God; (ii) the dignity and worth of the human person; (iii) respect for moral and spiritual values, and (iv) the rule of law. (p.15)

Furthermore, according to Quigley, the totality of these principles is affirmed in sections 15 and 27 of the Charter which state, respectively, that

15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability;

27 This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the

multicultural heritage of Canadians.

As a result, Quigley J. noted

that the wilful promotion of hatred against a section of the Canadian public distinguished by colour, race, religion or ethnic origin is antithetical to the dignity and worth of the members of an identifiable group. As such, it negates their rights and freedoms, in particular denying them the right to the equal protection and benefit of the law without discrimination. (p.15)

and concluded that

The protection afforded by the proscription [section 319(2)] tends to banish the apprehension which might otherwise inhibit certain segments of our society from freely expressing themselves upon the whole spectrum of topics, whether social, economic, scientific, political, religious, or spiritual in nature. The unfettered right to express divergent opinions on these topics is the the kind of freedom of expression the Charter protects. (p.16)

Applying a section 1 analysis to section 319(2), Quigley J. concluded that "it is beyond doubt that breeding hate is detrimental to society for psychological and social reasons and that it can easily create hostility and aggression which leads to violence". (p.16) He saw s. 319(2) as a rational means of at least attempting to prevent this and felt that

the various restrictions and defences built into s. 319(2) ensure it has a very minimal effect on the over-all right of freedom of expression [which was justified by] the balance struck between free expression and the broader interests of social cohesion and the common good thus justified by s. 319(2) as a reasonable limit to s. 2(b) under s. 1. (p.16)

A unanimous decision of the Alberta Court of Appeal found that Keegstra's Charter rights had been violated. Writing for

this court, Kerans J.A. “was willing to accept that knowingly false expression was not covered by s. 2(b).” (p.17) However, because, according to Kerans, section 319(2) covered all falsehoods, extending

beyond knowingly false communications...covering all falsehoods, including those innocently and negligently made. The relevant question under 2(b) was therefore whether falsehoods unknowingly made were protected by the Charter...Kerans J.A. decided in the affirmative stating that “s. 2(b) should be understood as protecting both innocent error and imprudent speech” (p.164). As s. 319(2) did neither, he held that it infringes s. 2(b) of the Charter.” (p.17)

Regarding the section 1 analysis of section 319(2), he “accepted that preventing harm to the reputation and psychological well-being of target group members was a valid s. 1 objective..”, (p.17) adding that the intended victims of hate can feel alienated from society. However, Kerans makes an interesting distinction in assessing the way hate can be manifest:

Kerans, J.A. nevertheless saw a difference between pain suffered by the target of isolated abuse and the crushing effect of systemic discrimination. He remarked that feelings of outrage and frustration caused by name-calling may be bearable if the abuse is rejected by the community as a whole, while in contrast name-calling becomes unbearable when “it indeed cools one’s friends and heats one’s enemies” (p.169) Consequently, he viewed injury stemming from hate propaganda as serious enough to require the sanction of criminal law only where people *actually* hate a group as a result of abuse. (p.17)

Finally, Kerans concludes that

s. 319(2) fails the proportionality test through overbreadth, permitting as it does the conviction of a

person who merely *intends* to cause hatred... [concluding] that the challenged law “catches more than that” (p.178).” (p.17)

Thus, according to the unanimous decision of the Alberta Court of Appeal, section 319(2) was not saved by section 1 of the Charter.

The majority in Keegstra.

Writing for the majority, Dickson, C.J.C. argues that prior to the Charter and even prior to the Canadian Bill of Rights, freedom of expression

was seen as an essential value of Canadian parliamentary democracy...[and] with the Charter came not only its increased importance, but also a more careful and generous study of the values informing the freedom. (p.21/22)

The *Irwin Toy* case, in particular, argues Dickson,

can be seen at once as clarifying the relationship between ss. 2(b) and 1 in freedom of expression cases and reaffirming and strengthening the large and liberal interpretation given the freedom in s. 2(b) by the court in *Ford*. (p.23)

Indeed, *Irwin Toy* established the three criteria which express the context for freedom of expression in a free and democratic society:

1. seeking and attaining truth is an inherently good activity;
2. participation in social and political decision-making is to be fostered and encouraged, and
3. diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in a tolerant

and welcoming environment for the sake of both those who convey a meaning and those to whom the meaning is conveyed. (p.22/23)

Finding that s. 319(2) does constitute an infringement of the freedom of expression guaranteed in section 2 (b), Dickson canvasses “two arguments made in favour of the position that communications intended to promote hatred do not fall within the ambit of s. 2(b).” (p.25) The first argument would deny violence and threats of violence section 2(b) protection. However, Dickson is very clear about what does not constitute violence:

It should be emphasized...that no decision of this court [the Court] has rested on the notion that expressive conduct is excluded from s. 2(b) where it involves violence.... communications restricted by s. 319(2) cannot be considered as violence, which on a reading of *Irwin Toy* I find to refer to expression communicated directly through physical harm. Nor do I find hate propaganda to be analogous to violence, and through this route exclude it from the protection of freedom of expression...[my emphasis] (p.25/26)

Dickson does, however, distinguish between content and form in any discussion of free expression:

the content of expression is irrelevant in determining the scope of this Charter provision [s.2(b)]. Stated at its highest, an exception has been suggested [in *Irwin Toy*] where meaning is communicated directly *via* physical violence, the extreme repugnance of this form to free expression values justifying such an extraordinary step. Section 319(2) of the *Criminal Code* prohibits the communication of meaning that is repugnant, but the repugnance stems from the content of the message as opposed to its form. (p.26)

Therefore, if the “content of expression is irrelevant” in determining whether or not it is protected by the Charter, then what must strip expression of its Charter guarantee under section 2(b) must be its form. Referring again to *Irwin Toy*, Dickson makes this point:

It is not necessary here to delineate precisely when and on what basis a *form* of expression chosen to convey a meaning falls outside the sphere of the guarantee. But it is clear, for example, that a murderer or a rapist cannot invoke freedom of expression in justification of the form of expression he has chosen. (p.26)

Thus, says Dickson,

While the line between form and content is not always easily drawn, in my opinion, threats of violence can only be so classified by reference to the content of their meaning. As such, they do not fall within the exception [that all content of expression has Charter protection] spoken of in *Irwin Toy*, and their suppression must be justified under s. 1. [my emphasis] (p.26)

The second argument, attempting to strip free expression from the protection of section 2(b), relies heavily on other Charter provisions and international agreements to which Canada is a party. Dickson is dismissive of this approach simply because there is a

danger of balancing competing values without the benefit of a context...[therefore] It is, in my opinion, inappropriate to attenuate the s. 2(b) freedom on the grounds that a *particular* context requires such; the large and liberal interpretation given the freedom of expression in *Irwin Toy* indicates that the preferable course is to weigh the various contextual values and factors in s.1. (p.27)

Within *Regina v. Oakes*, Dickson found that section 1 of the Charter

has a dual function, operating both to activate Charter rights and freedoms and to permit such reasonable limits as a free and democratic society may have occasion to place on them...What seems to me to be of significance in this dual function is the commonality that links the guarantee of rights and freedoms to their limitation. This commonality lies in the phrase “free and democratic society”. [my emphasis] (p.28)

Regarding the values that “free and democratic society” evoke, Dickson again follows *Oakes*:

The court must be guided by values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the charter and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified. (p.29)

What Dickson calls “the factual circumstances” (p.29) tend to place the argument for limiting a right or freedom in what Wilson J.called the “contextual approach”: (p.29)

...a particular right or freedom may have a different value depending on the context. It may be, for example, that freedom of expression has greater value in a political context than it does in the context of disclosure of the details of a matrimonial dispute. The contextual approach attempts to bring into sharp relief the aspect of the right or freedom which is truly at stake in the case as well as the relevant aspects of any values in competition with it. It seems to be more sensitive to the reality of the dilemma

posed by the particular facts and therefore more conducive to finding a fair and just compromise between the two competing values under s. 1. (p.29)

As a consequence, Dickson argued that

the proper judicial perspective under which s. 1 must be derived [is] from an awareness of the synergetic relation between two elements: the values underlying the Charter and the circumstances of the particular case. (p.30)

Furthermore, Dickson is mindful that any section 1 challenge to section 319(2) be resolved within the context of “values fundamental to the Canadian concept of a free and democratic society”. (p.35)

The objective of section 319(2)

Using the first part of the Oakes test, Dickson asks whether or not the objective - the elimination of hatred aimed at identifiable groups - is “pressing and substantial in a free and democratic society”. In doing so, he quotes the Cohen Committee’s 1965 report on hate propaganda in Canada:

It is easy to conclude that because the number of persons and organizations is not very large, they should not be taken too seriously. The Committee is of the opinion that this line of analysis is no longer tenable after what is known to have been the result of hate propaganda in other countries, particularly in the 1930s when such material and ideas played a significant role in the creation of a climate of malice, destructive of the central values of Judaic-Christian society, the values of our civilization. (p.35)

Dickson noted two sorts of injury caused by hate propaganda: first, the harm done to the target group, and, second, its harmful influence on society in general. For Dickson, combating both of these injuries is a pressing and substantial

objective in a free and democratic country. Again, referring to the Cohen Committee's report, he emphasized the powerful influence of hate propaganda on society in general:

...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**, [my emphasis] 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 the 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. (p.37)

Dickson notes the close link between the Cohen Committee's 1965 recommendation that Parliament use the *Criminal Code* to fight against what he calls "wilful, hate-promoting expression" (p.38) and the passing, in 1970, of such legislation creating the law found in section 319(2). Thus, concludes Dickson, the original objective of section 319(2) was closely connected to the aims of Parliament then and this objective was re-affirmed by the Canadian Bar Association in 1984 and again in 1986 by the Law Reform Commission of Canada. (p.38)

International human rights instruments.

Next, Dickson notes that such a Canadian objective was also consistent with Canada's support for international human rights instruments which have the same objective. Dickson cites article 19 of the International Covenant on Civil and Political Rights, 1966, 999 U.N.T.S. 171 adopted by the U.N. in 1966 and by Canada in 1976:

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For the respect of the rights and the reputations of others;
 - (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

Article 20

1. Any propaganda for war shall be prohibited by law.
2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law. (p.40)

Furthermore, Dickson cites Article 10 (1) and (2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, of which twenty-one states are parties:

- (1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers...**
- (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary. [my emphasis] (p.41)**

Dickson noted the similarity of Article 10 (2) to section 1 of the Charter (p.42) and further noted that in Slaight Communications Inc. v. Davidson:

...Canada's international human rights obligations should inform not only the interpretation of the content of the rights guaranteed by the Charter but also the interpretation of what can constitute pressing and substantial s. 1 objectives which may justify restrictions upon those rights. (p.39)

**Not only is section 319(2) reflective of pressing and substantial concerns in a free and democratic nation; not only is it reflective of specific commitments made by Canada to international human rights instruments, but section 319(2) is also reflective of other sections of the Charter.
Other provisions of the Charter.**

Dickson quotes Wilson J. in Singh v. Canada (Minister of Employment and Immigration) (1985) in order to emphasize the

close connection between the objectives of section 319(2) and, in particular, sections 15 and 27 of the Charter:

...it is important to remember that the courts are conducting this inquiry in light of a commitment to uphold the rights and freedoms set out in other sections of the Charter. (p.43)

Proportionality

Essentially, the question being asked is: is the means - section 319(2) - of promoting the objective (the elimination of the wilful promotion of hate against an identifiable group) proportional to the end - creating a tolerant society? Dickson then deals with each of the three criteria of the proportionality test.

1. relation of the expression at stake to free expression values.

For Dickson, any assessment of this rational connection can not ignore the nature of the expression which is subjected to the section 1 override. Although expression, at this level, must not be dealt with according to its popularity,

it is equally destructive of free expression values, as well as the other values which underlie a free and democratic society, to treat all expression as equally crucial to those principles at the core of s. 2(b). (p.47)

Categorizing Keegstra's antisemitism, Dickson is clear:

...it is deeply offensive, hurtful and damaging to target group members, misleading to his listeners[students], and antithetical to the furtherance of tolerance and understanding in society....To say merely that expression is offensive and disturbing, however, fails to address satisfactorily the question of whether, and to what extent, the expressive activity prohibited by s. 319(2) promotes

the values underlying the freedom of expression.... I am of the opinion that expression intended to promote the hatred of identifiable groups is of limited importance when measured against free expression values. (p.48)

In further assessing the rational connection of section 319(2) to the objectives of section 1 of the Charter, Dickson refers to *Irwin Toy* in applying the principles and values that protect free expression in Canada.

i) free expression as a means of seeking and attaining the truth.

At the core of freedom of expression lies the need to ensure that truth and the common good are attained... in the process of determining the best course to take in our political affairs. Since truth and the ideal form of political and social organization can rarely, if at all, be identified with absolute certainty, it is difficult to prohibit expression without impeding the free exchange of potentially valuable information. Nevertheless, the argument from truth does not provide convincing support for the protection of hate propaganda...the greater the degree of certainty that a statement is erroneous or mendacious, the less its value in the quest for truth. Indeed, expression can be used to the detriment of our search for the truth; the state should not be sole arbiter of truth, but neither should we overplay the view that rationality will overcome all falsehoods in the unregulated market-place of ideas. There is very little chance that statements intended to promote hatred against an identifiable group are true, or that their vision of society will lead to a better world. [my emphasis] (p.48/49)

ii) free expression as a means of ensuring individuals the ability to gain self-fulfillment by developing and articulating thoughts and ideas as they see fit.

For Dickson, what Keegstra had taught and stated publicly

was sufficient evidence that it ran counter to this second principle informing free expression:

The extent to which the unhindered promotion of this message furthers free expression values must therefore be tempered in so far as it advocates with inordinate vitriol an intolerance and prejudice which views as execrable the process of individual self-development and human flourishing among all members of society. (p.49)

iii) free expression as a means of fostering participation in social and political decision-making.

For Dickson,

The connection between freedom of expression and the political process is perhaps the linchpin of the s.2(b) guarantee, and the nature of this connection is largely derived from the Canadian commitment to democracy. (p.49)

As such, a 'market-place' of ideas is very important in maintaining the debate required of all healthy democracies. However, even though the suppression of hate propaganda

undeniably muzzles the participation of a few individuals in the democratic process...None the less, expression can work to undermine our commitment to democracy where employed to propagate ideas anathemic to democratic values. That propaganda works in just such a way, arguing as it does for a society in which the democratic process is subverted and individuals are denied respect and dignity simply because of racial or religious characteristics. This brand of expressive activity is thus wholly inimical to the democratic aspirations of the free expression guarantee....What I do wish to emphasize...is that one must be careful not to accept blindly that the suppression of

expression must always and unremittingly detract from values central to freedom of expression. [my emphasis] (p.50)

In other words, hate propaganda is sufficiently antithetical to the democratic process as to be justifiably excluded from the section 2(b) guarantee.

2. rational connection to the objective.

Dickson agrees that the objective of protecting target-group members and of promoting harmonious relations among the various social and multi-cultural groups in Canada is rationally connected to the objective of section 319(2). (p.52) Dickson's argument is organized as a rebuttal of the argument for the dissent by McLachlin J. According to this argument, section 319(2) may be seen as irrational in three ways:

- i) It may promote the cause of hate mongers by giving them undeserved publicity for their cause;**
- ii) Because the public will see the government acting to suppress hate propoganda, some may come to believe that it may be truthful in part or in whole;**
- iii) The Weimar Republic had very similar laws against hate propoganda and yet these did not prevent the Nazi regime and its racist philosophy.**

At the outset, Dickson states that although it is difficult to prove the efficacy of section 319(2) in stemming hate propoganda, he is unconvinced that that, in fact, is what happens. He reaches this conclusion by responding to the three conclusions of McLachlin J.

First, Dickson, quoting himself in R. v. Morgantaler (1988), sees "...criminal law...[as] a very special form of governmental regulation, for it seeks to express society's collective disapprobation of certain acts and omissions." (p.53) Perhaps

Dickson's image here may be analogous to the effect a school teacher has on his class by virtue of his knowledge and his commitment to the curriculum and learning in general. In both cases, what is important is the kind of effect that the image of the law, in the first instance, and that of the teacher, in the second, define. Essentially, Dickson's argument has the law existing on at least two levels: the literal and the connotative. Thus it is that target-group members are reminded that they are protected from hate propaganda and society in general sees its government affirming the importance of Canada as a multi-cultural nation.

Second, as a result of the above, it is doubtful that citizens would have sympathy for hate-mongers as Dickson argues:

Pornography is not dignified by its suppression, nor are defamatory statements against individuals seen as meritorious because the common law lends its support to their prohibition. Again, I stress my belief that hate propaganda legislation and trials are the means by which the values beneficial to a free and democratic society can be publicized. In this context, no dignity will be unwittingly foisted upon the convicted hate-monger or his or her philosophy, and that a hate-monger might see him or herself as a martyr is of no matter to the content of the state's message. [my emphasis] (p.54)

Third, Dickson affirms that

No one is contending that hate propaganda laws can in themselves prevent the tragedy of the Holocaust; conditions particular to Germany made the rise of Nazi ideology possible despite the existence and use of these laws. [my emphasis] (p.54)

Essentially, Dickson does not see Canada as similar to the Weimar Republic, nor does he see any law as a panacea for the ills and evils to which it responds. Rather, he sees the law as both a legal condemnation and as a possible moral condemnation

of an act.

3. minimal impairment of the s. 2(b) freedom.

Again, Dickson responds to the counter-arguments which essentially argue that section 319(2)

...creates the possibility of punishing expression that is not hate propaganda...[thus] the effect of s. 319(2) is to limit the expression of merely unpopular or unconventional communications...This overbreadth and vagueness could consequently allow the state to employ s. 319(2) to infringe excessively the freedom of expression or, what is more likely, could have a chilling effect whereby persons potentially within s. 319(2) would exercise self censorship. (p.55)

The main question posed by those who feel that section 319(2) impairs free expression is: does this law fail “to distinguish between low value expression that is squarely within the focus of Parliament’s valid objective and that which does not invoke the need for the severe response of criminal sanction.” (p.56) For Dickson, the answer exists in an analysis of section 319(2).

i) The terms of section 319(2).

Because section 319(2) prohibits statements “other than in private conversation” its scope is much narrower than its detractors would admit. As well, because “it is reasonable to infer a subjective *mens rea* [criminal intent] requirement regarding the type of conversation covered by s. 319(2)” (p.56) a private conversation accidentally made public would not satisfy the requirements of the section - again, limiting its scope. Another restricting factor within section 319(2) is the use of the word “wilfully”. For its meaning in law, Dickson has relied on the definition given it by Martin J.A. in R. v. Buzzanga and Durocher (1979):

It is evident that the use of the word “wilfully” in

[s. 319(2)], and not in [s. 319(1)], reflects Parliament's policy to strike a balance in protecting the competing social interests of freedom of expression on the one hand, and public order and group reputation on the other hand. (p.57)

Dickson takes "wilfully" to mean that an accused

subjectively desires the promotion of hatred or foresees such a consequence as certain or substantially certain to result from an act done in order to achieve some other purpose... (p.57)

Thus, such an interpretation "significantly restricts the reach of the provision, and thereby reduces the scope of the targeted expression." (p.58) putting an added burden of proof on the Crown.

The next step in the analysis of section 319(2) deals with Kerans' J.A. reason for finding it in violation of the Charter. The problem, according to Kerans, exists in the fact that this section requires no proof of actual hatred stemming from whatever has been said. In response, Dickson argued

First, to predicate the limitation of free expression upon proof of actual hatred gives insufficient attention to the severe psychological trauma suffered by those identifiable groups targeted by hate propaganda. Secondly, it is clearly difficult to prove a causative link between a specific statement and hatred of an identifiable group. In fact, to require direct proof of hatred in listeners would severely debilitate the effectiveness of s. 319(2) in achieving Parliament's aim. It is well accepted that Parliament can use the criminal law to prevent the risk of serious harms, a leading example being the drinking and driving provisions in the *Criminal Code*. The conclusions of the Cohen Committee and subsequent study groups show that the risk of hatred caused by hate propaganda is very real, and in view of the grievous harm to be avoided in the context of this appeal, I conclude that proof of actual hatred is not

required in order to justify a limit under s.1. (p.58/59)

Just as “wilfully” required careful analysis to establish its meaning within the context of Parliament’s intent as expressed through section 319(2), so too, according to Dickson, does the word “hatred”:

Noting the purpose of s. 319(2), in my opinion the term “hatred” connotes emotion of an intense and extreme nature that is clearly associated with vilification and detestation...Hatred is predicated on destruction and hatred against identifiable groups therefore [it] thrives on insensitivity, bigotry and destruction of both the target group and of the values of our society. Hatred in this sense is a most extreme emotion that belies reason...

Those who argue that s. 319(2) should be struck down submit that it is impossible to define with care and precision a term like “hatred”. Yet, as I have stated, the sense in which “hatred” is used in s. 319(2) does not denote a wide range of emotions, but is circumscribed so as to cover only the most intense form of dislike. (p.59/60)

What remains, says Dickson, is for the judge, in any case dealing with section 319(2), to instruct the jury (as well as himself) in the circumscribed meaning of “hatred” which reflects Parliament’s intent in having passed this law. In particular, Dickson warns:

Such a direction should include express mention of the need to avoid finding that the accused intended to promote hatred merely because the expression is distasteful. (p.60)

ii) The defences to section 319(2).

