PROSECUTING HATE SPEECH:
KEEGSTRA, ZUNDEL, AND THE CRIMINAL LAW'S ABILITY TO PROTECT VULNERABLE COMMUNITIES

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ABSTRACT

There has been an alarming increase in hate speech in recent years, both in Canada and abroad. There is wide consensus that increased emphasis on criminal law will help suppress harmful expression. Numerous countries have proposed or enacted new criminal laws targeting hate speech. But there is little evidence of governments and policymakers taking into account the experience of countries that have long had criminal laws aimed at harmful expression. Canada, which has criminalized hate speech since 1970, is one such country. The Canadian experience may hold lessons regarding whether the criminal law has proved an effective tool for countering racism and uplifting vulnerable groups.

This question—whether the criminal law is an effective tool for countering racism and uplifting vulnerable groups—forms the core inquiry of this dissertation. I explore this question through the cases of *R v Keegstra* and *R v Zundel*. Both prosecutions commenced in 1985 and both were ultimately decided by the Supreme Court of Canada. Both involved antisemitism and Holocaust denial. They remain the leading cases in Canadian law on the scope and limits of freedom of expression.

Keegstra and *Zundel* have received attention primarily from scholars interested in the proper ambit of freedom of speech in a liberal-democratic society. Missing from this scholarship is any significant assessment of whether hate-speech laws serve the goals of the criminal sanction and how hate-speech prosecutions impact victim groups.

This dissertation fills this gap by providing a history of these cases from the perspective of the Canadian Jewish community. The *Keegstra* and *Zundel* prosecutions had a profound impact on Canada's Jews. Yet no comprehensive history of these prosecutions has been written. I provide that account here.

This dissertation makes three main findings. First, to understand and respect vulnerable communities, we must acknowledge divisions within these groups. Second, the criminal law is a poor mechanism for countering hate speech. Third, civil law remedies and non-legal approaches should be relied on to supplement the criminal law in the fight against harmful expression.

DEDICATION

To my wife, Arlee, and to our children, Millie, Lyla, and Isabelle.

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CHAPTER 1 – Introduction

We live in a time of rising hate speech. Recent years have seen an alarming and precipitous increase in xenophobia, racism, and intolerance.[1] The COVID-19 pandemic and conflicts in the Middle East and around the globe have served as a catalyst and accelerant for this trend, unleashing what United Nations (UN) Secretary General António Guterres has called a "tsunami of hate, xenophobia, scapegoating and scare-mongering."[2] The Internet and social media have provided fertile ground for the spread of harmful expression.

There is, seemingly, a broad consensus that increased emphasis on the criminal law will help suppress growing hate speech. In just the last two years, Australia, South Africa, Scotland, Sweden, Ireland, and Nigeria have proposed or enacted new criminal laws targeting hate speech, to provide a non-exhaustive list.[3] Even in the United States, where the First Amendment seemingly makes it impossible to criminalize speech (absent an additional factor such as incitement to violence[4]), some commentators have recently called for hate speech to be criminalized.[5]

Canada fits squarely within this emerging consensus. The number of police-reported hate

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[1] United Nations (UN), "United Nations Strategy and Plan of Action on Hate Speech," online (PDF): un.org/en/genocideprevention/documents/advising-and-mobilizing/Action_plan_on_hate_speech_EN.pdf.

[2] United Nations (UN), Press Release, SG/SM/20076, "Secretary-General Denounces 'Tsunami' of Xenophobia Unleashed amid COVID-19, Calling for All-Out Effort against Hate Speech" (8 May 2020), online: press.un.org/en/2020/sgsm20076.doc.htm. See also United Nations, "A pandemic of hate," online: un.org/en/hate-speech/impact-and-prevention/a-pandemic-of-hate (accessed 17 July 2024); Gabriella Borter, "US antisemitic incidents hit record high in 2023 amid war in Gaza, report says," *Reuters* (16 April 2024), online: reuters.com/world/us/us-antisemitic-incidents-hit-record-high-2023-amid-war-gaza-report-says-2024-04-16/.

[3] Natassia Chrysanthos, "Labor's hate speech bill to outlaw vilification," *The Sydney Morning Herald* (26 May 2024), online: smh.com.au/politics/federal/labor-s-hate-speech-bill-to-outlaw-vilification-20240524-p5jgdw.html; Daniel Itai, "South African president signs new hate crimes, hate speech law," *Washington Blade* (12 May 2024), online: washingtonblade.com/2024/05/12/south-african-president-signs-new-hate-crimes-hate-speech-law/; James Cook, "Scotland's new hate crime law comes into force," *BBC* (1 April 2024), online: bbc.com/news/uk-scotland-68703684; "Sweden's Parliament Approves Proposal to Outlaw Holocaust Denial and Distortion," *World Jewish Congress* (22 May 2024), online: worldjewishcongress.org/en/news/swedish-parliament-proposes-resolutions-to-outlaw-holocaust-denial-and-distortion; Joshua Askew, "New hate speech laws kick up a storm in Ireland," *EuroNews* (3 May 2023), online: euronews.com/2023/05/03/new-hate-speech-laws-kick-up-a-storm-in-ireland.

[4] *Brandenburg v Ohio*, 395 US 444 at 447-48.

[5] Richard Stengel, "Why America needs a hate speech law," *Washington Post* (7 November 2019), online: washingtonpost.com/opinions/2019/10/29/why-america-needs-hate-speech-law/; Mannirmal Kaur Jawa, "The 'offensive' oversimplification: An argument for hate speech laws in the modern era," 19:5 *First Amendment Law Review* (2020); Noah Berlatsky, "Is the First Amendment too broad? The case for regulating hate speech in America," *NBC News* (23 December 2017), online: nbcnews.com/think/opinion/first-amendment-too-broad-case-regulating-hate-speech-america-ncna832246.

crimes in Canada increased 32% from 2022 to 2023 and has more than doubled since 2019.[6] In response, the Government of Canada has introduced new criminal law tools and promised greater enforcement of existing criminal laws.[7] In 2022, for instance, the federal government enacted a new criminal offence targeting the promotion of antisemitism.[8] In February 2024, the Canadian government proposed new legislation that would increase penalties available for existing hate-speech crimes.[9] Furthermore, in September 2024 a member of the federal New Democratic Party (NDP) introduced a Private Member's Bill aimed at criminalization residential school denialism.[10]

Caught up in this trend, there is little evidence that governments are taking into account the experience of countries that have long had criminal laws targeting harmful expression. Canada is one such country. Since 1970 the *Criminal Code of Canada* has contained several provisions outlawing hate speech. Accordingly, Canada has more than half a century of experience with criminal hate-speech laws. However, few seem interested in studying the lessons of this experience, including whether the criminal law has proved an effective tool for countering racism and uplifting vulnerable groups.

This question—whether the criminal law is an effective tool for countering racism and uplifting vulnerable groups—forms the core inquiry of this dissertation. Although past performance does not guarantee future results, in assessing the global trend in favour of hate-speech criminalization, it is imperative that we ask how the criminal law has performed thus far.

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[6] Government of Canada (Press Release), "The Government of Canada launches *Canada's Action Plan on Combatting Hate*" (24 September 2024), online: canada.ca/en/canadian-heritage/news/2024/09/the-government-of-canada-launches-canadas-action-plan-on-combatting-hate.html. Police-reported hate crime includes hate-speech offences under ss 318.1, 319.1, 319.2 and 319(2.1) of the *Criminal Code of Canada*, RSC, 1985, c C-46 [*Criminal Code*]. It also includes conversion therapy offences, mischief motivated by hate in relation to religious property, and any offence found to have been motivated by hate. Royal Canadian Mounted Police, "Hate crimes and incidents in Canada: Facts trends and information for frontline police officers,"

[7] See Government of Canada, "Canada's Action Plan on Combatting Hate," online: canada.ca/en/canadian-heritage/services/combatting-hate/action-plan.html.

[8] *Criminal Code*, *supra* note 6, s 319(2.1).

[9] Bill C-63, "An Act to enact the Online Harms Act, to amend the Criminal Code, the Canadian Human Rights Act and An Act respecting the mandatory reporting of Internet child pornography by persons who provide an Internet service and to make consequential and related amendments to other Acts," (44th Parliament, 1st session), online: parl.ca/LegisInfo/en/bill/44-1/c-63 [Bill C-63]. I will have more to say on these proposed amendments below.

[10] NDP (Press Release), "NDP's Leah Gazan tables bill to end residential school denialism," online: https://www.ndp.ca/news/ndps-leah-gazan-tables-bill-end-residential-school-denialism.

A failure to do so risks failing to heed the lessons of the past.

I explore this question through the cases of *R v Keegstra* and *R v Zundel*.[11] Both prosecutions were commenced in 1985 and both were ultimately decided by the Supreme Court of Canada – *Keegstra* in 1990 and *Zundel* in 1992. Both involved antisemitic speech and Holocaust denial. I rely on these two cases because they remain the leading cases in Canadian law on the scope and limits of freedom of expression. As such, these prosecutions have played a central role in defining Canadian hate-speech law and influencing past, present, and future uses of the criminal law to combat hate speech in Canada.

Keegstra and *Zundel* have received attention primarily from scholars interested in the proper ambit of freedom of speech in a liberal-democratic society. Missing from this scholarship is any significant assessment of whether hate-speech laws serve the goals of the criminal sanction and how hate-speech prosecutions impact victim groups.

My research fills this gap by providing a history of these cases from the perspective of the Canadian Jewish community. This story is a fascinating one but remains largely unexamined. Indeed, the Keegstra and Zundel cases have had a deep and lasting impact on Canadian Jews. In the words of Bernie Farber, former president of the Canadian Jewish Congress, the cases were "the discussion at every *Shabbes* [Sabbath] table across Canada."[12] These prosecutions continue to resonate and provoke debate both within and outside of the Jewish community. Yet no comprehensive historical account of them exists.

The Keegstra and Zundel cases are collectively unique in certain respects. As with all case studies, we should be cautious in extrapolating too much from them in assessing the criminalization of hate speech generally. But *Keegstra* and *Zundel* contain important lessons that are applicable to the broader question of whether hate speech should be criminalized. These lessons include how hate-speech prosecutions affect vulnerable groups and whether hate-speech trials advance the objectives of criminal justice. I will return to these themes in my conclusion.

[11] *R v Keegstra*, [1990] 3 SCR 697 [*Keegstra*]; *R v Zundel*, [1992] 2 SCR 731 [*Zundel*].
[12] Interview of Bernie Farber (2 February 2021) [on file with author] at 20.

I proceed in the remainder of this introduction as follows. First, I canvass academic conversations relevant to this study, including existing scholarship on *Keegstra* and *Zundel*. Second, I outline my methodology. Third, in order to better situate the reader, I provide an overview of existing hate-speech laws in Canada. Lastly, I offer brief descriptions of my dissertation chapters.

I. Scholarly Context

a. Existing scholarship on *Zundel* and *Keegstra*

The first category of scholarship relevant to this dissertation comprises writings directly relating to Keegstra's and Zundel's prosecutions and appeals. This scholarship can, in turn, be divided into three sub-categories.

First, there are historical works that address the Keegstra and Zundel cases. These writings summarize the legal proceedings and/or background to the cases, typically as part of larger works pertaining to antisemitism, Jewish history, or the history of Holocaust denial.[13] This category includes two monographs about James Keegstra, both published in 1985, that address Keegstra's

[13] See eg Alain Goldschläger, "The Trials of Ernst Zundel" in Robert Solomon Wistrich, ed, *Holocaust Denial: The Politics of Perfidy* (Jerusalem and Berlin: Hebrew University Magnes Press and De Gruyter, 2012); Deborah E Lipstadt, *Denying the Holocaust: The growing assault on truth and memory* (New York: The Free Press, 1993); Franklin Bialystok, *Delayed Impact*, *Delayed Impact: The Holocaust and the Canadian Jewish Community* (Montreal and Kingston: McGill-Queens University Press, 2000) at 230-39; Ira Robinson, *A History of Antisemitism in Canada* (Waterloo, Ont.: Wilfrid Laurier University Press, 2015) at 136, 139-44; Gerald Tulchinsky, *Canada's Jews: A People's Journey* (Toronto: University of Toronto Press, 2008) at 467-68; Jason Tingler, "Holocaust Denial and Holocaust Memory: The Case of Ernst Zündel" (2016) 10:2 Genocide Studies International 210; Alan Davies, ed., *Antisemitism in Canada: Theories and interpretation* (Waterloo, Ont.: Wilfried Laurier University Press, 1992); Leonidas E Hill, "The Trial of Ernst Zundel: Revisionism and the Law in Canada", online: museumoftolerance.com/education/archives-and-reference-library/online-resources/simon-wiesenthal-center-annual-volume-6/annual-6-chapter-7.html [https://perma.cc/X3XE-B3CW?type=image]; Robert A Kahn, "Who Takes the Blame - Scapegoating, Legal Responsibility and the Prosecution of Holocaust Revisionists in the Federal Republic of Germany and Canada" (1998) 16 Glendale L Rev 17; Warren Kinsella, *Web of hate: inside Canada's far right network* (Toronto: Harper Collins Publishers, 1994); Stanley R Barrett, *Is God a Racist? The right wing in Canada* (Toronto: University of Toronto Press, 1987); Guenter Lewy, *Outlawing genocide denial: the dilemmas of official historical truth* (Salt Lake City: The University of Utah Press, 2014); Mark Sandler, "Hate Crimes and Hate Group Activity in Canada" (1994) 43 UNBLJ 269; Allan Levine, *Seeking the Fabled City: The Canadian Jewish Experience* (Toronto: McLelland & Stewart, 2018) at 313-14.

first trial.[14] One is *Keegstra: The Trial, the Issues, the Consequences*[15] by journalists Steve Mertl and John Ward; the second is *A Trust Betrayed: The Keegstra Affair*[16] by David Bercuson—a historian and professor at the University of Calgary—and Douglas Wertheimer, the founder and editor the Alberta newspaper the *Jewish Star*. These monographs are helpful for illuminating some of the history behind Keegstra's prosecution, and I will utilize them for this purpose.

Surprisingly, leading works of Canadian-Jewish history devote little attention to the Keegstra and Zundel cases. Gerald Tulchinsky's landmark two-volume work on Canada's Jews, for example, summarizes *Keegstra* and *Zundel* in less than two pages.[17] The same is true of Allan Levine's *Seeking the Fabled City: The Canadian Jewish Experience*.[18] Franklin Bialystok's *Delayed Impact: The Holocaust and the Canadian Jewish Community*[19] and Ira Robinson's *A History of Antisemitism in Canada*[20] discuss the cases in only slightly greater detail. These authors' research into Canadian-Jewish history is, nevertheless, highly valuable and I will draw on their scholarship here.

The second sub-category is doctrinal works on *Keegstra* and *Zundel*. This consists mainly of scholarship that analyzes the trials or appeal decisions through the lens of the debate over the scope and limits of freedom of expression in Canadian law.[21] Some of this work is comparative,

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[14] Two monographs were also published concerning the Zundel prosecution: one by Douglas Christie, counsel for both Keegstra and Zundel, entitled *The Zundel trial & free speech* (Toronto: Citizens for Foreign Aid Reform Inc., 1985) and another published by the Institute for Historical Review, an organization known for publishing works that promote Holocaust denial (Michael Hoffman, *The Great Holocaust Trial* (Torrance, CA: Institute for Historical Review, 1985)). The former book consists solely of excerpts from Christie's closing submissions to the jury in Zundel's first trial.

[15] Saskatoon: Western Producer Prairie Books, 1985.

[16] Toronto: Doubleday, 1985.

[17] See Gerald Tulchinsky, *Branching Out: The Transformation of the Canadian Jewish Community* (Toronto: Stoddard Publishing Co, 1998) at 330-31; see also Tulchinsky, *Canada's Jews*, *supra* note 13 at 467-8 (the latter work is a "replacement and an update" to Tulchinsky's earlier two-volume work, which includes *Branching Out* and *Taking Root: The Origins of the Canadian Jewish Community* (Toronto: Lester Pub., 1992). The portion discussing Keegstra, Zundel, and the trial of Malcolm Ross, is identical in *Branching Out* and in *Canada's Jews*.

[18] Levine, *supra* note 13 at 313-14.

[19] Bialystok, *Delayed Impact*, *supra* note 13 at 230-39.

[20] Robinson, *supra* note 13 at 139-44.

[21] See eg Michel Rosenfeld, "Hate Speech in Constitutional Jurisprudence: A comparative analysis" in Michael E Herz & Péter Molnár, The content and context of hate speech: rethinking regulation and responses (New York: Cambridge University Press, 2012) at 242; Arthur Fish, Freedom of speech: the legal right in its political setting (SJD Dissertation, University of Toronto Faculty of Law, 1994) [unpublished] [Fish, "Freedom of speech"]; Arthur Fish, "Hate Promotion and Freedom of Expression: Truth and Consequences" (1989) 2:2 Can JL & Jur 111; Lorraine E

drawing similarities and differences between Canada's and other countries' approaches to hate speech, and taking a position on the merits of these approaches.[22] I do not intend to add significantly to this doctrinal literature assessing the merits of the decisions, as my focus is on the impacts of the trials on the Jewish community; nevertheless, my work seeks to inform and shape doctrine through my study of the impact of these prosecutions on the victim community and through the lens of the effectiveness of the criminal sanction.

The third sub-category of scholarship directly relating to these cases is the smallest, yet perhaps the most relevant to my work. It encompasses two studies that used survey research to measure the impact of the Keegstra and Zundel prosecutions on the victims and the broader public. One is Evelyn Kallen's and Lawrence Lam's 1993 article "Target for Hate: The Impact of the Zundel and Keegstra Trials on a Jewish-Canadian Audience."[23] (The authors were professors of social anthropology and sociology, respectively, at York University.) The other is *Hate on Trial:*

Weinrib, "Hate Promotion in a Free and Democratic Society: R. v. Keegstra" (1991) 36:4 McGill LJ 1416; Dino Bottos, "Keegstra and Andrews: A commentary on hate propaganda and the freedom of expression." (1989) 27:3 Alta L Rev 461; Ian B McKenna, "Canada's Hate Propaganda Laws—A Critique" (1994) 26:1 Ottawa L Rev 159; Edward L Greenspan, "Should Hate Speech Be a Crime?" (2004) 111:1 Queen's Quarterly 72 at 85; Jamie Cameron, "The Past, Present, and Future of Expressive Freedom under the Charter," (1997) 35:1 Osgoode Hall LJ 35 1; Gerald Tishler, "Freedom of Speech and Holocaust Denial" (1987) 8:3 Cardozo L Rev 559; Marouf A. Hasian, "Canadian Civil Liberties, Holocaust Denial, and the Zundel Trials" (1999) 21:3 Communications and the Law 32; Bruce P Elman, "Combatting Racist Speech: The Canadian Experience" (1994) 32:4 Alta L Rev 632; Bruce P Elman & Erin Nelson, "Distinguishing Zundel and Keegstra" (1993) 4:3 Const Forum Const 71; Susan M Ross & Brian M O'Connell, "The Boundaries of Expression Canadian Law and the Dynamics of the Internet" (1997) 35 Free Speech Year Book 175; Credence Fogo-Schensul, "More Than a River in Egypt: Holocaust Denial, the Internet, and International Freedom of Expression Norms" (1997) 33:1 Gonz L Rev 241; Mayo Moran, "Talking about Hate Speech: A Rhetorical Analysis of American and Canadian Approaches to the Regulation of Hate Speech" (1994) 6 Wis L Rev 1425; Ronda Bessner, "The Constitutionality of the Group Libel Offences in the Canadian Criminal Code" (1987) 17:2 Man LJ 184; Stefan Braun, "Social and Racial Tolerance and Freedom of Expression in a Democratic Society: Friends or Foes - Regina v. Zundel" (1988) 11:2 Dal LJ 471 [Braun, "Social and Racial Tolerance"]; Alan Borovoy, et al, "Language As Violence v. Freedom of Expression: Canadian and American Perspectives on Group Defamation." (1988-1989) 37:2 Buff L Rev 337; Terry Heinrichs, "Free Speech and the Zundel Trial" (1986) 93:1 Queen's Quarterly 837; Martine Valois, "Hate Propaganda, Section 2(b) and Section 1 of the Charter: A Canadian Constitutional Dilemma" (1992) 26:3 Revue Juridique Thémis 373; Michael Mandel, *The Charter of Rights and the legalization of politics in Canada* (Toronto: Thompson Educational Publishing, 1994) at 369-376; Thomas D Jones, "Group Defamation under British, Canadian, Indian and Nigerian Law" (1997) 5:3 Intl J on Minority & Group Rights 281; Richard Moon, "Drawing Lines in a Culture of Prejudice: *R. v. Keegstra* and the Restriction of Hate Propaganda" (1992) 26:1 UBC L Rev 99; Stefan Braun, *Democracy Off Balance* (Toronto: University of Toronto Press, 2004).

[22] Rosenfeld, *supra* note 21; Fish, "Freedom of speech", *supra* note 21; Fogo-Schensul, *supra* note 21; Moran, *supra* note 21; Bessner, *supra* note 21; Braun, "Social and Racial Tolerance", *supra* note 21; Borovoy, *supra* note 21; Valois, *supra* note 21 ; Jones, *supra* note 21; Lewy, *supra* note 13.

[23] (1993) 25:1 Canadian Ethnic Studies 9.

The Zundel Affair, the Media, and Public Opinion in Canada (1986), written by Gabriel Weimann—a political scientist at Carleton University—and Haifa University sociologist Conrad Winn.[24] I will refer to these studies in chapter 4 and again in my conclusion.

This dissertation adds to existing scholarship on *Keegstra* and *Zundel* in at least two ways: first, by providing a comprehensive historical account of these cases from the perspective of the Jewish community; second, by studying these cases through the lens of the limits of the criminal law and the effectiveness of the criminal sanction in protecting vulnerable groups, rather than through the framework of freedom of expression.

b. Background and informing literatures

In addition to scholarship directly relating to the Zundel and Keegstra cases, there are a set of literatures in the background more or less overtly informing the way that I am reading this history and analyzing it.

Most obviously, and sometimes engaged directly, is scholarship pertaining to the philosophical debate regarding hate speech and freedom of expression. There is a longstanding conflict as to whether hate speech should be criminalized or otherwise regulated. The counterparties are those who champion a "marketplace of ideas" and those who view the law as an effective tool for protecting the victims of harmful speech.[25] The former rests on the premise that there is a societal benefit to hearing all sides and that the better or truer view will prevail in this competition of ideas[26] – in other words, that "the answer to bad or erroneous speech is not censorship, but rather more and better speech."[27] The latter approach posits that hate speech has

[24] (Oakville, Ont: Mosaic Press, 1986).
[25] See eg Tishler, *supra* note 21.
[26] See eg Anthony Lewis, *Freedom for the Thought That We Hate: A Biography of the First Amendment* (New York: Basic Books, 2007); Ronald Dworkin, "Foreword" in I Hare and J Weinstein, eds., *Extreme speech and democracy* (Oxford: Oxford University Press, 2009); Jeremy Waldron, *The Harm in Hate Speech* (Cambridge, MA: Harvard University Press, 2012.
[27] Richard Moon, "What happens when the assumptions underlying our commitment to free speech no longer hold?", 28:1 Const Forum Const 1 at 1. See also e.g. Greenspan, *supra* note 21 at 85 ("[T]he only way to kill a bad idea is by exposing it and trumping it with better ones."); Henrichs, *supra* note 21 ("[T]he proper response to the danger [of hate speech] is not suppression but refutation in argument. This approach, to be sure, entails risks, but it is the only one which can *both* be successful *and* consistent with the values of a liberal-democratic society." (emphasis in original)); A Alan Borovoy, **"**Freedom of Expression: Some Recurring Impediments" in Rosalie Abella and Melvin L Rothman,

pernicious effects on its targets and erodes the self-esteem of vulnerable groups and, therefore, should be regulated.[28]

But although the philosophical debate is longstanding, I am aware of no empirical studies into interactions between the criminal justice system and the victims of hate speech. This gap should concern us. A lack of empirical research means we risk making policy and doctrinal choices in the absence of information about whether these choices will actually protect vulnerable groups – and risk mistakenly assuming that the criminal law is capable of meaningfully protecting victimized communities. Accordingly, if we want to assist the targets of hate speech, it is imperative that we study the lived experience of victims to determine whether the law is—and is capable of—accomplishing this goal.

Second, of necessity given that this study addresses the efficacy of the criminal law in the hate-speech context, debates about the utility and limits of the criminal sanction form part of the backdrop. This literature asks what model or models the criminal justice system is founded upon—or should be founded upon—whose interests these models serve, and whether the incentives shaped by the criminal law match the goals of a well-functioning criminal justice system. Relatedly, scholars have debated what a "well-functioning" criminal justice system should look like, what are its proper ends, and what means should be used to attain those ends. Included in this debate is the question, long debated by criminal law theorists, of why we punish and the different

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eds, *Justice Beyond Orwell* (Montréal: Éditions Y. Blais, 1986) 125 at 134 ("In my view, it is rarely possible to express, for legal purposes, the relevant distinctions – between acceptable criticism and unredeemed offensiveness, between the worthwhile and the worthless. I conclude, therefore, that in general the law should avoid the attempt. Subject to few exceptions, it is better to risk exposure to insult than to allow an interference with society's 'grievance procedure'. By the same token, it is usually better to permit a piece of trash than to suppress a work of art.").

[28] See Waldron, *supra* note 26; Mari Matsuda, "Public response to racist speech: Considering the victim's story" in Mari Matsuda, et al, eds., *Words that wound: Critical race theory, assaultive speech, and the first amendment* (New York: Routledge, 1993) at 17; Judith Butler, *Excitable speech: A politics of the performative* (Abingdon: Routledge, 1997); Mark Sandler, "Hate Crimes and Hate Group Activity in Canada" (1994) 43 UNBLJ 269 at 269, 276-77 ("Whereas legitimate defenders of freedom of speech raise legitimate concerns about inhibiting this basic freedom, freedom of speech is also being used by the racists in our midst to disguise the true nature of their activity, and to seek immunity for hate propaganda that undermines the very fabric of our society, hate propaganda has to be addressed. We have a moral responsibility to do so. Whether it be anti-semitic, anti-black or homophobic, one cannot be silent. A 'let's do nothing' attitude, with the hope that this material will not persuade and enlist youngsters to the cause is a most dangerous position to take.")

justifications offered for punishment. These theorists have also questioned whether, and if so to what degree, the criminal sanction has an educational function and can shape societal norms.

As with freedom of speech, academics typically approach these questions through a philosophical lens, and eschew, or at least deemphasize, empirical inquiry.[29] Here again, approaching the issue from a purely theoretical vantage point risks relying on assumptions that do not accord with lived experience. Furthermore, some of this literature effaces the victim from the discussion entirely. My dissertation will supplement this scholarship by grounding the theoretical debate about the criminal law's effectiveness in qualitative and empirical analysis in the context of hate speech.

Third, connected with the above, this dissertation is informed by the growing conversation surrounding the lived experience of victims, including the unsatisfying and potentially harmful effects of criminal prosecutions and the adversarial system on victims of crime. Increasingly, scholars are asking whether the criminal law is benefitting victims or simply making things worse, and whether the criminal law as currently formulated is even capable of vindicating victims or effectively performing the other myriad tasks we assign to it.[30] Some of this work has emerged in the area of feminist scholarship and the law of sexual assault, where some scholars have recognized that the system is leaving victims traumatized and dissatisfied, even when convictions are

[29] Examples of this scholarship include: Herbert Packer, *The Limits of the Criminal Sanction* (Stanford, CA: Stanford University Press, 1968); RA Duff, et al, eds., *Criminalization: the political morality of the criminal law* (Oxford: Oxford University Press, 2015); Joel Feinberg, *Moral limits of the criminal law: Volume 1, harm to others* (New York: Oxford University Press, 1984); Annika Snare Oslo, ed, *Beware of Punishment: On the Utility and Futility of Criminal Law* (Oslo: Pax Forlag, 1995); Michael King, *The Framework of Criminal Justice* (London: Croom Helm, 1981); Kent Roach, "Four Models of the Criminal Process" (1999) 89:2 Journal of Criminal Law and Criminology 671; Douglas Evan Beloof, "The Third Model of Criminal Process: The Victim Participation Model" (1999) 1999:2 Utah L Rev 289.

[30] See eg Benjamin L Berger, "On the Book of Job, Justice, and The Precariousness of the Criminal Law" (2008) 4:1 Law Culture and Humanities 98 at 99 ("Despite society's expectations, the criminal law is always unable to wholly achieve [the goal of doing justice] and is, indeed, always on the precipice of making things worse. This awkwardness plagues even, or perhaps especially, the quotidian; this precariousness is a brooding, relentless companion to the criminal law."); Owen Fiss, "The Awkwardness of the Criminal Law," in *ibid*, *The Law as it Could Be* (New York: New York University Press, 2003) 133; Paul Iganski, *'Hate crime' and the city* (Brisol: Policy Press, 2008); Kent Roach, *Due Process and Victims' Rights: The New Law and Politics of Criminal Justice* (Toronto: University of Toronto Press, 1999).

obtained.[31] I ask whether the Jewish community has been well-served by the criminal law; and, if not, whether the criminal justice system was ever capable of giving the community what it wanted, or, to borrow a phrase from Gerald Rosenberg, it always represented a "hollow hope".[32]

Related to literature relating to the lived experience of victims, this study intersects with law and emotion scholarship. Although not overtly engaged with in this dissertation, writings in the field of law and emotions have shaped my reactions to my research, particularly as it relates to the emotional impact wrought by the Keegstra and Zundel prosecutions on the Jewish community. As Emily Kidd White eloquently puts it, "Legal philosophy is obsessed with bloodless questions. And yet, human rights cases are adjudicated in spaces full of beating hearts."[33] Indeed, writing about hate and victimhood necessarily involves engaging with emotion. As described by Terry Maroney, "contemporary law and emotion scholarship is based on the beliefs that human emotion is amenable to being specifically and searchingly studied, that it is highly relevant to the theory and practice of law, and that its relevance is deserving of closer scrutiny than it historically has

[31] See eg: Elaine Craig, *Putting trials on trial: Sexual assault and the failure of the legal profession* (Montreal, McGill-Queen's University Press); Rosemary L Barberet, *Women, crime and criminal justice: A global enquiry* (London: Routledge, 2014); Lee Madigan & Nancy Gamble, *The second rape: society's continual betrayal of the victim* (New York: Lexington Books, 1991); Dianne L. Martin, "Retribution Revisited: A Reconsideration of Feminist Criminal Law Reform Strategies" (1998) 36 Osgoode Hall LJ 151 (see at 184: "[T]he need for a clear and public acknowledgement of the wrong that has been done is a legitimate and indeed fundamental need of any crime victim. The ultimate false promise lies in the identification of punishment/retribution with that recognition. At the same time, those who abuse, and the communities that condone or ignore their conduct must change; the false promise that punishment will achieve that change must be more than acknowledged; and the understanding must be incorporated in new strategies."); Meagan Johnston, "Sisterhood Will Get Ya: Anti-rape Activism and the Criminal Justice System" in Elizabeth A Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women's Activism* (Ottawa: University of Ottawa Press, 2012) at 267 (arguing that "the criminal justice system is woefully inadequate to the task of addressing sexual assault at every turn"); Dana Phillips, "Let's Talk about Sexual Assault: Survivor Stories and the Law in the Jian Ghomeshi Media Discourse" (2017) 54:4 Osgoode Hall LJ 1133 at 1147-48, 1156-57; Aya Gruber, "Rape, Feminism, and the War on Crime" (2009) 84:4 Wash L Rev 581 (see at 659: "The lonely voice of women's empowerment cannot and will not be heard above the sound and fury of the criminal system's other messages – messages that reinforce stereotypes, construct racial and socio-economic binaries, and unmoor crime from issues of social justice. Now is the time for us to step back, change directions, and reclaim the feminist movement from the hands of mainstream power and conservative ideology."); Lynne N. Henderson, The Wrongs of Victim's Rights, (1985) 37 Stan L Rev 937 at 966 (1985) (asserting that when the criminal system focuses on "blame and denial, [it] proceeds on the basis of mistaken normative assumptions about victims").

[32] Gerald N Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* 2nd ed (Chicago and London: The University of Chicago Press, 2008).

[33] Emily Kidd White, "Till Human Voices Wake Us" (2014) 3:3 J of L, Religion & State 201 at 238.

received."[34] This body of scholarship, although still relatively new,[35] has produced several insights that are highly relevant to my work. For example, a central teaching of law and emotion scholars is that a deeper understanding of emotions can better inform doctrinal choices.[36] In the words of Susan Bandes: "The legal system is built on assumptions about human behavior, including assumptions about emotion."[37] This overreliance on assumptions is especially true of how the law approaches victims. The criminal law is long on assumptions of how victims feel and what victims want, but short on empirical and qualitative data.

II. Qualitative and Empirical Research

While engagement with the literatures canvassed above forms a core part of my methods in this dissertation, my study also relies on several other research components. These other components help ground my doctrinal and conceptual analysis in a solid foundation of empirical and qualitative research integral to the study of legal history.

For instance, this dissertation draws heavily from archival research. I rely on archival documents from repositories across Canada. This includes Jewish archives such as the Ontario Jewish Archives (located in Toronto), the Alex Dworkin Canadian Jewish Archives (Montreal), and the Jewish Heritage Centre of Western Canada (Winnipeg), and other archives including Library and Archives Canada, the Archives of Ontario, the City of Toronto Archives, and the Legal Archives Society of Alberta. These and other archives contain a rich body of documentation relevant to these cases, which has heretofore remained unexplored.

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[34] Terry A Maroney, "Law and Emotion: A Proposed Taxonomy of an Emerging Field" (2006) 30:2 Law and Human Behavior 119 at 124.

[35] *Ibid* at 123 ("While the literature that identifies itself as part of a distinct law and emotion field remains small, it continues to grow in both volume and richness. Indeed, well over half of the literature on law and emotion, both theoretical and empirical, has been generated since 1999").

[36] See also eg Susan Bandes, "Introduction" in Susan Bandes, ed, *The Passions of Law* (New York: New York University Press, 1999) 1 at 7 [Bandes, "*Passions of Law*"]; Kathryn Abrams & Hila Keren, "Who's Afraid of Law and the Emotions?" (2010) 94:6 Minn L Rev 1997 at 2063; Maroney, *supra* note 34 at 12.

[37] Susan A Bandes, et al, eds, *The Edward Elgar Research Handbook on Law and Emotion* (forthcoming) at 1, available online: papers.ssrn.com/sol3/papers.cfm?abstract_id=3676084. See also Maroney, *supra* note 34 at 121 ("The emotional aspects of our substantive and procedural law … have tended to develop *sub rosa*, consisting largely of unstated assumptions about human nature").

I also rely heavily on interviews. I have interviewed approximately fifty people for this dissertation. My interviewees include Holocaust survivors, members of the Jewish community who occupied leadership roles and formulated community strategy on antisemitism, lawyers involved in the Keegstra and Zundel cases, and journalists who covered them. The interviews were semi-structured, using rough outlines and open-ended questions. In addition to the interviews I have personally conducted, I cite from interview transcripts available through databases such as the USC Shoah Foundation and the Osgoode Society for Canadian Legal History Oral History Program. Oral history provides a fuller picture than use of documentation alone.[38] It also complements the use of documentary evidence, as I have been able to triangulate both types of evidence against one another.

In addition to archival research and interviews, I draw extensively on other qualitative and empirical sources including court transcripts, judicial decisions, legislative debates, and newspaper and other media articles.

The goal of my research methodology is to draw contemporary lessons from historical events. To borrow from Martha Minow's typology of legal scholarship, I seek to (1) offer a rich description of an earlier era; (2) satisfy the criteria within the field of history in use of sources, triangulation, and contextualization; and (3) suggest how this study illuminates differences, choices, or continuities when compared with contemporary domestic practice with respect to hate speech.[39]

III. Canadian Hate Speech Laws

Given that this dissertation tracks the history of the hate-speech legislation and assesses its efficacy, it is useful to provide the reader at the outset with an overview of existing hate-speech laws in Canada.

Under the Canadian constitution, the federal government, rather than the provinces, has

[38] See Baylor University Institute for Oral History, "Understanding oral history: Why do it?", online: https://www.baylor.edu/content/services/document.php/66420.pdf.
[39] Martha Minow, "Archetypal Legal Scholarship: A Field Guide", (2013) 63 J Legal Educ. 65.

exclusive authority to pass criminal legislation.[40] Accordingly, Canada's criminal statutes are contained solely in federal legislation, primarily the *Criminal Code of Canada*.[41] The *Criminal Code* has specifically outlawed hate speech since 1970. As we will see, Canada's hate-speech laws were introduced in large measure due to lobbying from the Canadian-Jewish community. The original legislation created three criminal offences, which remain the heart of Canada's hate-speech provisions:

(1) **Advocating genocide:** Advocating or promoting the genocide of an identifiable group.[42]

(2) **Wilful promotion of hatred:** Wilfully promoting hatred, other than in private conversation, against an identifiable group.[43]

(3) **Public incitement of hatred:** Incitement of hatred against an identifiable group where such statement is likely to lead to a breach of the peace.[44]

Advocating genocide is punishable by up to five years imprisonment.[45] Wilful promotion of hatred and public incitement of hatred are punishable by up to two years imprisonment.[46]

The word "wilful" has been interpreted by the courts to mean that the speaker must have desired to promote hatred or foreseen that this consequence was certain or substantially certain to result.[47] "Hatred" has been interpreted to connote "emotion of an intense and extreme nature that is clearly associated with vilification and detestation."[48] It therefore applies only to "expression of an unusual and extreme nature."[49] "Identifiable group" is defined as "any section of the public distinguished by colour, race, religion, national or ethnic origin, age, sex, sexual orientation, gender identity or expression, or mental or physical disability."[50]

The first two offences—advocating genocide and wilful promotion of hatred—criminalize

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[40] *Constitution Act, 1867*, 30 & 31 Victoria, c 3 (UK), s 91(27) [*Constitution Act, 1867*].
[41] The provinces have authority to enact regulatory offences, so long as they do not encroach on the federal government's exclusive criminal law power. See *Constitution Act, 1867*, s 91(15).
[42] *Criminal Code*, *supra* note 6, s 318.
[43] *Ibid* s 319(2).
[44] *Ibid* s 319(1).
[45] *Ibid* s 318(1).
[46] *Ibid* s 319(1)(a) & s 319(2)(a).
[47] *Keegstra*, *supra* note 11 at 774-75.
[48] *Ibid* at 777-78.
[49] *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11 at para 40.
[50] *Criminal Code*, *supra* note 6, s 319(1).

certain forms of speech *per se* – that is, without the need to show any risk of violence or other factor. In contrast, the third offence—incitement of hatred—requires the prosecution to establish that the speech was likely to lead to breach of the peace. Because the offences of advocating genocide and wilfully promoting hatred criminalize speech *per se*, thereby creating an amplified threat to freedom of expression, they are subject to the additional requirement that no prosecution for these offences can be commenced without the consent of the attorney general.[51] This is an unusual requirement that does not apply to most other offences in the *Criminal Code*. The requirement of the attorney general's consent has had a chilling effect on use of these provisions.[52]

In addition, the offence of wilful promotion of hatred is subject to four defences written into the legislation. Specifically, no person shall be convicted of wilful promotion of hatred if:

(a) The accused's statements were true;

(b) The accused in good faith expressed or attempted to establish by argument an opinion on a religious subject or an opinion based on a belief in a religious text;

(c) The accused's statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds they believed them to be true; or

(d) if, in good faith, they intended to point out, for the purpose of removal, matters producing or tending to produce feelings of antisemitism toward Jews.[53]

Out of these three hate-speech offences, wilful promotion of hatred is the one most frequently charged.[54] However, all of them are used infrequently compared with other *Criminal Code* offences, and the conviction rate for these crimes is also significantly lower than the average

[51] *Ibid* s 318(3) & s 319(6). "Attorney General" is defined as the attorney general of the province where the charge is laid. See *ibid* at s 2(a). Note that although the federal government has exclusive jurisdiction to pass criminal laws, the provinces have authority over the actual administration of justice. See *Constitution Act, 1867*, *supra* note 40, s 92(14).
[52] William Kaplan, "Maxwell Cohen and the Report of the Special Committee on Hate Propaganda" in William Kaplan & Donald McRae, eds, Law, Policy, and International Justice: Essays in Honour of Maxwell Cohen (McGill-Queen's University Press, 1993) 243 at 267; Richard Moon, *Putting Faith in Hate: When Religion is the Source or Target of Hate Speech* (Cambridge University Press, 2018) at 25; Craig S MacMillan, Myron G Claridge & Rick McKenna, "Criminal Proceedings as a Response to Hate: The British Columbia Experience" (2002) 45 Crim LQ 419 at 446
[53] *Criminal Code*, *supra* note 6 s 319(3).
[54] Hate crime statistics provided by Statistics Canada to author, January 2021 [on file with author].

for all criminal offences in Canada.[55]

In 2022, the Canadian government enacted a new hate-speech offence called "wilful promotion of antisemitism." This offence makes it a crime to wilfully promote antisemitism by condoning, denying or downplaying the Holocaust.[56] A prosecution for wilful promotion of antisemitism requires the attorney general's consent, and this offence is also subject to the same defences applicable to wilful promotion of hatred set out above.[57] This legislation was introduced in response to a disturbing increase in antisemitic incidents in Canada, which have risen further since the onset of war between Israel and Hamas after 7 October 2023.[58]

In February 2024, the Canadian government introduced new legislation, called the *Online Harms Act*, that would increase regulation of speech, particularly on social media.[59] As part of this proposed legislation, the government plans to increase the maximum penalties available for existing hate-speech crimes. The maximum punishment for wilful promotion of hatred, public incitement of hatred, and wilful promotion of antisemitism would be increased from two years to five years imprisonment.[60] The maximum penalty for advocating genocide would be raised to life imprisonment.[61] Additionally, the *Online Harms Act* proposes new criminal law tools to counter hate speech. For instance, the legislation would create a new provision authorizing a court to issue a peace bond (akin to a restraining order) against anyone whom the court fears on reasonable

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[55] I note some of the specific data on this issue in chapter 2. See also Jason Proctor, "The difficult history of prosecuting hate speech in Canada," *CBC News* (13 June 2020), online: https://www.cbc.ca/news/canada/british-columbia/racists-attacks-court-hate-crimes-1.5604912; Chris Selley, "'Very narrow': Here's why 'hate crimes' are rarely charged and almost never prosecuted in Canada," *National Post*, online: nationalpost.com/opinion/why-hate-crimes-are-rarely-charged-and-almost-never-prosecuted-in-canada.

[56] *Criminal Code*, *supra* note 6, s 319(2.1).

[57] *Criminal Code*, *supra* note 6, s 319(6) & s 319(3.1).

[58] Marie Woolf, "Holocaust denial – and downplaying the Nazis' murder of Jews – to be outlawed," *Canadian Press* (8 April 2022); Peter Zimonjic, "Number of antisemitic incidents reached record high in 2023, says B'nai Brith Canada audit," *CBC News* (6 May 2024), online: cbc.ca/news/politics/bnai-brith-antisemitic-report-record-high-1.7195197.

[59] See Bill C-63, "An Act to enact the Online Harms Act, to amend the Criminal Code, the Canadian Human Rights Act and An Act respecting the mandatory reporting of Internet child pornography by persons who provide an Internet service and to make consequential and related amendments to other Acts," (44th Parliament, 1st session), online: parl.ca/LegisInfo/en/bill/44-1/c-63.

[60] See Government of Canada, Department of Justice, "Bill C-63 Explanatory Note," online: justice.gc.ca/eng/csj-sjc/pl/charter-charte/c63.html (last accessed 17 July 2024).

[61] *Ibid*.

grounds will commit a hate-crime offence in the future, including a hate-speech offence.[62] The *Online Harms Act* has received significant criticism, including from the Conservative Party, the main opposition to the governing Liberals.[63] Accordingly, its passage may depend on the result of the upcoming federal election scheduled for 28 April 2025.[64]

Another bill introduced in Canada's Parliament in September 2024 by NDP Member of Parliament Leah Gazan proposes to criminalize the promotion of hatred against Indigenous Peoples by condoning, justifying or downplaying the historical and lasting impact of residential schools.[65] This bill has yet to be passed but enjoys widespread public support.[66]

In addition to the existing and proposed laws set out above, the *Criminal Code* formerly contained a provision outlawing the spreading of false news. This law was included as part of the original *Criminal Code* introduced in 1892.[67] The provision made it an offence to wilfully publish "a statement, tale or news that he knows is false and causes or is likely to cause injury or mischief to a public interest."[68] The crime of spreading false news was declared unconstitutional by the Supreme Court of Canada in 1992 in *Zundel*.[69]

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[62] *Ibid*.
[63] Stephanie Taylor, "Poilievre promises to scrap Online Harms Act after budget watchdog projects $200M cost," *Canadian Press* (4 July 2024), online: ca.news.yahoo.com/creating-proposed-online-harms-regulators-134135238.html ["Poilievre promises to scrap Online Harms Act"]. See also eg Stephanie Taylor, "Canadians divided on whether online harms bill will make social media safer," *National Post* (13 March 2024), online: nationalpost.com/news/canada/canadians-divided-on-whether-online-harms-bill-will-make-social-media-safer; Kristopher Kinsinger, "The Libreals' online harms law is a full-frontal assault on freedom of speech," *The Hub* (20 March 2024), online: thehub.ca/2024/03/20/kristopher-kinsinger-online-harms-law/.
[64] In December 2024, the government announced that it is splitting the *Online Harms Act* into two separate bills. Amendments to the *Criminal Code* and the *Canadian Human Rights Act*, RSC, 1985, c H-6 will be included in the second bill, reducing the likelihood that these amendments will be passed prior to the next election. The first bill, which includes legislation aimed at regulating online speech, will be prioritized. See Marie Woolf, "Online harms bill to be split in two," *Globe and Mail* (5 December 2024) A4.
[65] "NDP's Leah Gazan tables bill to end residential school denialism," *supra* note 10.
[66] Mario Canseco, "Most Canadians Would Restrain Residential School Denialism," *ResearchCo* (6 November 2024), online: researchco.ca/2024/11/06/residential-schools-canada-2/; Andrew Weichel, "Most Canadians support criminalizing residential school denialism, poll finds," *CTV News Vancouver* (6 November 2024), online: bc.ctvnews.ca/most-canadians-support-criminalizing-residential-school-denialism-poll-finds-1.7100756.
[67] See *Zundel*, *supra* note 11 at 745.
[68] *Ibid* at 742-43.
[69] *Ibid* at 778.

IV. Chapter Descriptions

This study is organized both chronologically and thematically. Chapter 2, entitled "Jews and the Criminalization of Hate Speech in Canada, 1953-1970," examines the central role of the Jewish community in Canada's decision to criminalize hate speech. This chapter encompasses the years 1953, when post-war lobbying from the Jewish community began, to 1970, when the legislation was passed. In canvassing this history, I explore intra-communal tension among Canadian Jews leading up to the legislation's introduction and enactment. This theme of intra-communal tension over the hate-speech laws runs throughout the history of the Keegstra and Zundel cases. Accordingly, the story of the Jewish community and the criminalization of hate speech is vital to understanding the history that follows in the remainder of this study.

Chapter 3, "The Road to Prosecution: Zundel, Keegstra, and Community Divisions 1970-1984," explores the aftermath of the hate-speech legislation's enactment. It commences in June 1970, after the hate-speech provisions were proclaimed into law, and concludes in early 1984, after Ernst Zundel and James Keegstra had both been charged with hate-speech offences. This chapter addresses the lead-up to the prosecutions of Zundel and Keegstra. It examines the rise of both Holocaust consciousness and Holocaust denial during the 1970s. The chapter delves into the early history of Keegstra's and Zundel's antisemitic activities, which disturbed the Canadian-Jewish community and especially Holocaust survivors. It further examines division among Canadian Jews over the question of whether to prosecute Keegstra and Zundel under Canada's hate-speech laws. One important consequence of this rift was the decision of Sabina Citron and Helen Smolack to form an organization called the Canadian Holocaust Remembrance Association, which was responsible for commencing a private prosecution against Zundel for spreading false news.

Chapter 4, "Trials and Tribulations: The Prosecutions of Ernst Zundel and James Keegstra, 1984-1985," addresses the Keegstra and Zundel trials. Chronologically, it focuses on the period from January 1984, after criminal charges were laid against Zundel and Keegstra, through July 1985, after both trials concluded. This trials of Zundel and Keegstra were public spectacles that spread trauma throughout the Jewish community. Observers watched in horror as Douglas

Christie, lawyer to both Zundel and Keegstra, effectively put the Holocaust on trial. This included the brutal cross-examination of Holocaust survivors during Zundel's proceedings. This chapter also addresses the aftermath of the prosecutions, exhibiting how Canadian Jews remained deeply divided following the trials over the wisdom of putting hatemongers on trial.

Chapter 5, "End of an Era: The Culmination of the Zundel and Keegstra Affairs, 1985-2017," tells the story of the resolution of the Zundel's and Keegstra's legal proceedings. It picks up following their convictions at trial in 1985 and concludes with their deaths in 2014 and 2017, respectively. The hard-earned legal victories of 1985 were only the beginning of Zundel's and Keegstra's odysseys through the Canadian legal system. Both cases ultimately ended up in the Supreme Court of Canada. As for Keegstra, the Supreme Court of Canada upheld the constitutionality of the offence of wilful promotion of hatred in its decision in 1990. But in Zundel's decision, rendered two years later, the Supreme Court handed him a shocking victory, declaring the offence of spreading false news unconstitutional—as an unjustifiable infringement of freedom of expression under Section 2(b) of the *Canadian Charter of Rights and Freedoms*—and acquitting Zundel. Neither case, however, ended at the Supreme Court. Keegstra was granted another trial, leading to a second conviction that was eventually upheld by the Supreme Court in 1996 – 12 long years after his prosecution commenced. As for Zundel, his opponents—Citron chief among them—initiated a prosecution against him under Section 13(1) of the *Canadian Human Rights Act*.[70] This proceeding set off a chain of events that led to Zundel's conviction, flight from Canada, and eventual deportation to Germany, where he was convicted of inciting hatred under German law.

[70] At the relevant time, Section 13(1) of the *Canadian Human Rights Act*, *supra* note 64, read: "It is a discriminatory practice for a person or a group of persons acting in concert to communicate telephonically or to cause to be so communicated, repeatedly, in whole or in part by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament, any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination." This provision was repealed by the federal Conservative government in 2014 (see Allyson M Lunny, D*ebating Hate Crime: Language, Legislatures, and the Law in Canada* (Vancouver: UBC Press, 2017) 135-170). The current Liberal government has proposed re-introducing a similar provision to the *Canadian Human Rights Act* as part of the *Online Harms Act*. However, as noted *supra*, note 64, the government has recently de-prioritized this amendment along with its proposed changes to the *Criminal Code*.

Chapter 6, my conclusion, returns to the research question posed in this introduction. What lessons can we extract from this study to inform the contemporary debate concerning whether hate speech should be criminalized and how best to uplift vulnerable communities? I suggest three such lessons: first, that to understand and respect vulnerable communities, we must acknowledge divisions within these groups; second, that the criminal law is a poor mechanism for countering hate speech; and third, that civil law remedies and non-legal approaches should be relied on to supplement the criminal law in the fight against harmful expression.

The broadest ambition of this study is to question the assumption that the criminal law is beneficial to vulnerable groups in the fight against racism. A subsidiary goal is to excavate a captivating history that continues to be the subject of debate at the *Shabbes* table and numerous other venues, but which has thus far eluded detailed scholarly attention. It is to this history I now turn.

CHAPTER 2 – A Gesture of Criminal Law: Jews and the Criminalization of Hate Speech in Canada, 1953-1970

On 11 June 2020—amid the COVID-19 pandemic and a disturbing rise in hatred and xenophobia[1]—the fiftieth anniversary of the criminalization of hate speech in Canada passed with little comment.[2] The hate-speech provisions have not been widely enforced and, when invoked, the rate of conviction has been low.[3] As William Kaplan writes, "If number of prosecutions and convictions is the standard used for assessment, the legislation has clearly failed."[4] There is a

[1] Numerous examples abound. See *e.g.* "COVID-19 pandemic unleashing 'tsunami of hate,' says UNI chief," *CBC News* (8 May 2020), online: <cbc.ca/news/world/coronvirus-un-fear-xenophobia-1.5561069>; Julie Posetti & Kalina Bontcheva, "Disinfodemic: Deciphering COVID-19 disinformation" (2020) at 3, online (pdf): *Unesco* <en.unesco.org/sites/default/files/disinfodemic_deciphering_covid19_disinformation.pdf>; Irene Connelly, "Online anti-Semitism thrives around coronavirus, even on mainstream platforms," *The Forward* (11 March 2020), online: <forward.com/news/441421/anti-semitic-coronavirus-response-thrives-online-even-on-mainstream>; Gerald Chan, "The virus of anti-Asian prejudice," *Toronto Star* (13 April 2020), online: <thestar.com/opinion/contributors/2020/04/13/the-virus-of-anti-asian-prejudice.html>; Kenneth Grad & Amanda Turnbull, "Harmful Speech and the COVID-19 Penumbra" (2021) 19 CJLT 1.

[2] For a rare exception, see Jason Proctor, "The difficult history of prosecuting hate speech in Canada," *CBC News* (13 June 2020), online: <cbc.ca/news/canada/british-columbia/racists-attacks-court-hate-crimes-1.5604912>.

[3] For the hate-speech provisions, see *Criminal Code*, RSC 1985, c C-46, ss 318(1), 319(1), 319(2) [*Criminal Code*] (in addition, ss 320 and 320.1 authorize *in rem* proceedings against hate propaganda).

According to Statistics Canada's Integrated Criminal Court Survey, between the 2009/2010 and 2017/2018 fiscal years, there were 53 completed cases (with "completed case" defined as one or more charge(s) against an accused person that reached a final decision in court or resulted in a guilty plea) in adult and youth court where the most serious charge was classified as a hate-crime offence. Hate-crime offences consist primarily of charges under ss 318 and 319, but also include a small percentage of charges under s 430(4.1) (mischief against religious property). Of these 53 cases, 23 ended in a finding of guilt (43%).

To give a sense of proportion, during the same period approximately 3.74 million total cases reached a decision in adult and youth court. Thus, the percentage of hate-crime cases out of all completed cases was approximately 0.0014%. The rate of conviction for hate-crime offences was even smaller—approximately 0.0001% of all findings of guilt—reflecting the fact that findings of guilt in hate-crime cases are less frequent than the average rate across all offences. See Greg Moreau, "Police-reported hate crime in Canada, 2018" (26 February 2020), online (pdf): *Statistics Canada* <www150.statcan.gc.ca/n1/pub/85-002-x/2020001/article/00003-eng.pdf>; "Adult criminal courts, number of cases and charges by type of decision" (last modified 19 October 2021), online: *Statistics Canada* <www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3510002701>; "Youth courts, number of cases and charges by type of decision" (last modified 19 October 2021), online: *Statistics Canada* <www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3510003801>. See also Richard Moon, *Putting Faith in Hate: When Religion is the Source or Target of Hate Speech* (Cambridge, UK: Cambridge University Press, 2018) at 25, n 15 (between 1994 and 2004 there were only 93 prosecutions under s 319, resulting in 32 convictions).

[4] William Kaplan, "Maxwell Cohen and the Report of the Special Committee on Hate Propaganda" in William Kaplan & Donald McRae, eds, *Law, Policy, and International Justice: Essays in Honour of Maxwell Cohen* (Montreal: McGill-Queen's University Press, 1993) 243 at 266. Kaplan does note, however, that the legislation may be deemed a success if its goals are more broadly conceived, an argument I will return to in this article's conclusion in Part V, below.

general view that the laws have been ineffective.[5] Hate speech is far more widespread in Canada today than it was a half-century ago. At the time of its enactment, even proponents of the legislation acknowledged that the volume of hate propaganda was low.[6] Fifty years later, racist speech has risen to unprecedented levels, aided by the ease of dissemination and anonymity provided by social media and the internet.[7]

In light of this half-century of experience, it is worth revisiting the genesis of the hate-speech provisions for answers as to why the laws have seemingly had little impact. In this chapter, I provide one explanation: The legislation's primary aim was not to prosecute hatemongers. Indeed, Maxwell Cohen, who headed the Special Committee on Hate Propaganda that provided the initial draft of the legislation (known as the "Cohen Committee"), predicted that "it may prove very difficult to obtain prosecutions or convictions" under the Act.[8] Rather, its purpose was predominantly symbolic: to enshrine equality principles in the criminal law and thereby send the message that Canadian society did not tolerate racism. It should then come as no surprise—nor would it have surprised the legislation's supporters—that the laws have been difficult to use, and that prosecutions and convictions have been infrequent.

The symbolic nature of the legislation can be illuminated through a history of the campaign for the criminalization of hate speech from the perspective of Canada's Jews. I focus on the Jewish

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[5] See *e.g.* Moon, *supra* note 3 at 25-26; Andrea Huncar, "Far-right extremists getting bolder as threatening behaviour goes unchecked, police warned," *CBC News* (11 May 2020), online: <cbc.ca/news/canada/edmonton/ramadan-bombathon-edmonton-mosque-far-right-extremists-police-charges-1.5564323>; Franklin Bialystok, *Delayed Impact: The Holocaust and the Canadian Jewish Community* (Montreal: McGill-Queen's University Press, 2000) at 168; Jacky Habib, "Far-right extremist groups and hate crime rates are growing in Canada," *The Passionate Eye* (n.d.), online: <web.archive.org/web/20210201094729/http:/cbc.ca/passionateeye/features/right-wing-extremist-groups-and-hate-crimes-are-growing-in-canada>.

[6] See *e.g.* Maxwell Cohen et al, *Report of the Special Committee on Hate Propaganda in Canada* (Ottawa: Queen's Printer and Controller of Stationery, 1966) at 27 [Cohen Committee Report].

[7] See *e.g.* Tavia Grant, "Hate crimes in Canada surge with most not solved," *The Globe and Mail* (30 April 2019), online: <theglobeandmail.com/canada/article-hate-crimes-in-canada-surge-with-most-not-solved>; Habib, *supra* note 5; "Online hate speech in Canada is up 600 percent. What can be done?" *Maclean's* (2 November 2017), online: <macleans.ca/politics/online-hate-speech-in-canada-is-up-600-percent-what-can-be-done>; League for Human Rights, "Annual Audit of Antisemitic Incidents 2020" (2021) at 11, online (pdf): *B'nai Brith Canada* <drive.google.com/file/d/1IqrqxVoO0tCXxMxvC0_12rsSn5xPgMpu/view> [www.bnaibrith.ca/antisemitic-incidents]. B'nai Brith, which has published an annual audit of total antisemitic incidents in Canada since 1982, reported that antisemitic incidents reached a record high in 2020 for the fifth consecutive year.

[8] "The Hate Propaganda Amendments: Reflections on a Controversy" (1971) 9 Alta L Rev 103 at 112 [Cohen, "Reflections on a Controversy"].

community because lobbying from Canadian-Jewish leadership was the primary driver of the legislation's enactment. Accordingly, a focus on the Jewish community is essential to understanding why hate speech was criminalized, how the language of the provisions was decided upon, and why the legislation has proved unwieldy. Commentators have acknowledged Jewish efforts in lobbying for the legislation, but the singular contribution of Canadian Jews to the hate-speech provisions has not received full attention.

Although it is typically assumed that the Canadian-Jewish community was united on the content of the legislation, there was in fact a deep doctrinal chasm between Jewish leadership and the community's grassroots, particularly the large influx of Holocaust survivors who found refuge in Canada after the Second World War. Canadian-Jewish leadership was initially lukewarm to hate-speech legislation. The longstanding position of the Canadian Jewish Congress ("CJC" or "Congress") was that hatemongers were better ignored, not prosecuted. Although it had long argued for hate-speech legislation, Congress advocated for the criminalization of hate speech only insofar as it was connected to incitement to violence. Citing freedom of speech, the CJC vigorously opposed a broader "group libel" bill that would criminalize the dissemination of hatred whether or not violence was intended or involved. Congress changed its position only after the disturbing rise of neo-Nazism in the 1960s created intense pressure to shift course.

However, the CJC's dominant objective was to get a bill passed, not necessarily one that could be implemented. Jewish leadership focused on what Parliament and the Canadian public would accept and was unconcerned with how the provisions might later be used. The CJC took pains to allay concerns over freedom of speech, insisting on the insertion of broad defences into the legislation and readily acceding to a requirement that no proceedings could be instituted without the consent of the provincial attorney general. At the same time, Congress discounted the objections of Holocaust survivors who predicted that the legislation would be unhelpful in the fight against antisemitism.

This chapter proceeds as follows. First, I outline efforts by the CJC in the 1950s to lobby the government for legislation that would restore protection for incitement to violence against

groups. Next, I discuss the rise of neo-Nazism and the renewed push for legislation in the 1960s, culminating with the formation of the Cohen Committee in 1965. I then explore Jewish lobbying and community tension during the legislative and public debate that followed the government's tabling of hate-speech legislation until its enactment in 1970.

A few clarificatory comments may be helpful before proceeding. The goal of this chapter is to outline Jewish contributions to the hate-speech legislation as accurately as possible and to help explain why the legislation has been infrequently invoked. This account is missing from the literature.[9] I take no position in the debate between Jewish leadership, which was skeptical of a group libel bill, and the community's grassroots, which demanded it. Viewed through contemporary eyes, the CJC may come across as uncaring of the Holocaust survivors or unreasonable in its advocacy for a weakened bill. We should be cautious with such interpretations. Among other motivations behind their reticence, Jewish leadership was undoubtedly concerned with sacrificing its hard-earned credibility on a risky venture with uncertain benefits. This was a logical position to take—squandering the community's goodwill would make it harder to achieve other, potentially more beneficial, legislative gains.

Furthermore, simply because the CJC's civil libertarians reflected a minority view does not mean they were wrong. Whether hate speech should be criminalized within a legal order seriously committed to free expression is a difficult and complex question, which I will take up further in my conclusion to this dissertation. Moreover, as we will see in chapter 5, the Supreme Court of Canada ("SCC") only narrowly upheld the offence of wilful promotion of hatred—the heart of the

[9] Discussion of the genesis of Canadian hate-speech laws is scattered throughout the literature. The topic has primarily received attention in two categories of scholarship. The first category pertains to the history of Canadian Jews. However, leading scholars of Canadian-Jewish history give surprisingly limited attention to the hate-speech campaign. The exception is Franklin Bialystok, whose wonderful monograph entitled *Delayed Impact: The Holocaust and the Canadian Jewish Community* (*supra*, note 5) provides an indispensable starting point for this study. The second category is literature on the history of human rights advocacy in Canada. This scholarship pays significant attention to earlier lobbying efforts by the Jewish community to secure anti-discrimination laws, particularly in Ontario. But this literature pays very little attention to Jewish advocacy for hate-speech legislation. Aside from Bialystok, two other works have addressed the genesis of the hate-speech provisions in some detail. One is Allyson M Lunny's *Debating Hate Crime: Language, Legislatures, and the Law in Canada* (Vancouver: UBC Press, 2017), which presents a semiotic analysis of the hate-speech debate. The other is William Kaplan's article "Maxwell Cohen and the Report of the Special Committee on Hate Propaganda" (*supra*, note 4). I am indebted to both these scholars and will build on their work here.

hate-speech legislation—as a reasonable limit on free speech in its 1990 decision in *R. v. Keegstra* ("*Keegstra*").[10] Thus, the CJC was prescient in its concern that the bill not go too far; legislation that further impeded on freedom of expression would almost certainly have been later struck down under the *Canadian Charter of Rights and Freedoms* ("*Charter*"). And on account of *Keegstra*, a stronger bill appears impossible within our constitutional framework, which suggests, as the civil libertarians had argued, that the fight against hate speech must take place largely outside of the *Criminal Code*.

I. *Boucher v. The King* and CJC Lobbying in the 1950s

In 1951, the Supreme Court of Canada curtailed the criminal offence of seditious libel through its decision in *Boucher v. The King* ("*Boucher*").[11] *Boucher* was an appeal by a farmer convicted for distributing a pamphlet that criticized the Quebec government, the Catholic Church, and "mobs" of Catholic lay people for their persecution of Jehovah's Witnesses.[12] The SCC split over the definition of "seditious intention" required to constitute seditious libel.[13] In allowing the appeal and acquitting the accused, the majority found that seditious libel must include the intention to incite violence against the government.[14] Only Chief Justice Thibaudeau Rinfret would have applied a broader definition, which was generally accepted at the time Boucher was charged, that included the intention "to produce feelings of hatred and ill-will between different classes of His Majesty's subjects."[15] Justice Ivan Rand, reflecting the majority's views on this issue, found that the mere "baiting or denouncing of one group by another or others without an aim directly or

[10] [1990] 3 SCR 697 [*Keegstra*].
[11] [1951] SCR 265 [*Boucher*].
[12] *Ibid* at 284-85, Rand J.
[13] See *Criminal Code*, *supra* note 3, s 59(2) (seditious libel is defined as "a libel that expresses a seditious intention").
[14] See *Boucher*, *supra* note 11 at 283, Kerwin J; *Ibid* at 288-89, Rand J; *Ibid* at 296, 301, Kellock J; *Ibid* at 315, Estey J; *Ibid* at 331, Locke J.
[15] *Ibid* at 276, Rinfret CJ.

indirectly at government," amounted to the common law offence of public mischief, but not seditious libel.[16]

The decision in *Boucher* attracted the attention of the Canadian Jewish Congress. The CJC, an umbrella coalition of Jewish organizations, was the leading voice of Canada's Jews.[17] Headquartered in Montreal, it was divided into regional components with each region allocated a number of representatives elected every three years.[18] Despite its purportedly democratic framework, the CJC's agenda was controlled by a small group of administrative officials under national executive director Saul Hayes.[19] Until the mid-1960s, leading members of Congress were drawn from a narrow group of men born or raised in Canada. Immigrants, women, and Orthodox Jews were vastly under-represented.[20]

In March 1953, the CJC sent a delegation to testify before a Special Committee of the House of Commons tasked with a general revision of the *Criminal Code*.[21] The delegation included Saul Hayes and Bora Laskin. Laskin, then a professor at the University of Toronto, was

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[16] *Ibid* at 289, Rand J.

[17] Allan Levine, *Seeking the Fabled City: The Canadian Jewish Experience* (Toronto: McClelland & Stewart, 2018) at 338-45. The CJC lost its position of primacy around the early 2000s and was dissolved in 2011.

[18] See Zach Paikin & James Gutman, "It's time to bring back Canadian Jewish Congress," *Canadian Jewish News* (20 November 2015), online: <cjnews.com/perspectives/opinions/its-time-to-bring-back-canadian-jewish-congress>.

[19] See Harold Troper, *The defining decade: identity, politics, and the Canadian Jewish community in the 1960s* (Toronto: University of Toronto Press, 2010) at 30-32; Levine, *Seeking the Fabled City*, *supra* note 17 at 339. Hayes was executive director from 1942-1959 and national executive vice president from 1959-1974. See "Saul Hayes Dead at 73," *Jewish Telegraphic Agency* (15 January 1980), online: <www.jta.org/archive/saul-hayes-dead-at-73>.

[20] Bialystok, *supra* note 5 at 5.

[21] Although I have focused on the post-war period, CJC's advocacy for criminal legislation to combat anti-Semitic speech goes back further. In the 1930s, in light of a rise in anti-Semitic literature produced by Canadian fascist groups, the CJC asked the federal government on several occasions to enact legislation to combat racial hatred, including amending the *Criminal Code*. A legislative proposal submitted by Congress in 1935 suggested an amendment to then *Criminal Code*, s 201, which outlawed the disturbance of persons assembled for religious worship (an analogous provision is now s 176(2)). The CJC reported that the Law Committee of the Senate approved the amendment, but the legislation was abandoned after a meeting of the Council of Ministers. See David Rome, *Clouds in the Thirties: On Antisemitism in Canada 1929-1939*, vol 2 (Montreal: CJC National Archives, 1977) at 60, 68-69. In 1937, Congress wrote directly to Prime Minister William Lyon Mackenzie King to request that legal measures be adopted which would make libellous accusations against Jews and other groups a criminal offence. King forwarded the request to Minister of Justice Ernest Lapointe, who dismissed the idea. See Letter from HM Caiserman to WL Mackenzie King (25 August 1937), Montreal, Canadian Jewish Archives [henceforth, "CJA"] (CJC ZA 1937, Box 1, File 16); Letter from WL Mackenzie King to E Lapointe (10 September 1937), CJA (CJC ZA 1937, Box 1, File 16); Confidential Memorandum of AA Heaps (17 September 1937), CJA (CJC ZA, Box 2, File 23A).

introduced as Congress's "expert on the law."[22] Although Laskin was instrumental to the CJC's anti-discrimination campaigns in the 1940s and 50s, this was a rare instance of him taking a public position on Congress's behalf.[23]

The bill under consideration would abolish all common law criminal offences, thus invalidating Justice Rand's conclusion in *Boucher* that the baiting or denouncing of one group by another would constitute the common law offence of public mischief.[24] In order to restore protection deprived by this change and the decision in *Boucher* to narrow seditious libel, the CJC requested two amendments to the *Criminal Code*.

First, Congress asked that Parliament add a new section after the seditious libel provisions to criminalize incitement to violence against groups. Second, it requested an amendment to then section 166 of the *Criminal Code*, which prohibited the spreading of false news causing injury to "a public interest." Predicting the reasoning of the majority of the SCC in *R. v. Zundel*, which declared the provision unconstitutional forty years later, the CJC delegation argued that its wording was overly vague.[25] Congress suggested adding a new subsection to define public interest as including the promotion of "disaffection among or ill will or hostility between different sections of persons in Canada."[26]

The delegation emphasized the narrowness of its submissions. Laskin stressed that he concurred with the SCC's definition of seditious libel and agreed that group libel (*i.e.*, "produc[ing] feelings of hatred and ill-will between different classes of His Majesty's subjects") should not be criminalized.[27] As Laskin put it, Congress was not suggesting "that people should be prohibited from talking simply because they happen to injure the feelings of others."[28]

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[22] House of Commons, Special Committee on Bill No 93, *Evidence*, 21-7, vol 1, No 2 (3 March 1953) at 58 (Saul Hayes) [House of Commons, Bill No 93].
[23] Philip Girard, *Bora Laskin: Bringing Law to Life* (Toronto: University of Toronto Press, 2005) at 248, 266-67.
[24] See *Criminal Code*, *supra* note 3, s 9.
[25] See House of Commons, Bill No 93, *supra* note 22 at 57 (Saul Hayes); *R v Zundel*, [1992] 2 SCR 731 at 769-70.
[26] House of Commons, Bill No 93, *supra* note 22 at 59 (Saul Hayes).
[27] *Boucher*, *supra* note 11 at 276, Rinfret CJ.
[28] House of Commons, Bill No 93, *supra* note 22 at 62 (Bora Laskin).

The CJC's recommendations did not make it into the revised *Criminal Code* in 1955.[29] Notwithstanding this failed effort, Congress did not view hate speech as a pressing concern at this time.[30] Moreover, its leadership felt that the best way to deal with hate speech was to simply ignore it and not provide hatemongers with any exposure—euphemistically referred to as the "quarantining" approach.[31]

Congress's lobbying of the federal government in 1953 fit within its broader push for human rights legislation that ramped up in the post-war period. This campaign was carried out primarily through the Joint Public Relations Committee of the CJC and B'nai Brith Canada ("JPRC").[32] Formed in 1938, the JPRC was a collaborative effort by Congress and B'nai Brith to fight antisemitism.[33] Representation was equal between the two groups, but all public statements were made by the CJC as the official voice of Canada's Jews.[34] As with Congress, leadership of the JPRC was insular and unrepresentative of the wider community.[35] For example, out of thirty-one members who attended a JPRC meeting on 24 June 1965, only eight were born in Europe and none came to Canada after 1926. It included "no survivors, no small businessmen, no tradesmen, no women, no one under age thirty-five, and no representatives of the Orthodox community."[36]

The JPRC achieved some success during the Second World War, notably in lobbying for Ontario's *Racial Discrimination Act* (1944), but came into its own after the war on account of a more favourable climate and the hiring of Ben Kayfetz as its executive director in 1947.[37] In

[29] It is unclear why the CJC's suggestions were not adopted. For further explanation, see Kaplan, *supra* note 4 at 269, n 4. Kaplan reports that "[i]n early 1953 the federal government actually considered some draft legislation. However, the consideration was brief, and the decision was made not to proceed" (*ibid*).
[30] See Letter from Ben Kayfetz to J Alex Edmison (13 June 1952), Toronto, Ontario Jewish Archives [henceforth, "OJA"] (Fonds 17, Series 5-4-6, File 5).
[31] See *e.g.* W Gunther Plaut, *Unfinished Business: An Autobiography* (Toronto: Lester & Orpen Dennys, 1981) at 243.
[32] See Michael Friesen, "The Joint Public Relations Committee Series at the Ontario Jewish Archives: Some New Questions" (2019) 28 Can Jewish Studies 125 at 126. In 1962, the JPRC changed its name to the "Joint Community Relations Committee, Central Region." For simplicity, it will be referred to as the JPRC throughout this article. In the late 1970s, B'nai Brith ended its relationship with the JPRC, although the word "joint" was not dropped until 1991. The JPRC was dissolved along with the CJC in 2011 (*ibid* at 127).
[33] *Ibid* at 126.
[34] Ross Lambertson, *Repression and Resistance: Canadian Human Rights Activists 1930-1960* (Toronto: University of Toronto Press, 2005) at 201.
[35] See Girard, *supra* note 23 at 248.
[36] Bialystok, *supra* note 5 at 139.
[37] Friesen, *supra* note 32 at 126; Girard, *supra* note 23 at 253.