The defences to the charge of wilfully promoting hatred against any identifiable group are found in section 319(3):

319(3) No person shall be convicted of an offence under

subsection (2)

- (a) if he establishes that the statements communicated were true;**
- (b) if, in good faith, he expressed or attempted to establish by argument an opinion on a religious subject;**
- (c) if the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true; or**
- (d) if, in good faith, he intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred toward an identifiable group in Canada.**

For Dickson, “only rarely will one who intends to promote hatred be acting in good faith or upon honest belief”; (p.61) therefore, the defences – 319(3) (b), (c), and (d) – negating as they do the idea of criminal intent, reflect

...a commitment to the idea that an individual’s freedom of expression will not be curtailed in borderline cases. The line between the rough and tumble of public debate and brutal, negative and damaging attacks upon identifiable groups is hence adjusted in order to give some leeway to freedom of expression. (p.61)

Furthermore, the defence of truth found in section 319(3)(a) is

an especially poignant indicator of Parliament’s cautionary approach and care in protecting freedom of expression. Of course, if statements of truth are made without the intention to promote hatred towards identifiable groups, the offence as defined in s. 319(2) has not been committed.

On the other hand, if a situation arises where an individual uses statements of truth in order to promote hatred against identifiable groups, the accused is acquitted despite the existence of the harm which Parliament seeks to prevent. Excusing the accused who intentionally promotes hatred through the communication of truthful statements is thus a circumspect measure associated with the importance attributed to truth - and hence to free expression - in our society. (p.61/62)

This defence of truth is crucial to Dickson's argument as it exemplifies the commitment of Parliament to the truth even at the risk of fomenting hatred against identifiable groups in Canada. After all, seeking the truth is one of Parliament's central objectives as well as one of the principles (as stated in *Irwin Toy*) which are the fundamentals of freedom of expression in Canada. However,

When the statement contains no truth... this flicker of justification for the intentional promotion of hatred is extinguished, and the harmful malice of the disseminator stands alone. The relationship between the value of hate propaganda as expression and the parliamentary objective of eradicating harm, slightly altered so as to increase the magnitude of the former where the statement of the accused is truthful, thus returns to its more usual condition, a condition in which it is permissible to suppress the expression...Where the likelihood of truth or benefit from an idea diminishes to the point of vanishing, and the statement in question has harmful consequences inimical to the most central values of a free and democratic society, it is not excessively problematic to make a judgement that involves limiting expression. (p.62/63)

After having defined the crucial words "wilfully" and "hatred", it is in the defences provided by section 319(3) in general, and in this section's affirmation regarding the overwhelming importance of the truth in public discourse in

particular, that Dickson situates his argument that section 319(2) is not overly broad in its scope as "only the most intentionally extreme forms of expression will find a place within s. 319(2)." (p.64) As a result of "the proportionality of hate propaganda legislation to legitimate parliamentary objectives", (p.64) Dickson dismisses the counter argument resting on the notion that section 319(2) will engender police harassment. (p.64)

iii) Alternative modes of furthering Parliament's objective.

Dickson recognizes that "One of the strongest arguments [against the necessity of section 319(2)] posits that a criminal sanction is not necessary to meet Parliament's objective." (p.64) this argument assumes that the kind of discrimination targeted by section 319(2) is best dealt with through education programs extolling tolerance and co-operation among the racial and ethnic communities of Canada. It adds that if education should fail, then human rights statutes are more effective than criminal prosecution as a response to hate-mongers because not only is the disseminator of hate propaganda subject to reduced stigma and punishment but expression is less threatened. Thus, it is argued, within human rights legislation exists more of an incentive for the hate-monger to co-operate with the human rights tribunals and, consequently, more of a possibility that the hate-monger will change his ways.

Dickson generally does not disagree with this counter-argument to the use of section 319(2); he does, however, extend it. He admits that the section 1 Charter override "should not operate in every instance" (p.65) thus forcing the government to rely on it. He further admits that any number of responses to the wilful promotion of hatred against identifiable groups may be used in combination as a coercive reaction. However, Dickson is firm in his desire that the government has in its arsenal all the possible responses to hate-mongers even though the criminal sanction ought to be used sparingly:

Though the fostering of attitudes among Canadians

will be best achieved through a combination of diverse measures, the harm done through hate propaganda may require that especially stringent responses be taken to suppress and prohibit a modicum of expressive activity... [in order] to punish a recalcitrant hate-monger. [my emphasis] (p.65)

Thus, through a variety of approaches available to the government and by virtue of the specific meanings in law of words like “wilfully” and “hatred” as well as through the defences provided in section 319(3), Dickson argues that section 319(2) impairs as little as possible the right to free expression as guaranteed by the Charter.

iv) Effects of the limitation.

Noting that under the Oakes’ test even if the first two criteria of proportionality are met, Dickson states that “the deleterious effects of a limit may be too great to permit infringement of the right or guarantee in issue.” (p.66) However, as regards the suppression of hate propaganda caught by section 319(2) the “impairment of an individual’s freedom of expression...is not of a most serious nature” (p.66/67) because of the narrowly drawn terms of this section and the defences provided by section 319(3).

Finally, Dickson stresses

...the enormous importance of the objective fuelling s. 319(2), an objective of such magnitude as to support even the severe response of criminal prohibition. Few concerns can be as central to the concept of a free and democratic society as the dissipation of racism, and the especially strong value which Canadian society attaches to this goal must never be forgotten in assessing the effects of an impugned legislative measure. (p.67)

The minority in Keegstra.

A. A philosophical view of freedom of expression and the Charter.

McLachlin J., writing for the minority, noted that freedom of expression has been understood both “as a means to other ends...[or] as an end in itself.” (p.78) She further notes that Western thought supports the idea that freedom of expression “is seen as worth preserving for its own intrinsic value.” (p.79)

As far as Canada is concerned,

The interpretation which has been placed on s. 2(b) of the Charter confirms the relevance of both the instrumental and intrinsic justifications for free expression... [furthermore] Freedom of expression protects certain values which we consider fundamental - democracy, a vital, vibrant and creative culture, the dignity of the individual. (p.81)

However, freedom of expression may also threaten

our fundamental governmental institutions and undercut racial and social harmony...[therefore] the law may legitimately trench on freedom of expression where the value of free expression is outweighed by the risks engendered by allowing freedom of expression. (p.81)

Finally, McLachlin J. notes that the Canadian guarantee of freedom of expression is “broad...and all expression is *prima facie* protected. Any infringement must be justified by the state under s. 1.” (p.82)

B. Hate propaganda and freedom of speech - an overview.

McLachlin begins this overview with the affirmation that The evil of hate propaganda is beyond doubt. It inflicts pain and indignity upon individuals who are members of the

group in question. In so far as it *may* persuade others to the same point of view, it *may* threaten social stability. And it is intrinsically offensive to people - the majority in most democratic countries - who believe in the equality of all people regardless of race or creed. [my emphasis] (p.85)

McLachlin notes the American concern for freedom of expression in Schenck v. United States (1919):

The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. (p.86)

This is also echoed in Whitney v. California (1927):

...no danger flowing from speech can be deemed clear and present, unless the incidence of evil apprehended is so imminent that it may befall before there is opportunity for complete discussion...moreover...unless the evil apprehended is relatively serious...There must be probability of serious injury to the State. (p.86)

This American understanding of “clear and present danger” was made somewhat more ideological when, in Brandenburg v. Ohio (1969), the court’s finding strongly argued that (in McLachlin’s words)

advocacy of the use of force or violation of the law cannot be proscribed “ except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action”. (p.88)

This ideological (as opposed to pragmatic) commitment to freedom of expression is succinctly summarized by McLachlin:

The rationale for invalidating statutes that are overbroad (even in a case where the litigant’s conduct is clearly not

protected by the First Amendment) [in which one finds the guarantee of freedom of expression] or vague is that they have a *chilling effect* on legitimate speech. Protection of free speech is regarded as such a strong value that legislation aimed at legitimate ends and in practice used only to achieve those legitimate ends may be struck down, if it also tends to inhibit protected speech. (p.90)

By way, it seems, of responding to Dickson's earlier argument regarding Canada's support for the international community's fight against racism, McLachlin notes that, for example, the European Commission on Human Rights has generously "permitted prosecutions for dissemination of racist ideas and literature...under the article [10]". (p.91) Furthermore

In other contexts, protection of free expression under this article has at times been decidedly lukewarm, as befits an international instrument which is designed to limit as little as possible the sovereignty of the nations that signed it. (p.91)

Essentially, then, from McLachlin's point of view, the American and the international perspectives on the protection of freedom of expression are somewhat divergent:

These international instruments embody quite a different conception of freedom of expression than the case law under the U.S. First Amendment. The international decisions reflect the much more explicit priorities of the relevant documents regarding the relationship between freedom of expression and the objective of eradicating speech which advocates racial and cultural hatred. The approach seems to be to read down freedom of expression to the extent necessary to accommodate the legislation prohibiting the speech in question.

Both the American and international approach recognize that freedom of expression is not absolute, and must yield in some circumstances to other values. The

divergence lies in the way the limits are determined. On the international approach, the objective of suppressing hatred appears to be sufficient to override freedom of expression. In the United States, it is necessary to go much further and show clear and present danger before free speech can be overridden. (p.92/93)

In Canada, McLachlin notes the history of legislation intended to curb freedom of expression. Here, the Cohen Committee (1965) is of particular interest as it was not until one of its former members, Pierre-Elliott Trudeau, had become Prime Minister that the *Criminal Code* was amended to create sections 318 (proscribing the advocating of genocide), 319(1) (proscribing the incitement of hatred likely to lead to a breach of the peace, and section 319(2) (proscribing the wilful promotion of hatred).

C. The scope of section 2 (b) of the Charter.

McLachlin recognizes that freedom of expression, which is not absolute, may be limited in several ways. She notes that in R.W.D.S.U., Local 580 v. Dolphin Delivery Ltd. (1986) “it was suggested, in *obiter dicta*, that violence and threats of violence would be excluded from the protection offered by s. 2(b).” (p.96) Regarding ‘purpose’ and ‘effect’:

Where the government’s aim was not to limit freedom of expression, and this is but an incident of its attempt to accomplish another goal, then the person complaining of the infringement must show that its *effect* was to infringe his constitutional freedom. (p.96)

In doing so, “a complainant must show that one of the suggested values [enumerated in *Irwin Toy*] underlying the guarantee is infringed...” (p.96) These values are:

1. seeking and attaining the truth is an inherently good activity;

2. participation in social and political decision-making is to be fostered and encouraged;
3. the diversity in the forms of individual self-fulfillment and human flourishing ought to be cultivated in an essentially tolerant, indeed welcoming, environment not only for the sake of those who convey a meaning, but also for the sake of those for whom it is conveyed. (p.96/97)

McLachlin's analysis of the Crown's appeal of Keegstra then begins with the following questions:

1. Is the impugned activity or legislation, given its form and content, protected by the guarantee of freedom of expression found in section 2(b)?
2. Is the purpose or effect of the government action to restrict freedom of expression?

McLachlin concludes that if "the answers to both these questions are affirmative, a breach of the section is established and it is necessary to consider whether the government action or legislation is saved under s. 1 of the Charter." (p.97)

Next, McLachlin deals with the three arguments which characterize expression which is caught by section 319(2) and is not saved by section 1 of the Charter.

D. The argument based on violence.

McLachlin does not accept that Keegstra's antisemitism is analogous to a threat or an act of violence:

While many may find Mr. Keegstra's ideas unsettling, it is not suggested that they are made with the intention or have the effect of compelling Jewish people or anyone else to do one thing or another. Nor do they urge violence against the Jewish people. This was the context in

which “threat” was used in *Dolphin Delivery, supra*. Mr. Keegstra’s communications were offensive and propagandistic, but they did not constitute threats in the usual sense of the word. [my emphasis] (p.98)

Also, McLachlin concludes that

Keegstra’s statements do not constitute violence or threats of violence...[because] Violence as discussed in *Dolphin Delivery* and *Irwin Toy* connotes actual or threatened physical interference with the activities of others. (p.98)

Moreover, McLachlin argues that violence is “antithetical to the values underlying the guarantee of freedom of expression, [therefore] it is logical and appropriate that violence and threats of violence be excluded from its [section 2(b) protection] scope.” (p.99) However, she concludes that hate propaganda does not equal violence. (p.98) In fact, McLachlin compares it to the heated political debates among various political parties, suggesting that “In some contexts, it [the promotion of hate propaganda] is not inimical to the workings of democracy.” (p.99) And, while concluding that “[t]here might be a world of difference between such statements and expression covered by s. 319(2) [the difference is] in content, not form” (p.99) Regarding the argument that hate propaganda attacks the credibility of those it vilifies, McLachlin notes that “[f]reedom of expression guarantees the right to loose one’s ideas on the world; it does not guarantee the right to be listened to or to be believed.” (p.99) Thus, McLachlin concludes

that statements promoting hatred are not akin to violence or threats of violence, and that the argument that they should for this reason be excluded from the protection of 2(b) of the Charter should be rejected. (p.100)

E. The arguments based on sections 15 and 27 of the Charter.

Section 15 of the Charter states:

Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

McLachlin concludes that

There is no violation of s. 15 in the case at the bar, since there is no law or state action which puts the guarantee of equality into issue. The right granted by s. 15 is the right to be free from inequality and discrimination effected by the state. That right is not violated in the case at bar. The conflict, then, is not between *rights*, but rather between philosophies. (p.100/101)

McLachlin also argues that, first, since section 2(b) seeks to protect the individual from the government's attempt to infringe on his freedom of expression, as does section 15,

it seems a misapplication of Charter values to thereby limit the scope of that individual guarantee with an argument based on s. 15, which is also aimed at circumscribing the power of the state. (p.101)

Second, because the Court in *Irwin Toy* has rejected proscribing freedom of expression based on content, and because the Court has agreed with the argument based on context in *Edmonton Journal*, she notes that if a balancing of rights is necessary, then it ought to be done under section 1 rather than section 2(b).125(K.p.102)

Section 27 of the Charter states:

This Charter shall be interpreted in a manner consistent

with the preservation and enhancement of the multi-cultural heritage of Canadians.

Again, McLachlin argues that section 27 does not conflict with the case at bar because section 27 is a statement of principle rather than of rights conferred on all Canadians. Secondly, she sees section 27 as potentially overbroad in what it may proscribe:

...this is not to mention the difficulty of weighing abstract values such as multiculturalism in the balance against freedom of speech. (p.102)...Is not the ideal of toleration, fundamental to our traditional concept of free expression, also the essence of multiculturalism, and can multiculturalism truly be promoted by denying that ideal?" (p.103)

F. The argument based on international law.

McLachlin rejects the argument that, because Canada has signed various international articles all of which denounce racism and bigotry, the Court should uphold the limitation on freedom of expression in section 319(2). She concludes that the "international tradition" (p.104) regarding the infringement of freedom of expression is inconsistent with the Canadian model which "posits a broad and unlimited right to expression under 2(b)" (p.104) which can only be restricted by the action of section 1.

G. The argument based on the absence of redeeming value.

According to McLachlin, Dickson, C.J.C. has argued

that Charter rights must be interpreted purposively, in the light of the interests they were meant to protect, and in their proper linguistic, philosophic and historical contexts. (p.105)

Therefore, expression that wilfully promotes hatred was not the type of expression that the Charter attempted to protect because it lacked redeeming value within the context of a just and equal Canadian society. McLachlin concludes:

This argument amounts to saying that the right to free expression enshrined in the Charter must be confined to the ambit of the rules affecting free speech which preceded the Charter. (p.105)

McLachlin dismisses this argument, suggesting that even prior to the Charter,

this court was not prepared to accept historical legal limitations on expression where they conflicted with the larger Canadian conception of free speech. (p.106)

Next McLachlin deals with the three principles informing freedom of expression as articulated by *Irwin Toy*. These principles provided a context for protected speech. Protected speech was speech that was 1. true, 2. was essential to the debate in the market-place of ideas required by a democracy, and 3. was essential for the self-fulfillment and flourishing of the individual. These principles were used by Dickson C.J.C. when arguing that the wilful promotion of hatred against an identifiable group was not caught by any of these three principles. McLachlin, however, argues that "none of the previous decisions of this court involving free speech have followed such an approach." (p.106) Secondly, even though the expression in *Irwin Toy*

had little redeeming value...the court had little difficulty in finding that the limitation of such speech infringed the guarantee of freedom of expression in s. 2(b) of the Charter." (p.106)

Thirdly, McLachlin sees a circular argument stemming from section 319(2)

If one starts from the premise that the speech covered by s. 319(2) is dangerous and without value, then it is simple to conclude that none of the commonly offered justifications for protecting freedom of expression are served by it. (p.106)

Finally, she concludes that

Attempts to confine the guarantee of free expression only to content which is judged to possess redeeming value or to accord with the accepted values strike at the very essence of the value of freedom, reducing the realm of protected discussion to that which is comfortable and compatible with current conceptions. If the guarantee of free expression is to be meaningful, it must protect expression which challenges even the very basic conception about our society. A true commitment to freedom of expression demands nothing less. [my emphasis] (p.107)

H. The analysis under section 1.

McLachlin characterizes any section 1 analysis as essentially one of balancing between a fundamental right or freedom and an objective of the state which is so important that overriding the fundamental right or freedom can be demonstrably justified. Furthermore, and, somewhat curiously, she adds:

In this task logic and precedent are but of limited assistance. What must be determinative in the end is the court's judgement, based on an understanding of the values our society is built on and the interests at stake in the particular case...the judge must situate the analysis in the facts of the particular case, weighing the different values represented in that context. [my emphasis] (p.109)

I. The objective of section 319(2) of the Criminal Code.

The objective of this section - to prevent the promotion of hatred towards identifiable groups in our society - has, according to McLachlin, "the twin values of social harmony and individual dignity." (p.111) She believes these are

...laudable goals and serious ones. The objectives are clearly of a substantial nature. Given the history of racial and religious conflict in the world in the past 50 years, they may be said to be pressing, even though it is not asserted that an emergency exists in Canada. [my emphasis] (p.111)

At the same time, McLachlin admits that the Cohen Committee's Report indicates "that defamation of particular groups is a pressing and substantial concern in Canada" (p.111) creating harm for both the victims of hatred and Canadian society as a whole. Thus, she is satisfied that the objective of section 319(2) "is of sufficient gravity to be capable of justifying limitations on constitutionally protected rights and freedoms." (p.112) However, for McLachlin,

The real question in this case, as I see it, is whether the means - the criminal prohibition of wilfully promoting hatred - are proportional and appropriate to the ends of suppressing hate propaganda in order to maintain social harmony and individual dignity. (p.112)

J. Proportionality

(a) general considerations.

While admitting that some restrictions on free expression exist justifiably in a free and democratic society, McLachlin argues that freedom of expression is unique in two ways. First, it is a necessary requirement in any democracy; therefore,

restrictions which touch the critical core of social and political debate require particularly close consideration because of the dangers inherent in state censorship of such debate. [my emphasis] (p.113)

Second, limitations on one form of expression “tend to have an effect on expression other than that which is their target.” (p.113)

(b) rational connection.

Essentially, the question here asks: will the intent of the law be achieved through its use? In other words - does it work? According to McLachlin, if

the measure may in fact detract from the objectives it is designed to promote, the absence of a rational connection between the measure and the objective is clear. (p.115)

It is McLachlin’s view that, for the following reasons, section 319(2) is not rationally connected to the objective of preventing the promotion of hatred against identifiable groups in Canada.

- 1. It may well have a chilling effect on defensible expression by law-abiding citizens;**
- 2. It is far from clear that it provides an effective way of curbing hate-mongers, some of whom have argued that this type of criminal prosecution is “a million dollars worth of publicity”;**
- 3. This criminal process may create sympathy for the hate-monger’s cause as theories of a grand conspiracy between government and elements of society wrongly perceived as malevolent can become all too appealing if government dignifies them by completely suppressing their utterance;**

4. Finally, successful prosecutions under laws forbidding the promotion of hatred in pre-Hitler Germany did not prevent the catastrophe of the Nazi rise to power. (p.115/116)

McLachlin concludes “[c]ertainly it cannot be said that there is a strong and evident connection between the criminalization of hate propaganda and its suppression.” (p.116)

(c) minimal impairment.

In determining whether or not section 319(2) impairs freedom of expression as little as possible, McLachlin asks the following two questions:

1. Is this section “drafted too broadly, catching more expressive conduct than can be justified by the objectives of promoting social harmony and individual dignity”? (p.117) According to McLachlin, the word “hatred” is too difficult to limit to a very specific meaning in law. As well, it is too subjective. It is proved by the inference drawn by judge and /or jury and “inferences are more likely to be drawn when the speech is unpopular.” (p.118) Next, is the problem with the phrase “wilful promotion”:

It is argued that the requirement of “wilful promotion” eliminates from the ambit of s. 319(2) statements which are made for honest purposes such as telling a perceived truth or contributing to political or social debate. The difficulty with this argument is that those purposes are compatible with the intention (or presumed intention by reason of foreseeability) of promoting hatred. A belief that what one says about a group is true and important to political and social debate is quite compatible with and indeed may inspire an intention to promote active dislike of that group. Such a belief is usually compatible with foreseeing that promotion of such dislike may stem from one’s statements. The result is that

people who make statements primarily for non-nefarious reasons may be convicted of wilfully promoting hatred. (p.118)

The problem, for McLachlin, is further compounded by the fact that there is no requirement that harm to the intended victims or incitement to hate them has occurred.

While admitting that the breadth of section 319(2) is somewhat narrowed by the defences provided in 319(3), McLachlin argues

...it is far from clear that in practice they significantly narrow the ambit of s. 319(2)...The most important defence is truth - if the accused establishes that his statements are true, s. 319(2) is not violated. On the other hand... conviction may result from true statements given that the onus of proof lies on the accused. Moreover, the concepts of "truth" and "reasonable belief in truth" may not always be applicable. Statements of opinion may be incapable of being classified as true or false, communicating not facts so much as sentiments and beliefs. Polemic statements frequently do not lend themselves to proof of truth or falsity. As for the defence of reasonable belief, how is a court to evaluate the reasonableness of diverse theories, political or otherwise? The defence of statements in the public interests poses similar problems. How is a court to determine what is in the public interest, given the wide range of views which may be held on matters potentially caught by s. 319(2)? (p.119)

Next, McLachlin asks if the criminalization of hate-mongering is "in itself...an excessive response to the problem, given the alternatives." (p.117) Noting that "[o]nly private conversations are exempt from state scrutiny" (p.119), McLachlin concludes that section 319(2) catches everything from speeches on the corner soap-box to ideas in books, films, and works of art. (p.119) Furthermore, because Salmon Rushdie's Satanic Verses and a film called "Nelson Mandela" (among other

instances) have already been stopped at the border (albeit, briefly), McLachlin argues that

[t]he real answer to the debate about whether s. 319(2) is overbroad is provided by the section's track record. Although the section is of relatively recent origin, it has provoked many questionable actions on the part of the authorities. (p.120)

Ultimately, McLachlin's concern is with the overbreadth of section 319(2) is

that the legislation may have a chilling effect on legitimate activities important to our society by subjecting innocent persons to constraints born out of a fear of the criminal process. (p.120)

2. Secondly, is the Criminal code the best way of responding to hate-mongers? McLachlin thinks not and cites Alan Borovoy's arguments against the criminal prosecution of hate-mongers. Criminal prosecution of these cases is unnecessary as

proceedings under the human rights codes show strong success in achieving their essential purpose, the curtailment of discrimination. It may be counter-productive in that: (1) racial discriminators threatened with prosecution may have little or no incentive to co-operate with human rights boards and voluntarily amend their conduct...and (2) it leaves open the argument that "where prosecutorial remedy exists, the state is obliged to adopt such a route first"...thereby eliminating the possibility of voluntary amendment of conduct [thus, concludes Borovoy] "...the criminal process can safely be eliminated from human rights matters". (p.121/122)

Finally, McLachlin concludes that because "greater precision is required in criminal law than, for example, in human rights legislation" (p.122) it is better to proceed under the

latter's aegis as

it has considerable discretion in determining what messages or conduct should be banned and by its order may indicate more precisely their exact nature, all of which occurs before any consequences inure to the alleged violator. (p.122)

McLachlin concludes that "the criminalization of hate statements does not impair free speech to the minimum extent permitted by its objectives." (K.p.122)

(d) Importance of the right versus the benefit conferred.

Noting that the infringement of freedom of expression in *Keegstra* is not the same as in *Irwin Toy* where "the only value that could be prayed in aid of free expression was the right to earn a profit", (p.123) McLachlin concludes that

[a]n infringement of this seriousness [as in *Keegstra*] can only be justified by a countervailing state interest of the most compelling nature....[however] It is far from clear that the legislation does not promote the cause of hate-mongering extremists and hinder the possibility of voluntary amendment of conduct more than it discourages the spread of hate propaganda. Accepting the importance to our society [of] the goals of social harmony and individual dignity, of multiculturalism and equality, it remains difficult to see how s. 319(2) fosters them. (p.123/124)

Therefore, McLachlin concludes that section 319(2) does not meet the proportionality test. It is thus not a justifiable section 1 infringement of the guarantee of freedom of expression found in section 2(b) of the Charter. She, therefore, would dismiss the Crown's appeal.

4. Regina v. Butler, February 27, 1992.

A major issue which, it seems, is only adumbrated in the Malcolm Ross case, has to do with whether or not a public school teacher ought to be a moral exemplar for his students. Consequently, the Butler case, dealing as it does with obscenity and pornography and whether or not Parliament is justified in guarding, at least to some degree, the moral fibre of Canada, is significant to the Ross case. As did *Irwin Toy*, the Butler case also stresses the importance, from Parliament's perspective, of protecting children from certain kinds of expression.

In August 1987, Donald Victor Butler opened the Avenue Video Boutique in Winnipeg, Manitoba. On August 21, 1987, the Winnipeg police searched his boutique, seized all his inventory, and eventually charged him under section 163 of the Criminal Code which deals with obscenity and pornography. He was convicted on eight counts under section 163 and acquitted on 242 other counts. The Crown appealed these acquittals and Mr. Butler appealed his eight convictions. The majority of the Manitoba Court of Appeal allowed the Crown's appeal. Mr. Butler then appealed to the Supreme Court of Canada.

Section 163 of the Criminal Code states:

(1) Every one commits an offence who,

(a) makes, prints, publishes, distributes, circulates, or has in his possession for the purpose of publication, distribution or circulation any obscene written matter, picture, model, phonograph record or other thing whatever; or

(b) makes, prints, publishes, distributes, sells or has in his possession for the purpose of publication, distribution or circulation a crime comic.

(2) Every one commits an offence who knowingly, without lawful justification or excuse,

- (a) sells, exposes to public view or has in his possession for such a purpose any obscene written matter, picture, model, phonograph record or other thing whatever;**
- (b) publicly exhibits a disgusting object or and indecent show;**
- (c) offers to sell, advertises or publishes and advertisement or, or has for sale or disposal, any means, instructions, medicine, drug or article intended or represented as a method of causing abortion or miscarriage; or**
- (d) advertises or publishes an advertisement of any means, instructions, medicine, drug or article intended or represented as a method for restoring sexual virility or curing venereal diseases or diseases of the generative organs.**

The rest of this Criminal Code legislation (sections 3 - 7) stipulates a defence of serving "the public good"; stipulates a context in law for this public good; notes that motives of an accused are irrelevant; and defines key words and phrases. The last section, however, bears stating:

- (8) For the purposes of this Act, any publication a dominant characteristic of which is the undue exploitation [my emphasis] of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence shall be deemed to be obscene.**

The constitutional questions are: (a) does section 163 violates section 2(b) of the Charter? and, (b) is this violation

saved by section 1 of the Charter?

Sopinka J., writing for the majority, found it was useful to divide pornography into three categories:

- i. explicit sex with violence;
- ii. explicit sex without violence but which subjects people to treatment that is degrading or dehumanizing, and;
- iii. explicit sex without violence that is neither degrading nor dehumanising. Violence in this context includes both actual physical violence and threats of physical violence. (Regina v. Butler, 1992, p.150)

(a) Does section 163 violate section 2(b) of the Charter?

Sopinka, in reference to *Keegstra*, argued that any interpretation of section 2 ought to be

a generous approach...Our Court confirmed the view...that activities cannot be excluded from the scope of the guaranteed freedom on the basis of the content or meaning being conveyed. (p.153)

In the Butler case, he argued that

the majority of the Court of Appeal did not sufficiently distance itself from the content of the [alleged pornographic] materials....[furthermore] Meaning sought to be expressed need not be “redeeming” in the eyes of the court to merit the protection of s. 2(b) whose purpose is to ensure that thoughts and feelings may be conveyed freely in non-violent ways without fear of censure. [my emphasis] (p.153)

As a result, Sopinka concluded that the Court of Appeal’s focus on content in *Butler*, caused it to override, unjustifiably, the

accused's freedom of expression as guaranteed under section 2 of the Charter.

(b) Is section 163 justified under section 1 of the Charter?

After concluding that section 163(8) "provides an intelligible standard" (p.155) under law by which to judge such cases, Sopinka concludes that section 163 is prescribed by law. Next, Sopinka deals with the argument of the respondent (the Crown, Manitoba) that the objective aimed at in overriding the freedom to distribute obscene materials is of a pressing and substantial nature.

i) the objective.

From the respondent's point of view

these objectives are the avoidance of harm resulting from antisocial attitudinal changes that exposure to obscene material causes and the public interest in maintaining a "decent society". On the other hand, the appellant [Butler] argues that the objective of s. 163 is to have the state act as "moral custodian" in sexual matters and to impose subjective standards of morality. (p.155)

While arguing that

To impose certain standards of public and sexual morality, solely because it reflects the conventions of a given community, is inimical to the exercise and enjoyment of individual freedoms, which form the basis of our social contract[,] (p.156)

Sopinka adds

I cannot agree with the suggestion of the appellant that Parliament does not have the right to legislate on the basis of some fundamental conception of morality for the purposes of safeguarding the values which are integral to a

free and democratic society...the mere fact that a law is grounded in morality does not automatically render it illegitimate. In this regard, criminalizing the proliferation of materials which undermine another basic Charter right may indeed be a legitimate objective. (p.156)

However, regarding section 163, Sopinka believes “the overriding objective...is not moral disapprobation but the avoidance of harm to society.” (p.157) Citing the Report on Pornography by the Standing Committee on Justice and Legal Affairs (1978), Sopinka notes:

The clear and unquestionable danger of this type of material is that it reinforces some unhealthy tendencies in Canadian society. The effect of this type of material is to reinforce male-female stereotypes to the detriment of both sexes. It attempts to make degradation, humiliation, victimization, and violence in human relationships appear normal and acceptable. A society which holds that egalitarianism, non-violence, consensualism, and mutuality are basic to any human interaction, whether sexual or other, is clearly justified in controlling and prohibiting any medium of depiction, description or advocacy which violates these principles. (p.157)

Sopinka also notes that “notions of moral corruption and harm to society are not distinct, as the appellant suggests, but are inextricably linked.” [my emphasis] (p.157) Noting *Keegstra*, Sopinka argues that

this court unanimously accepted that the prevention of the influence of hate propaganda on society at large was a legitimate objective...[therefore] This court has thus recognized that the harm caused by the proliferation of materials which seriously offend the values fundamental to our society is a substantial concern which justifies restricting the otherwise full exercise of freedom of expression. (p.159)

Finally, after noting that legal precedents for the suppression of pornography and obscenity existed under the aegis of the *Canadian Bill of Rights* prior to the Charter, and, that “such legislation may be found in most free and democratic societies” (p.159), Sopinka concludes that “the objective of the impugned legislation is valid only in so far as it relates to the harm to society associated with obscene materials.” (p.160)

Proportionality.

i. rational connection

Sopinka makes a very important comparison when he states

The message of obscenity which degrades and dehumanizes is analogous to that of hate propaganda. As the Attorney-General of Ontario has argued...obscenity wields the power to wreak social damage in that a significant portion of the population is humiliated by its gross misrepresentations. (p.162)

Despite the fact that a direct link between obscenity and hate propaganda

may be difficult, if not impossible, to establish, it is reasonable to presume that exposure to images bears a causal relationship to changes in attitudes and beliefs. (B.p.163)

In support of this argument, Sopinka quotes Dickson C.J.C. in *Keegstra*:

First, to predicate the limitation of free expression upon proof of actual hatred gives insufficient attention to the severe psychological trauma suffered by members of those identifiable groups targeted by hate propaganda. Secondly, it is clearly difficult to prove a causative link between a specific statement and hatred of an identifiable

group. (p.163)

He also agrees with Twaddle J.A. of the Manitoba Court of Appeal

who expressed the view that Parliament was entitled to have a “reasoned apprehension of harm” resulting from the desensitization of individuals exposed to materials which depict violence, cruelty, and dehumanization in sexual relations. [my emphasis] (p.164)

Sopinka thus concludes “that there is a sufficiently rational link”180(B.p.164) between section 163 and the objective of protecting the public from the harm of pornography.

ii. minimal impairment.

Sopinka list five factors contributing to the finding that section 163 minimally impairs freedom of expression.

- a) Section 163 “does not proscribe sexually explicit erotica without violence that is not degrading or dehumanising...[only that which] creates a risk of harm to society.” (p.165)**
- b) “[M]aterials which have scientific, artistic or literary merit are not captured by the provisions...the court must be generous in its application of the “artistic defence”. (p.165)**
- c) Because it has been difficult to determine, in past laws, with exactitude what is and what is not obscene “the only practical alternative is to strive towards a more abstract definition of obscenity which is contextually sensitive and responsive to progress in the knowledge and understanding of the phenomenon to which the legislation is directed” [my emphasis] (p.165)**
- d) Section 163 does not prevent individuals from**

**“private use or viewing of obscene materials.
(p.166)**

e) The Canadian Civil Liberties Association and the Manitoba Association for Rights and Liberties has argued that the objectives of section 163 could be met better through time, manner, and place restrictions rather than the outright prohibition of section 163. In addition, they have argued that the following strategies offer better alternatives to section 163:

**counselling rape victims to charge their assailants, provision of shelter and assistance for battered women, campaigns for laws against discrimination on the grounds of sex, education to increase sensitivity of law enforcement agencies and other governmental authorities.
(p.167)**

Sopinka notes that these alternatives are

***responses* to the harm engendered by negative attitudes against women...given the gravity of the harm, and the threat to the values at stake, I do not believe that the measure chosen by Parliament is equalled by the alternatives which have been suggested...**Serious social problems such as violence against women** [my emphasis] require multi-pronged approaches by government. Education and legislation are not alternatives but complements in addressing such problems. (p.167)**

Thus, section 163 minimally impairs the expression at issue.

iii. balance between effects of limiting measures and legislative objective.

Sopinka concludes that the effects of section 163 are justified because

this kind of expression lies far from the core of the guarantee of freedom of expression...[and because the objective of section 163] is aimed at avoiding harm, which Parliament has reasonably concluded will be caused directly or indirectly, to individuals, groups such as women and children, and consequently to society as a whole, by the distribution of these materials. (p.168)

Finally, Sopinka notes the distinction between the way the trial judge ruled and his own conclusion regarding the constitutionality of section 163. While the trial judge's context within which the issue was mediated was a legal one, Sopinka's context was the issue of harm and victims which he considered more important. Consequently, he ruled that section 163 was demonstrably justified under section 1 of the Charter.

Gonthier J. - adding to the majority decision.

Although in agreement with Sopinka about "his disposition of the case and with his reasons generally", (p.169) Gonthier J. wished to add to them "with respect to the judicial interpretation of s. 163...and to its constitutional validity." (p.169)

The constitutional validity of s. 163 of the Code.

Gonthier notes that

Sopinka J. rules out the possibility that "public morality" can be a legitimate objective for s. 163 of the *Code* and, while admitting that Parliament may legislate to protect "fundamental conceptions of morality", he goes on to conclude that the true objective of s. 163 is the avoidance of harm to society. (p.176)

Gonthier, unlike Sopinka, sees this distinction between public morality and the avoidance of harm to society as, simply, distinctions "between...two orders of morality..." (p.177) He concludes: "...I cannot conceive that the state could not

legitimately act on the basis of morality.” (p.177)

Supporting this conclusion, Gonthier cites a number of cases dealt with by the Court since the Charter.193(B.p.177) He also notes that “Morality is also listed as one of the grounds for which freedom of expression can be restricted in the European Convention For the Protection of Human Rights and Fundamental Freedoms...” (p.177) Furthermore, he cites Ronald Dworkin’s “Liberty and Moralism” (in Taking Rights Seriously) in which Dworkin argued that Parliamentarians had to take notice of

a moral consensus...based on an appeal to the legislator’s sense of how his community reacts to some disfavoured practice. But this same sense includes an awareness of the grounds on which that reaction is generally supported ...[therefore] He must sift these arguments and positions, suppose general principles or theories vast parts of the population could not be supposed to accept, and so on. (p.177/178)

For Gonthier, this task of Parliament’s is also the task of the Court. (p.178) However, such a conclusion is to be understood within the following context:

- 1. “...the moral claims must be grounded. They must involve concrete problems such as life, harm, well-being, to name a few, and not merely differences of opinion or of taste.” (p.178)**
- 2. “...a consensus must exist among the population on these claims. They must attract the support of more than a simple majority of the people. In a pluralistic society such as ours, many different conceptions of the good are held by various segments of the population. The guarantees of s. 2 of the Charter protect this pluralistic diversity. However, of the holders of these different conceptions agree that some conduct is not good, then the respect for pluralism that underlies s.2 of the Charter becomes less insurmountable an**

objection to state action...In this sense, a wide consensus among holders of different conceptions of the good is necessary before the state can intervene in the name of morality.” (p.178)

Gonthier concludes that preventing harm is, in fact, a valid objective under section 1 of the Charter. (p.179) As a result, Gonthier differs with Sopinka regarding the latter’s view that the third category of pornography, from a legal standpoint, is benign:

Contrary to Sopinka J., I consider that the third category may sometimes attract criminal liability. The requirement that the impugned materials exceed the community standard of tolerance of harm provides sufficient precision and protection for those whose activities are at stake...the criterion of tolerance of harm by the community as a whole is one that, by definition, reflects the general level of tolerance throughout all sectors of the community, hence generally of all its members. It is, therefore, a very demanding criterion to meet as it must be by definition generally known or apprehended. (p.179)

5. Zundel v. The Queen et al., August 27, 1992

Ernst Zundel was charged under section 181 of the Criminal Code as a result of having published the pamphlet "Did Six Million Really Die?" which denied the fact of the Holocaust during World War II. Zundel was convicted and in his appeal to the Ontario Court of Appeal his conviction was upheld on constitutional grounds but struck down for errors in the admission of evidence and the charge to the jury. This second trial resulted in Zundel again being convicted. His second appeal to the Ontario Court of Appeal was denied unanimously. It was only on the constitutional issues that Mr. Zundel was allowed to appeal to the Supreme Court of Canada which allowed his appeal.

At first blush, the Zundel case, stemming from Ernst Zundel's Holocaust denial, does not seem particularly relevant to an understanding of the Malcolm Ross case.* After all, Mr. Zundel is not a teacher, nor are he or his activities generally associated with children in, at least, a paternal way. However, *Zundel* is germane to *Ross*. The dissent clearly articulates the threat to all Canadians (and, in particular, to Jewish Canadians) of Holocaust denial. Equally significant in *Zundel* is the majority's affirmation (under *Keegstra*) of section 319(2) of the Criminal Code. Indeed, from the majority's view, what is at issue in *Zundel* is the vagueness of section 181 and of its redundancy when compared with the much more carefully crafted section 319(2). In essence, then, *Zundel* outlines the legal borders within which to prosecute Holocaust deniers while its dissent recognizes the unique venom that is Holocaust denial.

Section 181 of the Criminal code states:

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

*Of striking interest in *Keegstra*, *Zundel* and *Ross* is a particular insensitivity, at best, or, at worst, what may be described as a certain pathological form of intellectual detachment that seems to govern part of the Court's commitment to freedom of expression. I will deal with this in chapter 5.

offence and liable to imprisonment for a term not exceeding two years.

The dissent.

Writing for the dissent, Cory J. and Iacobucci J. (known hereafter as the dissent), noted that the first Ontario Court of appeal ruling against Ernst Zundel had stated, in the words of the dissent, that “deliberate lies likely to produce racial and social intolerance did not fall within [section 2(b)’s] embrace.” (Zundel v. The Queen et al, 1992, p.462) Furthermore, that court had concluded:

Spreading falsehoods knowingly is the antithesis of seeking truth through the exchange of ideas. It would appear to have no social or moral value which would merit constitutional protection. Nor would it aid the working of parliamentary democracy or further self fulfilment. (p.462)

The dissent also noted that in the second appeal to the Ontario Court of Appeal the trial judge characterized “the promotion of racism as a practice contrary to a public interest.”: (p.463)

[I]t is not in the public interest to have one segment of the community racially or religiously intolerant against another segment of the community. An attack on one segment of the community is, in reality, an attack on the whole community. If one segment is not protected from criminal defamation and libel, accusations of criminal wrong-doing, criminal fraud, the whole community is vulnerable because the next segment is fair game, and then the next segment is fair game, until you have destroyed the entire community. (p.463)

The Charter analysis - section 1.

The dissent notes (in reference to *Keegstra*) that the content of all expression is protected by the Charter “unless the expression is communicated in a physically violent form...”

(p.469) It also concludes that insofar as section 181 targets expression “that causes or is likely to cause injury or mischief to the public interest...” it infringes freedom of expression. The question is whether or not section 181 can be justified under section 1 of the Charter and, to answer it, the dissent turns to the Oakes test. However, of immediate concern for the dissent is whether or not section 181 is clear as “a person should know with reasonable certainty what the law is and what actions are in danger of breaking the law.” (p.471)

i. How should “public interest” be defined within section 181?

Noting that the term “public interest” appears “224 times in 84 federal statutes...[and] in comparable numbers in provincial statutes” (p.472) the dissent argues that the term

must be interpreted in light of the legislative history of the particular provision in which it appears and the legislative and social context in which it is used. (p.472)

The general context for an understanding of the “public interest” is, they argue, to be found within the Charter:

A democratic society capable of giving effect to the Charter’s guarantees is one which strives toward creating a community committed to equality, liberty and human dignity. The public interest is, therefore, in preserving and promoting these goals...Thus, the term “public interest” as it appears in s. 181 refers to the protection and preservation of those rights and freedoms set out in the charter as fundamental to Canadian society. It is only if the deliberate false statements are likely to seriously injure the rights and freedoms contained in the Charter that s. 181 is infringed...It follows that the section cannot be said to be so vague that it is void. (p.473)

ii. The objective of section 181 must be of pressing and substantial concern in a free and democratic society.

Noting that the decision in *Keegstra* recognized clearly “the invidious and severely harmful effects of hate propaganda upon target group members” (p.474) the dissent argued that the context for this case testing the constitutionality of section 181 remained, specifically, Holocaust denial. And, in turn, Holocaust denial must be seen in the way it affects Canadian society:

The publication of such lies makes the concept of multiculturalism in a true democracy impossible to attain. These materials do not merely operate to foment discord and hatred, but they do so in an extraordinarily duplicitous manner. By couching their propaganda as the banal product of disinterested research, the purveyors of these works seek to circumvent rather than appeal to the critical faculties of their audience. The harm wreaked by this genre of material can best be illustrated with reference to the sort of Holocaust denial literature at issue in this appeal.

Holocaust denial has pernicious effects upon Canadians who suffered, fought and died as a result of the Nazi’s [sic] campaign of racial bigotry and upon Canadian society as a whole. For Holocaust survivors, it is a deep and grievous denial of the significance of the harm done to them and thus belittles their enormous pain and loss. It deprives others of the opportunity to learn from the lessons of history. To deliberately lie about the indescribable suffering and death inflicted upon the Jews by Hitler is the foulest of falsehoods and the essence of cruelty. Throughout their tragic history, the circulation of malicious false reports about the Jewish people has resulted in attacks, killings, pogroms and expulsions. They have, indeed, suffered cruelly from the publication of falsehoods concerning their culture. [my emphasis] (p.474/475)

Concluding their argument that section 181 is connected to the aims of the Charter, the dissent notes that it encourages

racial and social tolerance...[and expresses society's] repugnance... for [deliberate lies] that are likely to cause serious injury or mischief to the public interest which is defined in terms of Charter values. (p.475)

iii. International instruments and legislative responses in other jurisdictions.