Ontario, lobbying by the JPRC and affiliated groups led to the enactment of the *Fair Employment Practices Act* (1951) and the *Fair Accommodations Practices Act* (1954) and to the amendment of the *Conveyancing and Law of Property Act* in 1950 to outlaw future discriminatory property covenants.[38] In fact, the Frost government accepted draft bills provided by the Jewish community with little amendment.[39] The JPRC exported its techniques across the country and the legislation it successfully promoted in Ontario was copied by all other provinces and the federal government.[40]

The CJC's post-war activism was successful but cautious. Jewish leadership never demanded more than the government could give and in its legislative campaigns advanced the least controversial proposal available.[41] Some criticized this apparent unassertiveness, but it had achieved results and Jewish leaders saw no reason to abandon it. Events in the new decade would put increasing strain on this approach.

II. 1960–65: Neo-Nazism, Community Tension, and the Cohen Committee

a. "There's nothing we can do about it, it's a free country": The Emergence of Neo-Nazism and a Renewed Push for Legislation, 1960–61

Despite Canada's shameful record concerning Jewish refugees leading up to and during World War II,[42] many Holocaust survivors found a home in Canada after the war. Thirty to thirty-five thousand survivors and their families immigrated to and remained in Canada between 1945 and 1956.[43] Holocaust survivors constituted a high percentage of Canadian Jewry; by the late 1950s, thirteen to fifteen per cent of the community were survivors (significantly more than the

[38] Carmela Patrias & Ruth Frager, "'This is Our Country, These Are Our Rights': Minorities and the Origins of Ontario's Human Rights Campaigns" (2001) 82:1 Can Hist Rev at 14-19; James W St G Walker, "The 'Jewish Phase' in the Movement for Racial Equality in Canada" (2002) 34:1 Canadian Ethnic Studies 1 at 5-15. With the assistance of Bora Laskin, the JPRC also sponsored legal challenges to the validity of existing restrictive covenants. See Lambertson, *supra* note 34 at 211-14, 220-22, 228-37.
[39] Girard, *supra* note 23 at 261.
[40] *Ibid* at 248.
[41] *Ibid* at 262.
[42] See Irving Abella and Harold Troper, *None is Too Many: Canada and the Jews of Europe, 1933-1948* (Toronto: University of Toronto Press, 1983).
[43] Bialystok, *supra* note 5 at 73.

four per cent of American Jews during the same period).[44]

The seeming rise of a worldwide neo-Nazi movement in the early 1960s shocked Canadian Jews and particularly the survivors. On Christmas Eve 1959, vandals painted swastikas on a synagogue in Cologne, Germany that had three months earlier been inaugurated on the site of a Jewish shrine burned down by the Nazis in 1938.[45] Subsequently, antisemitic vandalism spread throughout the globe. Similar incidents were reported over the next month in thirty-four countries.[46]

This antisemitic outburst reached Canada. In early January, fifty swastikas were found painted on a Montreal building.[47] In Toronto, among other incidents, a swastika and the words *Juden raus* ("Jews get out") were scratched into a plaster cast at the Royal Ontario Museum, and the Bais Yahuda Synagogue in downtown Toronto was vandalized.[48] Synagogues in other communities in Ontario and British Columbia were also defaced.[49]

Congress preached caution. Its message to the Jewish community was to ignore the hatemongers and not be alarmed. The vandalism was the work of a "lunatic fringe" that was looking for publicity and it was important "not to overestimate the doings of an obscure group of nonentities."[50] Indeed, the antisemitic incidents in Canada and elsewhere appeared uncoordinated and died out shortly after they began.[51]

The CJC's caution did not sit well with some in the community. A group of Holocaust survivors in Toronto demanded that Congress explain why it was not being more aggressive—the

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[44] *Ibid*; Troper, *supra* note 19 at 26.
[45] "Synagogue Smeared with Swastikas," *Toronto Daily Star* (28 December 1959) 25; Joseph Unger, "Germany's Jewish Leaders Claim Police Did Not Protect Synagogue," *Canadian Jewish News* (1 January 1960) 1.
[46] See Howard J Ehrlich, "The Swastika Epidemic of 1959-1960: Anti-semitism and community characteristics" (1962) 9 Social Problems 264; "Swastika Wave Grows," *Toronto Daily Star* (4 January 1960) 1; "Swastikas Daubed in 13 Lands," *The Globe and Mail* (6 January 1960) 4 ["Swastikas Daubed in 13 Lands"].
[47] "Swastikas in Montreal," *Toronto Daily Star* (5 January 1960) 1.
[48] "Recent Swastika Craze in Toronto Abating," *Canadian Jewish News* (15 January 1960) 1 at 8 ["Swastika Craze Abating"]; "Swastikas Daubed in 13 Lands," *supra* note 46; "Swastikas in Canada," *The Globe and Mail* (9 January 1960) 6.
[49] Bialystok, *supra* note 5 at 99.
[50] Letter from Ben Kayfetz to Rabbi William Rosenthal (3 November 1960), OJA (Fonds 17, Series 5-4-6, File 7) [Letter from Kayfetz to Rosenthal]; CJC News Release (10 January 1960), OJA (Fonds 17, Series 5-4-6, File 7).
[51] "Experts agree swastika spree not planned," *The Globe and Mail* (26 January 1961) 25; Martin Deutsch, "The 1960 Swastika-Smearings: Analysis of the Apprehended Youth" (1962) 8 Merrill-Palmer Q Behavior & Development 99.

first-time survivors had openly challenged CJC policy.[52] Communal leaders responded by downplaying the events and discouraging any form of vigilantism.[53] In a letter to a concerned rabbi from Sudbury, Kayfetz minimized the threat while emphasizing that Congress was considering renewing its efforts at obtaining anti-hate legislation.[54]

Storm clouds gathered again in late 1960. On October 30, the CBC dedicated an episode of its *Newsmagazine* program to neo-Nazism. It interviewed George Lincoln Rockwell, head of the American Nazi Party, who claimed that there were "two fairly large sections of the Nazi party" operating in Canada.[55] Nine days later, Congress issued a press release reiterating its position that there was no imminent threat.[56]

Holocaust survivors who viewed the CBC program were astounded that Nazism existed in Canada and was apparently legal. In Montreal, a group of fifty survivors discussed the program the day after it aired and decided to send a delegation to meet with Saul Hayes. According to Lou Zablow, a Holocaust survivor from Łódź, Poland, Hayes told them, "There's nothing we can do about it, it's a free country."[57] Appalled by this response, the Montreal group, led by Zablow, formed the Association of Former Concentration Camp Inmates/Survivors of Nazi Oppression ("Association of Holocaust Survivors" or "Association"). Adopting the motto "Homage to the Dead, Warning to the Living," its central aims were to preserve Holocaust memory and counteract neo-Nazism. The Association of Holocaust Survivors would become the largest and most influential Holocaust survivor group in Canada.[58]

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[52] Bialystok, *supra* note 5 at 99-100.
[53] *Ibid* at 100; "Swastika Craze Abating," *supra* note 48.
[54] Letter from Kayfetz to Rosenthal, *supra* note 50.
[55] Bialystok, *supra* note 5 at 103.
[56] *Ibid*.
[57] *Ibid* at 104.
[58] *Ibid*; Myra Giberovitch, *The Contributions of Montreal Holocaust Survivor Organizations to Jewish Communal Life* (Montreal: MA Thesis, McGill University, 1988) at 96-97 [unpublished]. See also Interview of Ludwig Zabludowski (Lou Zablow) by Paulana Layman (28 August 1997), USC Shoah Foundation Visual History Archive (Segment 48). Zablow recounted that "hearing of a neo-Nazi party being formed in Canada alarmed all survivors, who were shocked to learn that there was no such thing as a law against [the] neo-Nazi party" (*ibid* at 00h:22m:42s). Upon founding the Association of Holocaust Survivors, Zablow discovered that very few people, including Jews, knew anything about the Holocaust, prompting the survivors to take steps to encourage Holocaust education.

Even though Jewish leadership remained unconcerned,[59] the CJC renewed its push for legislative reform. In the summer of 1961, a Congress delegation met with federal Minister of Justice Davie Fulton. The CJC advanced essentially the same proposal it had submitted in 1953.[60] The meeting seemed to have gone well; the *Canadian Jewish News* reported that Fulton was "very impressed" with Congress's presentation.[61] In 1962, the Progressive Conservative government referred the possibility of amending the *Criminal Code* to the Conference of Commissioners on Uniformity of Legislation in Canada ("CCULC"). However, as the CCULC deals with areas of provincial jurisdiction where laws differ among provinces, it is a reasonable inference that the federal government was looking to bury the issue. In fact, the Commissioners advised against accepting Congress's proposals and the government took no action.[62]

b. "We must know what small and futile enemies we now have": The Re-Emergence of Neo-Nazism and Congress's Response, 1963–64

Although Congress had failed to obtain legislation, incidents of neo-Nazism trailed off following the early 1960s, vindicating Congress's position and easing pressure on its leadership.

But neo-Nazism re-emerged in 1963, consisting primarily of the distribution of antisemitic pamphlets and other material, much of which originated in the United States.[63] In May 1963, swastikas were painted on several Jewish communal buildings and synagogues in Toronto.[64] Perhaps most shockingly, on 11 November 1963, hundreds of leaflets were dropped from a

[59] See *e.g.* "Antisemitism Here Abating," *Canadian Jewish News* (13 January 1961) 1.
[60] Letter from Monroe Abbey & Saul Hayes to Hon E Davie Fulton (8 September 1961), OJA (Fonds 17, Series 5-4-6, File 14).
[61] Max Bookman, "Parliament Hill Notebook," *Canadian Jewish News* (27 October 1961) 4.
[62] See *House of Commons Debates*, 26-2, vol 1 (24 February 1964) at 132-33 (Hon Guy Favreau). See also Report on Community Relations (1965), OJA (Fonds 17, Series 5-4-6, File 33) [Report on Community Relations].
[63] See *e.g.* Cohen Committee Report, *supra* note 6 at 12-24.
[64] Report by Sydney M Harris – Community Meeting (1 December 1963), OJA (Fonds 17, Series 5-4-6, File 13) [Report by Harris]; "Swastika on a Synagogue," *Canadian Jewish News* (17 May 1963) 4; Dave Kagan, "Police Investigates Vandalism," *Canadian Jewish News* (24 May 1963) 6; "Swastikas in Toronto," *Canadian Jewish News* (31 May 1963) 1.

downtown Toronto building, each reading on both sides, "Hitler was Right" and "Communism is Jewish."[65]

The neo-Nazi campaign intensified in 1964. For example, in February, several hundred recipients, including synagogues, Jewish agencies, and communal leaders, received a membership card to the National White Americans Party ("NWAP") based in Atlanta, Georgia. A cover letter explained that "[t]he NWAP is a party of the Whiteman and…believe[s] in the superiority of the Aryan race." It advocated "sending all negroes back to Africa whence they came." "On the Jewish Question," however, the NWAP stated, "our policy is much stricter. We *demand* the arrest of all Jews involved in Communist or Zionist plots, public trials and executions. All other Jews would be immidiatly [*sic*] sterilized so that they could not breed more Jews."[66]

Although Toronto was worst affected, other municipalities were not immune. On 30 June 1963, in Winnipeg Beach, Manitoba, a man driving a sound truck called out over a loudspeaker, "This is Adolf Eichman! All Jews must report for the gas chambers!"[67] In February 1964, antisemitic material was mailed to students at McGill University and Loyola College in Montreal.[68] Hateful literature was also disseminated in other cities throughout Canada.[69]

The avalanche of hate literature gave the appearance of a broad and well-organized movement, disturbing the Canadian-Jewish community. However, in reality, it was coordinated by a handful of people, led by David Stanley and John Beattie, both based out of Toronto.[70] Stanley publicly disavowed his views in August 1965.[71] Kayfetz recalled that he bumped into Stanley years later, who admitted that he organized the leaflet-dropping incident in November 1963 with

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[65] See Ken Lefolii, "Of course hate-mongering should be stamped out. But not by passing censorship laws," Editorial, *Maclean's* (4 April 1964) 4, online: <archive.macleans.ca/article/1964/4/4/editorial#!&pid=4>; Don Watson, "Hate From The Sky," *Canadian Jewish News* (15 November 1963) 1.
[66] Letter from Col JP Fry (17 February 1964), OJA (Fonds 17, Series 5-4-6. File 11) [emphasis in original]; "Toronto Jews Bombarded by Provocative Hate Mail," *Canadian Jewish News* (21 February 1964) 1; Letter from Ben Kayfetz to Jack Baker (4 March 1964), OJA (Fonds 17, Series 5-4-6, File 24).
[67] "What happened in the west?" *Canadian Jewish News* (2 August 1963) 4.
[68] "Nazi Underground in Montreal," *Canadian Jewish News* (7 February 1964) 1; "McGill Daily Revelations," *Canadian Jewish News* (7 February 1964) 8.
[69] "Some Facts about Neo-Nazi Leaflets" (9 March 1964), OJA (Fonds 17, Series 5-4-6, File 14).
[70] See *e.g.* Cohen Committee Report, *supra* note 6 at 27.
[71] *Ibid* at 13; "After Stanley's Defection, Complete Chaos in Nazi Camp Here," *Canadian Jewish News* (27 August 1965) 1.

a few other people at a cost of only twenty-five dollars, fooling Kayfetz into thinking that it was a highly-organized operation.[72] Beattie, whose antics will be discussed further below, formed the Canadian Nazi Party in April 1965, but it never numbered more than fifty and by the end of the decade had receded into obsolescence.[73]

In response to the rise in antisemitism, Congress reverted to its well-established playbook: Calm the Jewish community and work with the authorities.[74] The community, however, was not so easily placated. On 2 June 1963, two separate meetings were held by Labour Zionist groups in Toronto to discuss the neo-Nazi situation. At the Borochov Centre in Downsview, with more than six hundred people in attendance—mostly Holocaust survivors—speaker after speaker railed against Congress's alleged passivity.[75] The situation in Canada was compared "to that which prevailed in pre-war Germany when the Nazis began their activities."[76] The attendees passed a resolution demanding immediate action and threatening to take matters into their own hands. At the other meeting on 2 June 1963, at Toronto's Zionist Centre, a resolution was passed urging Congress to take more aggressive steps and opposing any "quiet politicking" on the question of antisemitism.[77]

Facing increasing pressure, the CJC sought to reassure the community that it had the situation under control. Congress organized separate meetings in Toronto and Montreal on 1 December 1963. In Montreal, at the Queen Elizabeth Hotel with seven hundred delegates present, a resolution was passed demanding legislative action.[78] In Toronto, at the downtown Young Men's Hebrew Association in front of four hundred representatives of various Jewish organizations, Sydney Harris, national chairman of the JPRC, pledged that Congress would redouble its efforts

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[72] Bialystok, *supra* note 5 at 111.
[73] *Ibid* at 147-48. See also John Garrity, "My sixteen months as a Nazi," *Maclean's* (1 October 1966) 11.
[74] See *e.g.* "Congress Committee Chairmen Confer With Toronto Police Head About Anti-Jewish Vandalism," *Canadian Jewish News* (24 May 1963) 1; "Cautions Torontonians Against Swastika Panic," *Canadian Jewish News* (7 June 1963) 1.
[75] MJ Nurenberger, "Dybbuk in Downsview," *Canadian Jewish News* (7 June 1963) 1.
[76] Ray Gould, "Jewish Leaders Meet Continuously on Swastika Wave," *Canadian Jewish News* (7 June 1963) 1.
[77] See *ibid*; Nurenberger, *supra* note 75.
[78] D Goldman, "Demand Law Against Nazis – 400 at CJC Conference in Toronto Warn Nation: Don't Tolerate Bigots," *Canadian Jewish News* (6 December 1963) 1.

to secure legislative changes.[79] Harris defended Congress's policy of not publicizing hatemongers and discouraging violence, arguing that a contrary approach could backfire.[80]

As promised, leadership placed renewed emphasis on its legislative campaign. In December 1963, a delegation including Hayes, Kayfetz, and Harris met with Minister of Justice Lionel Chevrier to discuss the epidemic of hate literature. Congress relied on the same legislative proposals it had previously put forward.[81] Once again, this led to no significant response.

The survivor community remained unsatisfied. On 8 December 1963, the Association of Holocaust Survivors held a mass meeting at the Young Israel of Montreal Synagogue, attended by approximately one thousand people. The Association adopted a resolution to push for the enactment of laws to prevent the dissemination of hate literature. Milton Klein, the Liberal Member of Parliament ("MP") for the predominantly-Jewish Montreal riding of Cartier, was in attendance and pledged support for a bill to combat racial hatred.[82]

As neo-Nazism intensified in early 1964, so did criticism of Congress. On March 6th, an editorial by Max Bookman[83] appearing in the *Canadian Jewish Chronicle* mocked leadership for its purported timidity. Bookman wrote that any suggestion that "it is time for something more potent than talk immediately horrifies Jewish leadership….[T]ime and again we have been assured: 'see. we've been successful, we've handled anti-Semites, no more swastika smearings, no more vile propaganda, etc., etc., etc.' Well, gentlemen, what excuse have you got now?"[84] Bookman suggested that if Congress could not deliver, the community would have no choice but to resort to vigilantism:

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[79] Letter from Meyer Gasner to Presidents and Secretaries of Jewish Community Organizations and Congregations, Toronto (3 December 1963), OJA (Fonds 17, Series 5-4-6, File 13); Report by Harris, *supra* note 64.
[80] Report by Harris, *supra* note 64.
[81] "CJC Presses for Anti-Bias Laws," *Canadian Jewish News* (3 January 1964) 1.
[82] "Predict Ottawa Will Ban Dissemination of Hatred – Senator Croll, CJC Former Camp Inmates Press for New Law," *Canadian Jewish News* (27 December 1963) 1.
[83] Bookman was the founder of the *Ottawa Hebrew News*. He wrote syndicated columns that appeared at one time or another in nearly all Canadian Jewish publications. See Lewis Levendel, *A Century of the Canadian Jewish Press: 1880s-1980s* (Ottawa: Borealis Press, 1989) at 233-34.
[84] Max Bookman, "Dateline Ottawa," *Canadian Jewish Chronicle* (6 March 1964), OJA (Fonds 17, Series 5-4-6, File 14).

> It has been brought to our attention that certain cases of anti-Semitism in Montreal were handled in a method which brought immediate results. We are not revealing any details except to note that the end result smashed the Jew-haters in the only fashion they really understand. If the "gentlemen" who are now handling the "fight" against anti-Semitism in their manner can give us results we are on their side. But if they cannot achieve even partial success then we suggest to them no hypocritical tears if the Canadian Nazis or what have you are handled in a manner which appears uncouth.[85]

The mounting criticism seemingly led to a change in the CJC's approach. Congress knew by now who was responsible for the distribution of antisemitic material, as it had infiltrated the neo-Nazi group through a paid informer.[86] CJC leadership decided it would abandon its "quarantine" policy and disclose this information to the community.[87] On 9 April 1964, Harris gave a speech to a crowd of more than one thousand five hundred people at Beth Tzedec Synagogue in Toronto, at an event commemorating the Warsaw Ghetto Uprising. Harris revealed that the neo-Nazi ringleaders were Stanley and Beattie. Promising a more aggressive strategy, he stated that Congress had "for the time being abandoned the policy that has said 'Don't publicize the hate-monger.'"[88] Although Harris stressed that these would-be Nazis were so "insignificant in stature and in meaning that we must know what small and futile enemies we now have," nevertheless exposure was required because "the ever widening tidal waves of his influence, if unchecked by the barriers of public disavowal…may spread to inundate our society before we recognize the disaster."[89]

The goal of Harris's speech was as much to satisfy Congress's detractors as it was to silence the hatemongers. Leadership remained concerned that exposing anti-Semites would be ineffectual and would provide them with the publicity they wanted.[90] However, pressure from the community had built to unprecedented levels and Congress needed to show it was doing something. As Harris later put it, while exposure "didn't shut [Stanley] up, it certainly satisfied the community."[91]

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[85] See *ibid*.
[86] Bialystok, *supra* note 5 at 124. In his memoir, W Gunther Plaut, Senior Rabbi of Holy Blossom Temple from 1961-1977, recounts that in February 1964 an anti-Nazi committee was created under the CJC's auspices and that this committee "monitored the Nazis and, in co-operation with the police, placed an undercover agent in their cell." Plaut, *supra* note 31 at 242.
[87] Florence Goldberg, "Canadian Jewry Acts: Move Against Neo-Nazis Here – Congress Decides to Combat Hitlerite Agents in Canada," *Canadian Jewish News* (21 February 1964) 1.
[88] Speech by Sydney M Harris entitled "And Now The Facts" (9 April 1964), OJA (Fonds 17, Series 5-4-6, File 14) at 10.
[89] *Ibid*; "The Wrong Court," *The Globe and Mail* (11 April 1964) 6.
[90] "Report on Community Relations," *supra* note 62.
[91] Bialystok, *supra* note 5 at 124.

Indeed, subsequent events suggested the merit of Congress's position, as neo-Nazism continued unabated even after Harris's address.[92]

c. "For God's sake let us forget this *yichus* business": The Klein-Walker and Orlikow Bills, 1964

Despite Congress's change of direction, many in the survivor community remained skeptical of Jewish leadership. Impatient with Congress, the Association of Holocaust Survivors worked on legislation outside of CJC auspices by directly lobbying Milton Klein. Zablow met with Klein on several occasions in 1963 to discuss the issue.[93]

On 20 February 1964, Klein introduced a private member's bill in the House of Commons. Entitled "An Act respecting Genocide," the bill sought to make genocide a capital offence and impose a minimum of ten years' imprisonment for anyone who inflicted bodily or mental harm with genocidal intent. However, the bill's most important clause was arguably its group libel provision, which prescribed five years' imprisonment for anyone who published statements likely to injure a national, ethnic, racial, or religious group by exposing that group to hatred, contempt, or ridicule.[94]

James Walker, Liberal MP for York Centre, co-sponsored the legislation, which became known as the Klein-Walker bill.[95] Walker's riding included the Toronto suburb of North York, which following post-war suburbanization of the Toronto Jewish community, by 1961, was home to over 45,000 Jews (up from only 3,989 in 1951) out of a total Canadian-Jewish population of approximately 250,000.[96]

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[92] See *e.g. ibid*; "Alabama Hate Publication Seeks Subscribers Here," *Canadian Jewish News* (5 June 1964) 1; "Nazis Defy Ottawa, Hate mailings from Scarboro continue – Clamour For Anti-Hate Legislation Mounting," *Canadian Jewish News* (12 June 1964) 1; "Canadian Nazis & The New Year," *Canadian Jewish News* (18 September 1964) 4; "Jewish Journal Threatened," *Canadian Jewish Chronicle* (25 September 1964) 1; Letter from Ben Kayfetz to JS Midanik (7 December 1964), OJA (Fonds 17, Series 5-4-6, File 17).

[93] Bialystok, *supra* note 5 at 115.

[94] See "Bill C-21, An Act respecting Genocide," 1st reading, *House of Commons Debates*, 26-2, vol 1 (20 February 1964) at 30 (ML Klein); House of Commons, Standing Committee on External Affairs, *Evidence*, vol 3, no 34 (18 November 1964) at 1677 (John Matheson); *Bialystok*, *supra* note 5 at 115.

[95] *House of Commons Debates*, 26-2, vol 6 (17 July 1964) at 5658-60 (JE Walker).

[96] "Jews of Toronto: New Statistics," *Canadian Jewish News* (27 July 1962) 6. The total Jewish population in Canada in 1961 was 254,368. See Mordecai Hirshenson, "Canadian Panorama," *Canadian Jewish News* (20 July 1962) 7. This was approximately 1.4 per cent of the national population. See Troper, *supra* note 19 at 23.

Also on 20 February 1964, New Democratic Party (NDP) MP David Orlikow, representing Winnipeg North, introduced a private member's bill to amend the *Post Office Act* to deny use of the mails for disseminating hate literature.[97] Orlikow, like Klein, was one of only four Jewish MPs at the time and represented a riding with a large percentage of Jews.[98]

Klein, Walker, and Orlikow sought to address the survivors' two pressing concerns: that Nazism should be declared illegal and that the government should stop the unrelenting flow of hate literature. Many in the community were pleased. A Jewish resident of Toronto wrote to Orlikow praising him for

> the courageous stand you are taking in connection with the antisemitic litterature [*sic*] distributed here. At last somebody has the interest and intestinal fortitude to speak out loud about this very unfortunate social phenomenon.
>
> I have been in this Country for ten years, and whenever I discussed antisemitism with some "leading" personality, suggesting that action be taken whilst there is still time, I was always hooted down – "it can't happen here". – That's what they said in Europe a quarter of a century ago – and yet it did happen, and not in a backward country either.[99]

In an editorial published on 21 February 1964, the *Canadian Jewish News* endorsed the bills and applauded the Association of Holocaust Survivors for its work at "the forefront of those in Canada fighting for the outlawing of hate literature in the mail."[100] At an event held in the fall of 1964, Klein and Walker received the Association's "Man of the Year" award.[101]

The Klein-Walker and Orlikow bills were drafted without Congress input.[102] On 24 February 1964, Kayfetz wrote to Ottawa to request a copy of the bills, which upon receipt were sent to Laskin and the JPRC's Legal Committee for review.[103]

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[97] "Bill C-43, An Act to amend the Post Office Act (Hate Literature)," 1st reading, *House of Commons Debates*, 26-2, vol 1 (20 February 1964) at 32 (David Orlikow).
[98] "Ottawa Still Has Four Jewish MP's," *Canadian Jews News* (19 April 1963) 1. As of 1961 (and until about 1991, when it was surpassed by Vancouver), Winnipeg had the third-largest Jewish population in Canada, at approximately 19,000. Orlikow represented Winnipeg North, which was traditionally home to most of Winnipeg's Jews, although much of this population migrated south after the Second World War. See Levine, *Seeking the Fabled City*, *supra* note 17 at 260-61, 366.
[99] Letter from George J Beer to David Orlikow (29 February 1964), OJA (Fonds 17, Series 5-4-6, File 16).
[100] "Time to Act – Anti-Hate Bill," Editorial, *Canadian Jewish News* (21 February 1964) 4.
[101] "Montreal Mass Meeting Told Anti-Hate Bill Okayed By PM," *Canadian Jewish News* (4 December 1964) 1.
[102] See "Why Congress Did Not Support Klein Bill," *Canadian Jewish Chronicle* (28 August 1964) 1 ["Why Congress Did Not Support Klein Bill"].
[103] See Letter from Ben Kayfetz to Queen's Printers (24 February 1964), OJA (Fonds 17, Series 5-4-6, File 20); Letter from Ben Kayfetz to Bora Laskin (2 March 1964), OJA (Fonds 17, Series 5-4-6, File 20).

Although Congress had been campaigning for hate-speech legislation for over a decade, it did not voice support for either bill. This was a confusing and disappointing response from the perspective of many CJC constituents. Some speculated that the silence was attributable to jealousy. Bookman bemoaned the fact that finally the community had "a parliamentary measure which if adopted, would give teeth to the law to take action against…the distributors of anti-Semitic propaganda; and yet on this vital matter all we've had to date from Congress is a deafening silence." Quoting "one individual" who accused the Jewish community of fighting over "who will get the credit for a measure to combat hate propaganda," Bookman pleaded, "For heaven's sake let us forget this 'yichus' business and let Congress get behind any measure which would curb anti-Semitism."[104]

But Congress's discomfort with the bills was more fundamental: It did not agree with them. Central to CJC proposals since at least 1953 had been a link to incitement of violence; as Laskin told the Special Committee, Congress did not think someone should face criminal charges for hurting the feelings of others.[105] The Klein-Walker and Orlikow bills were something different: restrictions on speech untethered from risk of physical harm.

When reviewing the membership of the JPRC Legal Committee as of March 1964, it becomes clear why its members would be uncomfortable with a group libel bill. Indeed, two things are immediately apparent from its roster. First, this was an incredible collection of legal minds. It included: Laskin, the future Chief Justice of Canada; Harris, later appointed a provincial court judge in Ontario; Harry Arthurs, future Dean of Osgoode Hall Law School; Alan Borovoy, long-time General Counsel for the Canadian Civil Liberties Association ("CCLA"); Edwin Goodman, founding partner of Goodmans LLP; and Wolfe Goodman and Donald Carr, founding partners of

[104] Max Bookman, "Dateline Ottawa," *Canadian Jewish Chronicle* (17 July 1964) 6. The Yiddish word *yichus* generally refers to family standing or lineage. Thus, in this context, Bookman is criticizing Congress for its alleged insistence that advocacy for the hate-speech bill must run through the CJC (with thanks to Nina Warnke for assistance with the Yiddish translation).
[105] House of Commons, Bill No 93, *supra* note 22 at 62 (Bora Laskin).

Goodman and Carr LLP.[106] A future Justice of the Court of Appeal for Ontario, Marvin Catzman, joined the committee a short time later (Catzman's father, Fred Catzman, was also a member and had previously headed the committee).[107] But the second feature is more pertinent to the present discussion: This group had a markedly civil-libertarian bent.[108] The Legal Committee included two of the CCLA's founding members (Laskin and Arthurs) and its intellectual driving force for over forty years (Borovoy). Harris would later author one of the most pro-freedom of expression and generally civil-libertarian judgments ever written in Canada.[109] Borovoy recalled that "[f]or the longest time" he and other members of the JPRC were in sync in their positions, which were increasingly out of sync with what most of the community wanted.[110]

Congress leadership viewed the Klein-Walker and Orlikow bills as unjustified infringements on free expression. As Borovoy put it in an internal memo to the Legal Committee, "I have always opposed, as too great a risk to free speech, any legislation which would curtail the right to propagate race hatred, unless violence were intended or involved."[111] Laskin held the same view, writing in 1964 that while no "constitutional or other protection should be given to incitement to violence…I have stoutly maintained that it is unwise to go beyond incitement to violence."[112]

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[106] Letter from Bora Laskin to Members of Legal Committee (4 March 1964), OJA (Fonds 17, Series 5-4-6, File 20); Interview of Harry Arthurs (18 March 2020) [on file with author] [Arthurs Interview].
[107] See Outline of Recommendations and Conclusions of Legal Committee Meeting (22 November 1966), OJA (Fonds 17, Series 5-4-6, File 41).
[108] Arthurs Interview, *supra* note 106.
[109] See *R v Popert et al* (1981), 58 CCC (2d) 505 (Ont CA) [*Popert*]. The *Popert* case concerned a charge for mailing obscene material (then s 164, now s 168 of the *Criminal Code*) brought against publishers of *The Body Politic*, a newsmagazine aimed at the gay community. The impugned article, "Men Loving Boys Loving Men," described sexual relations of fictional men with young boys (*ibid* at 506-07). Justice Harris acquitted the accused, but a new trial was ordered by the County Court and upheld by the Court of Appeal for Ontario. For further explanation, see Interview of Sydney Harris by Osgoode Society for Canadian Legal History (9 March 1995, 14 March 1995) at 117-20 [on file with author]. In explaining why he did not deem the material obscene, Harris noted that he brought his "pre-judicial life into" the case: "I remember making some comparisons and talking about…you want obscenity, the concentration camps in the war, that was obscenity. This isn't obscenity" (*ibid* at 119).
[110] Alan Borovoy, *"At the Barricades": A Memoir* (Toronto: Irwin Law, 2013) at 98-99.
[111] Memorandum from Al Borovoy to Legal Committee of the Canadian Jewish Congress (1965), OJA (Fonds 17, Series 5-4-6, File 34).
[112] Laskin clarified that he was comfortable proposing an amendment to clarify the false news provision. See Melvin Fenson, "Group Defamation: Is the Cure Too Costly?" (1965) 1 Man LJ 255 at 273, n 67.

Although hesitant to criticize Klein, Walker, and Orlikow directly, Hayes conceded in an August 1964 interview—under pressure to explain the CJC's stance—that there were "people in Congress, at leadership level, who feel very strongly about civil liberties.…These people weren't going to…back something like the Klein bill." However, Hayes also asserted, based on "inside information," that the legislation had no chance of passage and that Congress did not think it prudent to expend its goodwill on a bill that was doomed to fail.[113]

This reasoning did not go over well in the community. Bookman lamented that, "[a]s we see it, legislation will only be obtained over the dead bodies of the civil rightniks" who "make out a most beautiful case on behalf of freedom of opinion and speech and association; but let us remind ourselves that the first thing Hitler did after taking the fullest advantage of these freedoms was to deny them to everybody else."[114] The *Canadian Jewish News* was no less critical. An editorial published on 4 September 1964 called Jewish leadership "Januses" who with "one face proclaimed the necessity of adopting such a law, the other condescendingly rejected it as impractical."[115] A letter to the editor on 18 September 1964 applauded the editorial: "My friends and I, all very active in the Jewish community here in Montreal, agree with you on the essence of [your] criticism."[116]

Bereft of Congress's support, the Klein-Walker and Orlikow bills failed to gain much traction in Parliament. Both bills were referred to a House Standing Committee on External Affairs in October 1964. The committee held six meetings but dissolved without completing its study when the legislative session ended in April 1965.[117] Congress submitted written testimony to the committee that tracked its previous recommendations and did not endorse the Klein-Walker and

[113] "Why Congress Did Not Support Klein Bill," *supra* note 102.
[114] Max Bookman, "Dateline Ottawa," *Canadian Jewish Chronicle* (16 October 1964) 2.
[115] "Canadian Jewry – New Year Balance," Editorial, *Canadian Jewish News* (4 September 1964) 4.
[116] L Goldstein, "The Issue: Representation," Letter to the Editor, *Canadian Jewish News* (18 September 1964) 4.
[117] See House of Commons, Standing Committee on External Affairs, *Minutes of Proceedings*, 26-2, vol 3, no 39 (24 March 1965) at 1885-86.

Orlikow bills.[118] Klein and Orlikow reintroduced their bills in the new legislative session, but the government did not refer them for further study and both bills died on the order paper.[119]

d. "The committee…was set up to satisfy them": The CJC's Legislative Campaign and the Formation of the Cohen Committee, 1964

Even as Congress distanced itself from these legislative efforts, it simultaneously embarked on an aggressive campaign to obtain its preferred legislation. In early March 1964, the CJC organized a letter-writing campaign to lobby the government to enact legal protections against hate propaganda. Congress mailed letters to the representatives of hundreds of Jewish organizations urging them to have their members wire the Minister of Justice, Guy Favreau, requesting that he take action, and to write their MP asking that they do all in their power to combat hatemongers. The CJC included different forms of draft language that could be sent to Favreau or individual MPs.[120] The JPRC files contain numerous letters subsequently sent by community members to Parliament, suggesting that many eagerly took up the CJC's request.[121]

On 12 March 1964, a CJC delegation met with Favreau and other government officials. The delegation submitted a brief emphasizing the rise in neo-Nazism, calling attention to existing laws and regulations that might be used to restrict the flow of hate propaganda, and requesting the

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[118] See CJC Submission to the House of Commons Standing Committee on External Affairs (18 March 1965), OJA (Fonds 17, Series 5-4-6, File 33). Although the proposal was similar to the CJC's prior submissions, it in fact went even further in its concern that the legislation not unduly impede freedom of speech. The March 1965 submission to the Standing Committee now recommended an additional clause under s 166 (the false news provision) that "[n]o person shall be convicted of an offence under this section by reason only of having published statements relating to controversial social, economic, political or religious beliefs or opinions" (*ibid*).

[119] See Bill C-30, *An act respecting Genocide*, 3rd Sess, 26th Parl, 1965 (first reading 8 April 1965); Bill C-43, *An Act to amend the Post Office Act (Hate Literature)*, 3rd Sess, 26th Parl, 1965 (first reading 8 April 1965). In addition to the Klein-Walker and Orlikow bills, two other private member's bills were introduced in 1965 to amend the *Criminal Code* to curb hate propaganda, neither of which were passed. The first, proposed by Liberal MP Marvin Gelber, would have expanded the definition of seditious intention to include the wilful promotion of hatred or contempt against groups. See Bill C-16, *An Act to amend the Criminal Code (Disturbing the public peace)*, 3rd Sess, 26th Parl, 1965 (first reading 8 April 1965). The second, proposed by PC member Wally Nesbitt, would have expanded the definition of defamatory libel to include group libel. See Bill C-117, *An Act to amend the Criminal Code (Group Defamatory Libel)*, 3rd Sess, 26th Parl, 1965 (first reading 15 June 1965).

[120] Letter from Meyer W Gasner (2 March 1964), OJA (Fonds 17, Series 5-4-6, File 18).

[121] See *e.g.* Letter from President, Beth El Congregation (Oakville, Ontario) to Guy Favreau (9 March 1964), OJA (Fonds 17, Series 5-4-6, File 16); Letter from B Litman to Guy Favreau (9 March 1964), OJA (Fonds 17, Series 5-4-6, File 16); Letter from Fred Sommers & Julius Miller to Guy Favreau (6 March 1964), OJA (Fonds 17, Series 5-4-6, File 16); Letter from Bernard Leffell, Philip Shnairson, & Erwin Schild to Lester B Pearson & Guy Favreau (10 March 1964), OJA (Fonds 17, Series 5-4-6, File 16).

same amendments to the *Criminal Code* it had previously advanced. Congress subsequently reported that the meeting had gone well and that the ministers had assured them they would investigate the matter. In fact, on 13 March 1964, Favreau stated in Parliament that "the Jewish congress of Canada ought to be commended for the very good presentation which they made" and "that the material submitted and the comments which [they] made…are already under study by my officials."[122] Additionally, Congress sent the brief to the premiers of all ten provinces[123] and to numerous MPs, including John Diefenbaker and Tommy Douglas, leaders of the federal Progressive Conservatives ("PCs") and NDP, respectively. Diefenbaker and Douglas both replied, expressing support for government action while not committing themselves to a specific proposal.[124]

Congress's lobbying made an impact. On 26 April 1964, Prime Minister Lester Pearson spoke at a dinner organized by the Montreal Israel Bond Organization, telling a crowd of twelve hundred that it was the government's duty "to act against all those who advocate, incite or insinuate discrimination or disseminate 'hate' literature for that purpose."[125] The next day, Secretary of External Affairs Paul Martin gave a speech at Beth Sholom Synagogue in Toronto in which he acknowledged the spread of neo-Nazism and told the congregation that the government may introduce legislation if it could not deal with the threat under existing laws.[126] In addition, at a speech in Montreal around the same time, Diefenbaker deemed hate literature poisonous, outrageous, and offensive.[127]

To bolster the legitimacy of its legal position, the CJC retained two of the most well-known lawyers in Canada, JJ Robinette and Arthur Maloney, to separately provide opinions on the

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[122] *House of Commons Debates*, 26-2, vol 1 (13 March 1964) at 873 (Hon Guy Favreau).
[123] See *e.g.* Memorandum from Ben Kayfetz to Sydney Harris (31 March 1964), OJA (Fonds 17, Series 5-4-6, File 14) (indicating that various Premiers had acknowledged the material sent by the CJC).
[124] Letter from John Diefenbaker to Ben Kayfetz (16 March 1964), OJA (Fonds 17, Series 5-4-6, File 16); Letter from Tommy Douglas to Ben Kayfetz (16 March 1964), OJA (Fonds 17, Series 5-4-6, File 16).
[125] "Gov't., Opposition for Immediate Action Against Canada neo-Nazis," *Canadian Jewish News* (1 May 1964) 1 ["Gov't. Opposition"]; "No 'graded' citizenship in Canada–Pearson," *Toronto Daily Star* (27 April 1964) 1.
[126] "Gov't. Opposition," *supra* note 125.
[127] "Diefenbaker Calls for Action in Canada Against Anti-Jewish Tracts," *Jewish Telegraphic Agency* (29 April 1964) 4.

prospect of successfully prosecuting disseminators of hate literature under existing laws. In a memo to Harris on 1 May 1964, Robinette concluded that the present sections of the *Criminal Code* were inadequate and that a criminal prosecution would be unsuccessful.[128] Maloney likewise foresaw "grave difficulties" with a criminal prosecution under current laws.[129]

Harris sent both memos to Diefenbaker and Favreau.[130] On 5 June 1964, in response to a question from Diefenbaker in Parliament, Favreau acknowledged that he had read Robinette's opinion and stated that "the matter is still being actively pursued by my officers and myself, but a formula which will reconcile freedom of thought and expression…has not yet been evolved in a manner which is satisfactory to me."[131]

The CJC's campaign made a breakthrough in the fall of 1964. On 17 October 1964, Hayes and Congress President Michael Garber, along with recently-appointed Dean of McGill Faculty of Law Maxwell Cohen, met with Favreau.[132] Cohen—McGill's first full-time Jewish law professor and Canada's first Jewish law school dean—was active in Congress leadership.[133] He also had deep connections to the federal Liberals.[134] Cohen served as a foreign policy consultant to the government and had assisted Pearson in his successful campaign for the party's leadership.[135] In addition, he was friends with then Minister of Justice Favreau.[136]

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[128] See Letter from John J Robinette to SM Harris (1 May 1964), OJA (Fonds 17, Series 5-4-6, File 20). This was not the first time Congress worked with Robinette. See *Noble et al v Alley*, [1951] SCR 64 [*Noble*]. The JPRC paid for Robinette's services as lead counsel in *Noble* in which the Supreme Court struck down a restrictive covenant prohibiting the sale of property "to any person of the Jewish, Hebrew, Semitic, Negro or coloured race or blood" (*ibid* at 64). See George D Finlayson, *John J. Robinette, Peerless Mentor: An Appreciation* (Toronto: Dundurn Press for the Osgoode Society for Canadian Legal History, 2003) at 44-47; Girard, *supra* note 23 at 257-58.
[129] Letter from Arthur Maloney to Sydney Harris (28 May 1964), OJA (Fonds 17, Series 5-4-6, File 20).
[130] Letter from BG Kayfetz to John Diefenbaker (21 May 1964), OJA (Fonds 17, Series 5-4-6, File 20); Letter from Saul Hayes to Guy Favreau (29 May 1964), OJA (Fonds 17, Series 5-4-6, File 20); Letter from Sydney Harris to John Diefenbaker (8 June 1964), OJA (Fonds 17, Series 5-4-6, File 20); Letter from Sydney Harris to Guy Favreau (8 June 1964), OJA (Fonds 17, Series 5-4-6, File 20).
[131] *House of Commons Debates*, 26-2, vol 4 (5 June 1964) at 3976-77 (Hon Guy Favreau).
[132] Kaplan, *supra* note 4 at 247.
[133] Sheldon Kirshner, "Cohen feels at home in academia, government," *Canadian Jewish News* (12 March 1981) 5; Ronald St John MacDonald, "Maxwell Cohen at Eighty: International Lawyer, Educator, and Judge" (1989) 27 Can YB Intl Law 3 at 31.
[134] See MacDonald, *supra* note 133 at 42-43.
[135] *Ibid* at 43.
[136] *Ibid* at 39, n 150.

The delegation of Hayes, Garber, and Cohen recommended that a "first-class team" be assembled to study the hate-speech issue.[137] The government accepted Congress's proposal. On 10 November 1964, at an event at the Sheraton Mount Royal Hotel sponsored by Montreal B'nai Brith and flanked by Jewish dignitaries including Klein and Hayes, Favreau announced that the government would create a "small, informal committee of experts" to study possible measures against hate literature. To a standing ovation, Favreau promised the packed audience "that we do not intend to allow this challenge to our civilization to stand without answer." Favreau named the first two members of the committee: Saul Hayes and Maxwell Cohen.[138]

In January 1965, Favreau announced that Cohen would chair the committee and appointed the remaining members: Doctor James A. Corry, a constitutional law scholar and Principal of Queen's University; Father Gérard Dion, Professor of Industrial Relations at Université Laval; Mark MacGuigan, Professor of Law at the University of Toronto; Shane MacKay, Executive Director of the *Winnipeg Free Press*; and Professor Pierre-Elliott Trudeau of the Faculty of Law of the Université de Montréal.[139] MacGuigan later recalled that the speed with which the government acted and the fact that Hayes was appointed led him "to believe that [the CJC] was the principal reason for the committee and that it was set up to satisfy them."[140]

Although the committee's personnel was finalized in January 1965, its report would not be released until April 1966.[141] In the meantime, tension in the Jewish community would rise to a boil.

e. "Don't stick your noses in it": Jewish Vigilantism, 1964–65

Despite Congress's hard work, anxiety continued to grow among Canadian Jews over the

[137] *Ibid*; Kaplan, *supra* note 4 at 247.
[138] "Favreau To Appoint Committee To Study 'Hate' Legislation," *Canadian Jewish Chronicle* (13 November 1964) 1; Kaplan, *supra* note 4 at 247-48.
[139] *Ibid*.
[140] Bialystok, *supra* note 5 at 118.
[141] Kaplan, *supra* note 4 at 256.

perceived onslaught of neo-Nazism and the lack of progress in suppressing antisemitism.

On 25 October 1964, on its public affairs show *This Hour Has Seven Days*, the CBC again broadcasted an interview with George Lincoln Rockwell, leader of the American Nazi Party. Sitting under a swastika flag, Rockwell declared that Hitler could not have destroyed six million Jews and proclaimed his intention to gas "queers and liberals" and send "Negroes back to Africa from whence they came."[142] Understandably, many in the Jewish community (as well as the broader Canadian public) were upset with CBC's decision to give Rockwell a platform.[143] The Association of Holocaust Survivors sent a memo to the Board of Broadcast Governors expressing outrage that "tens of thousands of Canadian citizens who suffered bodily and spiritually under the Nazi tyranny and who lost their closest relatives in Nazi extermination camps should be insulted, threatened again and their wounds reopened for the sake of cheap sensationalism."[144]

Criticism was also directed at Congress. Although the CJC had known in advance that Rockwell would be interviewed, it decided not to issue a statement until after the interview aired so as not to place a prior restraint on free speech. The *Canadian Jewish News* reported that it had been bombarded with "letters and telephone calls directed against the Canadian Jewish Congress," and that some rabbis spent their Saturday morning sermons criticizing the CJC for failing to do anything to stop the interview. *Canadian Jewish News* editor M.J. Nurenberger commented that in prioritizing freedom of speech, Jewish leadership had ignored what the community wanted and thereby committed "the same fundamental error…that guided the [JPRC] to hesitate when the Klein-Walker Anti-Hate Bill first was discussed."[145]

Frustrated with leadership, some took more direct measures. In early 1965, a group of Holocaust survivors and others created a vigilante organization to fight the neo-Nazis. They called

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[142] *Ibid* at 253; Oscar Berson, "Reporters or Yokels?," *Canadian Jewish News* (30 October 1964) 1.
[143] See *e.g.* "CBC showered with protests on Nazi show," *The Globe and Mail* (26 October 1964) 12; "800 protests flood CBC over Nazi," *Toronto Daily Star* (26 October 1964) 27; "Anger against CBC erupts in Commons," *The Globe and Mail* (27 October 1964) 11.
[144] Memorandum presented to Board of Broadcast Governors by Association of Former Concentration Camp Inmates, Survivors of Nazi Oppression (17 November 1964), OJA (Fonds 17, Series 5-4-6, File 30).
[145] MJ Nurenberger, "Canadian Jewry – Crisis in Leadership," *Canadian Jewish News* (6 November 1964) 1.

themselves "N3," referring to Newton's third law of motion, that to each action there is an opposite and equal reaction.[146] The group felt it had to do something because Jewish leadership would not. Mike Berwald, one of N3's founding members, recalled that he had previously met with Kayfetz, Harris, and J.S. Midanik (Chairman of the JPRC's Central Region) but was told "not to stick our noses in it," that "it was [the JPRC's] job," and that they were "doing everything possible."[147] N3 bugged meetings held at John Beattie's home and hired a private investigator to infiltrate Beattie's organization.[148]

N3 was not the only group taking matters into its own hands. Several high school students in Toronto formed the Canadian Organization for the Indictment of Nazism ("COIN"). COIN operated a "defence element" that gathered intelligence on neo-Nazis and managed to photograph Beattie's files. Cyril Levitt—now a professor at McMaster University, who has written about Jewish history and racial incitement—was one of its founders. He recently recalled that, looking back, "we thought of ourselves in a more grandiose way than I do today."[149]

In addition, Michael Englishman—a Holocaust survivor from the Netherlands—and a friend secretly attended meetings held by Beattie and Stanley. Shocked by what he was hearing, Englishman began to record the licence plate numbers of all attendees. He and his friend subsequently broke into the neo-Nazis' headquarters and stole their membership files.[150] According to Englishman, his desire to take action arose from Congress's inaction:

> I spoke with Ben Kayfetz and Myer Sharzer who both held positions within the executive of the Jewish Congress. They told me that the Jewish Congress knew all about it. I then asked what they were planning to do about it. Their answer was that the position of the Executive was to do "nothing."…I was flabbergasted at first. Then I said to them, "you people have not learned a thing from the Holocaust. Because what you are doing now is precisely what brought the Nazis to power in Germany![151]

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[146] Memorandum from Ben Kayfetz to JS Midanik (1 February 1965), OJA (Fonds 17, Series 5-4-6, File 34); Interview of Cyril Levitt (26 November 2020) [on file with author] [Levitt Interview].
[147] Bialystok, *supra* note 5 at 126-28.
[148] *Ibid*.
[149] Levitt Interview, *supra* note 146; Bialystok, *supra* note 5 at 128. With respect to Professor Levitt's work on Jewish history and racial incitement, see Louis Greenspan & Cyril Levitt, eds, *Under the Shadow of Weimar: Democracy, Law, and Racial Incitement in Six Countries* (Westport, Connecticut: Praeger, 1993); Cyril Levitt & William Shaffir, *The Riot at Christie Pits* (Toronto: Lester & Orpen Dennys, 1987).
[150] Interview of Michael Englishman by Karyn Farber (17 August 1987), Los Angeles, USC Shoah Foundation Visual History Archive (Collection of the Sarah and Chaim Neuberger Holocaust Education Centre).
[151] Michael Englishman, "Neo-Nazis in Toronto" (1996-97) 4-5 Can Jewish Studies 120 at 121-22. In the quoted passage Englishman was referring to the announcement that Beattie planned a rally at Allan Gardens, discussed below.

Congress did in fact know all about neo-Nazi activities, as they too were surveilling Stanley, Beattie, and their associates.[152] The JPRC hired several informants to attend neo-Nazi meetings and record conversations involving Stanley and Beattie.[153] It passed on this information to the police.[154]

While it was monitoring the Nazis, Congress was *also* spying on the Jewish vigilantes.[155] The JPRC had at least two agents regularly attend N3's meetings and report back to Kayfetz, one of whom was accepted as a member of N3's executive. Kayfetz's agents provided details about N3's membership, plans, and its views of Congress.[156] Berwald claimed that Jewish leadership also bugged their meetings; when N3 bought a bugging device to infiltrate the neo-Nazis, it picked up the one Congress was using.[157] Needless to say, there was a breakdown of trust between leadership and the survivor community, which would burst into the open in the summer of 1965.

f. "But a drop in an already full and bitter cup": The CJC Plenary, the Riot at Allan Gardens, and the Community Anti-Nazi Committee, 1965

Two events in mid-1965 would place tensions between Jewish leadership and its constituents on public display, and at last, result in a material shift in Congress's approach to hate-speech legislation. The first was the intervention by the Association of Holocaust Survivors at the CJC plenary in May 1965; the second was the riot at Allan Gardens and Congress's response to the violence.

The fourteenth CJC plenary, held at the Queen Elizabeth Hotel in Montreal from 20 May 1965 to 24 May 1965, drew a record high of more than eight hundred delegates. At the insistence

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[152] See *e.g.* Announcement of Meeting at the Windsor Room, King Edward Hotel (1964), OJA (Fonds 17, Series 5-4-6, File 17); Memorandum from Sydney Harris to file re campaign against hate literature (14 December 1964), OJA (Fonds 17, Series 5-4-6, File 30).
[153] See Memorandum from Ben Kayfetz to Sydney Harris (1 December 1964), OJA (Fonds 17, Series 5-4-6, File 34); "Report re Mr. G." from MS to SMH, JSM, & BGK (18 February 1965), OJA (Fonds 17, Series 5-4-6, File 34); Garrity, *supra* note 73 at 11.
[154] Letter from Ben Kayfetz to L McIsaac (7 December 1964), OJA (Fonds 17, Series 5-4-6, File 14).
[155] Memorandum from Ben Kayfetz to file (25 January 1965), OJA (Fonds 17, Series 5-4-6, File 34).
[156] See *e.g.* Memorandum from Ben Kayfetz to JS Midanik re N-3 (5 February 1965), OJA (Fonds 17, Series 5-4-6, File 34); Memorandum from Ben Kayfetz to JS Midanik re N-3 (9 February 1965), OJA (Fonds 17, Series 5-4-6, File 34).
[157] Bialystok, *supra* note 5 at 127.

of the Association of Holocaust Survivors, a number of its members, in addition to Klein and Orlikow, were granted delegate status.[158]

An intense debate ensued at the plenary over whether Congress would recommend that the government adopt legislation linked to incitement of violence, as the CJC had advocated for over a decade, or whether it would adopt a broader group libel bill along the lines proposed by Klein and Walker. In a speech on community relations delivered on 22 May 1965, Midanik offered a vigorous defence of the civil-libertarian wing—arguing that the place of Jews in society and the polity is best ensured over the long term by their support for the norms and institutions of liberal democracy, including free speech:

> I have been extremely perturbed [with]…the civil libertarians, civil-libertyniks or the civil rightniks…being used…as a term of oprobrium [*sic*]. That to have a concern for civil rights and a concern for civil liberties is apparently something that Jews should not have when Jews are attacked. And I take the opportunity of this particular platform in not pleading with you, but pointing out to you that the Jewish community would have descended to an extremely sorry state if in fact the term civil libertarian and civil rightnik was an epithet and a term of opprobrium rather than one that should be treated with the respect for the concern of others that it deserves. We should not forget ourselves and forget our own identity.[159]

In his address the next morning, Harris argued that the community was best served by keeping in mind what the Canadian public would accept; asking for too much might undermine the entire endeavour. As he put it, "If our proposals cut down the freedom of Jehovah's Witnesses or Orangemen, of Roman Catholics or of Separatists, then our proposals will not be accepted by Parliament – and no one should fool himself into wishfully thinking otherwise."[160] Klein spoke in response, criticizing Congress's leadership for its alleged diffidence and calling hate literature an abuse of free speech.[161]

Harris proposed a resolution pursuant to which the delegation would endorse the CJC's prior proposals on hate-speech legislation. However, the Association of Holocaust Survivors moved from the floor for an amendment supporting the Klein-Walker and Orlikow bills. The

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[158] "Montreal Delegates Ask for Klein, Orlikow on Program," *Canadian Jewish Chronicle* (7 May 1965) 1. Lou Zablow claimed that the Association of Holocaust Survivors and Klein were at first denied entry to the plenary but were allowed in when they threatened to demonstrate outside the Queen Elizabeth Hotel. See Bialystok, *supra* note 5 at 151-52.
[159] Speech by JS Midanik (22 May 1965), CJA (Fonds CJC0001, ZA 1965-2-14A).
[160] Speech by Sydney Harris (23 May 1965), CJA (Fonds CJC0001, ZA 1965-2-14A).
[161] Speech by Milton Klein (23 May 1965), CJA (Fonds CJC0001, ZA 1965-2-14A).

amendment was put to a vote and carried by a huge majority, with only a handful of members, including Borovoy and Midanik, voting against it.[162] The survivors had finally succeeded in making support for group libel legislation official CJC policy. Lou Zablow later proudly recounted that the Association's "resolution, although fought tooth and nail by…most influential members of the Establishment, passed with flying colours…terminating the era of the iron rule by so called civil libertarians who were willing to give the Nazis the right to spread their venom."[163]

The CJC's reversal was received positively. In the *Canadian Jewish News*, Nurenberger applauded Congress leaders for changing their minds.[164] However, any goodwill was nearly lost a short time later.

On 30 May 1965, John Beattie was scheduled to speak at a public rally at Allan Gardens in Toronto. The announcement that Beattie would be holding a rally reverberated throughout the Jewish community. N3 sent letters to Jewish organizations and synagogues calling for mass attendance.[165] An anonymous pamphlet informed "all Jewish youth" that they were "*required*, as a citizen of Toronto and as a Jew, to be there, no questions asked by parents," as "your lives are at stake if these people become bolder."[166]

As it turned out, Beattie never obtained a permit to speak in the park; had he given a speech, he would have been arrested. He never got the opportunity to do so. By the time Beattie showed up, a crowd of between one thousand five hundred and five thousand people had gathered, including a large number of Holocaust survivors. Beattie, holding a swastika flag, was immediately detected and attacked. Another group of six youths wearing biker jackets—which turned out to be members of a motorcycle club happening to pass by—were also set upon. Police rescued the

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[162] "Big Crowds at CJC Sessions, Sparks Fly at Hate Legislation Debate," *Canadian Jewish Chronicle* (28 May 1965) 1; MJ Nurenberger, "Commentary: Breakthrough," *Canadian Jewish News* (28 May 1965) 1 ["Breakthrough"]; Borovoy, *supra* note 110 at 100.
[163] Lou Zablow, "Comments," *Voice of the Survivors* (1966), Montreal, Montreal Holocaust Museum Archives (2011X.41.91) at 3.
[164] "Breakthrough," *supra* note 162.
[165] Bialystok, *supra* note 5 at 131.
[166] Anonymous Pamphlet to All Jewish Youth (1965), OJA (Fonds 17, Series 5-4-6, File 11) [emphasis in original]. The pamphlet, though unsigned, stated that it had "Rabbi Monson's endorsement," presumably referring to Rabbi David Monson of Beth Sholom Synagogue in Toronto (*ibid*).

victims before any serious injury resulted. Eight Jews were arrested, in addition to Beattie. N3 provided bail for the Jewish arrestees.[167]

Congress was very unhappy with this display of vigilantism, which threatened to undo decades of careful progress. On 8 June 1965, the CJC sent a "communiqué" to approximately twenty thousand members of the Ontario Jewish community, admonishing the vigilantes "in our midst, who are determined to act on their own in dealing with the neo-Nazis with little regard for the consequences to the community."[168] It continued:

> The Canadian Jewish Congress accuses these persons and groups of irresponsibly creating a tense and inflamed situation which…was bound to erupt into violence and which unfortunately did so erupt; let us face it—the consequences of the riot could have been more ugly, even tragic!
>
> […]
>
> There are some individuals—fortunately very few—of these self-appointed *shomrim* [guardians] who have mistaken noise for action and rabble-rousing for militancy and who have not hesitated to turn an unfortunate coincidence into the occasion for inflammatory allegations of anti-Semitic motivation.[169]

Predictably, the statement was not well received. A note from a Toronto resident attached to the communiqué in the JPRC files is indicative:

> It is disgusting and very much disappointment [*sic*] in reading this letter. You are acting in such a passive way as during the war when 6 million Jews were slaughtered and you were afraid to raise your voice because this might embarrass the government.[170]

Congress received a flood of similar criticism. The Association of Holocaust Survivors called for the immediate resignation of those responsible for the "malicious and unjust" statement, blaming this "deplorable and foolish act" on "the rancor of the handful of opponents of the recent plenary session resolution," who were looking to avenge their defeat on the question of group libel legislation.[171] Likewise, a resolution passed by the Conference of Jewish Folk Organizations and Survivors of Concentration Camps in Toronto called Congress's statement "an insult to the feelings of thousands of Jewish people in our city" and demanded its withdrawal and the

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[167] Bialystok, *supra* note 5 at 132; Englishman, *supra* note 151 at 122-23.
[168] CJC Report on Neo-Nazism and Hate Literature (8 June 1965), OJA (Fonds 17, Series 5-4-6, File 24).
[169] *Ibid* [emphasis in original]; "Jewish Congress Blames Jews for Fomenting Mob Violence," *The Globe and Mail* (9 June 1965) 1 ["Congress Blames Jews"].
[170] Handwritten Note from Samuel Panik (11 June 1965), OJA (Fonds 17, Series 5-4-6, File 24).
[171] "Congress Statement On Toronto Riot – Concentration Camp Survivors Demand Resignations Of Responsible Parties," *Canadian Jewish Chronicle* (18 June 1965) 1.

resignation of all responsible parties.[172]

In response to the backlash, on 7 July 1965, the CJC held a community meeting at Holy Blossom Temple in Toronto, chaired by Rabbi W. Gunther Plaut.[173] The meeting was designed to alleviate tensions caused by the communiqué, which, in Rabbi Plaut's words, had "set the already smouldering Jewish community fully ablaze."[174] Plaut recalled that the voices of protest had become so loud "that the very continuance of Congress, at least in Toronto, was in jeopardy."[175] Approximately eight hundred people attended the meeting, which lasted five hours.[176]

Plaut opened by declaring, "[T]he first thing that we must understand is that we are here tonight not to fight Jews but to fight Nazis."[177] Nevertheless, tension was palpable between Holocaust survivors and community leadership. Cyril Levitt, who attended the meeting, recalled that the atmosphere was "pretty raucous," and people were "really angry."[178] Numerous attendees rose to excoriate Congress leadership and praise the vigilantes at Allan Gardens. One Holocaust survivor called the CJC communiqué "a tremendous offense to those who went through the hells and agony of Nazism."[179] Sabina Citron—an honorary secretary of the Association of Holocaust Survivors, who would gain prominence over the ensuing years through her quest to have Ernst Zundel prosecuted—tied Congress's insensitivity to its failure to support legislation on group libel.[180] Citron reminded the audience that it was the survivors who had lobbied for the Klein-

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[172] Resolution of Conference of Jewish Folk Organizations and Survivors of Concentration Camps (22 June 1965), OJA (Fonds 17, Series 5-4-6, File 49). Making matters worse, the communiqué was leaked to *The Globe and Mail* before it reached its recipients. See "Congress Blames Jews," *supra* note 169; Bialystok, *supra* note 5 at 136. Many other newspapers picked up the story and ran similar headlines. See Letter from Ben Kayfetz to JS Midanik (22 June 1965), OJA (Fonds 17, Series 5-4-6, File 11).

[173] Rabbi Plaut was a member of Congress's anti-Nazi committee established in February 1964. He would go on to serve as president of the CJC and Vice-Chair of the Ontario Human Rights Commission. See Ron Csillag, "Scholar urged Jews to engage larger world," *The Globe and Mail* (14 February 2012) S8.

[174] Plaut, *supra* note 31 at 244.

[175] *Ibid* at 244.

[176] See *ibid* at 244-45. Only delegates who had attended the fourteenth plenary and presidents of organizations and congregations of the Toronto Jewish community were invited. But when a much larger crowd showed up, Plaut ruled that all Jews concerned with the welfare of the community were entitled to participate.

[177] Transcript of community meeting at Holy Blossom Temple (7 July 1965), OJA (Fonds 17, Series 5-4-6, File 32) [Meeting at Holy Blossom].

[178] Levitt Interview, *supra* note 146.

[179] Meeting at Holy Blossom, *supra* note 177.

[180] *Ibid.* See also Sabina Citron, "The Anti-Hate Legislation: What it Really Signifies," *Voice of the Survivors* (1966) at 6, Montreal, Montreal Holocaust Museum Archives (2011X.41.91).

Walker bill and that "Congress refused to have anything to do with it." It was only "after a year and a half's struggle and under the pressure of all but 4 delegates to the Plenary Session [that] the Klein-Walker bill was finally taken under the wings of Congress." Thus, Citron noted, "[w]e should make it absolutely clear that the letter in itself was but a drop in an already full and bitter cup."[181] Responding to Citron and others, Midanik defended both the communiqué and his position on the legislation:

> I don't retreat from my position at all on the question of group libel or on the question that came up at the Plenary Session. I have a right to a viewpoint and I have a right to a defence of civil liberties and I have a right to be convinced that I am right even though I am a group of four people.[182]

However, a resolution passed at the 7 July 1965 meeting would further marginalize the civil libertarians. Under pressure to incorporate a broader perspective into the CJC's response to neo-Nazism, it was resolved that a "democratic and widely representative" special committee be established to formulate the community's position.[183] The composition of this group, which came to be known as the Community Anti-Nazi Committee ("CANC"), was decided at a subsequent meeting on 22 July 1964. Although operating under the aegis of Congress, only fourteen of its eighty members would come from the CJC and B'nai Brith. The remaining members were chosen by a cross-section of Jewish community organizations, including synagogue congregations of all stripes, labour groups, Zionists, women's organizations, youth groups, and *landsmanshaftn* (Jewish fraternal societies).[184]

The CANC acted in an advisory capacity and its specific impact on CJC policy can be difficult to pinpoint.[185] Indeed, as set out below, the CANC's formation did not prevent disagreement in the years to come between Congress leadership and Holocaust survivors over the content of the hate-speech legislation. Rather, it further entrenched support for a group libel bill of some form. Congress had crossed the Rubicon and there would be no turning back. Levitt, who

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[181] Meeting at Holy Blossom, *supra* note 177.
[182] *Ibid*.
[183] *Ibid*.
[184] Memorandum from Myer Sharzer to BG Kayfetz re Special Steering Committee (3 August 1965), OJA (Fonds 17, Series 5-4-6, File 32).
[185] See Bialystok, *supra* note 5 at 142-43.

served as one of the committee's youth representatives, noted that the CANC's creation was a seminal event—"a kind of opening of the door – the bowing to the pressure to bring [the newcomers] into the inner circle."[186]

But although Jewish leadership was now firmly behind the advancement of a group libel bill, its precise content remained an open question.

III. 1965–1970: "Finally: Anti-Hate Bill"[187]

a. Overview

The bulk of the Cohen Committee's findings were agreed on in July 1965 and the report was completed and sent to the government in November 1965. It was released in April 1966. In November 1966, the government tabled legislation in the Senate that was virtually identical to what the Cohen Committee had recommended.[188]

The Cohen Committee's recommendations and the government's proposed legislation tracked closer to the Klein-Walker bill than Congress's earlier proposals. The bill outlawed three things: First, advocacy or promotion of genocide (section 267A; now section 318); second, incitement of violence or hatred against an identifiable group through public communication, where such incitement was likely to lead to a breach of the peace (section 267B(1); now section 319(1)); third, a group libel provision, proscribing the wilful promotion of hatred or contempt against an identifiable group (section 267B(2); now section 319(2)). In addition, the legislation authorized *in rem* proceedings to seize hate propaganda (section 267C; now section 320).[189]

The offence of wilful promotion of hatred, which was punishable by up to two years imprisonment, contained two defences. No person could be convicted if they established that: (a) the statements were true; or (b) the statements were relevant to any subject of public interest, the

[186] Levitt Interview, *supra* note 146.
[187] See *Canadian Jewish News* (21 November 1969) 1.
[188] Kaplan, *supra* note 4 at 254-59, 272, n 61.
[189] Bill S-49, *An Act to amend the Criminal Code*, 1st Sess, 27th Parl, 1966 (first reading 7 November 1966) at 1-2.

discussion of which was for the public benefit, and that on reasonable grounds they believed them to be true.[190]

Harvey Yarosky, then a young criminal lawyer and one of Maxwell Cohen's former students at McGill University, served on the committee as Cohen's executive assistant. He provided criminal law expertise and invaluable research on hate propaganda and legislation in other countries and assisted with drafting the report. According to Yarosky, the committee's members came to their task with no preconceived notions as to the necessity of hate-speech legislation. Indeed, many were concerned about the impact of such legislation on civil liberties and the question of whether criminalization of hate speech would prove an effective deterrent. However, after further study and review of racist material, the committee gradually came to a unanimous opinion on the need for a hate-speech bill. Yarosky remembered one committee member commenting that he had never realized how hurtful hate speech was for targeted groups.[191]

It was understood by the other committee members that Saul Hayes spoke for the Jewish community.[192] Undoubtedly influenced by the shift in CJC policy, Hayes signed on to the Cohen Committee's opinion and would have gone further; Hayes objected to the insertion of the defence of truth in section 267B(2). His dissent on this issue was noted in a footnote.[193] The report was otherwise unanimous.

Although the government introduced draft legislation in 1966, it was not passed until four years later, reflecting considerable opposition to the bill—as Harris and others had warned. The legislation originally introduced in November 1966 was referred to a special joint committee of the Senate and House of Commons; however, the legislative session ended without the bill's consideration. The government reintroduced the legislation in May 1967 as Bill S-5, and in November 1967, the bill was referred to a Senate committee. That committee met three times but

[190] *Ibid* at 2.
[191] Interview of Harvey Yarosky (30 November 2020) [on file with author] [Yarosky Interview]. See also Kaplan, *supra* note 4 at 255.
[192] Yarosky Interview, *supra* note 191.
[193] Cohen Committee Report, *supra* note 6 at 66, n 17 ("Mr. Hayes, while agreeing with these conclusions and recommendations, would have wished the recommendations to go further by excluding truth as a defence").

dissolved in 1968 in advance of the June election, which re-elected a Liberal government under its new leader, Pierre Elliott Trudeau. Due to a recent redrawing of its boundaries, Trudeau's Mount Royal riding became thirty-eight per cent Jewish—making it Canada's most Jewish riding—further incentivizing him to ensure the legislation was enacted.[194]

The bill was introduced again in December 1968 as Bill S-21 and referred to another senate committee in February 1969. Bill S-21 passed the Senate in June 1969, only to die when Parliament was prorogued later that same month. The legislation was then introduced in the House of Commons in October 1969 and passed in April 1970.[195] After further debate in the Senate—and a last-minute attempt by the legislation's opponents to refer the question of its constitutionality under the Bill of Rights to the SCC—it received Royal Assent on 11 June 1970.[196]

The legislation was amended along the way and weakened in several respects. Perhaps most importantly, a provision was inserted requiring the consent of the attorney general of a province to initiate a prosecution for wilful promotion of hatred or advocating genocide. Furthermore, private conversations were exempted from liability under section 267B(2). In addition, two defences were added to wilful promotion of hatred, protecting persons who in good faith: expressed an opinion on a religious subject or an opinion based on a belief in a religious text; or intended to point out, for purposes of removal, matters producing or tending to produce feelings of hatred toward an identifiable group.[197]

Debate over the bill was intense. Most controversial was the section on group libel.[198] Criticism centred on two points: first, that the bill was too great an infringement on freedom of

[194] Troper, *supra* note 19 at 210.
[195] See *House of Commons Debates*, 28-2, vol 1 (17 November 1969) at 87 (Mr Turner); *House of Commons Debates*, 28-2, vol 6 (13 April 1970) at 5807 [*House of Commons Debates*, vol 6].
[196] See *Senate Debates*, 28-2, vol 2 (16 April 1970) at 881-82 (Hon Muriel McQ Fergusson); Kaplan, *supra* note 4 at 259-64.
[197] The bill went through other changes. "Religion" was added to the definition of "identifiable group"; the definition of "statements" was expanded to include electronic recordings; the word "means" was substituted for "includes" in the definition section of the genocide provision; the word "contempt" was deleted from the offence of wilful promotion of hatred; and communication facilities were exempted from *in rem* proceedings under s 267C.
[198] Kaplan, *supra* note 4 at 263; Cohen, "Reflections on a Controversy," *supra* note 8 at 112.

speech;[199] second, that the legislation would prove ineffective as a tool for combating hatred. Two leading academics, FR Scott and Harry Arthurs, emphasized the latter argument. Scott contended that the bill provided "a false sense of security" but would not attack the root causes of racism; as he stated, "[W]e are making a gesture on the criminal law side and then everything else goes on as before."[200] Arthurs, who had resigned from the JPRC's Legal Committee in part over its shifting views on group libel,[201] now became one of the legislation's most convincing opponents. Among other things, he argued that the criminal law was a suboptimal instrument for countering hateful speech and that emphasis on criminal sanctions would discourage other, more useful measures, such as education.[202] Arthurs's testimony had a powerful impact; it was cited several times by opponents of the bill in the bitter legislative debate that followed.[203]

The response of the legislation's proponents to the first argument was that freedom of speech is not absolute and that the bill had been carefully tailored to restrict speech as little as possible.[204] The answer to the second was that the bill's effectiveness was to be found in its pedagogical and symbolic functions, not in its utility as a prosecutorial tool. To the legislation's supporters, the opponents had missed the point. As Cohen put it in an article he published shortly after the legislation was enacted, the provisions would serve a useful purpose simply through their enactment:

> [T]he Committee took into account the important criticism aimed generally at any such controls, namely that such legislation cannot change the human heart and that fundamentally change must come from within and that the most formidable enemy of prejudice was education and not punitive criminal law. As a general proposition, the Committee accepted this broad concept of the basic role of the educational process, and of

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[199] See *e.g. Senate Debates*, 28-1, vol 2 (17 June 1969) at 1615 (Daniel A Lang) [*Senate Debates* vol 2]; *House of Commons Debates*, vol 6, *supra* note 195 at 5532 (Eldon M Woolliams).
[200] Senate, Standing Committee on Legal and Constitutional Affairs, *Evidence*, 28-1, vol 1, No 9 (29 April 1969) at 206-07 (Professor Scott).
[201] Arthurs Interview, *supra* note 106.
[202] *Ibid*; Senate, Standing Committee on Legal and Constitutional Affairs, *Evidence*, 28-1, vol 1, No 7 (22 April 1969) at 146-47 (Prof Arthurs). Part of Arthurs's evidence was also published. See HW Arthurs, "Hate propaganda – an argument against attempts to stop it by legislation" (1970) 18 Chitty's LJ 1.
[203] See *e.g. House of Commons Debates* vol 6, *supra* note 195 at 5543 (Eldon M Woolliams); *House of Commons Debates*, 28-2, vol 6 (9 April 1970) at 5687 (Paul St Pierre); *Senate Debates*, 28-2, vol 2 (21 April 1970) at 895 (Hon Lionel Choquette).
[204] See *e.g.* Senate, Special Committee on the Criminal Code (Hate Propaganda), *Evidence*, 27-2, vol 1, No 2 (29 February 1968) at 43-44, 49-50 (Prof Maxwell Cohen) [Special Committee on the Criminal Code, vol 1, No 2]; *Senate Debates* vol 2, *supra* note 199 at 1610 (Mr Roebuck); Paul Martin, "Right to Live Without Fear," *Canadian Jewish Notes* (29 May 1970) 1.