Characterizing the Holocaust as

undeniably a watershed marking the apogee of the brutal consequences which flow from unchecked racism (p.476) ...[and as] that most evil episode in history...[in which] the Jewish people...were its victims. (p.477)

the dissent noted that, in response to such “horrors” (p.476) Canada is a signatory to two conventions subscribed to by the international community: The United Nations International Covenant on Civil and Political Rights, 999 U.N.T.S. 172, article 20(2), and the International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 212, preamble and article 4. They argue that these documents support and emphasize the aims of section 181. Furthermore, they argue that decisions by German courts (1980) support the argument that “false allegations about the Holocaust [are] not about different interpretations of history but about disrespect...” (p.478)

iv. A permissible shift in emphasis.

The argument was made that section 181 is an anachronism in that its origin dates back to the offence of De Scandalis Magnatum (1275) - making deliberate slanderous statements against the great persons of the realm which could then lead to feuding and the consequent social instability. The dissent argues that maintaining section 181 is a permissible shift in emphasis - as opposed to a shift in purpose - in that Canadian

multiculturalism requires the protection of all minorities from the wilful promotion of hatred against them in particular. Essentially, the dissent, in arguing for the constitutionality of section 181, is arguing that Holocaust denial is a unique form of hate propaganda:

The tragedy of the Holocaust and the enactment of the Charter have served to emphasize the laudable s. 181 aim of preventing the harmful effects of false speech and thereby promoting racial and social tolerance. In fact, it was in part the publication of the evil and invidious statements that were known to be false by those that made them regarding the Jewish people that lead the way to the inferno of the Holocaust. The realities of Canada's multicultural society emphasize the vital need to protect minorities and preserve Canada's mosaic of cultures. [my emphasis]...(p.483) [Furthermore] [t]hese lies poison and destroy the fundamental foundations of a free and democratic society. (p.484)

Here, the dissent is clear that they are not advocating a shift in purpose - in essence, rationalizing the use of an outdated, old law (as a sophist might) in order to address a modern and significantly different legal and social concern. Instead, they argue for a shift in emphasis - the purpose of social stability and the protection of minorities being the same, conceptually, as the original law. Support for this position, they argue, stems from *Butler* in which Sopinka J. stated that a "permissible shift in emphasis was built into the legislation [section 163] when, as interpreted by the courts, it adopted the community standards test..." (p.485) The same, they argue, is true of section 181 as a result of its emphasis on the "public interest". (p.485) Again, their understanding of the Holocaust and, consequently, of Holocaust denial, as a unique expression of hatred aimed at Jews is foundational to their argument.

v. Proportionality.

a) a pressing and substantial objective.

In acknowledging the fundamental importance of free expression to the maintenance of democratic values, the dissent observed that “the risk of losing a kernel of the truth which might lie buried in even the most apparently worthless and venal theory” (p.486) justifies absolute freedom of expression.

However,

where there is no absolute possibility that speech may be true because even its source has knowledge of its falsity, the arguments against state intervention weaken. When such false speech can be positively demonstrated to undermine democratic values, these argument fade into oblivion. (p.486)

Furthermore, the dissent rejects the majority’s argument that truth may sometimes exist in the eye of the beholder. (p.487) This, they argue, reflects the dissent in *Keegstra* which argued that freedom of expression guaranteed the “freedom to ‘loose one’s ideas on the world’ and not to be respected, ‘listened to or believed’.” (p.487) This position, they argue, tends to rest more on abstract values connected to freedom of expression, ignoring, as it does, the reality that not all speech is of equal value in a democracy and “the inclination of listeners to believe messages which are already part of the dominant culture.” (p.487) What is particularly important here is the dissent’s recognition that “the dominant culture[‘s]... messages” merely reflects the kind of mythology already discussed in chapter 2. This argument is further grounded in the recognition by Dickson J.C. in *Keegstra* that

expression can be used to the detriment of our search for the truth; the state should not be the sole arbiter of truth, but neither should we overplay the view that rationality will overcome all falsehoods in the unregulated market-place of ideas. (p.488)

Thus, the dissent concludes that “s.181, at best, limits only that expression which is peripheral to the core rights protected by s. 2(b).” (p.489)

b) rational connection.

In arguing for the rational connection of section 181 to the aim of preventing “injurious lies” (p.489) to vulnerable minorities in Canada, the dissent quotes the 1966 *Report of the Special Committee on Hate Propaganda in Canada*:

This Report is a study in the power of words to maim, and what it is that a civilized society can do about it. Not every abuse of human communication can or should be controlled by law or custom. But every society from time to time draws lines at the point where the intolerable and the impermissible coincide. In a free society such as our own, where the privilege of speech can induce ideas that may change the very order itself, there is a bias weighted heavily in favour of the maximum of rhetoric whatever the cost and consequences. But that bias stops this side of injury to the community itself and to individual members or identifiable groups innocently caught in verbal cross-fire that goes beyond legitimate debate. (p.489/490)

As a result, the dissent concludes:

A society is to be measured and judged by the protections it offers to the vulnerable in its midst. Where racial and social intolerance is fomented through the deliberate manipulation of people of good faith by unscrupulous fabrications, a limitation of the expression of such speech is rationally connected to its indication. (p.490)

c) minimal impairment

In arguing that section 181 is a minimal impairment to freedom of expression, the dissent notes that “[a]ny uncertainty as to the nature of the speech must inure to the benefit of the

accused.” (p.491) They refer to the Crown’s factum regarding section 181 in support of this position:

It does not capture all false statements of fact but only those false to the knowledge of the accused. It does not capture all statements of fact false to the knowledge of the accused but only such statements as the accused deliberately chooses to make generally available to the public. It does not capture all statements of fact false to the knowledge of the accused which cause injury or pose a threat of injury. Injury even serious injury to an *individual* through falsehood is irrelevant under section 181. The possibility of some injury to even a *public* interest equally falls outside the scope of the section as the section requires the harm to such an interest to rise to the level of likelihood or to, in fact, occur. (p.491)

The dissent sees section 181 as a

minimal intrusion on the freedom to lie [which] fits into the broad category of *Criminal Code* offences which punish lying. These offences include, *inter alia*, the provisions dealing with fraud, forgery, false prospectuses, perjury and defamatory libel. (p.492)

The fact versus opinion debate.

The dissent defines the difference between fact and opinion as follows:

Expression which makes a statement susceptible to proof and disproof is an assertion of fact; expression which merely offers an interpretation of fact which may be embraced or rejected depending on its currency or normative appeal, is opinion. (p.492)

For a statement to be understood as either fact or opinion, it “must be made in a linguistic context in which it will be understood as fact rather than opinion.” (p.493)

Having established these definitions and the context in which they may be understood, the dissent argues that Holocaust denial is merely a unique context for a particular type of lie. They argue that Professor Gill Seidel's The Holocaust Denial: Anti-Semitism, Racism and the New Right (1986)

...points out the lacuna in the theoretical perspective of those who uncritically defend the type of "revisionist history" at issue here. [Seidel] notes that those who would uncritically defend the free expression rights of purveyors of this form of speech...[miss] a crucial point:

[I]n encouraging a thousand versions of history to bloom, while refusing an acceptable label to any one [Thion], replaces a state view of history (which he is surely right to reject) with a range of undifferentiated, equally weighted accounts. *The difficulty is that such a range ignores power relations. It is a kind of free-market version of history.*

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*[But this orientation] does not allow him to see, even less accept, that Faurisson and others are bent on replacing the present anti-Nazi climate with a Nazi consensus, and that, in order to do so, they are playing intellectual games using academic, anti-authoritarian language.*²³⁶**[the dissent's emphasis]**
(p.495)

Moreover, in arguing that Zundel, by virtue of the content of his publications, has lied, (p.495) the dissent places him squarely in the same category as Faurisson (see chapter 2). Zundel, as well as Faurisson, therefore, is subject to the criticism levelled at the latter by thirty-four French historians writing in *Le Monde* (Feb. 21, 1979):

Everyone is free to interpret a phenomenon like the Hitlerite genocide according to his own philosophy. Everyone is free to compare it with other enterprises of murder committed earlier, at the same time, later. Everyone is free to offer such or such kind of explanation;

everyone is free, to the limit, to imagine or to dream that these monstrous deeds did not take place. Unfortunately, they did take place and no one can deny their existence without committing an outrage on truth. [my emphasis] (p.495)

Specifically judging Zundel's pamphlet "Did Six Million Really Die?", the dissent argues that it

does not fit with received views of reality because it is not part of reality. In the name of integrity of knowledge, the appellant demands the right to throw a monkey-wrench into the mechanisms of knowledge. (p.496)

Further, noting that Zundel's lies "render reasoned debate impossible" (p.497) and, regardless of its packaging, Holocaust denial amounts to racism; and "racism with footnotes and chapter headings is still fundamentally racism and should be treated as such." (p.497)

d. alternative modes of furthering Parliament's objectives.

The majority argues that section 181 is unnecessary as a criminal sanction against the publication of hate literature as that is already covered by section 319 which, in *Keegstra*, was accepted as a justifiable limitation on section 2(b). In response, the dissent argues that many laws in the Criminal Code overlap and are still valid. For them, the fact the Zundel knows that his publications are essentially lies creates "a pervasive and pernicious air of evil that surrounds their conscious aim to manipulate people." (p.497) Thus, section 181 stills plays

an important role in a multicultural and democratic society ...[by emphasizing] the repugnance of Canadian society for the wilful publication of known falsehoods that cause injury to the public interest...and therefore [to] society as a whole. (p.498)

e. proportionality between effects and objectives.

As section 181 is aimed at expression which “is inimical to the values underlying freedom of expression”; (p.498) and, as these expressions serve “only to hinder and detract from democratic debate”; (p.498) and, as section 181 “is narrowly defined in order to minimally impair s. 2(b)” (p.498) its effects are proportional to its objectives. Hence, the dissent would uphold Zundel’s conviction under section 181.

The Majority.

Writing for the majority, McLachlin J. characterized *Zundel*, as opposed to *Keegstra*, as a case presenting the Court with “a much broader and vaguer class of speech – false statements deemed likely to injure or cause mischief to any public interest...” (p.500) Her general argument against the constitutionality of section 181 is reflected in the introduction to her judgement:

I do not assert that Parliament cannot criminalize the dissemination of racial slurs and hate propaganda. I do assert, however, that such provisions must be drafted with sufficient particularity to offer assurance that they cannot be abused so as to stifle a broad range of legitimate and valuable speech. (p.500)

1. Procedural and conceptual flaws.

In discussing the background of the Zundel appeal, McLachlin argues that the Court cannot be assured “that the defendant Zundel was accorded procedural justice.” (p.504) Specifically, she argues that the trial judge, Judge Thomas, in taking judicial notice that the Holocaust (the systematic murder of about six million Jews in Nazi-occupied Europe) was an historical fact that no reasonable person could dispute, “the judge effectively settled the issue for them.” (p.504) Second, she argues that Judge Thomas ought to have placed the more

difficult burden on the Crown “of first explaining to and then convincing a jury of the distinction between historical fact and historical opinion regarding events almost 50 years old.” (p.504) In other words, McLachlin felt that the Crown should have had to deal with the argument that Zundel’s Holocaust denial was an expression of opinion rather than of fact. Third, as a result of Judge Thomas’ judicial notice regarding the Holocaust as a proven historical fact, the jury, argues McLachlin, would logically extend this notion in their understanding of Ernst Zundel’s motivations for publishing his pamphlet. Thus, “The logic is ineluctable: everyone knows this is false; therefore the defendant must have known it was false.” (p.505) Fourth, because Judge Thomas instructed the jury that racism and religious defamation have a “cancerous effect...upon society’s interest...”, (p.505) he may have prejudiced the jury’s conclusions regarding whether or not Zundel’s pamphlet threatened the public interest. The real culprit responsible for these procedural problems is section 181 itself:

There was little practical possibility of showing that the publication was an expression of opinion, not of showing that the accused did not know it to be false, not of showing that it would not cause injury or mischief to the public interest. The fault lies not with the trial judge or the jury...The fault lies rather in concepts as vague as fact versus opinion or truth versus falsity in the context of history, and the likelihood of “mischief” to the “public interest”. [my emphasis] (p.506)

Having questioned the judicial procedure under which the Zundel case was brought before the Court, McLachlin then deals with the conceptual weakness of section 181 as contrasted with the section 2(b) guarantees.

2. Does section 2(b) of the Charter protect Ernst Zundel’s right to publish his pamphlet?

McLachlin notes that

the guarantee of freedom of expression serves to protect the right of the minority to express its view, however unpopular it may be;...it serves to preclude the majority's perception of "truth" or "public interest" from smothering the minority's perception. (p.507)

McLachlin also noted that in *Keegstra* the Court had decided that hate propaganda was protected by the section 2(b) of the Charter, thus, there "is no ground for refusing the same protection to the communications at issue in this case." (p.507)

Next, McLachlin deals with the two arguments advanced by the Crown that the falsity of the statements in Zundel's pamphlet take it out of the purview of section 2(b):

a) that a deliberate lie constitutes an illegitimate form of expression; and

b) that Zundel's publication serves none of the values underlying section 2(b).

Apart from the fact that content is protected by section 2(b), the Crown's argument presents two difficulties:

[t]he first stems from the difficulty of concluding categorically that all deliberate lies are entirely unrelated to the values underlying s. 2(b) of the Charter. The second lies in the difficulty of determining the meaning of a statement and whether it is false. (p.508)

McLachlin argues that some falsehoods, exaggeration for example, "may...serve useful social purposes linked to the values underlying freedom of expression." (p.508) A person fighting against cruelty to animals; a doctor trying to convince people to be inoculated against a disease; or an artist's deliberate lie* may all be justified under section 2(b) as each of

*** McLachlin cites Rushdie's Satanic Verses as something "that a particular society considers both an assertion of fact and a manifestly deliberate lie...viewed by many Muslim societies as perpetrating deliberate lies against the prophet."259 (p.508/509)**

these examples is caught by the principles enunciated in *Irwin Toy* - political participation and self-fulfilment. (p.509)

According to McLachlin

The second *difficulty* lies in the assumption that we can *identify the essence of the communication* and determine that it is false with sufficient accuracy to make falsity a fair criterion for denial of constitutional protection. [my emphasis] (p.509)

Furthermore, this difficulty creates two problems:

One problem lies in determining the meaning which is to be judged to be true or false...meaning is not a datum so much as an interactive process...The guarantee of freedom of expression seeks to protect not only the meaning intended to be communicated by the publisher but also the meaning or meanings understood by the reader. (p.509/510)

As a result, argues McLachlin:

Even a publication as crude as that at issue in this case illustrates the difficulty of determining its meaning. On the respondent's view, the assertion that there was no Nazi policy of the extermination of Jews in World War II communicates only one meaning - that there was no policy, a meaning which, as my colleagues rightly point out, may be extremely hurtful to those who suffered or lost loved ones under it. Yet, other meanings may be derived from the expressive activity, *e.g.*, that the public should not be quick to adopt "accepted" versions of history, truth, etc., or that one should rigorously analyze common characterizations of past events. Even more esoterically, what is being communicated by the very fact that persons such as the appellant Mr. Zundel are able to publish and distribute materials, regardless of their deception, is that there is value inherent in the unimpeded communication or assertion of "facts" or "opinions". (p.510)

The second problem concerns “determining whether the particular meaning assigned to the statement is true or false.” (p.510) McLachlin notes that the civil action for defamation seems close to the alleged crime in the Zundel case; however, in defamation cases the jury’s task, because it must deal with “a statement made about a specific living individual” (p.510) is less daunting than what a jury must contend with under section 181. In defamation cases “[d]irect evidence is usually available as to its truth or falsity...[while] [c]omplex social and historical facts are not at stake.” [my emphasis] (p.510) Thus, because the “criterion of falsity falls short of...certainty, [and] given that false statements can sometimes have value...” (p.511) McLachlin believes that the speech in *Zundel* is protected under section 2(b).

3. Is the limitation on the Charter imposed by section 181 justified under section 1 of the Charter?

The main question, argues McLachlin, asks whether or not section 181 is “demonstrably justified in a free and democratic society”-

that is, a society based on the recognition of fundamental rights, including tolerance of expression which does not conform to the views of the majority. (p.512)

In response to the dissent’s argument that section 181 is constitutional because, even though its antecedent is hundreds of years old, using it to protect racial, religious, and ethnic minorities is a permissible shift in emphasis, McLachlin argues that section 181 goes “beyond any permissible shift in emphasis and effectively rewrite[s] the section.” (p.513)

Next, McLachlin deals with the argument that any justification of an override of fundamental freedom must have as its objective a specific purpose which is pressing and substantial enough to do so. She noted that parties supporting section 181 submitted the following arguments:

1. to protect matters that rise to a level of public interest from being jeopardized by false speech (respondent);
2. to further racial and social tolerance (Canadian Jewish Congress), and
3. to ensure that meaningful public discussion is not tainted by the deleterious effects of the wilful publication of falsehoods which cause, or are likely to cause, damage to public interests, to the detriment of public order (Attorney-General for Canada). (p.514)

For McLachlin, however,

The difficulty in assigning an objective to s. 181 lies in two factors: the absence of any documentation explaining why s. 181 was enacted and retained, and the absence of any specific purpose disclosed on the face of the provision. (p.514)

Furthermore, to accept section 181 as a way of combating hate propaganda is “to adopt the “shifting purpose” analysis this court has rejected” (p.515)and, because of the Court’s earlier ruling on the constitutionality of section 319 in *Keegstra*, hate propaganda can be prosecuted under its aegis instead of under section 181.

In response to the dissent’s ‘rational connection’ argument in which they noted that mankind is not as rational as the 19th century intellect conceived him and therefore the state must protect minorities by regulating hateful speech, McLachlin argues that the dissent has avoided the other side of this argument:

...no credence appears to be given to the similar lesson (or warning) of history regarding the potential use by the state (or the powerful) of provisions, such as s. 181, to crush speech which it considers detrimental to its interests, interests frequently identified as equivalent to

the “public interest”. History has taught us that much of the speech potentially smothered, or at least “chilled”, by state prosecution of the proscribed expression is likely to be the speech of minority or traditionally disadvantaged groups. (p.517)

Furthermore, while the Court in *Butler* could, as part of its justification for the override of section 2(b) guarantees, turn to similar legislation in other free and democratic societies, the same is not true of section 181. Thus, for all these reasons, argues McLachlin, section 181 is not such a pressing and substantial concern (as required by the first criterion of the Oakes’ test) as to justify the infringement of section 2(b) Charter freedoms.

Proportionality.

Nonetheless, even if section 181 could be justified under the first criterion of the Oakes’ test, it would fail under the proportionality criteria, the fundamental problem being section 181’s overbreadth. (p.521) The problem, according to McLachlin, is the difficulty in deciding what is false:

What is false may, as the case on appeal illustrates, be determined by reference to what is generally (or, as in *Hoaglin*, officially) accepted as true, with the result that knowledge of falsity required for guilt may be inferred from the impugned expression’s divergence from prevailing or officially accepted beliefs. This makes possible conviction for virtually any statement which does not accord with currently accepted “truths”, and lends force to the argument that the section [181] could be used (or abused) in a circular fashion essentially to permit the prosecution of unpopular ideas. Particularly with regard to the historical fact - historical opinion dichotomy, we cannot be mindful enough both of the evolving concept of history and of its manipulation in the past to promote and perpetuate certain messages. (p.519)

However, the greatest danger with section 181 “lies in the undefined and virtually unlimited reach of the phrase “injury or mischief to a public interest.” (p.519) McLachlin disagrees with the dissent’s argument that Zundel’s actions have abridged the equality rights (s. 7) and the assertion that Canada is a multicultural society (s. 27) both guaranteed by the Charter. To venture thus, she states, is to

have arguably created a new offence, an offence hitherto unknown in the criminal law. The promotion of equality and multiculturalism is a laudable goal, but, with respect, I can see no basis in the history or language of s. 181 to suggest that it is the motivating goal behind its enactment or retention. (p.520/521) [As well], [i]ts danger lies in the fact that by its broad reach it criminalizes a vast penumbra of other statements merely because they might be thought to constitute a mischief to some public interest...(p.521)

In response to the dissent’s argument about section 181’s potential overbreadth being countered by the heavy onus of proof on the Crown, McLachlin replies:

I, for one, find cold comfort in the assurance that a prosecutor’s perception of “over-all beneficial or neutral effect” affords adequate protection against undue impingement on the free expression of facts and opinions. The whole purpose of enshrining rights in the Charter is to afford the individual protection against even the well-intentioned majority. To justify the invasion of a constitutional right on the ground that public authorities can be trusted not to violate it unduly is to undermine the very premise upon which the Charter is predicated. (p.522)

Finally, McLachlin argues that the dissent has failed to address the dangerous “chilling effect” (p.522) on ordinary speech of section 181 particularly in light of the fact that the section has “the most Draconian of sanctions to effect its ends - prosecution for an indictable offence under the criminal law.” (p.522) As the range of speech potentially caught by section 181

exceeds that of section 319, McLachlin argues that “s. 181 fails the proportionality test applied in *Keegstra*.” (p.524)

McLachlin concludes that the dissent has made three errors:

First, they effectively rewrite s. 181 to supply its text with a particularity which finds no support in the provision’s history or in its rare application in the Canadian context. Secondly, they underrate the expansive breadth of s. 181 and its potential not only for improper prosecution and conviction but for “chilling” the speech of persons who may otherwise have exercised their freedom of expression. Finally, they go far beyond accepted principles of statutory and Charter interpretation in their application of s. 1 of the Charter. (p.525)

Chapter 5**Analysis: the legal and the pedagogic responses to Malcolm Ross**

The following quotations are all from Shakespeare's
Measure For Measure:

**Angelo: I do not deny,
The jury, passing on the prisoner's life,
May, in the sworn twelve, have a thief or two
Guiltier than him they try. What's open made
to justice,
That justice seizes.**

II, i, 18 - 22.

**Isabel: ...but man, proud man!
Dress'd in a little brief authority, -
Most ignorant of what he's most assured,
His glassy essence, - like an angry ape,
Plays such fantastic tricks before high heaven
as make the angels weep;**

II, ii, 120 - 125.

Isabel: ...Justice! Justice! Justice!

II, i, 26.

Measure For Measure, among others things, deals with the nature of justice. In particular, however, the play is concerned with justice as the golden mean. As such, justice is created by the applied tension of two extremes on the legal dispute: the application of the letter of the law as opposed to the application

of the spirit of the law.

Isabel's brother Claudio is condemned to death because his fiance, Juliet, is pregnant by him out of wedlock. The law in Vienna (the play's setting) stipulates the death penalty for such conduct even though this law has been ignored by the ruling Duke, Vincentio, for many years. Angelo, the Duke's substitute for a short time, decides to re-invoke the strictest interpretation of all laws and thus, Claudio's life stands forfeit. The question, of course, is: does such an interpretation serve the requirements of justice? Corollary questions are: is this law, of itself, a just law? and, is the general intent of laws that define such intimate relationships between citizens just?

The quotations indicate the problems inherent in any system of justice. The first appears to be cynical in admitting that the very process of justice, in this case the jury system, is flawed because it relies on the good character and good will of the men and women who are charged with deciding a case. The second, perhaps not quite so cynical, observes that each person's flaws may be magnified through the exercise of power, in this case, legal and legislative authority. The final quote is merely the demand that, despite these flaws, and many others, the final result had better be justice. However, a play, especially a comedy, does not have to create a just world. It must entertain. Interestingly enough, audiences and critics alike have not been satisfied that Measure For Measure is simply a comedy. There is something about it that is too close to the bone, that remains unresolved, that leaves the audience unsatisfied. Critics categorize it (along with Merchant of Venice and some other of Shakespeare's plays) as a "problem play". Simply put, there is something wrong in the resolution of its conflicts and because these conflicts have to do with justice, it is obvious that what passes as justice is somehow incomplete. The penalties are too light but a comedy, unlike a tragedy, demands forgiveness, even if it sometimes seems unwarranted. Finally, even to the first time viewer, Isabel's demand for "Justice!" seems to have been met by forgiving even the unforgivable, and fobbing her off with an offer of marriage.

Significantly, Shakespeare never allows her to respond to this offer, and the play ends.

Just as significantly, the Malcolm Ross case, as it has progressed through the courts, has evoked a similar debate about Canadian justice. While the courts condemn his antisemitism, they still allow him to teach children all in the name of the greater good: the protection of freedom of expression as set out in section 2 of the *Charter of Rights and Freedoms*. The questions thus remain:

- 1. what, exactly, does it mean to deny the Holocaust from both a rational and an historical point of view?, and,**
- 2. is the greater good served by allowing a teacher the right to spread hatred through the canard of Holocaust denial (in this case, allowing him to advocate the murder of Jews) in order to preserve our notion of freedom of expression?**

To answer these questions it is necessary to deal with the following:

- 1. We must understand what the historical significance of Holocaust denial is;**
- 2. It is necessary to understand the two strands of legal response to Holocaust denial. Each seems to exist as an ideology. The first I will call the 'civil liberties perspective'; the second, the 'post-Holocaust perspective';**
- 3. It is necessary to understand what our courts have decided about the importance of protecting children when the cases have placed their protection in opposition to fundamental freedoms like freedom of expression;**
- 4. It is important to understand what our courts have said**

about the significance of public school teachers as role models.

Thus far, two legal contexts can clarify the two questions above. The first, which I will call the New Brunswick Context, is found in the following decisions:

- a) New Brunswick Human Rights Board of Inquiry order (the Bruce decision);
- b) the New Brunswick Court of Queen's Bench ruling (the Creaghan decision); and
- c) the New Brunswick Court of Appeal's ruling (the majority and the dissent).

The second legal context, which I will call the National Context, exists within the *Irwin Toy*, *Keegstra*, *Butler*, and *Zundel* decisions of the Supreme Court as well as in the Ontario Court of Appeal's *Zylberberg* decision. In turn, parts of each of these contexts may fall broadly within the two ideological perspectives I have called 1. the civil liberties perspective, and 2. the post-Holocaust perspective.

The nature of contemporary Holocaust denial.

Before any analyses of these contexts can be meaningful from a legal, judicial, or a pedagogic standpoint, they must include a clear understanding of Holocaust denial as a palpable and potentially mortal threat to Jews, to other minorities, and to democracy as we understand it.

In a 1993 lecture given by Eric Hobsbawm to open the academic year at the Central European University in Budapest, Hungary, Hobsbawm argued that historians

...have a responsibility to historical facts in general, and for criticizing the politico-ideological abuse of history in

particular. (Hobsbawm, Dec.16, 1993, p.63)

He warns historians against

...the rise of “postmodernist” intellectual fashions in Western universities, particularly in departments of literature and anthropology, which imply that all “facts” claiming objective existence are simply intellectual constructions. In short, that there is no clear difference between fact and fiction. (p.63)

He argues that the relativism to which this kind of thinking leads would soon enough destroy historicity and truth. Hobsbawm warns:

Make no mistake about it. History is not ancestral memory or collective tradition. It is what people learned from priests, schoolmasters, the writers of history books, and the compilers of magazine articles and TV programs. It is very important for historians to remember their responsibility, which is, above all, to stand aside from the passions of identity politics—even if they also feel them. [my emphasis] (p.64)

The historian’s admonition – ‘tell the truth’ – to his fellow historians applies no less to those whose profession it is to teach children.

Malcolm Ross’ writings place him centrally within the camp of the Holocaust deniers. It is an ethos that has borrowed heavily from part of the deconstructionist school of criticism – although it has done so with malevolence. Hobsbawm’s warning about “The New Threat to History” (p.63) contemplates a world that has intellectual pretensions without intellectual vigour or honesty. As evinced by his writings and public statements, it is also Malcolm Ross’ world. According to Deborah Lipstadt in Denying the Holocaust, deconstructionism,

At its most radical... contended that there was no bedrock

thing such as experience. Experience was mediated through one's language. The scholars who supported this deconstructionist approach were neither deniers themselves nor sympathetic to the deniers' attitudes; most had no trouble identifying Holocaust denial as disingenuous. But because deconstructionism argued that experience was relative and nothing was fixed, it created an atmosphere of permissiveness toward questioning the meaning of historical events and made it hard for its proponents to assert that there was anything "off limits" for this skeptical approach. The legacy of this kind of thinking was evident when students had to confront the issue. Far too many of them found it impossible to recognize Holocaust denial as a movement with no scholarly, intellectual, or rational validity. A sentiment had been generated in society—not just on campus—that made it difficult to say: "This has nothing to do with ideas. This is bigotry."

This relativistic approach to the truth* has permeated the arena of popular culture, where there is an increasing fascination with, and acceptance of, the irrational. [my emphasis] (Lipstadt, 1993, p.18/19)

Malcolm Ross' writings well exemplify the methods of Holocaust denial: quote and footnote other deniers to ape scholarly argument; ignore any evidence that may contradict the thesis of denial; seek a public forum and invent the 'debate' about the Holocaust by calling yourself a "revisionist" and your opponents the "exterminationists"**; misinterpret and falsify evidence when necessary; and, for good measure, ridicule the Jews.

*An interesting example of this type of thinking is to be found in *Zundel*. McLachlin J., writing for the majority, argues that it is difficult to "identify the essence of [a] communication and determine that it is false...meaning is not a datum so much as an interactive process...The guarantee of freedom of expression seeks to protect not only meaning intended to be communicated by the publisher but also the meaning or meanings understood by the reader. See *B. v. Zundel*, 75 C.C.C. (3d), pages 509 - 510.

**See "Faurisson still waiting for 'exterminationists'", letters to the editor, *The North Shore News*, (North Vancouver, B.C.) Friday, December 3, 1993.

However, most people are not historians. Most people do not research the deniers' claims, or read history. Most people do not search out footnotes. Most people do not speak the language that allows the necessary access to the primary sources of a particular history. Instead, most people rely on the good will of their teachers, their historians, their journalists, and their governments. And it is this good will that Holocaust deniers such as Malcolm Ross abuse. And it is precisely this good will that seeks to respond to the Holocaust deniers by giving them their debate. However, according to the French historian, Pierre Vidal-Naquet, debating the deniers is folly:

In the final analysis, one does not refute a closed system, a total lie that is not refutable to the extent that its conclusion has preceded any evidence. (Vidal-Naquet, 1992, p.82)

For Vidal-Naquet, such a "closed system"

appears as a concerted derealization of discourse, and its literature is a pastiche, a parody of History. (p.116)

The important point here - indeed, it could be called the paradigm point - has to do with the aim of Holocaust denial. For Vidal-Naquet, the animus as well as the objective of the Holocaust deniers is transparent:

There is nothing comparable in the case of the revisionists of the Hitlerian genocide, in which it is simply a matter of replacing the unbearable truth with a reassuring lie... (p.18) The share of anti-Semitism - of a pathological hatred of the Jews - is enormous. The operation's aim is obvious: it is a question of depriving, ideologically, a community of what represents its historical memory. (p.20)

Again, for Vidal-Naquet, the "political aim of this group [the Holocaust deniers]" (p.92) is equally transparent:

The central theme is perfectly clear: it is a matter of shattering the antifascist consensus resulting from the

Second World War and sealed by the revelation of the extermination of the Jews. (p.92)

Historian, Deborah Lipstadt concurs:

...evidence plays no role for deniers...The deniers aim to undermine readers' faith in "orthodox" historians' commitment to transmitting the truth. (Lipstadt, p.21)

According to Lipstadt, their methodology is to

...misstate, misquote, falsify statistics, and falsely attribute conclusions to reliable sources. They rely on books that directly contradict their arguments, quoting in a manner that completely distorts the authors' objectives. Deniers count on the fact that the vast majority of readers will not have access to the documentation or make the effort to determine how they have falsified or misconstrued information. (p.111)

One of their aims, according to Lipstadt, is

to reshape history in order to rehabilitate the persecutors and demonize the victims...If Holocaust denial has demonstrated anything, it is the fragility of memory, truth, reason, and history. (p.216)

Lipstadt's analysis of their real identity and of the real problem in confronting them is a reminder of just how vulnerable we can be rendered by such fragility:

The deniers...are no different from these neo-fascist groups. They hate the same things-Jews, racial minorities, and democracy-and have the same objectives, the destruction of truth and memory...The average person who is uninformed will find it difficult to discern their true objectives. (That may be one of the reasons why Canadian high school teacher James Keegstra was able to espouse Holocaust denial and virulent antisemitic theories for more

than a decade without any protest being mounted against him. He made them sound like rational history.) (p.217)

Ultimately, Holocaust denial is an attempt to rehabilitate Nazism by removing the victim and thereby destroying his moral authority. If there was no Holocaust then the Nazis were not evil - merely opponents. Thus, Lipstadt argues, Holocaust deniers "are intent on weakening liberal democratic institutions". (p.217) This point is echoed by William Nicholls in Christian Antisemitism: A History of Hate:

..it is not a *Jewish* concern that the Holocaust be taught. The story of the Holocaust should not be taught just to please Jews. It must be taught because it is a major event in all Western history, without knowledge of which we cannot evaluate our common culture. The history of the Holocaust cannot be confined to Jewish studies. An event of this magnitude must be studied by all. Only knowledge can effectively counteract evil intentioned lying about our past. (Nicholls, 1993, p.392/393)

Finally, the perspective of the Canadian Jewish community is important. According to Manuel Prutschi, National Director of Community Relations for the Canadian Jewish Congress, the ultimate purpose of Holocaust deniers

...is the unabashed and unqualified rehabilitation* of the Third Reich. If there was never any crime of mass murder

*On July 25, 1985, Mel Mermelstein successfully sued The Institute for Historical Review. The Institute had challenged Holocaust survivors to present evidence that Jews had been gassed at Auschwitz. Mermelstein, a survivor of Auschwitz where his mother and two sisters were gassed, did so. However, only after a court battle could Mermelstein claim the \$50,000 plus another \$50,000 in damages. As a result of the court settlement, The Legion for Survival of Freedom, the Institute for Historical Review, Noontide Press, Elisabeth Carto, Liberty Lobby and Willis Carto officially and formerly apologized to Mermelstein and all other survivors of Auschwitz. "The defendants also agreed to formally acknowledge the Oct. 9, 1981, judicial recognition by Los Angeles Superior Court Judge Thomas T. Johnson that "Jews were gassed at Auschwitz concentration camp in Poland during the summer of 1944." See Los Angeles Times, July 25, 1985, "Holocaust Doubters Settle Auschwitz Survivor's Suit" by Myrna Oliver, page 1 & 26.

then there are no mass murderers. Nazism and the Third Reich are whitewashed and made once again respectable and, what is important for the neo-Nazis, attractive.

The Holocaust made Nazism into a tainted product... If Nazism was to remain viable as an ideology, in light of the Holocaust, logic absolutely demanded that, as neo-Nazism, it deny that the Holocaust ever happened... Holocaust deniers want to bring back Nazism and make it today and tomorrow the powerful political force that it was yesterday. (Prutschi, 1989, p.33)

It is, then, from this ultimate perspective, that Holocaust denial ought to be seen and understood. For Jews, the paradigm point of Holocaust denial is that Jews are once again targeted for murder and genocide. (Prutschi, *The Globe and Mail*, Thursday, June 16, 1988 - A7, p. 40) For all the rest, it is that murderers require victims and the victims' names become academic in the pursuit of murder.

The New Brunswick Context.

The Bruce decision.

Professor Bruce emphasized that, according to McIntyre, J. in the *Simpson-Sears* decision:

it is the effect on the complainant and not the intent of the party accused of discriminating which is relevant in determining whether the human rights legislation has been breached. (Attis, p.31)

Bruce also noted that, according to McIntyre, J., the intent of human rights legislation is "not to punish the discriminator, but rather to provide relief for the victims of discrimination." (p.64) Furthermore, Bruce, quoting Rinfret, J.'s dissent in *Boucher v. The King*, noted that "freedom as licence is a dangerous fallacy" and that freedom of expression cannot be sanctioned "utterly

irrespective of the evil results which are often inevitable.”(p.39)

Bruce noted that the legal precedent allowing an employer to control the off-duty conduct of his employees had been established by 1982 (p.57); as a result, Bruce also noted that an employee’s performance could be impaired

...where the civil servant’s occupation was both important and sensitive and the substance, form and context of the criticism [by the employee] was extreme. (p.57)

Regarding a teacher’s off-duty conduct, Bruce argued that whether or not a student is in a particular teacher’s class, that teacher was still a role model for that student. (p.47) Moreover,

teachers play a broader role influencing children through their general demeanour in the classroom and through their off-duty lifestyle... (p.47)

Bruce continues to make this point first, by citing Etobicoke Board of Education v. Ontario Secondary School Teachers’ Federation (1982) in which it was argued that, beyond teaching the curriculum, teachers had “to practice, within reasonable limits that which they teach.” (p.48) Second, he cites Abbotsford School district 34 board of Trustees v. Shewan and Shewan (1986) in which Mr. Justice Bouck argued that a teacher

...is an important member of the community who leads by example. He or she not only owes a duty of good behaviour to the school board as an employer but also to the local community at large and to the teaching profession. An appropriate standard of moral conduct or behaviour must be maintained both inside and outside the classroom. (p.49)

Third, he cites Madame Justice McLachlin in Peterson v. British Columbia School District No. 65 – Cowichan, (1988) who argued, in the context of teacher misconduct, that inappropriate role models could be a danger to students. (p.48)

Finally, Bruce finds that Malcolm Ross' writings "are *prima facie* discriminatory against persons of the Jewish faith and ancestry..." (p.52) Bruce does not intend to deal with whether or not Ross' writings are caught by section 319 of the criminal code. Instead, he finds that Ross' writings, by virtue of his being a public school teacher, "have led to discrimination in the provision of services by the School Board." (p.53) Bruce also found that Ross' writings were neither scholarly nor rational(18.5,p.54) and, combined with his public statements, have had the effect of creating a "poisoned environment within School District 15..." (p.54/55)

As a result, Professor Bruce's order took Malcolm Ross out of the classroom, provided him with a non-teaching job if one could be found within eighteen months, and prohibited him from publishing, writing for the purpose of publication, selling or distributing directly or indirectly any of his previous publications or anything that "mentions a Jewish or Zionist conspiracy, or attacks the followers of the Jewish religion..." (p.70)

The Creaghan decision.

Judge Paul Creaghan's decision struck down Professor Bruce's order which effectively prevented Malcolm Ross from publishing and distributing and selling any new or previous books he had written. Creaghan, J., applying the Oakes' test, could not justify overriding Ross' freedom of expression guaranteed under section 2 (b) of the Charter. He did uphold Bruce's order taking Malcolm Ross out of the classroom; however, implicit in Creaghan, J.'s decision was the distinction, when it came to these section 2 (b) rights, between Malcolm Ross - the antisemitic teacher, and Malcolm Ross - the antisemitic non-teaching school board employee. Thus, for Creaghan J., freedom of expression as it applies to public school teachers, was obviously the key legal issue in the Malcolm Ross case.

While the Creaghan decision is, in many ways, significantly different from the Bruce decision, it still poses the question of

whether or not a school board ought to be held responsible (as is a teacher) for its employees' public promotion of hatred against any identifiable group. Equally, this decision questions whether or not a school board, by its choice of employees (whenever proper and possible), ought to set as high an example of moral and rational conduct as possible. In other words, ought a bureaucracy dedicated to educating the young in a multi-cultural Western democracy exemplify in a public way, the very values it is charged with teaching its students? No small consideration here is the fact that such a bureaucracy is funded through the public purse.

The New Brunswick Court of Appeal's decision.

1. the majority (Hoyt and Angers).

The majority found for the appellant, Malcolm Ross. As a result, Ross' legal victory over all the orders of the Bruce decision was complete. The majority argued that the Charter argument determined the appeal. It characterized the Ross case in terms of a dilemma:

[t]he issue is whether an individual's freedom of expression can prevail against the fear that there will be a public perception that Mr. Ross' discriminatory remarks directed against a religious or ethnic minority are being condoned. The discrimination here is aggravated because the minority is one that has been historically targeted for discrimination and because the author of the discrimination is a teacher, who might be considered a role model to students. [my emphasis] (Ross, December 20, 1993 p.11)

The legal fulcrum, in the opinion of the majority, upon which the Ross appeal rested was the fact, in the majority's eyes, that Ross' antisemitism created no victims:

No connection was made between Mr. Ross' expressed

views and any offensive remarks directed to Miss Attis and Mr. Lambert [sic]...If evidence disclosed that Mr. Ross' remarks sparked or even were used to legitimize the offensive remarks made in the school yard, perhaps the sanction in the [Bruce] Order would be appropriate. (p.13)

Not only were there no victims of Malcolm Ross' antisemitism, antisemitism itself was reduced from a virulent and lethal cultural and religious hatred to a mere view when the majority cautioned that overriding Malcolm Ross' antisemitism

would, in my view, have the effect of condoning the suppression of views that are not politically popular any given time. [my emphasis] (p.14)

It is at least curious that in six words, the majority has reduced Malcolm Ross' Jew-hatred, buttressed by his lies, to something that is merely "not politically popular" and, consequently, something that is, perhaps, benignly unfashionable. Thus, the majority decision has within its cautious, careful, and credible locutions a certain imprecision exactly where nothing in our post-Holocaust world can rationally justify it.

The majority decision reflects a clinical concern for the protection of Malcolm Ross' right to freedom of expression. In part, this is as it should be. However, the majority decision is flawed in three important ways:

1. It is equivocal with regard to whether or not a teacher is a role model despite the significant number of legal cases that indicate he is - despite, in fact, the prima facie necessity in teaching that the teacher must exemplify that which he teaches. This is a very significant flaw because it allows (if not directly, at least by strong inference) the notion that teachers are not really committed to what the English philosopher of education R. S. Peters called "the demands of reason". It is a truism in public education that regardless of the bureaucracy of a school system, regardless of the administrative apparatus in the schools, and regardless of the amount of money to fund it, the school

system's most important arena is the classroom, and the classroom is the teacher's domain.

2. The majority, by reducing antisemitism to "views which are not politically popular" demonstrates that it does not understand significantly enough the difference between the pre and post-Holocaust worlds. I emphasize 'understand' as opposed to know. In short, by its decision, the majority has shown that it has not understood the lessons of Auschwitz.

3. Finally, the majority seems not to have given sufficient credence to Dickson, C. J. C. in Regina v. Oakes (1986) when he argued that

The court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the Charter and the ultimate standard against which a limit on a right and freedom must be shown, despite its effect, to be reasonable and demonstrably justified.

The rights and freedoms guaranteed by the Charter are not, however, absolute. It may become necessary to limit rights and freedoms in circumstances where their exercise would be inimical to the realization of collective goals of fundamental importance. [my emphasis] (Oakes, 1986, p.225)

The lesson of *Oakes* (discussed in chapters three and four) is clear. Overriding a fundamental freedom ought not be easy. Assuming absolute freedom for any Charter right does not consider others' competing rights nor a situation or context within which one right ought to be subordinate to another if "the

underlying values and principles of a free and democratic society” are to survive.

By failing to recognize fully that a public school teacher must exemplify a rational and moral commitment to his students if he is to teach them anything that is worthwhile, the majority has grossly misunderstood the kind of professional and moral incompetence exemplified by Malcolm Ross as a public school teacher. By failing to understand more completely the nature of antisemitism in the post-Holocaust world, the majority protects Malcolm Ross’ freedom of expression by disregarding the fundamental freedoms guaranteed to his intended victims, not the least of which are embodied in the following Charter sections:

Legal Rights, section 7: Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

General, section 27: This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

The majority’s inability to understand fully what it means to be a public school teacher combined with its inability to understand antisemitism - especially since 1945 - as anything more than a view that is “not politically popular”, endorses, by default, the getting of more victims in a sequence that is frighteningly all too familiar. Not having understood the context of Malcolm Ross’ antisemitism fifty years after the beginning of World War Two indicts not only Ross’ victims but the very justice they seek.