> the social environment in general, as the more desirable framework within which to alter and control "patterns of prejudice." But it could not reject the double conclusion to which it came, namely that many of the community's most important self-educating values were enshrined in statements of criminal law and these in turn, once so enacted, had a continuing educational effect by their very formulation.[205]

Numerous parliamentarians similarly placed emphasis on the criminal law's symbolic and educative power. As Minister of Justice John Turner argued, to view the legislation as merely a penal sanction was to take an overly narrow view of the criminal law's objectives:

> The criminal law is not merely a sanction or control process. It is reflective and declaratory of the moral sense of a community and the total integrity of a community. It seeks not merely to proscribe, but to educate.… I make no prediction as to how successful this legislation is going to be; I would be a fool to try to do it and so would any other member. [It] is a conscientious attempt on the part of the government…to outlaw as an articulation of the total integrity of the Canadian community the dissemination of hate in this country and throughout the world, proclaiming our commitment to humanity, humanism and to the rule of law.[206]

b. "There is a good deal of feeling that this is a Jewish bill": Congress Efforts to Secure Passage of the Legislation

Despite years of reluctance to accept a group libel bill, Congress now embraced the Cohen Committee's report and threw its weight behind the proposed legislation. Congress created a legislative planning committee, headed by a prominent Toronto lawyer, John Geller, and worked diligently to have the legislation passed.

CJC leadership sought to counter any impression that it was acting out of self-interest or that hate speech was only a matter of Jewish concern. Congress hired an Ottawa-based consultant, R Alex Sim, to lobby Members of Parliament and report back inside information. Sim held himself out as the chairman of the "Committee on Citizen Rights," likely to conceal his ties to the CJC when it was beneficial to do so.[207] He attended parliamentary debates in Ottawa and travelled the country, attending public meetings on the legislation and talking to politicians and community groups.[208] Sim was given other tasks, such as writing letters to the editor to major newspapers

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[205] Cohen, "Reflections on a Controversy," *supra* note 8 at 109.
[206] *House of Commons Debates* vol 6, *supra* note 195 at 5557-58 (Mr Turner).
[207] Note however that it is not clear whether Sim created this organization for purposes of this campaign or whether it was already in existence.
[208] See *e.g.* Letter from Ben Kayfetz to Saul Hayes re Report on planning committee meeting (15 January 1968), OJA (Fonds 17, Series 5-4-6, File 52) [Report on planning committee]; Letter from Alex Sim to Ben Kayfetz (14 February 1968), OJA (Fonds 17, Series 5-4-6, File 56); Letter from Alex Sim to Ben Kayfetz (29 April 1968), OJA (Fonds 17, Series 5-4-6, File 52).

around the country—in his capacity as chairman of the Committee on Citizen Rights—expressing support for the bill and countering arguments against the legislation.[209] In addition, he liaised with non-Jewish organizations, whom Congress wanted to get on board so as to provide the legislation with a broad base of support.[210]

Congress worked hard to secure the backing of a wide assortment of minority and special interest groups. It forwarded relevant material to these organizations and offered to draft a brief for anyone who requested it.[211] Several of the groups solicited by Congress testified in support of the bill. Indeed, most, if not all, of the groups who testified in favour of the legislation were affiliated with the Jewish community or had been approached by the CJC.[212] Other organizations

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[209] Letter from Ben Kayfetz to Saul Hayes (12 June 1968), OJA (Fonds 17, Series 5-4-6, File 52); Letter from Alex Sim to Ben Kayfetz (20 June 1968), OJA (Fonds 17, Series 5-4-6, File 53); R Alex Sim, "Kennedy assassination shows need for anti-hate law," Letter to the Editor, *Toronto Daily Star* (15 June 1968) 6; R Alex Sim, "Time for a bill," *Toronto Telegram* (29 June 1968), OJA (Fonds 17, Series 5-4-6, File 53).

[210] See *e.g.* Letter from Ben Kayfetz to Alex Sim (30 December 1967), OJA (Fonds 17, Series 5-4-6, File 56); Letter from Alex Sim to Walter Deiter, Canadian Indian Brotherhood (16 February 1968), OJA(Fonds 17, Series 5-4-6, File 52); Letter from John Geller to Alex Sim (26 January 1968), OJA (Fonds 17, Series 5-4-6, File 56); Memorandum from R Alex Sim to Ben Kayfetz re Further action on Bill S-5 (16 February 1968), OJA (Fonds 17, Series 5-4-6, File 52) [Memorandum from Sim to Kayfetz on Bill S-5]; Letter from Alex Sim to Ben Kayfetz (11 April 1968), OJA (Fonds 17, Series 5-4-6, File 52).

[211] Report on planning committee, *supra* note 208; Letter from Louis Herman to Richard Jones (19 January 1968), OJA (Fonds 17, Series 5-4-6, File 56).

[212] According to the Hansard Index, witnesses who testified in support of the legislation were as follows: The CJC (29 February 1968 and 25 February 1969); National Council of Jewish Women (29 February 1968); United Organizations for Histadrut (29 February 1968) (note that the National Council of Jewish Women and the United Organizations for Histadrut appeared alongside the CJC on 29 February 1968); Maxwell Cohen (29 February 1968 and 1 May 1969); Jewish Labor Committee of Canada (11 March 1969); United Nations Association of Canada (11 March 1969); Canadian Labour Congress (18 March 1968); Mark MacGuigan (18 March 1969); Canadian Council of Christians and Jews (25 March 1969); Association of Holocaust Survivors (25 March 1969); Manitoba Human Rights Association (22 April 1969); Canadian Polish Congress (24 April 1969); and United Black Front (30 April 1969).

Several of the nominally non-Jewish groups had ties to the Jewish community. For example, the United Nations Association was represented by Justice Harry Batshaw, who in 1950 became the first Jew appointed to a Superior Court in Canada and was active on Jewish community issues. See Canadian Jewish Heritage Network, "Batshaw, Justice Harry," online: <www.cjhn.ca/en/permalink/cjhn88127>. The Canadian Council of Christians and Jews was created with CJC assistance and the CJC initially provided its entire funding. See Letter from Ben Kayfetz to Max Melamet (22 January 1959), OJA (Fonds 17, Series 5-4-6, File 6). The delegation from the Manitoba Human Rights Association was led by Melvin Fenson, a Jewish lawyer from Winnipeg, CJC member, and formerly the long-time editor of Winnipeg's *Jewish Post*. See Allan Levine, *Coming of Age: A History of the Jewish People of Manitoba* (Winnipeg: Heartland Associates, 2009) at 216.

In addition, the CJC lobbied the Canadian Polish Congress to support the legislation and wrote a brief on their behalf. Although it is not clear whether the CJC also approached the United Black Front, internal correspondence from January 1968 indicates that its planning committee was reaching out to "Negro groups." See Report on planning committee, *supra* note 208.

issued public statements which the CJC could then cite in its own testimony—as "spontaneous" endorsements—to argue that "a groundswell of opinion across Canada" favoured the legislation.[213]

The CJC's concern over not appearing self-interested was well-founded. James Harper Prowse, chairman of the Senate committee on Bill S-5, reported to Sim in February 1968 that there was "a good deal of feeling [in the Senate] that this is a Jewish bill"; Prowse was thus grateful when Sim brought him a list of non-Jewish organizations that Congress had been in touch with, which Prowse thought "would make a tremendous difference in the attitude of the committee members."[214] However, legislators continued to display antisemitic attitudes during the debates. Senator Lionel Choquette suggested that the Jewish community was trying to "shove this type of legislation down people's throats"[215] and that Jewish witnesses were prejudiced.[216] Senator David Walker queried whether anyone supported the bill other than the CJC.[217] Other legislators used language that invoked stereotypes of the "pathological Jew" who derived "pleasure in raising the alarm of imminent danger and in producing a perpetual and paranoid status of victimhood."[218]

Congress engaged in other lobbying efforts. It was in contact with Mark MacGuigan, who had served on the Cohen Committee as a law professor and was elected as a Liberal MP in 1968.[219] Kayfetz asked MacGuigan to analyze the arguments being made against the bill, in exchange for which Kayfetz promised him "a suitable honorarium."[220] MacGuigan published two academic articles and at least one editorial in support of the legislation, and testified before the Senate.[221] In addition, the CJC sent letters to candidates in advance of the 1968 federal election requesting their

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[213] Special Committee on the Criminal Code, vol 1, No 2, *supra* note 204 at 34 (Mr Harris); Senate, Standing Committee on Legal and Constitutional Affairs, *Evidence*, 28-1, vol 1, No 2 (25 February 1969) at 41 (Mr Abbey) [Committee on Legal and Constitutional Affairs No 2].
[214] Memorandum from Sim to Kayfetz on Bill S-5, *supra* note 210.
[215] Special Committee on the Criminal Code, vol 1, No 2, *supra* note 204 at 24 (Senator Choquette).
[216] Senate, Standing Committee on Legal and Constitutional Affairs, *Evidence*, 28-1, vol 1, No 5 (18 March 1969) at 94 (Senator Choquette).
[217] Committee on Legal and Constitutional Affairs No 2, *supra* note 213 at 43 (Senator Walker).
[218] Lunny, *supra* note 9 at 41, 58.
[219] Cyril Levitt recalled that MacGuigan also came to speak to the CANC about the legislation and the Cohen Committee's work, although Levitt could not recall when exactly this took place. Levitt Interview, *supra* note 146.
[220] Letter from Ben Kayfetz to Mark MacGuigan (21 March 1967), OJA (Fonds 17, Series 5-4-6, File 42); Bialystok, *supra* note 5 at 165.
[221] Mark R MacGuigan, "Hate Control and Freedom of Assembly" (1966) 31:4 Sask L Rev 232; Mark R MacGuigan, "Proposed Anti-hate Legislation - Bill S-5 and the Cohen Report" (1967) 15:9 Chitty's LJ 302.

support and had local representatives approach candidates in person.[222] As the legislative process dragged on, Congress lobbied MPs, influential senators, and high-ranking members of the Liberal government.[223] In September and October 1969, Congress had a number of discussions with Trudeau and Turner and was able to secure a commitment that the government would introduce the anti-hate bill early in the upcoming legislative session and secure its passage—promises the government kept.[224]

c. "We reserve the right to oppose any law so full of loopholes and escape clauses": Survivors' Dissatisfaction with the Legislation

The CJC testified twice before Senate committees considering the legislation: first, on 29 February 1968, before the committee on Bill S-5, and again on 25 February 1969, before the committee on Bill S-21.

In its February 1968 testimony, echoing its prior legislative campaigns, the CJC took a position that offered the greatest opportunity to ensure the bill's enactment. Sydney Harris told the committee that Congress fully agreed with the defences to wilful promotion of hatred contained in the draft legislation; in fact, Harris emphasized, the CJC would go further and "*oppose* legislation that [did] not have these built-in safeguards to protect the full and free debate of social issues centering on the uninhibited discussion of controversial social issues."[225] Notably, Congress did not adopt Hayes's dissenting position in the Cohen Committee report opposing the defence of truth.[226] Moreover, the Congress delegation encouraged the Senate to consider introducing an additional hurdle, that no prosecution be commenced without the attorney general's consent—a

[222] See *e.g.* Letter from Ben Kayfetz to Saul Hayes, *supra* note 209; Letter from Andrew Brewin to Sydney Harris (13 June 1968), OJA (Fonds 17, Series 5-4-6, File 53); Letter from Ben Kayfetz to John Geller (14 June 1968), OJA (Fonds 17, Series 5-4-6, File 52); Letter from Sydney Harris & Louis Herman (17 June 1968), OJA (Fonds 17, Series 5-4-6, File 52); Letter from John Geller to members of Legislative Planning Committee (24 October 1969), OJA (Fonds 17, Series 5-4-6, File 52).
[223] See *e.g.* Letter from John Geller to members of Legislative Planning Committee, *supra* note 222; Letter from John Geller (26 November 1968), OJA (Fonds 17, Series 5-4-6, File 52); Letter from Philip Givens to Ben Kayfetz (22 April 1970), OJA (Fonds 17, Series 5-4-6, File 66).
[224] Letter from John Geller to members of Legislative Planning Committee (9 October 1969), OJA (Fonds 17, Series 5-4-6, File 53).
[225] Special Committee on the Criminal Code, vol 1, No 2, *supra* note 204 at 32 (Mr Harris) [emphasis added].
[226] See *ibid*. The CJC explicitly approved of this defence.

suggestion the Senate ultimately gave effect to.[227] Since requirement of the attorney general's consent has discouraged use of the legislation, it is surprising in hindsight that the CJC would go out of its way to propose this provision.[228] The same is true of the CJC's approval of the statute's generous defences.[229]

Congress's attitude can be explained by its goal of overcoming opposition to the bill and its optimism that the legislation would not need to be used. As Fred Catzman testified, "if this legislation were enacted we would be bitterly disappointed if we found it necessary to have to resort to the courts to enforce it."[230] Congress envisioned that the law would have a powerful symbolic and deterrent impact: "that the very enactment of such a law as a declaration of policy would have the salutary effect of making citizens aware that these are taboos they shouldn't engage in."[231] As Kayfetz wrote after the legislation was enacted, Jewish leadership felt that the anti-hate bill would not "eliminate or even outlaw the bulk of antisemitic material that is circulated." Rather, "just as [with] the anti-discrimination laws on the provincial level," it was hoped that the law would improve "the climate of opinion."[232]

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[227] See Cohen Committee Report, *supra* note 6 at 71. The Committee flagged the possibility of requiring the consent of the federal or provincial attorney general to initiate a prosecution but took no position and did not include such a provision in its proposed legislation. The government's draft legislation contained this prerequisite only for *in rem* proceedings.

The CJC's testimony regarding the attorney general's consent was somewhat equivocal, but it raised the issue on its own initiative and made clear that it endorsed such a requirement. In both its 1968 and 1969 testimony, the CJC quoted passages from a speech by Chief Justice Dalton Wells of the Ontario High Court of Justice advocating for mandating the attorney general's consent out of concern for freedom of speech. In addition, in 1968 (but not 1969) the delegation added the following testimony: "It may well be that Chief Justice Wells' suggestion as to an Attorney General's fiat being a condition precedent to a prosecution is one which should be given effect to." See Special Committee on the Criminal Code, vol 1, No 2, *supra* note 204 at 33 (Mr Harris).

During the 1968 Senate hearing, in response to a question from Senator Arthur Roebuck—expressing concern about the practicality of requiring the attorney general's consent—the CJC delegation clarified that it "felt obliged to point out to the committee that Chief Justice Wells made this suggestion [but it did] not feel in any way the bill would be defective unless [the] suggestion were given effect to." See Special Committee on the Criminal Code, vol 1, No 2, *supra* note 204 at 42 (Mr Geller). Nevertheless, as noted, the CJC quoted the same passage from Chief Justice Wells when it appeared before the Senate one year later. See Committee on Legal and Constitutional Affairs No 2, *supra* note 213 at 39 (Mr Abbey).

[228] Kaplan, *supra* note 4 at 267; Moon, *supra* note 3 at 25; Craig S MacMillan, Myron G Claridge & Rick McKenna, "Criminal Proceedings as a Response to Hate: The British Columbia Experience" (2002) 45 Crim LQ 419 at 446.

[229] MacMillan, Claridge & McKenna, *supra* note 228 at 443 (statutory defences under s 319(2) have made investigation and prosecution of hate speech more challenging).

[230] Special Committee on the Criminal Code, vol 1, No 2, *supra* note 204 at 40 (Mr Fred M Catzman).

[231] *Ibid*.

[232] G Kayfetz, "The story behind Canada's new anti-hate law" (1970) 4:3 Patterns of Prejudice 5 at 8.

The Association of Holocaust Survivors was unhappy with Congress's position. It was concerned that the legislation was too weak and would prove ineffective. Among other things, the survivors wanted the defences to wilful promotion of hatred eliminated. Paul Goldstein, the Association's president, accused Congress of displaying "a flagrant disregard for the Community's feelings and interest."[233] In Goldstein's view, the CJC was hijacking the bill and prioritizing the rights of Nazis over their victims:

> It is clear that the same civil liberty advocated in the Jewish leadership who were so instrumental in muzzling the demands of the Jewish Community for effective group libel legislation in the past, are back in business again.
>
> Let us not forget that the only reason the Congress is fighting for a group libel bill is because of the demands of the Jewish Community, spearheaded by the Association of Survivors and won by an overwhelming majority at the last plenary session in 1965.
>
> These leaders didn't want the bill in the first place! And now they are fighting in a manner which would make the proposed legislation permanently ineffective![234]

The CJC did not back down. Hayes called Goldstein way out of line and accused him of not understanding the proposed legislation.[235] In an internal memo, Geller deemed Goldstein's criticism "a completely dishonest attack not only on the intelligence of those of us engaged in the promotion of Bill S5 (which is fair) but on our honesty."[236] As Geller explained, the CJC position was carefully considered in order to "establish the bona fides of the Jewish community on the question of freedom of speech" so as to appeal to the legislation's opponents.[237] He added in a subsequent correspondence, "We might be able to deal with our enemies but God protect us from our friends."[238]

When it testified again one year later, Congress presented a virtually identical brief.[239] This time, the Association of Holocaust Survivors also testified. The Association repeated its critique—

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[233] Paul Goldstein, "Bill to curb hate mongers has too many loopholes," *Canadian Jewish Chronicle* (29 March 1968) 5.
[234] *Ibid*.
[235] *Ibid.*
[236] Letter from John Geller to Saul Hayes (2 April 1968), OJA (Fonds 17, Series 5-4-6, File 52).
[237] *Ibid*.
[238] Letter from John Geller to Saul Hayes (3 April 1968), OJA (Fonds 17, Series 5-4-6, File 52).
[239] See Committee on Legal and Constitutional Affairs No 2, *supra* note 213 at 31-42 (Mr Abbey).

that the legislation had too many loopholes and that the defences should be deleted.[240] The survivors were not well-received. Much of the criticism directed against them came from David Croll, the only Jewish senator and himself a member of the CJC. As he remarked in frustration:

> The government has presented this bill. The Government wants a bill. You have got ten or a dozen lawyers and other people here who know more than lawyers. This is not an exercise for us. The intention is to get a bill that works. So…you [can] give us that much credit.[241]

Faced with a hostile reception, Goldstein conceded that the Association did not wish to jeopardize the legislation's passage, and "would be quite satisfied to see Bill S-21 adopted in its present form and to let its efficacy be tested by the courts."[242]

IV. Conclusion

With the benefit of hindsight, it is easy to criticize the Canadian Jewish Congress for its approach to the hate-speech legislation. Such criticism might centre on two areas.

First, Congress often comes across as insensitive to the Holocaust survivors. As neo-Nazism gained momentum in the early 1960s—only two decades after the murder of six million Jews—Canadian-Jewish leadership downplayed the threat and held steadfast to its civil-libertarian position. Only when the CJC's legitimacy was threatened did it finally change course and permit broader representation in determining its approach to neo-Nazism. By this time, the relationship between the survivor community and leadership was extremely strained: "a full and bitter cup," as Sabina Citron put it after Congress's tone-deaf response to the riot at Allan Gardens. But even when it threw its support behind a group libel bill, the CJC disregarded the survivors' protests that the bill would be difficult to implement. History has proven the survivors correct.

Second, Congress's failure to endorse the Klein-Walker and Orlikow bills may have squandered its best opportunity to secure a stronger law. In 1964, when these bills were introduced, neo-Nazism was ascendant and appeared well-coordinated. All major parties were on record as

[240] Senate, Standing Committee on Legal and Constitutional Affairs, *Evidence*, 28-1, vol 1, No 6 (25 March 1969) at 129 (Mr Goldstein).
[241] *Ibid* at 129 (Mr Croll).
[242] *Ibid* at 129 (Mr Goldstein).

supporting some form of anti-hate legislation.[243] In the House of Commons, Diefenbaker repeatedly pressed the government to take steps to stem the flow of hate literature.[244] According to the *Canadian Jewish Chronicle*, even the Social Credit Party and the Creditistes had promised to "vote for a law with teeth to curb hate propaganda."[245] However, by the time Congress got on board with the legislation and the Liberal bill slowly worked its way through Parliament, neo-Nazism had subsided, handing its opponents a powerful argument against the legislation. In addition, Diefenbaker was replaced by Robert Stanfield in 1967, and the PCs ultimately opposed the bill.[246]

But persuasive arguments can be marshalled in Congress's defence. For example, the legislation it obtained was arguably the best it could get. As noted, Hayes asserted in 1964 that the CJC did not lend its support to the Klein-Walker bill in part because the bill had no chance of passage. If this is true—and we have no proof that it is not—it is difficult to fault Congress for not supporting it. Moreover, once it got behind a group libel bill, the effort put forth by the CJC was indispensable to securing the legislation. It drew heavily on its resources, prestige, and contacts inside and, especially, outside of the Jewish community. The Cohen Committee, which led to the hate-speech legislation, was created at the CJC's initiative. Once the government tabled legislation, Congress ramped up lobbying in favour of the bill—including by hiring a lobbyist and working tirelessly to build up a broad base of support among non-Jewish groups, which proved vital to overcoming opposition. In accepting the bill despite its weaknesses, Congress was surely correct that its best chance at obtaining the legislation was by not asking for more than the government could give. To do otherwise would risk ending up with nothing.

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[243] See *e.g.* "NDP Head Hopes for Legislation that Will Stop Hate Propaganda," *Canadian Jewish Chronicle* (5 March 1965) 1; "Diefenbaker Says Conservatives Will Support Law Against Hate," *Canadian Jewish Chronicle* (12 March 1965) 1.
[244] See *House of Commons Debates*, 26-2, vol 1 (10 March 1964) at 732 (Right Hon J G Diefenbaker).
[245] Max Bookman, "Dateline Ottawa," *Canadian Jewish Chronicle* (7 May 1965) 6.
[246] See *House of Commons Debates* vol 6, *supra* note 195 at 5530-33 (Mr Eldon M Woolliams). The Progressive Conservatives supported the genocide provision but opposed the rest of the bill. Despite the party's official position, several Conservative MPs voted for the legislation.

It also bears emphasizing that the CJC's careful approach ensured the legislation was eventually determined to be constitutional. In deeming section 319(2) of the *Criminal Code* a reasonable limit on freedom of expression pursuant to section 1 of the *Charter*, a one-vote majority of the SCC in *Keegstra* cited the wide defences afforded to those accused of wilful promotion of hatred, which "significantly reduced" the "danger…that s. 319(2) is overbroad or unduly vague."[247] The majority was also impressed with the "particularly strong" Cohen Committee.[248] Although Congress could not have predicted the language of the *Charter*, it deserves credit for indirectly anticipating how much of an inroad into freedom of speech the SCC would ultimately accept. Furthermore, the closely-divided panel and the reasoning of the Court in *Keegstra* signals that a stronger bill—one absent the broad defences that the survivors found objectionable—would almost certainly have been struck down.

On account of the rise in hate speech over the last half-decade and the limited use of the legislation since its enactment, it is tempting to interpret the story of the criminalization of hate speech as a cautionary tale of the symbolic use of the criminal law. Arthurs, for example, calls the hate-speech legislation "an empty symbol" on account of its seldom invocation and apparently minimal deterrent effect.[249]

Arthurs is correct that the legislation has proved mainly symbolic. Indeed, as this chapter has shown, the legislation's proponents saw the law's symbolism as its primary aim. But this does not make the symbol an empty one. In fact, the contrary is true: the history of the hate-speech legislation recounted here reveals the fecundity of its symbolism. For people like Turner and Cohen, the law bore the important message that Canada was a multicultural society where racism and xenophobia were abhorrent. For the Canadian Jewish community and other minority groups, the legislation symbolized that they were equal citizens and that the government would protect them from discrimination. For the Holocaust survivors, the bill symbolized that Jewish leadership

[247] *Keegstra*, *supra* note 10 at 779.
[248] *Ibid* at 724-25.
[249] Arthurs Interview, *supra* note 106.

was at last willing to acknowledge their feelings and—at least tepidly—permit them to enter the inner circle of the CJC and influence its policy.

Arthurs's view of the legislation as a hollow symbol echoes the opinion of those who argue the law has failed because of the low number of prosecutions and convictions. But the rich symbolism of the legislation suggests that we need to broaden our measure of the legislation's effectiveness to accord with the actual goals of the bill. Irrespective of the number of prosecutions, the hate-speech legislation does arguably stand as an important symbol that we live in a cultural mosaic where hate speech and neo-Nazism are considered deviant and contrary to Canadian values. Moreover, although manifestly difficult to quantify, it is certainly possible that the legislation has had an educative and deterrent impact through its very formulation, as envisioned by Turner, Cohen, and others. And, as Turner argued in Parliament, to view the criminal law as merely a penal sanction is to take an overly restrictive view of the objectives of criminal justice.[250]

Yet, notwithstanding this defence of Congress and the legislation it obtained, the CJC did fail in what was perhaps the principal symbolism of its advocacy for a hate-speech bill: that Canada's Jews stood united in the fight against antisemitism. This is because the Holocaust survivors did not share Congress's view of the legislation as purely symbolic. They wanted a bill that could be used to prosecute neo-Nazis. They were deeply concerned with the legislation's weaknesses and argued in vain that Congress should press for a stronger law. By supporting a weakened bill, the CJC ensured that community tensions would persist in the years to come, as neo-Nazism and Holocaust denial gained adherents and the legislation proved challenging to invoke. That, too, is an important story, which I leave for the next chapter.

[250] Indeed, this is perhaps especially true in the context of hate crime legislation. See *e.g.* James B Jacobs, "Implementing Hate Crime Legislation Symbolism and Crime Control" (1992) 1992 Ann Surv Am L 541.

CHAPTER 3 – The Road to Prosecution: Zundel, Keegstra, and Community Divisions, 1970-1984

The 1960s was a turbulent decade for Canada's Jews. One of the primary fault-lines in the Canadian-Jewish community was the issue of criminalizing group libel. As Holocaust survivors grew increasingly assertive within the community—and grew increasingly alarmed by homegrown neo-Nazism—they challenged community leadership to push for the criminalization of hate speech. Initially unreceptive, the Canadian Jewish Congress eventually yielded to the survivors' demands. Jewish leaders put together an impressive lobbying campaign, which resulted in the enactment of hate-speech provisions in the *Criminal Code of Canada* in 1970.[1] But tension between Congress and survivors persisted over their divergent goals for the legislation. To the CJC, the hate-speech laws were primarily symbolic, and their weaknesses were not a significant concern. To the survivors, the bill's weaknesses were of paramount concern because these deficiencies would make it difficult to invoke the legislation against hatemongers in the future.

This chapter deals with the aftermath of the hate-speech legislation's enactment. It commences in June 1970—after the hate-speech provisions were proclaimed into law—and concludes in January 1984, when James Keegstra was charged with wilful promotion of hatred. This chapter examines the lead-up to the prosecutions of Keegstra and Ernst Zundel from the perspective of the Canadian-Jewish community.

In the aftermath of the legislation's enactment, Jewish leadership remained uncomfortable with the criminalization of hate speech. As a result, it discouraged use of the hate-speech laws. This attitude among community leadership resulted in the hate-speech provisions remaining largely unused for much of the 1970s. As in the previous decade, Congress's reluctance to invoke the hate-speech legislation brought it into conflict with Holocaust survivors. Survivors were appalled by the rise of Holocaust denial in the 1970s. Shockingly, the world's most prominent Holocaust denier, Ernst Zundel, lived in Toronto. Congress's reluctance to confront Zundel

[1] RSC 1985, c C-46 [*Criminal Code*].

inspired a group of survivors led by Sabina Citron to break away from the CJC and form an independent group, the Canadian Holocaust Remembrance Association. The Canadian Holocaust Remembrance Association garnered widespread support in the Jewish community and worked alongside groups like the Jewish Defense League that were frustrated with Congress leadership and wanted stronger action against neo-Nazis. When Attorney General of Ontario Roy McMurtry refused to consent to a prosecution for wilful promotion of hatred, Citron's group initiated a private prosecution against Zundel for the obscure offence of spreading false news, then section 177 of the *Criminal Code*.[2] Backed into a corner, the Crown agreed to take over the prosecution, and Congress, despite its reservations, agreed to support it.

Meanwhile, in faraway Eckville, Alberta, throughout the 1970s a schoolteacher named James Keegstra was teaching his students that Jews were at the root of all evil. After Keegstra was fired from his teaching position in December 1982, his teachings attracted widespread media attention and deeply upset Alberta's Jews. Even more disturbing was the response of the government and the non-Jewish community in Alberta, who seemed unwilling to counter antisemitism. However, when it came to light that at least one member of the Alberta government shared Keegstra's views, a public outcry emerged. The government announced a series of measures in response, including a criminal investigation of Keegstra. Accordingly, on 11 January 1984, Keegstra was charged with wilful promotion of hatred.

In this chapter I make two primary, interconnected claims. The first is that the Zundel and Keegstra prosecutions were initiated without the support of Jewish communal leaders, many of whom remained wary of prosecuting hate speech. In fact, numerous leading members of the Jewish community opposed the charging of Zundel and Keegstra. The second is that the lead-up to the prosecutions—especially in the case of Zundel—both caused and reinforced pre-existing communal divisions. The Jewish community was deeply divided over how to respond to

[2] This provision was subsequently renumbered as *Criminal Code* s 181. Although the offence of spreading false news was declared unconstitutional in 1992 in *R v Zundel*, [1992] 2 SCR 731 [*Zundel*], this section was not repealed until 2019 (*An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, SC 2019, c 25).

antisemitism and Holocaust denial. Groups like the Canadian Holocaust Remembrance Association, the Jewish Defense League, the League for Human Rights of B'nai Brith Canada, and the Canadian Civil Liberties Association—which was led throughout this period by Alan Borovoy and incorporated other Canadian-Jewish lawyers like Marc Rosenberg who opposed the prosecution of hate-speech—feuded with Congress and with each other over what to do with neo-Nazis. I turn to this history now.

I. "God help us if we have to invoke this legislation": Reluctance of Jewish leadership to use the hate-speech laws in the 1970s

By 1970 the campaign for the criminalization of hate speech had been won with thanks to the tireless efforts of the CJC. But having secured this legislative tool, a seemingly curious thing happened: Congress exhibited virtually no desire to use it. The CJC's conduct after the legislation was enacted further supports the hypothesis posited in the previous chapter that Jewish leadership viewed the law as merely symbolic. Indeed, the CJC's actions in the wake of obtaining the legislation suggest that leading voices in Congress had never sincerely abandoned their opposition to the hate-speech law or their preference for a "quarantining" approach—under which hatemongers were ignored, not prosecuted—and that their purported change of heart had more to do with quelling internal criticism than taking action against neo-Nazis. As Manuel Prutschi—National Director of the Joint Community Relations Committee[3] from 1984-2004—put it, if the law "was to have the sound and salutary effect that was expected of it, one would think it would have to be used. But there [did] not appear, to say the least, a full hearted readiness on the part of the community to press for the laws to be used."[4]

[3] As noted in the previous chapter, the Joint Public Relations Committee of the Canadian Jewish Congress and the League for Human Rights of B'nai Brith Canada (henceforth, "B'nai Brith") changed its name in the 1960s to the "Joint Community Relations Committee." Moreover, as discussed in further detail below, B'nai Brith subsequently left the Committee, although the word "joint" continued to be used in the Committee's title until 1991. For simplicity, I will continue to refer to it as the "JPRC" in this chapter. See generally Michael Friesen, "The Joint Public Relations Committee Series at the Ontario Jewish Archives: Some New Questions" (2019) 28 Canadian Jewish Studies 125.

[4] Manuel Prutschi, "Prelude to Trial – Zundel, the Jewish Community, Government and the Law" (unpublished manuscript), typescript 58, quoting BG Kayfetz, "The story behind Canada's new anti-hate law" (1970) 4:3 Patterns of Prejudice 5 at 8 (internal quotation marks omitted).

In fact, Congress discouraged use of the legislation. For instance, in response to an antisemitic incident in Manitoba around early 1971, a member of the Winnipeg Jewish community wrote to the Deputy Attorney General of Manitoba to suggest a hate-propaganda charge. Learning of this, Ben Kayfetz, the JPRC's Executive Director, attempted to dissuade his Manitoban coreligionists from pursuing a prosecution.[5] Kayfetz emphasized that there were "serious doubts here whether the law would stand up in court and there is no wish to court a defeat."[6] No prosecution was initiated in this instance, perhaps due to Kayfetz's discouragement.[7] Congress took a similar approach when confronted with antisemitism elsewhere.[8] The prevailing view expressed at Congress's Plenary in 1971 was that prosecution should be avoided to protect freedom of expression.[9]

The emergence of an organization called the Western Guard tested the CJC's reluctance to invoke the hate-speech law. Founded in 1972 in Toronto, the Western Guard evolved out of the anti-communist Edmund Burke Society (EBS).[10] Whereas the EBS had focussed on fighting communism, the Western Guard was openly and militantly white supremacist.[11] The Western Guard's first leader was Donald Andrews, one of the EBS's founders.[12] John Ross Taylor, who had been active in Canadian fascist circles since the 1930's, headed the Western Guard's "Department of Truth."[13] Taylor had been interned with other fascists in Petawawa, Ontario by the Canadian government during the Second World War.[14] He took over as leader of the Western Guard in July 1976 after Andrews and other members of the organization were charged with

[5] Letter from BG Kayfetz to AJ Arnold (12 April 1971), Winnipeg, Provincial Archives of Manitoba [henceforth, "PAM"] (Abraham J. Arnold Fonds, P5103/7).
[6] *Ibid*.
[7] See Letter from Alan Rose to B Kayfetz (14 April 1971), PAM (Abraham J. Arnold Fonds, P5103/7).
[8] Minutes of the Joint Community Relations Committee, Central Region (24 November 1971), Montreal, Alex Dworkin Canadian Jewish Archives [henceforth, "CJA"] (Fonds CJC DA21, Box 19, File 17) at 1-3.
[9] *Ibid* at 1-2.
[10] Asa McKercher, "The Edmund Burke Society and Right-Wing Extremism in Late Twentieth-Century Canada," (2022) 103:1 Can Hist Rev 75 at 79, 90.
[11] *Ibid* at 90.
[12] *Ibid* at 79, 90.
[13] Stanley R Barrett, *Is God a Racist? The Right Wing in Canada* (Toronto: University of Toronto Press, 1987) at 91-92.
[14] *Ibid* at 91.

plotting an attack—foiled by the Royal Canadian Mounted Police (RCMP)—against the Israeli Olympic soccer team prior to a match at Varsity Stadium in Toronto.[15]

The Western Guard's activities included painting racist messages on buildings, distributing leaflets, and harassing Jews, gays, and Blacks. In May 1973, Andrews was charged with assault for spitting in a woman's face at a showing of the film *Hitler: The Last Ten Days* in Toronto. Members of the Western Guard were alleged to have worn swastikas on their clothing and to have interrupted the film with shouts of "Sieg Heil" and "Heil Hitler."[16] Andrews, however, was later acquitted of the assault charge.[17] In addition to acts of violence and vandalism, the Western Guard disseminated hate propaganda over the telephone. Taylor created a telephone service whereby anyone could dial a number and listen to a pre-recorded, antisemitic and/or generally xenophobic message of about one minute in length. All the telephone messages were drafted and recorded by Taylor himself. To give an example, a telephone message dated 7 April 1978 stated that the "Western Guard advocates racial amity… or in other words each race being in its own geographical location where it is in the majority which means the deportation of 40 million Black Americans back to Africa and special arrangements for the mixed." The same telephone message went on to accuse communists of being behind race-mixing and asserted that the founders of communism and the National Association for the Advancement of Colored People were Jewish. The Western Guard distributed cards on Toronto street corners bearing an invitation to dial the hotline. They also listed the number in the telephone book opposite a notation that read "White Power Message."[18]

Congress was disturbed by the Western Guard's emergence but reluctant to invoke the hate-speech law against the group. On 29 July 1973, at a party celebrating the ninetieth anniversary of Benito Mussolini's birth, the Western Guard unfurled a flag displaying the words "Juden Raus"

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[15] *Ibid* at 88, 92. The charges against Andrews and others related to plotting an attack on the Israeli soccer team were dropped, but he and a co-accused, Dawd Zarytshansky, were convicted on other counts and sentenced to two years' and 18-months' incarceration, respectively (*ibid* at 88).
[16] Brian Stoneman, "Western Guard's Andrews is charged with assault," *Canadian Jewish News* (1 June 1973) at 1.
[17] Barrett, *supra* note 13 at 88.
[18] See generally *Canada (Human Rights Commission) v Taylor*, [1990] 3 SCR 892 at 903-04; *Smith v Western Guard Party*, 1970 CarswellNat 1291 at paras 4-5 [*Smith v Western Guard*]. The quoted text of the April 1978 telephone message is taken from the Case on Appeal filed in *ibid* at 66-67. See also Allyson M Lunny, *Debating Hate Crime: Language, Legislatures, and the Law in Canada* (Vancouver: UBC Press, 2017) at 137.

("Jews get out"). The JPRC's Legal Committee discussed the incident and concluded that while this conduct was certainly actionable under the anti-hate law, it would not seek prosecution. In the Legal Committee's view, the Western Guard was an obscure organization that was best ignored; a trial would only provide them with the publicity they sought. The Committee agreed that it would seek prosecution only in an "outrageous and … blatant" case, for example if a neo-Nazi group paraded by a synagogue on Yom Kippur.[19]

Further conduct by the Western Guard, did, however, lead to the first charges ever laid under one of the hate-speech provisions. At approximately 8:45am on 11 November 1973, Harold Wintraub was parked in the circular driveway in front of his apartment building in the Forest Hill area of Toronto. According to Wintraub, he witnessed two men get out of their car and begin spray-painting some signs on a construction board, one of which appeared to read "dump Israel." Wintraub notified two police officers in a passing cruiser. The officers proceeded to the scene and caught Armand Siksna, a member of the Western Guard, in the process of spray-painting the phrase "Down with Jews." Siksna and an accomplice, Gary Miller, were charged with public incitement of hatred.[20]

Although it does not appear the CJC had any role in laying the charge, Kayfetz publicly supported the prosecution. As he told the *Canadian Jewish News*, "We trust that this will be a good test of the hate propaganda act and that it will put an end to the anti-Jewish and anti-Black hate scrawling appearing in public and private places."[21] However, Miller and Siksna were acquitted.[22] Unfortunately, the police failed to capture the phrase "Down with Jews" in the photographic evidence it took from the scene.[23] The presiding judge also concluded that because the incident took place on a quiet Sunday morning, their conduct was unlikely to have led to a breach of the

[19] Prutschi, "Prelude to Trial", *supra* note 4 at 60.
[20] *Ibid*; "Hate Act case dismissed," *Canadian Jewish News* (8 March 1974) 1. Public incitement of hatred was then s 281.1(1) of the *Criminal Code*, *supra* note 1. It is now s 319(1) of the *Criminal Code*.
[21] "Charges to test act: Kayfetz," *Canadian Jewish News* (23 November 1973) 3.
[22] "Hate Act case dismissed," *supra* note 20.
[23] *Ibid*.

peace as required to make out the offence of public incitement of hatred.[24] Although the first prosecution under the hate-speech laws resulted in an acquittal, Kayfetz commented that the case did not undermine the legislation and that on better facts its validity would be upheld.[25]

Kayfetz's faith in the law was not shared by many of his colleagues. In January 1974, Siksna and two accomplices were again caught spray-painting racist slogans on a fence near High Park in Toronto.[26] The case seemed airtight: they had been observed fleeing the scene, a can of spray-paint was found nearby, and one of them even admitted to having written the phrase "White Power."[27] In light of this, Austin Cooper, Chair of the Legal Committee, thought the time might be appropriate to advocate for a prosecution. As he wrote to Kayfetz, "it is not necessary that all prosecutions be won as long as there are reasonable and probable grounds for bringing them. Sometimes people are deterred from illegal conduct by the fact that they are hauled into court on reasonable grounds [and] charged with an offence."[28] Nevertheless, there continued to be internal opposition at the leadership level to using the hate-speech laws. In response to Cooper's opinion, JS Midanik, chairman of the JPRC's Central Region, urged Congress to abstain from lobbying for use of the hate provisions except in the clearest of cases, so as not to give the hatemonger a platform and risk an acquittal. As Midanik put it in a letter to Kayfetz, a prosecution would only benefit the hatemonger:[29]

> I take a view diametrically opposed to Austin Cooper's. In my view, it is important that prosecution not be undertaken unless there is a reasonable chance of success. I do not view the cases already undertaken as meeting that criterion. In particular, I do not believe that this type of person is at all deterred from illegal conduct by being hauled into court and then acquitted. On the contrary, it seems to me they become heroes in their own eyes and in the eyes of their particular group and rather than being deterred, become bolder. This type of person wallows and glories in that type of situation.

Ultimately no prosecution was undertaken in connection with this incident.

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[24] *Ibid*; Prutschi, "Prelude to trial," *supra* note 4 at 22-23. It is unclear why the accused were not charged with wilful promotion of hatred—which might have made conviction easier—but this may reflect lack of confidence in that provision.
[25] "Hate Act case dismissed," *supra* note 20.
[26] Prutschi, "Prelude to trial," *supra* note 4 at 60.
[27] Letter from Austin M Cooper to Ben Kayfetz (11 April 1974), Toronto, Ontario Jewish Archives [henceforth, "OJA"] (Fonds 17, Series 5-3, File 222) [Letter from Cooper to Kayfetz].
[28] *Ibid*.
[29] Letter from JS Midanik to BG Kayfetz (10 June 1974), OJA (Fonds 17, Series 5-3, File 222).

Congress thereafter retrenched into a cautious stance in connection with the legislation. In September 1974, the JPRC discussed a pamphlet distributed in Toronto by the American group Children of God, headed by Moses David Berg. The pamphlet echoed the *Protocols of Elders of Zion* and accused Jews of causing monetary inflation.[30] At a meeting of the JPRC's national executive, it was recommended that no action would be taken because the group was "still perceived by the public at large as a harmless cult of religious cranks."[31] When the matter came up for discussion at a meeting of the JPRC's Central Region, Alan Borovoy—who remained an active member of Congress and served on the JPRC's Legal Committee while simultaneously serving as the Executive Director of the Canadian Civil Liberties Association (CCLA)—strongly countered the suggestion that prosecution should be pursued.[32] At a subsequent meeting of the national JPRC, Sydney Harris (the JPRC's national chairman) similarly opined that it would be a mistake to turn to the criminal law. According to Harris, "To initiate a prosecution unless we are totally sure of our ground would not be helpful."[33] The Legal Committee concurred with this view, concluding that the pamphlet was not covered by the hate-speech legislation and that no action should be taken.[34] Fred Catzman emphasized his position that the legislation should perhaps never be used, because "the main purpose of such legislation was not to be punitive but to stand as a deterrent".[35] In a subsequent meeting of the Legal Committee in October 1975, the group again recommended against seeking prosecution in response to material circulated in Calgary that called Jews sodomites. In the Committee's view, "the publicity given to the hate screed would in itself only serve to widen the audience of what was previously circulated to a small circle."[36] Catzman

[30] Minutes of the Central Region Joint Community Relations Committee (11 September 1974), CJA (Fonds CJC DA21, Box 19, File 18) at 1-2.
[31] *Ibid* at 3.
[32] *Ibid* at 3-4.
[33] Minutes of the National Joint Community Relations Committee (27 October 1974), CJA (Fonds CJC DA21, Box 19, File 18) at 5.
[34] *Ibid* at 4-5. Austin Cooper reported that the Ontario Attorney General's department had, in any event, become aware of the pamphlet and "determined it did not incite hatred but had 'blamed the Jews for the monetary crises". (*ibid* at 5).
[35] Prutschi, "Prelude to the Trial," *supra* note 4 at 62. As noted in chapter 2, Catzman had taken the same position prior to the legislation's enactment.
[36] Minutes of the meeting of the Joint Community Relations Committee (29 October 1975), OJA (Fonds 17, Series 5-4-1, File 169) at 1-2. See also Minutes of the National Joint Community Relations Committee (23 November 1975), CJA (Fonds CJC DA21, Box 19, File 19).

reiterated his position that the legislation should be used with extreme caution: "God help us if we have to resort to invoking this legislation very often because in the long run it could do us a great deal more harm than good."[37]

Congress's reluctance to invoke the hate-speech legislation did not escape the attention of Holocaust survivors, whose previous criticism of the legislation was proving well-founded. In 1976, in response to the perceived rise of antisemitic incidents, the Association of Former Concentration Camp Inmates/Survivors of Nazi Oppression (the "Association of Holocaust Survivors") began to pressure Congress to make use of the anti-hate laws.[38] Congress set up a subcommittee to consider the survivors' concerns and review the legislation.[39] At the 1977 Congress plenary, a resolution was passed that the CJC should re-examine the legislation to determine whether the law could be strengthened.[40] Nevertheless, it does not appear the CJC took concrete steps to implement or strengthen the law at this time. Indeed, Kayfetz expressed the view that the authorities were doing a good job in monitoring hate groups and that the principal such organization, the Western Guard, was in decline.[41] Moreover, the prevailing opinion among Congress leadership remained that a prosecution would be counterproductive.[42]

II. "The conviction refuted the glib assumption that the law was meant to protect Jews": *R v Buzzanga and Durocher*

Perhaps because the Canadian-Jewish community—the primary group that had lobbied for

[37] Meeting of the Legal Committee, Central Region (15 October 1975), OJA (Fonds 17, Series 5-4-1, File 169). The vote was 4-2. Expressing the dissenting view, JB Pomerant "felt that this item was exactly the kind of propaganda that the anti-hate law was designed for, that it is a classical piece of garbage and it was up to us as a Legal Committee and the Jewish community to take action in such cases. He also believed it could be prosecuted successfully." Unsurprisingly, Borovoy and Catzman voted against seeking prosecution.
[38] Prutschi, "Prelude to the trial," *supra* note 4 at 63-64. As discussed in chapter 2, the Association of Holocaust Survivors, founded in the early 1960s, was a large and influential Holocaust survivor advocacy group. It was independent from and predates the Canadian Holocaust Remembrance Association, mentioned above and discussed in more detail below.
[39] *Ibid* at 67; Canadian Jewish Congress Inter-Office Memorandum No. 793 (15 October 1976), Winnipeg, Jewish Heritage Centre of Western Canada Archives (Fonds 255, File 1).
[40] Meeting of the National Holocaust Committee Canadian Jewish Congress – 18th Plenary Assembly, Queen Elizabeth Hotel (15 May 1977) at 3, CJA (Fonds CJC DA17.1, Box 6, File 5).
[41] Prutschi, "Prelude to the trial," *supra* note 4 at 64-65.
[42] See eg Toba Korenblum, "Is prejudice on the rise in Canada?" *Canadian Jewish News* (24 December 1976) 5.

the hate-speech legislation—exhibited little desire to use it, the provisions sat largely dormant for much of the 1970s. After the acquittal of Siksna and Miller of public incitement of hatred in 1974, the second time the legislation was invoked was in 1975, when three persons were charged with wilful promotion of hatred for distributing leaflets that read "Yankee Go Home!" during a Shriner's convention in Toronto.[43] The three individuals were members of an organization called the Canadian Liberation Movement, which was opposed to American tourism in Canada.[44] The leaflet in question said, among other things: "U.S. imperialism is destroying Canadian industry, causing unemployment to soar--these Yanks want Canadians to be their servants: guides, bartenders, chamber-maids and prostitutes."[45] The hate-speech charges were quickly dropped.[46] However, Borovoy and the CCLA decried the arrests as evidence of the dangers of the anti-hate laws.[47] The *Globe and Mail*, moreover, used this incident to revive criticisms it had leveled against the hate-speech laws when they were enacted in 1970.[48]

The next time the legislation was used—the first prosecution and conviction in Canada for wilful promotion of hatred—was in the 1977 case of *R. v. Buzzanga and Durocher*. The case arose out of an odd set of facts. The accused were francophones in Windsor, Ontario, who were upset by the failure of the Essex County Board of Education to construct a French-language high school. They were also concerned that the community was becoming apathetic to the issue. Attempting to attract attention and gain sympathy for their cause, the defendants distributed a handbill purporting

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[43] Rosemarie Boyle, "Hate literature charges against 3 to be dropped," *Globe and Mail* (4 July 1975) ["Charges against 3 to be dropped"]. It appears from the reporting and from notes in the CCLA's archives that the Crown may have mistakenly thought that the charges did not require the consent of the Attorney General to prosecute. See *ibid* and loose-leaf notes dated 2 July 1975 in Ottawa, Library and Archives Canada [henceforth, "LAC"] (Fonds R9833-813-7-E, Vol 36, File FF-HP-203). Wilful promotion of hatred was then s 281.1(2) of the *Criminal Code*, *supra* note 1, and now is s 319(2). The requirement of the Attorney General's consent for a prosecution under s 319(2) is found in s 319(6).

[44] "Charges against 3 to be dropped," *supra* note 43.

[45] "Yankee Go Home!" LAC (Fonds R9833-813-7-E, Vol 36, File FF-HP-203).

[46] "Charges against 3 to be dropped," *supra* note 43. Separate charges against the same accused for disturbing the peace were continued. (*ibid.*)

[47] See Alan Borovoy, "Freedom of Expression: Some Recurring Impediments" in Rosalie S Abella & Melvin L Rothman, eds, *Justice Beyond Orwell* (Montreal: Éditions Yvon Blais, 1995) 125 at 141; Alan Borovoy, *When Freedoms Collide: The Case for Our Civil Liberties* (Toronto: Lester & Orpen Dennys, 1988) at 42 [Borovoy, *When Freedoms Collide*].

[48] "A law full of dangers," *Globe and Mail* (2 July 1975).

to attack the francophone community. Entitled "Wake up Canadians your future is at stake!", it called French Canadians a "subversive element which uses history to justify its freeloading on the taxpayers of Canada." At their trial, Buzzanga and Durocher argued the pamphlets were satire. Nevertheless, they were convicted and given a suspended sentence and two-years' probation.[49]

Kayfetz publicly applauded this first conviction under the legislation. He was pleased that the case had nothing to do with Jews "nor had any link with anti-Semitism or neo-Nazis". The conviction thus refuted "the glib assumptions of many in the 1960s" who claimed the law was "framed or meant to be applied as a law to 'protect the Jews.'" Even though the accused had, bizarrely, been convicted of promoting hatred against members of their own ethnic group, in Kayfetz's view the case "belie[d] another argument used by the press or the earlier opponents of the law – that it could be misused and abused as a club against dissenters and unpopular dissidents."[50]

This celebration proved premature. In 1979, the Court of Appeal for Ontario overturned the conviction. The Court of Appeal found that the trial judge had set the bar too low for the *mens rea* (mental state) required to convict someone of wilfully promoting hatred. The central issue on appeal was the meaning of the word "wilfully" in the expression "wilfully promotes hatred against an identifiable group". In a judgment authored by legendary criminal defence lawyer G Arthur Martin, who had been appointed to the Court of Appeal for Ontario in 1973, the Court concluded that "wilfully" in this context meant the specific intention to promote hatred against an identifiable group. In other words, an accused could only be convicted of wilfully promoting hatred if (a) it was their conscious purpose to promote hatred or (b) they foresaw that promotion of hatred was certain or substantially certain to result from their conduct.[51] Recklessness or negligence would not suffice; an accused could not be convicted of wilful promotion of hatred even if promotion of

[49] *R v Buzzanga and Durocher*, 25 OR (2d) 705, 1979 CanLII 1927 (CA) at paras 1-21 [*Buzzanga*]. The trial was held before a judge sitting without a jury.
[50] BG Kayfetz, "First conviction under hate propaganda legislation proves law can be used with intelligence, humanity," *Canadian Jewish News* (19 May 1978) 5.
[51] *Buzzanga*, *supra* note 49 at para 46.

hatred was a highly probable, but not substantially certain, result of their conduct.[52] The trial judge erred because he had deemed the defendants' admission that they intended to create "controversy, furor and an uproar" sufficient to establish that they intended to promote hatred.[53] Accordingly, the Court of Appeal quashed the verdict and ordered a new trial. Buzzanga and Durocher were not re-prosecuted.[54]

By providing a strict application of the word "wilful" in the offence of wilfully promoting hatred, the Court of Appeal for Ontario significantly narrowed the scope of this offence. The Court of Appeal thereby placed another hurdle in the way of securing a conviction for wilful promotion of hatred, compounding other weaknesses in the provision. Importantly, in *R v Keegstra* the Supreme Court of Canada later adopted the interpretation of wilful provided by Justice Martin in *Buzzanga*.[55] The Supreme Court acknowledged that *Buzzanga*'s interpretation "import[ed] a difficult burden for the Crown to meet" but held "this stringent standard of *mens rea* is an invaluable means of limiting the incursion of s. 319(2) into the realm of acceptable (though perhaps offensive and controversial) expression."[56]

It is possible that the sympathetic nature of the accused in *Buzzanga* encouraged the Court of Appeal for Ontario to circumscribe the provision's scope. Indeed, Justice Martin acknowledged that the word wilfully did not have a fixed meaning and had been interpreted in other contexts to include recklessness.[57] Certainly Buzzanga and Durocher were more sympathetic than neo-Nazis like Donald Andrews and John Ross Taylor – and, undoubtedly, more sympathetic than James Keegstra and Ernst Zundel. Accordingly, the Jewish community arguably erred by not pushing for a test case on facts better suited to sustain a conviction. This was far from an optimal set of circumstances to underpin the first prosecution for wilful promotion of hatred. *Buzzanga* seemed to confirm fears that the provisions would be used to criminalize legitimate speech. Borovoy, for

[52] *Ibid* at para 44.
[53] *Ibid* at paras 53-54.
[54] Prutschi, "Prelude to Trial," *supra* note 4 at 27.
[55] *R v Keegstra*, [1990] 3 SCR 697 at p 775.
[56] *Ibid*.
[57] *Buzzanga*, *supra* note 49 at para 31.

one, called it a "bizarre case" and pointed to "the price in money and anxiety" exacted on the accused even though their convictions were reversed on appeal.[58]

Buzzanga featured counsel who would reappear as interlocutors in *Zundel* and *Keegstra*. The Crown who argued the *Buzzanga* appeal was Doug Hunt, who later became Assistant Deputy Attorney General for Ontario and was lead counsel for the Crown in Zundel's appeal of his first conviction. Opposite Hunt in *Buzzanga* were two young, Jewish lawyers: Marc Rosenberg and Morris Manning. Both were brilliant legal minds and vocal opponents of the hate-speech provisions.[59] Both were also staunch civil-libertarians: Rosenberg later acted as counsel for the CCLA in its interventions at the Supreme Court of Canada in both *Keegstra* and *Zundel*. Hunt recalled that Rosenberg was a "very, very astute guy and he had a very good argument" and Manning "was a very good appellate lawyer."[60] Hunt, therefore, "knew that this argument that they were going to bring on behalf of the appellants was gonna be a formidable one. And it was."[61]

The first test case for the offence of wilful promotion of hatred had undermined the provision further. This would become a matter of increasing concern to many in the Jewish community, especially Holocaust survivors, as Holocaust denial began to make inroads. To situate the emergence of Holocaust denial, we first need to explore Holocaust consciousness.

III. "You weren't allowed to open your mouth about what happened": The slow emergence of Holocaust awareness

Holocaust consciousness took time to build in Canada and around the world. Countless survivors have recounted how in the immediate aftermath of the Holocaust they focused primarily on rebuilding their shattered lives. When survivors tried to talk about what they had gone through, few people were willing to listen, including—perhaps especially—in the Jewish community. In the words of Adara Golberg, who has studied Holocaust survivors in Canada in the aftermath of

[58] Borovoy, *When Freedoms Collide*, *supra* note 47 at 42.
[59] See Kirk Makin, "Five years of rights under the Charter: The cutting edge of the law," *The Globe and Mail* (11 April 1987) D1.
[60] Interview of Doug Hunt (30 May 2022) [on file with author].
[61] *Ibid*.

the Second World War, "like much of the population, [Canadian Jews] showed little interest in hearing about, or the ability to holistically comprehend, the survivors' experiences during the war."[62] This reaction encouraged the survivors to keep quiet. As Goldberg writes: "Faced with this perceived lack of compassion on the part of even their closest relatives, many survivors reluctantly entered a cone of silence about their wartime experiences."[63]

Examples of this experience are ubiquitous. Elly Gotz, a survivor from Lithuania, moved with his father to South Africa after the war and later immigrated to Toronto in the 1970s. Gotz recounted his shock when he discovered that not even his own family in South Africa was interested in hearing their story:

> We expected to be asked about our experiences during the war years. My father started to explain what had happened in the ghetto. However, it soon became clear that this was not a topic that people wanted to discuss. My father was told, "Julius, don't talk about it. You'll only upset yourself." We realized that their concern was not to save my father from pain but to save themselves. We had a lot to tell, and we were willing to talk, but they were not willing to listen. When I realized how unwelcome our tales of suffering were, I decided never to talk about our experience again. And I didn't, for about twenty-five years.[64]

A Holocaust survivor who immigrated to Montreal recalled a similar reception from her Canadian family:

> You weren't allowed to open your mouth about what had happened to us. … I remember in … 1949 I arrived in June and the first Rosh Hashanah [and] Yom Kippur my late aunt invited me to go with her [to] shul for *Yizkor*. … I'm not a person that cries a lot. … I guess she noticed a couple of drops out of my eyes, a couple of tears. After all it was a *Yizkor*. That's the purpose to go and to remember the deceased. This is 1949, only four years after the war. What I got from my own dear aunt. [She said] enough is enough. Stop already, no more crying and no more talking about what happened. This is a new country and a new life. … This is as much as she could understand of what hurt me and how I needed to express my sorrow at a *Yizkor* memorial.[65]

In general, survivors encountered a Jewish community that "didn't want to listen [and] didn't want to know."[66]

Gradually attitudes changed. A multitude of factors contributed to the growth of Holocaust awareness. Public consciousness was abetted by the emergence of Holocaust historiography. In

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[62] Adara Golberg, *Holocaust Survivors in Canada: Exclusion, Inclusion, Transformation, 1947-1955* (Winnipeg: University of Manitoba Press, 2015) at 70.
[63] *Ibid* at 71.
[64] Elly Gotz, *Flights of Spirit* (Toronto: The Azrieli Foundation, 2018) at 108.
[65] Interview: 3 Members of the Association of Survivors of Nazi Oppression, Women's Division by Myra Giberovitch (31 May 1988), CJA (Fonds P17/08, Box 2, File 43) [Women's Division Interview]. *Yizkor* ("may God remember") is a special prayer recited four times a year, including on Yom Kippur, to commemorate the dead.
[66] *Ibid*.

1961, University of Vermont professor Raul Hilberg—who had fled as a child with his parents from Vienna to the United States in 1939 and served in the US Army during the Second World War—published the first comprehensive history of the Holocaust.[67] Entitled *The Destruction of the European Jews*, it served as the basic introductory text for Holocaust studies in the ensuing decades, and remains influential.[68] Around the same time, first-hand accounts of the Holocaust gained popularity, including *Anne Frank: The Diary of a Young Girl*, which first appeared in English in 1952, and Elie Wiesel's memoir, *Night*, published in French in 1958 and subsequently translated into more than a dozen languages.[69] Holocaust education became part of the regular curriculum in Jewish schools in the 1970s and 1980s, spearheaded by survivors in the face of opposition from educators who claimed that learning about the Holocaust would scar the students.[70] Holocaust education also slowly emerged in the public schools and at the post-secondary level; the first university-level Holocaust course in Canada was started by York University in 1975, and the University of Toronto followed suit in 1978.[71] The first Holocaust Centre in Canada—the Montreal Holocaust Memorial Centre—was established in 1979 thanks to the tireless efforts of the Association of Holocaust Survivors.[72] Toronto's Holocaust Education Centre opened in 1985, also driven by survivors in the face of resistance from community leadership.[73] Depiction of the Holocaust in the popular media was another contributing factor to Holocaust awareness. The four-part NBC docudrama *Holocaust*, which aired in Canada in April

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[67] See Daniel Blatman, "The Holocaust as Genocide: Milestones in the Historiographical Discourse" in Simone Gigliotti & Hilary Earl, eds, *A Companion to the Holocaust* (Hoboken, NJ: John Wiley & Sons, 2020) at 99-100.
[68] See Dan Michman, "The Holocaust scholar who was hard on the Jews," *Haaretz* (28 August 2007), online: https://web.archive.org/web/20160325231311/http://www.haaretz.com/print-edition/features/the-holocaust-scholar-who-was-hard-on-the-jews-1.228314; Michael R Marrus, *The Holocaust in History* (Toronto: Key Porter, 2000) at 48.
[69] See Avril Alba, "Lessons from History? The Future of Holocaust Education" in Gigliotti & Earl, eds, *supra* note 67 at 606; Alan Rosen, "The Holocaust Witness: Wartime and Postwar Voices" in Gigliotti & Earl, eds, *supra* note 67.
[70] See Women's Division Interview, *supra* note 65.
[71] Franklin Bialystok, *Delayed Impact: The Holocaust and the Canadian Jewish Community* (Montreal & Kingston: McGill-Queen's University Press, 2000) at 204.
[72] See Myra Giberovitch, *The Contributions of Montreal Holocaust Survivor Organizations to Jewish Communal Life* (MA Thesis, McGill University, 1988) at 101 [unpublished]; Bialystok, *supra* note 71 at 190-92. According to Zablow, it was the first Holocaust Centre in North America. See Interview of Lou Zablow by Myra Giberovitch (1 September 1987) at 1B-22-24, CJA (Fonds P17/08, Box 2, File 1) at 2A-10 [Zablow Interview].
[73] Bialystok, *supra* note 71 at 213.

1978 and starred Meryl Streep and James Woods, was enormously popular and, according to Franklin Bialystok, "did more to spur interest in the Holocaust in Canada, the United States, and western Europe than any other event since the [Adolf] Eichmann trial."[74] As time passed, survivors began to feel more comfortable speaking about their experiences and found an increasingly receptive audience, especially among the new generation of young Canadian Jews.[75]

IV. "The vast, imaginary slaughter": The rise of Holocaust denial

A sad irony of Holocaust consciousness is that it exists in a symbiotic relationship with Holocaust denial. Popularization of the Holocaust led increasing numbers of people to deny the Nazi's crimes, which, in turn, inspired more survivors to speak publicly about their experiences.[76] As with Holocaust consciousness, Holocaust denial developed slowly and sporadically. An early and influential apologist for the Nazi regime was Paul Rassinier, who had served in the French resistance and was interned in Buchenwald during the Second World War. After the war Rassinier devoted his remaining years to whitewashing Nazi conduct, and a collection of his writings was published posthumously in 1977 under the title *Debunking the Genocide Myth*.[77] Rassinier and other early Nazi apologists did not completely deny Nazi atrocities or use of gas chambers, but instead played them down and blamed Jews for provoking antisemitism.[78] In the 1970s, the movement shifted toward the allegation that there had been no mass killing of Jews and that the Holocaust was fabricated as part of an international conspiracy by the Zionist establishment, working in league with the Soviet Union, to garner support for the State of Israel. The numerous confessions by the perpetrators themselves were brushed aside as being elicited under torture or as the Nazis telling their captors what they wanted to hear.[79] Holocaust historians—especially Hilberg, the pre-eminent Holocaust scholar—were liars, plain and simple, working arm-in-arm

[74] *Ibid* at 205.
[75] *Ibid* at 180.
[76] *Ibid* at 179.
[77] Deborah E Lipstadt, *Denying the Holocaust: The Growing Assault on Truth and Memory* (London: Penguin, 1994) at 51.
[78] *Ibid* at 52.
[79] See *ibid* at 55, 129-32

with the Zionists and the communists.[80] Holocaust denial increasingly gained a veneer of academic rigour. In 1976, Arthur Butz, a tenured professor of electrical engineering at Northwestern University in Chicago, published *The Hoax of the Twentieth Century*.[81] Butz's stature as a tenured professor helped create the appearance that the Holocaust's existence was a matter of serious academic inquiry. So did the establishment of the Institute for Historical Review (IHR) in 1978 based out of California. The IHR claimed that it was dedicated to Holocaust "revisionism" and produced an academic-style journal, the *Journal of Historical Review*, which featured articles by Holocaust deniers.[82] The IHR also published monographs such as *Anne Frank's Diary – A Hoax*, by the Austrian-born, Swedish resident Ditlieb Felderer, which called Anne "a habitual drug addict", preoccupied "with the anus and excrements" ("a trait typical of many Jews"), and "a spoiled child, a bore and a brat, hotheaded, nervous, rude and filled with egomania".[83]

Another important moment in the Holocaust-denial movement was the publication in 1974 of a twenty-eight-page booklet entitled *Did Six Million Really Die? Truth at Last Exposed*, by Richard Verrall, a British neo-Nazi.[84] Verrall published the booklet under the pseudonym Richard Harwood, who was falsely described as "a writer and specialist in political and diplomatic aspects of the Second World War" teaching at the University of London.[85] *Did Six Million Really Die?* was presented as a sober, scholarly review of the evidence. It made numerous claims that attempted to prove the impossibility of six million Jews having perished during World War II. There were, in fact, only three million Jews under Nazi occupation, of which "there can be no doubt that the majority … are, in fact, very much alive."[86] Total Jewish casualties during the war "can only be estimated at a figure in thousands."[87] One would think thousands of deaths would be enough grief for the Jewish people, yet Jews insisted on compounding "it with vast imaginary slaughter,

[80] *Ibid* at 56.
[81] *Ibid* at 123.
[82] *Ibid* at 137-38.
[83] (Torrance, CA: Institute For Historical Review, 1979) at 52, 57, 61,
[84] (Toronto: Samisdat Publishers) (filed as Ex 1 in *R v Zundel*, ONSC 1987) [*Did Six Million Really Die?*].
[85] *Ibid* at 30; Lipstadt, *supra* note 77 at 104.
[86] Harwood, *supra* note 83 at 30.
[87] *Ibid*.

marking with eternal shame a great European nation, as well as wringing fraudulent monetary compensation from them".[88] This imaginary slaughter was promoted through falsified evidence, fraudulent affidavits, phony memoirs such as Anne Frank's diary, and other forgeries such as photographs and films that purported to show atrocities committed in death camps.[89] Verrall sent his publication to all members of the Parliament of Great Britain, a broad spectrum of journalists and academics, leading members of the Jewish community, and public figures.[90] More than a million copies of Verrall's work were distributed within less than a decade in more than forty countries.[91] It has been frequently cited by other Holocaust deniers as an authoritative source.[92]

Holocaust survivors worldwide were disturbed by the proliferation of Holocaust denial. Canadian Holocaust survivors would be particularly shocked to learn that the largest base for the publication and distribution of such material was located on Carlton Street in downtown Toronto.

V. "It was an everyday event to find something": Ernst Zundel and the Jewish community

In March 1981, the West German police raided approximately 450 homes of suspected neo-Nazis, seizing weapons, ammunitions, and explosives. They also found tens of thousands of antisemitic leaflets, including Holocaust-denial literature. To their surprise, a significant portion this material came from Canada. The material seemed to have been distributed by a German-born, Canadian resident named Ernst Christof Friedrich Zundel. Reached by the *Toronto Star* for comment, Zundel admitted he was the chief author of the seized material and blamed the raids on "Zionist pressure triggered by a demand for emigration by Israelis who want out of Israel because of its horrible economic situation."[93] Disclosure that arguably the world's leading neo-Nazi lived in Canada embarrassed the Canadian government.[94]

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[88] *Ibid*.
[89] See *ibid* at 15, 19-22, 25-26.
[90] Lipstadt, *supra* note 77 at 104. Verrall's work was not an original creation, but was based on a book called *The Myth of the Six Million* published in the United States in 1969 (*ibid* at 105).
[91] *Ibid* at 104.
[92] *Ibid*.
[93] See "German raids find Metro Nazi propaganda," *Toronto Star* (25 March 1981) A25; Barrett, *supra* note 15 at 156.
[94] See Eva Brewster, "The accusations of children," *Lethbridge Herald* (23 May 1981) A5.

Zundel was already well known by this time to the Canadian-Jewish community. Born on 24 April 1939 in Calmbach in the Black Forest region of Germany, Zundel was six-years'-old when the Second World War ended. His father was a woodcutter who served as a medic during the war. Zundel recalled "hunger, cold and sickness" under French military occupation. In 1956, he graduated from trade school with a diploma as a photo retoucher. Upon graduation Zundel lived and worked in north Germany, but he emigrated to Montreal in 1958 at the age of 19. According to Zundel, he left Germany to avoid military service.[95]

In Montreal Zundel met Adrien Arcand, a prominent antisemite and Nazi sympathizer from the pre-war era who, like John Ross Taylor, had been arrested and interned by the Canadian government during the Second World War. Arcand took Zundel under his wing, sharing his private library and putting Zundel in touch with neo-Nazis such as Rassinier.[96] Around this time, Zundel also got married and had two sons.[97] (Zundel and his first wife separated around 1975.[98]) Around the mid-1960s, Zundel moved with his family to Toronto. There he associated himself with David Stanley (prior to Stanley's repudiation of neo-Nazism) and John Beattie, although Zundel did not yet take a leadership role in Toronto's neo-Nazi movement.[99] Zundel accumulated a vast collection of Nazi books and memorabilia, which he kept at his townhouse at 206 Carlton St. in the Cabbagetown area of downtown Toronto.[100] In the meantime, he built a reputation as an excellent photo retoucher, working for Canada's leading magazines, most of whom had no idea of Zundel's extracurricular activities.[101] Zundel in fact had numerous Jewish clients.[102] According to Kirk

[95] With respect to Zundel's background, see generally Manuel Prutschi, "The Zündel Affair" in Alan Davies, ed, *Antisemitism in Canada: History and Interpretation* (Waterloo, Ont: Wilfrid Laurier, 1992) at 253-55 [Prutschi, "Zundel Affair"].
[96] *Ibid* at 254.
[97] *Ibid*.
[98] *Ibid* at 257.
[99] See Bialystok, *supra* note 71 at 231.
[100] Prutschi, "Zundel Affair," *supra* note 95 at 254.
[101] Barrett, *supra* note 15 at 159.
[102] Letter from BG Kayfetz to Saul Hayes (13 March 1968), LAC (MG28-V133, Vol 98) [Letter from Kayfetz to Hayes 13 March 1968].

Makin, a columnist at *The Globe and Mail* who later covered Zundel's legal proceedings, Zundel's graphic design work was highly respected:[103]

> At one point [Zundel] was doing a lot of work for *Maclean's*. He was I believe their chief freelancer in graphic design. I have a friend who is one of the toasts of Canada's graphic design community, and he knew Zundel from his work before he got waylaid from all this stuff and he said there was no one… better at it.