2. the dissent (Ryan).

The main issue for Ryan, J. was the balancing of freedom of expression and religion with the prohibition against discrimination. The context within which this balance could be

adjudicated was determined by settling first the question of whether or not a school teacher was a role model and, second, by determining if an equitable balance could be struck between competing rights.

Regarding the first issue, Ryan, unlike the majority, is clear and unequivocal:

Ross, as a school teacher is a role model to his pupils in an elementary school, **inside and outside the classroom.** He is a role model to children and yet, outside the classroom, he advocates prejudice. He urges discrimination. **He publicly proclaims outside the classroom that which would not be tolerated if said in the classroom.** He is a servant of the public. In my opinion, a teacher cannot discriminate, in the sense of show bias, **inside the classroom or publicly, in such an important area as is this target in the Human Rights Act of this province.** [my emphasis] (Ross, December 20, 1993, p.7)

Ryan is also quick to note the irony that Ross' discrimination (antisemitism) which seeks to attack and compromise the rights of others (including Jewish students and their parents) is treated by Ross "as though there were no consequences to the exercise of them." (p.9) In failing to understand fully the lethal nature of antisemitism, the majority erred in similar fashion.

The main point of the second issue, that of balancing competing rights, has to do with the recognition in *Oakes* that no right is absolute. This implies that context is the crucial determinant in the balancing of competing rights. Ryan argues that the context is the public school classroom in which the teacher is also the role model; consequently, the balance is tipped to protect vulnerable young minds:

...To sever the ban order from the classroom situation [as Creaghan did] simply does not answer the problem in a meaningful way. It falls too short of the mark. The wrong

is in the continued discrimination publicly promoted by Ross, a public servant, as a role model to children...We cannot in this age of pervasive mass communication... underestimate the cumulative effect on young people of statements and writings made outside the classroom.* [my emphasis] (p.11)

Finally, allowing Malcolm Ross to speak, publish, and generally to promote his antisemitism either as a teacher or as a non-teaching employee of the school board “would be to trample upon” (,p.15) the values and principles that are, according to Oakes, “the genesis of the rights and freedoms guaranteed by the Charter...” (Oakes, p.225) In applying the Oakes’ test, Ryan finds that a) a rational connection exists between the Bruce decision and the end - an environment free of discrimination; b) that because Ross is still employed in a non-teaching position but is out of the classroom, the approbation of discrimination by a role model will have ceased; however, as Ross will still be able to earn a living, his rights have been minimally impaired; and c) the proscriptions which impugn Ross’ section 2 Charter rights are in effect only while Ross is employed by the school board. The deleterious effects suffered by Ross in an effort to protect his victims are, therefore, justified:

Ross remains free to leave public employment and engage fully in the exercise of his freedom of speech and religion without restraint. A restriction, therefore, that he cease his discriminatory conduct is a justifiable infringement. It is not absolute. [my emphasis] (p.15)

What is most significant in Ryan, J.’s dissent is the

***According to Paul T. Clarke, “...Ross’s actions became totally incompatible with public school philosophy.” (page 23). Clarke argues that “Ross’s expression clearly had a “chilling effect” on the target group...[furthermore] Racist speech which silences student voices ultimately impoverishes the quality of individual expression. In *Attis*, how many other students have kept silent, thus denying themselves the benefit of section 2(b)?” (page 16). For a perceptive analysis of the Malcolm Ross case, see Clarke’s “Public School Teachers and Racist Speech: Why the “In-Class”/“Out-of-Class” Distinction Is Not Valid”, *Education and Law Journal*, 6.1, Vol. 6, No. 1, September 1994, Carswell, Thomson Professional Publishing, pages 1 - 26.**

importance, for him, of the fact that Malcolm Ross is a public school teacher. Without this, the notion of children being compelled by law to learn from a liar, a racist, and an antisemite, would seem like something out of Swift. In short, if Malcolm Ross were not a public school teacher, he could be the man in the majority decision.

The National Context.

The five decisions discussed in chapter 4 make up this National context. *Zylberberg* excepted, the rest are all decisions of the Canadian Supreme Court. Each decision acts as a focus through which some aspect of the context of the Malcolm Ross case may become more clear. *Zylberberg* - context 1 - has something important to say about the protection of children in the coercive environment of a public school. *Irwin Toy* and *Butler* - context 2 - have something to say about freedom of expression and children. *Keegstra* and *Zundel* - context 3 - have much to say about the nature of freedom of expression and, perhaps just as importantly, about the pre and post-Holocaust paradigms as they may provide the context for the so-called 'free speech' debate.

Context 1.

The majority in *Zylberberg* (1988) observed that a public school is a "sensitive setting". (Zylberberg, 1988, p.590) Essentially, what was argued and affirmed in both *Zylberberg* (1986) and in the 1988 appeal (which was upheld) was that a public school is, by its very nature, a coercive environment. It requires little speculation, then, to understand the coercive power of a teacher who exemplifies antisemitism through his Holocaust denial.

Context 2.

The majority in *Irwin Toy* argued that "violence as a form of expression receives no such protection [as offered by section

2 (b) of the Charter]” (Irwin Toy, 1989, p.601) Furthermore, in an attempt to understand the principles and values that inform freedom of expression, the majority relied on Ford v. Quebec (A.-G.), (1988) which found these to be: a) “seeking and attaining the truth”; b) “participation in social and political decision-making” ; and c) “self-fulfillment and human flourishing”. (p.612) The majority added that a legitimate breach of one’s freedom of expression must impair at least one of these principles. (p.612)

The majority also ruled that children have difficulty differentiating fact from fiction and are insufficiently skeptical when it came to resisting the persuasive nature of advertising. (p.626) It concluded that protecting children from the manipulations of advertising was such a pressing and substantial goal in Canada that it warranted the suppression of the Irwin Toy Company’s right to freedom of expression via their advertising aimed at children. Even McIntyre J.’s dissent recognized that freedom of expression may be suppressed

in cases where urgent and compelling reasons exist and then only to the extent and for the time necessary for the protection of the community. (p.637)

In endorsing the three principles informing freedom of expression, the majority (as well as the dissent) gives the lie to the notion that a public school teacher has a constitutional right to expression that spreads hatred while still calling himself a competent teacher. One must ask: in what way is the popularizing of antisemitism by a teacher somehow pedagogically sound and constitutionally valid?

In *Butler*, Sopinka J., writing for the majority, concluded that Parliament has a right (via section 163 of the criminal code) to censure expression that may cause harm

directly or indirectly, to individuals, groups such as women and children, and consequently to society as a whole... [my emphasis] (Butler, 1992, p.168)

Sopinka argues that censoring expression (in this case, obscenity and pornography) “which [may] undermine another basic Charter right may indeed be a legitimate objective [of Parliament].” (156) Furthermore, noting *Keegstra*, he argues that the Supreme Court has already

recognized that the harm caused by the proliferation of materials which seriously offend the values fundamental to our society is a substantial concern which justifies restricting the otherwise full exercise of freedom of expression. [my emphasis] (p.160)

In finding that section 163 minimally impairs freedom of expression, Sopinka argues: “Serious social problems such as violence against women require multi-pronged approaches by government.” [my emphasis] (p.168) Sopinka’s understanding of the effects of pornography and obscenity in a free and democratic society caused him to view them from the victim’s perspective.

However, where Sopinka sees a distinction between the promotion of public morality and the avoidance of harm to victims, Gonthier J. sees this distinction as “between...two orders of morality...” (p.177) Thus, he concludes that morality is not only a legitimate objective of Parliament but it can also be a legitimate objective of criminal legislation. (p.177)

Butler ought to give little comfort to those who promote hatred against identifiable groups such as Jews, for example. It extends the criminal sanction to harm caused indirectly to women and particularly to children. *Butler* also argues via Gonthier J. that the criminal law may be understood to exemplify Parliament’s sensitivity to immoral actions: in short, Gonthier understands one of Parliament’s objectives to be the legislation, where necessary, of public morality. As such, the objectives of avoiding harm to particularly vulnerable groups, such as children, becomes identical with a public condemnation of both the harm and its perpetrators. Thus, in future cases, *Butler* may be seen by the Court more as an expressive decision rather

than merely as a **reactive** one. This being the case, the Court may find itself hard-pressed to distinguish the difference between the promotion of pornography and obscenity and the promotion of hatred against identifiable groups in this, our post-Holocaust world.

Context 3.

Keegstra and *Zundel* constitute this final context within the National one that provides a focus on freedom of expression as it is understood in the post-Holocaust world. Indeed, context 3 reflects well the differences between the majority and the minority in the New Brunswick Court of Appeal's decision. It is, essentially, the difference between a clinical interpretation of the law in which the assault on the victim of hateful speech is understood as minimal but specific, and an interpretation that is informed by an understanding of the enormity of the Holocaust – for Jews and for non-Jews. In short, it is the difference between the 'civil liberties' perspective and the 'post-Holocaust' perspective.

i) the civil liberties perspective in *Keegstra* and *Zundel*.

In *Keegstra*, McLachlin J., writing for the minority, argued that “[t]he rationale for invalidating statutes that are overbroad...or vague is that they have a *chilling effect* on legitimate speech.” (Keegstra, 1990, p.90) It is this concern, ultimately, that animates her dissent in *Keegstra*. Furthermore, in arguing against the constitutionality of section 319(2), she distances Canada from the values informing the international community's fight against racism even though Canada is a signatory of the Convention on the Elimination of All Forms of Racial Discrimination (p.39) McLachlin argues that the effect of such conventions is to protect a nation's sovereignty (p.91) more than the ideal of freedom of expression. She does not, however, define the nature of the threat that certain types of expression can be to a country's sovereignty nor why this type of threat should be tolerated except to rely on the 'market-place' of ideas analogy. Applying *Oakes*, McLachlin finds that section 319 (2) is

not rationally connected to the objective of preventing hatred against identifiable groups in Canada because:

1. it has a chilling effect on all expression;
2. it merely provides hate-mongers with “a million dollars worth of free publicity”;
3. government may, in fact, dignify the hate-monger’s cause by suppressing their expression;
4. similar hate laws in the Weimar Republic did not prevent the Nazis from taking power.

Regarding the effects of antisemitism as well as the nature of teaching in the public school system, these arguments miss the essential points:

a) It is difficult to see how such a narrowly drawn law could create the kind of chilling effect McLachlin J. fears. Certainly its legal interpretation does not support this conclusion. According to Irwin Cotler, section 319 (2)

...does not prohibit the dissemination of propaganda, or the dissemination of hatred, but rather the *promotion* of hatred; not just the promotion of hatred but the *wilful* promotion of hatred; and not against everybody, but only against certain identifiable groups; and not just in any situation, but only in other than private conversations; and not pursuant to a complaint laid by just anyone, but only with the consent of the Attorney General. These qualifications make the section one of the most circumscribed provisions in the *Criminal Code*. (Cotler, 1991, p.253)

Although in *Zundel*, McLachlin J. concludes similarly with regard to the ‘chilling’ effect, (Zundel, 1992, p.525) it seems to be a truism that all laws create a chilling effect in some people, at some time, and to some degree. In a democracy, this is hardly a

reason to avoid a legal sanction against those who would, by their wilful hatred, deny fellow citizens their Charter rights - particularly those guaranteed in sections 15 (1) and 27.

b) Whether or not a defendant receives "a million dollars worth of publicity" is a red herring. If the law is to work it must ensure not simply that justice is done, but that it is seen to be done. As long as due process is followed, the Court ought not be concerned about the public relations gambit of any of the interested parties. In fact, it is reasonable to assume that all sides, if well represented, receive good publicity. The Canadian Jewish community does not seem to be concerned with the publicity claimed by Zundel; rather they refuse to be - again - the victims of Nazism and racism. (Prutschi, 1990, p. 19 and Prutschi, 1990, p. 29) Furthermore, the very publicity with which McLachlin J. is concerned may, indeed, be the whetstone lawyers need to do their jobs very well. After all, a court of law is a very public arena. Finally, according to Manuel Prutschi of the Canadian Jewish Congress, the public's response to the Keegstra and Zundel trials met the Canadian Jewish Congress's expectations:

The expectation of the Jewish community was that hatemongers would only be preaching to the already converted and not gain any new adherents. It was hoped that for the vast majority of the Canadian population, the trial publicity would serve as a positive, consciousness-raising exercise.

A recent public opinion study on the effect of the Zundel trial's media coverage has shown the Jewish community's expectations were not far off the mark. *Those who followed the trial*, if at all affected by the coverage, were affected in the positive way the Jewish community had hoped.

The anti-semites and those with marked anti-semitic tendencies (because of factors such as geography, social standing, education and cultural background) were among the sectors of the population least aware of the trial. Their anti-semitism predated the trial and was independent of

trial publicity. If Zundel was preaching to the converted, they were not listening. (Prutschi, The Globe and Mail, 1988)

c) If McLachlin J. is committed to the 'market-place' of ideas in a free and democratic society, her third concern is really no concern or else betrays a weakness in her understanding of this metaphor.

d) Comparing Weimar Germany with contemporary Canada is a faulty comparison. Weimar Germany did not have the cultural and political foundations provided by the democratic institutions that Canada inherited from Britain and France. The Weimar Republic was not, unlike Canada, a nation founded on immigration with the attendant mix of cultures and the type of tolerance such a society is forced to embrace if it is to survive. The Weimar Republic was an experiment in democracy. In Cyril Levitt's "Racial Incitement and the Law: The Case of the Weimar Republic", Levitt paraphrases Leo Strauss who maintained

that it was the weakness of the Weimar democracy, its unwillingness or inability to wield the sword of justice in its self-defence, which was to blame for the calamity which resulted.(Levitt, 1991, p.212)

According to Levitt,

By and large, the struggle against racist anti-Semitism was not considered a high priority by the democratic, republican political parties, the trade unions, churches and other mass organizations in Germany until the fateful election on September 14, 1930, which saw the Nazi Party increase its parliamentary representation from 12 to 107 deputies. The only exception to this was the organization which represented the majority of Germany's Jews - *Der Central-Verein deutscher Staatsbuerger juedischen Glaubens* (C.V.)... [my emphasis] (p.213)

By contrast, Canada's democracy is much more deeply rooted in

our Anglo-French past. Today, it is also profoundly influenced by our proximity to the United States. Moreover, our present justice system does not seem to reflect the fundamental problems that, according to Levitt, plagued the Weimar Republic's justice system:

During the years of the Weimar Republic, opinion was bitterly divided on the question of the impartiality of the justice system. Spokesmen for the SPD [socialists] and the left-liberal DDP time and again referred to a "crisis of trust" in the administration of law and to a general "crisis of law" in Germany. (p.216)

In addition, Levitt argues that,

Almost all post-World War II historical research has supported the view of a condition of legal distress during the Weimar Republic. [my emphasis] (p.237)

Levitt's conclusion is a warning to those who wish to compare Canadian justice with that practiced in the Weimar Republic:

Had the administration of justice in the Weimar period functioned perfectly, and had all the draft amendments to the *Criminal Code* been enacted extending the legal protection further, it is hard to see what difference this would have made in a political culture which was, to a significant degree, anti-democratic...

If there is anything we can learn from the Weimar experience, I think it is this: The law can only be an effective instrument in containing, controlling and discouraging racist expression if it is founded upon a sound democratic political culture. [my emphasis] (p.241)

Canadians have lived in the culture of democracy and with a reasonably stable justice system much longer than present day Germany and certainly longer than the failed experiment of the Weimar Republic.

Thus, McLachlin's argument that section 319 (2) is not rationally connected to the objective of combating the wilful promotion of hatred against an identifiable group is fundamentally unsound. However, of singular and stunning importance is McLachlin's conclusion that Keegstra's ideas and statements do not

urge violence against the Jewish people...[and] were offensive and propagandistic, but they did not constitute threats in the usual sense of the word." (Keegstra, p.98)

In a phrase that echoes the majority decision in the New Brunswick Court of Appeal, McLachlin reduces Keegstra's antisemitism to the grab-bag notion of any "unpopular viewpoint". (p. 120) Finally, McLachlin's argument about the constitutionality of section 319 (2) is stated succinctly:

If the guarantee of free expression is to be meaningful, it must protect expression which challenges even the very basic conception about our society. A true commitment to freedom of expression demands nothing less. [my emphasis] (p.107)

McLachlin's conclusion defies the logic of the Holocaust and its genesis. It exemplifies a vision of the Holocaust unconnected to the language of understanding. The Holocaust merely becomes part of some "interactive process" in which all meaning is, in large part, organized within the limits of one's personal experience regardless of how limited that experience is. So, if one is committed to freedom of expression, one measures the counter arguments against this commitment to freedom of expression. Likewise, if one is committed to understanding the Holocaust, one measures all arguments to make it relative to something else with suspicion.

In short, the language that worked so well for Hitler and the Nazi Party, transplanted to Canada after the Holocaust, somehow becomes merely "offensive" to McLachlin J. of the Supreme Court while for Hoyt C.J. and Angers J. A. of the New

Brunswick Court of Appeal, this language merely represents “views that are not politically popular”. In a final transformational irony, Holocaust denial that is the new antisemitism, whose objective correlative was the Holocaust, has become merely another form of expression whose very existence in a democracy guarantees most other forms of expression.* As a result, and regardless of its incipient danger, Nazi antisemitism takes on a legitimacy it does not deserve from both a moral and an historical perspective. Therefore, it is important to ask how, since the Holocaust, some in the judiciary can argue that antisemitism as well as “expression which challenges even the very basic conception about our society” can be tolerated. The answer is to be found in what I have already called the ‘civil libertarian’ - the civ-lib - perspective.

The ‘civ-lib’ perspective.

In his President’s Message in the 1986 Annual Report of the British Columbia Civil Liberties Association, John Dixon described what he called the “Bessie Smith factor”:

***On March 1, 1994 I had a brief conversation with a professor, well-known as a member of the B.C. Civil Liberties Association. He also has a well-deserved public reputation for combating institutional stupidity and threats to the public good. When he found out my thesis was about Malcolm Ross, his immediate response was “I guess we have to protect [Malcolm Ross’ freedom of expression] in order to protect our rights to free speech.” Superficially, this makes sense. But something is missing. It is presumptuous. It presumes that people of good will (in other words, we) know what is worth speaking and what is not. It presumes that the only good way of defending our speech is by not exercising critical judgement, via the courts, against anyone else for fear of being criticized as well. This statement betrays a sense of self-satisfied comfort in our own views. It is not enlightened self-interest. Instead, it represents a fear of criticism. It says: ‘I want to be tolerated without accountability and to ensure this I will not hold anyone else accountable for his statements, regardless of how dangerous and hurtful they may be.’ This ignores the victim’s right not to be a victim of hatred and the violence that often flows from this hatred. This statement ignores the significance of the Holocaust for Jews. It ignores the historical record of the Weimar Republic and it ignores the world’s failure to prevent Hitler and the Third Reich. Finally, it is not the argument of someone who has been a victim or of someone who can ever see himself as a victim in the post-Holocaust world.**

It was once believed, by very many educated people, that listening to jazz caused impressionable women to turn to a life of sexual immoderation and/or drug addiction. (Dixon, 1989, p.13)

Dixon summed this up as “the confusion of “cause” with “influence.” (p.15) In retrospect, what was asserted by some about the effects of jazz on “impressionable women” is quaintly amusing. Measured against current problems (pollution, starvation, AIDS, cancer, and waste - to name just a few) and their paradoxically complex potential solutions, we chuckle at this innocent syllogism. Dixon reminds us that simple solutions do not exist (if they ever did). Inherent in the Bessie Smith factor is the presumed need for a type of paternal censorship in order to assure the innocence of young women and, by extension, of society. It is this sort of censorship of expression that the BCCLA sees as antithetical to a true democracy of “sovereign citizens” (p.39) who are “the legitimate seat of sovereignty...in any nation”. (p.18) However, according to Dixon, the BCCLA’s commitment to freedom of expression

...is not limitless...we are willing to set aside our protection [of free expression] in the case of speech that is indistinguishable from action in its effects, as in criminal incitement... (p.18)

According to Dixon, proponents of the Bessie Smith factor “have effectively given up on democracy, and are looking to the development of a different sort of governance.” (p.21) In “The Bessie Smith Factor” Dixon has defined the civ-lib position on freedom of expression by relying on the anti-democratic straw man. Instead of serious argument based on serious conditions, Dixon, through an amusing parable, has sought to trivialize visions of democracy and freedom of expression which may oppose the civ-lib vision. Either you are for the civ-lib perspective of the sovereign citizen or you are one with the soft-headed proponents that link jazz to a particular nymphomania.