Zundel was also a talented painter and apparently made money selling his art.[104] In 1967 Zundel won best in show at the Fourth Annual Festival of the Arts in Malton, Ontario, for what *The Globe and Mail* described as "an exquisite spray tempera painting."[105]

The entrepreneurial Zundel found synergy between his artistic flair and his fledging reputation in neo-Nazi circles. For his work in the latter field, Zundel was on Congress's radar from at least the mid-1960s. It appears Zundel first came to the CJC's attention for sending German nationalist propaganda to a rabbi in Montreal who had made comments about Germany and neo-Nazism.[106] The material purported to be from an organization called the "Western Unity Movement", which advocated for reuniting East and West Germany.[107] Congress kept tabs on Zundel and the Western Unity Movement, whose mailings shifted from pan-Germanism to antisemitism.[108] In a letter from Saul Hayes (the CJC's National Executive Director) to Kayfetz in November 1964, Hayes reported that Zundel—who at the time went by "Ernest Zuendel"—was doing work as an organizer for the French-Canadian social credit party the Ralliement créditiste and that Zundel had "an enormous library of Nazi literature, the largest in North America … with shelves 4 feet high, packed with books by Hitler, Hess, Goebbels, and fascists and nazis of all nationalities [and] a full collection of Hitler's speeches, the Horst Wessel song, etc."[109] Hayes added that Zundel and Taylor had met the previous year at Zundel's home in Montreal.[110] Zundel

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[103] Interview of Kirk Makin (18 April 2022) [on file with author] [Makin Interview].
[104] Kay Kritzwiser, "Star Sapphire outshines all at Festival of the Arts," *The Globe and Mail* (11 September 1967) 14.
[105] *Ibid*.
[106] Letter from Kayfetz to Hayes 13 March 1968, *supra* note 102; Letter from Sol I Littman to Irwin Suall (31 July 1968), LAC (MG28-V133, Vol 98) [Letter from Littman to Suall].
[107] Letter from Littman to Suall, *supra* note 106.
[108] *Ibid*.
[109] Letter from BG Kayfetz to Saul Hayes re neo-Nazis in Montreal (19 November 1964), CJA (Fonds CJC ZA 1965, Box 4, File 30) [Letter from Kayfetz to Hayes 19 November 1964].
[110] *Ibid*.

was strongly suspected of being responsible for the distribution of hate mail to students.[111] Congress passed on this information to the RCMP.[112]

According to a January 1965 correspondence between Kayfetz and the Canadian Department of Citizenship and Immigration, it appears Congress tried to have Zundel deported;[113] this attempt failed, but Zundel's application for Canadian citizenship in 1967 was turned down.[114] According to Zundel no reason was given,[115] but it may have been rejected on account of information shared by Congress with the police and the immigration authorities. This would turn out to be highly significant because Zundel never obtained Canadian citizenship—he did not re-apply until the 1980s, when he was well-known as a Holocaust denier—and his status as a non-citizen paved the way for his eventual deportation to Germany in 2005.[116]

Zundel reached for the limelight in April 1968 when he ran for leadership of the federal Liberal Party. He failed to receive a single vote, but attracted press coverage as an oddball candidate.[117] Paradoxically in light of his neo-Nazism, Zundel painted himself as a national unity candidate who was seeking representation for minority groups.[118] In his convention speech Zundel complained of the incessant "anti-German hate programs [we] are subjected to every night."[119] He received some applause after his address, although it was reported that most in the audience "talked instead of listening to him."[120] The Canadian-Jewish community—at least those who were aware of Zundel—appeared mildly alarmed by his candidacy. Kayfetz monitored the German-Canadian press and reported that Zundel had received praise for his speech from two German-language

[111] Letter from M Saalheimer to BG Kayfetz (24 November 1964), CJA (Fonds CJC ZA 1965, Box 4, File 30).
[112] Letter from Kayfetz to Hayes 19 November 1964, *supra* note 109; Letter from Saul Hayes to Superintendent GH Miller (16 July 1965), CJA (Fonds CJC ZA 1965, Box 4, File 30).
[113] See Letter from BG Kayfetz to JC Morrison, Director of Special Services, Immigration Branch (28 January 1965), CJA (Fonds CJC ZA 1965, Box 4, File 30).
[114] Ernst Zundel, "Zundel's citizenship" (letter to the editor), *The Globe and Mail* (11 July 1987) D7.
[115] *Ibid*.
[116] On Zundel's deportation, see Kirk Makin, "Holocaust denier is returned to Germany," *The Globe and Mail* (2 March 2005) A7.
[117] See George Bain, "The serious candidates," *The Globe and Mail* (20 March 1968) 6; Prutschi, "Zundel Affair," *supra* note 95 at 255.
[118] "'Not crackpot': Unknown asks for equality," *The Globe and Mail* (5 April 1968) 27.
[119] *Ibid*.
[120] "Nuisance candidate almost misses speech," *The Globe and Mail* (6 April 1968) 10.

dailies.[121] Sol Littman, executive director of the Anti-Defamation League of B'nai Brith, concluded that, "While Zuendel appears to [have] a very small cloud in Canada at the present time, nevertheless his presence and his strategy should cause considerable concern" as his "strategy may yet find fertile soil in Canada."[122] The Jewish Labour Committee sent a protest letter to the Liberal Party of Canada, outing Zundel as a neo-Nazi.[123] The Liberals responded by noting that "freedom of speech is at the cornerstone of our society," that Zundel was entitled to address the delegates since he had secured the requisite signatures, and that Zundel's ideas had clearly not merited any attention since no other candidates or delegates commented on them.[124] In addition, Kayfetz contacted Philip Givens—the Jewish, former mayor of Toronto who ran successfully as a federal Liberal candidate in the 1968 election—but Givens declined to raise the matter with party leadership, advising that "it was possible Zuendel would be forgotten by tomorrow" and shouldn't be provided with "any needless notoriety."[125]

Zundel stayed active following the 1968 Liberal leadership convention. In fact, in his testimony in 1969 before the Senate Committee studying the hate-speech legislation, Hayes told the Committee that Jewish organizations had recently received a barrage of hate mail believed to have been sent by Zundel.[126] In the ensuing years Zundel continued disseminating neo-Nazi material from his new base in Toronto, but around this time Zundel switched to using the pseudonym "Christof Friedrich" – his middle names. Zundel may have concluded that publishing under his real name would harm his graphic design business, which was enjoying success.[127] In or around 1975, Zundel, under the name Christof Friedrich, published a 160-page monograph entitled *UFOs: Nazi Secret Weapon?* Its central thesis was that Hitler's scientists had created flying saucers

[121] Letter from BG Kayfetz to JS Midanik (29 April 1968), LAC (MG28-V133, Vol 98); Letter from BG Kayfetz to JS Midanik (3 May 1963), CJA (Fonds CJC ZA1969, Box 3, File 40).
[122] Letter from Littman to Suall, *supra* note 106.
[123] Letter from R Ryba to Alan O'Brien (16 April 1968), LAC (MG28-V75, Vol 26).
[124] Letter from Dan Coates to R Ryba (6 May 1968), LAC (MG28-V75, Vol 26).
[125] Letter from Kayfetz to Hayes (13 March 1968), LAC (MG28-V133, Vol 98). On the topic of Zundel's candidacy for the Liberal Party leadership, see also Bialystok, *supra* note 71 at 230-31.
[126] Senate, Standing Committee on Legal and Constitutional Affairs, *Evidence*, 28-1, vol 1, No 2 (25 February 1969) at 46 (Mr Hayes).
[127] See Prutschi, "Zundel Affair," *supra* note 95 at 256-57.

during the war and that escaped Nazis continued to produce them from secret bases buried a mile below the surface in Antarctica.[128] In Zundel's recounting, UFO sightings around the world were evidence of this clandestine Nazi program.[129] Zundel self-published the book under the name Samisdat Publishers Ltd., under whose auspices he would disseminate his neo-Nazi material in the coming years.[130] Zundel was actually interviewed (under the name Christof Friedrich) by Barbara Frum for the CBC Radio program *As It Happens* in a short segment on the book which aired on 27 February 1975. During the interview a very sincere-sounding Zundel explained his flying-saucer theory to a very skeptical Frum.[131] The program portrayed Zundel as an amusing side show and certainly not as any kind of threat or person to be taken seriously. In 1977, Zundel—again under the name Christof Friedrich—produced another monograph, entitled *The Hitler We Loved and Why*, published on 20 April 1977 (the anniversary of Hitler's birthday) by "White Power Publications", based out of West Virginia. Even by Zundel's standards, the work is shockingly racist; for example, a photograph of Rabbi Jacob Rothschild presenting an award to Martin Luther King, Jr. at the South's first racially-integrated banquet, held in 1965 in Atlanta, is captioned "The Face of the Enemy," with accompanying text underneath the photo explaining: "We loved [Hitler] because he saved us from the alien invaders who promoted the extinction of our race, the White Race."[132] Another photograph shows Jews in the Warsaw Ghetto above a caption reading: "Jews were happy to be back among their own kind and to live according to their own laws."[133]

By 1977 Zundel had acquired some prominence in Toronto neo-Nazi circles, holding meetings in his home attended by dozens of guests.[134] But what significantly raised Zundel's

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[128] See generally, Mattern & Friedrich, *UFO's: Nazi Secret Weapon?* (Toronto: Samisdat Publishers Ltd, undated).
[129] See *ibid*.
[130] "'Samizdat' is a Russian word meaning self-publishing, typically referring to illegal or underground publishing in the Soviet Union." (see Barrett, *supra* note 15 at 34).
[131] Interview of Christof Friedrich by Barbara Frum, *As It Happens*, CBC Radio (27 February 1975), Toronto, CBC Archives. Note that the clip from CBC Archives ends partway through the interview.
[132] Christof Friedrich & Rich Thomson, *The Hitler We Loved and Why* (Reedy, West VA: White Power Publications, 1977) at 42. Regarding the 1965 Atlanta banquet, see Stephanie Butnick, "Martin Luther King Jr. and the Jews of Atlanta," *Tablet* (18 January 2014), online: https://www.tabletmag.com/sections/news/articles/martin-luther-king-jr-and-the-jews-of-atlanta.
[133] Friedrich & Thomson, *supra* note 132 at 32.
[134] Prutschi, "Zundel Affair," *supra* note 95 at 256-57.

public profile was his response to the airing of the NBC series *Holocaust* in April 1978. The series was fictional, highly sanitized, featured "well-fed actors parading as concentration camp inmates," and was criticized by serious scholars.[135] Elie Wiesel called the series, "Untrue, offensive, cheap" and "an insult to those who perished and to those who survived."[136] However, it revealed how little the public knew about the Holocaust. Bialystok, then a high school teacher in Toronto, recalled being stunned when students asked him whether things had really been that bad.[137] The series was an important catalyst for Holocaust consciousness. It also served an accelerator for Holocaust denial. Even though it presented a sugar-coated view of the events, neo-Nazis like Zundel were upset by the program's popularity and the sympathy it engendered for Jews. Zundel created an organization called "Concerned Parents of German Descent" to protest screenings of the series.[138] On behalf of this organization, he wrote a letter to Attorney General of Ontario Roy McMurtry and Ontario Premier Bill Davis, alleging that the "so-called 'docu-drama' about the alleged extermination of six million European Jews is portraying and stereotyping … Germans … and is instilling in innocent postwar generations almost 40 years later the same inflammatory hatred."[139] Zundel called for the immediate prosecution for wilful promotion of hatred of those responsible for disseminating the program.[140] (Unsurprisingly, it appears Zundel did not receive a response.) In January 1979, Zundel organized a series of poorly attended demonstrations at the West German Consulate, other German agencies, and the Israeli Consulate, to protest the screening of *Holocaust* in Germany.[141]

Zundel's response to *Holocaust* garnered him widespread publicity as a neo-Nazi. An article in the *Toronto Sun* by Mark Bonokoski on 18 April 1978 outed Zundel as Christof Friedrich, the author of *The Hitler We Loved and Why*, and noted that he was the leader of Concerned Parents

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[135] Bialystok, *supra* note 71 at 177.
[136] Elie Wiesel, "Trivializing the Holocaust: Semi-Fact and Semi-Fiction," *New York Times* (16 April 1978) D29.
[137] Bialystok, *supra* note 71 at 205.
[138] Lipstadt, *supra* note 77 at 158-59; Prutschi, "Zundel Affair," *supra* note 95 at 257.
[139] Letter from Ernst Zundel for Parents of German Descent (18 April 1978), Toronto, Archives of Ontario [henceforth, "AOO"] (F 4297-4 (Ontario Press Council fonds) J-1). There is a handwritten note at the top of the letter which states that the letter was sent to Premier Davis and Roy McMurtry and "NO reply was ever received!" (emphasis in original)
[140] *Ibid*.
[141] Prutschi, "Zundel Affair," *supra* note 95 at 258-59.

of German Descent.[142] Bonokoski cited "police sources" who indicated Zundel was publishing neo-Nazi material from his studio on Carlton St., and quoted Kayfetz, who said the CJC had been aware of Zundel for years.[143] Although Zundel would later claim to revel in publicity, this initial media exposure seemed to have upset him. Zundel refused to admit that he was Chistof Friedrich and wrote to the *Toronto Sun* threatening to sue them with libel.[144] Zundel disseminated "A Statement of Explanation" in which he called Bonokoski a "journalistic hatchetman … conducting a smear-campaign directed against me as a person, which is calculated to distract the public from the important issues which are of concern to all Canadians of every ethnic group."[145] He said the article was full of "distortions, fictions, half-truths and innudendoes [*sic*]" and queried whether "the Canadian Jewish Congress [was] maintaining some kind of 'hit-list' and … gathering blackmail information against private citizens in Canada".[146] Zundel also wrote to Metropolitan Toronto Police accusing them of permitting Bonokoski access to confidential information.[147] In January 1982, Zundel filed a complaint with the Ontario Press Council, alleging that the news media had grossly and incessantly abused the German-Canadian minority. The Press Council dismissed the complaint, explaining it could only deal "with specific unsatisfied complaints about specific and current conduct of the press."[148] Zundel followed up by filing a complaint against the *Canadian Jewish News*, which the Press Council also dismissed.[149]

Zundel did, however, leverage his newfound platform to disseminate material under his own name. He bombarded politicians, the media, libraries, and schools across Canada with neo-Nazi propaganda, including books, films, and cassettes.[150] Makin, who started working for the *Globe and Mail* in 1979, recalled that "anyone in the media was very familiar with Ernst Zundel … because he would pepper us with these communiqués … and they were constantly arriving in

[142] Mark Bonokoski, "Neo Nazi leads Toronto protest," *Toronto Sun* (19 April 1978)
[143] *Ibid*.
[144] Letter from Ernst Zundel to the Editor, *Toronto Sun* (18 April 1978), AOO (F 4297-4, J-1).
[145] "A Statement of Explanation" by Ernst Zundel (undated), AOO (F 4297-4, J-1).
[146] Letter from Ernst Zundel to The Ontario Press Council (9 January 1982), AOO (F 4297, J-1).
[147] Letter from WM Swanton, Inspector, Intelligence Bureau to Ernst Zundel (20 April 1978), AOO (F 4297-4, J-1).
[148] Letter from Fraser MacDougall to Ernst Zundel (24 June 1982), AOO (F 4297-4, J-1).
[149] Letter from Fraser MacDougall to Ernst Zundel (21 December 1982), AOO (F 4297, J-1).
[150] Prutschi, "Zundel Affair," *supra* note 95 at 263.

newsrooms and in our mailboxes. … [I]t was an everyday event to find something."[151] Zundel also disseminated French-language Holocaust-denial material in Quebec.[152] Many recipients of Zundel's missives (including non-Jewish recipients) contacted Congress to express concern.[153] Zundel gained a following of about 700-800 subscribers to his mailing list in Canada.[154] He reached more people outside of Canada, principally targeting the United States and West Germany.[155] This led to the discovery in 1981 by the West German police of large quantities of Zundel's material. Zundel estimated that in 1981 alone his mailing costs were $35,000.[156]

Zundel also leveraged his notoriety to take aim at the Jewish community. In 1980, one of Zundel's followers, Ernst Nielsen, enrolled in the Holocaust course at the University of Toronto taught by Jewish professors Michael Marrus and Jacques Kornberg, and attempted to disrupt the lectures.[157] Nielsen was expelled from the course.[158] In April 1981, Zundel applied for the position of director of the CJC's Holocaust Documentation Bank Project. In support of his application, he emphasized his knowledge and sensitivity to the "Holocaust issue," his fluency in German, his "good understanding of French and Yiddish," and his extensive experience in graphic arts.[159] According to Bernie Farber, a staff member of the JPRC in the 1980s who later became Chief Executive Officer of Congress, the CJC did not take Zundel's application seriously:[160]

> [H]e applied for the position. And he said, you know, "I speak German. I know the history inside out and backwards." … I mean, he was just a performer. And so when he applied, I think people just, you know, didn't pay any attention to it. … It was a very well-written letter [laughs] … and it talked nothing about his Holocaust denial. Just that he was a German, you know, historian interested in the Holocaust. And he's written about it. And I think there was some research that went into it – no no no, this is – this the nutbar out, you know – forget about him.

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[151] Makin Interview, *supra* note 103.
[152] See Letters from Centre canadien D'Oecumenism to Canadian Jewish Congress (attaching material) (22 December 1980 and 6 January 1981), CJA (Fonds CJC DA 15.2, Box 9, File entitled "Anti-Semitism – General").
[153] See *ibid*; Letter from Rev. Daniel Shute to Canadian Jewish Congress (attaching material) (26 October 1981), CJA (Fonds CJC DB05, Box 11, File 28); Prutschi, "Zundel Affair," *supra* note 95 at 263.
[154] Prutschi, "Zundel Affair," *supra* note 95 at 263.
[155] *Ibid*.
[156] Barrett, *supra* note 15 at 159.
[157] Prutschi, "Zundel Affair," *supra* note 95 at 265.
[158] *Ibid*; Barrett, *supra* note 15 at 159.
[159] Letter from Ernst Zundel to Selection Committee for National Holocaust Project Director, Canadian Jewish Congress (10 April 1981), CJA (Fonds CJC DB05, Box 11, File 28).
[160] Interview of Bernie Farber (2 February 2021) [on file with author] [Farber Interview].

Congress rejected Zundel's application on grounds that he had missed the deadline to apply.[161] On Rosh Hashanah in September 1981, Zundel took out an advertisement in the classified section of the *Toronto Star* on behalf of himself and Samisdat Publishers, wishing a "Happy New Year to all our Jewish friends."[162] Zundel also reached out to the Jewish community through letters addressed to Congress offering to debate the "rapidly-eroding Holocaust legend."[163] In addition, Zundel created an organization called the "German Jewish Historical Commission" and announced that he wanted to organize symposia on topics of Jewish interest.[164]

Congress ignored Zundel's outreach, preferring to deny him a larger profile. But cracks in the Canadian Jewish community had already begun to appear as other Jews—especially Holocaust survivors—began to lose patience with Zundel and with Congress's approach.

VI. "Don't raise false expectations, because there is no way to stop a Nazi party": The formation of the Canadian Holocaust Remembrance Association

As discussed in chapter 2, Congress leadership in the post-war period was slow to incorporate marginalized segments of the Jewish community, including Holocaust survivors. But over time, survivors became increasingly incorporated into leadership positions. The survivors' success in securing the hate-speech provisions—over the initial objections of CJC leadership—gave groups like the Association of Holocaust Survivors the confidence to make their voices heard and push for greater representation.[165]

Survivor representation continued to grow in the 1970s. For example, Lou Zablow recounted that he and Saul Hayes became friends and would meet regularly for lunch in the 1970s.[166] Aba Beer, who took over as president of the Association of Holocaust Survivors in the

[161] Prutschi, "Zundel Affair," *supra* note 95 at 267.
[162] *Ibid*.
[163] Letter from Ernst Zundel to The Directors, The Canadian Jewish Congress (4 November 1982), LAC (Fonds R9833-815-0-E, Vol 36, File FF-HP-205).
[164] Lipstadt, *supra* note 77 at 158.
[165] Zablow Interview, *supra* note 72 at 1A-31. See also Interview of Aba Beer by Myra Giberovitch, (1 September 1987), CJA (Fonds P17/08, Box 1, File 10) at 1A-13 [Beer Interview], calling the hate-speech campaign the turning point in the history of the community awareness of the survivors.
[166] *Ibid* at 1A-31-1A-33.

early 1970s, described a similar mending of the fences. According to Beer, Hayes called him around 1972 and said: "Look here. You're working from outside … shouting and screaming, why don't you come in? … [W]e are one community, why should we fight each other?"[167] Zablow's and Beers's rapprochement with Hayes is emblematic of improved relations between survivors and Congress. In 1972, Congress created a Holocaust Remembrance Committee (HRC) for the Eastern (Quebec) region.[168] The Committee was responsible for coordinating Holocaust commemoration and education, among other things.[169] It was headed by Beer, who simultaneously served as president of the Association of Holocaust Survivors.[170] In 1973, the CJC created a National Holocaust Remembrance Committee (NHRC).[171] Beer served as the NHRC's first chairman and many members of the Association of Holocaust Survivors were active participants.[172] The NHRC had a significant impact on Holocaust education and consciousness across the country.[173] Around the same time, Congress set up local Holocaust Remembrance Committees in Toronto and every other Canadian city with a significant Jewish population.[174] The initial chairman of Toronto's HRC was Paul Goldstein, a former president of the Association of Holocaust Survivors who had been a vocal critic of the CJC's approach to the hate-speech legislation in the previous decade.[175] Congress's greater sensitivity to the survivors and to Holocaust awareness relieved tension between the two groups, particularly as delineation between them became increasingly blurred, with survivors occupying leadership roles within Congress itself.

Despite this progress, as in the previous decade tension gradually emerged between survivors and CJC leadership over the hate-speech issue. As Holocaust denial gained

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[167] Beer Interview, *supra* note 165 at 1B-3-4.
[168] See Bialystok, *supra* note 71 at 173. The Holocaust Remembrance Committees created by Congress were initially known as Holocaust Memorial Committees (*ibid*).
[169] *Ibid* at 173.
[170] *Ibid*.
[171] Giberovitch, *supra* note 72 at 100.
[172] *Ibid*.
[173] Bialystok, *supra* note 71 at 187-88.
[174] *Ibid* at 174, 181.
[175] *Ibid* at 173.

prominence—especially after Zundel began to attract significant public attention in the late 1970s—some survivors demanded that Congress take a more aggressive approach. The focal point for this tension was Toronto's Holocaust Remembrance Committee. Toronto's HRC initially focused, like other Holocaust Remembrance Committees, on commemoration and education. This changed in 1977 when Helen Smolack took over as chairman. Although born in Canada, Smolack was part of a more vocal group within the Committee that wanted it to have a role in combating neo-Nazism.[176]

Smolack made common cause with Sabina Citron, a Holocaust survivor and fellow member of Toronto's HRC. Citron was born in Łódź in 1928, and was eleven-years'-old when war broke out in 1939.[177] In July 1944 she was packed into a cattle car with her immediate family and sent to Auschwitz.[178] As she and her family were on the way to Auschwitz, soldiers guarding the train opened the door and started shooting at random, killing one person and injuring Citron's brother.[179] After several months in Auschwitz, Citron was sent to Bergen-Belsen, in Germany, as the Soviet Army closed in.[180] As the front grew even closer, she was placed with her mother in a cattle car on a train toward Berlin with approximately nine hundred other women; they fled from the train after it was hit by a bomb and were liberated a few days before the end of the war.[181] She returned to Poland and immigrated to Canada in 1952.[182] There she married a fellow survivor of Auschwitz and they formed successful fibreglass and electro-plating companies based out of the Downsview area of Toronto.[183] Citron was active in the companies since their formation in the 1950s and took over day-to-day operations after her husband's death in 1985.[184] As of 1988 her businesses, which manufactured fibreglass parts for trucks (Volvo was one of her biggest

[176] See Bialystok, *supra* note 71 at 195-96.
[177] Transcript of Proceedings, Vol 1 (22 December 1987), *R v Zundel* (Ont SC) at 19-20 (examination-in-chief on *voir dire* of Sabina Citron).
[178] *Ibid* at 20.
[179] *Ibid* at 21.
[180] *Ibid* at 20.
[181] *Ibid*.
[182] *Ibid* at 22-24.
[183] *United Steelworkers of America v. Plaza Fiberglas Manufacturing Limited*, 1990 CanLII 5659 (ON LRB) at para 8.
[184] *Ibid*.

customers), employed about two hundred people.[185] In this role, Citron was accused by her employees of unfair labour practices and held in contempt of court in 1989 for failing to comply with an order of the Ontario Labour Relations Board, for which she received a thirty-day suspended sentence.[186] Citron's status as a wealthy factory owner and her sharp business practices are somewhat ironic given that Zundel and Keegstra were at the same time accusing her and other survivors of fabricating the Holocaust in furtherance of a communist conspiracy.

Despite her horrific experiences during the Holocaust—or on account of them—Citron was unbowed in the face of opposition, whether it came from inside or outside the Jewish community. Farber, for instance, described Citron as "a firecracker" and "tough as nails."[187] Meir Halevi Weinstein, former head of the Jewish Defense League in Canada, recalled that Citron was a fighter with "a lot of energy" who "never, ever gave up".[188] Robert Armstrong, who provided legal representation to Citron as a partner at Torys LLP[189] and was later appointed to the Court of Appeal for Ontario, recounted that Citron would always wear a short-sleeved dress to their meetings, revealing the tattoo of the number she received at Auschwitz.[190] Armstrong recalled that Citron and Smolack were "tough-minded women who wanted justice and so I took my hat off to them, I really did"; Citron's approach was "uncompromising… if you're gonna do the job, you had to do the job, and you shouldn't be wimpish about it".[191]

Citron's assertiveness (or, depending on one's perspective, Congress' unassertiveness) brought her into conflict with community leadership. As noted in the previous chapter, Citron—then an "honourary secretary" of the Association of Holocaust Survivors—spoke up at the community meeting at Holy Blossom Temple in Toronto in July 1965, calling out Congress leadership for its refusal to support the hate-speech legislation and for its reaction to the riot at

[185] *Ibid* at para 12.
[186] *Ibid* at para 54; *United Steelworkers of America v Sabina Citron*, 1989 CanLII 3478 (Ont Div Ct), leave to appeal dismissed 1989 CanLII 3256 (Ont CA).
[187] Farber Interview, *supra* note 160.
[188] Interview of Meir Halevi Weinstein (21 April 2022) [on file with author] [Weinstein Interview].
[189] Then known as Tory Tory DesLauriers & Binnington.
[190] Interview of Robert Armstrong (18 December 2021) [on file with author] [Armstrong Interview].
[191] *Ibid*.

Allan Gardens. Citron subsequently attended meetings of the Community Anti-Nazi Committee.[192] This committee ceased operation in 1969,[193] but Citron, like other survivors, continued to work with Congress in the ensuing years; she was appointed to Toronto's Holocaust Remembrance Committee and was one of the founding members of the National Holocaust Remembrance Committee.[194] Although she affiliated herself with the CJC, Citron was no less reluctant to challenge Congress policy. In the 1970s, Citron and others grew frustrated with Congress's failure to address two primary issues: (1) lobbying the government to prosecute Nazi war criminals, many of whom came to Canada after the Second World War, and (2) combating neo-Nazism and Holocaust denial.[195] Citron began collecting material on Zundel from around the mid-1970's and urged the CJC to take legal action against him and other antisemites like Taylor.[196] According to Farber, Citron faced significant opposition within Congress on the Zundel question since most people were opposed to prosecution; Farber recalled that Milton Harris (CJC president 1983-86) "had battle royales with Sabina Citron. They yelled and screamed at each other all the time over this issue" and that "David Satok [chairman of CJC Central Region] hated her – oh my god … it was awful. And he wasn't wrong – I mean … it was her way or the highway, and we were an organization that had illusions of democracy."[197]

Citron's conflicts with communal leadership eventually resulted in her, Smolack, and other survivors breaking off from Congress. The split was acrimonious. When Smolack took over as chairman of the Toronto HRC in 1977, she and Citron pushed the Committee to take a more

[192] Letter from BG Kayfetz to Mel Fenson (23 May 1968), PAM (Fonds P5103, File 4) [Letter from Kayfetz to Fenson].
[193] Bialystok, *supra* note 71 at 196.
[194] See Letter from Samuel Resnick to David Satok re National Committee on the Holocaust (29 March 1973), OJA (Fonds 17, Series 1, File 467).
[195] See Bialystok, *supra* note 71 at 198. In fact, as Bialystok notes, the CJC had been quietly lobbying the government for decades to go after war criminals in Canada (*ibid*).
[196] See Transcript of Proceedings, Vol 1 (22 December 1987), *R v Zundel* (Ont SC) at 11-12 (examination-in-chief on *voir dire* of Helen Smolack); Minutes of the Holocaust Remembrance Committee (17 January 1978), CJA (Fonds CJC DA17.2, Box 25, File 14) [HRC 17 January 1978 Meeting Minutes]; Minutes of the Holocaust Remembrance Committee (17 May 1978), CJA (Fonds CJC DA17.1, Box 25, File 14) [HRC 17 May 1978 Meeting Minutes].
[197] Farber Interview, *supra* note 160.

prominent role in countering neo-Nazism and pursuing war criminals.[198] Congress opposed these efforts, which it claimed were outside of the Committee's mandate.[199] The matter came to a head in the summer of 1978. Following a meeting of the Toronto HRC on 20 June 1978 in which Citron made clear the Committee would not back down from combating Nazism, communal leaders adopted a resolution seeking to put the HRC in its place, instructing it to "issue no public statements in respect to social and political action and it conduct its activities and affairs within the purview of its defined purposes."[200] At a subsequent meeting between Congress and the survivor group, the HRC representatives were, according to Smolack, "told that this committee is raising false expectations in the community on an issue about which nothing can be done, for there is no way to stop a Nazi party."[201] The Toronto HRC refused to accede to Congress's demands. Citron was outraged and accused communal leadership of stonewalling.[202] Congress then asked Smolack to resign as chairman of Toronto's HRC, but Smolack refused.[203] In response, Congress dissolved the Toronto HRC.[204] The motion to dissolve the Committee was introduced by Satok and passed by a vote of 25-2.[205]

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[198] See eg HRC 17 January 1978 Meeting Minutes, *supra* note 196; HRC 17 May 1978 Meeting Minutes, *supra* note 196.

[199] See Bialystok, *supra* note 71 at 196. See also Draft Minutes of Holocaust Remembrance Committee (20 June 1978), CJA (Fonds CJC DA17.1, Box 25, File 14) (reflecting tension between Citron and Satok and the JPRC over the proper role of the HRC) [20 June 1978 HRC Minutes].

[200] The resolution was issued by the Toronto Jewish Congress, a federation of local agencies that was the parent committee to the Toronto Holocaust Remembrance Committee. The Toronto Jewish Congress was, in turn, one organization under the Canadian Jewish Congress umbrella. There was overlap in the membership of the Toronto Jewish Congress and the Canadian Jewish Congress; for example, the President of the Toronto Jewish Congress at the relevant time, Rose Wolfe, was the JPRC's chairman. (See eg Bialystok, *supra* note 71.) To simplify for our purposes, I refer in this paragraph to "communal leaders" or "Congress" when discussing actions by the Toronto Jewish Congress.

[201] Minutes of the Holocaust Remembrance Committee Meeting (9 August 1978), CJA (Fonds CJC DA17.1, Box 25, File 14).

[202] *Ibid*.

[203] "TJC vote ousts anti-Nazi group in controversy," *Canadian Jewish News* (23 November 1978) 1 ["TJC vote ousts anti-Nazi group"].

[204] See Letter from Rose Wolfe to Members of the Holocaust Remembrance Committee (29 September 1978), CJA (CJC DA 17.1 Box 25 File 14); "TJC vote ousts anti-Nazi group," *supra* note 203. The breakdown of the relationship between the Citron/Smolack group and communal leadership is recounted in significant detail by Bialystok, *supra* note 71 at 196-99.

[205] "TJC vote ousts anti-Nazi group," *supra* note 203.

After their ouster, Smolack, Citron, and their supporters created a new group, the Canadian Holocaust Remembrance Association (CHRA), with the express purpose of pursuing Nazi war criminals and opposing neo-Nazism, including seeking the enforcement of the hate-propaganda laws.[206] The organization started with twenty members, but by around 1990 had grown to approximately four thousand members across Canada.[207] It was affiliated with the Toronto Zionist Council and housed at the Council's headquarters in Toronto. The CHRA relied on volunteers and drew from Citron's personal funds.[208] From its inception, the CHRA attracted widespread support; according to Farber, there was no doubt the Smolack/Citron group spoke for the majority of survivors on the question of neo-Nazism.[209] Even survivors who remained affiliated with Congress sympathized with the CHRA's aims. Nathan Leipciger, who took over as chairman of the (reconstituted) Toronto HRC in 1981, commented: "I always supported Sabina Citron. Although I was in Congress, I became a member of the [C]HRA. … [Citron] could act independently and quickly … So officially she was not supported, [but] personally many survivors supported her."[210] Elly Gotz, who was also affiliated with the Toronto HRC in the 1980s, recalled of the CHRA: "We did not support them that much, but we agreed with everything they did in fact, quietly. We were happy for what they were doing. … They thought we were a talking shop, and they were right."[211]

Freed from hindrance by communal leadership, the CHRA wasted little time invoking legal means to combat neo-Nazis. They first went after John Ross Taylor, using a new legislative tool: Section 13 of the *Canadian Human Rights Act*. This provision—since repealed by the federal Conservative government in 2014—deemed it a discriminatory practice "for a person or a group of persons acting in concert to communicate telephonically … any matter that is likely to expose a [member of an identifiable group] to hatred or contempt".[212] Section 13 was included in the

[206] Bialystok, *supra* note 71 at 199; Affidavit of Helen Smolack in Support of Motion by CHRA for Leave to Appeal (24 January 1991), *R v Zundel*, SCC Court File No 21811, at para 4 [Smolack Affidavit].
[207] Smolack Affidavit, *supra* note 206 at para 5.
[208] Weinstein Interview, *supra* note 188; Farber Interview, *supra* note 160.
[209] Farber Interview, *supra* note 160.
[210] Quoted in Bialystok, *supra* note 71 at 199.
[211] Interview of Elly Gotz (20 September 2021) [on file with author].
[212] See *Canadian Human Rights Act*, RSC 1985, c H-6, s 13 (version in force between 12 December 2002 and 25 June 2014).

original version of the *Canadian Human Rights Act*, enacted in 1977. The provision was introduced with the support of minority groups, including the Canadian Jewish Congress, specifically with the Western Guard's telephone hotline in mind; the Western Guard's telephone messages, being (arguably) private communications, did not fall under the purview of the hate-speech provisions in the *Criminal Code*.[213] Although Section 13 did not receive much attention within broader debates over the establishment of a federal human rights code, Borovoy and the CCLA unsuccessfully tried to have it removed from the bill.[214] The CHRA spearheaded the first use of s. 13 of the *Canadian Human Rights Act* in an action in 1979 against Taylor and the Western Guard.[215] (This was the first hearing of any kind heard by the Canadian Human Rights Tribunal.[216]) The CHRA on its own behalf and an individual member of the group named David S. Smith filed two of the complaints in May 1979, joining complaints by the Toronto Zionist Council, the Ajalon Lodge (a fraternal Zionist organization), and the Canadian Human Rights Commission.[217] Notably, neither the Canadian Jewish Congress nor B'nai Brith Canada joined the action. The complaints concerned fifteen telephone messages recorded by Taylor between August 1977 and May 1979.[218] At the hearing, Citron and Paul Goldstein testified about how Taylor's propaganda impacted them as Holocaust survivors.[219] The CHRA also retained two expert witnesses. Emil Fackenheim, a rabbi and Professor of Philosophy at the University of Toronto, testified about the historical roots of the antisemitism in Taylor's recordings.[220] In addition, René-Jean Ravault, a Professor in the Department of Communication at the University of Ottawa, gave evidence about the impact of the messages on the target groups.[221]

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[213] See Lunny, *supra* note 18 at 138-39. The telephone recordings were also not prohibited by Ontario's *Human Rights Code*, which had been enacted in 1962. (*Ibid* at 139.)
[214] *Ibid* at 140-41.
[215] See *Smith v Western Guard*, *supra* note 18 at para 1.
[216] *Ibid*.
[217] *Ibid* at para 2; Affidavit of Sabina Citron in Support of Motion for Leave to Intervene by CHRA (13 March 1989), *Canada (Human Rights Commission) v Taylor*, SCC File No 20462, at para 9 [Citron Affidavit].
[218] *Smith v Western Guard*, *supra* note 18 at para 6.
[219] *Ibid* at para 66; Citron Affidavit at para 11.
[220] *Smith v Western Guard*, *supra* note 18 at para 68.
[221] *Smith v Western Guard*, *supra* note 18 at paras 20-51.

In July 1979 the Canadian Human Rights Tribunal sided with the complainants and ordered Taylor and the Western Guard to cease using the telephone to communicate the subject matter which formed the contents of the tape-recorded messages.[222] Taylor promptly violated the Tribunal's order by recording another phone message in August 1979 similar in content to his previous recordings; he was found guilty of contempt of court and received a suspended sentence of one year. In addition, the Western Guard received a $5,000 suspended fine.[223] Taylor violated the order again, whereupon he was ordered to serve his prison term and the Western Guard ordered to pay its fine.[224] After Taylor was sentenced to prison, the CHRA issued a press release in which it applauded Taylor's incarceration as "the culmination of a three-year effort by the Canadian Holocaust Remembrance Association[,] who initiated the action, to stop this form of hate mongering".[225] After serving his sentence, Taylor re-commenced his telephone messages and was once again found in contempt of court; this time, however, he challenged section 13 of the *Canadian Human Rights Act* as a violation of his right to freedom of expression under section 2(b) of the newly-enacted *Canadian Charter of Rights and Freedoms*.[226] In 1990 Taylor lost at the Supreme Court of Canada, which upheld the provision as a reasonable limit on free speech.[227]

In addition to Taylor, the CHRA vigorously pursued Zundel. Unlike with Taylor, s. 13 of the *Canadian Human Rights Act* was unavailable to target Zundel because his preferred methods for disseminating propaganda were through print and digital media, not the telephone. Accordingly, Citron attempted to have Zundel charged under the *Criminal Code*. Citron lobbied Ontario Attorney General McMurtry to consent to a prosecution for wilful promotion of hatred.[228] But McMurtry would not consent, fearing that the legislation was too weak and that Zundel might

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[222] *Ibid* at para 74.
[223] See *Canadian Human Rights Commission v John Ross Taylor and the Western Guard Party*, Federal Court of Canada, Trial Division, Court No T-4022-79 (21 February 1980), aff'd *Jon Ross Taylor and the Western Guard Party v Canadian Human Rights Commission*, Federal Court of Appeal, Court No A-174-80.
[224] See *Canada (Human Rights Commission) v Taylor*, [1990] 3 SCR 892 at 905.
[225] Canadian Holocaust Remembrance Association, Press Release (20 August 1981), LAC (Fonds MG31-D74, Volume 42, File 4).
[226] *Ibid* at 905-06.
[227] See generally *ibid*.
[228] Kathy English, "Zionists want charges; McMurtry Pressured on Nazi Propaganda," *Toronto Sun* (23 November 1981) A24.

be acquitted, thereby raising his profile.[229] According to Smolack, she and Citron lobbied McMurtry for three years commencing around 1980, but the Attorney General and his team continuously stalled on the issue.[230] McMurtry's reticence was not due to any lack of affinity for the Jewish community or failure to appreciate the horrors of the Holocaust; he was an outspoken supporter of Israel and frequently spoke at synagogues and Jewish community events, including at a dinner at Toronto's Beth Sholom synagogue in April 1977 where, "To the sound of table-thumping, McMurtry referred to the Holocaust when he said that any commitment to brotherhood must include our own individual determination to repeat over and over again, 'Never Again'."[231] Nor was his reluctance to invoke the law limited to Zundel. McMurtry resisted pressure from other community groups who demanded around the same time that he prosecute the Ku Klux Klan in Ontario.[232]

On 24 December 1980, frustrated with the lack of progress, the CHRA submitted a formal petition signed by thirty thousand people to McMurtry and Jean Chrétien (then federal Minister of Justice) lobbying the government to strengthen the hate-speech provisions.[233] As the Association of Holocaust Survivors had argued a decade before, the CHRA asked that the defences to wilful promotion of hatred be removed in order to eliminate "loopholes [which] have the effect of contradicting the purpose of legislation against hate propaganda."[234] The CHRA correctly identified the hate-speech provisions as being mainly symbolic and educative; as it wrote in the

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[229] See Michael McAteer, "Nazi, KKK hate literature brings appeal for McMurtry to Act," *Toronto Star* (23 November 1981) A6.
[230] See Jane Taber, "Zundel gets a soapbox," *Ottawa Citizen* (2 March 1985) B1.
[231] Sheldon Kirshner, "McMurtry urges greater understanding of French Canadian cultural aspirations," *Canadian Jewish News* (22 April 1977) 11. On McMurtry's relationship with the Jewish community, see also Harvey Warren, "McMurtry: 'Israel's survival must never be debated'," *Canadian Jewish News* (21 January 1977) 3; "Holocaust is subject of synagogue address," *Canadian Jewish News* (18 March 1977) 10; Harvey Warren, "3,000 pack Beth Tzedec," *Canadian Jewish News* (29 April 1977) 1; "McMurtry Honored," *Canadian Jewish News* (22 May 1980) 8.
[232] See flyer entitled "Ban the Klan!" sponsored by the Ad Hoc Committee for Racial Equality (4 October 1980), Toronto, City of Toronto Archives (Fonds SC88, Box 3, File 7); Letter from Stan Dalton to Gordon Cressy (20 March 1981), Toronto, City of Toronto Archives (Fonds SC88, Box 3, File 7).
[233] See Brief of the Canadian Holocaust Remembrance Association to the Hon. Jean Chretien, Minister of Justice and the Hon. Roy McMurtry, Attorney-General of Ontario (24 December 1980), CJA (Fonds CJC DA21 Box 21, File 1) at 9-25. The CHRA made other submissions in the brief, primarily concerning the prosecution of Nazi war criminals in Canada (*ibid* at 2-8).
[234] *Ibid* at 12.

petition, "[w]hat seems clear … is that laws in Canada relating to racist hate propaganda and discrimination are mostly declaratory in nature."[235] The CHRA was not interested in symbolism; it wanted a law with teeth:[236]

> The essence of law and law enforcement as we see it in the area of race relations is not only to educate but to clearly define the bounds of legal rights and responsibilities of all Canadians without regard to race, colour, religion or ethnic origin. Lofty declarations alone cannot pretend to deal with the problem any more than they would in any other area of the law.

The CHRA's petition does not appear to have had any immediate impact on the hate-speech question. The federal Liberal government did eventually propose some amendments to strengthen the offence of wilful promotion of hatred in June 1984 following a report published by the Special Committee on Participation of Visible Minorities in Canadian Society (the report was released under the title *Equality Now!*).[237] These proposed amendments included deleting the word "wilful," which had been narrowly interpreted by the Court of Appeal for Ontario in *Buzzanga*.[238] However, these changes were shelved by the Progressive Conservative government which won a landslide electoral victory in September 1984.

With the criminal law route seemingly closed, the CHRA tried a different tact. In June 1981 it petitioned André Ouellet, Canada's postmaster-general, to revoke Zundel's mailing privileges.[239] Following an investigation, Ouellet imposed an interim prohibitory order under the *Canada Post Corporations Act* (*CPCA*) against Samisdat on 13 November 1981.[240] (Since the ban

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[235] *Ibid* at 21.
[236] *Ibid*.
[237] See *Equality Now! Report of the Special Committee on Visible Minorities in Canadian Society* (Ottawa: House of Commons, 1984) at 69-71; Minister of Justice and Attorney General of Canada, News Release, "Justice Minister Proposes Measures Against Hate Propaganda" (1 June 1984). The proposed amendments were (1) removing the word "wilfully" from the section; (2) clarifying that the burden of all defences (rather than only the defence of truth) was on the accused; (3) deleting the requirement of the Attorney General's consent to a prosecution. Note that the federal Minister of Justice at this time was Mark MacGuigan, who had served on the Cohen Committee.
[238] *Ibid*.
[239] Letter from Canadian Holocaust Remembrance Association to the Hon Andre Ouellet (24 June 1981), CJA (Fonds CJA DA 21, Box 21, File 1). Ouellet was the last postmaster-general, as the position was abolished when Canada Post became a Crown corporation in October 1981. The *Canada Post Corporation Act* was introduced at the same time. Ouellet then became the Minister responsible for the Canada Post Corporation.
[240] See Letter from André Ouellet to Samisdat Publishers Limited (18 November 1981), LAC (Fonds R9833-815-0-E, Vol 36, File FF-HP-205); Report of the Board of Review Appointed to Inquire Into the Facts and Circumstances Surrounding the Interim Prohibitory Order, *In the Matter of Section 41 of the Canada Post Corporation Act and In the Matter of an Interim Prohibitory Order of the Minister Respecting Samisdat Publishers Ltd* (18 October 1982) at

was against Samisdat, and not Zundel personally, Zundel was permitted to keep receiving and sending mail under his own name.[241]) The basis for the order was that the Minister had reasonable grounds to believe Samisdat had disseminated hate propaganda within the meaning of the wilful promotion of hatred section of the *Criminal Code*.[242]

Zundel appealed the ban to a three-member panel of the Board of Review, as he was entitled to do under the *CPCA*.[243] The Board of Review was (and still is) an advisory body, empowered only to make recommendations to the Minister about whether the interim ban should be made permanent.[244] Hearing dates before the Board were held in February and March 1982.[245]

The main parties to the proceeding were the Canada Post Corporation and Samisdat, with Samisdat represented by Toronto lawyer Lynn McCaw.[246] The CCLA supplied legal counsel to Zundel *pro bono*.[247] Zundel was at the time a member of the CCLA, as was McCaw.[248] Zundel had already been turned down by other lawyers, including famed litigator Arthur Maloney, when Borovoy stepped in and found Zundel representation.[249] The CCLA also intervened in the case, represented by future Attorney General of Ontario Ian Scott.[250] The CHRA, too, obtained leave to intervene.[251] Zundel was grateful for the CCLA's assistance, writing to Borovoy following the

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1 [Samisdat Board of Review]. The legal authority for the ban was s 41(1) of the *Canada Post Corporations Act* as it then read. See RSC 1985, c C-10 (version currently in force), s 43(1) [*CPCA*].

[241] See Letter from BG Kayfetz to Rabbi Jordan Pearlson (26 February 1982), CJA (Fonds CJA ZB (Zundel), File 2) [26 February 1982 Kayfetz Letter to Pearlson].

[242] Samisdat Board of Review, *supra* note 240 at 1.

[243] Zundel's entitlement to challenge his interim ban came from then 41(3) of the *CPCA*. See s 43(2) of the current version, *supra* note 242.

[244] See current s 45(3) *CPCA*, *supra* note 240.

[245] Samisdat Board of Review, *supra* note 240 at 1.

[246] Samisdat Board of Review at 1; Letter from Ben Kayfetz to Rabbi Jordan Pearlson re Postal ban (11 February 1982), CJA (Fonds ZB (Zundel), File 1).

[247] Loose-leaf notes re Mr Zundel and Lynn McCaw, LAC (Fonds R9833-815-0-E, Vol 36, File FF-HP-205) [Notes re Zundel and McCaw].

[248] *Zundel, Re* (FC Docket No DES-2-03), Transcript of Proceedings at 3426.

[249] Notes re Zundel and McCaw, *supra* note 247.

[250] Samisdat Board of Review, *supra* note 240 at 1, 3. An intervention is a procedural advice that allows a non-party to participate in a proceeding. The purpose of an intervention is to present the court with submissions from the perspective of a non-party who has a special interest or particular expertise in the subject matter of the appeal. The role of an intervener is to provide a unique perspective or specialized form of expertise to assist the court in deciding complex issues that have effects transcending the interests of the particular parties before it. See *R v Barton*, 2019 SCC 33 at paras 52-53.

[251] Samisdat Board of Review, *supra* note 240 at 3.

hearing to thank him and the CCLA for "com[ing] to my aid in my struggle for freedom of speech."[252] (In addition to his direct assistance to Zundel, Borovoy had unsuccessfully lobbied Ouellet to drop the case or refer the question of the constitutionality of the hate-speech provisions under the *Bill of Rights* to the Supreme Court of Canada.[253]) In contrast, the CCLA's intervention upset the CHRA.[254] However, Scott reported in a letter to Borovoy after one of the hearing dates that Scott had shared a cab to the airport with the CHRA's lawyer, Sydney Moscoe, and attempted to smooth things over.[255]

At the hearing the CHRA argued that the ban should be upheld and was permitted to cross-examine Zundel.[256] The CHRA also submitted a report about the impacts of Zundel's material on the Canadian-Jewish community by Professor Ravault.[257] The CCLA put forward two main arguments on Zundel's behalf: first, that no ban could be implemented until Zundel was found guilty of wilful promotion of hatred in a criminal proceeding, and second that the offence of wilful promotion of hatred was *ultra vires* because it contravened the *Canadian Bill of Rights*.[258] Scott emphasized that the CCLA was not taking a position on the content of the material.[259]

Congress did not participate, but Kayfetz attended the proceedings. Citron remained upset with the CJC; although they sat near one another in the small hearing room, Kayfetz recounted that "so deep is her embitterment and antagonism against 'us' that at no time did she so much as acknowledge my presence by a nod."[260] Citron's coldness, however, did not surprise Kayfetz, "as I had the experience before with her in recent months."[261]

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[252] Letter from Ernst Zundel to Alan Borovoy (4 November 1982), LAC (Fonds R9833-815-0-E, Vol 36, File FF-HP-205).
[253] Letter from A Alan Borovoy to André Ouellet (18 December 1981), LAC (Fonds R9833-815-0-E, Vol 36, File FF-HP-205); Letter from André Ouellet to A Alan Borovoy (27 January 1982), LAC (Fonds R9833-815-0-E, Vol 36, File FF-HP-205); Letter from A Alan Borovoy to André Ouellet (8 February 1982), LAC (Fonds R9833-815-0-E, Vol 36, File FF-HP-205).
[254] Letter from Ian Scott to Alan Borovoy (1 March 1982), LAC (Fonds R9833-815-0-E, Vol 36, File FF-HP-205).
[255] *Ibid*.
[256] See Regina Hickl-Szabo, "Citizen report 'hate literature'," *Ottawa Citizen* (24 February 1982).
[257] Samisdat Board of Review, *supra* note 240 at 5-6.
[258] 26 February 1982 Kayfetz Letter to Pearlson, *supra* note 241.
[259] Regina Hickl-Szabo, "Anti-Semitic publisher fights mail service cutoff," *Ottawa Citizen* (23 February 1982).
[260] 26 February 1982 Kayfetz Letter to Pearlson, *supra* note 241.
[261] *Ibid*.

The hearing was similar to the later Zundel prosecutions in several respects. Zundel tried to make the most of his publicity, arriving at the hearing each day carrying a copy of *Mein Kampf* under his arm and a stack of other antisemitic material.[262] Zundel was accompanied by an entourage of neo-Nazi followers, one of whom Kayfetz recognized as previously having stood outside of Zundel's house on Carlton St. with a "No Holocaust" placard.[263] Although the postal hearing did not attract anything close to the media attention of the subsequent criminal trials, a reporter from the *Ottawa Citizen* attended the hearings and Kayfetz reported that she was captivated by "the phenomenon of Zundel and his operation."[264] As in the later criminal trial, the content of the media coverage disappointed some in the Jewish community; following the hearing, Kayfetz complained that the *Citizen* had uncritically adopted Zundel's perspective.[265] The hearings dragged on—initially scheduled for two days, they took up five—and Zundel introduced vast amounts of seemingly irrelevant neo-Nazi material and articles about Zionism and various divisions within the Jewish community.[266] The core of Zundel's argument was that he was defending the honour of the German people, and moreover that he was not anti-Jewish, but rather anti-Zionist.[267] In fact, Zundel testified that some of his "best collaborators" were Jews.[268]

Shockingly, the Board of Review sided with Zundel. The panel was unimpressed with Ravault's evidence, finding it tainted by bias since it was proffered by Holocaust survivors.[269] And although the panel found Zundel's writings "in bad taste and no doubt offensive to some," it held they did not rise to the level of wilfully promoting hatred against Jews.[270] The Board essentially adopted Zundel's dubious position that he was merely defending the honour of Germans; as the panel wrote in its most alarming passage: "The Board believes that what is before it is a much

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[262] See Gershon B Newman, "The Mark of 'Z'," *The Jewish Standard* 13 March 1982) 5.
[263] 26 February 1982 Kayfetz Letter to Pearlson, *supra* note 241.
[264] *Ibid*.
[265] Letter from BG Kayfetz to Editor, *Ottawa Citizen* (21 December 1982), CJA (Fonds CJC DA17.1, Box 25, File 14).
[266] 26 February 1982 Kayfetz Letter to Pearlson, *supra* note 241.
[267] *Ibid*.
[268] *Ibid*.
[269] Samisdat Board of Review at 6.
[270] *Ibid* at 7.

larger problem or struggle between two peoples i.e. the Germans and the Jews and is reluctant to recommend to the Minister that the interruption of mail service should be continued."[271] In the alternative, the Board accepted the CCLA's argument that Zundel should have been prosecuted before his mailing rights were revoked.[272] Minister Ouellet accepted the Board's recommendation, rescinded the interim ban, and restored Samisdat's mailing privileges.[273] Zundel was back in business.

Congress was outraged. Kayfetz accused the Board of having no real understanding of the issues involved and of wrongly assuming that "attacks on a religious or ethnic group are the concern of that group and no one else's."[274] Kayfetz also heaped scorn on Citron and the CHRA for initiating the proceeding in the first place, commenting that they had done the community a disservice by undertaking the action on their own.[275] The JPRC's legal committee, which by then included two judges, deemed the Board of Review's reasons outrageous.[276] Congress reached out to Canada Post, which was embarrassed by the situation. George Cohon, a Jewish board member of Canada Post (who was also the founder and President of McDonald's Canada) was dumbfounded that Zundel had been allowed to resume disseminating Holocaust denial through the mail, and took the matter up with Canada Post's president.[277] At a subsequent meeting between representatives of Congress and Canada Post, members of the latter group were apologetic and agreed that the Board of Review opinion was clearly erroneous, but pointed out that the decision was up to the Minister.[278] The CJC considered seeking judicial review of the Minister's decision,

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[271] *Ibid*.
[272] *Ibid*.
[273] See Michael Prentice, "Anti-Zionist regains right to mail service," *Ottawa Citizen* (11 December 1982) ["Anti-Zionist regains right to mail"]; Letter from André Ouelett to Samisdat Publishers Limited (15 November 1982), LAC (Fonds R9833-815-0-E, Vol 36, File FF-HP-205).
[274] "Anti-Zionist regains right to mail," *supra* note 273; "Ban on Zundel's mail is lifted, CJC is critical of board's decision," *Canadian Jewish News* (13 January 1983) 3.
[275] Minutes of Meeting of the Joint Community Relations Committee, Ontario Region (24 November 1982), CJA (Fonds CJC DA21, Box 19, File 9).
[276] See Letter from BG Kayfetz to David Satok (25 April 1984), CJA (Fonds ZB (Zundel), File 4) [Letter from Kayfetz to Satok].
[277] Letter from George Cohon to Michael Warren (11 March 1983), CJA (Fonds ZB (Zundel), File 2).
[278] Letter from Kayfetz to Satok, *supra* note 276.

but ultimately decided against it, primarily because it had not been a party to the proceeding before the Board of Review.[279]

The CHRA also did not appeal the decision. It is not clear why they did not do so, but it may reflect disillusionment with the postal board process. Indeed, following the Minister's ruling, the CHRA redoubled its efforts at seeking Zundel's criminal prosecution. And while they explored further legal avenues, others in the community took up extralegal measures.

VII. "Illusions of being nice went up in the smoke of Auschwitz": The Jewish Defense League

Born in 1957, Meir Halevi Weinstein grew up in Downsview, home to a large concentration of Holocaust survivors. Weinstein's parents were survivors as were the parents of most of his friends. Weinstein recalled that when he was growing up neither his nor his friends' parents talked much about what they went through during the war. When Weinstein watched the docudrama *Holocaust* in 1978, it had a deep impression on him. Around the same time, he came across a book called *Never Again! A Program for Survival* by Rabbi Meir Kahane. Rabbi Kahane was the founder of the Jewish Defense League (JDL), formed in New York City 1968 to fight antisemitism by any means necessary, including violence. Kahane's fearless attitude inspired Weinstein. He and his friends—fellow second-generation survivors—were not impressed with Congress leadership. Weinstein knew that community leaders had failed to protect Jews during the Holocaust. And now Congress was apparently not doing much to combat antisemitism. Weinstein contacted JDL headquarters in New York and in 1979 set up a Canadian branch of the organization.[280] The JDL had, in fact, previously had a Canadian outlet, which was suspected of acts of violence in the early

[279] Minutes of meeting of National Joint Community Relations Committee of Canadian Jewish Congress (16 January 1983), CJA (DA21, Box 19, File 10) [16 January 1983 National JPRC Meeting]; Minutes of meeting of Joint Community Relations Committee Ontario Region (23 February 1983) [23 February 1983 Ontario JPRC Meeting].
[280] With respect to this sentence and everything above in this paragraph, see Weinstein Interview, *supra* note 188 and Ira Basen, "Shock troops of the faith," *The Globe and Mail* (28 November 1981). Weinstein clarified that at the time he formed his group, Kahane had broken off from the JDL in the United States and formed another group called the Conference of Jewish Activists. Weinstein's group was initially a Canadian branch of that organization. However, when Kahane returned to the JDL, Weinstein's group also returned. (Weinstein Interview, *supra* note 188).

1970s including arson at Donald Andrews's home.[281] But by the time Weinstein formed his group the first iteration of the Canadian JDL was defunct.[282] The JDL's approach was anathema to Congress's preference for quiet diplomacy; CJC leaders were hostile to and embarrassed by the JDL's conduct and would refuse to work with—and often even to acknowledge—the JDL in the coming years.[283] Weinstein explained when he founded his organization that, "We want our JDL members to first have some respect for themselves being Jewish, and one doesn't gain respect by asking for it or pleading for it. … I think it's understood by a lot of Jews nowadays that all those illusions of being extra nice really went up in smoke at Auschwitz."[284]

One of the JDL's first targets was Zundel. Weinstein was upset by Zundel's protests in response to *Holocaust*. He discovered that Zundel lived on Carlton St. in Toronto. Weinstein went with a friend to pay Zundel a visit. Zundel was surprised to see them and began to argue that Weinstein and his friend had been misled by their parents about the Holocaust. In any event, Zundel argued that he was only a child during the war and should not have to bear the blame for the Nazi's actions. Weinstein recalled that he sympathized with Zundel's perspective insofar as Zundel had no personal responsibility for the Holocaust. The encounter ended peaceably and they agreed to disagree. However, Weinstein later discovered that Zundel was one of the world's largest distributors of neo-Nazi material, including the book *The Hitler We Loved and Why*. He set up a P.O. Box under a fictitious name and subscribed to Samisdat's mailing list. Weinstein contacted Citron, who, according to Weinstein, worked closely with him in the following years and sympathized with the JDL's aims. Indeed, Weinstein recalled that the JDL had significant support in the survivor community. Weinstein shared Zundel's material with Citron, who used these documents in lobbying Canada Post to impose a ban on Samisdat's mailing privileges.[285]

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[281] Minutes of the Central Region Joint Community Relations Committee (18 December 1974), CJA (Fonds CJC DA21 Box 19, File 18) [18 December 1974 JPRC Meeting Minutes].
[282] Weinstein Interview, *supra* note 188.
[283] 18 December 1974 JPRC Meeting Minutes, *supra* note 281; Basen, *supra* note 280.
[284] Basen, *supra* note 280.
[285] Weinstein Interview, *supra* note 188.

Subsequent encounters between the JDL and Zundel were considerably less peaceable than the first meeting. According to Zundel, in 1980 he began receiving death threats and bomb threats from the JDL at his home, and members of the JDL would call him in the middle of the night and blast music into the telephone.[286] The revelation in April 1981 that mass quantities of Zundel's material had been seized by West German police enraged the JDL, as it did many others in the Canadian Jewish community. Following this disclosure, on 31 May 1981 several Jewish organizations including Congress and B'nai Brith sponsored a community rally against racism at Allan Gardens.[287] (The site was specifically chosen as the same location where John Beattie's May 1965 rally was disrupted by members of the Jewish community.[288]) Featured speakers included Rabbi Gunther Plaut and Bob Rae, then a federal Member of Parliament.[289] The rally was peaceful, but following the event a breakaway group of anywhere from 500 to 1,500 demonstrators, including the JDL and many Holocaust survivors, marched to Zundel's house, located only two blocks from Allan Gardens.[290] Zundel and his supporters emerged from the house wearing hard hats and carrying placards reading, among other things, "There was no Jewish Holocaust!", "No Truth to The Six Million Story!", and "No More Money For Lies."[291] Members of the crowd threw eggs and uttered bomb and arson threats at Zundel's group.[292] A grainy video of the incident—shot by a Zundel supporter and later distributed by Samisdat as footage of a "Zionist Uprising"—reveals a chaotic scene, with protesters pushing against dozens of police officers, shouting "Nazi scum!" and "Never again!", and singing *Hatikvah*.[293] Demonstrators broke through the police line,

[286] Examination-in-Chief on *voir dire* of Ernst Zundel, *R v Zundel* (1985), Transcript of Proceedings Vol 1 at 87-90; Unpublished 1979 interview with *The Globe and Mail* dated 22 November 1979, AOO (F4297-4, Ontario Press Council Fonds, J-7); "Ernst Zundel – Anti-German Propaganda" (1981) (video), https://altcensored.com/watch?v=Uy19HYO2p7I ["Zundel – Anti-German Propaganda"].
[287] See "Anti-Nazi rally Sunday," *Canadian Jewish News* (28 May 1981) 1.
[288] Prutschi, "Prelude to Trial," *supra* note 4 at 2.
[289] *Ibid* at 2-3.
[290] Kayfetz put the number at 500 of which he estimated 80% were survivors (Ben Kayfetz, "Police avert Toronto riot," *Jewish Chronicle* (5 June 1981) 3; the *Canadian Jewish News* put the number at 1,500 (David Birkan, "1,500 demonstrate at anti-Nazi rally," *Canadian Jewish News* (4 June 1981) 1).
[291] Birkan, *supra* note 290.
[292] *Ibid*; Examination-in-Chief on *voir dire* of Ernst Zundel, *R v Zundel* (1985), Transcript of Proceedings Vol 1 at 60.
[293] See "Zundel – Anti-German Propaganda," *supra* note 286; Barrett, *supra* note 15 at 160.

but further violence was averted by the timely arrival of police reinforcements and the retreat of Zundel and his supporters into the house.[294]

VIII. "She didn't twist our arms, she broke our arms": Community divisions and criminal charges against Zundel

Tension was thus rising in the Jewish community in the early 1980s. The community was, furthermore, growing increasingly fractured. Aside from the emergence of groups such as the CHRA and JDL that opposed Congress and were unafraid to proceed on their own, around the same time the CJC ended its formal working relationship with B'nai Brith. Despite some disagreements over the years, Congress and B'nai Brith had worked well together in the fight against antisemitism through the JPRC since 1938.[295] However, after almost forty-five years of cooperation, the CJC dissolved the agreement effective March 1982.[296] Although Congress suggested that B'nai Brith was to blame for the break-up, the decision was made by the CJC.[297] Henceforth, B'nai Brith would work independently to counter antisemitism through its League for Human Rights.[298] In the coming years, the relationship between B'nai Brith and Congress would become increasingly strained.[299]

B'nai Brith joined other voices in the community urging a more aggressive approach to antisemitism. Alan Shefman, National Director from 1980-88, recalled that he helped move the

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[294] Prutschi, "Prelude to Trial," *supra* note 4 at 2.
[295] See Michael Friesen, "The Joint Public Relations Committee Series at the Ontario Jewish Archives: Some New Questions" (2019) 28 Can Jewish Studies 125 at 126. On disagreements between the two groups over the years, see eg Janice Arnold, "Agreement signed to resolve discord between B'nai Brith and Congress," *Canadian Jewish News* (15 November 1981) 9.
[296] The split was announced in September 1981 but did not come into effect until March of the following year. See Beverley Stern, "JCRC partnership splits, operating since year 1938," *Canadian Jewish News* (28 January 1982) ["JCRC partnership splits"]. For an accounting of the split between Congress and B'nai Brith, see Bialystok, *supra* note 71 at 200-01.
[297] "JCRC partnership splits," *supra* note 296. See also League for Human Rights National Cabinet Meeting (18 January 1982), PAM (G-8-3-20, File 31) [18 January 1982 LHR Cabinet Meeting].
[298] See 18 January 1982 LHR Cabinet Meeting, *supra* note 297. The League for Human Rights of B'nai Brith Canada had initially been set up around 1970 as B'nai Brith's representative body within the JPRC ("JCRC partnership splits," *supra* note 297. For simplicity, as in prior chapters, I will henceforth in this chapter refer to the League for Human Rights of B'nai Brith Canada as "B'nai Brith."
[299] See Interview of Alen Shefman (23 December 2021) [on file with author] [Shefman Interview]; Interview of Mark Sandler (16 February 2022) [on file with author] [Sandler Interview].

organization from a passive entity into one that took a more active role against neo-Nazism.[300] Under Shefman's leadership B'nai Brith introduced its *Annual Audit of Antisemitic Incidents*, which it continues to publish.[301] Zundel was one of B'nai Brith's key targets; for instance, Shefman had someone rent an apartment across the street from Zundel to provide camera surveillance on him, and this information was then shared with the police.[302]

Zundel simultaneously acted as a catalyst for and reinforced communal divisions, especially following the reinstatement of Samisdat's mailing privileges. Increasing numbers of Canadian Jews were calling for Zundel's prosecution. Yet there remained significant concern within Congress leadership as to the wisdom of a charge, including whether the law was strong enough to obtain a conviction. According to Farber, there was also a lack of appreciation at the time of the link between Holocaust denial and antisemitism. As Farber put it:[303]

> I mean we were virgins in this territory. … Zundel was straight Holocaust denial. We loathed Holocaust denial, obviously … but we just didn't know if it would fit the hate-crime law. … [W]e all said 'yeah, he's a goddam anti-Semite' … But to be able to prove that was [wilful promotion of hatred] … I think there were too many worried people.

Through its reticence, Congress reflected the view of other prominent community members who thought it best to ignore Zundel. Judy Cohen, a Holocaust survivor who attended the same synagogue as Barbara Frum in Toronto, remembered that around this time she and other survivors at the synagogue got into an argument with Frum, who believed it would be a mistake to give Zundel a platform.[304]

Yet even within Congress the mood was shifting. For example, at a January 1983 meeting of the national executive of the JPRC, Alan Rose (Executive Vice-President of Congress) expressed frustration that, "We now have had 12 years of the Cohen committee's recommendation incorporated in the criminal code and to-date there has been one case in Windsor which has nothing to do with antisemitism."[305] Among communal leaders in Ontario it seems the CJC position

[300] Shefman Interview, *supra* note 299.
[301] *Ibid*.
[302] *Ibid*.
[303] Farber Interview, *supra* note 160.
[304] Interview of Judy Weissenberg Cohen (2 April 2021) [on file with author].
[305] 16 January 1983 National JPRC Meeting, *supra* note 279.

gravitated toward tepidly lobbying for a prosecution.[306] At a meeting between CJC representatives and McMurtry in September 1983, Congress informed the Attorney General "that the climate within the Jewish community had changed" and "the leadership in the Jewish community [was] under strong pressure to move in the direction of action".[307] McMurtry's view, however, remained unchanged. According to Les Scheininger, who in 1983 became chairman of the CJC's Ontario region and attended the meetings with McMurtry, the Attorney General expressed sincerity and understanding, but was clear that he would not consent to a prosecution and did not think it was a good idea to charge Zundel.[308] The genuineness of Congress's change in position is open to question, as there remained significant internal concern over the wisdom of prosecution – in addition to the ever-present dissenting voice of Alan Borovoy. For example, at a meeting of the Ontario JPRC held shortly after the September 1983 meeting with McMurtry, Rabbi Jordan Pearlson (chairman of the National JPRC) declared that "[t]he naivety which presumes that exposure automatically destroys a hatemonger is utterly childish."[309]

Congress was not the only group in contact with the Attorney General. The CHRA continued to lobby McMurtry and filed complaints with Toronto Police attempting unsuccessfully to have Zundel charged.[310] B'nai Brith also met with McMurtry and, unlike Congress, was united in favour of prosecution.[311] Pressure also came from outside the Jewish community. In June 1983 Ontario opposition leader David Peterson claimed that Ontario had the reputation "of being the home of some of the most vicious antisemitic literature in this country" and asked McMurtry whether he would show leadership by instituting criminal proceedings against neo-Nazis like Zundel. McMurtry replied that he would "encourage the laying of charges" against Zundel once he obtained "evidence on which we have a reasonable chance of a successful prosecution" and that

[306] See Minutes of Meeting of Joint Community Relations Committee Ontario Region (29 June 1983), CJA (Fonds DA21, Box 19, File 10).
[307] Prutschi, "Prelude to Trial," *supra* note 4 at 57.
[308] Interview of Les Scheininger (9 February 2021) [on file with author] [Scheininger Interview]. See also "CJC, McMurtry discuss enforcing anti-hate laws," *Canadian Jewish News* 17.
[309] Minutes of the Joint Community Relations Committee Ontario Region (5 October 1983) at 6.
[310] See Interview of Mark Mendelson (21 April 2022) [on file with author] [Mendelson Interview].
[311] See Shefman Interview, *supra* note 299; Sandler Interview, *supra* note 299.

an unsuccessful prosecution would only encourage other hatemongers.[312] During the summer and fall of 1983 Peterson continued to press McMurtry to prosecute Zundel.[313]

The CHRA broke the impasse. Fed up with the lack of progress, the survivors decided to circumvent the Attorney General. On 18 November 1983, Citron initiated a private prosecution against Zundel for the crime of spreading false news, then section 177 of the *Criminal Code*.[314] The false news section dated back to the introduction of the *Criminal Code of Canada* in 1892 and its origins reach back to medieval times.[315] Oddly, the crime was abolished in England in 1887 but still found its way into Canada's first *Criminal Code* in 1892.[316] The provision had almost never been used.[317] As we saw in chapter 2, the CJC going back to the 1950s had viewed this section as a potential tool against antisemitism, but wanted it strengthened and was concerned with the vagueness of "public interest".[318] A lawyer named Robert McGee advised Citron and Smolack to use the false news section.[319] McGee had previously been the Deputy Crown Attorney for Ontario before leaving the government and moving into private practice in 1982, following which the CHRA retained him.[320] The false news provision had the obvious benefit of not requiring the consent of the Attorney General. Accordingly, Citron and Smolack were free to rely on the *Criminal Code* power to lay a private Information (i.e. swear under oath to the facts of an offence) before a Justice of the Peace alleging that a crime had been committed.[321] Citron and Smolack

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[312] Ontario, Legislative Assembly, *Hansard*, 32nd Leg, 3rd Sess, No 45 (14 June 1983), online: http://hansardindex.ontla.on.ca/hansardeissue/32-3/l045.htm
[313] See Prutschi, "Prelude to Trial," *supra* note 4 at 102; Tammy Karol, "Peterson urges action against racist material," *Canadian Jewish News* (22 September 1983) 3.
[314] Prutschi, "Prelude to Trial," *supra* note 4 at 106.
[315] *Zundel*, *supra* note 2 at 744-45.
[316] *Ibid* at 745.
[317] *Ibid* at 746, 755-56.
[318] See House of Commons, Special Committee on Bill No 93, *Evidence*, 21-7, vol 1, No 2 (3 March 1953) at 57-59.
[319] See Prutschi, "Prelude to Trial," *supra* note 4 at 105; Mendelson Interview, *supra* note 310; Interview of Catharine Finley and David Finley (28 March 2022) [Finley Interview] [on file with author].
[320] See *ibid*.
[321] See *Criminal Code* (version currently in force), *supra* note 20 s 504 and s 507. The *Criminal Code* was subsequently amended to require that a private information be referred to a provincial court judge (and not dealt with by the Justice of the Peace). See *ibid* s. 507.1. But this was not a requirement during the time period under discussion.

went with McGee to Old City Hall Courthouse in downtown Toronto and convinced a Justice of the Peace that sufficient grounds existed to proceed with the charge.[322]

Shortly after Zundel was charged, he appeared as a guest on Tom Cherington's political talk show on CHCH-TV in Hamilton, Ontario, appearing in-studio alongside Citron.[323] (Joana Kuras, a lawyer from the Ontario Advisory Council on Multiculturalism, was also an in-studio guest but received far less airtime than Citron and Zundel.) Zundel, in fact, had not yet learned of the charge against him; he was first informed by Citron on Cherington's program.[324] The hour-long show was tense and emotionally draining for all participants, including Cherington. Zundel sought to portray himself as a victim. He appeared combative and agitated, at several points raising his voice and pointing his finger at Citron. He accused her of sneaking around "like a bloody thief" to deny him his mailing privileges and trumpeted his victory before the Board of Review. Despite his victory, Zundel sounded embittered by the post office hearings and the temporary loss of his mailing rights. He also remained upset about the May 1981 demonstration in front of his house, accusing the crowd of threatening him and being "egged on by the JDL." Zundel brought with him copies of Hitler's *Mein Kampf* and Felderer's *Anne Frank's Diary – A Hoax*. Zundel quoted from *Mein Kampf* and called Hitler a "great genius". Citron kept her composure—which must have required tremendous fortitude—but was clearly pained by the encounter. (At least, she kept her composure on-air; according to Zundel, she threatened to throw a cup of coffee in his face during one of the commercial breaks.[325]) She refused to say Zundel's name or speak to him directly—referring to him throughout the program as "this person"—which upset Zundel further. Also appearing on the show by telephone were Ernst Koch, Consul General of the Federal Republic of Germany, and Borovoy, representing the CCLA. Koch responded to Zundel's claims that West

[322] See Mendelson Interview, *supra* note 310.
[323] Video of the show in its entirety may be found here: goyimtv.tv/v/3074802100/Ernst-Zundel-on--The-Tom-Cherington-Show---1983-. The content in the rest of this paragraph comes from the video of the program. The video does not have a date, but according to Zundel the show aired on 28 November 1983. See "Battle Royal Between Zündel & Zionists? An Invitation to the OPENING SALVOS of the GREAT HOLOCAUST TRIAL Old City Hall, Dec. 28th 1983, 2p.m. Courtroom 21," LAC (Fonds R9833-815-0-E, Vol 36, File FF-HP-205) ["Battle Royal Between Zündel & Zionists"].
[324] *Zundel, Re*, Transcript of Proceedings, *supra* note 248 at 3250-51.
[325] *Ibid*.

Germany was led by a "quisling" government. Astonishingly, Cherington permitted Zundel to question Koch directly. Koch quickly grew frustrated with Zundel and refused to engage further with him. Borovoy did not engage directly with Zundel either, but argued that racists were "marginal creeps who haven't made an impact" and that hate-speech laws were dangerous because they run too high of a risk of suppressing benign speech. Cherington also took four calls from the audience, all of whom addressed Zundel and sounded upset by his claims. One caller described himself as a Roman Catholic from Poland who had personally witnessed the machine-gunning of Jews during the war. Zundel was unmoved and accused Cherington of rigging the calls against him. Toward the end of the program, Citron, holding a copy of the *Charter of Rights and Freedoms*, claimed that the *Charter* did not protect libel and slander. She vowed: "We are going see to it that this man will be stopped." Zundel responded: "If you want to challenge me under the libel and slander laws in front of the Ontario courts, I'll have my day in court. So far I have done pretty well." In a letter to his followers after the program aired, Zundel wrote: "Blinded as she is by hatred and anger, Sabina Citron is offering us a victory which we could not hope to win so easily from the cooler and more calculating elders of Zion."[326]

Before Zundel could have his chance at victory, it remained to be determined what the Attorney General would do with the prosecution initiated by Citron's group. Once the charge was laid, McMurtry had three options: he could allow the case to proceed as a private prosecution, setting up an explosive situation in which McGee or other lawyers representing the CHRA would prosecute Zundel without the Crown's involvement; he could step in and end the prosecution by having the charge stayed or withdrawn; or he could have the Crown take over the case. McMurtry chose the third option. According to Weinstein, after the charge was laid, McMurtry agreed to meet with Citron and Smolack on the morning of Sunday 27 November 1983 at the CHRA's office. McMurtry was a huge football fan and had not realized when he scheduled the meeting that it coincided with Grey Cup Sunday, with the Toronto Argonauts set to face the BC Lions that

[326] Battle Royal Between Zündel & Zionists, *supra* note 323.

evening in the Canadian Football League's championship game (the Argonauts went on to defeat the Lions to win their first Grey Cup since 1952). McMurtry tried to reschedule but Citron refused. In Weinstein's telling, McMurtry "was a fanatical football fan. … I was a CFL fan at the time with the Toronto Argos and I used to go to games, so I knew how much it meant to him. So he's trying to get out of it, but [Citron] wouldn't relent." Prior to the meeting, Weinstein outfitted the meeting room with Zundel's hate-propaganda. As he recalled:

> I had all kinds of stuff [because] I used to go around speaking in various synagogues to prove my point of how dangerous they are and what they're sending out. So I had so much stuff. I had newspapers to show what they're putting out and posters they're putting out. I had it all – stickers, all that, with swastikas and everything. So that's how I outfitted the room in anticipation of McMurtry's coming.

McMurtry showed up as scheduled and looked at the material, following which he declared that he would recommend the Crown proceed with the charge.[327] Indeed, shortly thereafter the Crown took over carriage of the case.[328] McMurtry's decision was likely also influenced by discussions with Robert McGee after the charge was laid. Catharine Finley—the junior prosecutor on the ensuing criminal case alongside Crown counsel Peter Griffiths—recalled that on her first day of work in the Crown's office in the fall of 1983 she and Griffiths met with McGee, Citron, and Smolack to tell them the Crown was taking over the case.[329] (Citron and Smolack were, unsurprisingly, very pleased to hear the news.[330]) Griffiths, for his part, recalled that he was assigned the case in late-December 1983 and was told at that time that McMurtry had met with McGee and then decided to proceed with the prosecution.[331]

By laying the charge privately, Citron had backed McMurtry into a corner: to withdraw the charge or allow it to proceed privately risked signalling that the government sided with Zundel or did not care about the Jewish community. The same could be said for Congress, which was now placed in a situation where—despite lingering reservations over the wisdom of a prosecution—it could not maintain legitimacy while sitting on the sidelines. As Farber put it: "we had no choice,

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[327] Here and above in this paragraph, see Weinstein Interview, *supra* note 188. Regarding the 1983 Grey Cup, see "Grey Cup '83: Argos end drought at Lions' expense," *Vancouver Sun* (28 November 1983) C3.
[328] See Prutschi, "Prelude to Trial," *supra* note 4 at 107.
[329] Finley Interview *supra* note 319.
[330] *Ibid*.
[331] Interview of Peter Griffiths (6 May 2022) [on file with author].

remember. It wasn't because we wanted to – believe me. I mean I still remember that meeting where it was unanimously decided to [participate]. But boy oh boy – 'she's twisting our arm'; not twisted, 'she *broke* our arms', one person said."[332]

Zundel's prosecution would proceed. However, the Crown chose to continue under the false news section rather than re-laying the charge under wilful promotion of hatred, apparently because McMurtry still feared the latter provision's weakness.[333] It would prove a fateful error.

IX. "If only people had listened, Hitler could have rid the world of Jews forever": James Keegstra's background and teachings

As of the fall of 1983 the hate-speech provisions had been enshrined in the *Criminal Code* for nearly fourteen years but had scarcely been used. As Holocaust survivors had predicted prior to their enactment, the hate-speech sections seemed completely toothless – so much so, in fact, that a different provision entirely had been used to charge Zundel, arguably the world's foremost neo-Nazi. But in January 1984—not long after Zundel was charged—the wilful promotion of hatred section would at last be weaponized against antisemitism. Surprisingly, the prosecution emerged from the proverbial *yehupetzville* of Eckville, Alberta, a small town in central Alberta that contained no Jews.[334]

James (Jim) Keegstra was born in March 1934 in Kirkcaldy, Alberta—approximately 100 km southeast of Calgary—to Calvinist parents who had immigrated from Holland in 1928. The family subsequently moved to Eckville, a small town close to Red Deer with a population of 195 at the end of the Second World War, which grew to about 800 people by the 1980s. (Eckville is located roughly between Edmonton and Calgary, about 200 km from each.) After completing high school, Keegstra trained as an auto mechanic and then enrolled at the University of Calgary in 1959, eventually obtaining a Bachelor's of Education in 1967. Keegstra began teaching in 1961

[332] Farber Interview, *supra* note 160 (emphasis in original).
[333] See Paul Bilodeau, "Zundel verdict sets a formidable legal precedent," *Toronto Star* (21 May 1988) D6; Farber Interview, *supra* note 160.
[334] A *yehupetzville*, whose etymology derives from the fictional town of Yehupetz made famous by the Yiddish author Sholom Aleichem, is often used to represent a place in the middle of nowhere.

and obtained a permanent position at Eckville High School in 1968 after completing his university degree. He initially taught automotive and industrial arts, later moving into law, mathematics, science, and social studies. Keegstra thrived in Eckville; he became a respected member of the community and was elected to Eckville town council (by acclamation) in 1974. In 1980 he was elected mayor of Eckville (also by acclamation).[335]

Keegstra was a member of the Social Credit Party of Canada. The Social Credit Party was founded during the Great Depression in accordance with the theories of Major CH Douglas, an eccentric Englishman who alleged that the worldwide economic crisis was caused by a cabal of international bankers who manipulated the financial credit system. To wrest control back from these bankers, Douglas argued it was necessary to issue "social credit" in the form of a dividend for every citizen, permitting the recovery of individual purchasing power. Social Credit took root particularly in Alberta, where the party swept into power in 1934 under the leadership of William Aberhart. The Social Credit Party controlled the Alberta legislature until its defeat at the hands of Peter Lougheed's Progressive Conservatives in 1971.[336]

Social Credit theory had antisemitic underpinnings. Douglas interwove antisemitism into his teachings, contending for example that, "While all international Financiers are not Jews, many are, and the observable policy of these Jews and of Freemasonry is that of the Talmud." (In 1939, Douglas wrote to Hitler to warn him that "The Jew…is the parasite upon and corruption of every civilization in which he has obtained power.") Under the leadership of Ernest Manning—Alberta's premier from 1943-1968—the party cracked down on antisemitism. Nevertheless, some anti-Jewish leanings remained among adherents of Social Credit. Douglas's theories would be echoed

[335] See David Bercuson & Douglas Wertheimer, *A Trust Betrayed: The Keegstra Affair* (Toronto: Doubleday, 1985) at 6-7, 16-18; Steve Mertl & John Ward, *Keegstra: The Trial, The Issues, The Consequences* (Saskatoon: Western Producer Prairie Books, 1985) at 10-11, 21-22; Robert Mason Lee, "Keegstra's Children," *Saturday Night* (May 1985) at 41; "Two councils in by acclamation," *Red Deer Advocate* (20 September 1974) 2.
[336] See Alan Davies, "The Keegstra Affair" in Alan Davies, ed, *Antisemitism in Canada: History and Interpretation* (Waterloo, Ont: Wilfrid Laurier, 1992) at 236-37.

and expanded upon by Keegstra, who twice ran unsuccessfully as the Social Credit candidate for Red Deer in the federal elections of 1972 and 1974, prior to his election to Eckville town council.[337]

Keegstra's philosophy combined Douglasite Social Credit theory and Dutch Calvinist Christianity with antisemitic currents that he picked up along the way. As Holocaust revisionism gained currency in the 1970s, Keegstra became an avid consumer of material disseminated by the Institute for Historical Review and used IHR-supplied material in his classroom. Gradually, these theories came to dominate his lectures on history as part of his social studies courses at Eckville High School. Keegstra's teachings are complex and have been well-summarized elsewhere,[338] but boil down to his belief that Jews were at the root of all evil and that the Talmud was an anti-Christian and perverted text. In fact, Jews—working in league with a secret society formed in 1776 known as the Illuminati—were responsible for, among other things, the Russian Revolution and both world wars. The Jewish-Illuminati conspiracy controlled the banking system, the media, Hollywood, the universities, most publishers, most churches, and almost all political leaders, and the Holocaust was a hoax perpetrated by the Jewish people for economic gain and to establish the State of Israel. Although Keegstra focused primarily on Jews, his teachings were also anti-Catholic.[339]

Keegstra was a popular and well-liked teacher, even though in 1971 he was charged with assault for hitting a 15-year-old student (Keegstra argued at trial that the beating was a reasonable use of his teacher's authority, and a jury acquitted him).[340] His students were graded based on their ability to regurgitate Keegstra's worldview. For instance, one student received a grade of 85% on

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[337] See *ibid* at 237-38; Mason Lee, *supra* note 335 at 42; "Socreds pick Jim Keegstra," *Red Deer Advocate* (6 July 1972) 3; Jim Cunningham, "Towers' rivals buried by 15,000 votes," *Red Deer Advocate* (31 October 1972) 3; Jim Lozeron, "Socred Jim runs again," *Red Deer Advocate* (25 May 1974) 3; "Here's how Alberta went," *Red Deer Advocate* (9 July 1974) 3. On antisemitism within the Social Credit Party, see eg Allan Mayer, "Keegstra's right, some Socreds say," *Edmonton Journal* (3 May 1983) 1.

[338] See *ibid*; Bercuson & Wertheimer, *supra* note 335 at 21-64; Mertl & Ward, *supra* note 335 at 25-29, 41-48.

[339] See *ibid*. On Keegstra's philosophy and its ties with Social Credit theory, see "Keegstra insists system rotten," *Red Deer Advocate* (3 July 1972) 2; Jim Keegstra, "Case for Keegstra," *Red Deer Advocate* (8 June 1974) 2; Douglas Wertheimer, "World Jewish Conspiracy is Taught in Town Without Jews," *The Jewish Star (Calgary Edition)* (29 April – 12 May 1983) 1 ["World Jewish Conspiracy"]. On Keegstra's antisemitism and Holocaust denial, including influence by the IHR, see Kathryn Warden, "Jim Keegstra: Persecution reinforces his beliefs," *Calgary Herald* (3 June 1983) 5; "Keegstra's children," *supra* note 335 at 41-42.

[340] Mertl & Ward, *supra* note 335 at 24; "Keegstra's children," *supra* note 339 at 38-41.

an essay in which they had written: "The Jews believe in violence and revolution to gain their end, while Christians believe in serving with compassion for each other. They live by the Bible and the Jews live by the Talmud, where evil acts are encouraged."[341] Another student received 75% for an essay that included the phrase: "If people would have been listening, [Hitler] could have rid the world of Jews forever – it's funny how people never want to hear the truth."[342] In contrast, when a student used library material to research an essay on Catholicism for Keegstra's class in 1976, he refused to grade it.[343]

Keegstra introduced his anti-Jewish teachings into his classroom around 1971 and taught them largely unimpeded for about a decade.[344] That Keegstra's views escaped the attention of the Jewish community is unsurprising because there were no Jews in Eckville. In fact, in all of Alberta as of 1981 there were only about 10,000 Jews, who lived predominantly in Calgary (5,500) and Edmonton (4,200).[345] Very few lived in rural areas.[346] As a result, the first complaints against Keegstra focused on his anti-Catholicism.[347] However, these early complaints were brushed off by school officials.[348] Keegstra's downfall occurred largely through the determination of two mothers of children in Keegstra's classes: Margaret Andrew and Susan Maddox. Andrew, a Catholic, was upset that her children were being taught antisemitism and anti-Catholicism. She filed a written complaint with the Lacombe County School Board in 1978; Keegstra was by then the mayor of Eckville and no significant action was taken.[349] Subsequently, Keegstra toned down his anti-Catholic teachings and placed more emphasis on anti-Jewish material.[350] Andrew renewed her complaint in January 1982, following the 1980-81 school year in which her daughter was in Keegstra's grade 12 social studies course and her twin sons attended Keegstra's grade 9 social

[341] Bercuson & Wertheimer, *supra* note 335 at 61.
[342] *Ibid*; "Keegstra's children," *supra* note 339 at 38.
[343] Bercuson & Wertheimer, *supra* note 335 at 61.
[344] "Keegstra's children," *supra* note 339 at 42.
[345] Bercuson & Wertheimer, *supra* note 335 at 130.
[346] *Ibid*.
[347] *Ibid* at 68-69.
[348] *Ibid* at 69-73.
[349] *Ibid* at 73-75.
[350] *Ibid* at 84.

studies course.[351] This time, she was intent on having Keegstra removed.[352] When it seemed no action had been taken, Andrew drew up a petition, obtained approximately sixty signatures, and presented it to the School Board on 11 May 1982.[353] She followed this up with a letter to Alberta's Minister of Education Dave King in early June.[354] In the fall of 1982, Maddox—whose son Paul entered grade nine at Eckville High School in September 1982 and was assigned to Keegstra's social studies and science classes—also grew alarmed by what her son was being taught.[355] She made a complaint to the School Board and attached a photocopy of her son's classroom notes.[356] Maddox followed this up by confronting Keegstra and the school principal in person.[357] In response, Keegstra gave Maddox some of his source material—to correct her "slanted" view of history—which a horrified Maddox forwarded to the School Board.[358] After further correspondence with Keegstra and hand-wringing by the Board, Keegstra was fired on 7 December 1982.[359] Keegstra's popularity was evident after his dismissal; on 13 December 1982 the School Board received a petition signed by 94 students protesting Keegstra's firing alongside a similar petition signed by 128 parents and former students.[360] Only about 20 active students at Eckville High School refused to sign the petition.[361]

As was his statutory right, Keegstra appealed the School Board's decision to an entity known as the Board of Reference, which convened a hearing before a single judge of the Court of

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[351] *Ibid* at 98.
[352] *Ibid* at 98.
[353] *Ibid* at 99. Unbeknownst to Andrew, an investigation of Keegstra had been commenced by the superintendent of the Lacombe County School Board following additional complaints made in December 1981. In March 1982 and again in April 1982 the Board instructed Keegstra to amend his classroom instruction to align with the curriculum, which Keegstra disregarded (See *ibid* at 87-98; Howard Solomon, "Complaint triggers trek to Red Deer courtroom," *Calgary Herald* (8 April 1985) 5; *Keegstra v. Board of Education of Lacombe (County)*, 1983 CarswellAlta 551, [1983] AWLD 552 [*Keegstra v Board of Education*]).
[354] Bercuson & Wertheimer, *supra* note 335 at 101. King responded to Andrew in October 1982, writing that "bigotry and parading falsehood as truth" had no place in Alberta's classrooms but that the School Board was "making an effort to deal with the situation" and King was confident that its efforts would result in positive action. (*ibid* at 102).
[355] *Ibid* at 102-03; *Keegstra v Board of Education*.
[356] *Ibid*.
[357] Bercuson & Wertheimer, *supra* note 335 at 104.
[358] *Ibid* at 104-05; *Keegstra v Board of Education*.
[359] Bercuson & Wertheimer, *supra* note 335 at 105-09.
[360] Jim Ibister, "Student spurns petition for teacher," *Red Deer Advocate* (15 December 1982) 13.
[361] *Ibid*.

Queen's Bench of Alberta.[362] Although there had been a growing number of news stories since Keegstra's dismissal, the Board of Reference hearing received widespread publicity and revealed for the first time what Keegstra had been teaching and how long he had been teaching it.[363] Susan Maddox, Paul Maddox, Margaret Andrew, and school superintendent Robert David testified on behalf of the School Board.[364] Some of the students' essays and notes were admitted as evidence at the hearing. This revealed that the students had written, among many other things, that Hitler was soft on the Jews; that Franklin Roosevelt had struck a secret deal with the Zionists to secure the Jewish vote and the support of the Jewish-controlled press; and that it was important to "get rid of every Jew in existence so we may live in peace and freedom."[365] Keegstra took the stand and—as he would later do in his criminal trial—frankly admitted to his beliefs and to having taught them to his students (although he claimed that he cautioned his students that his perspective was not widely accepted).[366] He testified that Jews were behind nearly every war and insurrection; that Jesus Christ was not a Jew; that Israel was a nation of atheists; that the Talmud authorized Jews to kill Gentiles; that feminism was a Jewish ploy aimed at undermining Christian values; and that Jews caused financial havoc by creating money out of nothing (Keegstra clarified to the confused lawyer for the School Board that Jews did so by charging excessive interest on loans).[367] Controversially, the Alberta Teachers' Association (ATA) defended Keegstra at the hearing even though it was not legally required to do so.[368] The ATA's seemingly enthusiastic support of Mr. Keegstra's position did not go unnoticed by Alberta's Jewish community.[369] The hearing

[362] See *Keegstra v. Board of Education*, *supra* note 353. In Alberta, Boards of Reference are quasi-judicial bodies with the power to hear sworn testimony. (Bercuson & Wertheimer, *supra* note 335 at 110-11.)
[363] Bercuson & Wertheimer, *supra* note 335 at 112.
[364] Robert Lee, "Keegstra teachings 'alarming'," *Red Deer Advocate* (22 March 1983); "Teacher maligned Jews, hearing told," *Calgary Herald* (24 March 1983) 24
[365] "Keegstra's children," *supra* note 335 at 43.
[366] *Keegstra v. Board of Education*, *supra* note 353.
[367] Bercuson & Wertheimer, *supra* note 335 at 113-14; Robert Lee, "Keegstra claims Jewish plot," *Red Deer Advocate* (25 March 1983) 1; "Teaching defended," *Calgary Herald* (25 March 1983) 61; Robert Lee, "Even PM's rose 'socialism sign' Keegstra says," *Red Deer Advocate* (26 March 1983) 1.
[368] Bercuson & Wertheimer, *supra* note 335 at 111. The ATA explained that while it was not obligated to supply Keegstra's defence it was its general practice to lend assistance to fired teachers. See "'Law has spoken': No ATA appeal planned," *Red Deer Advocate* (15 April 1983) 10.
[369] See Letter from Sheldon M Chumir to Arthur Cowley (4 May 1983), LAC (R9833-4449-X-E, Vol 225, File 1983-1989).

commenced in Edmonton on 22 March 1983 and concluded on 28 March 1983.[370] On 14 April 1983, the Board of Reference denied Keegstra's appeal and upheld his dismissal.[371] Asked for comment after the verdict, Keegstra replied that the judiciary had been ensnared by the Jewish conspiracy.[372]

X. "If this was in Toronto, we would have been down the Crown's ass": The Jewish community response to Keegstra

As no Jews lived in or around Eckville, the Jewish community was at first unaware of the emerging controversy. It appears that the first time anyone from the Jewish community was notified of Keegstra was in January 1982. A member of the Lacombe County School Board who had seen one of the student essays was aghast by its contents—"I could not believe that a kid in our school system could write that kind of essay. What the hell was going on?"—and was disturbed others did not seem share this sense of outrage.[373] The board member passed this information on to Harry Shatz, Executive Director of the Calgary Jewish Community Council, the Congress-affiliated group in Calgary.[374] Internal Jewish politics intervened and let this early opportunity to expose Keegstra slip away. Shatz suggested the informant photocopy the material and send it to the Jewish Federation of Edmonton, Edmonton's Congress-affiliated group (JFE).[375] Shatz did not notify the JFE directly; relations between the Calgary and Edmonton groups were strained at the time.[376] The informant had no access to a photocopier and never sent the material to Edmonton.[377] In the fall of 1982, the School Board informant telephoned Shatz again and sent him further evidence of what Keegstra had been teaching.[378] This time, Shatz discussed the material with others on the Council and they decided to share the material with Congress leaders in eastern

[370] *Ibid* at 112.
[371] *Keegstra v. Board of Education*, *supra* note 353.
[372] Robert Lee, "Firing upheld, Keegstra says courts in conspiracy," *Red Deer Advocate* (15 April 1983) 1.
[373] Bercuson & Wertheimer, *supra* note 335 at 127.
[374] *Ibid*.
[375] *Ibid*.
[376] *Ibid* at 127-28.
[377] *Ibid* at 127.
[378] *Ibid*.

Canada.[379] (Reflecting their poor working relationship, the Calgary group did not reach out to Edmonton until the third week of January.[380]) Ben Kayfetz was appalled by what he saw. He wrote to Shatz: "I have never seen such systematic antisemitism in pedagogic form regurgitated by pupils."[381]

This sense of outrage was far from universal in Congress, which failed to push for an aggressive response and seemed content to leave the situation in the hands of western leaders. When a Calgary representative notified the National JPRC about Keegstra during a January 1983 meeting, this elicited little discussion.[382] Notably, at this time there were only three National JPRC members in attendance from western Canada—one from Calgary and two from Winnipeg—compared with 29 from Ontario and nine from Quebec.[383] When the matter came up at a subsequent meeting of the Ontario JPRC, it again garnered only brief attention.[384] One of the voices urging a stronger reaction was Borovoy, who protested at a JPRC meeting in May 1983 that, "We are not dealing with a minor aberration but a major outrage" and advocated for a better-coordinated lobbying effort to push for Keegstra's resignation as mayor of Eckville.[385] (Borovoy did, however, argue against any attempt at prosecuting Keestra, which he said would be a "useless legalism."[386]) Borovoy faced opposition from others who were concerned that such a campaign would provoke backlash.[387] In general, according to historians David Bercuson and Douglas Wertheimer, Congress leaders offered no guidance and were "confused about what had happened

[379] *Ibid* at 127-28.
[380] *Ibid* at 128.
[381] *Ibid*.
[382] Minutes of the National Joint Community Relations Committee (16 Sunday 1983), CJA (Fonds DA21, Box 19, File 10) at 3.
[383] *Ibid* at 1.
[384] See Minutes of the Joint Community Relations Committee Ontario Region (6 April 1983), CJA (Fonds DA21, Box 19, File 10) at 5.
[385] Minutes of the Joint Community Relations Committee Ontario Region (25 May 1983), CJA (Fonds DA21, Box 19, File 10) at 5 [25 May 1983 JPRC Meeting]; Minutes of the Joint Community Relations Committee Ontario Region (4 May 1983), CJA (Fonds DA21, Box 19, File 10) at 2,4 [4 May 1983 JPRC Meeting].
[386] 4 May 1983 JPRC Meeting, *supra* note 385 at 2.
[387] 25 May 1983 JPRC Meeting, *supra* note 385 at 4.

and what should be done."[388] In Farber's view, the toned-down response reflected Congress's geographical biases:[389]

> Keegstra was really a nobody out west, right? He was a teacher in a small town that nobody had ever heard of before. There wasn't a huge interest in going after Keegstra. … I mean … everything the [hate-speech] law was written for, [was] embodied in James Keegstra. So … the only reason that we didn't push it was because it was in Red Deer, Alberta. I think if James Keegstra was a teacher in Toronto, we would have been down the Crown's and the police's ass, getting this done. But Red Deer did not excite anybody.

In fact, Congress leaders jokingly referred to Eckville as *Eck-velt* – Yiddish for "the edge of the world."[390]

The muted reaction in the east may also have reflected the reasonably-held view that westerners did not take kindly to easterners intervening in their affairs.[391] For instance, the Association of Holocaust Survivors was hesitant to respond aggressively for fear of offending western sensibilities. As Zablow put it, when they got wind of the Keegstra affair, "we didn't want everybody from Montreal on it, because they hate the Easterners … [so] we ha[d] to be very careful there."[392] Zablow ruled out any demonstration.[393] Instead, he sent a small delegation of three survivors—making sure to include one from western Canada—to meet with Eckville students.[394] The survivors engaged in a public discussion with students, parents, and teachers.[395] They were well-received.[396] The principal of Eckville High School wrote a kind note to Zablow after the visit expressing his appreciation for their "willingness to recall painful memories of the concentration camps" which was "appreciated and should leave a lasting impression on the students."[397] One of

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[388] Bercuson & Wertheimer, *supra* note 335 at 133.
[389] Farber Interview, *supra* note 160.
[390] Bercuson & Wertheimer, *supra* note 335 at 138; 4 May 1983 JPRC Meeting, *supra* note 386 at 3.
[391] See Barrett, *supra* note 15 at 229.
[392] Zablow Interview, *supra* note 72 at 2A-14.
[393] *Ibid*.
[394] *Ibid* at 2A-14-15.
[395] See Mark Klein, "Beer gives lesson in Eckville," 2:2 Hillel Star (November-December 1983) 1.
[396] See eg Ross Henderson, "Holocaust survivors' tales move students to tears," *Red Deer Advocate* (20 September 1983) 1; "Jews' stories move students of Eckville," *Calgary Herald* (20 September 1983) 2; Karen McCall, "Nazi film is eye-opener for Eckville students," *Eckville Examiner* (27 September 1983) 1; Tammy Karol, "Alberta students hear, see horrors of Holocaust," *Canadian Jewish News* (29 September 1983) 3; Albert Martinaitis, "Jewish groups 'ignored' Holocaust denial" *Montreal Gazette* (5 December 1983) A4.
[397] Letter from E Olsen to Lou Zablow (undated), CJA**.** See also Letter from Howard L Starkman to Lou Zablow (25 October 1985), CJA**.**

Keegstra's students, Brad Andrew—who would later testify for the Crown at Keegstra's trial—also wrote Zablow a nice letter thanking him for the visit.[398]

Another member of the eastern Jewish community received a less welcoming reception than Zablow. When North York mayor Mel Lastman heard about Keegstra, Lastman announced that he would soon be visiting Eckville to show the students what a "real live Jew" looked like.[399] In response, Herb Katz, chairman of the Community Relations Council of the JFE, declared that Keegstra was a "local problem" and threatened to put Lastman "on the next plane back to Toronto" if he came to Alberta.[400] Lastman never made the trip.[401]

But in Alberta, too, there was uncertainty over how to respond. At first, Jewish leaders moved cautiously out of fear of re-awakening latent antisemitism. When news of Keegstra's firing first disseminated in January 1983, the prevailing reaction among some in community leadership was that further publicization was undesirable.[402] According to Bercuson, who was then head of the local chapter of B'nai Brith and Professor of History at the University of Calgary (he remains in the latter role), he and others at the time viewed leadership as unassertive and thought they were not doing enough. As he recounted,

> we felt [the Calgary Jewish Community Council] had an older, more stodgy, more conservative group. … That doesn't mean it was true. … But at the time it sort of suited our narrative to think that we were the Young Turks and they were the old accommodating … what we call the *sha shtil* people. … Don't make noise. … And we felt that they were moving it too slowly and too deliberately.[403]

Bercuson recalled that when he and others started to raise alarm bells, they were told by community leaders to slow things down and not attract too much attention.[404] Another member of the Jewish

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[398] Letter from Brad Andrew to Lou Zablow (20 October 1983), CJA (Fonds P17/8, Box 2, File 43). Andrews had evidently had a change of heart, as on September 20, following the survivors' visit, the *Calgary Herald* quoted Andrew as saying "nothing the Holocaust survivors said … had changed his mind." ("Jews' stories move students of Eckville," *supra* note 396).
[399] See Robert Lee, "Jewish mayor seeks to enlighten Eckville," *Red Deer Advocate* (12 April 1983) 1; 4 May 1983 JPRC Meeting, *supra* note 386 at 1; "New teacher replaces conspiracy theories," *Red Deer Advocate* (15 April 1983) 10.
[400] "Stay out of town, Jewish mayor told," *Calgary Herald* (14 April 1983) 10.
[401] See 4 May 1983 JPRC Meeting, *supra* note 386 at 1 (reporting that "[t]hrough the efforts of various persons [Lastman] was dissuaded.")
[402] Bercuson & Wertheimer, *supra* note 335 at 129, 132.
[403] Interview of David Bercuson (7 January 2022) [on file with author] [Bercuson Interview].
[404] *Ibid*.

community accused Jewish leaders around this time of being obsequious, which he characterized as sickening and despicable.[405] Hal Joffe, then a board member of the Calgary Jewish Community Council, agreed that in "the early 80's … there was still as it were [a] *sha shtil*, or … *zug gornisht* kind of attitude in the community. … [A] lot of attitude was to fly under the radar."[406] The initial response to Keegstra was also hampered by the poor relationship between the Edmonton and Calgary groups, which resulted in a Jewish-community reaction that was disunited and *ad hoc*.[407]

This reserved and *ad hoc* approach became increasingly untenable because the revelations affected Jewish Albertans deeply, undermining a sense of belonging that some had taken for granted. Bercuson, for one, noted that his father and uncle had served in the military and that his cousin—like many other Jews—was killed in action fighting for Canada in the Second World War.[408] Bercuson had always been secure in his identity as a Canadian, but when Keegstra emerged

> I personally felt alienated in my own province … [M]ost of the family – the male part of the family – had all put on a uniform in the Second World War and one of them had been killed in action. So the family gave a life to the war effort. … I've always felt confident in being a Canadian and playing a role in Canadian society and contributing to it in whatever way. But during the Keegstra affair I felt alienated. I felt – I don't know – who's on his side and who's on my side? I felt that for a while. I don't feel it anymore – I haven't felt it for a long time. But I did feel it at the time. I remember that.[409]

What was deeply upsetting to many Jews was the sense that Keegstra might represent only the tip of an antisemitic iceberg. In addition to the public support of the Alberta Teachers' Association and many of his students, Keegstra's exposure inspired others to publicly declare allegiance with his views. For example, after the Board of Reference decision was released, a member of the Lacombe County School Board was quoted as saying that he could find no fault in what Keegstra was teaching.[410] Letters to the editor appeared defending Keegstra, including a long letter

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[405] Quoted in Barrett, *supra* note 15 at 229.
[406] Interview of Hal Joffe (17 January 2022) [on file with author] [Joffe Interview]. Joffe noted, however, that he did not recall this attitude within Congress or the board of the Community Council. The Yiddish phrases *sha shtil* and *zug gornisht* translate roughly into "keep quiet" and "say nothing".
[407] Bercuson & Wertheimer, *supra* note 335 at 129.
[408] Bercuson Interview, *supra* note 403. With respect to David Bercuson's cousin Bernard Bercuson who perished in Word War II, see David J Bercuson, "A Halifax: The Story of MX 899," 30:2 *Canadian Military History* 1.
[409] *Ibid*.
[410] Robert Lee, "Keegstra should be rehired, trustee says," *Red Deer Advocate* (16 April 1983) 1.

published by the *Lethbridge Herald* in which the writer argued that the Holocaust was a hoax and that millions of others agreed with Keegstra but were too afraid to say so publicly.[411] Several prominent members of Alberta's Social Credit Party were also enthusiastic in their support. James Green, the party's Alberta Director, called Keegstra's persecution akin to McCarthyism and commented that, "Most of these Jews are not representative of the mass of Jewish people but are conspiring without the knowledge of the Jewish people to promote the Beast and the AntiChrist"; Tom Erhart, the Party's national vice-president, said that Keegstra was right about the Jews and added: "we're tired of listening to this Holocaust, 6 million Jews who never were. It was totally impossible for 6 million Jews to die in the concentration camps. They had shower baths but never a gas chamber."[412] When leader of the federal Social Credit Party Marshall Hattersley tried to kick out Keegstra, Green, and Erhart, the national executive voted to reinstate them, and Hattersley instead was forced to resign.[413] A subsequent attempt to suspend Keegstra from the party was also voted down.[414]

Perhaps more disconcerting than these public displays of support was silence from much of the non-Jewish community. By the end of April 1983, with the exception of the Presbyterian Church in Canada, no organizations or community groups had expressed support for Alberta's Jews.[415] As Herb Katz put it, what was disturbing about Keegstra was "not the 'world Jewish conspiracy' but the non-Jewish conspiracy of silence."[416] Silence from church groups was particularly notable since Keegstra purported to speak on behalf of Christianity. When the *Calgary Herald* phoned eight church groups in late April 1983, it found that not one had formulated an official response to antisemitism or the Keegstra affair.[417] Rabbi Louis Schecther of Calgary's

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[411] RAB, "Almanac backs up Keegstra," *Lethbridge Herald* (7 June 1983) 7. See also eg James A Green, "Keegstra case and McCarthy," *Red Deer Advocate* (9 April 1983) 4.
[412] Green, *supra* note 411; Don Braid, "Alberta's unrepentant band of bigots," *Toronto Star* (22 May 1983) F3.
[413] "Keegstra back in, Socred leader quits," *Globe and Mail* (20 June 1983) 8. Keegstra was at the time a national vice-president of the Party, a position he had been elected to around early April 1983. See "Parting of the ways," *Globe and Mail* (21 June 1983) 6.
[414] "Socreds won't oust Keegstra," *Canadian Jewish News* (17 November 1983) 1.
[415] Bercuson & Wertheimer, *supra* note 333 at 163.
[416] "World Jewish Conspiracy," *supra* note 339.
[417] Nancy Millar, "Silence on anti-Semitism is disgraceful," *Calgary Herald* (30 April 1083) G10.

Beth Israel Synagogue called the reaction from church leaders "deathly silent" and said he had "never been so disappointed in my 14 years in Calgary."[418] However, church leaders rejected this criticism, arguing that there was no need for a public statement.[419] In fact, Rev. Ken MacLeod of the Eckville Presbyterian Church conceded that members of his congregation agreed with Keegstra's views.[420]

Nor did the government show much concern for the Jewish community. Premier Lougheed issued no statement on Keegstra until the middle of May – and only did so only under intense pressure to respond to the Stephen Stiles affair, as discussed below. Moreover, the government did not take any steps to revoke Keegstra's teaching licence. When Ray Martin of the NDP pressed Minister of Education Dave King to strip Keegstra of his licence, King refused even though he acknowledged that he had the power to do so.[421] Instead, the government waited for the Alberta Teachers' Association to complete its investigation before removing Keegstra's licence, which did not happen until October 1983.[422] In addition, Keegstra remained mayor of Eckville. A motion by an Eckville town councillor in May 1983 calling for Keegstra's resignation was defeated by a 4-2 vote.[423] These showings of tacit (and explicit) support for Keegstra made Albertan Jews feel alienated in their own homes.[424] As Katz explained, "what has shaken our fundamental confidence is the failure of the society in which we live to respond effectively and morally to this challenge."[425]

Jewish leaders gradually pursued a more aggressive strategy. Much of the response was spearheaded by Katz and Hillel Boroditsky of the Jewish Federation of Edmonton. Katz had just read *None is Too Many*—Irving Abella's and Harold Troper's devastating account of the Canadian

[418] Bob Bettson, "Jews lash out over 'silence'," *Calgary Herald* (5 May 1983) 1.
[419] Bob Bettson, "Church leaders reject criticism from Jews," *Calgary Herald* (6 May 1983) 9.
[420] Millar, *supra* note 417.
[421] *Legislative Assembly of Alberta Debates*, 20-1 (18 April 1983) at 603.
[422] "Alberta will withdraw Keegstra's certificate," (12 October 1983) 11. King argued he was following usual practice not to revoke a teaching licence absent a recommendation by the ATA.
[423] "Bid to oust Keegstra fails on 4-2 vote," *Globe and Mail* (18 May 1983) 10.
[424] See Bercuson Interview, *supra* note 403.
[425] "Securing Values through Structures: The Submission of the Jewish Federation of Edmonton to the Committee on Tolerance," *The Jewish Star* (March 1984) 5E.

government's determination to keep Jews out of Canada leading up to and during the Second World War—and felt ashamed by the actions of Jewish leaders during the war.[426] He was determined "to fight tooth and nail" against antisemitism.[427] Katz and Boroditsky decided that as much publicity as possible should be brought to bear on the events in Eckville.[428] They succeeded in getting the media to report on the Keegstra affair and take it seriously.[429] In addition, Katz (unsuccessfully) lobbied King and the Alberta Teachers' Association for revocation of Keegstra's teaching licence.[430] The Community Relations Committee of the JFE set up legal and outreach sub-committees to manage the response to antisemitism.[431] Bercuson, on behalf of Calgary B'nai Brith, also played an important role in repeatedly and publicly calling out the government and church leaders for their silence and lobbying for Keegstra's decertification.[432] Furthermore, Katz and Sheldon Chumir, a lawyer from Calgary, attended the Board of Reference hearings, provided volunteer assistance to the School Board's lawyer, shared information with the media, and spoke to the residents of Eckville.[433]

Jewish leaders did not, however, want criminal charges. In late April 1983 the JFE's legal committee met to discuss the issue and decided that a hate-propaganda prosecution against Keegstra was inadvisable. The group concluded that charging Keegstra might turn him into a "civil rights hero."[434] Moreover, with the enactment of the *Charter* in 1982, there was now the risk that the law might be unconstitutional.[435] The Jewish community's views on prosecution dovetailed with the government's: Attorney General Neil Crawford commented around the same time that he

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[426] Bercuson & Wertheimer, *supra* note 333 at 133.
[427] *Ibid*.
[428] *Ibid* at 133.
[429] *Ibid* at 134, 136-37.
[430] See Letter from CH Katz to Executive Assistant to the Minister of Education (21 April 1983), Edmonton, Provincial Archives of Alberta [henceforth, "PAA"] (PR1985.0401/2193, Box 176); "Huge Turnout Decries ATA, Desires Dismissal of Stiles," *Jewish Star* (Edmonton Edition) 1 ["Huge Turnout Decries ATA"].
[431] "Huge Turnout Decries ATA," *supra* note 430.
[432] See eg Bob Bettson, "Anti-Semitism makes his blood boil," (1983 May 7) 5; "World Jewish Conspiracy," *supra* note 339.
[433] World Jewish Conspiracy," *supra* note 339.
[434] Robert Lee, "Keegstra hate case scrapped," *Red Deer Advocate* (27 April 1983) 1B.
[435] *Ibid*.

doubted there was enough evidence to charge Keegstra with wilful promotion of hatred.[436] Crawford added that he feared an acquittal and that a trial might "attract other irrationals"[437]

XI. "This is a new Alberta and this is something we have to do": Stephen Stiles and the laying of charges against Keegstra

Jim Keegstra might have faded into obscurity if not for a rookie Member of the Alberta Legislative Assembly named Stephen Stiles. On 20 April 1983 a front-page article in the *Edmonton Journal* reported that Stiles had questioned the existence of the Holocaust.[438] According to the article, Stiles had said: "What was the Holocaust? I mean, The Holocaust was the name of a movie. It sold and made a lot of money for the people who produced it. … Are we being exposed to a great deal of popular myth perhaps?"[439] Informed of these remarks, the government defended Stiles, stated that it had no intention of disciplining him, and suggested his comments had been misunderstood.[440] In response, the *Journal* published a transcript of the interview, which made clear that Stiles had been accurately quoted and, if anything, his comments were even worse than had been initially reported.[441] After an intense caucus meeting, on 21 April 1983 Stiles rose in the legislature and apologized to the Jewish community and others whom he had offended with his remarks, saying that he had "no doubt that horrible atrocities were committed principally but not exclusively against the Jewish people" during the Second World War.[442] Crawford spoke after Stiles and dissociated the government from Stiles's remarks.[443] Stiles then promptly rendered the

[436] "Charge against teacher eyed," *Calgary Herald* (21 April 1983) A3.
[437] Bercuson & Wertheimer, *supra* note 333 at 171.
[438] Cheryl Cohen, "Holocaust exaggerated, MLA says," *Edmonton Journal* (20 April 1983) 1.
[439] *Ibid*.
[440] "Alberta's unrepentant band of bigots," *supra* note 412; "Tories won't censure MLA," *Calgary Herald* (21 April 1983) A3; "Holocaust Just the Name of a Movie – Stiles," *Jewish Star* (Calgary Edition) (29 April 1983) 1 ["Holocaust Name of a Movie"].
[441] "Taped interview with MLA Stiles," *Edmonton Journal* (21 April 1983) A10.
[442] *Legislative Assembly of Alberta Debates*, 20-1 (21 April 1983) at 659.
[443] *Ibid*.

apology worthless by admitting to reporters that he had not actually changed his views.[444] Still, the government declared the matter closed and refused to dismiss Stiles from caucus.[445]

The revelation that a member of the government was a Holocaust denier reinforced the sense among Alberta's Jews that Keegstra was far from alone and that the government did not take antisemitism seriously. Stiles's comments and the government's tepid response further upset the Jewish community and provoked a new and broader round of lobbying. Speaking on behalf of the Jewish Federation of Edmonton, Katz said they were dissatisfied with Stiles's apology, calling it a hollow statement motivated by political considerations.[446] An editorial on 29 April 1983 in the *Jewish Star*—then the leading Jewish newspaper in Alberta—severely criticized Lougheed for protecting Stiles.[447] The *Star* called Stiles's remarks "outrageous and offensive" and noted that Stiles's apology was obviously insincere as he had almost immediately disavowed it.[448] The Stiles affair also led to a response from Alberta's small community of Holocaust survivors. For example, in remarks to a second-generation Holocaust survivor group, Sidney Cyngiser, a survivor living in Calgary, urged the younger generation to "stand up and speak out" against Keegstra and Stiles and called for both men to be removed from their positions.[449] In addition, Peter Owen, a prominent Edmonton lawyer who had fled Nazi Germany with his family in 1938, wrote to Lougheed urging him to make a strong statement in response to Stiles's "outrageous remarks concerning the holocaust."[450] Owen sagely advised Lougheed that he should do so promptly "rather than as a response to the turmoil that will no doubt ensue" and stated that "the Jewish community (as well as other minorities) whose families and memories have been maligned, are looking to you for a powerful condemnation of ignorance and hate."[451] The controversy even attracted attention from

[444] "Alberta's unrepentant band of bigots," *supra* note 412.
[445] Sheila Pratt, "Stiles stays despite protests," *Calgary Herald* (23 April 1983) 1; Sheila Pratt, "Premier closes file on Stiles storm," *Calgary Herald* (26 April 1983) A19.
[446] Pratt, *supra* note 445.
[447] "Dear Peter," *Jewish Star* (Calgary Edition) (29 April 1983) 4.
[448] *Ibid*.
[449] Sidney Syngiser, "A Message to the Second Generation," *Jewish Star* (Calgary Edition) (13 May 1983) 4. See also Don Martin, "City Jews insist Holocaust real," (7 May 1983) A1.
[450] Letter from Peter M Owen, QC to Peter Lougheed (21 April 1983), PAA (PR1985.0401/2193, Box 176).
[451] *Ibid*.

Holocaust survivors outside of Canada. Famed Nazi-hunter Simon Wiesenthal, along with Rabbi Marvin Hier, Dean of the Simon Wiesenthal Center in Los Angeles, were shocked by Stiles's remarks and sent a letter to Lougheed asking him to launch an intensive Holocaust educational program.[452]

The depth of feeling within the Jewish community was put on display on 9 May 1983 at a community rally organized by the JFE's Community Relations Committee. One thousand people—about a quarter Edmonton's Jewish population—crowded into the Jewish Community Centre for the two-hour meeting, and, according to the *Jewish Star*, the venue was not large enough to accommodate all those who wished to attend. The meeting was the largest in the history of Edmonton's Jewish community. Several leaders of the Jewish Federation addressed the crowd and provided a detailed report on the actions of Jewish leadership to address the Keegstra and Stiles matters. Katz explained that the Stiles and Keegstra revelations had "galvanized the anger of so many people in the province" and that the Jewish community was "shaken up." He also emphasized that leadership did not believe in "backroom diplomacy." Speeches from the floor reflected the community's distress at the "disgraceful" behavior of the Alberta Teachers' Association and the government's decision not to eject Stiles from caucus.[453]

Amid this outcry Lougheed agreed to meet with a delegation of Jewish leaders from Edmonton and Calgary, which also took place on 9 May.[454] The delegation consisted of nine representatives from Edmonton and three from Calgary, with the Edmonton group including Katz, Boroditsky, Owen, and Myer Horowitz, then president of the University of Alberta (Lougheed and his assistant were the only other people present).[455] According to Katz, this was the first time the Alberta Jewish community had made a "major representation" to the government.[456] Katz initially

[452] Letter from Simon Wiesenthal and Marvin Hier to Peter Lougheed (11 May 1983), PAA (PR1985.0401/2193, Box 176); Sheila Pratt, "Famed Nazi hunter complains to premier," (12 May 1983) A21.
[453] See generally "Huge Turnout Decries ATA," *supra* note 430; Dene Creswell & Robin Barstow, "Lougheed ponders statement on racism," *Edmonton Journal* (10 May 1983) B1.
[454] See Letter from Howard Starkman to EP Lougheed (25 April 1983), PAA (PR1985.0401/2193, Box 176).
[455] "Premier Sets 3 Actions to Deal With Prejudice," *Jewish Star* (Calgary Edition) 1 ["Premier Sets 3 Actions"].
[456] Janice Arnold, "Keegstra affair unites Edmonton's community," *Canadian Jewish News* (19 May 1983) 1.

received a frosty reception, apparently because of an *Edmonton Journal* article that morning which alleged that he had "demanded" the premier speak up on race hatred.[457] The Jewish leaders expressed how profoundly shaken the community was as a result of the Stiles and Keegstra affairs.[458] They voiced their concern with the government's delay in responding to Keegstra and with the premier's refusal to dismiss Stiles from caucus.[459] Lougheed appeared cold and businesslike, but tried to reassure the delegation that Keegstra and Stiles were not representative Albertans.[460] He argued that the government had already made efforts on behalf of minority groups and that the Minister of Education was looking into changes in the school curriculum.[461] In Lougheed's view, Stiles's apology and Crawford's comments on behalf of the government were sufficient, and the Stiles matter was now closed.[462] When members of the delegation pushed back strongly and asked Lougheed to make a public statement on antisemitism, the premier demurred and abruptly ended the meeting.[463] Although Jewish leaders tried to put a positive spin on the encounter, Lougheed made clear to the media that he had avoided making any commitments.[464]

What finally shifted the government's approach was the reaction of the non-Jewish community. Stiles's comments, coming on the heels of the Keegstra revelations, embarrassed many Albertans.[465] Contrary to the initial reaction to Keegstra, many non-Jews and community

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[457] Bercuson & Wertheimer, *supra* note 335 at 156; Ron Chalmers, "Katz demands premier speak up on race hatred," *Edmonton Journal* (9 May 1983, morning edition) A8. The *Journal* changed the headline in its afternoon edition to read: "Premier should speak out on racism – Jewish leader."
[458] Bercuson & Wertheimer, *supra* note 335 at 156.
[459] *Ibid*; Transcript of Interview of Peter Lougheed by Don Braid, PAA (PR1985.0401/2193, Box 176) [Lougheed Interview].
[460] Bercuson & Wertheimer, *supra* note 335 at 157.
[461] *Ibid*.
[462] Dene Creswell, "Lougheed backs off from Jewish pressure for public statement," *Edmonton Journal* (10 May 1983, morning edition) ["Lougheed backs off from Jewish pressure"]; "Alberta's unrepentant band of bigots," *supra* note 412.
[463] Bercuson & Wertheimer, *supra* note 335 at 157.
[464] "Jewish leaders say Lougheed to battle racism," *Calgary Herald* (10 May 1983) C8; Lougheed Interview, *supra* note 459; "Lougheed backs off from Jewish pressure," *supra* note 462; "Lougheed ponders statement on racism," *supra* note 430.
[465] An important factor that further abetted the public reaction around this time was Keegstra's 3 May 1983 interview by Linden MacIntyre on the CBC's popular and nationally-syndicated show *The Journal*. This program introduced many Canadians outside of Alberta to the Keegstra affair and, according to Bercuson & Wertheimer, "probably did more than any other single event to finally focus attention on Keegstra." See Bercuson & Wertheimer, *supra* note 335 at 150-51.

groups expressed their support for the Jewish community and their disappointment with the government's conduct. Following Stiles's remarks, numerous letters to the editor, editorials, and articles quoting ordinary Albertans appeared expressing allegiance with the Jewish community and revulsion of Stiles and Keegstra.[466] This included support from non-Jewish witnesses of the Holocaust living in Alberta.[467] Chairman of the Alberta Human Rights Commission Marlene Antonio said that Stiles's stupidity had boggled her mind and issued a statement denouncing Stiles and Keegstra and announcing that she was willing to meet with organizations and take suggestions for a public education program.[468] Church leaders also spoke out.[469] On 12 May 1983 Calgary's Jewish and Christian religious leaders issued a joint statement rejecting "all forms of hatred, bigotry and racism," calling antisemitism a "blasphemy" that "in spirit and deed [is] inherently an attack against Christianity."[470] Moreover, Alberta's media was extremely critical of Stiles and the government's response. As the *Calgary Herald* put it, "The stigma attached to Stiles' political career is one thing. … The stain left on Alberta's reputation as a tolerant society is another."[471] The *Edmonton Journal* added in a similar vein: "we all share responsibility for the failure to remove this horrible stain from Alberta's social fabric."[472] Lougheed faced a renewed round of criticism after his cool treatment of the Jewish delegation on 9 May 1983.[473] At a Tory fundraising

[466] See eg Bob Warwick, "MLA's views sicken campaign manager," *Calgary Herald* (21 April 1983) A20; Walter and Jennie Brown & Sandy and Annette DeWaal, Letter to the Editor, *Jewish Star* (Calgary Edition) (13 May 1983) 5; Mr and Mrs R Canfield & Mrs L Davies, Letter to the Editor, *Jewish Star* (Calgary Edition) (13 May 1983) 5; Gloria Whipple, "Ignorance is an old enemy," Letter to the Editor, *Calgary Herald* (15 May 1983) A6; Jim and Mary Bylsma, "Stronger action needed," *Red Deer Advocate* (30 May 1983) 4A; Nancy Westholt, "Together we can stamp out intolerance," Letter to the Editor, *Calgary Herald* (20 June 1983) A6; W Gunther Plaut, "A Gentile speaks out on Keegstra," *Canadian Jewish News* (23 June 1983) 2.
[467] See eg Margaret Devlieger, "I was there Mr. Keegstra: here's what I saw," Letter to the Editor, *Red Deer Advocate* (14 May 1983) 4A; "Go and see Auschwitz, mayor told," *Toronto Star* (17 May 1983) A9; Dennis G Scott, "Can't Ignore terrifying experiences," Letter to the Editor, *Red Deer Advocate* (26 May 1983) 4A.
[468] See "Holocaust Name of a Movie," *supra* note 440; "Statement by Marlene Antonio" (4 May 1983), PAA (PR1985.0401/2193, Box 176).
[469] See eg Rev Keith Wilcox, "Issue is sacredness of life," Letter to the Editor, *Calgary Herald* (15 May 1983) A6; Garnet Leach and five Pastors of the South Alberta District, Western Canada Synod, Lutheran Church in America, "Attacks on Jews 'shameful'," Letter to the Editor, *Calgary Herald* (15 May 1983) A6.
[470] Gila Wertheimer, "Anti-Semitism a 'Blasphemy', Leaders State," *Jewish Star* (Calgary Edition) (13 May 1983) 1.
[471] Geoff White, Party washed its hands of Stiles," *Calgary Herald* (22 April 1983) A8.
[472] "Stiles: special student," *Edmonton Journal* (21 April 1983) A6.
[473] See eg "Speak up Peter," *Edmonton Journal* (11 May 1983) A6.

dinner held shortly thereafter, Lougheed was approached by attendees who threatened to withdraw their support if he did not speak out.[474]

Finally Lougheed took action. On 12 May 1983, reading in the legislature from a seven-page prepared statement, Lougheed condemned antisemitism generally and Keegstra's teachings specifically.[475] He stated that the government was taking three steps to respond to the affair: establishing a public education program aimed at combatting racism in the province; beginning a special review of the public school curriculum; and asking the Minister of Education to find ways to insure that any future bigotry in the schools would be as quickly remedied as possible.[476] After Lougheed's statement failed to quell public criticism—many pointed out, for example, that Lougheed had not explained his delay nor had he mentioned Stiles[477]—the government announced further measures. On 31 May 1983, following a meeting with Jewish representatives, King declared that he would be introducing a package of amendments to the school system to promote antiracism.[478] More significantly, on 27 June 1983 King established a Committee on Tolerance and Understanding headed by Ron Ghitter (known as the "Ghitter Committee"), a prominent Jewish lawyer in Calgary and a former member of Peter Lougheed's cabinet.[479] The Ghitter Committee consisted of thirteen members and was provided a budget of $350,000 and two full-time staff.[480] It went on to hear 375 formal presentations, and eventually published four discussion

[474] See Robert Sheppard, "Lougheed promises to fight any bigotry in Alberta's schools," *Globe and Mail* (13 May 1983) P1; Minutes of the Meeting of the Joint Community Relations Committee Ontario Region (29 June 1983), CJA (Fonds CJA DA21, Box 19, File 10) at 1.
[475] See *Legislative Assembly of Alberta Debates*, 20-1 (12 May 1983) at 921-22 [12 May 1983 Debates].
[476] 12 May 1983 Debates, *supra* note 475 at 922; "Premier Sets 3 Actions," *supra* note 455.
[477] See eg "Alberta's unrepentant band of bigots," *supra* note 412; "Fleming alarmed at passive reaction to bigots," *Calgary Herald* (14 May 1983) A3; Cheryl Cohen, "Premier's antisemitism speech pleases Jews, angers NDP," *Edmonton Journal* (13 May 1983) B2; George Oake, "Premier's half a loaf for anti-Semitism," *Edmonton Journal* 13 May 1983) B2; "Peter speaks out but not too loudly," *Edmonton Journal* (14 May 1983) A6; "Alberta a bad word to Canada's Jews," *Toronto Star* (14 May 1983) A3; "Right words belated," *Calgary Herald* (13 May 1983) A4; Douglas Wertheimer, "Caution, Discipline, Laissez-Faire Guide Attorney General in Quality-of-Life Issues," *Jewish Star* (Calgary Edition) (7 September 1983) 1.
[478] See "King says changes in works," *Calgary Herald* (31 May 1983) B6; "King hints at curriculum change," *Red Deer Advocate* (31 May 1983) 1A.
[479] See Sheila Pratt, "King starts war on school racism," *Calgary Herald* (27 June 1983) A1.
[480] "Alberta group trying to find extent of racism," *Toronto Star* (24 October 1983) A17

papers and two reports.[481] Furthermore, on 4 October 1983, Marlene Antonio and Labour Minister Les Young jointly announced a $540,000 advertising campaign to promote tolerance and understanding. [482] According to one prominent member of the Jewish community, the government's dramatic about-face had occurred because Lougheed eventually realized he could make political profit off of Keegstra and Stiles.[483]

In addition to these measures, around late July the Attorney General directed the RCMP to commence a criminal investigation into Keegstra.[484] The RCMP announced in late September that it had completed its investigation and that its report had been submitted to Crawford.[485] On 11 January 1984 Keegstra was charged with one count of wilful promotion of hatred.[486] Keegstra was the first person charged with wilful promotion of hatred in Alberta and only the fifth in all of Canada.[487] Told that no one had as of yet been successfully prosecuted for this offence, Keegstra responded: "I suppose I can take some solace in that."[488]

The investigation and charge came as a surprise to the Jewish community, which had no material involvement in the decision to prosecute.[489] Indeed, there had been no perceptible change in the community's view. Alberta's Jewish leadership remained generally opposed or agnostic on the question of prosecuting Keegstra. For instance, Bercuson—one of the loudest advocates for an aggressive response—was (and remains) opposed to the criminalization of hate-speech. [490]

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[481] See generally Committee on Tolerance and Understanding, *Final Report* (Ottawa: National Library of Canada, 1984), online: https://archive.org/details/finalreport00albe_1/. See also Bercuson & Wertheimer, *supra* note 335 at 176.
[482] Sheila Pratt, "Province takes aim at racism," *Calgary Herald* (4 October 1983) A2. See also "Saving $500,000," *Jewish Star* (Edmonton Edition) (November 1983) 4 (calling the campaign "tokenism" and criticizing the government for not speaking out immediately on the Keegstra or Stiles affairs).
[483] Barrett, *supra* note 15 at 227-28.
[484] Don Collins, "Police probing Keegstra case," *Calgary Herald* (4 August 1983) A2; Tammy Karol, "Alberta asks RCMP to conduct inquiry," *Canadian Jewish News* (11 August 1983) 1.
[485] Tammy Karol, "RCMP puts wrap on Keegstra probe; now in hands of AG," *Canadian Jewish News* (29 September 1983) 1.
[486] See Ross Henderson, "My right to free speech on trial: Keegstra," *Red Deer Advocate* (13 January 1984) 1A ["Free speech on trial"].
[487] See Agnes Buttner, "Keegstra charged with promoting hatred," *Edmonton Journal* (13 January 1984) A1; "Keegstra charged with promoting hatred of Jews," *Montreal Gazette* (13 January 1984) B1.
[488] Free speech on trial, *supra* note 486.
[489] See Bercuson & Wertheimer, *supra* note 335 at xiii.
[490] Bercuson Interview, *supra* note 403.

According to him, no pressure was placed on the government from Jewish groups and "a lot of us thought that he should be allowed to crawl off into the woods and die."[491] Joffe, for his part, recalled that the Calgary Jewish Community Council did not ask for a prosecution, but after the charge felt the step was important and appropriate.[492] Other prominent voices in the Alberta Jewish community spoke out against the prosecution. Ghitter, for example, was strongly opposed, worrying that a trial would turn Keegstra into a martyr, allowing him "to act as a catalyst for all of the bigoted fringe groups that will flow like lemmings to Red Deer to gather around [K]eegstra as a downtrodden, misunderstood spokesman for the truth."[493] The *Jewish Star* felt similarly, arguing that Keegstra should have been left to recede into irrelevance.[494] Indeed, Keegstra had been stripped of his teaching licence in October 1983 and lost his bid for re-election as Eckville's mayor in the same month, further suggesting that a prosecution was unnecessary.[495] Moreover, unlike in Ontario, there was no Holocaust survivor or grassroots movement pushing for prosecution.[496] The JDL also did not yet have a significant presence in Alberta.[497] Fascinatingly, even Elie Wiesel opposed Keegstra's prosecution; Crown counsel Bruce Fraser spoke to Wiesel after the charge was laid and Wiesel urged Fraser to abandon the prosecution so as not to give Keegstra a platform.[498] In addition, Susan Maddox did not want a criminal trial, telling a reporter that it was overkill and would polarize Albertans further.[499]

Why then was Keegstra charged? The answer is simply that the police investigation revealed Keegstra had broken the law. Fraser—who was Alberta's Director of Special Prosecutions and had previously been Assistant Deputy Minister of Criminal Justice—was put in charge of the investigation. The decision of whether to prosecute was left in his hands. Fraser's

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[491] *Ibid*.
[492] Joffe Interview, *supra* note 406.
[493] Ron Ghitter, "Let Keegstra go," *Calgary Herald* (1 April 1984) A3.
[494] See "Unfinished business," *Jewish Star* (Calgary Edition) (15 July – 12 August 1983) 4.
[495] Regarding Keegstra's loss of his position as mayor, see eg Bob Warwick, "Tired town turfs out Keegstra," *Calgary Herald* (18 October 1983) D1.
[496] See eg Shefman Interview, *supra* note 299; Farber Interview, *supra* note 160.
[497] See Weinstein Interview, *supra* note 203.
[498] Interview of Bruce Fraser (2 March 2022) [on file with author] [Fraser Interview].
[499] See Bob Warwick, "Keegstra charged with hate," *Calgary Herald* (13 January 1984) A2.

recollection was that the first round of the RCMP investigation consisted solely of interviews and did not involve any of the students' notes, essays, or examinations. He asked the police to go back and seize the written materials. When they brought these to him, Fraser was alarmed by what he saw. As he described:

> I thought there could be [a conviction] if you have some documentary evidence as to what he was teaching and that would be in the notes, the essays, and the exams. So they went back and they found them and brought them in and I said "Holy cow, that's what he's teaching" [laughs]. And so it went from there.

He was also disturbed that Keegstra had written notes in the margins and graded the exams in a manner that made clear the students were penalized for deviating from Keegstra's views. In Fraser's opinion, Keegstra's conduct clearly amounted to wilful promotion of hatred. Fraser was aware of divisions, including within the Jewish community, over whether a criminal prosecution was a good idea, but decided that such extralegal considerations were outside of his role. Accordingly, he recommended to Deputy Attorney General Neil McCrank that they proceed with prosecution. McCrank communicated Fraser's recommendation to Crawford, who permitted the case to go forward. In Fraser's view, it would have been almost impossible for the government not to consent to the charge once he had concluded there was a reasonable prospect of conviction. In addition, it is reasonable to infer that Crawford and Lougheed were not prepared to block a prosecution because of the intense criticism they had previously faced for their reaction to Stiles and Keegstra. As Bercuson summed, "I don't think [the government] loved Jews. I think as far as they were concerned, this is a new Alberta, we have to have a modern approach to things and this is something that we have to do. I think that's why they went ahead and prosecuted him."[500]

XII. Conclusion

The Zundel and Keegstra prosecutions were initiated in the face of opposition from many segments of the Canadian-Jewish community. In the case of Ernst Zundel, Congress was extremely wary of a prosecution and feared the weakness of the hate-speech legislation. Moreover, groups

[500] With respect to this paragraph generally, see Fraser Interview, *supra* note 498 and Bercuson Interview, *supra* note 400. See also Bercuson & Wertheimer, *supra* note 335 at 175.

like the CCLA—whose operating mind, Alan Borovoy, remained a member in good standing of Congress—consistently fought the use of legal measures to combat hate speech in general and Zundel in particular. But Holocaust survivors and other community groups like the JDL wanted more to be done and were unafraid to strike out on their own. A group of Holocaust survivors led by Sabina Citron broke off from Congress and initiated a prosecution without Congress support or involvement, under an entirely different section of the *Criminal Code*: spreading false news. In the case of Jim Keegstra, while the Alberta Jewish community rallied together to combat antisemitism, its leaders were reluctant to proceed with a criminal charge. Indeed, the prosecution was initiated by the government alone and in the face of opposition from many leading Jews, including even Elie Wiesel.

Thus, as 1984 commenced, Canadian Jews were faced with two prosecutions that many in the community neither wanted nor had asked for. Yet, moving forward, they would be asked to put their differences aside, support the Crown, and unite against antisemitism and Holocaust denial. This would prove an increasingly difficult task as the trauma of the trials began to unfold.

CHAPTER 4 – Trials and Tribulations: The Prosecutions of Ernst Zundel and James Keegstra, 1984-1985

Following the criminalization of hate speech in 1970, Jewish communal leaders were reluctant to invoke the hate-speech provisions. As a result, this period was once again characterized by conflict between community leadership and other segments of the Canadian-Jewish community, particularly Holocaust survivors, who wanted a more aggressive stance against antisemitism. The rise to prominence of Holocaust denial generally, and Ernst Zundel specifically, put increasing strain on community leadership to lobby for Zundel's prosecution. However, the Attorney General of Ontario, Roy McMurtry, refused to charge Zundel. Two Holocaust survivors, Sabina Citron and Helen Smolack, finally broke the impasse by laying a private Information against Zundel for the offence of spreading false news in November 1983. With his hand forced, McMurtry agreed to have the Crown take over the prosecution.

Around the same time, in Eckville, Alberta, high school teacher James Keegstra was teaching his students about the evils of Judaism. Keegstra's teachings went largely unnoticed by the Jewish community until Keegstra was fired in December 1982. When news broke of what Keegstra had been teaching, this deeply upset Canadian Jews—especially the small Jewish community in Alberta—and led to calls for the Alberta government to take action. So did the subsequent revelation that a member of Alberta's governing caucus, Stephen Stiles, had publicly questioned the truth of the Holocaust. Embarrassed by these events, Peter Lougheed's government took steps to address racism in the province, including by ordering an investigation into whether Keegstra should be charged with wilful promotion of hatred. Following this investigation, Keegstra was charged in January 1984. The Jewish community of Alberta had no direct involvement in the laying of charges against Keegstra, and many in the Alberta Jewish community were opposed to a prosecution, believing it would do more harm than good.

This chapter addresses the trials of Jim Keegstra and Ernst Zundel. Chronologically, it focuses primarily on the period from January 1984, after criminal charges were laid against Zundel

and Keegstra, through July 1985, after both trials concluded. This chapter is divided into seven sections. Part I goes back in time to address the topic of the Canadian-Jewish community and the *Canadian Charter of Rights and Freedoms*, showing how, while the Jewish community was supportive of the *Charter*, some were concerned that the right to freedom of expression might later be used to protect hatemongers like Keegstra and Zundel. Part II discusses Zundel's early court appearances and his preliminary inquiry, with a focus on how these court proceedings presaged the trauma to come through the trials. Part III addresses Keegstra's early court appearances and preliminary inquiry, and introduces Douglas (Doug) Christie, an aggressive lawyer from British Columbia who became a primary antagonist for the Canadian-Jewish community and would go on to represent both Keegstra and Zundel at their trials. Part IV deals with Keegstra's unsuccessful *Charter* challenge prior to his trial and shows how the Jewish community missed an opportunity to have the *Charter* question referred directly to the Supreme Court of Canada. Part V takes up Zundel's trial, which turned into an enormous spectacle and exacted a deep emotional toll on Canadian Jews. Part VI addresses Keegstra's trial, which was a spectacle of its own and visited additional trauma on the Canadian-Jewish community. Part VII discusses the aftermath of the prosecutions, showing how Canadian Jews remained deeply divided following the trials regarding the utility of the criminal law in the fight against hate speech and antisemitism.

Historians have generally characterized the Zundel and Keegstra trials as positive events for the Canadian-Jewish community – as community building exercises and important victories over antisemitism. In a sense, these historians are correct; Canadian Jews pulled together during the trials to assist the prosecutions, and many rejoiced in Zundel's and Keegstra's convictions. But there is more to this story. This chapter makes two central claims. The first is that these legal victories came at a steep price. Witnessing the trials was painful and undermined Canadian Jews' sense of inclusivity and belonging in Canadian society. Second, on account of this trauma, the prosecutions left Canadian Jews more divided than ever over the wisdom of prosecuting hatemongers; many, including leading members of the Canadian Jewish Congress, were upset that

the trials had taken place and, following the prosecutions, worked to prevent future hate-speech trials from occurring. I take up these topics below.

I. "Let us raise our cups and say *lechaim*": The *Charter* and the Jewish community

The *Canadian Charter of Rights and Freedoms* was enacted in April 1982.[1] The *Charter*'s enactment was part of a broader amendment to the Canadian constitution, commonly referred to as the constitution's "patriation" because it resulted in full Canadian sovereignty from the United Kingdom for the first time.[2] Prior to the *Charter*'s adoption, Canada had a strong tradition of parliamentary supremacy, meaning that courts had little power to invalidate legislation passed by the legislature.[3] This tradition of parliamentary supremacy echoed the constitutional framework of the United Kingdom, in contrast to the United States of America, which has since the eighteenth century possessed a constitutionally-entrenched bill of rights. As with the American *Bill of Rights*, the *Charter* granted Canadian courts the authority to invalidate legislation that contravened the rights and freedoms contained therein. One of these rights and freedoms is freedom of expression, guaranteed by section 2(b) of the *Charter*. However, pursuant to section 1 the rights and freedoms guaranteed by the *Charter*, including freedom of expression, are subject "to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." This has resulted in a two-part framework when assessing constitutional challenges, under which a court asks: (1) whether the legislation contravenes the *Charter* provision in question and, if so, (2) whether the infringement is a reasonable and justifiable limit in a free and democratic society.[4]

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[1] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]. The *Charter* came into force on April 17, 1982, except for section 15 which came into force on 17 April 1985. Government of Canada, "Guide to the Canadian Charter of Rights and Freedoms," online: canada.ca/en/canadian-heritage/services/how-rights-protected/guide-canadian-charter-rights-freedoms.html.
[2] See eg, John Gray, "Quebec bitterness blunts joy of patriation, visit by Queen," *Globe and Mail* (15 April 1982) A1.
[3] Prior to the *Charter*'s enactment, the judiciary's power to strike down legislation was limited primarily to federalism grounds, meaning that the provincial or federal legislature had exceeded the authority granted to it under the division of powers set out in the *Constitution Act, 1867*, 30 & 31 Victoria, c 3 (UK), rendering the legislation unconstitutional. See Robert J Sharpe & Kent Roach, *The Charter of Rights and Freedoms*, 6th ed (Toronto: Irwin Law, 2017) at 5-6.
[4] See eg *R v Oakes*, 1986 CanLII 46 (SCC), [1986] 1 SCR 103 at paras 62-71.

A primary motivator behind the *Charter*'s enactment was the perceived failure of the courts to protect minorities from discrimination.[5] The Canadian Jewish Congress enthusiastically supported the *Charter*'s introduction, believing that it would benefit vulnerable groups.[6] According to Jim Fleming, federal Minister of State for Multiculturalism in the early 1980s, support from the Jewish community was essential to the government moving forward with its proposal for a bill of rights. As Fleming told the *Canadian Jewish News*, "It would have been unimaginable to entrench basic rights and freedoms if groups like Congress had opposed entrenchment. We wouldn't dare have acted if they opposed it."[7]

After Congress learned around early 1980 that the federal government intended to include a bill of rights in its proposed constitutional amendment package, it set up a committee to study and make recommendations on this issue. Maxwell Cohen—who had headed the Special Committee on Hate Propaganda formed by the federal government in 1965 (the Cohen Committee)—was appointed chairman of the CJC's "Select Constitution Committee."[8] The Select Constitution Committee's membership included brilliant lawyers and legal scholars from across Canada, such as Harry Arthurs, Marvin Catzman, Irwin Cotler, and Martin Friedland.[9] Cohen, Cotler, and others appeared on behalf of Congress before a Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada (the Joint Committee) in November 1980 and the CJC also submitted a written brief.[10] In general, Congress lauded the government's

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[5] Sharpe & Roach, *supra* note 3 at 12.

[6] See Beverley Stern, "CJC urges bill of rights be put in constitution," *Canadian Jewish News* (2 October 1980) 2. As in previous chapters, I will refer to the Canadian Jewish Congress as "CJC" or "Congress" throughout this chapter.

[7] Sheldon Kirshner, "CJC encourages putting civil rights in constitution," *Canadian Jewish Jews* (9 October 1980) 1.

[8] See Letter from Alan Rose to Maxwell Cohen (4 July 1980), Montreal, Alex Dworkin Canadian Jewish Archives [henceforth, "CJA"] (Fonds DA5, Box 35, File 2).

[9] See "Submission of the Select Committee on the Constitution of Canada, Canadian Jewish Congress," Winnipeg, Provincial Archives of Manitoba [henceforth, "PAM"] (Abraham J Arnold Fonds, P5104/2) at 1 [Submission of Constitutional Committee]. As noted in prior chapters, Harry Arthurs is the former dean of Osgoode Hall Law School (1972-77); Martin Friedland is the former dean of the University of Toronto Faculty of Law (1972-79); Marvin Catzman was a lawyer and later Justice of the Court of Appeal for Ontario from 1988-2007; and Irwin Cotler, as discussed below, is the former Attorney General of Canada (2003-2006) and was for many years a law professor at McGill University, among other roles.

[10] See generally *ibid*; Senate and House of Commons, Special Joint Committee on the Constitution of Canada, *Evidence*, 32-1, vol 1, No 7 (18 November 1980) at 80-113 [Special Joint Committee, vol 1, No 7]; Peter W Hogg &

draft bill of rights. As Cohen put it in his remarks to the Joint Committee, "I do believe that a charter of rights of this historic proportions and dimensions should sound a trumpet, should be a Jericho … [that] we are stating a national system of values for a long time to come."[11]

The CJC did, however, flag some concerns with the proposed language of the *Charter*. It was particularly worried that the guarantee of freedom of expression in section 2(b) might render the hate-propaganda legislation in the *Criminal Code of Canada* [12] unconstitutional. [13] Furthermore, Congress did not want a cloud of uncertainty hanging over the legislation until the Supreme Court had a chance to rule on it.[14] This concern was close to Cohen's heart given his prior role as chairman of the Cohen Committee, which had recommended the criminalization of hate speech and had written the initial draft of the hate-propaganda bill.[15] The Cohen Committee, as we have seen, worked hard on this question and came up with a proposal that it believed struck an appropriate balance between freedom of speech and the protection of vulnerable communities.[16]

Accordingly, in his presentation to the Joint Committee in November 1980, Cohen suggested that Parliament specifically exempt hate-speech from protection under section 2(b), by inserting language to "state very starkly and flatly that the advocacy of genocide or group libel is forbidden."[17] However, he conceded that Congress would support the *Charter* even if the language was not amended.[18] The government accepted some of the amendments suggested by Congress and other groups, but refused to budge on the issue of freedom of expression. [19] Cohen subsequently took up his request for a hate-speech carveout directly with Minister of Justice Jean

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Annika Wang, "The Special Joint Committee on the Constitution of Canada, 1980-81," (2017) 81 Sup Ct Law Rev 3 at 7.

[11] Special Joint Committee, vol 1, No 7, *supra* note 10 at 81.

[12] RSC 1985, c C-46 [*Criminal Code*].

[13] Submission of Constitutional Committee, *supra* note 10 at 2-3.

[14] See Canadian Jewish Congress, 1:2 Quarterly Report (Spring/Summer 1982), PAM (Abraham J Arnold Fonds, P5104/2) at 4-5.

[15] Special Joint Committee, vol 1, No 7, *supra* note 10 at 87.

[16] See generally, Maxwell Cohen et al, *Report of the Special Committee on Hate Propaganda in Canada* (Queen's Printer and Controller of Stationery, 1966).

[17] Special Joint Committee, vol 1, No 7, *supra* note 10 at 87.

[18] *Ibid* at 106-07.

[19] See Sheldon Kirshner, "Cohen feels at home in academic, government," *Canadian Jewish News* (12 March 1981) 5.