Alister Brown's "Response to the Fraser Committee Recommendations on Pornography" (1985) states clearly the civ-lib perspective on pornography:

We [Brown is speaking for the BCCLA] also think that censorship will carry with it much greater evils than those it prevents. First, by denying people access to material (whether they want it or not), we engender a substantial amount of resentment and irritation. Second, and more important, freedom of speech is crucial to a democratic society. If the people are to be genuinely self-governing - if they are to be rulers as well as the ruled - they must be free to express and hear all opinions on all matters concerning the public interest. (Brown, 1989, p.33)

There is a naive tone that informs Brown's words. First, censorship is bad because it engenders "resentment and irritation". Second, by default, the wilful promotion of hatred against identifiable groups finds its sanction in "the public interest." This tone is also resonant later in the same essay:

Without wishing to imply that women should be thankful for the presence of pornography, its existence has allowed them to put forward their views about their proper place in society as they never could have otherwise. [my emphasis] (p.33)

Despite Brown's disclaimer, the point is made. Thus, if pornography can be a tool (certainly not a catalyst) whereby women can argue for equality and justice in society "as they never could have otherwise" it is not difficult to imagine how the civ-lib perspective sees the Holocaust and the Holocaust deniers. In Brown's conclusion, one hears the same either/or argument in Dixon:

The task of deciding policy on the volatile issue of pornography is an unenviable one. What largely makes it difficult, in our opinion, is that public feeling runs one way, reason the other. We understand that politicians

have a duty to to be responsive to public opinion, and the pressures they are under to be so. But we also think that **they have a responsibility to demonstrate leadership and not to give in to majoritarian impulses when there is no rational backing for them. [my emphasis] (p.35)**

What has happened, one might ask, to the “sovereign citizen”, to representative democracy? And why are all arguments against the civ-lib position merely “impulses” which elected representatives (despite the meaning here) are “not to give in to”? Rather than appearing to be democrats, the civil libertarians appear more as intellectual autocrats somewhat tainted by what Sartre labelled “our condescending liberalism”. (Sartre, 1965, p.135) Sartre’s phrase is well exemplified in John Dixon’s 1986 essay “The Keegstra Case: Freedom of Speech and the Prosecution of Hateful Ideas” published in the BCCLA’s book Liberties.*

In his introduction to this essay, the editor of Liberties, John Russell, states:

The question still remains: Was the democratic principle of free speech meant to encompass hateful expression? Public discussion of these cases lacked any thorough-going consideration of the issues involved in answering this question. Predictably, neither Keegstra nor Zundel made the issue of free speech a substantial part of their defences, preferring instead to use the courts as a vehicle for demonstrating the truth of their **cockamamie views** about international Jewish conspiracy and “revisionist” accounts of the Holocaust. This article provides the civil libertarian account of why even the hateful railing of the likes of Keegstra and Zundel deserve the protection of the democratic forum. [my emphasis] (Russell, 1989, p.36)

*All my references are to the same essay published by the BCCLA in Liberties, edited by John Russell and published by New Star Books, Vancouver, B.C., 1989. According to John Russell, John Dixon’s essay was originally published by Canadian Forum magazine in April 1986 as “The Politics of Speech”.

Given the nature and aim of Holocaust denial one wonders how Russell could possibly characterize Keegstra's and Zundel's views as "cockamamie" - an adjective that is reserved for the innocence of an "Archie" comic book.* It is the same tone observed in the first two essays.

Significantly Dixon argues:

No person can legitimately take shelter under the freedom of expression protections of a democracy when the expressions at issue are made while undertaking the public responsibility of educating children. The elementary and high school systems are not viewed by civil libertarians as part of the public forum we seek to protect from censorship. [my emphasis] (p.37/38)

Dixon adds:

Let me state our position (perhaps it would be more forthright to say "our dilemma") bluntly: we hold that the wilful attempt to promote hatred against an identifiable group is immoral, but we also argue that the expressions that form such attempts must be protected from legal sanction or obstruction. (We emphasize that protection should be limited to "expressions" because we are at least sometimes misunderstood as holding the view that even racist "acts" should be protected as a sort of civil right. Related to this confusion is the interesting claim that there really isn't any morally or politically relevant difference between talk and action, and that the non-existence of such a difference makes our position nonsensical. Treatment of this form of moral dyslexia would require a separate and more extensive article than this one). (p.38/39)

***See Jughead's Double Digest Magazine, no. 27, the Archie Digest Library, Archie Comic Publications, Inc., 325 Fayette Avenue, Mamaroneck, New York 10543, "Jughead Starting Time", page 3.**

Here, it is clear that Dixon does not admit the paradigm point of Holocaust denial: to sanitize and rehabilitate Nazism in order to pose the same threat, yet again, to the very existence of the Jewish people. Other forms of racism aside, it is difficult to understand how Dixon and the BCCLA can, in the light of history, separate the Nazi antisemitism espoused by Keegstra and Zundel (and by Malcolm Ross) from the act of advocating the genocide of the Jewish people. Prior to 1939 this kind of discussion that separated the expression of antisemitism from the murder of Jews was academic - since then, it is tragic. Furthermore, to call this position a form of "moral dyslexia" is to show the kind of smug insensitivity that has become a hallmark of the civ-lib perspective as a response to the type of antisemitism espoused by Keegstra, Zundel, and Ross.

Dixon's argument for freedom of expression conflates, by inference, Holocaust denial with potentially nasty caricatures in the press of well-known political figures. Again, the straw man of press censorship is trotted out. His tone continues to be condescending:

We must all, as both ruler and as individuals, live lives of judicious intolerance for hateful ideas and expressions. It is, of course, tiresome to engage the thin-witted and their noisome ideas, and it is irksome to realize that there is no respite from this duty to be hoped for. [my emphasis] (p.42)

One assumes it is not as equally "tiresome" or "irksome" to deal with murderers. Nonetheless, Dixon understands that he must deal with the paradigm of the Holocaust.

Dixon says that because he is not a Jew, he cannot speak of the Holocaust (p.42) (from a Jewish perspective, one assumes). He recognizes that the reality of the Holocaust is used by some who argue that here is the exception to the civ-lib commitment to a generally untrammelled guarantee of freedom of expression:

Here, it is objected, is a special thought which demands, even if no other thought does, formal repudiation by the State. (p.42)

Dixon, however, takes liberties with the intent and meaning of those who warn against the dangers of Holocaust denial. He dresses them in robes they never intended to wear. Indeed, they are portrayed, in effect, as the enemies of democracy:

Proponents of this interpretation hold that the Holocaust teaches us that we must not be wholehearted in our commitment to the project of self-government. We must not trust the uncensored, unobstructed expression of thoughts and ideas that is the mark of a people who rule themselves. (p.42)

Having gone to this extreme in his attack on those who do not share the civ-lib response to Holocaust denial, he returns to a more charitable interpretation:

We must, in order to forestall evil actions, forestall at least some evil thinking and saying. We have to draw the line somewhere, and those who remember what happened will choose to draw it short of the historical revisions offered by Jim Keegstra and Ernst Zundel. (p.42/43)

However, Dixon disavows their wisdom:

This is not the lesson of the Holocaust - and on this point I have a right and duty to speak as a citizen. [my emphasis] (p.42/43)

For Dixon, "the lesson of the Holocaust" is to be found in the failure of the Weimar Republic's anti-hate laws to stem the tide of fascism. Thus, McLachlin J.'s argument is a reflection of Dixon's civ-lib understanding of the failure of the first German democracy:

...if history has any practical lesson to offer in this

connection, it is that minds and ideas - evil or otherwise - offer a protean resistance to repression. (p.44)

In what eventually becomes a sly irony, the “repression” to which Dixon refers is not Nazi repression but the attempts by the central organization of German Jews to defend Jews against antisemitic attacks. Next, Dixon equates the worst possible imagined forms of repression with section 319 (2):

And when we consider the forms of repression that can imaginably be embraced by a democracy (our hate propaganda laws, for instance), it is difficult to foresee their use producing any result other than the provision of a public focal point for minds and ideas that positively thirst for publicity and a sense that they belong at the centre of things rather than at the edge. (p.44)

Either Dixon’s imagination is myopic or he feels his argument is so weak he must rely on hyperbole to sway his audience. How, one must ask, can it be so “difficult to foresee [section 319 (2)] producing any result” other than publicity for the Nazis? What about the results for the potential victims of the hate-mongers? Does not someone who refuses to be a victim deserve the right to serve such notice in such a public forum as a court of law? Through the legitimate application of these laws, ought not society serve notice that it will not brook such attacks that in the past have proven themselves so deadly? In all this, one must ask of Dixon, where is the argument of the target group - the potential victims? Next, Dixon oversimplifies to establish the straw man - if the hate laws in the Weimar Republic did not prevent Hitler, then they will not work in Canada either. Having thus fed his audience well, the obvious question is, ‘well, how did Hitler come to power?’ Using logic that is reminiscent of Mark Antony’s speech in *Julius Caesar*, Dixon reminds us:

The history lesson that bears remembering now is that the failure of German democracy was, most emphatically, not attributable to German resistance to the control of hateful

expressions. German democracy failed because the citizens of the Weimar Republic did not take responsibility for the course of their politics...Their acquiescence to censorship of hate propaganda was not an anomaly; it was a symptom of their general conditions of readiness to be ruled. And they got their ruler...[my emphasis] (p.44)

Dixon's logic is frightening. In a fuzzy conclusion, unsupported by his previous statements, he claims that German democracy failed because Germans as citizens acted in an irresponsible way. What does this really mean? What would John Dixon have to say about the voter turn-out in the United States? At just above fifty percent for federal elections one wonders if we border on the next Reich. He equates the anti-hate laws of the Weimar Republic to a limp-wristed approach to democracy. Thus, one is to understand that the attempt of a minority (in this case the Jews) to protect itself from slander and the occasional pogrom through a specific legal sanction so threatens the sovereignty of the rest of the citizenry (including the would-be perpetrators) that democracy itself becomes the victim. One must conclude that such a democracy can only exist if the Jews acquiesce to their own destruction. Dixon's irony is now complete.

Finally, if one is going to understand a particular judicial response to Malcolm Ross it is important to understand this civ-lib perspective. It is concerned mightily with the section 2 (b) guarantee of freedom of expression. And, we all ought to be. However, the civ-lib perspective betrays its right-minded intent when it stiffens into an ideological totem. It is this totemic civil liberties perspective that in both the New Brunswick and the National contexts has blinded some civil libertarians to the lethal threat posed by Holocaust denial. It has made some of them sly apologists (by omission) for the Christian antisemitism that informed and still informs not just the German psyche but the Western one as well. As a result it has also made some civil libertarians less than sensitive to the rights of the deniers' victims. And all this has made a mockery of the notion that a

teacher is someone who exemplifies a life based on “the demands of reason”.

The post-Holocaust perspective in Keegstra and Zundel.

Writing for the majority in *Keegstra*, Dickson noted the Cohen Committee’s 1965 warning that the world since Hitler has changed and no longer can mankind trust education to liberate the mind from superstition. (Keegstra, 1990, p.37) Dickson warned that neither the state nor “the unregulated marketplace of ideas” should be solely responsible for arbitrating what is true (p.48/49) as “expression can be used to the detriment of our search for the truth”. (p.48/49) Dickson’s main point runs counter to the ideological civ-lib commitment to free expression:

What I want to emphasize...is that one must be careful not to accept blindly that the suppression of expression must always and unremittingly detract from values central to freedom of expression. (p.50)

Finally, Dickson notes that the comparison between Canada today and “Weimar” Germany is spurious as

...conditions particular to Germany made the rise of Nazi ideology possible despite the existence and use of these laws. [my emphasis] (p.54)

Writing for the dissent in *Zundel*, Cory, J. and Iacobucci J. viewed Ernst Zundel’s Holocaust denial “as the foulest of falsehoods and the essence of cruelty.” (Zundel, 1992, p.474/475) Furthermore, the dissent characterized the Holocaust in terms that both the minority in *Keegstra* and the majority in *Zundel* seem to eschew. For the dissent, the Holocaust was “...a watershed marking the apogee of the brutal consequences which flow from unchecked racism.” (p.476) Finally, the dissent makes the important connection between antisemitism as expression and the German state policies that lead to the Holocaust:

In fact, it was in part the publication of the evil and invidious statements that were known to be false by those that made them regarding Jewish people that lead the way to the inferno of the Holocaust. (p.483)

In “The Eichmann Trial in Retrospect” (1962), Israel’s former ambassador to the United Nations, Abba Eban, argued against what I have called the civ-lib perspective and which he calls the “oldest dilemma of liberalism”:

The trial [of Adolf Eichmann*] asks urgent questions about the limits beyond which racial incitement cannot be tolerated. This is the oldest dilemma of liberalism. If a society is free and tolerant, must it even tolerate attacks on its own toleration? If a society can suppress pornography without ceasing to be free, why it is forbidden to establish some criterion whereby ideas fatal to social morality may be denied the sanction of law? The indulgence granted the Nazi doctrine in the 1930’s before it reached irresistible proportions stands as an ominous warning against inertia and apathy. In the Weimar Republic this indulgence flowed from the doctrine that there is no limit to the free dissemination of opinion—not even the limit of decency and survival. [my emphasis] (Eban, 1967, p.136)

In general, then, the dramatic distinction between the civ-lib perspective and the post-Holocaust perspective is reflected in the recognition that the Holocaust, as the objective correlative of antisemitism, is a paradigm. Thus, the innocence and idealism that underpin the civ-lib perspective regarding antisemitic hatred and what it may or may not lead to have no

***“Adolf Eichmann (1906–1962) – Lieutenant–Colonel in the Nazi secret police. After World War II, he escaped to Argentina where he lived under an assumed name. He was seized there by Israeli agents in May, 1960, and taken to Israel, tried, and hanged in 1962 for his part in the killing of about 6, 000,000 Jews.” See Essays of our Time, Canadian edition, McGraw–Hill Co. of Canada Limited, 1967, page 132. Note that Raul Hilberg’s “The Statistic” places the number of murdered Jews at approximately 5,100,000. See Unanswered Questions: Nazi Germany and the Genocide of the Jews, edited by Francois Furet, Schocken Books, New York, 1989, page 171.**

place in the post-Holocaust world. To paraphrase a well-known sixties anti-nuclear saw: 'With the Holocaust, everything has changed except Man's way of thinking.'

Paradoxically, Holocaust deniers seem to understand this better than most. Their denial is an attempt to convince the world not to change its way of thinking. Otherwise, how can the "the oldest dilemma of liberalism" still be sustained in the post-Holocaust world? The answer, of course, has to do with our fear of ourselves. Both the Holocaust deniers and the psychology that informs the civ-lib perspective seek a tidier, more simple world than exists. From the deniers' point of view, if there were no Holocaust, what is so bad about Nazism, fascism, and racism? Just as paradoxically, denying the effects of untrammelled freedom of expression vis a vis its potent connection to the Holocaust, permits civil libertarians to argue that expression such as racist laws, racist incitement, and official antisemitism did not create the Holocaust. They insist that anti-hate laws do not work. They point to the Weimar Republic's list of anti-hate laws and anti-hate prosecutions to try to prove this point. However, civil libertarians do not seem to want to deal with German antisemitism. They do not deal with German authoritarianism* and the anti-democratic tendency it informs. They do not deal with German racism. They do not deal with Christian antisemitism.** They do not deal with the complicity of the West in not doing much to aid Jewish refugees.*** In short, civil libertarians are also in a state of denial. They have anointed themselves the ideological defenders of free speech

*Matthew Arnold, the Victorian poet and inspector of schools, remarked on this German tendency to authoritarianism. In Culture and Anarchy, first published in 1869, Arnold noted that Germany was a country "...where people were disposed to act too little for themselves, and to rely too much on the Government." See "Barbarians, Philistines, Populace" in Culture and Anarchy, by Matthew Arnold, edited by J. Dover Wilson, C. H., Cambridge At The University Press, 1963, page 126.

**See William Nicholls' Christian Antisemitism: A History of Hate, Jason Aronson Inc., Northvale, New Jersey, London, 1993.

***See None Is Too Many: Canada and the Jews of Europe 1933 - 1948, Irving Abella and Harold Troper, Lester & Orpen Dennys, Publishers, Toronto, Ontario, 1983.

yet they understand that to do so, they, like the Holocaust deniers, have to separate their sensibilities from those of the victims. They have to minimize the genesis of the Holocaust and the world's original and continuing response to it.

The pedagogic response.

According to Eli Wiesel the Holocaust was, among other things, a failure of religion. However, in dealing with the suffering, agony, and death that marked his present world (1990), Wiesel claimed:

What we are seeing today...is a failure of humanity, perhaps a failure of rationalism, but certainly a failure of politics and commitment, a failure of all systems, of philosophy, and of art. [my emphasis] (Wiesel, 1990 (a), p.11)

It is significant that Wiesel's list of failures begins with "humanity", progresses to "rationalism", and ends with "a failure of all systems". It is significant that the same list of failures (including the failure of religion) created the Holocaust. However, systems, of themselves, do not fail - it is the people running and designing the systems that fail. Consequently, any analysis of the Malcolm Ross case must include a piercing analysis of the systems that allowed him to teach, for over a decade, as a very public antisemite. Minimally, such an analysis would have to consider the effects of a teacher's irrationality on his closest constituency - his students; on his profession and on his colleagues' ability to teach as they ought to teach; and on the limits of free expression in one of the places where it is most required - the public school classroom. In the Ross case, such an analysis is made possible by comparing Malcolm Ross with James Keegstra. The only major distinction would seem to be that while Keegstra made his Holocaust denial and complementary antisemitism his curriculum, Ross did not. However, the notion that a public school teacher is a role model collapses this distinction. Essentially, then, as teachers, Malcolm Ross and James Keegstra are the same. One

then needs only to look at the effects Keegstra's teaching had on his students in Eckville, Alberta to understand the potential effects that Malcolm Ross would have on his own and on others who were impressed by his authority as a teacher.

1. the effects of Keegstra's teaching on his students.

On page 213 of Bercuson and Wertheimer's A Trust Betrayed: The Keegstra Affair, the authors have reproduced an essay, "Judaism and Its Role in Society from 1776 - 1918". It was written by one of James Keegstra's students and was given, by Keegstra, to R. K. David, the Superintendent of the Lacomb County School Board who eventually fired Keegstra. The student, by way of the essay, finds Jews complicit in a number of so-called nefarious organizations. They are accused of wanting

...to control the world...through welfare states and bloody revolutions. They want to set up their "New World Order" with the Headquarters in Israel...They are planning to get all governments grouped together into one world dictatorship. (Bercuson and Wertheimer, 1985, p.213)

The ten and a half page essay concludes:

As you can see the Jews are truly a formidable sect. They work through deception and false tales to achieve their ends. They are very powerful and must be put in their place. (p.223)

Its content aside, it is poorly written. However, this, combined with its content, makes it a remarkable testament to Keegstra's teachings. It is equally remarkable (although consistent) that Keegstra would have chosen this essay to show to his Superintendent. It reflects his sense of trust in the system he was using. It reflects too, his sense that the system was approving his teachings.

James Keegstra's students also attest to his effectiveness

as a teacher of hatred. In “Keegstra’s Children”, the May 1985 article for *Saturday Night*, Robert Mason Lee quickly scans the lives of four of Keegstra’s former Eckville students. Keegstra is described as a man having

...the respect of his students’ parents... Few chose to contradict the teacher-mayor with the plain speech and the facts and figures at his fingertips. (Lee, 1985, p.42)

According to Gwen Matthews, a former student of Keegstra’s:

I wouldn’t say I had an exact view of world history. It’s a pretty deep subject. But I was open to suggestion... I believed anything that he backed with a lot of evidence...Mainly evidence from the Bible. He knew the Bible inside out, cover to cover. [my emphasis] (p.43)

According to Lee:

Gwen now says that she was “kind of confused” when she wrote the essay [in which she claimed Jews were evil], “because I’d never heard of [the Illuminati] before. Then it began to make sense.” [my emphasis] (p.43)

According to Dick Hoeksma, the teacher hired to replace Keegstra, it wasn’t just his former students who were potential ‘true believers’:

Keegstra was in the lunch room with the teachers, too. People forget he had as much influence with the staff as with students. I believe this could happen in Toronto or Ottawa, if you have someone as skilled as Keegstra in presenting his views. [my emphasis] (p.44)

Keegstra was particularly dangerous as a teacher because he seemed to have sufficient technique to be credible to his students. According to Danny Desrosiers, Keegstra’s history lessons were connected to the curriculum:

Instead of just giving us events, dates, and people, he'd give us the reason for things, linking it together...What he said niched into what our school books said. He just filled in the blanks. (p.45)

Lee's final paragraph is ironic. According to Danny Desrosiers:

Mr. Keegstra used to say history, on its own, is of no value at all. But if you don't know what went on, you're bound to repeat it. (p.46)

It is obvious that James Keegstra was promoting irrationality under the guise of being rational. In other words, he perverted the concept of teaching by destroying one of its central aims. According to Allen T. Pearson (1986):

The intentionality of teaching requires that some presuppositions about the rationality of the actors involved have been made. (Pearson, 1986, p.2)...Not only is rationality a presupposition of teaching but it is as well a criterion for acceptable teaching. Teaching can be criticized if it promotes irrationality in students. (p.3)...What makes teaching important is the special purpose that exists in the relationship between the teacher and the student. The teacher is to help enable the student to think and act on his or her own as an independent agent. To do this the student needs to come to adopt the standards of rationality. Only when the student has accepted standards of rationality as governing one's own actions will independent, knowledgeable and purposive thought and action be possible. (p.4)

Assessing the logic of the Jewish conspiracy theory taught by both Malcolm Ross and James Keegstra, Pearson argues:

Anyone who speaks against the theory is thus an agent or a dupe of the conspiracy...The conspiracy theory is in this way self-serving in that part of the theory serves to protect it from defeat. If one accepts the theory, one is at

the same time accepting beliefs that prevent one from ever seeing that the theory may not be correct...Since their [Keegstra's students] picture of rationality is itself irrational they may try to make all their beliefs fit such a pattern. So, one can conclude that Keegstra failed in his responsibility as a teacher to promote rational beliefs and understandings among his students and may well have thwarted the possibility of the students' becoming autonomous individuals. (p.4/5)

2. the effects of Keegstra and Ross' teaching on their colleagues' ability to teach and on the profession of teaching.