Chrétien.[20] Cohen felt that the highly-publicized seizure of hate propaganda in West Germany in March 1981, which had revealed the alarming reach of Ernst Zundel's operation, strongly indicated that hate propaganda should be specifically exempted in section 2(b) of the *Charter*.[21] The government again refused this request. Chrétien explained to Cohen that while he agreed that hate speech should remain outlawed in Canada, he was confident the *Charter* would not be interpreted by the courts to shield hate propaganda. Chrétien said he had "no doubt that the limits on freedom of expression contained in the hate propaganda provisions of the Criminal Code would be found to be both reasonable and demonstrably justified in a free and democratic society."[22] It was, therefore, unnecessary in Chrétien's view to specify hate propaganda as a specific limit on freedom of expression. Cohen thanked the Minister of Justice for his sympathetic response but did not share Chrétien's optimism that the *Charter* could not be used to strike down anti-hate legislation.[23]

Despite the government's unyielding stance on hate speech, it appears the *Charter* was widely supported by Canadian Jews. In an April 1982 article in the *Canadian Jewish News* entitled "The boys in the *shvitz* drink *lechayim* to Canada's newly patriated constitution," long-time activist (and the last communist elected to the Ontario legislature) JB Salsberg declared that Jews welcomed the *Charter*. As he wrote: "there is plenty of cause for cheering the patriation of our constitution, so let us raise our cups and say *lechayim*."[24]

Congress was far from the only organization that made submissions to the government on the *Charter*. One of the other groups that appeared before the Joint Committee was the Canadian Civil Liberties Association (CCLA). The CCLA's three-member delegation included two

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[20] See Minutes of CJC National Executive Meeting (5 April 1981), PAM (Abraham J Arnold Fonds, P5104/2) at 4-5 [April 1981 CJC Executive Meeting]; "CJC reiterates stand on hate propaganda," *Canadian Jewish News* (9 April 1981) 7.
[21] April 1981 CJC Executive Meeting, *supra* note 20 at 5.
[22] Letter from Jean Chretien to Maxwell Cohen (1 May 1981), PAM (Abraham J Arnold Fonds, P5104/2).
[23] Letter from Maxwell Cohen to Jean Chretien (20 May 1981), PAM (Abraham J Arnold Fonds, P5104/2). The government was also concerned that if it specifically carved out hate-speech from section 2(b), this might raise questions as to why it did not delineate other specific limits to section 2(b) or the other *Charter* provisions (*ibid*).
[24] JB Salsberg, "The boys in the *shvitz* drink *lechayim* to Canada's newly patriated constitution," *Canadian Jewish News* (22 April 1982) 4**.** *Schvitz* is a Yiddish term referring to a sauna or steam bath; *lechayim*, meaning "to life" in Hebrew, is customarily said as a toast. On JB Salsberg and communism, see Valerie Hauch, "Once Upon A City: When Communists were elected to office," *Toronto Star* (24 February 2017), online: thestar.com/yourtoronto/once-upon-a-city-archives/2017/02/24/once-upon-a-city-when-communists-were-elected-to-office.html.

prominent members of the Jewish community: Alan Borovoy and JS Midanik.[25] Borovoy and Midanik were the General Counsel and past president of the CCLA, respectively.[26] They were also among the leaders of the Joint Public Relations Committee of the Canadian Jewish Congress and the League for Human Rights of B'nai Brith Canada (JPRC).[27] The CCLA urged the government to delete section 1 of the *Charter* entirely, arguing that the rights enshrined in the *Charter* should not be subject to any limitation.[28] Although the government declined to delete section 1, it adopted an amendment reflecting a compromise position suggested by the CCLA to strengthen the courts' ability to strike down legislation. The substance of this amendment was as follows:

> *The Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits ~~as are generally accepted~~ prescribed by law as can be demonstrably justified in a free and democratic society ~~with a parliamentary system of government~~.[29]

By replacing the phrase "as are generally accepted in a free and democratic society with a parliamentary system of government" with "prescribed by law as can be demonstrably justified in a free and democratic society" the government responded to the concern—voiced by the CCLA and others—that the prior standard was unduly deferential to the government. The words "generally accepted in a free and democratic society with a parliamentary system of government" might have suggested that almost all legislation passed by Parliament was constitutional, since

[25] See Special Joint Committee, vol 1, No 7, *supra* note 10 at 7-35. The third member of the CCLA delegation was professor Walter Tarnopolsky, the incumbent president of the CCLA and future justice of the Court of Appeal for Ontario.
[26] See Special Joint Committee, vol 1, No 7, *supra* note 10 at 7.
[27] With respect to the JPRC, as previously noted, the Joint Public Relations Committee of the Canadian Jewish Congress and B'nai Brith Canada changed its name in the 1960s to the "Joint Community Relations Committee" and the CJC ended its partnership with B'nai Brith in the early 1980s, although the word "joint" continued to be used in the Committee's title until 1991. For simplicity, I will continue to refer to this organization as the "JPRC" in this chapter. See generally Michael Friesen, "The Joint Public Relations Committee Series at the Ontario Jewish Archives: Some New Questions" (2019) 28 Canadian Jewish Studies 125. Note additionally that I will refer below to the League for Human Rights of B'nai Brith Canada simply as "B'nai Brith."
[28] See Special Joint Committee, vol 1, No 7, *supra* note 10 at 9, 24.
[29] Hogg & Wang, *supra* note 10 at 11. The amendments to section 1 were also made in response to criticism from other groups, including the Canadian Human Rights Commission (*ibid*). Note that the CJC also suggested that section 1 be deleted, although this request was made alongside its other recommendations, including that section 2(b) be amended to clearly exempt hate propaganda (See Special Joint Committee, vol 1, No 7, *supra* note 10 at 86).

Parliament represents the will of the people.[30] The amended section 1 thus created a higher threshold for the government to justify any *Charter* infringements.

As the prosecutions of Ernst Zundel and James Keegstra got under way in early 1984, Canada now possessed a constitutionally-entrenched bill of rights that provided strong protection for freedom of speech (section 2(b)) alongside a limitation clause (section 1) that was weaker than what had been initially proposed. Consequently, the *Charter* had placed an additional, significant roadblock in the way of a successful prosecution of hatemongers. It would take several years for the full weight of this burden to become apparent.

II. "Oh God I remember those days": Zundel's court appearances and preliminary inquiry

Ernst Zundel was charged with spreading false news in November 1983.[31] The case began as a private prosecution initiated by Sabina Citron and the Canadian Holocaust Remembrance Association (CHRA).[32] Soon after Zundel was charged, Roy McMurtry, Attorney General of Ontario, agreed to have the Crown take over the prosecution.[33] However, the Crown decided to continue the prosecution under the offence of spreading false news, rather than re-laying the charge under wilful promotion of hatred.

A Crown prosecutor, Peter Griffiths, was assigned to the case around late-December 1983. Griffiths had only been a Crown attorney for a few years; he was called to the bar in 1976 and joined the Crown's office in 1979. According to Griffiths, he was selected for the Zundel prosecution purely by chance. Griffiths recalled that he was working in a largely-empty Crown's office between Christmas and New Year's when the supervising lawyer noticed that he was there and assigned him the case. Griffiths was selected simply because he was in the office while everyone else was on vacation. He was told that there had been discussion between Citron's lawyer

[30] Hogg & Wang, *supra* note 10 at 11.
[31] See Manuel Prutschi, "Prelude to Trial – Zundel, the Jewish Community, Government and the Law" (unpublished manuscript) at 106.
[32] *Ibid*.
[33] See Prutschi, "Prelude to Trial," *supra* note 31 at 107; Interview of Meir Halevi Weinstein (21 April 2022) [on file with author] [Weinstein Interview].

and McMurtry, the upshot of which was that the case would not be withdrawn and that he should proceed with it.[34] Catharine Finley (then Catharine White) assisted Griffiths as a student intern and subsequently served as the junior Crown on the Zundel prosecution upon her graduation.[35]

The Crown's first task was to particularize the charge; the Information sworn by Citron alleged that Zundel had committed the offence of spreading false news but failed to specify how he had done so.[36] Griffiths reviewed Zundel's material and particularized the charge into two counts.[37] The Crown now alleged that Zundel had committed a criminal offence by publishing false news during the year 1981 in the form of two pamphlets: (1) *The West, War and Islam!* and (2) *Did Six Million Really Die? Truth At Last*.[38] *The West, War, and Islam* was a three-page pamphlet authored by Zundel that purported to be an appeal to the "Islamic world," requesting support in the fight against an international conspiracy of Zionists, freemasons, bankers, and communists.[39] *Did Six Million Really Die* was not Zundel's own work, but he had distributed it in Canada and worldwide along with a short foreword and postscript written by Zundel himself.[40] *Did Six Million Really Die*'s central thesis was that the Holocaust was an invention of post-war propaganda concocted by the Jewish people for financial gain.[41]

Zundel's first court appearance was on 28 December 1983 at the Old City Hall courthouse in downtown Toronto.[42] Following this court appearance Zundel had several other court dates, spaced roughly one or two months apart, prior to the commencement of his preliminary inquiry in June 1984. Such court appearances following a criminal charge are routine; they provide the opportunity for counsel to update the court on the status of the case, for the Crown to provide

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[34] With respect to this sentence and everything above in this paragraph, see Interview of Peter Griffiths (6 May 2022) [on file with author] [Griffiths Interview].
[35] Interview of Catharine Finley and David Finley (28 March 2022) [Finley Interview] [on file with author].
[36] Griffiths Interview, *supra* note 34.
[37] *Ibid*.
[38] See Indictment, *R v Ernst Zundel* (Ont Court of General Sessions of the Peace) (28 July 1984); Ernst Zundel, "The West, The War, and Islam!" CJA (Fonds DA21, Box 21, File 12) [*The West, War, and Islam*]; *Did Six Million Really Die? Truth At Last* (Toronto: Samisdat Publishers) (filed as Ex 1 in *R v Zundel*, ONSC 1987) [*Did Six Million Really Die*].
[39] *The West, War, and Islam*, *supra* note 38.
[40] *Did Six Million Really Die*, *supra* note 38.
[41] See *ibid* at 4, 30.
[42] See "Denies Holocaust, publisher remanded," *Globe and Mail* (29 December 1983) A4.

disclosure to the defence, and/or to set a date for the preliminary hearing or the trial.[43] Zundel would have appeared on a docket with numerous other persons charged with criminal offences and each court appearance may only have taken a few minutes.[44] They are rarely the subject of significant media or public scrutiny.

Zundel's court appearances were different. They attracted large crowds and were widely reported in the media. The atmosphere was raucous and violent and revealed the deep emotional current running through the Jewish community. At Zundel's first court appearance on 28 December, he was greeted by a crowd of approximately forty people, including members of the Jewish Defense League (JDL), who spat on him and shouted "scumbag" and "God will get you, you fascist pig!"[45] Members of the JDL carried placards—which sometimes doubled as weapons—and wore yellow stars reminiscent of those the Nazis forced the Jews to wear.[46] As he would in subsequent court appearances and at his trial, Zundel appeared at court with a coterie of supporters and wore a hardhat and a bulletproof vest.[47] Zundel and his group had to fight through an angry crowd to get into the courthouse and continued to be accosted when they entered the hallway inside Old City Hall.[48] This scene repeated itself at Zundel's subsequent court appearances. Footage from Zundel's January 1984 court date, for example, appears to show members of the JDL kicking a Zundel supporter lying prone on the ground.[49] Eventually the police presence was significantly increased; at Zundel's court date in June 1984, police officers outnumbered the demonstrators.[50] In addition, the JDL eventually decided to tone down its

[43] See eg Ontario Court of Justice, "Guide for Accused Persons in Criminal Trials," (updated Spring 2012), online: ontariocourts.ca/ocj/self-represented-parties/guide-for-accused-in-criminal-cases/guide/. Note that the preliminary inquiry is often referred to as the "preliminary hearing," and I will use these terms interchangeably in this chapter.
[44] See Interview of Lauren Marshall (12 August 2022) [on file with author] [Marshall Interview].
[45] "Toronto crowd spits on publisher outside court," (29 December 1983) 5.
[46] See "Ernst Zundel – News Clips – 1983-1985 part 1 of 2," *GoyimTV*, online: goyimtv.tv/v/1854384373/Ernst-Zundel---News-Clips---1983-1985-part-1-of-2 [Zundel – News Clips]; Marshall Interview, *supra* note 44.
[47] Zundel – News Clips, *supra* note 46.
[48] *Ibid*.
[49] *Ibid*.
[50] *Ibid*.

approach—at least temporarily—so as not to jeopardize the proceedings, perhaps on account of criticism from others in the Jewish community who were appalled by the violence.[51]

Looking back on these events recently, Meir Halevi Weinstein, former leader of the JDL, explained that the JDL's goal was partly to divert media attention from Zundel's group by providing their own sensationalism – in other words, to dilute Zundel's message by making noise themselves. The JDL's approach was thus part of a broader propaganda war, which resulted in "some clashes outside the courthouse" and "pushing and shoving [between] the JDL guys and these neo-Nazis." Added Weinstein: "Oh God, I remember those days."[52]

An integral part of the police contingent tasked with protecting Zundel during his criminal proceedings was the Jewish Section of the "Ethnic Relations Unit" of the Metropolitan Toronto Police Force. The Jewish Section consisted of only two police officers: Mark Mendelson and Douglas Bowerman. Mendelson was Jewish and had been born and raised in Toronto; Bowerman, who was significantly older than Mendelson, was not Jewish, but had served as a police officer in Palestine under the British Mandate (perhaps the ideal training for the Zundel trial). The Jewish Section was formed in August 1983 in response to a perceived rise in antisemitism in Toronto. Mendelson was selected because of his Jewish background and his knowledge of Hebrew. According to Mendelson, when he joined Toronto Police in the late-1970s, he was only the third Jewish police officer in the city's history. Although he had not heard of Zundel prior to his work with the Jewish Section, Mendelson soon became well acquainted with Zundel and the JDL. Mendelson and Bowerman protected Zundel and served as a conduit between him and the Jewish community. The police officers' relationship with Zundel was cordial; Mendelson recalled that Zundel was always very polite and once served them coffee and carrot cake at his house on Carlton St. Mendelson noted, however, that Zundel's politeness may have been influenced by the fact that the police were keeping him alive.[53]

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[51] *Ibid*.
[52] Weinstein Interview, *supra* note 33.
[53] With respect to this entire paragraph, see Interview of Mark Mendelson (21 April 2022) [on file with author] [Mendelson 2022 Interview]; Interview of Mark Mendelson by Osgoode Society for Canadian Legal History (July

After Zundel was charged he retained Lauren Marshall as his defence counsel. Marshall had been practicing law for about five years and came to Zundel's attention because she had recently defended someone charged with hate-motivated violence. Zundel's early court appearances were immensely stressful for her. The scenes were chaotic and she received death threats. Marshall pleaded for greater protection from the court but her requests were ignored. However, Griffiths graciously offered to meet her prior to the court appearances at his office at Old City Hall and escort her to court through an internal elevator, saving Marshall from walking through a hostile crowd with her client. This did not, however, completely remove the threat of violence; Marshall recalled that after one court appearance during the preliminary hearing, she and Zundel were chased by an angry crowd carrying placards, forcing her to jump into the van used by Zundel and his supporters to escape from the courthouse. According to Marshall, the most impactful protesters were not the JDL but the Holocaust survivors and others who peacefully bore witness to the proceedings. Marshall remembered two survivors coming up to her in the hallway at Old City Hall and asking her why she was representing someone who was the cause of so much pain. Tears filled her eyes as she struggled to respond.[54]

The preliminary inquiry got under way on 18 June 1984. A huge police presence of approximately forty officers separated Zundel and his supporters from protestors.[55] Zundel's supporters waved placards reading "There was no Jewish Holocaust," "Stop anti-German slander," and "The government sponsors Holocaust lies."[56] Mendelson recalled that the staircase near the entrance inside Old City Hall was covered in demonstrators and that, despite the army of police officers, it was difficult to keep the angry crowd away from Zundel's group:

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and November 1990); and Joint Community Relations Committee Ontario Region Meeting Minutes (27 June 1984), CJA (Fonds DA21, Box 19, File 11) at 1. See also David MK Sheinin, "That Other Time the Toronto Police Tried to Solve the Race Problem: The Ethnic Relations Unit, 1970s-1980s," *Active History* (14 July 2020), online: activehistory.ca/2020/07/that-other-time-the-toronto-police-tried-to-solve-the-race-problem-the-ethnic-relations-unit-1970s-1980s/.

[54] With respect to this entire paragraph, see Marshall Interview, *supra* note 44. Note that Marshall was appointed a provincial court judge in Ontario in 1988.

[55] "Preliminary hearing starts into false-news charges," *Globe and Mail* (19 June 1984) M1; Tammy Karol, "Zundel object of interest; Shades of Keegstra," *Canadian Jewish News* (28 June 1984) 1 ["Zundel object of interest"].

[56] "Zundel object of interest," *supra* note 55.

> Ernst showed up in all of his glory with his people. They weren't marching in, but it was almost as if that was the message he was sending. We're marching into battle. And there were a lot of people there that were survivors or children of survivors. But I saw literally men in their eighties just get so emotional at the sight of him – just the sight of him – that literally they were climbing over the back of uniformed officers that were there for crowd control.[57]

The courtroom was small and filled to capacity with spectators.[58] Despite the circus-like atmosphere inside and outside of the building, the court proceedings themselves attracted little media attention because Marshall requested and received a ban on publication.[59]

The function of a preliminary inquiry is to decide whether there is enough evidence to send a case to trial.[60] Consequently, at Zundel's preliminary hearing, as is common practice, only the Crown presented evidence; the defence called no witnesses. The Crown's witnesses included Holocaust survivors Sabina Citron and Arnold Friedman, Holocaust-historian Raul Hilberg, and John Fried, a professor of political science at City University of New York who had served as special counsel to the United States War Crimes Tribunal at Nuremberg (the Nuremberg Tribunal). After a week-long hearing, the presiding judge deemed the evidence sufficient to order Zundel to stand trial.[61] At a subsequent court appearance, the trial was scheduled to begin on 7 January 1985 in the District Court of Ontario (now the Ontario Superior Court of Justice) at 361 University Avenue in Toronto.[62]

Marshall and Zundel clashed over strategy during the preliminary hearing. To situate this clash, it is helpful to set out the elements of the crime of spreading false news. To convict Zundel of this offence, the Crown was required to prove the following beyond a reasonable doubt:

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[57] Mendelson 2022 Interview, *supra* note 53.
[58] Marshall Interview, *supra* note 44.
[59] "Zundel object of interest," *supra* note 55; Tammy Karol, "Zundel hearing stays off limits to the press," (21 June 1984) *Canadian Jewish News* 12.
[60] See Government of Canada Department of Justice, Victims Services and Information, "Trial," (last modified 7 July 2021), online: justice.gc.ca/eng/cj-jp/victims-victimes/court-tribunaux/trial-proces.html; *R v Arcuri*, 2001 SCC 54 at para 21; *Criminal Code*, supra note 12 s 535. Pursuant to legislative changes made in 2019, a preliminary hearing is presently available only for indictable offences punishable by 14 years or more imprisonment. Previously, preliminary hearings were available in any indictable matter, including spreading false news, or "hybrid" offences like wilful promotion of hatred when the Crown chose to proceed by way of indictment rather than summary conviction. See Government of Canada, Department of Justice, "Reducing Delays and Modernizing the Criminal Justice System" (last modified 7 July 2021), online: justice.gc.ca/eng/cj-jp/redu/index.html.
[61] "Zundel to stand trial," *Montreal Gazette* (29 June 1984) B1.
[62] "Zundel trial set," *Canadian Jewish News* (16 August 1984) 12.

(1) That Zundel published the two pamphlets;

(2) That the pamphlets were false;

(3) That Zundel knew the pamphlets were false when he published them; and

(4) That the pamphlets were likely to cause injury or mischief to a public interest.[63]

The third factor—establishing beyond a reasonable doubt that Zundel knew what he was publishing was false when he published it—presented the greatest obstacle to a conviction. Marshall wanted the defence to focus on this element. In addition, Marshall wanted to devote significant attention to the question of whether the false news law was an unreasonable limit on freedom of expression under the newly-enacted *Charter* (as discussed below, the *Charter* argument in Zundel's case was not held until the commencement of the trial in January 1985). Zundel, however, wanted to argue that the pamphlets were true—to, in effect, put the Holocaust on trial—and not simply that he had believed them to be true. Marshall deemed this strategy both ineffective and objectionable. Although Marshall had challenged the credibility of Citron, Hilberg, and other Crown witnesses at the preliminary hearing, Zundel was dissatisfied when she did not delve further into the truth of the Holocaust. After the preliminary hearing concluded, Marshall recommended that Zundel seek new counsel for the trial.[64]

Fortunately for Zundel, he already had someone else in mind: a young, aggressive lawyer fighting relentlessly on behalf of Jim Keegstra in Alberta.

III. "I think your community is in for quite a show": Keegstra's court appearances and preliminary inquiry

Keegstra was charged with wilful promotion of hatred in January 1984.[65] The charge alleged that Keegstra had, between 1 September 1978 and 31 December 1982, wilfully promoted

[63] See *R v Zundel*, 31 CCC (3d) 97, 1987 CarswellOnt 83 (CA) at paras 27-31 [Zundel Court of Appeal]. I have used the elements set out by the Court of Appeal for Ontario in its decision on Zundel's appeal of his first conviction. Note that according to the Court of Appeal, Justice Locke erred by setting a lower burden with respect to the third element, requiring the Crown to prove "that the appellant published the pamphlet with no honest belief in its truth" rather than that he knew it was false when he published it (*ibid* at para 184).

[64] With respect to this sentence and above in this paragraph, see Marshall Interview, *supra* note 43 and Finley Interview, *supra* note 35.

[65] Ross Henderson, "My right to free speech on trial: Keegstra," *Red Deer Advocate* (13 January 1984) 1A.

hatred against the Jewish people while teaching at Eckville High School.[66] Following his arrest, the situation for Keegstra seemed bleak; having lost his teaching licence, Keegstra was working as an auto mechanic and had little funds available to hire a lawyer.[67] An organization calling itself the Christian Defence League (CDL)—formed in September 1983 ostensibly to support Keegstra's litigation— pledged to raise funds, but said that it too did not have enough money for a lawyer.[68] (The CDL's president, Terry Long, would go on to become the leader of the Canadian branch of the White-supremacist group the Aryan Nations.[69])

Doug Christie came to Keegstra's rescue. Keegstra retained Christie as his defence counsel around late-January 1983, shortly after Keegstra was charged.[70] Christie was then thirty-seven years old.[71] He operated a solo criminal law practice out of a reconverted parking lot attendant's booth across from the courthouse in Victoria, British Columbia.[72] Christie kept images of Jesus and Confederate general Robert E Lee hanging on the walls of his small office.[73] He was the founder of the Western Canada Concept (WCC), a western-separatist political party created in 1980 that had managed one electoral success—Gordon Kesler's election to the Alberta legislature in a 1982 by-election—before collapsing amid infighting in the western-separatist movement.[74] Kesler, who lost his seat eight months after his election and quit the WCC, commented in 1984 that Christie was "an intolerant man in terms of accepting other people's points of view" and

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[66] Tammy Karol, "Hate charges laid against Keegstra," *Canadian Jewish News* (19 January 1984) 1.
[67] *Ibid.* As discussed the previous chapter, following the recommendation of the Alberta Teachers Association (ATA), Keegstra's teaching licence was revoked in October 1983 ("Alberta will withdraw Keegstra's certificate," *Globe and Mail* (12 October 1983) A11). In February 1984, the Teaching Profession Appeal Board denied Keegstra's appeal of the ATA's decision.
[68] See Warren Kinsella, *Web of Hate: Inside Canada's Far Right Network* (Toronto: HarperCollins, 1994) at 150-51; Bob Warwick, "Keegstra Charged with hate," *Calgary Herald* (13 January 1984) A1. According to Kinsella, the CDL engaged in a number of antisemitic and illegal activities.
[69] Kinsella, *supra* note 68 at 145. According to Keegstra, the CDL later disassociated itself from Terry Long because of the racist views espoused by the Aryan Nations. See *R v Keegstra* (1985) (ABQB), Transcript of Proceedings, Cross-examination of Mr. Keegstra, Vol 23 at 4528-29.
[70] See Bob Warwick, "Keegstra defence offered by Christie," *Calgary Herald* (20 January 1984) A14.
[71] See "Christie joins bar to defend Keegstra," *Calgary Herald* (15 February 1984) D23; Jody Paterson, "An uneasy peace: Jody Paterson's 2002 profile of Doug Christie," (12 March 2013) *Times Colonist*, online: timescolonist.com/archive/an-uneasy-peace-jody-patersons-2002-profile-of-doug-christie-4581827.
[72] See Kirk Makin, "Lawyer is called maverick," *Globe and Mail* (1 March 1985) A1; Shona McKay, "The unpopular defender," 98:11 *MacLean's* (11 March 1985) 11.
[73] Paterson, *supra* note 71.
[74] Kinsella, *supra* note 68 at 88-90.

suggested that many WCC members were xenophobic.[75] Learning that Keegstra had retained Christie, Kesler predicted: "I think you'll find out what kind of character [Christie] is during the trial. I think your community is in for quite a show."[76]

According to Christie, the circumstances that led to his hiring by Keegstra were as follows: Christie had heard about Keegstra in the news and found the media coverage terribly one-sided. "The whole world was jumping on one little guy," Christie recalled. A practicing Catholic, Christie was driving to Mass one morning when he thought to himself that he wanted to phone Keegstra to tell him not to get down; as someone involved in politics, he knew the impact of negative media publicity. Christie subsequently phoned Keegstra out of the blue. Keegstra recognized Christie from western-separatist circles and asked Christie to represent him. Christie remembered that he "said OK very slowly, because I knew this would change my life forever." Christie sympathized with Keegstra, feeling that whether one believed in what Keegstra was saying, Keegstra was entitled to his perspective. Christie also thought Keegstra's perspective had merit. Christie began to give the questions raised by Keegstra serious thought and concluded that Keegstra's "point of view was consistent with so many facts and inconsistent with so few—if any facts—that it deserves to be considered and if facts contradict it to reject it. … It struck me as a similar reaction to what Copernicus might have got to some of his theories."[77]

As with Zundel, Keegstra had a few court appearances before his preliminary hearing commenced in June 1984. All of Keegstra's court appearances, including his subsequent preliminary hearing and trial, took place in Red Deer, Alberta, which possessed jurisdiction over criminal charges brought in nearby Eckville. Keegstra's court appearances attracted significant public and media attention, but unlike Zundel's proceedings few spectators attended from the

[75] Ross Henderson, "Separatist lawyer Doug Christie takes on his most important case," *Red Deer Advocate* (4 June 1984) A9.
[76] *Ibid*.
[77] This quote is taken from freedomsite, "Ernst Zundel Meets Doug Christie and Keltie Zubko for first time" (uploaded 30 August 2013), online (video) *YouTube* <www.youtube.com/watch?v=yIUzvXM6_A0> ["Zundel Meets Christie and Zubko"]. With respect to this entire paragraph, see *ibid*; Paterson, *supra* note 71; John Hay, "Controversial cases cost Christie," *Calgary Herald* (24 March 1985) E8.

Jewish community. At Keegstra's court date on 2 February 1984, the courtroom was jammed to capacity with approximately one hundred spectators, most of whom appeared to be Keegstra supporters aside from an elderly Jewish couple.[78] About twenty people outside the court carried hand-written signs supporting Keegstra.[79] At Keegstra's next appearance on 29 February most of the one hundred people who packed the courtroom were Keegstra supporters and/or members of the CDL.[80] About thirty people carrying signs such as "Jews control Alberta" paraded outside the courthouse and distributed excerpts from the *Protocols of the Elders of Zion*."[81] The contingent applauded Keegstra wildly when he left court.[82] Christie appeared for the first time as Keegstra's lawyer and elected a trial by judge and jury on Keegstra's behalf.[83] The case was adjourned until 4 June 1984 for commencement of the preliminary hearing.[84]

The limited Jewish presence at Keegstra's court proceedings reflected the small Jewish population in Alberta in addition to Red Deer's distance from the major Alberta-Jewish population centres of Edmonton and Calgary.[85] Only about 55 Jews lived in Red Deer at the time.[86] But it may also have reflected discomfort among Alberta's Jews over the wisdom of prosecuting Keegstra. At a meeting of the National JPRC on 15 April 1984, Edmonton representative Len Dolgoy reported that he was facing pressure from "some quarters" in the Jewish community to ask that the Attorney General of Alberta drop the charges.[87] Dolgoy indicated, however, that he and his colleagues had no intention of interfering with the proceedings.[88] Calgary representative Hal Joffe agreed that there was "the feeling prevalent among some Jews as well as among Gentiles …

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[78] See Letter from Michael Helmer to Janet Keeping (2 February 1984), Calgary, Legal Archives Society of Alberta [henceforth, "LASA"] (Fonds 113-00-02, vol. 2, file 41) [Letter from Helmer to Keeping].
[79] "Keegstra reserves plea," *Calgary Herald* (1 February 1984) A3.
[80] Tammy Karol, "Keegstra pleads not guilty, opts for jury trial," *Canadian Jewish News* (8 March 1984) 5.
[81] *Ibid.*
[82] *Ibid*.
[83] "Keegstra chooses jury," *Calgary Herald* (29 February 1984) A2.
[84] *Ibid*.
[85] See David Bercuson & Douglas Wertheimer, *A Trust Betrayed: The Keegstra Affair* (Toronto: Doubleday, 1985) at 130. In 1981 Edmonton's Jewish population was 4,250 and Calgary's was 5,580 (see Allan Levine, *Seeking the Fabled City: The Canadian Jewish Experiences* (Toronto: McClelland & Stewart, 2018) at 366.
[86] See Douglas Wertheimer, "In Red Deer, Effort to Unite Jews is Begun," *Jewish Star* (Calgary) (June-July 1989) 1.
87 Minutes of the National Joint Community Relations Committee (15 April 1984), CJA (Fonds DA21, Box 19, File 20) [15 April 1984 NJCRC Meeting Minutes].
[88] *Ibid*.

that Keegstra has been punished enough without charging him."[89] At the same meeting, Frank Schlesinger, a JPRC member from Montreal, likewise argued that Keegstra's loss of his teaching job and mayoralty were *dayenu* without the criminal prosecution.[90] Similar sentiments were expressed around the same time by the *Jewish Star*, the leading Jewish newspaper in Alberta, which accused the Alberta government of wrongly utilizing "the forced bludgeoning of thought" to combat antisemitism instead of the more powerful weapon of public disapprobation.[91] In addition—and perhaps related to—concerns over the benefits of prosecution, the CJC discouraged demonstrations at Keegstra's proceedings, fearing that this would create the appearance that Jews were driving Keegstra's prosecution.[92]

When Keegstra's preliminary inquiry commenced on 4 June 1984, his supporters again dominated the packed gallery.[93] There was also a large contingent of media representatives.[94] Outside of the courthouse, the CDL protested and on 11 June handed out a press release promoting Arthur Butz's Holocaust-denial book *The Hoax of the Twentieth Century*, whose importation had recently been banned by Canada Customs.[95] (This ban did not receive much notice until Keegstra's preliminary hearing.[96]) One highly prominent Keegstra supporter was Ernst Zundel, who flew in to attend the hearing. Zundel wore his now-trademark hardhat and carried a placard that solicited donations for Keegstra's defence.[97] "I'm here to show my support for a man victimized unjustly," Zundel explained.[98]

Although very few Jews were noticeably present during the preliminary inquiry, some did

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[89] *Ibid*. Joffe noted however that, unlike Edmonton, he was not facing pressure to approach the Attorney General to drop the charge.
[90] *Ibid*. *Dayenu* is a Hebrew term meaning roughly "it would have been enough for us" and refers to a song typically sung on Passover.
[91] "Stiles II," *Jewish Star (Edmonton)* (1 March 1984) 4.
[92] 15 April 1984 NJCRC Meeting Minutes, *supra* note 87.
[93] See "Keegstra's instruction 'biased,'" *Alberni Valley Times* (5 June 1984) 2; Bercuson & Wertheimer, *supra* note 85 at 177.
[94] Bruce P Elman, "Regina v Keegstra: Report on Preliminary Hearing" (22 June 1984), CJA (Fonds DA21, Box 13, File 1) at 24 [Elman Report].
[95] See *ibid*; "Holocaust-hoax book banned by Customs," *Red Deer Advocate* (9 June 1984) 3A.
[96] Bercuson & Wertheimer, *supa* note 85 at 178.
[97] Tammy Karol, "'Greatest test of freedom of speech' – defence; The Keestra hearings," *Canadian Jewish News* (14 Jun 1984) 12 [Karol, "Keegstra hearings"].
[98] *Ibid*.

make the trip.[99] Bruce Elman, then a professor at the University of Alberta Faculty of Law, sat in on the hearing as the CJC's representative.[100] On the first day of the preliminary inquiry three Russian-Jewish immigrants from Calgary paraded outside the courthouse, wearing yarmulkes and yellow Stars of David and carrying placards saying the Holocaust did happen.[101] In addition, on 14 June a group of five Jews from Winnipeg who had just attended a wedding in Edmonton drove to Red Deer to attend the hearing. One member of the group, Annette Minuk, explained that they had been disturbed by stories they had read in the media and wanted to see it in person. Outside the courthouse, the group confronted one of Keegstra's students, Dana Kreil, who had just testified. Kreil told reporters this was the first time she had knowingly met anyone Jewish and that she was willing to sit down and talk to them, although "it's hard to talk to five at once." Minuk said they approached Kreil because "We just wanted her to see what Jewish people look like. We're just human beings. We told her we don't have horns."[102] Elman observed the encounter and recalled that Kreil was clearly shaken by it.[103]

The preliminary hearing concluded on 15 June 1984. The Crown called thirteen witnesses and filed sixty exhibits, mostly student essays and notes. The notes, essays, and testimony further revealed Keegstra's bizarre and insidious teachings, which co-mingled antisemitic tropes like Holocaust denial and the Blood Libel with more novel theories, including that Jews had ordered Abraham Lincoln's assassination.[104] The testimony reflected Keegstra's hold on his students; many of them expressed fondness for Keegstra and sympathy for his views.[105] However, it was difficult for the students to deny the contents of their notes and essays.[106]

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[99] Elman Report, *supra* note 93 at 25-26; Bob Bettson, "Jews seek action on hate literature," *Calgary Herald* (19 July 1984) B6.
[100] Interview of Bruce Elman (25 October 2022) [on file with author] at 1. [Elman Interview]
[101] Karol, "Keegstra hearings," *supra* note 97. See also "Keegstra Trial," Letter to the Editor, *Jewish Star (Calgary)* (1 June 1984) 5
[102] "We're people, Jews tell witness," *Calgary Herald* (15 June 1984) A3; "Jews tell witness facts of Holocaust," *Canadian Jewish News* (21 June 1984) 12.
[103] Elman Interview, *supra* note 100 at 11.
[104] See *ibid* at 2-23; Karol, "Keegstra hearings," *supra* note 97; Bob Warwick, "Keegstra marking outlined," *Calgary Herald* (15 June 1984) A3; Bob Warwick, "Keegstra student in tears," *Calgary Herald* (7 June 1984) A2.
[105] See "Keegstra attack on Jews accepted by students," (21 June 1984) 12; Bob Warwick, "Former student praises Keegstra as 'good man'," *Calgary Herald* (12 June 1984) A3.
[106] Elman Report, *supra* note 94 at 18.

The preliminary inquiry offered the Jewish community and most of the public their first glimpse of Doug Christie in action. Christie exhibited several characteristics that would repeat themselves in his subsequent representation of Keegstra, Zundel, and other alleged hatemongers in the years to come. Christie's approach to cross-examination was aggressive and unforgiving. Elman described the cross-examination of the student witnesses as brutal; some of them broke down in tears, one after "a considerable amount of ridiculing by Christie."[107] Elman predicted that this approach would not play well with a jury at trial.[108] Christie asked the witnesses about seemingly-irrelevant material, including reading long excerpts from the Talmud, apparently to show the basis for Keegstra's beliefs.[109] Christie clashed often with the judge, at one point coming very close to being cited in contempt of court.[110] Christie also experienced for the first time the depth of anger his representation of Keegstra and others would invoke; during the preliminary hearing, vandals broke windows and painted swastikas on his Victoria law office.[111]

Surprisingly, Christie did not ask for a publication ban.[112] Keegstra later explained the reason for this decision was that he had nothing to hide and wanted to debate his views in the public forum.[113] As a result, the preliminary hearing—including Keegstra's various antisemitic theories—received widespread exposure across Canada.[114] The CJC was actually pleased with the media coverage, finding it sympathetic to the Crown.[115] But there were signs that the publicity had already begun to take its toll on the community. Prominent Toronto Rabbi W Gunther Plaut opined that Canadian Jews were anxious about the airing of Keegstra's wild accusations, as well as

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[107] See *ibid* at 3, 9, 12; "Keegstra student in tears," *supra* note 104.
[108] Elman Report, *supra* note 94 at 9.
[109] Elman Report, *supra* note 94 at 15, 22; Bercuson & Wertheimer, *supra* note 85 at 18.
[110] *Ibid* at 20.
[111] Tammy Karol, "Keegstra hearing continues," *Canadian Jewish News* (14 June 1984) 1; McKay, "The unpopular defender," *supra* note 72.
[112] Crown counsel Bruce Fraser asked for a publication ban to be imposed but the judge denied this request because it was up to Keegstra. See "Keegstra's instruction 'biased,'" *supra* note 93; Elman Report, *supra* note 94 at 2.
[113] Re-examination of James Keegstra (14 February 1985), *R v Zundel* (Ont Dist Ct), Transcript of Proceedings [Zundel Transcript], Vol 16 at 3506.
[114] Elman Report, *supra* note 94 at 2, 25-26.
[115] *Ibid* at 27; Minutes of Meeting of the National Joint Community Relations Committee (3 October 1984), CJA (Fonds DA21, Box 19, File 20) at 2.

Christie's apparent desire to demonstrate the historical accuracy of his client's worldview.[116] Plaut commented that it was "far from pleasant to see the media reprint this garbage," noting that the airing of Holocaust-denial put him most ill at ease.[117]

Not everyone came away with a negative impression of Christie and his client. Zundel, for one, was very impressed by Christie's aggressiveness, seeing in him "a tough, principled and learned attorney."[118] Zundel may also have been impressed by Christie's ability to work long hours for little pay – Keegstra paid Christie almost nothing for his representation.[119] Zundel met with Christie and Christie's assistant (and later wife) Keltie Zubko while in Red Deer.[120] Zundel's relationship with Marshall was frayed and he was having difficulty finding another representative; Zundel later claimed that about a dozen lawyers turned him down around this time.[121] Christie did not. In September 1984 Zundel retained Christie to conduct his upcoming trial.[122]

IV. "How unfortunate it would be if his name became associated with freedom of speech": Keegstra's *Charter* challenge

No trial date was set at the conclusion of Keegstra's preliminary inquiry. Instead, a court date was scheduled for the fall for pre-trial motions, including Keegstra's constitutional challenge, which would argue that the offence of wilful promotion of hatred was an unjustified infringement of the right of freedom of expression guaranteed by section 2(b) of the *Charter*.[123]

Christie retained Calgary lawyer Duncan McKillop to present the *Charter* argument.[124] McKillop, president of the Alberta Chamber of Commerce, knew Christie from prior involvement

[116] Rabbi W Gunther Plaut, "No longer sympathy for Keegstra," *Canadian Jewish News* (21 June 1984) 2.
[117] *Ibid*.
[118] Kinsella, *supra* note 67 at 91.
[119] "Lawyer is called maverick," *supra* note 72.
[120] "Zundel Meets Christie and Zubko," *supra* note 77.
[121] Ernst Zundel, Letter to the Editor, *Canadian Lawyer* (May 1986).
[122] Kinsella, *supra* note 67 at 91.
[123] The date for argument on pre-trial motions was initially scheduled for 24 September but then delayed to 10 October. See Judy Monchuk, "Keegstra trial delayed," *Red Deer Advocate* (24 September 1984) 2A.
[124] Bob Warwick, "Second lawyer enlisted in Keegstra's legal battle," *Calgary Herald* (25 September 1984) F1 [Warwick, "Second lawyer enlisted"].

in Western separatism.[125] McKillop insisted that he took the case solely because of the constitutional issue, not because he supported Keegstra's views.[126] However, in February 1985 McKillop was quoted as saying that he doubted the number of Jews killed in the Holocaust.[127] McKillop subsequently backtracked on these remarks and resigned as Chamber of Commerce president.[128] However, McKillop had reaffirmed the widespread belief among many Albertans, including in the Jewish community, that Keegstra was not alone in his views.[129]

The *Charter* argument commenced on 10 October 1984. Unbeknownst to many, Borovoy and the CCLA had tried, unsuccessfully, to have the constitutional issue proceed directly to the Supreme Court of Canada (SCC). In late April 1984, Borovoy wrote then Minister of Justice Mark MacGuigan suggesting that the government submit a reference question to the SCC regarding whether the offences of wilful promotion of hatred and public incitement to hatred ran afoul of the *Charter*.[130] Borovoy made clear that the CCLA wanted the laws struck down.[131] And he made another, perhaps more compelling, argument: by referring the question directly to the Supreme Court, the government could deprive Keegstra and other antisemites of a potential propaganda victory should their constitutional challenge succeed. As Borovoy explained to MacGuigan, "You will appreciate how unfortunate it would be if Mr. Keegstra's name and reputation became associated with a successful free speech challenge of the hate propaganda section."[132]

Borovoy made the same point internally within the Jewish community, arguing in vain that

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[125] Interview of Duncan Lovell McKillip, QC (6 November 2000), LASA (Accession No 2000039) at 22-23 [McKillop Interview].
[126] Warwick, "Second lawyer enlisted," *supra* note 125; Ross Henderson, "Keegstra case gets added aid," *Red Deer Advocate* (26 September 1984) 1B.
[127] "Holocaust comments raise Edmonton storm," *Calgary Herald* (10 February 1985) A1.
[128] Douglas Wertheimer, "McKillop, Chamber Head, Steps Aside after Holocaust Statement," *Jewish Star (Calgary)* (15 February – 7 March 1985) 1.
[129] See *ibid*; Sheila Pratt, "Ill-timed Holocaust remarks deeply disturbing," *Calgary Herald* (13 February 1985) A11.
[130] The CCLA took no issue with the offence of advocating genocide (now s 318 of the *Criminal Code*), the third offence created by the anti-hate legislation enacted in 1970. See David Rooney, "Revisions sought to anti-hate law," *Calgary Herald* (19 May 1984) D18. On the reference procedure, see generally Leah McDaniel, "The Reference Procedure: The Government's Ability to Ask the Court's Opinion," *Centre for Constitutional Studies* (9 August 2012), online: www.constitutionalstudies.ca/2012/08/the-reference-procedure-the-governments-ability-to-ask-the-courts-opinion.
[131] Rooney, *supra* note 130.
[132] *Ibid*.

the CJC should join with the CCLA in lobbying for a reference. Borovoy was sensitive to the fact that Keegstra and especially Zundel had already gained support by cloaking themselves in the mantle of freedom of speech.[133] By referring the constitutional issue directly to the Supreme Court the Jewish community could avoid a significant amount of trauma and take the freedom of speech question away from the hatemongers. Borovoy brought this issue up at a May 1984 meeting of the Ontario JPRC. His argument seemed persuasive. But he gained no traction with the committee. Responses to the proposal among the JPRC suggest that the committee members may have missed Borovoy's point. David Satok, Chairman of the National JPRC, accused Borovoy of not understanding what the Jewish community wanted.[134] According to Satok, no reference was necessary because most Jews believed Keegstra would win at trial anyway.[135] Focus should thus be placed on lobbying to have the legislation strengthened rather than on its constitutionality.[136] (How stronger legislation might fare under the *Charter* went unremarked upon.) Moreover, Satok argued that if Congress supported a reference this would attract undue attention on the Jewish community.[137] Others who spoke after Satok concurred with his reasoning.[138] The meeting minutes reflect no support for Borovoy's proposal.

The government turned down the CCLA's request. While it is impossible to know what would have happened had the CJC joined the lobbying effort, it is reasonable to speculate that Congress's support would have been influential. Reporting on this behind-the-scenes meeting four years later—after Keegstra's conviction had been overturned by the Court of Appeal of Alberta—the *Jewish Star* rued the missed opportunity: "Four years have now passed since the CCLA request was made. Today, Alan Borovoy's words of warning, and his failed effort, have taken on new meaning."[139]

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[133] See Minutes of Meeting of Ontario Joint Community Relations Committee (28 May 1984), CJA (Fonds DA21, Box 19, File 11) at 5 [28 May 1984 JPRC Meeting Minutes]; A Alan Borovoy, *'At the Barricades': A Memoir* (Toronto: Irwin Law, 2013) 134 [*At the Barricades*].
[134] 28 May 1984 JPRC Meeting Minutes at 5.
[135] *Ibid*.
[136] *Ibid*.
[137] *Ibid*.
[138] *Ibid* at 6.
[139] Douglas Wertheimer, "1984: How the Trial Was Almost Stopped," *Jewish Star (Calgary)* (10 June 1988) 1.

Keegstra's *Charter* argument proceeded as scheduled in October 1984. The Court ruled in favour of the Crown and upheld the hate-speech law. Justice Frank Quigley held that the offence of wilful promotion of hatred did not violate the *Charter* right to freedom of expression because this right does not protect hate speech.[140] It would be contrary to Canadian values and to the principles underlying the constitution, explained Justice Quigley, to permit the wilful and public promotion of hatred against an identifiable group under the rubric of freedom of expression.[141] To conclude otherwise would undermine the dignity and worth of members of identifiable groups.[142] Indeed, permitting hate speech against identifiable groups would discourage vulnerable communities from participating in the public sphere, thus inhibiting *their* capacity for free expression.[143] In reaching this conclusion regarding the proper interpretation of section 2(b), Justice Quigley referred to the guarantee of equality contained in section 15 and to section 27, which states that the *Charter* "shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians."[144] These sections, in his view, must infuse and animate the interpretation of other *Charter* rights, including freedom of expression.[145] Because he found no violation of section 2(b), it was unnecessary for Justice Quigley to address whether he would have upheld the legislation under section 1 of the *Charter* as a reasonable limit demonstrably justified in a free and democratic society. Nevertheless, he concluded that he would have done so.[146] Justice Quigley's powerful decision seemed to have confirmed Chrétien's view that it was unnecessary to explicitly carve out hate speech from section 2(b) because the courts would do so on their own.

Christie's other pre-trial applications were dismissed as meritless.[147] Keegstra's trial was

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[140] *R v Keegstra*, 1984 CarswellAlta 428, 19 CCC (3d) 254 (ABQB) at para 61 [*Keegstra* Charter].
[141] *Ibid* at paras 41-54.
[142] *Ibid* at para 59.
[143] *Ibid* at para 60.
[144] Section 15 of the *Charter* did not come into force until 17 April 1985 (three years after the rest of the *Charter*), in order to allow governments time to bring their legislation in line with this provision (Sharpe & Roach, *supra* note 3 at 357 n9).
[145] *Keegstra* Charter, *supra* note 140 at paras 55-58.
[146] *Ibid* at paras 63-95.
[147] *Ibid* at paras 96-133.

scheduled to begin on 10 April 1985, shortly after Zundel's trial in Toronto.[148]

V. "What the hell did those Jews expect?": The trial of Ernst Zundel

a. Pre-trial, *Charter* argument, and jury selection

Back in Ontario, emotions continued to run high as the Crown and defence—led by Zundel's new lawyer, Doug Christie—prepared for the upcoming trial. At 4:20 a.m. on 9 September 1984 a pipe bomb exploded outside Zundel's house, blowing a hole in the garage door, damaging two cars, and sending debris flying into neighboring yards.[149] The JDL immediately fell under suspicion, but the perpetrator was never identified. Mendelson and Bowerman questioned Weinstein about the bombing and he denied any involvement.[150] Asked recently about this incident, Weinstein said: "I wasn't there… I just can't say one way or the other [whether the JDL was involved]. It made my day."[151] After the bombing Zundel fortified his house with wrought iron concrete barriers, wire-mesh window coverings and a closed-circuit surveillance system.[152]

As with Keegstra, before Zundel's trial could proceed it was necessary to determine whether the law under which he was charged was constitutional. Because Zundel had been charged with spreading false news and not wilful promotion of hatred, this was still an open question.[153] Argument on the *Charter* motion proceeded on 7 January 1985, the first date scheduled for the trial. This time Christie handled the *Charter* argument himself. Although seven years later in the Supreme Court—following two lengthy trials and two appeals in the Court of Appeal for Ontario—the case would turn entirely on this issue, Christie devoted only about fifteen minutes to the *Charter* question, contrasting sharply with his prolonged submissions on numerous other issues during the trial.[154] Christie's argument was concise and compelling, but he cited no case law and

[148] See *ibid* at para 100.
[149] "Pipe bomb blasts garage, cars at publisher's Carlton St. home," *Toronto Star* (10 September 1984) A6.
[150] Mendelson 2022 Interview, *supra* note 53; Weinstein Interview, *supra* note 33.
[151] Weinstein Interview, *supra* note 33.
[152] Hal Quinn, "The Holocaust Trial," 98:11 *Maclean's* (11 March 1985) 42 at 46.
[153] Even if Zundel and Keegstra had been charged with the same offence, the *Charter* decision of the Alberta Court of Queen's Bench in *Keegstra* would not have been binding on an Ontario court, although it would likely have been treated as persuasive authority. See eg Hon M Rowe and L Katz, "A Practical Guide to Stare Decisis" (2020), 41 Windsor Rev Legal Soc Issues 1 at 6-7.
[154] See Zundel Transcript, Submissions by Mr. Christie (7 January 1985), Vol 1 at 2, 9.

virtually no other authority, nor did he attempt to distinguish Zundel's case from Keegstra's.[155] Crown counsel leaned heavily on the *Charter* decision in *Keegstra*, which Griffiths argued was essentially dispositive of whether freedom of expression covered hate speech.[156] Justice Hugh Locke agreed with the Crown, ruling that the offence of spreading false news did not impede freedom of expression primarily because the purpose behind outlawing wilful promotion of hatred and spreading false news was the same: to prevent the wilful promotion of speech likely to cause injury to the public interest.[157] Justice Locke therefore deemed Justice Quigley's decision directly applicable.[158] Justice Locke added that had he found a violation of section 2(b), he would have upheld the offence of spreading false news as a reasonable limit under section 1.[159]

Another important issue that required resolution before the trial concerned selection of the jury. Jury selection offered a strong hint of the defence Christie was prepared to run and the emotional toll the Zundel trial would exact from Canadian Jews. Christie requested that Justice Locke exclude from the jury all Jews, anyone who was employed by Jewish persons, and anyone who was a close relative of a Jewish person.[160] Christie explained that it was proper to exclude Jews from the jury because no one should be permitted to sit in judgment of their own case.[161] (Christie also sought to exclude all freemasons, on account of allegations about freemasons made in *The West, War, and Islam*.[162]) In addition, Christie sought permission from Justice Locke to challenge potential jurors "for cause," which would, if permitted, have allowed him to question

[155] *Ibid* at 9-15. Christie referred to part of Article 19 of the United Nations Declaration of Human Rights to note the roots of the *Charter* right to freedom of expression (*ibid* at 9-10).
[156] See Zundel Transcript, Submissions by Mr. Griffiths (7 January 1985), Vol 1 at 17-20.
[157] Zundel Transcript, Reasons for Ruling on *Charter* Motion (9 January 1985), Vol 1 at 167.
[158] *Ibid*.
[159] *Ibid* at 167-171.
[160] Zundel Transcript, Reasons for Ruling on Motion to Challenge Jurors for Cause (9 January 1985), Vol 1 at 175.
[161] Zundel Transcript, Submissions by Mr. Christie (9 January 1985), Vol 1 at 127-30.
[162] Zundel Transcript, Reasons for Ruling on Motion to Challenge Jurors for Cause (9 January 1985), Vol 1 at 175.

jurors about their personal biases.[163] Much of these purported biases, according to Christie, related to belief in the Holocaust and Judaism. His proposed questions to potential jurors included:[164]

1. Can you consider and will your mind allow consideration of the question of whether there were gas chambers in Germany for the extermination of Jews?

2. Can you impartially consider the question of gas chambers and the Holocaust and remove from your mind the massive publicity of it to decide the case on the evidence put before you in this Court and only on such evidence?

3. Do you believe that the Jews of today are God's chosen people or especially favoured by God?

4. Do you believe the Holocaust happened as depicted by the media, and would you be able to remove that idea from your mind and consider the question solely on the evidence presented in court?

5. Do you have any moral, religious or other beliefs relating to Jews or the Holocaust such that you would convict or acquit regardless of the law or evidence?

In support of his application to probe the biases of potential jurors, Christie called Zundel as a witness to testify to the widespread, negative pre-trial publicity and his frequent clashes with the JDL.[165] The defence played video for the court of some of these confrontations and introduced

[163] Challenges for cause are authorized by *Criminal Code* s 638(1); s 638(1)(b) permits a challenge on the basis that the prospective juror is not impartial (prior to 19 September 2019 this provision read "is not indifferent between the Queen and the accused."). To challenge for cause on the basis of impartiality, the applicant "must show a realistic potential that the jury pool may contain people who are not impartial, in the sense that even upon proper instructions by the trial judge they may not be able to set aside their prejudice and decide fairly between the Crown and the accused." *R v Find*, 2001 SCC 32 at para 31 [*Find*]. The leading case on this issue at the time of the Zundel trial was *R v Hubbert* (1976), 11 OR (2d) 464, 1975 CanLII 53 (CA), aff'd [1977] 2 SCR 267, which set out analogous principles and was cited approvingly in *Find*. In addition to challenges for cause, prior to September 2019 (when peremptory challenges were abolished) the parties were automatically permitted a certain number of peremptory challenges, which allowed the parties to exclude jurors without having to state a reason. (See *R v Chouhan*, 2021 SCC 26 at paras 10-17, 90) At the time of the Zundel trial, the Crown and defence both had 4 peremptory challenges, but the Crown was also permitted to "stand by" up to 48 prospective jurors, meaning to defer their consideration until the jury panel was exhausted (stand-bys were arguably indistinguishable from peremptory challenges due to the large size of jury panels) (See *R v Bain*, [1992] 1 SCR 91 at 105-11 (per Gonthier J, dissenting).

[164] Zundel Transcript, Reasons for Ruling on Motion to Challenge Jurors for Cause (9 January 1985), Vol 1 at 174-75. The other proposed questions were: (6) Do you have any moral, religious or other beliefs relating to Freemasons such that you would convict or acquit regardless of the law or evidence? (7) Have you, because of religious or moral beliefs, or because of what you have heard, read or seen in the media, formed any opinion as to the guilt or innocence of the accused? (8) Despite any beliefs or opinions, would you be able to set aside those beliefs or opinions and reach a verdict of guilty or not guilty solely on the evidence and the law you receive in this courtroom? (9) Do you have any abiding prejudice against German people? (*Ibid*.)

[165] See Zundel Transcript, Reasons for Ruling on Motion to Challenge Jurors for Cause (9 January 1985), Vol 1 at 177-78.

audio of telephone calls to Zundel's home that threatened him with death, mutilation, and castration, among other things.[166]

In bringing this application to challenge jurors for cause, Christie made clear that he intended to do what Lauren Marshall would not: make the truth of the pamphlets, and by extension the Holocaust, the central issue in the trial. As he told the court:

> I have asked that those who consider themselves Jews be excused, not because of their status or religion, but because the very issue in the case is, did six million really die, and we are not talking about apples, we are talking about Jews. Therefore, that is a very core issue to the case and that is why I asked for that.[167]

Justice Locke denied the motion in its entirety, refusing to exclude Jews or freemasons or to put any of Christie's proposed questions to potential jurors.[168] Locke found distasteful and unpersuasive the unstated (and sometimes explicitly stated) assumptions in Christie's application.[169]

Had Christie succeeded in his motion, one member of the jury panel—the body from whom the jury was chosen—who would undoubtedly have been screened out was Nathan Leipciger, a Holocaust survivor and chairman of the Toronto Holocaust Remembrance Committee, who had been randomly selected to the panel. However, Leipciger's name was not called. Leipciger was disappointed because he wanted the opportunity to tell the court he was a Holocaust survivor and that his family was murdered in Auschwitz. Throughout the trial, Leipciger was confident the jury would return a guilty verdict because the time he spent with the panel left him convinced that the jurors possessed common sense and decency.[170]

The twelve-member jury that was selected consisted of ten men and two women. The jury appeared on the older side, pleasing the Crown which hoped an older jury might have more of a

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[166] Zundel Transcript, Reasons for Ruling on Motion to Challenge Jurors for Cause (9 January 1985), Vol 1 at 181.
[167] Zundel Transcript, Submissions by Mr. Christie (9 January 1985), Vol 1 at 146-47.
[168] See Zundel Transcript, Reasons for Ruling on Motion to Challenge Jurors for Cause (9 January 1985), Vol 1 at 187.
[169] See Zundel Transcript, Reasons for Ruling on Motion to Challenge Jurors for Cause (9 January 1985), Vol 1 at 179, 183.
[170] Interview of Nate Leipciger (16 February 2021) [on file with author] [Leipciger Interview]; Manuel Prutschi, "The Trial" (unpublished manuscript), typescript 13-14.

personal connection to the war.[171] Zundel, in contrast, wanted a younger jury, which he thought less likely to have been brainwashed by Allied propaganda.[172] Nevertheless, Zundel was happy that the jury contained, in his words, "a very good cross-section of Aryans" – with only one "coloured person" and "no obvious Jews."[173]

b. The Crown case

The prosecution was faced with a difficult task in seeking to convict Zundel for spreading false news. The Crown—like many in the Jewish community and the broader public—thought a conviction would be extremely hard to obtain.[174] Some of this fear was related to the nature of the charge: there had been almost no convictions for the crime of spreading false news since its introduction in Canada's first *Criminal Code* in 1892.[175]

As noted, the Crown's biggest obstacle was having to prove beyond a reasonable doubt that Zundel knew what he was publishing was false – in other words, that Zundel, in essence, believed that the Nazis had murdered approximately six million Jews during the Second World War. Moreover, the Crown had to establish Zundel knew what he was publishing was false at the time he published it in 1981, not by the time of the trial.[176] This was something not easily proved because, among other reasons, it appeared that Zundel sincerely believed his propaganda, including the contents of *Did Six Million Really Die* and *The West, War, and Islam*. According to Elisa Hategan, who as a former member of the white-supremacist group the Heritage Front spent significant time with Zundel in the early 1990s, "he absolutely believed it … it was very easy to make me believe it because he believed so much."[177] Hategan recalled that Zundel believed Sabina

[171] Prutschi, "The Trial," *supra* note 170 at 13; Memo from David Satok to National Council, Canadian Jewish Congress re Keegstra Trial Update, CJA (9 May 1985) at 1 [9 May 1985 Satok Memo to National Council].
[172] Samisdat Publishers, "Inside the Great Holocaust Trial: Part One," A film by Michael A Hoffman II, at 00h:7m:00s, online (video): *altCensored* <altcensored.com/watch?v=49kXVF12jFc> ["The Great Holocaust Trial Part I"].
[173] *Ibid*.
[174] See eg Griffiths Interview, *supra* note 34; Finley Interview, *supra* note 35; Interview of Alan Shefman (23 December 2021) [on file with author] [Shefman Interview]; Prutschi, *supra* note 170 at 1; Claude Adams, "Through the Fingers," *Canadian Lawyer* (April 1985) at 18; Kirk Makin, "Prosecution in Zundel trial faced long odds," *Globe and Mail* (1 March 1985) A15 ["Prosecution faced long odds"].
[175] See *R v Zundel*, [1992] 2 SCR 731 at 745-46, 755-56, 799-801.
[176] See Zundel Transcript, Reasons for Ruling on Motion to Admit Evidence (5 February 1985), Vol 12 at 2553.
[177] Interview of Elisa Hategan (14 October 2021) [on file with author] [Hategan Interview].

Citron was an agent paid by Israel to initiate the criminal proceedings against him.[178] Gary Botting, who stayed at Zundel's house during the trial and testified on behalf of the defence, provided a similar view: "He was sincerely a Nazi. He sincerely believed that the Nazis got the short end of the stick, somehow, after the Second World War. … [H]e was definitely sure about in his own mind is that the numbers were exaggerated and inflated in order to finance Israel."[179]

Another challenge faced by the Crown was having to prove the truth of the Holocaust (and in the case of *The West, War, and Islam*, having to disprove a conspiracy among freemasons, bankers, Zionists, and others.[180]) Because of Christie's goal of making the pamphlet's veracity the trial's primary focus, the Crown needed to have a working knowledge of the literature and themes of Holocaust denial. Griffiths recalled that going into the trial he had "a Gentile's knowledge [of the Holocaust]. I had read Leon Uris novels. … But the Holocaust denial world, the historical revisionism, I knew nothing about that."[181]

Griffiths benefitted from outside assistance. Help from Jewish community groups was essential to the Crown's preparation and conduct of the trial.[182] This assistance came largely the CJC and B'nai Brith. Although B'nai Brith and Congress had formally disaggregated their antiracism teams in the early 1980s, the two groups worked productively with one another during the Zundel and Keegstra trials.[183] The primary liaison with the Crown from the CJC was Manuel Prutschi, the JPRC's National Director.[184] Other Congress leaders in Ontario, including Rose Wolfe (chairman of the JPRC Ontario Region) and Les Scheininger (Chairman of the CJC Ontario

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[178] *Ibid*.
[179] Interview of Gary Botting (9 December 2021) [on file with author] [Botting Interview].
[180] As noted below, the jury acquitted on the count related to *The West, War, and Islam*, which was count #1 on the indictment. This count received less attention from the Crown and defence at the trial—which likely factored into the acquittal—and it may be reasonably inferred that this count caused less trauma to the Jewish community, as it did not directly involve Holocaust denial. Accordingly, I will focus primarily here and below on the evidence at trial concerning the pamphlet *Did Six Million Really Die*.
[181] Griffiths Interview, *supra* note 34.
[182] *Ibid*.
[183] As noted above and discussed in the previous chapter, the CJC and B'nai Brith entered into an agreement to work together in the antiracism field through the formation of the JPRC in 1938, but dissolved their agreement in March 1982. Nevertheless, the word "Joint" was kept in the organization's name. See Beverley Stern, "JCRC partnership splits, operating since year 1938," *Canadian Jewish News* (28 January 1982)
[184] Interview of Les Scheininger (9 February 2021) [on file with author] [Scheininger Interview] at 20; Griffiths Interview, *supra* note 34 at 24.

Region) were heavily involved.[185] The main participants from B'nai Brith were Mark Sandler, Alan Shefman, and Ellen Kachuck, the National Director, Senior Counsel, and Director of Communication and Education of B'nai Brith, respectively.[186] According to Prutschi, members of Congress and B'nai Brith met with Griffiths just prior to or at the beginning of the trial, whereupon they discovered that Griffiths "had basically been working on his own preparing for the case quite unassisted and lacking in even the most basic research support."[187] Subsequently, Congress and B'nai Brith provided extensive aid to the prosecution, including providing the Crown with legal materials, such as the transcript of the *Charter* ruling in the Keegstra case and Holocaust denial-related judgments from international jurisdictions; sharing their files on Zundel, which contained some of Zundel's neo-Nazi literature that was later used to cross-examine him with devastating effect; and putting together a team of historians to act as consultants.[188] They arranged for a doctoral student in history, Richard Menkis, to sit with the Crown during the trial to provide background and research assistance; this was particularly helpful for defence witnesses, whom Christie often did not disclose until shortly before they were called.[189] Congress and B'nai Brith also helped prepare Holocaust survivor witnesses for cross-examination, with Sandler, an experienced criminal defence lawyer, playing the role of Christie.[190] (Sandler recalled that to prepare them for Christie he had to mimic an incredibly-insulting cross-examination of Holocaust survivors, which was a bizarre experience.[191]) Griffiths characterized assistance from Jewish groups as, "Hugely helpful. I mean… I couldn't have done it without them. There would have been a different outcome."[192]

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[185] Scheininger Interview, *supra* note 184 at 11-12, 20; Prutschi, "The Trial," *supra* note 170 at 3.
[186] Prutschi, "The Trial," *supra* note 170 at 3.
[187] *Ibid* at 2.
[188] *Ibid* at 3-9; Canadian Jewish Congress Report on Zundel Trial (28 January 1985), CJA (Fonds DA21, Box 21, File 13) at 6-7 [CJC Zundel Report].
[189] Prutschi, "The Trial," *supra* note 170 at 5-6; Griffiths Interview, *supra* note 34 at 4-5, 9-10, 22; Zundel Transcript, Remarks by Mr Griffiths, Vol 11 at 2465; Zundel Transcript, Discussion (8 February 1985), Vol 13 at 3007-08. Dr. Menkis is now a Professor of Jewish History at the University of British Columbia.
[190] Minutes of the National Joint Community Relations Committee (19 March 1985), CJA (Fonds DA21, Box 19, File 20) at 2 [19 March 1985 NJCRC Meeting].
[191] Interview of Mark Sandler (16 February 2022) [on file with author] at 8-9 [Sandler Interview].
[192] Griffiths Interview, *supra* note 34 at 23.

The CHRA provided valuable assistance, too, but lacked the resources and contacts of the larger Jewish organizations. It was responsible for securing the participation of Professor Hilberg—likely the most important Crown witness—and some of the Holocaust survivor witnesses.[193] However, Griffiths recalled that Citron "was not as helpful as many others" perhaps because "she didn't understand the legal requirements of proof, of the dangers of a prosecution."[194] Mendelson had a similar recollection: "Helen [Smolack] and Sabina felt like all you had to do is throw that pamphlet up in front of Justice Locke and he'd wave it at the jurors and they'd say, hey, okay, that's it. Yeah, convicted. Well, it wasn't like that, you know?"[195]

The prosecution called thirteen witnesses, five of whom were Holocaust survivors: Arnold Friedman, Ignatz Fulop, Dennis Urstein, Henry Leader, and Rudolf Vrba. All of them had spent time in Auschwitz during the war, among other Nazi camps. Friedman and Fulop were both Hungarians who were sent to Auschwitz in 1944.[196] In their testimony they and other survivors described the selection process upon their arrival at Auschwitz, at which young and healthy persons were sent to work and the rest sent to their deaths.[197] Friedman vividly recalled witnessing flames and smoke coming out of the crematoria chimneys and the constant smell of burning flesh.[198] Urstein and Leader were from Austria and Poland, respectively.[199] At Auschwitz they were both forced to dispose of the bodies of gassing victims; Urstein saw the inside of a gas chamber and testified to the horrific appearance of gassing victims shortly after their killing.[200] Vrba was an especially powerful witness. Born in Czechoslovakia, he was in Auschwitz for approximately two years before escaping in April 1944 with his friend and fellow inmate Fred

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[193] Prutschi, "The Trial," *supra* note 170 at 2.
[194] Griffiths Interview, *supra* note 34 at 9-10.
[195] Mendelson 2022 Interview, *supra* note 53 at 6.
[196] Friedman was born in an area of Czechoslovakia that became part of Hungary in 1938. See Zundel Transcript, Examination-in-Chief of Arnold Friedman (10 January 1985), Vol 2 at 304-12 [Friedman in-chief]; Zundel Transcript, Examination-in-Chief of Ignatz Fulop (14 January 1985), Vol 3 at 591-92 [Fulop in-chief].
[197] Friedman in-chief, *supra* note 196 at 312-14; Fulop in-chief, *supra* note 196 at 592-94. See also Zundel Transcript, Examination-in-Chief of Rudolf Vrba (21 January 1985), Vol 6 at 1272-78 [Vrba in-chief]; Zundel Transcript, Examination-in-Chief of Dennis Urstein (28 January 1985), Vol 8 at 1741-44 [Urstein in-chief].
[198] Friedman in-chief, *supra* note 196 at 315-16, 326, 354.
[199] Urstein in-chief, *supra* note 197 at 1737-38; Zundel Transcript, Examination-in-Chief of Henry Leader (28 January 1985), Vol 8 at 1802-03 [Leader in-chief].
[200] Urstein in-chief, *supra* note 197 at 1745-50; Leader in-chief, *supra* note 199 at 1807-08.

Wetzler.[201] According to Vrba, he personally witnessed approximately 1.765 million people (including Jews and non-Jews) walk toward the area of the gas chamber and crematoria and never come out.[202] He helped load Zyklon-B gas into vans and on one occasion saw a Nazi corporal drop Zyklon-B cannisters into the chamber.[203] Following their escape, Vrba and Wetzler made their way back to Czechoslovakia and reported their experiences to the Slovak Jewish Council; their testimony, known as the Vrba-Wetzler Report, saved the lives of approximately 200,000 Jews.[204] Vrba joined the Slovak partisans in September 1944 and was later decorated for his bravery.[205] After the war he obtained a doctorate in chemistry and worked as a Professor of Pharmacology at the University of British Columbia.[206]

In addition to the Jewish survivors, the Crown called Chester Tomaszewski, a Christian Pole who was imprisoned in the concentration camp of Gussen (a satellite camp of Mauthausen) in Austria from 1940 to 1945.[207] Tomaszewski testified that there were about three hundred Jews in the camp when he arrived, all of whom were the first to be murdered.[208] He became emotional recalling his disbelief "that a man can inflict such misery and pain on another man."[209]

One survivor not called as a witness was Citron, even though she had initiated the prosecution and testified at the preliminary hearing. Christie complained about this repeatedly, accusing the Crown of having an "oblique motive" for not calling her and characterizing Citron's

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[201] Vrba in-chief, *supra* note 197 at 1244-46. Vrba's name at birth was Walter Rosenberg. He assumed the name Rudolf Vrba after his escape from Auschwitz when he joined the Slovak partisans (*ibid* at 1374-75).
[202] See Zundel Transcript, Cross-Examination of Rudolf Vrba (23 January 1985), Vol 7 at 1499-50 [Vrba cross-exam].
[203] Vrba in-chief, *supra* note 197 at 1327-29; Vrba cross-exam, *supra* note 202 at 1630.
[204] *Ibid* at 1342-72. See also Rudolf Vrba & Alan Bestic, *I Escaped from Auschwitz*, Nikola Zimring & Robin Vrba eds (New York: Racehorse, 2020) at 302-15; "Rudolf Vrba: Escapee from Auschwitz who revealed the truth about the camp," *The Guardian* (13 April 2013), online: theguardian.com/news/2006/apr/13/guardianobituaries.secondworldwar. ["Escapee from Auschwitz."]
[205] Vrba in-chief, *supra* note 197 at1374-75; "Escapee from Auschwitz," *supra* note 204.
[206] Vrba in-chief, *supra* note 197 at 1244-45. For a recent book on Vrba and his heroism during the Second World War, see Jonathan Freedland, *The Escape Artist: The Man Who Broke Out of Auschwitz to Warn the World* (New York: Harper, 2022).
[207] Zundel Transcript, Examination-in-Chief of Chester Tomaszewski (25 January 1985), Vol 8 at 1685-87.
[208] *Ibid* at 1693-94.
[209] Zundel Transcript, Cross-examination of Chester Tomaszewski (25 January 1985), Vol 8 at 1710 [Tomaszeski cross-exam].

evidence as "consistent with the theory of the defence."[210] Christie's complaints had little impact since the Crown is under no obligation to call the same witnesses at trial as at the preliminary hearing.[211] Griffiths commented at trial that he did not plan on calling Citron because she had an illness in her family – likely that of her husband, who died in 1985.[212] More recently, Griffiths recalled that another reason Citron did not testify may have been because she was "not a good witness in the sense of being calm and considered."[213] Moreover, Griffiths "did not think it would serve her well or the case to give Christie free rein with Sabina Citron. I thought that would be a very cruel and hurtful cross-examination."[214] There was no love lost between Zundel and Citron—according to Hategan, Zundel hated Citron and "cursed her out all the time"—and Zundel and Christie were undoubtedly disappointed at being deprived the opportunity to cross-examine her.[215] Christie suggested he would subpoena Citron as a defence witness but never followed through.[216]

The Crown called Hilberg as its expert witness on the history of the Holocaust. The main thrust of Hilberg's evidence was that *Did Six Million Really Die* was full of concoctions, contradictions, untruths, and half-truths.[217] Griffiths took Hilberg through the pamphlet in detail to explain and refute its false and misleading statements.[218] Among the statements refuted by Hilberg was the pamphlet's inaccurate claim that Hilberg himself had estimated the number of Jewish dead during the Second World War at only 896,892.[219] Other evidence introduced by the Crown to establish the pamphlet's falsity included a film prepared by the United States Army showing scenes from German concentration camps at or around their time of liberation, and a letter

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[210] Zundel Transcript, Submissions by Mr. Christie (22 January 1985), Vol 6 at 1290. See also Zundel Transcript, Submissions by Mr. Christie (14 January 1985), Vol 3 at 494-95; Zundel Transcript, Submissions by Mr. Christie (4 February 1985), Vol 11 at 2322; Zundel Transcript, Discussion, Vol 18 at 4109-10.
[211] See Zundel Transcript, Ruling of Locke DCJ (22 January 1985), Vol 6 at 1300.
[212] Zundel Transcript, Submissions by Mr. Griffiths on Motion re Udo Walendy (22 January 1985), Vol 6 at 1290.
[213] Griffiths Interview, *supra* note 34 at 12.
[214] *Ibid*.
[215] Hategan Interview, *supra* note 177 at 5-6; Griffiths Interview, *supra* note 34 at 12-13.
[216] Zundel Transcript, Submissions by Mr. Christie (14 January 1985), Vol 3 at 494-95, 98; Zundel Transcript, Discussion, Vol 18 at 4110.
[217] Zundel Transcript, Examination-in-chief of Raul Hilberg (15 January 1985), Vol 4 at 692-759.
[218] *Ibid* at 690-91.
[219] *Ibid* at 746-59. The pamphlet cites Holocaust-denier Paul Rassinier as having provided this figure from Hilberg (*Did Six Million Really Die*, *supra* note 38 at 29).

from the International Red Cross disputing *Did Six Million Really Die*'s claims about statements allegedly made by the Red Cross concerning the number of Jewish dead during the war.[220] Additionally, to prove the falsity of *The West, War, and Islam*, the Crown called police officers who happened to be freemasons and a banker to attest that they were unaware of the conspiracies alleged in that document.[221]

Shortly before closing its case, the Crown requested that the trial judge take judicial notice of the Holocaust. A court may take judicial notice of any fact so generally accepted that it is not debatable among reasonable persons.[222] By taking judicial notice a court declares that the fact in question exists, relieving the parties of the need to bring proof.[223] The Crown waited until the end of its case to ask for judicial notice because it wanted to first lay an evidentiary foundation for the request.[224] Griffiths specifically asked for judicial notice of two things: (1) that millions of Jews were annihilated from 1933 to 1945 because of the deliberate policies of Nazi Germany and (2) that the means of annihilation included mass shootings, starvation, privation, and gassing.[225] Justice Locke denied the motion because, in his view, taking judicial notice of the Holocaust would have effectively decided for the jury one element of the charge: that the pamphlet was false.[226] Doing so might have thereby infringed the accused's right to make full answer and defence.[227] The Crown renewed the motion for judicial notice at the end of the trial following conclusion of the defence case, arguing that Zundel had now been provided with the opportunity to make full answer and defence and had not established that the Holocaust could be disputed by reasonable persons.[228]

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[220] Zundel Transcript, Evidence of William Murphy (1 February 1985), Vol 10 at 2288-2311; Zundel Transcript, Examination-in-Chief of Rene De Grace (29-30 January 1985), Vol 9 at 1930-33, 1995-97. The Court of Appeal for Ontario later concluded that the trial judge erred by admitting the film and the letter as evidence, as both were inadmissible hearsay (Zundel Court of Appeal, *supra* note 63 at paras 205-219.)

[221] See eg Zundel Transcript, Evidence of Roy Bassett, Vol 3 at 505-85; Zundel Transcript, Evidence of John Thomas Burnett, Vols 8-9 at 1835-1924; Zundel Transcript, Evidence of John Luby, Vol 9-10 at 2004-2076.

[222] Judicial notice may also be taken of facts that are capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy. See *Find*, *supra* note 163 at para 48.

[223] *Ibid*.

[224] Prutschi, "The Trial," *supra* note 170 at 32; Makin, "Prosecution faced long odds," *supra* note 174.

[225] Zundel Transcript, Submissions of Mr. Griffiths re Judicial Notice (30 January 1985), Vol 10 at 2073.

[226] Zundel Transcript, Ruling on Motion re Judicial Notice (31 January 1985), Vol 10 at 2190-91.

[227] *Ibid* at 2191.

[228] Zundel Transcript, Ruling on Motion re Judicial Notice (25 February 1985), Vol 20 at 4462.

Justice Locke denied the motion for the same reasons as before.[229] In rejecting the Crown's requests for judicial notice, Justice Locke noted both times that he did so with regret.[230]

Following the trial Griffiths was criticized for failing to seek judicial notice of the Holocaust at the trial's outset, which, if successful, might have avoided the need to call survivors and spared them and the Jewish community a significant amount of anguish.[231] However, Justice Locke's reasoning suggests he would not have granted judicial notice no matter when it was sought. In any event, in his charge to the jury, Justice Locke told the jury that there was overwhelming evidence that the Holocaust occurred.[232] By making clear his view on the issue, the trial judge provided an instruction substantively equivalent to taking judicial notice.

c. The defence case

In its cross-examination of Crown witnesses and through the witnesses it called, the central theme of the defence was clear: Zundel was not guilty of spreading false news because the pamphlets were essentially accurate. As Christie summarized early in the trial:

> Our position is, there was no order, there existed no order, there existed no plan, there existed no budget, there existed, in fact, no gas chambers that we are aware of, and we intend to call experts as well to demonstrate that the allegation is made in many of the publications about the stink of burning flesh, the sky blackened by the ashes of the deceased in the gas chambers, cremations, the rapid manner by which it was possible to go in and haul out thousands of bodies and cremate them, and it is subject to grave doubt. So that's where the defence will be raising evidence to prove that this booklet, in its statements, is true.[233]

In the alternative, the defence argued that Zundel had been presenting one side of a reasonable debate concerning the truth of the Holocaust: the "revisionist" perspective, as opposed to the "exterminationist" view.[234] Christie and Zundel relied on prominent Holocaust deniers Butz and Robert Faurisson (Faurisson, but not Butz, also testified at the trial) to assist with formulating this

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[229] *Ibid* at 4464-65.
[230] *Ibid* at 4465; Zundel Transcript, Ruling on Motion re Judicial Notice (31 January 1985), Vol 10 at 2191.
[231] See Gerald Tishler, "Debate: Freedom of Speech and Holocaust Denial," 8:3 Cardozo L Rev 559 at 563. See also Les Whittington, "Did Zundel turn out to be the winner?" *Montreal Gazette* (1 March 1985) B1; Prutschi, "The Trial," *supra* note 170 at 32; Quinn, *supra* note 152 at 43.
[232] Zundel Transcript, Charge to the Jury (27 February 1985), Vol 21 at 219.
[233] Zundel Transcript, Submissions by Mr. Christie (14 January 1985), Vol 3 at 485. See also eg *ibid* at 486-493; Zundel Transcript, Defence Opening Address to the Jury, Vol 11 at 2349 [Defence Opening Address]; Zundel Transcript, Submissions by Mr. Christie (5 February 1985), Vol 11 at 2452-53; Zundel Transcript, Submissions by Mr. Christie (9 January 1985), Vol 1 at 146-7; Zundel Court of Appeal, *supra* note 63 at para 174.
[234] See eg Zundel Transcript, Submissions by Mr. Christie (14 January 1985), Vol 3 at 500; Zundel Transcript, Submissions by Mr Christie, Vol 12 at 2708.

strategy.[235] Accordingly, relatively little time was spent by the defence imparting on the jury that Zundel could not be convicted unless the Crown proved beyond a reasonable doubt that he knew the pamphlets were false when he published them, regardless of whether the pamphlets were true or whether this belief was even reasonable. In fact, when it came time for him to testify, Zundel reinforced the primary defence theory by telling the jury that he viewed their task as deciding whether the Holocaust survivors were telling the truth.[236]

Christie's cross-examination of the Crown's witnesses has been varyingly described by observers as vigorous, aggressive, tough, combative, bullying, exasperating, relentless, and scathing.[237] Christie showed the survivors maps and pictures and asked them to identify gas chambers and other landmarks with a pen, following which he interrogated them about their recollections.[238] He suggested that the survivors had not made sufficient inquiries and that their family members might still be alive.[239] Responding to Friedman's evidence that he saw smoke and flames coming from the crematorium in Auschwitz, Christie characterized this evidence as "ridiculous" and said to Friedman: "I suggest it is quite impossible for smoke to come from human beings. What do you say to that, sir?" [240] (Friedman responded that he said "nothing" since he was testifying to what he witnessed and was not an expert on the inner workings of crematoria.[241]) After Urstein testified that he lost 154 members of his extended family in the Holocaust, Christie asked him to name twenty of them (Urstein named eleven before Christie stopped him).[242] Christie

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[235] "The Great Holocaust Trial Part I," *supra* note 172 at 00h:3m:45s; Ben Kayfetz, "Professor grilled in Canada," *Jewish Chronicle* (25 January 1985); Prutschi, "The Trial," *supra* note 170 at 16.
[236] Zundel Transcript, Cross-examination of Ernst Zundel, Vol 19 at 4261 [Zundel cross-exam].
[237] Les Whittington, "Emotions taut as horror of Nazi camps re-lived at trial," *Calgary Herald* (28 January 1985) A5; Franklin Bialystok, *Delayed Impact: The Holocaust and the Canadian Jewish Community* (Montreal & Kingston: McGill-Queen's University Press, 2000) at 234; Nancy Knickerbocker, "Zundel Trial dredged up old horrors," *Vancouver Sun* (1 March 1985) B1 ["Trial dredged up old horrors"]; Kirk Makin, "Holocaust victim accused of lying by Zundel lawyer," *Globe and Mail* (25 January 1985) A10; Prutschi, "The Trial," *supra* note 170 at 80, 127; Patricia Rucker, "Long hate trials taught us that we are all survivors," *Canadian Jewish News* (12 September 1985) 10 ["We are all survivors"]; Quinn, *supra* note 152; Makin, "Prosecution faced long odds," *supra* note 174.
[238] See eg Zundel Transcript, Cross-examination of Henry Leader (28 January 1985), Vol 8 at 1820-22, 1831-32.
[239] Zundel Transcript, Cross-examination of Arnold Friedman (10 January 1985), Vol 2 at 447-48 [Friedman cross-exam].
[240] Zundel Transcript, Friedman cross-exam, *supra* note 239 at 441-42.
[241] *Ibid* at 442.
[242] Zundel Transcript, Cross-examination of Dennis Urstein (28 January 1985), Vol 8 at 1782-86, 1798-99.

explicitly called Vrba a liar, accusing him of having learned during the war how to "keep [his] lies straight" and "tell lies very effectively" to escape the Nazis.[243] (Vrba responded that "if you … on that ground, consider me a liar, then you will have to consider a liar every nineteen-year-old Canadian boy who died fighting the Nazis because he didn't tell them in advance when he was going to attack them."[244]) In general, the themes of cross-examination echoed familiar tropes of Holocaust denial and of *Did Six Million Really Die*, for example: the purpose of Zyklon-B gas was to fumigate clothes and kill vermin, not human beings;[245] crematoria were used to burn the bodies of persons who died from typhus and prevent outbreaks;[246] inmates in the camps received good medical care;[247] the survivors had not personally witnessed anyone being gassed;[248] the survivors' evidence was shaped by other (alleged) survivors and by accounts of the Holocaust in the media;[249] the survivors had profited from their allegations by extracting reparations from the German government; [250] and/or that the survivors were simply lying [251]. Notably, Tomaszewski's evidence—which, coming from a non-Jewish victim, did not fit easily into the Holocaust-denial paradigm—attracted only a very brief cross-examination from the defence.[252]

The longest cross-examination was reserved for Hilberg, whom Christie questioned for almost three days. Christie and Zundel viewed Hilberg as the Crown's most important witness; Hilberg was an attractive target for the Holocaust-denial community since he was then the world's pre-eminent Holocaust historian.[253] Christie put to him the same themes as he had to the survivors, emphasizing repeatedly in Hilberg's case that his evidence was based not on first-hand knowledge

[243] Vrba cross-exam, *supra* note 202 at 1563-65 [Vrba cross-exam].
[244] *Ibid* at 1565.
[245] See eg Vrba cross-exam, *supra* note 202 at 1616; *R v Zundel* (1987 On Dist Ct), Transcript of Proceedings, Cross-examination of Raul Hilberg read in by Mr. Pearson, at 1944-45, 2000, 2218-20, 2226-231 [Hilberg cross-exam].
[246] See eg Vrba cross-exam, *supra* note 202 at 1547-49.
[247] See eg Vrba cross-exam, *supra* note 202 at 1460-63.
[248] See eg Friedman cross-exam, *supra* note 239 at 417; Vrba cross-exam, *supra* note 243 at 1527-28.
[249] See eg Freidman cross-exam, *supra* note 239 at 412; Hilberg cross-exam, *supra* note 245 at 2259-70.
[250] See eg Friedman cross-exam, *supra* note 239 at 457-58; Hilberg cross-exam, *supra* note 245 at 2306-16.
[251] See eg Vrba cross-exam, *supra* note 202 at 1563-65;
[252] See generally Tomaszewski cross-exam, *supra* note 209 at 1705-18.
[253] "The Great Holocaust Trial Part I," *supra* note 172 at 00h:39m:15s, 00h:43m:30s.

but on hearsay from other sources.[254] Christie put to Hilberg other Holocaust-denial themes canvassed in *Did Six Million Really Die*, for instance that defendants at Nuremberg and other Nazis who confessed to their crimes did so under torture;[255] that Hitler gave no order for genocide;[256] that no scientific or autopsy reports existed indicating that the Nazis gassed anyone during the war;[257] that Jews had a large or even predominant role in causing the Second World War;[258] and that the Nazis' plan was to resettle the Jews, not murder them[259]. The defence accused Hilberg of being an incompetent historian.[260] Christie had Hilberg admit that he was Jewish, implying that he was biased.[261] Hilberg stood up well but became frustrated with Christie as the cross-examination dragged on.[262] Hilberg was also frustrated with Congress, accusing the CJC after the trial of having failed to support him or the Crown and of being opposed to the prosecution.[263] According to Christopher Browning, a Holocaust historian who testified at Zundel's second trial in 1987 and who spoke with Hilberg after the first trial, Hilberg felt that he had not been adequately prepared or warned before walking into a well-planned propaganda ambush.[264] Hilberg would later refuse to testify at Zundel's second trial, stating that he did not have the time and energy to ward off another "assault" by Christie.[265]

A central paradox of the Zundel trial (which would repeat in the Keegstra trial) is that while the defence maximized the trauma experienced by the trial's observers, it simultaneously

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[254] See Hilberg cross-exam, *supra* note *supra* note 245 at 1745-49, 1768, 1784, 1788, 1802-03, 1860-61, 1951-52, 2187-88.
[255] Hilberg cross-exam, *supra* note 245 at 1973-90, 2046-47, 2051-71, 2088-99, 2140-54, 2166, 2179, 2305-06.
[256] *Ibid* at 1806-42, 2338-46.
[257] *Ibid* at 1993-2007; see also Vrba cross-exam, *supra* note 202 at 1591.
[258] *Ibid* at 2020-26, 2044-45, 2069-70.
[259] *Ibid* at 1772-74, 1780-81, 1837-42, 2011-13, 2018-19, 2283-87.
[260] *Ibid* at 1797-98, 1850-55, 1863, 1904-16, 1924-67, 1989, 2022, 2060-68, 2121-22.
[261] *Ibid* at 2149-50.
[262] *Ibid* at 2094-95, 2132-36, 2360; Kirk Makin, "Survivors' death camp account; Testimony at Zundel trial draws tears," *Globe and Mail* (19 January 1985) A15 ["Zundel trial draws tears"].
[263] See Letter from E Lipsitz to Charles H Rosenzveig (17 July 1987) and Letter from Manuel Prutschi to Raul Hilberg (12 August 1987), CJA (Fonds DA9, Box 51, File 1).
[264] Interview of Christopher Browning (13 December 2021) [on file with author] at 2. Browning was an expert witness for the Crown in Zundel's second trial. See also Les Whittington, "Holocaust survivors relive the horror," *Windsor Star* (24 January 1985) A1 ["Survivors relive the horror"].
[265] See Letter from Raul Hilberg to John C Pearson (5 October 1987), Ex D to *R v Zundel* (1987 Ont Dist Ct); Letter from Raul Hilberg to John C Pearson (6 January 1988), Ex G to *R v Zundel* (1987 Ont Dist Ct).

minimized the chance of acquittal. In other words, the defence theory greatly strengthened the Crown's case. This is so for several reasons. One is that Christie's brutal cross-examination of the Crown's witnesses likely heightened the impact of their testimony. As the *Canadian Lawyer* pointed out after the trial, the "image of a Holocaust witness struggling to remember the names of 20 nieces, second cousins, nephews, uncles and distant aunts who were burned in Nazi ovens would have softened the hardest jury."[266] An analogous example came during Hilberg's cross-examination, when Christie read aloud a long and heart-rending excerpt from the memoir of a Holocaust survivor who had tried to commit suicide by voluntarily entering the gas chamber.[267] Although Christie was attempting to show that the passage was unworthy of belief, it elicited audible sobs from the gallery; Hilberg, his voice rising, responded that it was the most moving passage in the entire book and he would not deprive the author of his honesty.[268] Furthermore, the survivors were not punching bags – they could also punch back. For example, when Christie suggested that Vrba could not testify to having witnessed anyone being gassed since he did not personally accompany them into the chamber, Vrba responded that he saw "people go in and I never saw one civilian come out. So it is possible that they are still there, or that there is a tunnel and they are now in China; otherwise they were gassed."[269] When Christie tried this line of inquiry again, Vrba replied:

> I knew that it is a gas chamber because I saw people going into the crematoria. I saw that they are not coming out. I heard that they are being gassed there, and I have seen Zyklon gas being thrown into, on top of the gas chamber. … And therefore I concluded that it is not a kitchen or a bakery, but a gas chamber.[270]

The defence approach proved particularly counterproductive when it came time to present its own evidence. At the conclusion of the Crown's case, Christie could have declined to call any witnesses and instead argued, with good reason, that the Crown had provided no evidence to prove beyond a reasonable doubt that Zundel knew the pamphlets were false when he published them.

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[266] Adams, *supra* note 174 at 18.
[267] Hilberg cross-exam, *supra* note 243 at 2253-56.
[268] *Ibid* at 2256-69; "Zundel trial draws tears," *supra* note 262; Paul Lungen, "Defence evidence reduced chance of acquittal," *Canadian Jewish News* (14 March 1985) 14.
[269] Vrba cross-exam, *supra* note 202 at 1528.
[270] *Ibid* at 1630-31.

Indeed, Griffiths recalled that he was relieved the defence called evidence because he was concerned that he had not managed to prove the requisite intent required to convict Zundel.[271]

Instead, Christie called twenty witnesses.[272] Many of these witnesses were leading members of the Holocaust-denial organization the Institute for Historical Review (IHR) and/or had been cited in *Did Six Million Die* to call the Holocaust into question.[273] The overarching theme of this evidence was that the revisionist views held by Zundel and published in *Did Six Million Really Die* were the product of serious research by genuine scholars.[274] The problem for the defence was that much of this testimony could be interpreted to prove the opposite: that the leaders of the Holocaust-denial community were unserious people who held odious and half-baked views – that they were, in fact, antisemites masquerading as legitimate researchers.

Examples of absurd and self-defeating testimony abound in the defence evidence. Ditlieb Felderer testified that there was a dance hall, theatre, and Olympic-sized swimming pool at Auschwitz (with starting blocks and a springboard used for competition) and that inmates received the best and most modern medical care.[275] Felderer admitted on cross-examination that he had been convicted of race hatred and sent to prison in Sweden for distributing a cartoon that depicted a Jewish person saying: "I was gassed 6 times! No! Ten times. No!.... and there are 5,999,999 others like me in New York."[276] He also admitted to distributing a flyer asking recipients to send their hair to the Auschwitz Museum director for display alongside the other phony hair (the flyer read in part: "To Mr. Smolen at Auschwitz Museum -- hereby forwarding my personal trophy… I feel rather miserable… not even Zyklon-B can cure me!").[277] Moreover, Felderer recounted

[271] Griffiths Interview, *supra* note 34 at 7.
[272] See Quinn, *supra* note 152 at 43.
[273] See eg Zundel Transcript, Cross-examination of Robert Faurisson, Vol 11 at 2433 [Faurisson cross-exam]; Zundel Transcript, Examination-in-Chief of Charles Weber, Vol 15 at 3353; Zundel Transcript, Cross-examination of Udo Walendy, Vol 17 at 3756-57; *Did Six Million Really Die*, *supra* note 38 at 17-18, 25-26.
[274] See eg Defence Opening Address, *supra* note 233 at 2351.
[275] Zundel transcript, Examination-in-Chief of Ditlieb Felderer, Vol 14 at 3186-92, 3196-97 [Felderer in-chief]; Zundel transcript, Cross-examination of Ditlieb Felderer, Vol. 14 at 3240-41 [Felderer cross-exam]; Zundel transcript, Re-examination of Ditlieb Felderer, Vol 14 at 3274-75 [Felderer re-exam].
[276] Felderer cross-exam, *supra* note 275 at 3247-51. Note I have changed the spelling of "New York" from that provided in the pamphlet.
[277] *Ibid* at 3253-71.

having been thrown out of a synagogue in Stockholm after he went there on Yom Kippur (the Day of Atonement, the holiest day in the Jewish calendar) to confirm that lies were still being perpetrated by the Jews.[278] Robert Faurisson, a Professor of Literature at the University of Lyon in France, was permitted to testify as a Holocaust expert.[279] Faurisson stated that after twenty-five years of personal inquiry he could not find the slightest proof of any Nazi gas chambers.[280] In his opinion only 250,000-350,000 people (whether Jewish or non-Jewish) died in all of the German concentration camps during the war.[281] Faurisson conceded that he had been convicted three times in France in relation to his Holocaust denial.[282] He also acknowledged that he had been banned from several research institutions and was no longer allowed to teach at his university.[283] When Griffiths asked Faurisson where all the Jews went if they had not been killed, Faurisson—with what the *Canadian Lawyer* described as "monumental arrogance"—urged the survivors to submit the names of family members to him and he would try to find them.[284] (According to David Satok, the CJC could have had Faurisson blocked from entering Canada prior to the trial, but the CJC and Crown mutually agreed that the prosecution would be better served if Faurisson was permitted to come to Canada and impale himself on cross-examination.[285]) Yet another defence witness, Thies Christopherson—a German whose evidence was that he worked in the town of Auschwitz (not the extermination camp) during the war and never observed any evidence of mass killings—was forced to concede in cross-examination that he had been criminally convicted in West Germany

[278] *Ibid* at 3263; Felderer re-exam, *supra* note 275 at 3275.
[279] Zundel Transcript, Ruling by Locke DCJ, Vol 11 at 2466-2475.
[280] Zundel Transcript, Examination-in-Chief of Robert Faurisson, Vol 11 at 2501-12.
[281] Faurisson cross-exam, *supra* note 273 at 2734-35.
[282] Faurisson cross-exam, *supra* note 273 at 2415-2420. Congress and B'nai Brith arranged for a telephone call between the Crown and the French prosecutor who had handled the various cases against Faurisson in France. See Prutschi, "The Trial," *supra* note 170 at 4.
[283] Faurisson cross-exam, *supra* note 273 at 2740.
[284] *Ibid* at 2877-79; Adams, *supra* note 174 at 18.
[285] Minutes of the Joint Community Relations Committee Ontario Region (30 January 1985), CJA (Fonds DA21, Box 19, File 12) [30 January 1985 JPRC Meeting].

for distributing neo-Nazi propaganda.[286] In short, the overall impact of such witnesses was likely to undermine the credibility of the entire defence.

Other witnesses were of limited relevance and may have cost the defence further goodwill with the jury. One of these witnesses was Botting, then a Professor of English at Red Deer College in Alberta.[287] He later became a lawyer and worked for Christie before publicly breaking ties with him in 1996 over Christie's alleged antisemitism.[288] Botting came to Christie's attention because Botting had attempted to use *The Hoax of the Twentieth Century* as suggested reading for his introductory literature course before the book was seized by the College and turned over to the Royal Canadian Mounted Police (RCMP).[289] (Likely unbeknownst to Botting, the CJC was also strongly opposed to banning *The Hoax of the Twentieth Century*.[290]) According to Botting, after he wrote a letter to the editor criticizing the decision to ban the book, Christie called him out of the blue, asked him "if I wanted to put my money where my mouth is," and told Botting that he had a subpoena and a first-class ticket for him to come testify at the Zundel trial.[291] The purported relevance of Botting's evidence at Zundel's trial was to show how those who taught both sides of the Holocaust were censored.[292] Botting's testimony did little to advance the defence and Botting agreed on cross-examination that he did not condone deliberate falsehood.[293]

Perhaps the most surprising witness at Zundel's trial was Jim Keegstra.[294] As with Botting, the seeming relevance of Keegstra's testimony was to show how those who tried to teach another

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[286] Zundel Transcript, Examination-in-Chief of Thies Christopherson, Vol 13 at 2979-88; Zundel Transcript, Cross-examination of Thies Christopherson at 3018-20. Christopherson was also convicted during the war of defamation of the Third Reich (*ibid* at 3019).
[287] Zundel Transcript, Examination-in-chief of Gary Botting, Vol 16 at 3571 [Botting in-chief].
[288] Kim Westad, "Botting comes face-to-face with past," *Times Colonist* (20 April 1996) B2.
[289] Botting in-chief, *supra* note 287 at 3580-84; Zundel Transcript, Cross-examination of Gary Botting, Vol 16 at 3605-06 [Botting cross-exam]. The defence attempted unsuccessfully to have Botting qualified as an expert witness in the interrelationships of history, literature, and cultural myth (Zundel Transcript, Ruling, Vol 16 at 3627-29).
[290] Minutes of the National Joint Community Relations Committee (3 October 1984), CJA (Fonds DA21, Box 19, File 20) at 4-5.
[291] Botting Interview, *supra* note 179 at 6. See also Gary Botting, "Individuals should judge book's merits" (letter to the editor), *Calgary Herald* (11 September 1984) A6.
[292] Botting in-chief, *supra* note 287 at 3580-87, 3590-93, 3596, 3600-01, 3630-32.
[293] Botting cross-exam, *supra* note 289 at 3635.
[294] See "Keegstra takes witness stand to aid Zundel," *Calgary Herald* (15 February 1985) A9.

perspective to the Holocaust were silenced.[295] Any benefit to the defence from this evidence dissipated upon cross-examination. One example will suffice: Asked by Griffiths whether Keegstra had taught his students anything about the Jewish role in the assassination of Abraham Lincoln, Keegstra acknowledged that he had; after all, John Wilkes Booth was Jewish, Keegstra explained.[296]

The most damaging witness was Zundel himself, the last witness called in the trial. During examination-in-chief, Christie sought to portray Zundel as a thorough researcher working in good faith.[297] The defence introduced close to one hundred books and periodicals into evidence to exhibit the solid foundation for Zundel's beliefs.[298] This image unraveled on cross-examination. Griffiths had Zundel admit to creating, publishing and/or selling various neo-Nazi material, including *The Hitler We Loved and Why*.[299] This material presented Zundel in an extremely bad light and gave lie to the testimony he had just provided in-chief. Griffiths pointed Zundel to excerpts from *The Hitler We Loved and Why*, such as where the book shows an image of Martin Luther King and Rabbi Jacob Rothschild above the heading "The Face of The Enemy."[300] Zundel conceded that he did not see much wrong with the book's contents.[301] Griffiths then went through the same exercise with some of Zundel's other writings. In one passage, Zundel had asked his readers to "Let others know that you support White Man in his struggle for truth, freedom, and justice."[302] (Zundel said it was ridiculous to suggest he was a racist based on this material, since he was white.) In another, Zundel told his followers that he looked forward "to the bright sunrise of Aryan Victory."[303] And in another, Zundel championed his "mass-mailings and marches against

[295] Zundel Transcript, Examination-in-Chief of James Keegstra, Vol 16 at 3487-91.
[296] Zundel Transcript, Cross-examination of James Keegstra, Vol 16 at 3495.
[297] See eg Zundel Transcript, Examination-in-Chief of Ernst Zundel, Vol 17-18 at 3814-3842, 3851-53, 3863-93 [Zundel in-chief].
[298] See Zundel Transcript, Ruling of Locke DCJ, Vol 19 at 4226.
[299] Zundel cross-exam, *supra* note 236 at 4228-36, 4245-59, 4265-76.
[300] *Ibid* at 4233-34, 4267-72; Christof Friedrich & Rich Thomson, *The Hitler We Loved and Why* (Reedy, West VA: White Power Publications, 1977) at 42.
[301] Zundel cross-exam, *supra* note 236 at 4231, 4270.
[302] *Ibid* at 4247.
[303] *Ibid* at 4259.

the Zionist Holocaust Hoaxers."[304] (Said Zundel to Griffiths: "And what do you find wrong with that?") In short, the Crown painted Zundel as an unrepentant racist who might say anything to whitewash Nazi crimes. Griffiths could tell from the jury's reaction that they clearly did not like Zundel.[305]

Given how damaging the defence evidence was to its own case, it is worth asking why Christie presented it. An obvious reason is that this is the strategy Zundel wanted.[306] It was, indeed, why he had switched from Marshall to Christie. As Marshall put it recently, "I sure as heck wasn't asking where the swimming pool was [in Auschwitz]."[307] Another reason may have been that Christie believed in Zundel's theories himself. Christie, who represented numerous alleged hatemongers before passing away in 2013, was long the subject of speculation as to whether he shared his clients' views.[308] But one need not speculate nor fall into the trap of identifying a lawyer with his client, because Christie's own words evidence sympathy for Zundel's—and Keegstra's—beliefs. In a televised interview shortly after Zundel's verdict, Christie suggested that Allied bombing of Germany during the Second World War was unfair and said that "maybe if we don't have the six million as an excuse for that, maybe we start asking those questions."[309] In another interview published a few weeks later, Christie stated: "I don't believe that the holocaust is generally accurately portrayed at all …. The stories are really impossible. The central gas-chamber thesis – I'm sorry, I don't believe it anymore. I don't think it stands up at all."[310] Additionally, in the summer of 1985 it came to light that Christie had authored a letter soliciting funds for

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[304] *Ibid* at 4251-52.
[305] Griffiths Interview, *supra* note 34 at 8.
[306] See Interview of Doug Christie by Jack Webster [on file with British Columbia Archives] on *Webster!* (4 March 1985), *YouTube*, online: youtube.com/watch?v=KAGif79YlTE at 00h:7m:55s [*Webster*].
[307] Marshall Interview, *supra* note 44.
[308] See Sarah Boesveld, "Controversial free speech defender Douglas H Christie, lawyer for Canada's most prominent hatemongers, dead at 66," *National Post* (12 March 2013), online: https://nationalpost.com/news/canada/controversial-free-speech-defender-douglas-h-christie-lawyer-for-canadas-most-prominent-hatemongers-dead-at-66.
[309] *Webster*, *supra* note 306 at 00h:15m:40m.
[310] Hay, *supra* note 77. See also Chris Morris, "Legal gunslinger ready to rise to aid of Keegstra, Ross," *Montreal Gazette* (18 December 1990) B1 ("When asked once about the Nazi slaughter of Jews, Christie admitted he has doubts about the way it is presented. 'I think the gas chamber story – I just can't believe it. I'm sorry, I'm just an unbeliever, but that's the way it is.").

Keegstra's defence which alleged that "the right to believe views that oppose Judaism" was at stake in Keegstra's trial; the letter went on: "Everyday a representative of the Canadian Jewish Congress sits in court and walks in and out of the prosecutor's office at the breaks, as well as advises the media, showing us who is the real power in the land."[311] Christie stayed with both Zundel and Keegstra during their respective trials, and behind-the-scenes footage from Zundel's house evidences Christie's affinity for his client's views.[312] For example, in a passionate speech to Zundel and his supporters on 15 February 1985 (the same day Botting testified), Christie told his audience they were making history through their courage. He continued:

> We are pushing, not just to get [Zundel's] acquittal which I feel is genuinely assured, but we are also pushing to put this type of prosecution forever out of the way. So that they will never do it again. So that we can then say to them: "Never Again!"[313]

Christie, Zundel, and his followers then laughed uproariously at Christie's witticism.[314]

Reflecting on these debriefings almost two decades later, Christie said that many times his emotions got the better of him:

> In talking about the trial, I would say whatever came into my head, probably unwisely. But human nature being what it is, when you get into a difficult situation with people that you feel a bond with, you usually throw caution to the wind and say what comes into your mind and heart. I know I was very emotional. In fact, I had tears in my eyes many times in those debriefings, which I would probably be embarrassed at.[315]

According to Botting, "Christie I think came to believe Zundel more than he probably should have."[316] Having been seemingly convinced by Zundel's Holocaust denial, he may have been more likely to think that the jury would be convinced, too.

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[311] The letter appeared in Montreal and purported to be an open letter to Muslims to lend support to Keegstra's defence. Christie acknowledged that he had written portions of the letter, but said it was meant to be private and he did not know it was being used to solicit donations. See Paul Lungen, "Flyer pleads for funds to support Keegstra," *Canadian Jewish News* (18 July 1985) 5; Richard Helm, "Letter asks Moslems to aid Keegstra defence," *Edmonton Journal* (21 July 1985) A2; "CCLA wanted Christie to clarify his position," *Canadian Jewish News* (28 August 1986) 1.

[312] See generally "The Great Holocaust Trial Part I," *supra* note 172; Samisdat Publishers, "Inside the Great Holocaust Trial: Part Two," A Mike Gustav video, online (video): *Internet Archive* https://archive.org/details/insidethegreatholocausttrialpart2 ["The Great Holocaust Trial Part II"].

[313] "The Great Holocaust Trial Part II," *supra* note 312 at 00h:37m:58s.

[314] See *ibid*.

[315] See *Zundel, Re* (FC Docket No DES-2-03), Transcript of Proceedings at 5356-57.

[316] Botting Interview, *supra* note 179 at 6.

d. Atmosphere and community reaction

Publicity of the trial was enormous, putting tremendous pressure on the Jewish community. Every morning Zundel and about a dozen of his followers drove up to the front of the courthouse on University Avenue in a van (a Volkswagen, of course).[317] An overflow group were escorted from Zundel's house to the court in a police vehicle.[318] Zundel wore a blue hardhat and a bulletproof vest, while the rest of his supporters wore yellow hardhats.[319] Upon arrival at the courthouse Zundel's group was met by additional police officers and a contingent of reporters and camerapeople.[320] This type of theatrical entrance was completely unnecessary, as the police had offered to have Zundel drive his van underground and use the judge's entrance.[321] Zundel, however, wanted the publicity; as Mendelson recalled, he "didn't mind the fancy-dancy Emergency Task Force vehicles all around him and guys with AR-15s. He didn't mind that. But shit no I'm not going in the underground. People gotta see me. He got coverage every day."[322] Although Zundel was trying to display strength by marching up the front of the courthouse with his supporters, not everyone was impressed. Prutschi noted that while "Zundel might have visualized himself as a führer and those surrounding him as his valiant, brown-shirted followers," in fact "Zundel and his group were more reminiscent of Robin Hood and his Merry Band of Men, albeit far more straggly and Zundel, rather than Robin Hood, reminded one much more of Friar Tuck in personal appearance."[323] Sandler had a similar reaction to Zundel's crew: "I always found it amusing, they'd come [to court] with their documents in paper bags, they looked dishevelled a

[317] James Quig, "Explosive emotions surround Zundel's trial; Survivors of Holocaust stand in line for seats," *Montreal Gazette* (2 February 1985) A1.
[318] Mendelson 2022 Interview, *supra* note 53 at 16.
[319] Quig, *supra* note 317.
[320] *Ibid*.
[321] Mendelson 2022 Interview, *supra* note 53 at 20.
[322] *Ibid*.
[323] Prutschi, "The Trial," *supra* note 170 at 22.

number of them and so on, and you'd say if this is the master race I must be missing something here."[324]

Protesters also greeted Zundel upon arrival. Prior to the trial, Mendelson and Bowerman met with Jewish groups to give them an overview of the security arrangements and to explicit tell them to keep the peace.[325] Unsurprisingly, the JDL ignored this instruction. As Zundel's band tried to enter court on the first day of proceedings, the JDL attacked them and pelted them with eggs, in the process breaking a television set carried by one of Zundel's men.[326] As Mendelson described:

> [W]e met with them [before the trial]… to tell them, look it… Zundel and company are going to arrive, you know, and here's what you can do. You want to shout, you want to scream at him, go ahead. Fill your boots. … Don't assault him or any of his people because you'll get arrested. Don't throw things because you'll get arrested. And sure enough, I swear to you, within seven seconds of him getting out of that vehicle the eggs were flying. Seven seconds. I went oh fuck, Jesus.[327]

Four JDL members including Weinstein were arrested.[328] Their bail stipulated that they could not come within one thousand feet of the courthouse.[329] Security was increased following this incident.[330] As a result, further violence was avoided, although Zundel continued to encounter heckling outside of court.[331] For instance, on 11 January 1985, following Friedman's evidence, Zundel told reporters that he had found Friedman's testimony "entertaining."[332] Someone in the crowd shouted: "Do you find people being burned entertaining?"[333] Moreover, on one day someone stole Zundel's hardhat when he left it near the security desk at the court entrance.[334] Said

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[324] Sandler Interview, *supra* note 190 at 9.
[325] Mendelson Interview, *supra* note 53 at 23.
[326] Kirk Makin, "Fists, eggs thrown as Zundel trial starts," *Globe and Mail* (8 January 1985) A13 ["Fists, eggs thrown"]; Zundel Transcript, Remarks by Mr Christie, Vol 1 at 8, 37.
[327] Mendelson Interview, *supra* note 53 at 23.
[328] "Fists, eggs thrown," *supra* note 326; Weinstein Interview, *supra* note 33 at 10.
[329] Weinstein Interview, *supra* note 33 at 10; Kirk Makin, "Lawyer seeks non-Jewish jury in Zundel trial," *Globe and Mail* (9 January 1985) M1. Weinstein later had his bail varied and was able to attend some of the trial. He and the other arrestees were subsequently acquitted of the charges (Weinstein Interview, *supra* note 33 at 9-10).
[330] Les Whittington, "Zundel jubilant despite verdict," *Calgary Herald* (1 March 1985) A1.
[331] Quig, *supra* note 317.
[332] The Great Holocaust Trial Part I, *supra* note 172 at 00h:28m:20s.
[333] *Ibid* at 00h:28m:40s.
[334] Kirk Makin, "Crown asks for long prison term; Zundel guilty, but unrepentant," *Globe and Mail* (1 March 1985) ["Guilty but unrepentant"].

Mendelson of the incident: "God it was so funny. I mean I laughed my head off. But Ernst made a big stink of it."[335]

Inside the building there were long lineups to claim one of about seventy seats in the courtroom.[336] The line grew longer every day and those hoping for a seat arrived up to two hours before the proceedings started.[337] Holocaust survivors and other members of the Jewish community waited in line alongside Zundel's supporters. This occasionally led to shouting matches between the two groups.[338] Judy Cohen, a Holocaust survivor from Hungary who came to watch the trial, remembered there being "so many neo-Nazis … oh the vulgarity of the whole thing, the way they talk. So finally one day I was so angry I turned around and told the guy in Hungarian – you know, surprised them – and I said 'better people were hung in Hungary than you are.'"[339] Suzanne Agasee, a Holocaust survivor from France, recounted a similar incident. When she observed Faurisson, "I looked at him and I called him a dirty Nazi pig in French. I said it quietly so the guards wouldn't hear. He got the message and he looked at me with daggers coming out of his eyes. Made me feel better, anyways."[340] Sandler, in contrast, recalled less tension between the groups:

> [A]s I would walk over to the courtroom [I would] see these people lined up talking to each other in line waiting for security … for example a Jewish member of the community wearing a *yarmulka* would be talking to a neo-Nazi, not realizing that it's a neo-Nazi. And then I think it dawned on people probably because once they got into the courtroom the neo-Nazis would go left … and then the Jewish community members would go the opposite direction amongst their friends and colleagues. So I was quite amused by the conversations that were taking place among the most unlikely people.[341]

Within the courtroom, the gallery consisted of a strange mix of Holocaust survivors, other Jewish observers, members of the media, police officers, and neo-Nazis.[342] The police ensured

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[335] Mendelson Interview, *supra* note 53 at 16.
[336] Prutschi, "The Trial," *supra* note 170 at 16-17; "Guilty but unrepentant," *supra* note 334; Quig, *supra* note 317; Wendy Eckersley, "Zundel Holocaust trial attracts extraordinary attention," *Daily Herald-Tribune* (12 February 1985) 3.
[337] Bialystok, *supra* note 237 at 236.
[338] Shefman Interview, *supra* note 174 at 17.
[339] Interview of Judy Cohen (2 April 2021) [on file with author] at 8-9.
[340] Interview of Suzanne Agasee by Lisa Newman (Sarah and Chaim Neuberger Holocaust Education Centre) (22 January 1990), Tape 2, available online: vha-usc-edu.ezproxy.library.yorku.ca/viewingPage?testimonyID=57658&returnIndex=0.
[341] Sandler Interview, *supra* note 190 at 9.
[342] Prutschi, "The Trial," *supra* note 170 at 17-20; Quig, *supra* note 317.

there was always space available for people like Citron, Smolack, Prutschi, and Shefman.[343] Shefman recalled that members of the Jewish community were always trying to occupy as many seats as possible to decrease those available for Zundel's group.[344] One attendee described the trial as being like a convention for Holocaust deniers.[345] Among the Zundel supporters regularly in attendance were Donald Andrews and Robert Smith (who in August 1984 became the second people ever charged in Ontario with wilful promotion of hatred), John Ross Taylor, and David McCalden, formerly Director of the IHR.[346] Faurisson and Felderer also sat in the gallery despite an order from Justice Locke excluding all witnesses from the courtroom; when this came to the judge's attention, he scolded Christie.[347] Felderer was ejected from the courtroom prior to being called as a witness when he attempted to hand Citron a neo-Nazi pamphlet, a subject which Griffiths brought up during Felderer's subsequent cross-examination.[348] (Felderer admitted he had been distributing the pamphlet and told Griffiths: "I gave that to Mrs. Citron. If anyone should appreciate this material, it should be her."[349])

The mood in court was tense.[350] As Kirk Makin described: "A courtroom during a trial is a really, for many stressful, for many fascinating and compelling spectacle. … [T]here's always a real tangible sense of momentousness and momentum to it, and this one was 50 times that."[351] The gallery was mostly quiet but occasionally gasps or sobs could be heard in response to the evidence.[352] One woman was taken out of the courtroom with heart palpitations.[353] Much of the

[343] Mendelson Interview, *supra* note 53 at 5.
[344] Shefman Interview, *supra* note 174 at 16-17.
[345] "Survivors relive the horror," *supra* note 264.
[346] See CJC Zundel Report, *supra* note 188 at 5-6.
[347] Zundel Transcript, Discussion, Vol 14 at 3156-57, 3163-66. See also Zundel Transcript, Cross-Examination of Jurgen Neumann, Vol 15 at 3345-46.
[348] Prutschi, "The Trial," *supra* note 170 at 18; Zundel Transcript, Remarks by Mr Griffiths, Vol 3 at 693; Felderer cross-exam, *supra* note 275 at 3245-46.
[349] Felderer cross-exam, *supra* note 275 at 3246.
[350] Weinstein Interview, *supra* note 33; Shefman Interview, *supra* note 174 at 16; "Survivor of Nazi death camps testifies at trial of man who denies Holocaust," *Montreal Gazette* (11 January 1985) B1; "Zundel trial draws tears," *supra* note 262.
[351] Interview of Kirk Makin (18 April 2022) [on file with author] at 5 [Makin Interview].
[352] Makin Interview, *supra* note 351 at 6; Finley Interview, *supra* note 35 at 16; Mendelson 2022 Interview, *supra* note 53 at 13; "Zundel trial draws tears," *supra* note 262.
[353] Kirk Makin, "Many angered by decision to prosecute; Jewish community torn by Zundel trial," *Globe and Mail* (28 February 1985) A1 ["Jewish community torn"].

testimony was gut-wrenching, particular for the Holocaust survivors who came to observe. Leipciger, who attended the trial after his dismissal from the jury panel, remembered that the evidence left him and other survivors feeling very angry and caused them nightmares.[354] Another survivor, Robert Rosen, attended the trial only for one day, explaining that "I got so aggravated and upset, I went out and I never went back because I couldn't take it."[355] Vera Schiff, a survivor from Prague, also could only stomach one day of evidence.[356] She recalled:

> The shock was that I have heard [Christie's] incredible comments that really … this is all exaggerated …. Not all lawyers are that, should I say, almost abrasive as Mr. Christie was. … And I sat there and of course to me, who has lost [my] entire family – every single family member of mine perished during the *Shoah* [Holocaust]. To listen that this is done for *money*? It wasn't that bad and the Jews invented these numbers. … I was crushed. … [I]t took me ages to recover and take a cab ride home. But then I said to my husband, who was a Holocaust survivor as well, that … we relied on other people to testify or put the record straight, and that was a wrong reliance. Because obviously they are already in my lifetime being doubted. What will happen long after I'm gone?[357]

It is important to emphasize that not only Jewish attendees were disturbed by the evidence. Asked whether it was painful to listen to the testimony, Griffiths responded: "Yes. An unqualified yes. … It was awful."[358] According to Finley, the Crown attorney who assisted Griffiths, the evidence "was very difficult for everybody …. You know to have someone like Chester Tomaszewski – having to be in a witness box and talk about those memories that were so horrific and then be cross-examined as though he's a liar. It was really difficult."[359] The evidence was also difficult for Justice Locke, who fought in the Second World War.[360] Observers remarked that the normally-reserved judge had difficulty containing his emotions during the proceedings.[361] Locke lost his temper repeatedly, twice threatening to cite Christie in contempt of court.[362] One notable

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[354] Leipciger Interview, *supra* note 170 at 9-10.
[355] Interview of Robert Rosen by Joshua Kamen (8 March 1989) [on file with USC Shoah Foundation Visual History Archive].
[356] Interview of Vera Schiff (30 March 2021) [on file with author] at 14.
[357] *Ibid* at 4 (emphasis in original).
[358] Griffiths Interview, *supra* note 34 at 15.
[359] Finley Interview, *supra* note 35 at 16; Sandler Interview, *supra* note 190 at 9.
[360] Finley Interview, *supra* note 35 at 15-17.
[361] Finley Interview, *supra* note 35 at 15; Makin Interview, *supra* note 351 at 21; Mendelson 2022 Interview, *supra* note 53 at 21.
[362] See eg Zundel Transcript, Cross-examination of Raul Hilberg, Vol 5 at 1164-66; Zundel in-chief, *supra* note 297; "Guilty but unrepentant," *supra* note 334; Zundel Transcript, Discussion, Vol 16 at 3543-44; Zundel Transcript, Cross-examination of Udo Walendy, Vol 17 at 3769-70; Faurisson cross-exam, *supra* note 273 at 2750-55.

incident occurred during Christie's cross-examination of Hilberg, when Christie attempted, without asking Justice Locke for permission, to bring up some of Zundel's supporters from the gallery to demonstrate how many people could fit in one square metre.[363] Christie had placed a number of sticks on the floor of the courtroom for this purpose.[364] The objective of this demonstration was to dispute the estimate provided by a Nazi SS officer of how many Jews the Nazis had been able to fit into a gas chamber at one time.[365] (Hilberg was clear that he had not relied on this estimate, finding it not credible, so the relevance of this line of questioning is difficult to discern.[366]) Locke immediately ordered the jury out of the room and ripped into Christie.[367] Steven Skurka, a veteran criminal defence lawyer who attended the trial, commented that Locke "was as angry as any judge I've seen in my career" when Christie pulled this stunt.[368]

Locke's anger derived from what he viewed as Christie's lack of respect for the Court and the rules of evidence, but also likely had to do with the fact that the defence themes could be interpreted as dishonouring the many Canadians who died fighting the Nazis.[369] Moreover, Justice Locke received threats during the trial, as did Griffiths, Christie, and at least one of the Holocaust survivor witnesses, Dennis Urstein.[370]

The trial was traumatic for those not in attendance, too. This was partly on account of the enormous quantity of press coverage of the proceedings, which attracted daily and prominent attention throughout Canada.[371] According to Makin, "next to the [Paul] Bernardo trial I have

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[363] Hilberg cross-exam at 911.
[364] See *ibid* at 918. Steven Skurka, discussed below, recalls them as "yellow strips." See Beth Sholom Synagogue Toronto, "Evenings with Steve Featuring Annamaria Enenajor and Mark Sandler" (26 January 2022), *YouTube*, online: youtube.com/watch?v=lfTtWUeHTbo at 00h:23m:15s ff ["Evenings with Steve"].
[365] See Hilberg cross-exam at 906-11. The name of the officer was Kurt Gerstein.
[366] Hilberg had, however, testified that a "surprisingly large number" of people could be squeezed into a gas chamber. See *ibid* at 906-11, 914-15. Christie's explanation of the relevance of this inquiry can be found at 915.
[367] See *ibid* at 911-18.
[368] Evenings with Steve, *supra* note 364 at 00h:23m:15s ff.
[369] Regarding Christie's disregard of judicial orders and the rules of evidence, see eg Zundel Transcript, Discussion, Vol 12 at 2610-11; Zundel Transcript, Ruling of Locke DCJ, Vol 12 at 2710-11; Friedman cross-exam, *supra* note 239 at 450-56; Zundel Transcript, Cross-examination of Roy Bassett, Vol 3 at 549; Hilberg cross-exam, *supra* note 245 at 784-85, 993-94, 1016-17, 1023-26, 1088-89, 1116-17, 1164-66.
[370] Zundel Transcript, Discussion, Vol 8 at 1736-37.
[371] Nicholas Russell, "Handling Hate: Reporting of the Zundel and Keegstra trials" in Nicholas Russell, ed, *Trials and Tribulations: An examination of news coverage given three prominent Canadian trials* (Regina: University of Regina, 1986) at 32. See also Scheininger Interview, *supra* note 184 at 11-12; Makin Interview, *supra* note 351 at 5.

never covered anything that had as much exposure as the Zundel trial."[372] The case became virtually unavoidable, making it difficult for some—especially Holocaust survivors—to open their newspapers.[373] As one survivor described: "When I see Zundel on the front page, I feel like someone stabbed me."[374] Another survivor added: "every time I read the paper, I felt sick. What it does to my insides – I wish I could show you. I don't know if you realize what it does to us, the survivors."[375] Shefman remembered people being "very emotional, very upset, very hurt. In fact, some people I do recall saying 'why are you doing this?' Not because they didn't feel that this guy should be criminally charged … [but] the things that were recorded in court and then reported in the newspapers were very, very hurtful."[376]

This reaction reflected not only the quantity, but also the quality of the coverage. During and after the trial the media was accused of granting unwarranted credibility to the defence and failing to appreciate the impact of the evidence on Canadian Jews. Prutschi spoke for many others when he opined: "The media … all too frequently shifted its attention away from the reality of the Holocaust to report uncritically on the Holocaust denial lie. Coverage of the prosecution's case tended to focus on defence cross-examination and on efforts to cast doubt on survivor and expert testimony."[377] Some of the headlines were particularly upsetting. For instance, on 12 January 1985, reporting on Arnold Friedman's evidence, the front page of the *Globe and Mail* declared: "Lawyer challenges crematoria theory; Witness indecisive."[378] "No scientific proof Jews gassed, trial told" announced the *Toronto Star* on 18 January 1985.[379] On 12 February 1985 the *Montreal Gazette* proclaimed: "Mass Nazi gassings impossible expert witness tells Zundel trial."[380] And on

[372] Makin Interview, *supra* note 351 at 5.
[373] Alan Mendelsohn, "Canadian Trial gave hate-monger a perfect platform for his views," *Akron Beacon Journal* (8 April 1985) A5.
[374] Interview of Lily Smietana by Renee Beiles (14 September 1992) [on file with USC Shoah Foundation Visual History Archive].
[375] "Trial dredged up old horrors," *supra* note 237.
[376] Shefman Interview, *supra* note 174 at 18.
[377] Manuel Prutschi, "Antisemitism on trial: Zundel convicted, media indicted" (Spring 1985) 27 Centre for Investigative Journalism Bulletin 13 at 13.
[378] Kirk Makin, "Lawyer challenges crematoria theory; Witness indecisive," *Globe and Mail* (12 January 1985) A1.
[379] Wendy Darroch, "No scientific proof Jews gassed, trial told" *Toronto Star* (18 January 1985) A2.
[380] "Mass gassings impossible expert witness tells Zundel trial," *Montreal Gazette* (12 February 1985) A6.

13 February 1985 the *Ottawa Citizen* described Ditlieb Felderer's evidence this way: "Nazi camps pleasurable, Zundel witness testifies."[381] (The *Toronto Star* captioned Felderer's testimony as: "Prisoners at Auschwitz dined, danced to bands Zundel witness testifies."[382]) As historian Irving Abella said after the trial, such "headlines and news stories will long be seared into our memories."[383] The media coverage also frustrated the Crown. As Finley recalled, "the whole cross-examination would be like 'the sky is grey' and the answer would be 'no, it's blue.' … And the headline in the paper the next day would be: 'The Defence Says the Sky is Grey.' It would never put what the witnesses said. It was always the outrageous things that the defence counsel would say."[384]

Following the trial some media outlets agreed that they went too far in seeking to remain objective between the Crown and defence.[385] Julian Sher, a radio reporter for the Canadian Broadcasting Corporation (CBC), said that the media had played into Zundel's hands; as he put it, "If the courts gave Zundel a platform, the media gave him a bullhorn."[386] Colin MacKenzie, the *Globe and Mail*'s metro editor, admitted following the trial: "Christie played us a little bit like a guitar …. There were some pretty bad headlines. There's no question they showed an appalling lack of sensitivity."[387] (Explained MacKenzie more recently: "We were younger and stupider than we are now."[388]) Makin, whose articles attracted significant criticism—although, as per standard practice, the journalist was not responsible for the headlines—agreed that some headlines were indefensible: "I wish that there had been a better job done on that and someone had said hold it, we're not going to call this a [crematoria] theory for God's sake."[389] But he noted that the media was placed in a difficult position by the Zundel case and had to cover it as it would any other

[381] "Nazi camps pleasurable, Zundel witness testifies," *Ottawa Citizen* (13 February 1985) A10.
[382] Wendy Darroch, "Prisoners at Auschwitz dined, danced to bands Zundel witness testifies," *Toronto Star* (13 February 1985) A2.
[383] Irving Abella, "The State of the Jews: Canada, 1986," (1986) 9:5 Viewpoints 3 at 3.
[384] Finley Interview, *supra* note 35 at 3.
[385] See eg Vivian Singer-Ferris, "Theatre of Hate: How Zundel played to the weaknesses of the press," (Winter 1986) Ryerson Review of Journalism 16; Russell, *supra* note 371 at 30-31.
[386] Russell, *supra* note 285 at 30.
[387] Singer-Ferris, *supra* note 385 at 18.
[388] Interview of Colin MacKenzie (25 April 2022) [on file with author] at 10.
[389] Makin Interview, *supra* note 351 at 11.

trial.[390] Furthermore, according to Makin the general feeling was that Holocaust denial was a fringe view that did not present a real and present danger; had they felt otherwise, the coverage might have been different.[391] Other media representatives had less patience for criticism. The *Toronto Sun*'s city editor John Paton called critiques of their coverage "utter bullshit. … You're restricted to reporting what happens inside the courtroom and that's what we did."[392] Clair Balfour of the *Montreal Gazette* argued: "We can't have a half-open system of justice. If a Zundel trial takes place, the media have an obligation to report it."[393]

The Jewish community, however, was aghast. As historian Franklin Bialystok put it, "The seeming insensitivity of some of the press alarmed Canadian Jews from coast to coast."[394] Bernie Farber recalled: "Oh it was horrible … observing the trial, not so much. What was horrible was the headlines that came out. I mean it was the discussion at every *Shabbes* [Sabbath] table – Jewish table across Canada. It was shaming the community ... we had no idea how to deal with it."[395] Conversely, the reporting delighted Zundel, who bragged to his followers that the articles were each worth hundreds of thousands of dollars and that the media would never have printed such propaganda if it came from Zundel himself.[396] As he later put it: "What the hell did those Jews expect? They had to expect the hard-hats and the cross and the other stuff. The medium is the message."[397]

Largely because of the media coverage, as the trial dragged on it seemed the Jewish community was coming apart at the seams. The tension became unbearable.[398] According to Prutschi, "There was no premonition of how painful, how emotionally wrenching the experience would be. … At times, it was iffy if the community would come through the trial. … In some way

[390] *Ibid* at 7.
[391] *Ibid* at 16.
[392] Singer-Ferris, *supra* note 385 at 18.
[393] Clair Balfour, "Post-trial photo of smiling Zundel was acceptable," *Montreal Gazette* (7 March 1985) B3.
[394] Bialystok, *supra* note 237 at 234.
[395] Interview of Bernie Farber (2 February 2021) [on file with author] at 20 [Farber Interview].
[396] The Great Holocaust Trial Part I, *supra* note 172 at 00h:50m:15s.
[397] Ken MacQueen, "Media face ethical dilemma with retrial of Ernst Zundel," *Ottawa Citizen* (9 January 1988) B5.
[398] Bialystok, *supra* note 237 at 234.

it was a crucible for the community."[399] Some took out their frustrations on the CHRA for bringing the case forward. Friedman, who as a member of the CHRA was responsible along with Citron and Smolack for laying the charges, recalled that after the first week of trial "when I walked into the synagogue, people shunned me."[400] Weinstein attended the same synagogue as Friedman and remembered arguments over the trial and people criticizing Friedman for allowing Christie to put words in his mouth.[401] Ellen Kachuck of B'nai Brith told the *Globe and Mail* during the trial that "virtually everyone she has spoken to, both Jew and Gentile, was against the prosecution" and claimed that those who initiated the case had been ostracized by mainstream community.[402] Citron made no apologies, mocking communal leaders for their lack of confidence in the outcome and predicting once Zundel was convicted "the doubting Thomases will be talking as if they had been supporters of the prosecution all along."[403]

Frustration was also directed at Congress. The CJC decided to keep a low profile for the trial's duration and persuaded other groups to do the same.[404] This included discouraging demonstrations, public statements by community leaders, and even letters to the editor.[405] Their thinking was that any agitation would benefit the defence and might even lead to a mistrial.[406] The downside to this approach was that it appeared to some that Jewish leadership was sitting on its hands while the community faced a daily onslaught from Zundel and Christie.[407] Congress was bitterly criticized and inundated with calls complaining about the media coverage and asking for direction.[408] Even within Congress there was significant tension over whether and how to respond. Leading members of the CJC—including its president Milton Harris—were, in fact, vigorously

[399] Quoted in *ibid* at 236.
[400] Interview of Arnold Friedman by Dave Harris (27 March 1995) [on file with the USC Shoah Foundation Visual History Archive].
[401] Weinstein Interview, *supra* note 33 at 10-11.
[402] "Jewish community torn," *supra* note 353.
[403] *Ibid*; Bialystok, *supra* note 237 at 234.
[404] Lewis Levendel, "CJC kept Jewish profiles low in Zundel trial," *Canadian Jewish News* (1 May 1986) 21.
[405] Patricia Rucker, "Debates over Holocaust created deep anguish," *Canadian Jewish News* (7 March 1985) 3.
[406] *Ibid*; Prutschi, "The Trial," *supra* note 170 at 11; Minutes of the Joint Community Relations Committee, Ontario Region (8 March 1985), CJA (Fonds DA21, Box 19, File 12) at 3 [8 March 1985 JPRC Meeting].
[407] Prutschi, "The Trial," *supra* note 170 at 9; 19 March 1985 NJCRC Meeting, *supra* note 190 at 6.
[408] 30 January 1985 JPRC Meeting, *supra* note 285; Letter from Barry Lazar to Alan Rose, et al (22 February 1985), CJA (Fonds DA5, Box 17, File 9).

opposed to a quiet approach.[409] Some suggested deliberately causing a mistrial to put the community out of its misery.[410] However, the JPRC, which was responsible for formulating strategy, resisted calls for a public demonstration until after the trial.[411]

e. Verdict and sentencing

The trial proceedings concluded on 27 February 1985 with Justice Locke's instructions to the jury. After nine hours of deliberation, the jury reached its verdict the following day.[412] As to Count #1 on the indictment, the publication of *The West, War, and Islam*, how did the jury find? Not guilty. A hush fell over the courtroom.[413] Zundel, it seemed, was on the verge of a dramatic victory. As to Count #2, the publication of *Did Six Million Die*, how did the jury find? Guilty. The Crown and others finally exhaled.[414] According to Griffiths, Zundel was probably acquitted on the first count because there was little evidence *The West, War, and Islam* was distributed within Canada.[415]

Following the verdict, Christie appeared crestfallen.[416] He told the court that he would not be making any sentencing submissions, accusing Justice Locke of having already made up his mind, which earned Christie another dressing down from the judge.[417] His client was in much better spirits. Zundel held an impromptu press conference in the courtroom, telling reporters he had "enjoyed myself thoroughly" and bragging that the trial garnered him "a million dollars worth of publicity for my cause."[418] Zundel vowed to continue his "struggle against the monstrous lie that is the Holocaust."[419]

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[409] See 19 March 1985 NJCRC Meeting, *supra* note 190 at 6.
[410] Zundel Trial: Canadian Jewish Congress Overall Report (8 March 1985), CJA (Fonds DA21, Box 21, File 13) at 12; 30 January 1985 JPRC Meeting, *supra* note 285.
[411] See Letter from Bernard J Finestone to Neri Bloomfield, et al, CJA (Fonds DA5, Box 1, File 9); 19 March 1985 NJCRC Meeting, *supra* note 190 at 5-6.
[412] "Guilty but unrepentant," *supra* note 334.
[413] See Finley Interview, *supra* note 35 at 29.
[414] *Ibid* at 6, 29.
[415] "Guilty but unrepentant," *supra* note 334.
[416] Adams, *supra* note 174 at 17.
[417] *R v Zundel* Sentencing Proceedings (1985 Ont Dist Ct), Submissions on Sentence (28 February 1985) at 2, 4-7.
[418] Adams, *supra* note 174 at 17; "Guilty but unrepentant," *supra* note 334.
[419] Guilty but unrepentant," *supra* note 334.

Sentencing took place on 25 March 1985. Zundel made one last dramatic entrance at the court, emerging from his van carrying a two-metre-long cross with a placard tacked onto it bearing the words "Freedom of Speech."[420] Christie changed his mind and decided to make sentencing submissions on Zundel's behalf, comparing Zundel's persecution to that of Jesus Christ, Galileo, Copernicus, Alexander Solzhenitsyn, and Emil Zola.[421] Griffiths countered by emphasizing the pain caused by the trial on the entire Canadian community and particularly the Jewish community, comparing "the kind of ordeal the Jewish community was put through in this trial" to that of "a rape victim in days gone by".[422] Justice Locke sentenced Zundel to fifteen months in jail followed by three years' probation, during which he would be prohibited from writing or speaking publicly about the Holocaust.[423] Unconvinced by comparisons to Christ and Galileo, Justice Locke denounced Zundel for perpetuating "the 'big lie' in the tradition of the now deceased sub-human monsters Adolf Hitler and Joseph Goebbels."[424] Zundel was carried away in handcuffs and taken into custody.[425] He was granted bail pending appeal the next day.[426]

VI. "How in the world are they ever going to convict him?": The trial of Jim Keegstra

a. Preparation for trial

Only about two weeks separated the conclusion of Zundel's proceedings on 25 March 1985 with the commencement of Keegstra's trial on 9 April. It is astounding and to Christie's credit that, after the tremendous time and effort put into Zundel's defence, he was able to prepare for another lengthy, complex, and emotionally-draining trial across the country almost immediately

[420] Paul Lungen, "Judge hopes sentence will deter other racists," *Canadian Jewish News* (4 April 1985) 3 ["Judge hopes sentence will deter"]; "Judge jails Zundel for 15 months brands him a 'danger' to Canada" *Montreal Gazette* (26 March 1985) A1.
[421] *R v Zundel* Sentencing Proceedings (1985 Ont Dist Ct), Submissions on Sentence by Mr Christie (25 March 1985) at 25.
[422] *R v Zundel* Sentencing Proceedings (1985 Ont Dist Ct), Submissions on Sentence by Mr Griffiths (25 March 1985) at 30.
[423] *R v Zundel* Sentencing Proceedings (1985 Ont Dist Ct), Reasons for Sentence (25 March 1985) at 42-43.
[424] *Ibid* at 40.
[425] "Judge hopes sentence will deter," *supra* note 420.
[426] *Ibid*.

thereafter. Keegstra's trial would, in fact, turn out upon its conclusion to have been the longest trial in Alberta history, lasting 76 days.[427]

Crown counsel had significantly more time to prepare. The lead prosecutor on the Keegstra case, both at the preliminary hearing and the trial, was Bruce Fraser. Fraser had overseen the RCMP investigation into Keegstra that commenced around July 1983.[428] In this role he had gone through the students' materials in detail.[429] Fraser was thus already familiar with the case at the time of the charge and was the one who had recommended prosecution.[430] Fraser was very experienced; he was Alberta's Director of Special Prosecutions and had previously been Alberta's Assistant Deputy Minister of Criminal Justice.[431] Because Fraser was a Special Prosecutor, he had a smaller caseload than a regular Crown and was therefore able to devote more time to the Keegstra prosecution.[432] Fraser also had the benefit of another experienced Crown, Larry Phillippe, to assist him during trial. In addition, Fraser had the opportunity to observe Christie during the preliminary hearing and during Zundel's trial and was therefore in a better position than Griffiths of knowing what to expect from the defence. As Fraser remembered, "after the preliminary I could tell this is going to be a real fight. … I could see this is going to be a long trial and [Christie]'s going to raise all kinds of things and I'd better know what I'm talking about."[433]

As with the Zundel case, Jewish organizations provided important assistance to Keegstra's prosecution. Members of the CJC and B'nai Brith were in regular contact with the Crown for over a year before the trial began.[434] Knowing that Keegstra would make specious claims about the Talmud, the Jewish community put Fraser together with a Calgary rabbi, Peter Hayman, to teach

[427] Gordon Lee, "Judgment reserved on Keegstra appeal," *Calgary Herald* (11 April 1987) B3.
[428] See Don Collins, "Police probing Keegstra case," *Calgary Herald* (4 August 1983) A2; Interview of Bruce Fraser (2 March 2022) [on file with author] [Fraser Interview] at 2-3.
[429] *Ibid* at 3.
[430] *Ibid*.
[431] *Ibid* at 2; See also eg Letter from Bruce R Fraser to Manuel Prutschi (20 August 1985), CJA (DA21, Box 13, File 2).
[432] 19 March 1985 NJCRC Meeting, *supra* note 190 at 6.
[433] Fraser Interview, *supra* note 428 at 13 (internal parentheses omitted).
[434] Memo from David Satok to Members, National Council, Canadian Jewish Congress re Upcoming Keegstra Trial (2 April 1985), CJA (DA21, Box 13, File 1) at 2 [2 April 1985 Satok Memo].

Fraser the basics of the Talmud.[435] Hayman recalled that Fraser first reached out to him in the middle of March 1985 and that they worked closely together during the trial.[436] Fraser had never seen the Talmud before, but became an eager student.[437] As Hayman described:

> I had the great pleasure of working closely with Mr. Fraser in reviewing the Talmudic sources utilized by Keegstra in his own defence. We became, in essence, *chevruta*, or learning partners, studying both the texts and the proper methodology for their analysis. I was deeply impressed by Mr. Fraser's analytical insight into the legal approach of the Talmud, by his ability to comprehend concepts and culture foreign to his own experience, and by his professional willingness to "go the extra mile" in preparing for cross-examination.[438]

Fraser, for his part, said that he had been willing to travel anywhere to find a suitable teacher, but, "In the end, I found that the best scholar for the case was right here in Alberta."[439] Jewish groups provided other key aid to the Crown, including hiring Professor Elman as a legal resource, providing the names of potential expert witnesses, and researching and supplying relevant historical and documentary material.[440] Fraser recalled that Prutschi was particularly supportive and was "never was trying to tell me how to do things. He was always: 'Can I do something for you?' And I actually asked him to do some things… he actually read some stuff or did some research for me."[441]

Such assistance was especially welcomed because the Crown and others were concerned that Keegstra would be acquitted.[442] As noted above, Satok had claimed that the Jewish community thought a conviction was very unlikely.[443] Indeed, no one had been successfully prosecuted for wilful promotion of hatred since the provision's enactment in 1970.[444] This concern derived not from the strength of the evidence—as had been made clear at the preliminary hearing, there was extensive evidence that Keegstra had been promoting hatred—but from the language of the

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[435] Peter Hayman, "The Talmud & the Trial," *Jewish Star* (Calgary) (13 September – 10 October 1985) 7 ["Talmud & the Trial"].
[436] "Talmud & the Trial," *supra* note 435.
[437] Fraser Interview, *supra* note 428 at 12.
[438] "Talmud & the Trial," *supra* note 435.
[439] Douglas Wertheimer, "Keegstra Crown Prosecutor Favours Decriminalizing Hate Promotion Law," *Jewish Star* (Calgary) (10-23 January 1986) 1.
[440] 2 April 1985 Satok Memo, *supra* note 434 at 2-3.
[441] Fraser Interview, *supra* note 428 at 14.
[442] See *ibid* at 21-22; Interview of Hal Joffe (17 January 2022) [on file with author] at 12-13 [Joffe Interview]; Bob Warwick, "Crown faces tough task in convicting Keegstra," *Calgary Herald* (8 April 1985) A1.
[443] See *supra* note 135.
[444] See Ross Henderson, "My right to free speech on trial: Keegstra," *Red Deer Advocate* (13 January 1984) 1A.

provision in question. The Crown would have to prove that Keegstra promoted hatred "wilfully," meaning that he had the specific intention of promoting hatred against Jews, rather than merely foreseeing the risk of this result.[445] Elman, for one, cautioned that a jury might view Keegstra's teachings as so patently ridiculous that it would conclude Keegstra was unbalanced and had not specifically intended to promote hatred.[446] Furthermore, the offence of wilful promotion of hatred is unusual in that it contains broad defences written into the *Criminal Code*—inserted on the recommendation of the Cohen Committee and the CJC, and over the objections of Holocaust survivors, to protect freedom of speech—which place significant hurdles in the way of a conviction. Pursuant to these defences, even if the Crown established that Keegstra had wilfully promoted hatred against the Jewish people, he could not be convicted if:

(a) Keegstra's statements were true;

(b) Keegstra had in good faith expressed an opinion on a religious subject or an opinion based on a belief in a religious text;

(c) the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and on reasonable grounds Keegstra believed them to be true; or

(d) Keegstra had, in good faith, intended to point out for the purpose of removal matters producing or tending to produce feelings of hatred toward another identifiable group.[447]

The burden of the first defence—the defence of truth—falls on the accused, meaning that Keegstra would have to prove that his statements were true (rather than the Crown having to establish that his statements were untrue, as in Zundel's trial); the remaining defences must be disproven by the Crown beyond a reasonable doubt.[448] On account of such escape clauses, one observer from the

[445] See *R v Buzzanga*, [1979] OJ No 4345, 1979 CarswellOnt 1502 (Ont CA) at paras 44-46. This narrow interpretation of "wilfully" was subsequently adopted by the Supreme Court of Canada in *R v Keegstra*, [1990] 3 SCR 697 at 775 [*Keegstra* SCC]. Unfortunately, Keegstra's trial judge misstated the intent (*mens rea*) requirement in his instructions to the jury, providing one of the bases under which the Court of Appeal for Alberta later ordered a new trial. See *R v Keegstra*, 1991 ABCA 97 at paras 32-43 [*Keegstra* ABCA].

[446] Elman Report, *supra* note 94 at 11-12.

[447] These defences correspond with what were then s 281.2(3)(a)-(d) of the *Criminal Code*, which are now s 318(2)(a)-(d) of the *Criminal Code*. See *Keegstra* SCC, *supra* note 445 at 779.

[448] As with all defences for which the accused bears the burden of proof (called a "reverse onus"), the evidentiary burden is the balance of probabilities, not the more exacting standard of proof beyond a reasonable doubt. See *ibid* at 790-91. As for the other defences in s 319(2) (which are not subject to a reverse onus), as per the general rule applicable to all defences, they need only be disproven by the Crown if the defence raises an "air of reality," meaning there is

CJC predicted that "Keegstra's may well be the last trial ever under an archaic, meatless law."[449] Fraser was most concerned about the defence of truth, fearing that Christie would try to call as witnesses some of the authors Keegstra had relied on for his anti-Jewish opinions, forcing the Crown to then call rebuttal evidence to try to disprove a worldwide Jewish conspiracy.[450] As it turned out, truth was the only defence that Keegstra did not rely on.

Aside from coordinating with the Crown, Jewish organizations also met with media representatives prior to and during the trial in an attempt to avoid some of the painful reporting that had appeared during Zundel's prosecution. Representatives from B'nai Brith and the CJC reached out to media organizations throughout Canada—including television, radio, and print media—and the CJC sent its Director of Communications to Red Deer in advance of the trial to meet with local journalists.[451] Congress argued that the freedom of speech issue had been manipulated by the defence during Zundel's trial and emphasized the devastating impact of the media coverage on the Jewish community.[452] They provided information and source material to the press, educating them on terms that were expected to come up during the trial.[453] This outreach appears to have made an impact; the Associate Managing Editor of the *Globe and Mail*, for example, wrote to Congress following one such meeting expressing gratitude for Congress's "intelligent, reasoned and articulate presentation" that "very much sensitized my cohorts to the feelings of the Jewish community and … how carefully the media must tread".[454] Indeed, Prutschi thought the meeting with the *Globe and Mail* had gone very well and predicted that the columnist from the *Globe and Mail* assigned to the Keegstra case was "very much on side in terms of the

sufficient evidence that a reasonably instructed trier of fact might acquit based on the evidence tendered in support of that defence. See *R v Osolin*, [1993] 4 SCR 595 at 682-83.

[449] Bernard C Moscovitz, "Lessons of the Keegstra Case," (October 1984) 8:2 Viewpoints 2 at 4.

[450] Fraser Interview, *supra* note 428 at 4.

[451] See eg Notes re meetings with media representatives, CJA (DA10.4, Box 17, File 24) [Notes re media representatives]; Letters from Barry Lazar to Judy Monchuk, Peter Deys, Richard Helm, Don Smith, Dick Gordon, Paul Workman, Steve Andrusiac, Mark Sigstrum, and Steve Mertl, CJA (DA10.4, Box 17, File 24).

[452] Notes re media representatives, *supra* note 451.

[453] *Ibid*.

[454] Letter from Shirley Sharzer to Rose Wolfe (23 May 1985), CJA (DA 21, Box 13, File 1). See also; Letter from Manuel Prutschi to Standard recipients (25 June 1987), CJA (DA21, Box 13, File 1).

issues and human rights."[455] Following the trial, Prutschi said that "since that first meeting we had with the *Globe* … our concerns have been reflected in the paper's coverage of Keegstra [and] Zundel's post-trial."[456]

b. Trial proceedings

i. Jury selection

Trial proceedings commenced on 9 April 1985 with jury selection. As in Zundel's case, Christie brought an application to challenge potential jurors for cause, arguing that the extensive, and negative, pre-trial publicity created the risk of bias against his client.[457] Christie called Botting as a witness in support of the application. Botting testified that he had recently conducted a poll of a random sample of 407 people at two shopping malls in Red Deer, and that over 50% of persons surveyed said they were convinced of Keegstra's guilt.[458] The trial judge, John Horace MacKenzie, denied the motion, deeming the defence evidence insufficient to support the argument that there was a possibility of bias in prospective jurors.[459] (Unlike in Zundel's case, Christie did not indicate on the record the questions he had intended to ask the jury panel.)