It is redundant to argue that any teacher who teaches as true that which is patently false immediately puts into question anything any other teacher teaches. Thus, guilt by association is part of James Keegstra and Malcolm Ross' legacies. Teachers, rightly, will be asked to condemn Keegstra and Ross* as teachers. However, even more important is the response from teachers' professional organizations. According to Arthur M. Schwartz in "Teaching Hatred: The Politics and Morality of Canada's Keegstra Affair" (1986):

The sequence of events surrounding Keegstra's dismissal, loss of teaching certificate and eventual conviction provide an example of a school system caught unawares and unprepared for the revelation of human inadequacies within it. The same events also provide a case study of how basic moral issues may become outweighed in public education by power struggles and the defence of prerogative and territory by various interests. Throughout the Keegstra affair, people acted not in terms of the moral issues at hand, but in terms of the potential effects of their actions on other issues in which they or

*See "The Ross Decision and Control in Professional Employment" by David Givan, The University of New Brunswick Law Journal, vol. 41, 1992, pages 332 - 344. In the same Journal, see also Eric D. MacKenzie, "You be the Judge", pages 345 - 353.

their institutional interests were involved. (Schwartz, 1986, p.10)

Schwartz notes that in following bureaucratic procedures, the Alberta Teachers' Association, in the eyes of the public, did not respond quickly enough to condemn Keegstra's teachings or to explain its procedural obligation to defend him. (p.17) Because the ATA, Keegstra's two principals, and the first superintendent seemed not to pay much attention to the content of his teaching, Schwartz is left wondering:

Is it demanding too much that we insist that those entering our graduate programs in school administration are at least knowledgeable about the major events of modern history, their origins and their outcomes...Is there room in educational administration for culture in the Arnoldian sense... "acquainting ourselves with the best that has been known and said in the world, and thus with the history of the human spirit"? (p.23)

The School Board and the New Brunswick Teachers' Federation dealing with Malcolm Ross seems to have acted in a similar way. It is important to remember that the NBT and the School District challenged the competency of the Human Rights Board of Inquiry. In "You be the Judge" Fredericton school teacher Eric D. MacKenzie noted that even after a number of people expressed concerns about Malcolm Ross' public statements, Nancy Humphrey, the School Board Chair, clarified School District 15's position: "that Malcolm Ross could do what he wanted on his own time." (MacKenzie, 1992, p.348) Furthermore, this Board hastily (in one month) set up a Review Committee to "review the possible impact of this issue [Ross] upon the learning environment in school programs." (p.349) It conducted fifty-nine interviews in four days despite expert advice arguing to the contrary. In the same year (1987), the only Jewish member of the Board, Audrey Lampert could not get a seconder for two motions: the first, to release the Review Committee's report; the second, "that the School Board make a public statement rejecting all forms of racism and

hate mongering” (p.349) Regarding the Ross case, David Givan concludes that:

While schools are microcosms of what society is, teachers must strive to be role models of what society ought to be, and of what the state’s greatest assets, its children, will determine it will become. The teacher’s burden is a sacred trust deserving and demanding professional status. It is to be hoped that the legacy of the *Ross* inquiry will be a renewed dedication to expertise to service as anticipated by the social contract of the professions... [my emphasis] (Givan, 1992, p.344)

3. the limits of freedom of expression in the public school.

In “Limiting the Freedom Of Expression: The Keegstra Case” (1990), William Hare argues:

Keegstra fails to qualify as an honest heretic in the classroom and forfeits the protection otherwise due. Appeal to the notion of a marketplace of ideas collapses because Keegstra’s classes were systematically biased to inculcate at every opportunity the Jewish conspiracy theory. (Hare, 1990, p.379)

Hare cautions that it is not that the public school classroom can not tolerate the arguments in the ‘marketplace’, rather,

What matters is how the argument is *conducted*... Keegstra is no champion of open-mindedness not because he held, and defended, certain convictions, but because these were *not* revisable...the students were adopting beliefs in such a way that rational criticisms were defused. (p.380/381)

The notion of ‘tolerance’ often muddies the educational waters swirling around teachers like Keegstra and Ross. In part, this ‘tolerance’ is sensitive to their assertion of their section 2 (b) rights. This, ultimately, is a matter for the courts. However, sometimes the notion of ‘tolerance’ is also advanced from a

naive position that ascribes to all debates the possibility of any and all positions regardless of the debates' venue and regardless of the canons of rationality. For example, Hare notes

In his first letter to Keegstra, Superintendent David wrote that he had not intended to muzzle Keegstra's academic freedom nor to limit his intellectual integrity. Controversial interpretations were not to be suppressed but all positions were to be presented in as unbiased a way as possible. [my emphasis] (p.382)

Quite aside from the difficult logistics encountered by any classroom teacher in carrying out this pantomime of fairness, David's comment misses the point. Simply put, if one tolerates all ideas in a public school classroom, none has currency and 'tolerance' merely becomes a mantra for intellectual lassitude. Ironically, this smacks of the type of "relativism" against which Ross railed – however, he did so not in the spirit of intellectual ecumenism but rather, in the spirit of the indoctrinator. To tolerate the type of vicious antisemitism promoted by Keegstra and Ross beggars the meaning of 'tolerance'. Thus, according to Hare:

The Jewish conspiracy theory...is both discredited and offensive. A teacher who accepts it necessarily alienates allthose[sic] students, not only Jews, who take offence at others being falsely accused of general wickedness. [my emphasis] (p.385/386)

Hare's conclusion focuses on a significant yet quiet aspect of the pedagogic problem posed by both Keegstra and Ross. It is both a warning about and a condemnation of the bureaucratic ineptitude and moral myopia that allowed James Keegstra to teach children hatred for almost fourteen years:

Recall that Keegstra was widely hailed as a "good teacher." This suggests the dispiriting conclusion that this appraisal has lost its essential meaning. The judgement was based on the fact that Keegstra maintained discipline; it was totally unrelated to any consideration of the

knowledge, skills and attitudes being learned by his students. Perhaps the Keegstra case will lead us to think out more carefully what a good teacher does. (p.386)

For more than a decade Malcolm Ross, well-known in his community as a public school teacher, publicly spoke and wrote the language that promotes the murder of Jews. In his 1992 essay "Ross, Rights and Justice", Reverend William Steele, Pastor of St. Andrew's Presbyterian Church in Moncton, New Brunswick, stated:

Malcolm Ross is a model husband and father, an outstanding professional in his vocation of teaching, and a devout man. Yet his writings bring such pain, anger and fear to the Jewish community. If I were a Jew in Moncton, I would undoubtedly feel afraid and angry. [my emphasis] (Steele, 1992, p.296)

It is difficult to understand how Steele can say of Ross that he is "an outstanding professional in his vocation of teaching" while admitting to the "pain, anger and fear" that this "outstanding" teacher caused for Jews and, in particular, for the Jewish parents and the Jewish students in School district 15. Malcolm Ross is a member of William Steele's congregation.

Chapter 6**Conclusion and Recommendation.**

Well, when a speaker who does not know the difference between good and evil tries to convince a people as ignorant as himself, not by ascribing to a poor beast like a donkey the virtues of a horse, but by representing evil as in fact good, and so by a careful study of popular notions succeeds in persuading them to do evil instead of good, what kind of harvest do you think this rhetoric will reap from the seed he has sown?

Socrates (the Platonic one) in Phaedrus and Letters VII and VIII, translated by Walter Hamilton, Penguin Books, London W8 5TZ, England, 1973, page 72.

I had no doubt about the reality of Nazi evil. But I could now be more clear that the purpose of my psychological project was to learn more about, rather than replace, precisely that evil. To avoid probing the sources of that evil seemed to me, in the end, a refusal to call forth our capacity to engage and combat it. Such avoidance contains not only fear of contagion but an assumption that Nazi or any other evil has no relationship whatsoever to the rest of us – to more general human capacities.

Robert Jay Lifton, The Nazi Doctors: Medical killing and the Psychology of Genocide, Basic books, Harper Collins Publishers, 1986, xi-xii.

Evil is not passive, but active, It is self-assertive, and it strives to conquer. If it is not halted, if it is not vanquished, it can triumph, just as desert can triumph over fertile land, or the sea over a sandy beach.

Eli Wiesel in conversation with Philippe-Michael Saint-Cheron in Evil and Exile by Elie Wiesel and Philippe-Michael De Saint-Cheron, translated by Jon Rothschild University of Notre Dame Press, Notre Dame, London, 1990, page 190.

“I am a Jew...” are the first four words of David Attis’ April 21, 1988 letter of complaint to the New Brunswick Human Rights Commission. They are a poignant short clause. To anyone who has been a victim of the Nazis, these four words identify the landscape of the victim, the perpetrator, and the bystander. As well, they echo Shylock’s final plea to be understood as a Jew in human terms and no other. Today “I am a Jew” ought to be understood as such. However, in 1988 as now, it is also an assertion that the time of being a victim is over. It is indeed poignant that almost four hundred years since Shakespeare and almost half a century since Auschwitz, a Canadian must preface his claim on the justice system by identifying himself as a Jew. David Attis’ words are reminder that, as a Jew, and on behalf of his children, he is asserting his right and his freedom as a Canadian - not to be a victim. However, “I am a Jew” is still a reminder to Christians that the Holocaust occurred within a family of nations whose culture was Christian.

Although the reasons for Christian antisemitism are complex, its effect is devastatingly simple. Ultimately, it deprives a Jew of his identity as a person. It, therefore, deprives him of the respect one gives to a person. It leaves him vulnerable in a culture that has already murdered, at one time, a third of his people. Consequently, both viscerally and intellectually, it is very difficult to understand how the type of antisemitism preached and promoted by James Keegstra, Ernst Zundel, and by Malcolm Ross, is, after being analyzed and conceptualized, tolerated in the name of freedom of expression. If the Malcolm Ross case is to become a hallmark of Canadian justice the Supreme Court of Canada will have to deal honestly and directly with the following general questions:

- 1. What is a ‘market-place’ of ideas in the post-Holocaust world?**
- 2. What is the meaning of toleration when it is used to invoke intolerance?**
- 3. Has the Holocaust warned us that both John Stuart Mill’s**

nineteenth century concept of civil liberties and Plato's notion of the sovereign citizen have failed the test?

- 4. If being a Jew in the post-Holocaust world means refusing to be a victim – what does it mean to be a Christian in this world?**
- 5. From a moral perspective, what are the responsibilities of Parliament to represent the Canadian conscience?**
- 6. Finally, what will the Supreme Court's decision in the Malcolm Ross case mean for Canadian public education generally, and specifically, what will 'to teach' mean in the public school system?**

At the beginning of this chapter, I have quoted Socrates, Robert Jay Lifton, and Eli Wiesel. Following Northrop Frye, I have argued in chapter one that "Socrates remains the archetypal teacher..." because he committed his life (indeed, gave his life) to the search for truth. Frye has argued consistently that the Socratic paradigm of the teacher requires such commitment. It also requires of the teacher an ironic commitment to questions more than to their answers.

The Socratic warning in Phaedrus is clear – not to understand the distinctions between good and evil is, sooner or later, to do evil. Socrates was concerned primarily with the youth of Athens. He tried to teach them to be rational. He tried to teach them that rationality only begins with the admission 'I know that I do not know.' Through dialectic, he tried to teach the mechanics of knowledge and understanding; he tried to teach that rationality demanded a keen eye for evidence and an ear tuned to the hum of irony. It is the absence of such an educated and moral mind that permits the demagogue to perpetrate evil. It was such absence coupled with indifference that created the Holocaust.

Robert Jay Lifton spent many hours interviewing Nazi doctors in an attempt to understand the psychology of genocide.

Lifton attempted to explain, at least in part, how doctors, considered by society to be amongst the best educated, could have created the Nazi template for genocide – medical murder:

The key to understanding how Nazi doctors came to do the work of Auschwitz is the psychological principle I call: “doubling”: the division of the self into two functioning wholes, so that a part-self acts as an entire self. An Auschwitz doctor could, through doubling, not only kill and contribute to killing but organize silently, on behalf of that evil project, an entire self-structure (or self-process) encompassing virtually all aspects of behaviour.

Doubling, then, was the psychological vehicle for the Nazi doctors’s Faustian bargain with the diabolical environment in exchange for his contribution to the killing; he was offered various psychological and material benefits on behalf of privileged adaptation. Beyond Auschwitz was the larger Faustian temptation offered to German doctors in general: that of becoming the theorists and implementers of a cosmic scheme of racial cure by means of victimization and mass murder. (Lifton, 1986, p.418)

Lifton’s* extensive interviews with the Nazi doctors left him with the understanding that beyond a psychological appreciation of what they had done, he had to face the fact that the Nazi doctors were evil and it was evil, not just its psychology, with which he was dealing. Professor Yehuda Bauer echoes this conclusion:

Our problem with the Nazis is not that they were inhuman beasts...our problem is that they were human. (November 2, 1994, notes from his speech at Beth Israel Synagogue, Vancouver, B. C.)

Thus, the Holocaust defines the nadir of humanity. It remains the paradigm point in our understanding of evil. The overwhelming irony here, of course, has to do with our common

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notion that the practice of medicine is about helping humanity. It is the same notion we rightly have about the work that teachers do. Socratic irony may be the only way one may be able to understand the depth of evil expressed by medical doctors who created genocide and teachers who advocate it.

I have also quoted Elie Wiesel because, for better or worse, he has, for many, become the best known witness of the Holocaust. For Wiesel, unlike most of us, the Holocaust was and is the concrete experience of evil. Wiesel reminds us that evil is aggressive and “strives to conquer.” In fact, he reminds us that “...it can triumph”. In A Journey of Faith, he also reminds us that ‘for evil to exist, good people must do nothing’:

Hatred becomes powerful only in the context of indifference. What was Nazism? Nazism was anti-Semitism in power. [my emphasis] (Wiesel, 1990 (b), p.28)

Again, in Evil and Exile, Wiesel makes the same point:

Past indifference has engendered today’s indifference. If the world let things go between 1939 and 1945, why not let things go today? [my emphasis] (Wiesel, 1990 (a), p.20)

It is thus very noteworthy that on May 20, 1994, “German parliamentarians...passed a law making it illegal to deny the murder of more than six million Jews by the Nazis.” (Margaret Evans, The Globe and Mail, May 21, 1994, p.D2) In effect, German courts accept prima facie that Holocaust “denial itself constitutes racial hatred and an attack on human dignity.” (Evans, p. D2) According to lawyer Michael Friedman, a board member of the Jewish Communities of Germany:

The law has two functions: one to strengthen an old law, making it much more difficult to continue openly saying these things. [And] it has an educational input. It is necessary in a democratic country to know that the denying of Auschwitz offends the spirit of the state

and society. [my emphasis] (Evans, 1992)

Friedman asserts that this new law is important for Germany in the symbolic sense that

democratic Germany...was established under the condition that it would accept responsibility for the history of the Third Reich and the Holocaust.(Evans, D2)

Regarding Ernst Zundel's activities in Canada, Friedman is clear:

I think it is a scandal that in Canada it is possible to be involved in this anti-human, neo-Nazi spirit without any risk of punishment. (Evans, D2)

The German law against the 'Auschwitz lie' clearly indicates how serious the threat of Holocaust denial is for the Germans. After all, they and the Poles live within the 'scene of the crime'. For Friedman, as a German Jew, Holocaust denial is an "anti-human, neo-Nazi spirit". For the majority in the New Brunswick Court of Appeal, however, Holocaust denial is simply transmuted to "views that are not politically popular". For the minority in *Keegstra* and the majority in *Zundel* Holocaust denial was primarily useful as an abstraction. It was something distasteful enough, such that, by its very inclusion in the 'market-place' of ideas, it could demonstrate Canadian democratic tolerance. Furthermore, ran the argument, if Holocaust denial were legally beyond the pale this would have a "chilling effect" on all discourse. This, of course, is the civil liberties' argument. It is an ideological position which must protect its ideology by separating Holocaust denial from its effect - and thus denies that very effect. As such, the civil liberties' argument is false. It asks Jews, and by inference, other minorities, to be victims in order to protect majoritarian speech. Post-Holocaust democracy demands that expression advocating both democracy's suicide and another Jewish genocide be "chilled" - otherwise, the cost of freedom of expression is both immoral and meaningless.

According to Yehuda Bauer, Nazis* attempt to deny the Holocaust because

the Holocaust has become the symbol - rightly - of what the Nazis did...the Holocaust has become a code for evil... and the intellectual counter-development to this is Holocaust denial. (Bauer's 1994 Vancouver speech)

Essentially, Holocaust denial must be understood as an attempt to rehabilitate Nazism and fascism. As such, it is anti-democratic. According to Bauer, Nazism itself was an attempt to destroy western civilization and replace it with the Third Reich, and thus "You can't deny democracy without denying the Holocaust." He cautions: "The Holocaust could become a precedent or it could become a warning...it must become the latter." Any Supreme Court decision in the Ross case must understand this fundament of Holocaust denial. Any decision must also understand the nature of antisemitism if it is going to understand the danger posed by Holocaust denial.

In Anti-Semite and Jew, (1965) Jean-Paul Sartre has anticipated James Keegstra, Ernst Zundel, and Malcolm Ross:

How can one choose to reason falsely? It is because of a longing for impenetrability. The rational man groans as he gropes for the truth; he knows that his reasoning is no more than tentative, that other considerations may supervene to cast doubt on it. He never sees very clearly where he is going; he is "open"; he may even appear to be hesitant. But there are people who are attracted by the durability of a stone. They wish to be massive and impenetrable; they wish not to change...They do not want any acquired opinions; they want them to be innate. Since they are afraid of reasoning, they wish to lead the kind of life wherein reasoning and research play only a subordinate role, wherein one seeks only what he has

***Bauer eschews the adjective 'neo' in front of Nazi. " 'Neo' means new - there is nothing new about them."**

already found, wherein one becomes only what he already was...The anti-Semite has chosen hate because hate is a faith; at the outset he has chosen to devalue words and reasons. How entirely at ease he feels as a result. (Sartre, 1965, p.18/19)

In examining the Malcolm Ross case thus far, the Supreme Court must not see him as merely another antisemitic crack-pot who happens to be a teacher. Unlike any teacher, Malcolm Ross has chosen hate over reason. He has chosen to lie. He has chosen to ignore evidence that contradicts his 'beliefs'. His tone is evasive - it is sometimes threatening. His lying is consistent. It is the theology of hate. The briefest perusal of his writings bears witness to this. The lethal danger he represents must not be trivialized. He must not be understood simply as a reminder of the price we pay for free speech. If the Court is to understand Malcolm Ross, it must first understand him within the tradition and the culture he has chosen to ape - that of the Nazis. To underestimate Malcolm Ross' intentions by neglecting to see his writings as part of this clearly delineated ideology of hate would be the grossest of oversights.

Malcolm Ross, as a public school teacher, is the cruelest of paradoxes. By his actions he has ridiculed reason in a profession whose hallmark she is. After all, to be a person, no less a teacher, is to live under "the demands of reason." Through at least three* significant decisions dealing with freedom of expression the Court has affirmed "the nature of the principles and values underlying the vigilant protection of free expression in a society such as ours." (Irwin Toy, p.612) They are particularly worth repeating within the context of the Malcolm Ross case:

1. seeking and attaining truth is an inherently good activity;

*Ford v. Quebec (A.-G.), 1988; Attorney-General of Quebec v. Irwin Toy Ltd., 1989; and Regina v. Keegstra et al., 1990.

2. participation in social and political decision-making is to be fostered and encouraged, and,
3. the diversity in the forms of self-fulfillment and human flourishing ought to be cultivated in an essentially tolerant and indeed welcoming environment not only for the sake of those who convey a meaning, but also for the sake of those to whom it is conveyed. [my emphasis] (p.612)

It is clear that the Board of Inquiry's order (the Bruce decision) was informed, balanced, and fair. It set about to eliminate the "poisoned climate" created in School district 15 by Malcolm Ross' antisemitism. It recognized that Ross had not only infringed David Attis' Charter rights (and those of his children), but he had also tainted his profession and, by association, the reputation of his colleagues, and that of School District 15. Clearly, Ross' public promotion of antisemitism as a very public hate is an assault on all that is good in public education. The fact that the original complainant, David Attis, sought no more than to have Ross taken out of the public school classroom exemplifies a remarkable tolerance which the Board's order reflected. In removing the so-called 'gag' order imposed by the Bruce decision, the New Brunswick Court of Queen's Bench demonstrated that it did not understand fully the power and the influence of the teacher as a role model - whether in the classroom, whether working for School District 15 as a planner, or as a member of the community. Furthermore, it did not understand fully enough the dispiriting guilt by association that Malcolm Ross undoubtedly engendered among many other New Brunswick teachers. Unfortunately, it seems that the New Brunswick Teachers' Federation did not understand the fullness of this point either. The majority in the New Brunswick Court of Appeal demonstrated that it did not understand either the historical lethality of antisemitism or its potential when expressed as Holocaust denial. Furthermore, it erred grossly by not paying sufficient attention to the power teachers exert as role models. Such a gross omission allowed the majority to argue that Malcolm Ross' antisemitism found no victims amongst

either the Jewish or non-Jewish students in School District 15.

In sharp contrast, the dissent articulated succinctly the relationship between a student and a teacher and the importance to the community of the teacher as role model. The dissent could not have done so had it not understood and recognized the lethal nature of Malcolm Ross' antisemitism in general and his Holocaust denial in particular:

Inherent in the evilness of discrimination is an outright attack on the freedoms of others protected under s.2 by persons urging their own freedoms as though there were no consequences to the exercise of them. [my emphasis] (Ross, December 20, 1993, p.25)

In arguing that Malcolm Ross' antisemitism was not expression worth defending, the dissent, citing Dickson C. J. in *Oakes*, argued

that it "may become necessary to limit rights and freedoms in circumstances where their exercise would be inimical to the realization of collective goals of fundamental importance." (Ross, p.24)

Given the evidence thus far, to argue that Malcolm Ross' section 2 (b) right to free expression is not saved by any of the three principles informing "the vigilant protection of free expression" is a truism. In addition, it has been clear since Regina v. Keegstra that Malcolm Ross could be prosecuted successfully under section 319 (2) of the *Criminal Code*.

Recommendation.

The Supreme Court of Canada has sufficient evidence to convict Malcolm Ross under section 319 (2) of the *Criminal Code*. It has a sufficient body of case law to decide that being a public school teacher in Canada means, among other things, that the teacher is a role model for rationality both inside and outside the classroom. It has more than sufficient evidence to show

that Malcolm Ross has chosen the public forum to flaunt his irrational hatred. It has significant and overwhelming evidence to argue that the ultimate aim of Holocaust denial is, *prima facie*, the advocacy of another Jewish genocide. As a result, the Supreme Court of Canada ought to uphold the decision of the New Brunswick Human Rights Board of Inquiry.

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