According to Botting, while conducting the poll he had accidentally surveyed Justice MacKenzie's 17-year-old son.[460] Botting removed the questionnaire once the judge's son revealed his identity, and Botting did not mention it in his testimony—as he recalled, "I didn't want to implicate the poor kid in that way and embarrass the judge"—but Botting thought Justice

[455] Minutes of the Meeting of the Joint Community Relations Committee, Ontario Region (17 April 1985), CJA (DA21, Box 19, File 12) at 7.
[456] Letter from Manuel Prutschi to Standard recipients re Enclosed excerpts (25 June 1987), CJA (DA21, Box 13, File 1) .
[457] *R v Keegstra* (ABQB 1985), Transcript of Proceedings, Application to examine potential jurors (*voir dire*) – Discussion, Vol 1 at 102.
[458] *R v Keegstra* (ABQB 1985), Transcript of Proceedings, Examination-in-Chief of Gary Botting (*voir dire*), Vol 1 at 103-104.
[459] *R v Keegstra* (ABQB 1985), Transcript of Proceedings, Ruling on application to examine potential jurors (*voir dire*), Vol 1 at 134-35. As with the denial of Zundel's application to challenge jurors for cause, the Court of Appeal for Alberta would subsequently deem this reversible error (*Keegstra* ABCA, *supra* note 445 at para 7).
[460] Botting Interview, *supra* note 179 at 12-13.

MacKenzie was aware of this incident and that it factored into the judge's decision to deny the application.[461]

Fraser and Congress were pleased with the jury selected, most of whom were between 25 and 35 years of age and from urban rather than rural areas; contrary to Zundel's trial, Fraser wanted a younger jury, which the Crown believed would be more sympathetic to Jews than an older one, which it feared might be more heavily influenced by antisemitic, Social Credit theories.[462]

ii. Crown evidence

The Crown's first witness was Dick Hoeksema. Hoeksema was the teacher who took over all of Keegstra's classes at Eckville High School in January 1983 after Keegstra was fired, including grade 9 and 12 Social Studies.[463] Because Hoeksema replaced Keegstra halfway through the school year, he asked the students to tell him what they had learned and to share their notes.[464] The students responded by telling Hoeksema of a worldwide Jewish conspiracy:

> The students said that the Jews controlled the media, the Jews controlled Hollywood, the Jews controlled the court.…6 million Jews were not killed in death camps…. Hitler was a hero and would have remained a hero except towards the end of the war, due to pressure, he went a little crazy.… All revolutions had been caused by the Jews, with the exception of the American Revolution.…All textbooks were censored by the Jews, so textbooks could not be trusted.…All banks are controlled by the Jews. The Bible could only be published by Jewish-controlled publishing companies if the Bible included that the Jews were the chosen race.…The Talmud instructs Jewish people to kill or to steal from Gentiles…. The Jewish word goy means dog, and that's how Jews typically refer to Gentiles, that Christ was not a Jew, that Jews called the Virgin Mary a prostitute and Christ a bastard…. One student was sure that Trudeau had been placed in power by the International Jewish Conspiracy. Another student said it would be okay to shoot Trudeau, but the Jews would just replace him with somebody equally corrupt and that Trudeau wore the red rose as a symbol of International Communism, which was controlled by the Jews.[465]

The students brought up these theories in all Hoeksema's classes, even during a course on mechanics and drafting.[466] They believed that Keegstra lost his job for speaking out against the Jews.[467]

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[461] *Ibid* at 13.
[462] 9 May 1985 Satok Memo to National Council, *supra* note 171 at 1.
[463] *R v Keegstra* (ABQB 1985), Transcript of Proceedings, Examination-in-chief of Dick Hoeksema, Vol 1 at 161-62.
[464] *Ibid* at 163, 180.
[465] *Ibid* at 182, 186-88.
[466] *Ibid* at 188.
[467] *Ibid* at 194.

Following Hoeksema, the Crown called twenty-three of Keegstra's former students. The Crown used the students primarily as vehicles to enter their classroom notes, essays, and exams into evidence, mostly from Keegstra's grade 12 Social Studies course.[468] The material essentially confirmed and expanded on Hoeksema's testimony of what Keegstra had been teaching. In brief, this evidence illustrated the core theme of Keegstra's lectures, which was that all major world events throughout history were connected by a Jewish conspiracy, in which Jews worked with a secret society called the Illuminati to take over the world and rule it through a "One World Government."[469] Keegstra often referred to Jewish people as "gutter rats" or "money thugs" in his lectures.[470] Keegstra taught that almost all modern-day Jews have no connection to the Jews of the Bible, but are descended from Khazars, a Mongol-Turkic group who converted to Judaism around 750 AD and adopted the Talmud as their holy book.[471] Students testified that Keegstra never or seldomly used the course textbook.[472] Rather, he would lecture seemingly off the top of his head; one student compared Keegstra's lecture style to the American Evangelical Christian preacher Billy Graham.[473] Instead of using the textbook, Keegstra would hand out material that he had obtained from the Canadian League of Rights, a xenophobic, anti-communist organization based in Ontario.[474] Through this evidence the Crown established not only the plainly antisemitic content of Keegstra's teachings, but also how the students' notes and essays were remarkably consistent

[468] See *R v Keegstra* (ABQB 1985), Transcript of Proceedings, Crown's closing submissions, Vol 27 at 5625.
[469] See eg *R v Keegstra* (ABQB 1985), Transcript of Proceedings, Examination-in-chief of Cain Ramstead, Vol 3 at 489, 500 [Ramstead in-chief]; Examination-in-chief of Paul Maddox, Vol 3 at 622-25 [Maddox in-chief]; Examination-in-chief of Carol Mannerfeldt, Vol 6 at 1259-60 [Mannerfeldt in-chief].
[470] See eg *R v Keegstra* (ABQB 1985), Transcript of Proceedings, Examination-in-chief of Lorriene Bogdane, Vol 5 at 897 [Bogdane in-chief]; Examination-in-chief of Blair Andrew, Vol 6 at 1272; Examination-in-chief of Rhonda Lee Williams, Vol 11 at 2318-19 [Williams in-chief].
[471] See eg *R v Keegstra* (ABQB 1985), Transcript of Proceedings, Cross-examination of Steven LeCerf, Vol 2 at 362-63 [LeCerf cross-exam]; Ramstead in-chief, *supra* note 469 at 482, 531; Maddox in-chief, *supra* note 469 at 622-25; Bogdane in-chief, *supra* note 470 at 903; Examination-in-chief of Sherron Lea Wolney, Vol 11 at 2433 [Wolney in-chief]. See also Examination-in-chief of James Keegstra, Vol 23 at 4510-11, Vol 26 at 4919 [Keegstra in-chief].
[472] See eg Mannerfeldt in-chief, *supra* note 469 at 1225; *R v Keegstra* (ABQB 1985), Transcript of Proceedings, Examination-in-chief of Richard Denis, Vol 11 at 2373; Wolney in-chief, *supra* note 471 at 2421; Williams in-chief, *supra* note 470 at 2322.
[473] Bogdane in-chief, *supra* note 470 at 898.
[474] See eg *R v Keegstra* (ABQB 1985), Transcript of Proceedings, Examination-in-chief of Trudi Roth, Vol 4 at 757-60 [Roth in-chief]. The Canadian League of Rights distributed material under the name Canadian Intelligence Service. See *R v Keegstra* (ABQB 1985), Transcript of Proceedings, Cross-examination of James Keegstra, Vol 23 at 4397 [Keegstra cross-exam].

with one another, making it unlikely they had misrepresented or misunderstood what Keegstra taught. Elman, who attended the trial on Congress's behalf, recalled that the consistency among the students' notes clearly left an impression on the jury:

> the notes are like literally, it's like a stenographer took down what he said. And over and over again, the same phrases, the same words, year after year. … [And] the jury, if some kid got it wrong during the examination – you know, like what did Keegstra say about the War of 1776? "Well, I don't remember anything." It was like the jury wanted to thrash the kid because he hadn't paid attention, because it was obviously the Jews who were responsible, right?[475]

The Crown showed how the students could only do well in Keegstra's course if they parroted his theories. As one of the students testified, "it was common knowledge that if you wanted to pass the course, you wrote what had been taught to you and what was in your notes."[476] Several students received poor marks for submitting essays that cited material other than what Keegstra taught in class, such as an encyclopedia or the course textbook. Rhonda Williams recounted how she had recently moved with her family from Red Deer to Eckville and wanted to make a good impression, so she conducted thorough research at the school library for her first essay. To her disappointment, she received 45% on the essay and Keegstra wrote notes in the margins telling her that what she had written was untrue. She learned her lesson and used only her notes on future assignments.[477] Another student, Corinna Andrew, received 55% on an essay she had written on the Bolshevik Revolution using information from encyclopedias. Keegstra wrote comments in the margins that said: "Where did you get this garbage. What about British & Jewish perfidity [*sic*]" and "Where did you get this information? It is definitely biased and false." She then wrote an essay using only her notes and received 70%.[478] Similarly, David Ackerman testified

[475] Elman Interview, *supra* note 103 at 8.
[476] Wolney in-chief, *supra* note 471 at 2426.
[477] Williams in-chief, *supra* note 470 at 2315-21.
[478] *R v Keegstra* (ABQB 1985), Transcript of Proceedings, Examination-in-chief of Corina Andrew, Vol 7 at 1373-83. For similar anecdotes to Williams' and Andrew's—in which Keegstra gave poor marks for essays that used authoritative sources and better marks for essays that relied on lecture materials—see eg Bogdane in-chief, *supra* note 470 at 901-05; *R v Keegstra* (ABQB 1985), Transcript of Proceedings, Examination-in-chief of Charles Daniel, Vol 7 at 1493-94.

that when the school librarian gave him a book to use for one of his essays, Ackerman showed it to Keegstra, who told him not to use it because the book had a Jewish author.[479]

Additionally, the content of the students' exams was concerning. For example, one question asked by Keegstra on an exam was whether the statement "The Jews generally were good citizens" was true or false. The Crown showed how several students circled false, which Keegstra marked as correct.[480] A question on another exam read: "Gullible politicians in England, France and USA felt they were helping god by supporting the Zionist Jew movement. Explain completely."[481] Another exam question asked the students to "Give three specific examples supporting the belief that Hitler was forced into war by the allies and Zionists."[482] And one student received 3/3 for the following response to a similar prompt: "Moles only come out in the dark when no one is watching. Jews only do their deeds when no one is watching. A mole when mad, will strike back and have no mercy if disturbed. Jews strike at any time and have no mercy. No one knows the Jews are there until they strike."[483]

In cross-examining the students, the primary themes explored by Christie were that the students' notes were not accurate and did not reflect the entirety of what Keegstra taught;[484] that Keegstra made clear to the students that he was not discussing all Jews, but only a small subset of

[479] *R v Keegstra* (ABQB 1985), Transcript of Proceedings, Examination-in-chief of David Ackerman, Vol 9 at 1739-40.
[480] Roth in-chief, *supra* note 474 at 826; Bogdane in-chief, *supra* note 470 at 933; *R v Keegstra* (ABQB 1985), Transcript of Proceedings, Examination-in-chief of Kelly Cordon, Vol 5 at 1059; Examination-in-chief of Shirley Nelson, Vol 6 at 1173 [Nelson in-chief]; Examination-in-chief of Dana Kreil, Vol 10 at 2182 [Kreil in-chief]; Mannerfeldt in-chief, *supra* note 469 at 1249.
[481] Nelson in-chief, *supra* note 480 at 1175.
[482] Kreil in-chief, *supra* note 481 2182.
[483] *Ibid* at 2179.
[484] See eg *R v Keegstra* (ABQB 1985), Transcript of Proceedings, Cross-examination of Paul Maddox, Vol 3 at 648, 678-79 [Maddox cross-exam]; Cross-examination of Trudi Roth, Vol 5 at 842; Cross-examination of Lorriene Bogdane, Vol 5 at 950, 954, 978 [Bogdane cross-exam]; Cross-examination of Kelly Cordon, Vol 5 at 1063, 1070, 1079-94 [Cordon cross-exam]; Cross-examination of Carol Mannerfeldt, Vol 6 at 1267.

Jews;[485] that Keegstra was a kind and patient teacher who taught Christian values;[486] and that Keegstra encouraged the students to make their own judgments and think for themselves[487]. For those students who seemed to dislike Keegstra, Christie suggested they were biased; for example, Christie accused Kelly Cordon of trying to get back at Keegstra because of a dispute between Keegstra and Cordon's father over a sewer right-of-way when Keegstra was mayor, and Christie suggested that Paul Maddox had been influenced by his mother, Susan Maddox, one of the parents responsible for Keegstra's firing.[488] As in Zundel's trial, Christie's cross-examinations could be withering. He brought a few of the students to tears, including a visibly-pregnant Trudi Roth.[489] However, several students clearly retained a favourable view of Keegstra and enthusiastically agreed with most of Christie's suggestions.[490] One student opined that Keegstra had been crucified for teaching unpopular views.[491] Another called Keegstra a "strong Christian man [who] promoted good morals."[492] The Crown was not overly concerned about the attitudes of the students or their performance on cross-examination because, as a Congress observer put it, the "notes, the essays, the examinations, and Keegstra's marginal comments … are in black and white for all the jury to see, and the hatred contained therein is unqualified and unmistakable."[493]

The last Crown witness was Robert David, Superintendent of the Lacombe County School Board. David's testimony was that he had instructed Keegstra in December 1981—one year before

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[485] See eg LeCerf cross-exam, *supra* note 471 at 397; Maddox cross-exam, *supra* note 484 at 671; Bogdane cross-exam, *supra* note 484 at 959, 999; *R v Keegstra* (ABQB 1985), Transcript of Proceedings, Cross-examination of Cain Ramstead, Vol 3 at 582 [Ramstead cross-exam]; Cross-examination of Danny Desrosiers, Vol 10 at 2073 [Desrosiers cross-exam].

[486] See eg LeCerf cross-exam, *supra* note 471 at 419; Ramstead cross-exam, *supra* note 485 at 573, 599-601; Desrosiers cross-exam, *supra* note 485 at 2081; *R v Keegstra* (ABQB 1985), Transcript of Proceedings, Cross-examination of Gwen Mathews, Vol 9 at 1881, 1962-63, 1968.

[487] See eg LeCerf cross-exam, *supra* note 471 at 399; Ramstead cross-exam, *supra* note 485 at 560, 600, 608; *R v Keegstra* (ABQB 1985), Transcript of Proceedings, Cross-examination of Trudi Roth, Vol 5 at 852-53, 868, 872.

[488] Cordon cross-exam, *supra* note 484 at 1078-79; Maddox cross-exam, *supra* note 484 at 653-54. See also eg *R v Keegstra* (ABQB 1985), Transcript of Proceedings, Cross-examination of Richard Denis, Vol 11 at 2387-88; Cross-examination of Sherron Wolney, Vol 12 at 2481-82.

[489] Judy Monchuk, "Witness reduced to tears; Accuracy queried," *Red Deer Advocate* (22 April 1985) 1A; Steve Mertl, "Tension showed between lawyers," *Calgary Herald* (21 July 1985) B6.

[490] See eg Judy Monchuk, "Jews spired on classroom, court told," *Red Deer Advocate* (13 April 1985) 1A.

[491] LeCerf cross-exam, *supra* note 471 at 558.

[492] Desrosiers cross-exam, *supra* note 485 at 2081.

[493] 9 May 1985 Satok Memo to National Council, *supra* note 171 at 2.

Keegstra was fired—and several times thereafter not to teach the Jewish conspiracy theory as fact, but Keegstra had refused and continued to teach the same things, leading to his dismissal. David also confirmed that Keegstra's teachings were outside of the school curriculum.[494]

The Crown sought judicial notice that the Jewish people are an identifiable group by religion, thus satisfying the wording of the offence that the wilful promotion of hatred must have been against an "identifiable group."[495] Both race and religion are included within the definition of identifiable group in the *Criminal Code*, but Fraser found that when he spoke to people in preparation for the trial, there was significant disagreement within the Jewish community over whether Jews were properly characterized as a racial group; he therefore decided to seek judicial notice on the basis of religion.[496] Christie opposed the application, arguing that it was "illogical to say that the Jewish people constitute either a race or a religion," because Judaism was more of "an abstraction, a concept, an ideology, maybe even a myth."[497] This was a difficult position for Christie to succeed on for several reasons, including since it implied that Jews were not protected by the hate-propaganda provisions of the *Criminal Code*—a conclusion the Cohen Committee would have undoubtedly taken issue with—or at least that the Crown would have to prove in every case that the religious group in question was covered by the legislation. Unsurprisingly, Justice MacKenzie took little time granting the Crown's application for judicial notice that the Jewish people constitute a religious group under the legislation.[498]

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[494] *R v Keegstra* (ABQB 1985), Transcript of Proceedings, Examination-in-chief of Robert David, Vol 13 at 2631-42, 2675-79; Re-examination of Robert David, Vol 13 at 2700-04.
[495] See *Criminal Code* s 318; *R v Keegstra* (ABQB 1985), Transcript of Proceedings, Discussion (*voir dire*), Vol 12 at 2522-23.
[496] See *ibid*; Fraser Interview, *supra* note 428 at 4.
[497] *R v Keegstra* (ABQB 1985), Transcript of Proceedings, Discussion (*voir dire*), Vol 12 at 2608-09.
[498] *R v Keegstra* (ABQB 1985), Transcript of Proceedings, Ruling, Vol 12 at 2627-28. The Crown initially intended to call two additional witnesses: a social psychologist to testify as to the impact Keegstra's teachings might have had on the students and an expert on antisemitism to explain the background of Keegstra's theories. See *R v Keegstra* (ABQB 1985), Transcript of Proceedings, Opening remarks by Mr Fraser, Vol 1 at 160. The Court did not allow the social psychologist to testify, deeming her evidence prejudicial and not properly the subject of expert evidence. See *R v Keegstra* (ABQB 1985), Transcript of Proceedings, Discussion (*voir dire*), Vol 12 at 2714-16. As for the expert on antisemitism, the Crown decided this evidence was unnecessary. See *R v Keegstra* (ABQB 1985), Transcript of Proceedings, Discussion (*voir dire*), Vol 12 at 2523.

iii. Defence evidence

The defence called seven witnesses, including Keegstra himself. As with Zundel's trial, this evidence was often self-defeating. Joseph Lindberg, a teacher at Eckville High School and the school's principal from 1970-75, spoke of Keegstra's good character and impeccable reputation.[499] However, when asked by Christie whether he had observed members of other racial or ethnic groups in Keegstra's home, Lindberg responded: "I have been acquainted with Jerry, the Indian, and Albert, Eskimo. … I never met Bob, the Jew. But I saw him riding around in the car."[500] On cross-examination, Lindberg admitted that he had encouraged his own daughters not to take Keegstra's classes because he was uncomfortable with what Keegstra was teaching.[501] (Lindberg clarified that he was not greatly concerned with what Keegstra had been teaching about the Nazis, because Lindberg, too, believed the Holocaust was exaggerated.[502]) Lindberg also admitted that when he was principal he had asked Keegstra not to teach Social Studies anymore, but nothing came of this when Lindberg resigned as principal in 1975.[503] The current principal, Ed Olsen (who took over from Lindberg) testified that he had a good relationship with Keegstra, that he did not think Keegstra had been promoting hatred, and that both of his children took Keegstra's class.[504] But Olsen conceded on cross-exam that he only set foot in Keegstra's classroom on two occasions and actually had no idea what Keegstra was teaching.[505] When Fraser read passages from the students' essays to him at trial, Olsen agreed they were concerning.[506] Another defence witness,

[499] See *R v Keegstra* (ABQB 1985), Transcript of Proceedings, Examination-in-chief of Joseph Lindberg, Vol 14 at 2728, 2752-55 [Lindberg in-chief]; Cross-examination of Joseph Lindberg, Vol 14 at 2760-62 [Lindberg cross-exam].
[500] Lindberg in-chief, *supra* note 498 at 2750.
[501] Lindberg cross-exam, *supra* note 498 at 2760-62.
[502] Lindberg cross-exam, *supra* note 498 at
[503] *Ibid* at 2778; *R v Keegstra* (ABQB 1985), Transcript of Proceedings, Re-examination of Joseph Lindberg, Vol 14 at 2792.
[504] *R v Keegstra* (ABQB 1985), Transcript of Proceedings, Examination-in-chief of Ed Olsen, Vol 14 at 2859, 2865-66.
[505] *R v Keegstra* (ABQB 1985), Transcript of Proceedings, cross-examination of Ed Olsen, Vol 14 at 2868, 2880-81.
[506] *Ibid* at 2878-80.

William Zuidhof—who called Keegstra a man of very high integrity—said he was aware of Keegstra's opinion of Jews and more or less agreed with him.[507]

The defence attempted to subpoena Alberta Premier Peter Lougheed as a witness. Christie candidly admitted that he wanted to call Lougheed to prove the existence of an international Zionist conspiracy – and, by extension, the truth of Keegstra's teachings.[508] Christie further explained the (circuitous) route by which Lougheed's evidence could supposedly prove the international Zionist conspiracy. As discussed in the previous chapter, the Premier gave a speech in the Alberta legislature on 12 May 1983 in which he condemned antisemitism generally and Keegstra's teachings specifically, and promised that the government would take steps to combat racism in the province.[509] Lougheed's statement came in response to pressure from the media, Church groups, and the Jewish community over the government's prolonged silence both on Keegstra and disturbing statements about the Holocaust made by Stephen Stiles, a member of Lougheed's caucus.[510] Simon Wiesenthal, a vocal Holocaust survivor and namesake of the Simon Wiesenthal Center in Los Angeles, also wrote to Lougheed asking him to combat Holocaust denial.[511] Christie now linked the two events, claiming Lougheed's remarks had been "incited by the actions of International Zionist pressure" brought by Wiesenthal, the same forces that were driving Keegstra's prosecution.[512] The government's lawyer strongly contested the subpoena, suggesting the application was a publicity stunt designed to embarrass the Premier.[513] Justice MacKenzie sided with the government and quashed the subpoena.[514]

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[507] *R v Keegstra* (ABQB 1985), Transcript of Proceedings, Examination-in-chief of William Zuidhof, Vol 14 at 2887; Cross-examination of William Zuidhof, Vol 14 at 2892.
[508] *R v Keegstra* (ABQB 1985), Transcript of Proceedings, Application to quash subpoena (*voir dire*), Vol 16 at 3121-23 [Application to quash subpoena].
[509] See *Legislative Assembly of Alberta Debates*, 20-1 (12 May 1983) at 921-22.
[510] See eg Gila Wertheimer, "Anti-Semitism a 'Blasphemy', Leaders State," *Jewish Star* (Calgary Edition) (13 May 1983) 1; "Speak up Peter," *Edmonton Journal* (11 May 1983) A6.
[511] Letter from Simon Wiesenthal and Marvin Hier to Peter Lougheed (11 May 1983), Edmonton, Provincial Archives of Alberta (PR1985.0401/2193, Box 176); Sheila Pratt, "Famed Nazi hunter complains to premier," (12 May 1983) A21.
[512] Application to quash subpoena, *supra* note 510.
[513] *Ibid* at 3115-16, 3122.
[514] *R v Keegstra* (ABQB 1985), Transcript of Proceedings, Ruling, Vol 16 at 3127. In an additional attempt to prove the truth of Keegstra's teachings, the defence called Dr. Heather Botting (then the wife of Gary Botting), a sociocultural anthropologist. The thrust of Dr. Botting's evidence was that Keegstra's theory that modern-day Jews

Keegstra was the last witness called in the trial. He was on the stand for an incredible twenty-six days – nineteen days in-chief and seven in cross-examination.[515] The defence admitted into evidence almost 150 books, articles, and other materials that Keegstra purportedly relied on for his beliefs. The examination-in-chief consisted mainly of Keegstra reading lengthy portions of these materials and explaining how they had informed his views.[516] Among these exhibits were excerpts from the Talmud which, according to Keegstra, authorized Jews to engage in pedophilia and sodomy, and to kill and rob non-Jews.[517] The defence also introduced the *Kol Nidre* into evidence, a declaration customarily read by Jewish congregations in synagogue on Yom Kippur, which Keegstra claimed permitted Jews to break contracts and cheat Gentiles.[518] All of this material was hearsay and could not be considered for the truth of its contents. Rather, the defence relied on it as evidence of two of the statutory defences to wilful promotion of hatred: that Keegstra had in good faith expressed an opinion on a religious subject and that Keegstra's teachings were relevant to a subject of public interest, the discussion of which was for the public benefit, and Keegstra on reasonable grounds believed them to be true.[519] Although this evidence seemingly provided a solid foundation for Keegstra's beliefs, it simultaneously confirmed the accuracy of the students' notes. As a Congress memo summed, Keegstra's testimony "made a mockery of a good deal of Christie's cross-examination of the students, aimed as it was, in good measure, to show that the notes were not an accurate record of what Keegstra had been teaching."[520]

The Crown's cross-examination removed any doubt that the notes, exams, and essays reflected Keegstra's views. Fraser had Keegstra concede that the students' notes generally echoed

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are descended from Khazars is accurate. Although the defence succeeded in qualifying Dr. Botting as an expert, she performed very poorly on cross-examination, forcing Christie to concede that her evidence was insufficient to prove the truth of Keegstra's beliefs. See *R v Keegstra* (ABQB 1985), Defence closing submissions, Vol 27 at 5211-12 [Defence closing]; Ross Henderson, "Keegstra based Jewish theory on Churchill," *Red Deer Advocate* (29 May 1985).

[515] See Ross Henderson, "Bible my guide to world events," *Red Deer Advocate* (22 June 1985) 1C; Bob Warwick, "Cross-examination of Keegstra ends," *Calgary Herald* (10 July 1985) A17.

[516] See "Sparks flew between opposing lawyers," *Red Deer Advocate* (22 July 1985) 6A.

[517] Keegstra in-chief, *supra* note 471 at 3272-79.

[518] *Ibid* at 3268-71.

[519] See eg *R v Keegstra* (ABQB 1985), Transcript of Proceedings, Ruling, Vol 17 at 3266.

[520] Memo from David Satok to Members, National Joint Community Relations Committee and Members, National Council, Canadian Jewish Congress (21 June 1985), CJA (DA 21, Box 13, File 1) at 1.

what Keegstra told them was important.[521] Keegstra also admitted his belief that all Jews hate Christianity and serve the devil, and that he taught this to his students.[522] He explained that Jews were "the chief people behind the pornography racket, the chief people in the mafia, the chief people in the movie industry … and … the ones that are operating most of the abortion clinics."[523] Keegstra even agreed that he had taught the students that the Jewish conspiracy was behind every major event in world history.[524] Fraser read some of the worst passages from the student essays and had Keegstra acknowledge that they reflected his beliefs.[525] For example, Keegstra concurred with one student's comment that, "At least [Hitler] tried to help our world by getting rid of the Jews instead of being sucked into their Socialist trap like we are now" and with another student's opinion that "we will soon be in a slavery state, unless we start trying to do something right now and try and fight the Jews off and keep our country free and responsible."[526] Furthermore, Fraser undermined Keegstra's alleged good faith by making clear that Keegstra ignored any information that did not align with his views, even when this information came from the same sources the defence had admitted into evidence.[527] Keegstra, in fact, seemed unfamiliar with many of the sources he claimed to have relied on for his teachings.[528] The Crown was able to have the excerpts from the Talmud and the *Kol Nidre* withdrawn as exhibits when Keegstra admitted on cross-examination that he had not actually read them until shortly before the trial.[529]

c. Atmosphere and community reaction

Because of the chaotic atmosphere at the Zundel trial and the packed gallery at Keegstra's preliminary hearing, many expected that Keegstra's trial would attract a large contingent of attendees and potentially result in violence. In anticipation of large crowds, the biggest courtroom

[521] Keegstra cross-exam, *supra* note 474 at 4403.
[522] *Ibid* at 4430-333.
[523] *Ibid* at 4526.
[524] *Ibid* at 4545.
[525] See generally *ibid* at 4974-84.
[526] *Ibid* at 4978-81.
[527] See eg *ibid* at 4883-4917.
[528] See eg *ibid* at 4917-19.
[529] See *ibid* at 4769-78. The Crown had other defence exhibits withdrawn for similar reasons. See eg Ross Henderson, "Schools teach leaders on conspiracy: trial," *Red Deer Advocate* (13 June 1985) 2B.

in Red Deer—with capacity of 110 persons—was booked for the trial, and strict security protocols were put in place.[530] RCMP were assigned to patrol inside and outside of the courthouse and to screen all attendees through a metal detector.[531]

Tension ran high on the first day of the trial, seemingly confirming these fears. As Keegstra and Christie walked up to court on the morning of 9 April 1985 they were greeted by a mob of reporters, photographers, and protesters.[532] One of these protesters was Sigmund Sherwood, a Polish Roman Catholic and resident of Fort Macleod, Alberta, who was interned for four years in Auschwitz during the war.[533] Sherwood wore a replica of his prison clothing and carried a large sign that read: "Auschwitz: Four Million Murdered."[534] Another veteran of the Second World War, Tony Hoogewoonink—who fought in the Dutch underground and spent two years in Nazi concentration camps—came to show his support for the Crown.[535] Sherwood and Hoogewoonink argued with Keegstra's supporters, including Terry Long, who shouted angrily at Hoogewoonink that the Holocaust was a lie.[536] In addition, a group of several young Jews from Calgary taunted Keegstra and held up placards reading "Never Again!" and "Herr Keegstra, What is your final solution to the Jewish question?"[537] One member of the group explained to a reporter: "We are here to represent history. We have to protest against what has been happening. We can't just sit around and watch an increasing number of people denying the Holocaust."[538]

Christie complained to Justice Mackenzie about the protesters and literature they had distributed outside of the court, arguing that it might influence the jury.[539] In response, the judge ordered that there was to be no demonstrations of any kind or attempts to interfere with persons

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[530] See generally Memo from Owen D Lowe to Stephen Lipman re Courthouse Security – Red Deer (26 March 1985), Calgary, LASA (Fonds 119-00-03, vol 3, file 19); "Media mob, protester greet Keegstra," *Red Deer Advocate* (9 April 1985) 1A ["Mob, protester greet Keegstra"].
[531] See *ibid*.
[532] "Mob, protester greet Keegstra," *supra* note 530.
[533] *Ibid*.
[534] *Ibid*.
[535] Don Collins, "Passions run high at Keegstra trial," *Calgary Herald* (10 April 1985) A1.
[536] *Ibid*.
[537] *Ibid*.
[538] *Ibid*.
[539] *R v Keegstra* (ABQB 1985), Discussion (*voir dire*), Vol 1 at 148.

coming into and out of court within two city blocks of the courthouse.[540] Subsequently, there were few if any demonstrations for the remainder of the trial, although Fraser later accused Keegstra's supporters of violating the court order by handing out cards outside of court encouraging people to protest against the prosecution.[541]

Attendance inside the courtroom was much smaller than expected. The gallery was half-empty for much of the trial.[542] Many of the attendees were members of the media, and even the media presence decreased as the trial dragged on.[543] The waning attendance was certainly influenced by the often-repetitive nature of the evidence and Keegstra's lack of charisma. As the *Canadian Jewish News* noted, Keegstra was "a humorless, fundamentalist Christian… not a media-savvy commercial artist like Zundel."[544] Indeed, the *Calgary Herald* reported on 6 June 1985—Keegstra's sixth day on the witness stand—that "reporters, spectators and jurors alike appeared to sleep through some of his evidence."[545] Nor was this the only day that the spectators and jury were observed dozing during Keegstra's testimony.[546] David McCalden, the IHR's former leader who had also attended the Zundel trial, complained that Keegstra's proceedings were "chronically boring" compared to Zundel's.[547] A Congress observer agreed with this view, reporting that Keegstra had been "deadly boring for long stretches."[548]

As with the preliminary hearing, Keegstra supporters far outnumbered those of the prosecution. As the *Red Deer Advocate* commented on 20 April 1985, "The trial was expected to generate standing-room only crowds, but so far the largest contingent of regulars has consisted of

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[540] *Ibid* at 149.
[541] See eg Bob Warwick, "Student tells of Keegstra 'facts'," *Calgary Herald* (12 April 1985) A1; Bob Warwick, "Interest ebbs at hate trial," *Calgary Herald* (6 May 1985) A12 ["Interest ebbs at trial"]; *R v Keegstra* (ABQB 1985), Discussion, Vol 20 at 3954.
[542] See eg Judy Monchuk, "Pupil recalls conspiracy teachings," *Red Deer Advocate* (12 April 1985) 1A; "Interest ebbs at trial," *supra* note 541; Bob Warwick, "Long study led to ideas – Keegstra," *Calgary Herald* (12 June 1985) A13 ["Long study led to ideas"].
[543] See eg Judy Monchuk, "Keegstra taught 'total learning'," *Red Deer Advocate* (7 May 1985) 1A.
[544] "We are all survivors," *supra* note 237.
[545] Bob Warwick, "Keegstra links Jews to moral decay," *Calgary Herald* (5 June 1985) A8.
[546] Ross Henderson, "Parents conspired, Keegstra testifies," *Red Deer Advocate* (20 June 1985) 1B.
[547] "Long study led to ideas," *supra* note 542.
[548] Memo from David Satok to Members, National Joint Community Relations Committee and Members, National Council, Canadian Jewish Congress (21 June 1985), CJA (DA21, Box 13, File 1) at 2.

elderly onlookers with sympathies firmly for Mr. Keegstra."[549] Keegstra's entourage wore buttons with slogans such as "Stop The Witch Hunt – Help Keegstra" and "Truth – The Final Solution."[550] A Keegstra supporter claimed they had received the buttons from Zundel.[551] At one point during Keegstra's evidence his supporters burst into applause, leading to a reprimand from Justice MacKenzie, who advised the crowd that "If anybody at all is here to be entertained … they will leave right now. The rest of us are carrying too heavy a burden. If you're here … to be entertained, leave, go find a movie theatre."[552]

In contrast, Jewish communal leaders attempted to keep a low profile, which was easier to accomplish in Keegstra's trial than in Zundel's because of the remote location of Keegstra's proceedings.[553] Elman attended most of the trial as Congress's observer; Prutschi and Shefman attended only portions of the trial, rotating on-and-off on behalf of Congress and B'nai Brith, respectively.[554] Although the Jewish presence was minimal, some members of the community attended for brief periods; Elman recalled that "at one point in time it became a place for Jews to go on their way to Banff or something. Let's go watch the trial for a bit."[555]

For those who did make the trip, hearing the evidence could be difficult. Sidney Cyngiser, a Holocaust survivor living in Calgary, attended the trial only for one day and found it "pretty hard to sit there and witness these lies and stupidity. Three times I checked my pulse; I was getting palpitations."[556] Elman recalled that, although he is not a Holocaust survivor, "personally I found it very painful to listen to the evidence, even though I knew a lot of the evidence was incorrect and inaccurate. Of course, it's painful to hear it."[557] University of Calgary professor David Bercuson

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[549] Ross Henderson, "Keegstra trial fascinates mixed bag of spectators," *Red Deer Advocate* (20 April 1985) 1C ["Mixed bag"].
[550] Judy Monchuk, "Jews are damned: Keegstra," *Red Deer Advocate* (27 June 1985) 1B.
[551] *Ibid*.
[552] *R v Keegstra* (ABQB 1985), Cross-examination of James Keegstra, Vol 23 at 4394.
[553] See Elman Interview, *supra* note 103 at 16; "Local CJC Region Launched; Harris Presses Jewish Interests," *Jewish Star* (Calgary) (17-30 August 1984) 2.
[554] *Ibid*; Shefman Interview, *supra* note 174 at 10.
[555] Elman Interview, *supra* note 103 at 4. See also
[556] Howard Solomon, "Keegstra slurs meant anguish for Jews," *Calgary Herald* (21 July 1985) B6 ["Slurs meant anguish for Jews"].
[557] Elman Interview, *supra* note 103 at 4.

also found the evidence upsetting, leading him to question whether a criminal trial was the optimal way to combat hate speech:

> I went to the trial several times and I saw what was on trial and from the defence perspective – from Doug Christie's perspective – the Holocaust was on trial. And I thought this is ridiculous. This is absolutely crazy. Here were are sitting in the middle of Western Canada trying to prove the truth of the Holocaust? In a court of Canadian law? … And I thought, this is bullshit. What are we doing here?[558]

Robert Haymond, a Jewish psychologist who sat in for part of the trial, became so enraged by Keegstra's evidence that he approached Keegstra during an adjournment, looked him in the eye and called him a "sick and pitiful man." An RCMP officer quickly separated the two men. Haymond explained that his response was a visceral reaction to Keegstra's lies: "It was like I was seeing again the torture of our people … as if we were vermin. I couldn't look at him without utter pain and disgust."[559]

As with Zundel's trial, this type of reaction was not confined to the Jewish community. Jack Downey, a non-Jewish businessman and Second World War veteran from Calgary, attended the trial because he was appalled by Keegstra's antisemitism. He fidgeted nervously, clutched his walking stick, and shook his head from side to side when listening to Keegstra's testimony.[560] Downey vented his anger to a reporter at the trial: "[Keegstra] has no historical knowledge whatsoever. He's a motor mechanic who did selective reading. He doesn't know shit from paint."[561]

Aside from the difficulty of hearing the evidence, Jewish observers experienced a hostile atmosphere at the trial. Rabbi Hayman, for one, was accosted by a woman who asked him why he was still alive if all the Jews had been killed during the war.[562] Shefman remembered the trial as being a "creepy experience" because of the prominence of Keegstra's supporters: "I'd walk in and you know they're pointing their finger at me, I'm the Jew from Toronto … [M]y attitude always

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[558] Interview of David Bercuson (7 January 2022) [on file with author] at 11-12.
[559] Paul Lungen, "Psychologist in Alberta protesting loss of job," *Canadian Jewish News* (2 January 1986) 3.
[560] Paul Lungen, "Keegstra's teachings anger Calgary businessman," *Canadian Jewish News* (15 August 1985) 9 ["Teachings anger businessman"].
[561] *Ibid*.
[562] "Mixed bag," *supra* note 549.

was to look at all that and say 'screw you', I'm doing something here, I don't care, you guys can point all you want – you're a bunch of goons."[563]

Media coverage of the trial was extensive, visiting trauma throughout the community. The volume of reporting on the Keegstra trial was similar to Zundel's, although more heavily weighted toward western Canadian media outlets.[564] As with Zundel's prosecution, the press was placed in a difficult position and typically sought to report the evidence objectively without correcting Keegstra's obvious distortions.[565] This led to some disturbing headlines. For instance, "Germans suffered 'more than Jews'" declared the front page of the *Red Deer Advocate* on 11 June 1985.[566] Other headlines included "Holocaust totals hoax, court told," "Talmud leads to hatred: Keegstra," and "Zionists control media, Keegstra testifies."[567] Keegstra's ridiculous claims about the Holocaust enraged and tortured Holocaust survivors.[568] Members of the Jewish community were particularly upset by Keegstra's assertions that the Talmud condones pedophilia and that the *Kol Nidre* allows Jews to cheat Gentiles.[569]

Nevertheless, there appears to have been a general sense among Canadian Jews that media reporting of the Keegstra trial was less traumatic than it had been during Zundel's proceedings.[570] This may have been influenced by the fact that press coverage of Keegstra's prosecution was relatively muted in eastern Canada, where the majority of Jews lived. Additionally, Elman theorized that it was easier to dismiss the defence evidence reported during Keegstra's trial because it came from Keegstra himself rather than the purported expert witnesses who testified during

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[563] Shefman Interview, *supra* note 174 at 10.
[564] Russell, *supra* note 371 at 31-32.
[565] See Interview of Steve Mertl (16 May 2022) [on file with author] at 9; Interview of Judy Monchuk (1 May 2022) at 10 [Monchuk Interview]; "No Conspiracy to Distort News, Media Reps. Assert," *Jewish Star* (Calgary) (6-20 December 1985) 3; "Covering Keegstra trial posed quandary for the media," *Canadian Jewish News* (10 October 1985) 9.
[566] Ross Henderson, "Germans suffered 'more than Jews'," *Red Deer Advocate* (11 June 1985) 1A.
[567] Bob Warwick, "Holocaust totals hoax, court told," *Calgary Herald* (30 April 1985) A9; Ross Henderson, "Talmud leads to hatred: Keegstra," *Red Deer Advocate* (3 June 1985) 1A; Richard Helm, "Zionists control media, Keegstra testifies," *Edmonton Journal* (17 June 1985) B5.
[568] "Slurs meant anguish for Jews," *supra* note 556.
[569] *Ibid*.
[570] See eg "Mixed bag," *supra* note 549; Joffe Interview, *supra* note 442 at 17; Harold Troper, "Keegstra," CJA (Fonds DA21, Box 13, File 2) at 6.

Zundel's prosecution.[571] Joffe added that Keegstra made no effort to use the media as a platform to turn his trial into a circus, in contrast to Zundel whose conduct was fundamentally aimed at maximizing his media attention.[572] Moreover, unlike Zundel's case, the Jewish community was spared the anguish of having to observe and read about Holocaust survivors being cross-examined and ridiculed by Christie.[573]

d. Verdict and sentencing

Trial evidence was completed on 9 July 1985—three months after the trial began—following the conclusion of Keegstra's testimony. In closing submissions, the Crown contended that Keegstra had effectively confessed under oath by conceding the accuracy of the students' notes, exams, and essays.[574] The bulk of Christie's closing submissions were dedicated to arguing that Keegstra was entitled to freedom of speech, even though this issue was irrelevant because the law had already been upheld under the *Charter*.[575] In addition, Christie argued that Keegstra had not wilfully promoted hatred and, even if he had, was entitled to rely on the legislation's broad defences. Christie acknowledged that there was no evidence to prove the truth of Keegstra's theories, but posited that the three other defences were applicable: Keegstra had in good faith expressed an opinion on a religious subject or an opinion based on a belief in a religious text; Keegstra's teachings were relevant to the public interest, the discussion of which was for the public benefit, and on reasonable grounds Keegstra believed them to be true; and Keegstra had, in good faith, intended to point out for the purpose of removal matters producing or tending to produce feelings of hatred toward another identifiable group (with respect to the latter defence, Christie argued that Keegstra's intent was to remove hatred against other groups including Christians, Arabs, and/or Germans).[576] In his charge to the jury, Justice MacKenzie agreed that each of these

[571] Elman Interiew, *supra* note 103 at 18.
[572] Joffe Interview, *supra* note 442 at 9.
[573] See Bialystok, *supra* note 237 at 238.
[574] *R v Keegstra* (ABQB 1985), Crown closing submissions, Vol 27 at 5266.
[575] See Memorandum from David Satok to Members, National Joint Community Relations Committee and Members, National Council, Canadian Jewish Congress re Keegstra Trial – Final Report (24 July 1985), CJA (DA21, Box 13, File 1) at 2 [Keegstra Trial – Final Report].
[576] See generally Defence closing, *supra* note 514 at 5034-5255.

defences might apply, and instructed the jury that if they found any one of the defences applicable, they must acquit.[577]

Supporters of the Crown and defence alike came away with the impression following the jury charge that, despite the strength of the evidence, conviction remained unlikely because of the plain language of the legislation. As a post-trial Congress memorandum put it (in a passage that surely would have angered Holocaust survivors who made the same point repeatedly prior to the passage of the legislation), "Only after sitting through a Judge's charge on this particular section of the law, can one come to a real appreciation of the many obstacles the legislation places in the path of a conviction."[578] As Elman remembered, the provision seemed to present too many opportunities for the jury to find Keegstra not guilty:

> If you look at the charge to the jury …. you would say to yourself after you finish that charge, How in the world are they ever going to convict him? … Because he says, If you do not find this beyond a reasonable doubt, then you must acquit. If you do not find this beyond a reasonable doubt, you must acquit. You know, if it wasn't willful, that is purposeful, then you must acquit. If it wasn't other than in private conversations, you must acquit.… [I]f you prove that it was true, you must acquit. If he raised a reasonable doubt as to whether or not it was a comment made in good faith about a subject of public interest, you must acquit. It just goes on and on. And I left after the charge when the jury went out, and I said, Oh there are just too many outs here for the jury, too many times at which during the process they could say not guilty.[579]

Keegstra had a similar view of Justice MacKenzie's jury instructions, believing his acquittal was inevitable. As Keegstra told a group of supporters after the trial, in reviewing the available defences, the trial judge "practically told [the jury] you have to find the guy innocent."[580]

The jury deliberated for thirty hours across four days. Several hours after the jury charge, the jurors sent a note to Justice MacKenzie asking for clarification of the terms "reasonable grounds" and "good faith," plainly because they were considering the applicability of the legislative defences.[581] On the fourth day of deliberations Christie alleged on the record that Fraser had been eating breakfast with Shefman and the media at the same hotel the jury was staying, and that they were doing so in sight of the jury – implying that the Crown, Jewish organizations, and

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[577] See generally, *R v Keegstra* (ABQB 1985), Charge to the Jury, Vol 29 at 5328-62.
[578] Keegstra Trial – Final Report, *supra* note 575 at 5.
[579] Elman Interview, *surpra* note 103 at 7.
[580] Everything Ernst Zundel, "The Trial of Jim Keegstra" (10 November 1985), online: https://archive.org/details/the-trial-of-jim-keegstra-10-nov.-1985-x-264 at 00h:43m:45s [Trial of Jim Keegstra].
[581] See *R v Keegstra* (ABQB 1985), Discussion re Question from Jury (17 July 1985), Vol 28 at 5376-81.

the media were working in concert to influence the verdict.[582] Fraser responded that he had never in his lifetime had breakfast with Shefman or any member of the media and that he had not eaten breakfast that morning in a hotel or anywhere.[583] Justice MacKenzie saw no merit in Christie's submissions and suggested to Christie that next time he might ask Fraser where he had eaten breakfast before raising the matter in open court.[584] Following the verdict, Keegstra would revive this allegation as evidence that the Jewish conspiracy had gotten to the jury and manipulated the outcome (in recounting the story, Keegstra added the JDL as another group that had been sitting at the table with the Crown, media, and B'nai Brith).[585]

The jury rendered its verdict in the afternoon of 20 July 1985, finding Keegstra guilty.[586] Sentencing took place later the same day. Fraser asked that Keegstra receive two years in prison, the maximum penalty allowable under the legislation.[587] The Crown noted that Zundel had received 15 months' jail time and argued that Keegstra's conduct was worse than Zundel's because Keegstra had promoted hatred to children.[588] Christie requested only that Justice MacKenzie sentence Keegstra according to the judge's conscience.[589]

Justice MacKenzie ordered that Keegstra pay a $5,000 fine.[590] In the judge's view, no jail time was warranted because Keegstra was "as much of a victim of his beliefs as a perpetrator," likening Keegstra to "a drug addict pushing drugs."[591] Moreover, Justice MacKenzie concluded that no punishment was likely to change Keegstra's beliefs.[592] Fraser was disappointed by the sentence, a reaction shared by some in the Jewish community.[593] Citron remarked that she was surprised Keegstra did not receive a prison sentence, lamenting that "Canadian people seem to

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[582] *R v Keegstra* (ABQB 1985), Discussion (*voir dire*) (20 July 1985), Vol 29 at 5395.
[583] *Ibid* at 5395-96.
[584] *Ibid* at 5396.
[585] Trial of Jim Keegstra, *supra* note 580 at 00h:45m:35s.
[586] *R v Keegstra* (ABQB 1985), Verdict (20 July 1985), Vol 29 at 5397.
[587] *R v Keegstra* (ABQB 1985), Speaking to sentence (20 July 1985), Vol 29 at 5399.
[588] *Ibid* at 5400.
[589] *Ibid* at 5401.
[590] *Ibid* at 5403.
[591] *Ibid*.
[592] *R v Keegstra* (ABQB 1985), Sentence (20 July 1985), Vol 29 at 5404-05.
[593] See Fraser Interview, *supra* note 428 at 20; Patricia Rucker, "Keegstra, terrorists, make news," *Canadian Jewish News* (15 August 1985) 2; Joffe Interview, *supra* note 442 at 14.

abhor sending people to jail."[594] Weinstein declared that "proper justice was [not] meted out to Jim Keegstra" and said that he intended to create a chapter of the JDL in Alberta.[595] But others were satisfied with a fine, noting that Keegstra had already suffered greatly, there was no need to make a martyr out of him by putting him in jail, and that the most important thing was that Keegstra had been convicted.[596] In the words of CJC national vice president Irv Epstein, "The sentence is very secondary to the main issue. The fact there were charges and they led to a conviction is by far the most important aspect. No sentence would change someone like Keegstra."[597]

Shockingly, after Justice MacKenzie rendered his sentence, the foreman of the jury, Dwight Arthur, approached some assembled members of the media and asked how he could contribute to Keegstra's fine.[598] Arthur explained that he was a fundamentalist Christian and would consider his contribution "a gift for the furthering of God's work."[599] Judy Monchuk, a columnist from the *Red Deer Advocate*, was one of the reporters present and was floored by the incident; "having a jury foreman come out and say, you know, Hey, I want to contribute to this, I don't know if there is a precedent for that anywhere. … I certainly know I never heard of anything like that after."[600] According to Keegstra, the foreman did, in fact, later donate some money.[601] This event, though disturbing to some,[602] underscored how Keegstra and Christie had squandered what was likely a very sympathetic jury. In an op-ed published several days later, Arthur clarified that his goal was not to support antisemitism but to protect free speech.[603] He emphasized that he

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[594] Diana Coulter, "Metro Jews laud courts for halting Keegstra 'poison,'" *Toronto Star* (21 July 1985) A4.
[595] "Jewish Leaders Say JDL is Not Welcome Here," *Jewish Star* (Calgary) (11-24 October 1985) 1.
[596] "Relief, disbelief greet verdict," *Edmonton Journal* (21 July 1985) A2; "Slurs meant anguish for Jews," *supra* note 556.
[597] Kim Bolan, "Keegstra conviction hailed by city Jews," *Vancouver Sun* (22 July 1985) A1.
[598] "Keegstra, terrorists make news," *supra* note 593; "Foreman willing to help pay fine," *Calgary Herald* (21 July 1985) A1.
[599] See *ibid*.
[600] Monchuk Interview, *supra* note 565 at 16-17.
[601] Trial of Jim Keegstra, *supra* note 580 at 00h:52m:00s.
[602] See eg Bolan, *supra* note 597; Ron Csillag, "Hatemonger question provides lively debate," *Canadian Jewish News* (15 August 1985) 29 ["Hatemonger question"]; "Was it Worth It?" *Jewish Star* (Calgary) (23 August 1985) 4.
[603] The same op-ed was published in the *Calgary Herald* and the *Edmonton Journal* (and perhaps other media outlets). See Dwight Arthur, "Free speech at issue, says Keegstra jury foreman" (letter to the editor) *Calgary Herald* (26 July 1985) A6; Dwight Arthur, "Public must ponder all views of history," (letter to the editor) *Edmonton Journal* (27 July 1985) A7.

disagreed with Keegstra's views—which, in Arthur's opinion, misrepresented the true spirit of Christianity—but also said that he did not support the prosecution; in a thoughtful passage, Arthur questioned the wisdom of putting Keesgtra on trial. As he wrote: "In a trial such as this, there are no winners, only losers. The Crown has only succeeded in giving national coverage to the very views it wishes to suppress and Keegstra, and to some degree all the citizens of this nation, have had their liberties compromised."[604]

VII. "Is it not time our community reconsidered the use of the criminal law to deal with hatemongers?": The trials' aftermath

a. Community pride

1985 had been an immensely difficult year for Canada's Jews. As the *Canadian Jewish News* put it in an August article, "For much of the past seven months, the Canadian public has been subjected to a barrage of lies aimed at Jews from East and West."[605] But with the Keegstra and Zundel trials both ending in convictions, many Canadian Jews celebrated the results. As Abella eloquently described:

> As Jews, indeed as Canadians, we rejoiced in the decisions of twelve ordinary citizens and two judges who were not swayed by the vilest sophistry and demagoguery ever heard in a Canadian court, and who saw Zundel, Keegstra and their henchmen for the racists and hatemongers they are. We rejoiced in a country which exacts penalties from those who spread calumnies, lies and slander. We rejoiced in the message of the courts: no more free rides for the hatemongers amongst us, for those who could defame, vex and harass, for those who would attempt to isolate a community – any community – and destroy it. Finally, we rejoiced in a legal system that says there are some opinions which are so far beyond the pale, that they must not be allowed into the free marketplace of ideas.[606]

The relief after Zundel's conviction was palpable. Congress and B'nai Brith held a joint press conference shortly after the verdict applauding the result and predicting that "this judgment will be the first of a number of judgments which will serve effectively to deter hatemongers from pursuing their aim of dividing Canadian society and turning some of us against our fellow citizens."[607] Furthermore, on 10 March 1985 the CJC and B'nai Brith organized a solidarity rally

[604] See *ibid*.
[605] "Teachings anger businessman," *supra* note 560.
[606] Abella, *supra* note 383 at 3.
[607] *Ibid*.

at the O'Keefe Centre in downtown Toronto.[608] The rally's main purpose was to provide catharsis for a traumatized community.[609] The hall was jammed with an overflow crowd of 3,700 people, with about 1,400 people taking part in a candlelight march from Nathan Phillips Square to the O'Keefe Centre prior to the event.[610] In a particularly emotional moment, Holocaust survivors and young Jews signed a covenant pledging to perpetuate the memories of Holocaust victims.[611] Farber called the rally "one of the most incredibly intense experiences of my life."[612]

Keegstra's verdict elicited a similar reaction. Although no rally was held, Congress and B'nai Brith again issued a joint press release, calling the conviction "a strong affirmation of the efficacy of the Canadian judicial system in dealing with those who spread racial hatred" and stating that, "This just and noble verdict reinforces the trust of all Canadians in their judicial system and their democratic institutions."[613] At a separate press conference, communal leaders in Alberta hailed the decision and said that all minorities should feel encouraged by the result.[614] Keegstra's conviction was particularly gratifying because it had come in a place largely free of Jews. As a Congress post-trial memo put it:

> The significance and the meaning of the verdict should not be under-estimated. In light of the law and the Judge's charge, the jury easily could have acquitted and walked away with a clear conscience. That they did not do so, but rather voted unanimously for conviction, says a great deal. The people who branded Keegstra for the criminal that he is are his people, they are his neighbours or the children of his neighbours. That a jury could convict one of their own of antisemitism in Red Deer, Alberta, points to the solidity and the health of main-stream Canadian society.[615]

Similarly, Prutschi argued that Keegstra's conviction was more important than Zundel's because Zundel was "tried in a cosmopolitan city in which the jurors had really no connection to the

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[608] Paul Lungen, "Rally for murdered millions; Thousands jam O'Keefe Centre," *Canadian Jewish News* (14 March 1985) 1 ["Rally for murdered millions"]; Paul Lungen, "Thousands participate in solidarity rally," *Canadian Jewish News* (21 March 1985) 30. The O'Keefe Centre is now known as Meridian Hall.
[609] See Letter from Ellen Kachuck to Michael Birenbaum (22 February 1985), Ottawa, Library and Archives Canada (MG28-V133, Volume number 107).
[610] "Rally for murdered millions," *supra* note 608.
[611] "Rally for murdered millions," *supra* note 608.
[612] Farber Interview, *supra* note 395 at 11.
[613] "B'nai Brith Canada/Canadian Jewish Congress Issue Statement on Keegstra Conviction," CJA (DA 21, Box 13, File 1).
[614] "Teachers' Conviction, Fine Assessed in Local Statements," *Jewish Star* (Edmonton) (August 1985) 1.
[615] Keegstra Trial – Final Report, *supra* note 575 at 6.

accused" whereas the "people who branded Keegstra a criminal were his own people. They were his neighbors and the children of his neighbors."[616]

b. Community trauma

But the legal victories had come at a steep price. The *Canadian Jewish News* called 1985 "a year of memory and pain" and said that "from the suffering, we learned that we are all survivors."[617] Once again, Abella evocatively captured the emotional toll when he reflected on the events one year later:

> Only slowly have Canadian Jews emerged from the trauma of 1985. … The trials of two hate-mongers, Ernst Zundel and Jim Keegstra left us numbed and outraged. For many – too many – the year was a nightmare, – a hideous, bizarre replay of a searing, indescribable experience. Nightly, the horrors of the Holocaust were replayed on our television screens and in our newspapers; worse was the obscenity of those arguing that not only were there no horrors, there was no Holocaust. Our hearts went out to the survivors of the death camps, and especially to those in the courtroom, who were put through a new and invidious torture, to prove that what happened to them really happened.[618]

Two surveys published after the trials helped clarify the impact of the proceedings on the Jewish community. The first survey was designed to measure the trials' effect on Canadian public opinion of Jews. In 1986, political scientist Gabriel Weimann and sociologist Conrad Winn released a short monograph containing results and analysis of a national poll of a random sample of 1,054 Canadians, conducted following Zundel's trial to test public responses to the prosecution.[619] The authors' primary motivation was to test the widely-held view that the trial, and particularly the media coverage, had benefitted Zundel by providing him with a valuable platform to disseminate his views – in Zundel's words, with "a million dollars worth of publicity."[620] The authors' key finding was that the trial likely increased rather than decreased sympathy for the Jewish community, although the trial did not alter the feelings of most Canadians toward Jews.[621] Only a tiny portion of those surveyed reported a less favourable opinion of Jews after the trial.[622]

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[616] Manuel Prutschi, "Learning the lessons of the hatemonger trials," *Canadian Jewish News* (8 May 1986) 10 ["Learning the lessons"].
[617] "We are all survivors," *supra* note 237.
[618] Abella, *supra* note 383 at 3.
[619] Gabriel Weimann & Conrad Winn, *Hate on Trial: The Zundel Affair, the Media, and Public Opinion in Canada* (Oakville, Ont: Mosaic Press, 1986) at 37.
[620] *Ibid*.
[621] *Ibid* at 60.
[622] *Ibid*.

Media exposure was actually found to be associated with increased sympathy for Jews.[623] Moreover, the trial increased public awareness of the Holocaust.[624]

Weimann's and Winn's findings were cited by many, including the authors themselves, to argue that concerns over the media coverage during the trials were overblown and that the prosecutions were ultimately beneficial to Canada's Jews.[625] After Weimann's and Winn's survey came out, Shefman declared that Zundel had received "one million dollars worth of notoriety" rather than one million dollars worth of publicity.[626] However, not everyone was convinced. Abella, for one, expressed skepticism in the survey results, arguing that many of those surveyed would have been understandably reluctant to admit to an unfavourable opinion of Jews.[627] Abraham Arnold, the former Western Region executive director of Congress, posited that while

> [i]n some quarters the findings of co-authors Weimann and Winn have been taken as evidence against the view of those who argued that the trial should not have taken place … in fact, the opposite argument may be made more strongly. If Zundel could make few, if any, converts when given a national nightly TV platform surely he must have been winning even fewer supporters when he worked in relative obscurity. What value could there be, then, in turning him into a martyr for the neo-nazi movement by invoking against him the ultimate weapon of the judicial system?[628]

Furthermore, the survey's central conclusion—that the Zundel trial had decreased antisemitism—overshadowed another important finding. The authors also found that when respondents were asked whether they thought their neighbours had become more or less antisemitic following the trial, most responded that they believed antisemitism in others had increased.[629] In other words, while antisemitism overall had seemingly gone down, most thought that it had gone up. Although the survey was aimed at Canadians generally and not Jews specifically, this finding could be interpreted to suggest that the trials had undermined Jewish people's sense of inclusivity and belonging, by creating the impression that Canada had become

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[623] *Ibid* at 107.
[624] *Ibid* at 78.
[625] See eg Serge Tittley, "Zundel trial worth emotional cost, says prof," *Canadian Jewish News* (27 February 1986) 6. See also Bialystok, *supra* note 237 at 235; *A History of Antisemitism in Canada* (Waterloo, Ont.: Wilfrid Laurier University Press, 2015) at 143.
[626] Tittley, *supra* note 625.
[627] Abella, *supra* note 383 at 3.
[628] Abraham J Arnold, "Book Review of *Hate on Trial: The Zundel Affair, the Media, and Public Opinion in Canada*" (22 May 1987), PAM (P5099/15).
[629] Weimann & Winn, *supra* note 619 at 78-80.

more antisemitic. Indeed, Abella thought this was the most important takeaway from Weimann's and Winn's study.[630]

Another survey conducted by sociologists Evelyn Kallen and Lawrence Lam in the early 1990's—this one aimed directly at the Jewish community—further supports the hypothesis that the trials significantly undermined the sense of belonging of Canadian Jews. Kallen and Lam polled 165 Jewish people in Toronto with the goal of measuring the impact of the Zundel and Keegstra trials on the victim community.[631] They found that almost half of the respondents (47.3%) thought the Keegstra and Zundel trials had increased antisemitism, while relatively few (16.4%) believed the trials had decreased antisemitism.[632] Moreover, 80% of respondents reported experiencing suffering/psychological harm from the trials, a finding that was consistent between Holocaust survivors and other respondents (which reified the *Canadian Jewish News*' conclusion that the "hate trials taught us that we are all survivors"[633]).[634] Respondents to the survey reported "psychic harm" and "mental anguish" and described feeling "a deep and gut-wrenching agony," "targeted and exposed," "insecure," and "angry and frustrated" by the prosecutions.[635] In sum, Kallen's and Lam's findings—particularly the deep pain of observing the prosecutions alongside the widespread belief that the trials had amplified antisemitism—suggest that the Keegstra and Zundel prosecutions had a traumatic and lasting impact on Canadian Jews, and made the victim community feel less secure, despite the convictions in both cases.[636]

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[630] See Abella, *supra* note 383 at 3. See also Sandler Interview, *supra* note 191 at 10.
[631] Evelyn Kallen & Lawrence Lam, "Target for hate: the impact of the Zundel and Keegstra trials on a Jewish-Canadian audience" (1993) 25:1 Canadian Ethnic Studies 9 at 17. The group surveyed included 70 males and 83 females. The results were cross-tabulated with variables of age, sex, education, birthplace and occupation of the respondents; the authors found that none of these variables made any significant difference in their responses to the impact of the trials.
[632] *Ibid* at 20.
[633] "We are all survivors," *supra* note 237.
[634] Kallen & Lam, *supra* note 631 at 20. Note that a majority of the respondents were non-survivors and born in Canada, although 86% of respondents reported that they had lost kin or family members in the Holocaust. (*ibid* at 19.)
[635] *Ibid* at 20-21.
[636] See *ibid* at 20.

c. Community division

In assessing the Zundel and Keegstra cases, many have emphasized the unifying aspect of the trials on the Canadian Jewish community. In a sense, they are correct; people who before the prosecutions were wary of putting Zundel and Keegstra on trial put aside their misgivings and rallied to support the Crown once the prosecutions began. Bialystok, with characteristic insightfulness, notes that once the charges were laid, "Inevitably, detractors and supporters of the decision to prosecute were drawn together. … The issue was not whether the [CHRA] or the Crown had erred, but how the community would respond. … Long-held divisions and animosities were set aside … [and] fissures between survivors and Canadian Jews were closed."[637] Abella added in a similar vein: "The trials had one salutary effect – they united us, Jew and non-Jew. There were many who questioned – and still do – the wisdom of a trial …. But once the trials began our divisions were put aside. Together we all saw the face off the enemy, and it was ugly and menacing."[638] Griffiths poignantly captured the feeling of the Jewish community through a metaphor; as he put it: "I don't know whether you've ever gone swimming in May in cottage country, but it's very cold. Once you're in the water, all you can do is swim. Once we were in the water on this case, they all pulled together. And we'll sort this out at the end. And I have views as to whether or not this should be happening. But we're here now, and we want to help in whatever way we can. That was universally the response that I had."[639]

But this does not mean that the Jewish community was united on the wisdom of putting hatemongers on trial. Following the trials, a vigorous debate resurfaced over whether the prosecutions were a good idea – in other words, whether the pain exacted by the trials had been worth the purported benefits. To again quote Griffiths:

> [T]he Jewish community, to my observation as an outsider, was divided on the issue. They were divided during the trial. They were divided after the trial. And I had the opportunity to speak, I don't know, a dozen different times to different Jewish groups, synagogues, conferences. That was the same at every conference and every group that I spoke with. There were people who said this never should have happened. And there were people who said, "This history, our memories of that time of our loved ones that were murdered, should

[637] See Bialystok, *supra* note 237 at 234-35.
[638] Abella, *supra* note 383 at 3.
[639] Griffiths Interview, *supra* note 34 at 13-14.

> not be stripped away from us through the lies of this man." And he should be held accountable for those lies. And that by running a successful prosecution, you prove to the world that they're lies.[640]

Supporters of the prosecution remained steadfast. Citron was predictably unapologetic. She acknowledged that the Zundel trial "was painful to survivors … but it was necessary to expose him. If you want to deal with a crime, you have to take it to court. You can't avoid dealing with it even if it's painful."[641] Shefman likewise recognized the emotional toll but concluded that this was an appropriate price to pay to address antisemitism, an opinion he continues to hold.[642] And, following the trials, Prutschi argued that while, "In a hatemonger trial it must be clearly understood that a victimized community can pay a heavy price in pain and distress … [t]he Criminal Code has proven itself effective in dealing with hatemongers."[643]

However, many voiced the opposite view. The most prominent example was likely Alan Borovoy. He railed against the prosecutions, calling the trials "a travesty, no matter the outcome. It was a[n] indignity and it extracted a cost in our self-respect, involving as it did, a debate on the Holocaust."[644] Asked Borovoy: "Is it not time our community reconsidered the whole use of the criminal law to deal with hatemongers?"[645] Borovoy was not alone. Famed criminal defence lawyer Edward Greenspan commented that the prosecutions had done more harm than good.[646] Clayton Ruby, another prominent lawyer, called prosecuting Zundel "the dumbest thing Roy McMurtry every did."[647] In an interview with the CBC, a visibly angry Ruby declared:

> I find it offensive to make Jews prove that they were tortured and murdered in vast numbers in Germany. And that's in effect what we're doing. You have to call the inmates who recount these horrible experiences and I wonder why they're being put through this. For what end? Is the next thing that we're going to make the Japanese prove they were bombed in Hiroshima and Nagasaki? Where's the end of it?[648]

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[640] *Ibid* at 16.
[641] See Paul Lungen, "Crown may appeal after court orders new Zundel trial," *Canadian Jewish News* (29 January 1987) 1.
[642] See "Relief disbelief greet verdict," *supra* note 596; Shefman Interview, *supra* note 174 at 18.
[643] "Learning the lessons," *supra* note 616.
[644] 8 March 1985 JPRC Meeting, *supra* note 406 at 5. See also eg Borovoy, *At the Barricades*, *supra* note 133 at 129; Alan Borovoy, "Law used to prosecute Keegstra is 'dangerously vague'," (editorial) *Toronto Star* (29 July 1985) A8 ["Dangerously vague"].
[645] 8 March 1985 JPRC Meeting, *supra* note 406 at 5.
[646] "Hatemonger question," *supra* note 602.
[647] "Did Zundel turn out to be the winner," *supra* note 231.
[648] Canadian Broadcasting Corporation, "The Journal: Year End" at 00h:8m:50s.

Legal scholar (as well as former Congress president and future Attorney General of Canada) Irwin Cotler opined that prosecutions of hate propagandists should be taken out of the criminal justice system and dealt with through the Canadian Human Rights Commission.[649]

In Alberta—where the Jewish community had no direct involvement in the decision to charge Keegstra and many were opposed to prosecution—numerous community leaders expressed dissatisfaction after the trial's conclusion. Bruce Libin, president of the Calgary Jewish Council, told a reporter that "I'm becoming more and more convinced prosecutions don't make sense. On the one hand, we've exposed to the public we have racists like Keegstra living in our community and holding positions of responsibility. But the trial also has the danger of cloaking his outrageous views of history in the aura of respectability a courtroom lends."[650] Rabbi Lewis Ginsburg of Calgary's Beth Israel Synagogue was certain Keegstra had gained too much publicity, commenting: "We have used a blunderbuss to fight a mosquito."[651] Ron Ghitter, the former Alberta MLA who was chairman of the provincial government's Committee on Tolerance and Understanding, announced after the trial that the laying of charges against Keegstra was a mistake which created a circus centered around the trial and made life difficult for ethnic communities.[652] Alberta's *Jewish Star* stated explicitly that the pain of the trial was not worth the cost, concluding that the "result of the trial was that in carrying out the legal process, the Jews got dragged through the mud."[653] Statements by other Jewish Albertans made clear that these views were far from exceptional, although certainly not uniform.[654]

Indeed, the dispute in the Jewish community over the wisdom of the prosecutions played out in a myriad of venues, including kitchen tables, synagogues, conference rooms, school auditoriums, newspapers, and television programs.[655] Newspapers ran competing editorials in

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[649] Michael Doyle, "Send hate cases to rights panel: Lawyer," *Montreal Gazette* (23 July 1985) B1.
[650] "Slurs meant anguish for Jews," *supra* note 556.
[651] *Ibid*.
[652] Kathy Kerr, "Hate case mistake, says Ghitter," *Calgary Herald* (3 August 1985) A2.
[653] "Was it worth it?" (editorial), *Jewish Star* (Calgary) (23 August – 12 September 1985) 4.
[654] See eg Sheldon Kirshner, "Bercuson: Keegstra trial counter-productive," *Canadian Jewish News* (28 November 1985) 3; "Slurs meant anguish for Jews," *supra* note 556.
[655] See eg Farber Interview, *supra* note 395 at 20; "Hatemonger question," *supra* note 602; "Hate's dangers" (editorial), *Canadian Jewish News* (19 December 1985) 7; Griffiths Interview, *supra* note at 26; Flyer for program

which Canadian Jews debated the merits of the trials.[656] At an event held in Ottawa in late-April 1985 to commemorate the 40th anniversary of the Holocaust's conclusion, Borovoy created a stir when he remarked that criminal hate laws are dangerous and inappropriate; "That's your opinion," someone in the back shouted, while another attendee grabbed a microphone and defended the prosecutions.[657]

Within the CJC, a similar debate was raging behind the scenes. Despite publicly stating that these prosecutions would be the first of many to come,[658] in fact some Congress leaders were horrified by the prosecutions and trying to prevent future trials from occurring. Congress president Milton Harris was particularly vocal. At a meeting of the Ontario JPRC after the Zundel trial, Harris found himself "completely at a loss to know whether there was any single benefit to the Jewish community" from the trial.[659] He continued: "Does anyone honestly believe that the conviction of Zundel … will stop hate literature? Very few people had heard of Zundel's name before the trial, [but] now he is a household word."[660] At a meeting of the National JPRC several days later, Harris emphasized that he did not think the trauma exacted by hate-speech prosecutions was justifiable:

> It's time … that we who claim to be leaders in the Jewish community apprise our constituency of the consequences of these trials. This has never been done. We somehow had the idea when we lobbied for legislation that there would be a prosecution it would be consented to by the Attorney General, there would be a great blanket of secrecy at that point and the next thing we would hear is that the accused was behind bars and silenced. Anybody who suggests that to our community is being totally irresponsible. It is impossible to avoid the severe consequences of these trials.[661]

Consequently, Harris declared that such trials should be resisted in the future:

> We could not avoid the Zundel trial – that has already happened. Nor can we avoid the Keegstra trial. But, in the future, there will be a great deal of option in the hands of the Jewish community as to whether we take action against every kook who publishes something anywhere. Our community will be under a great deal of

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entitled "Propagation of Hate," (1 April 1985), CJA (DB15, Box 23, File 5); Scheininger Interview, *supra* note 184 at 4-5; "Slurs meant anguish for Jews," *supra* note 556; Douglas Wertheimer, "Keegstra Crown Prosecutor Favours Decriminalizing Hate Promotion Law," *Jewish Star* (Calgary) (10-23 January 1986) 1.

[656] See eg Arthur Levin, "Yes! It Was Worth It!" (editorial), *Jewish Star* (Calgary) (13 September 1985) 11; Sol Littman, "Another view on Keegstra – It was right to prosecute him," (editorial) *Toronto Star* (28 July 1985) H2; "Dangerously vague," *supra* note 644.

[657] "Criminal Code hate laws are dangerous, Jews told," *Red Deer Advocate* (1 May 1985) 3A.

[658] See eg *supra* note 607.

[659] 8 March 1985 JPRC Meeting, *supra* note 406 at 4.

[660] *Ibid*.

[661] 19 March 1985 NJCRC Meeting, *supra* note 190 at 4.

> pressure and he believed it would do immense damage to them, particularly the survivors, who should not have to be exposed to it again.[662]

Other members of the JPRC also expressed reservations about future prosecutions.[663]

As a result of such misgivings, the CJC took an important step after the trials to limit use of the hate-speech laws in the future. Before the prosecutions, Congress had requested that the requirement of obtaining the Attorney General's consent be deleted from the legislation.[664] Following the Zundel trial, the CJC's national officers reversed course and adopted the position that this requirement should be maintained.[665] They made this decision specifically to discourage future hate-speech prosecutions. As Harris explained, "The amount of anguish caused by the trial was not foreseen by anyone. If we delete the consent of the Attorney General towards prosecutions under Section 281 there will be a continual stream of charges laid."[666] Notably, following the trials B'nai Brith took the same position, advocating that the requirement of the Attorney General's consent be kept in.[667] The clear message sent by communal leadership was that they wanted fewer prosecutions, not more.

And when presented with another opportunity to use the hate-speech provisions shortly after the Zundel and Keegstra trials, community leaders signaled that they had retrenched into a position of skepticism with respect to the benefits of the criminal law in the fight against hate speech. Malcolm Ross was a high school teacher in New Brunswick who, beginning around 1978, published several books and pamphlets and made public appearances in which he denied the Holocaust and argued that Christian civilization was being undermined and destroyed by an

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[662] *Ibid* at 4.
[663] See eg *ibid* at 6, 9.
[664] See *ibid* at 8. Congress took this position in response to a report published in June 1984 by the Special Committee on Participation of Visible Minorities in Canadian Society (released under the title *Equality Now!*), which had made the same recommendation. See *ibid* and *Equality Now! Report of the Special Committee on Visible Minorities in Canadian Society* (Ottawa: House of Commons, 1984) at 69-71. [*Equality Now!*]
[665] 19 March 1985 NJCRC Meeting, *supra* note 190 at 8-9. *Equality Now!* had proposed amendments three amendments to the offence of wilful promotion of hatred (then s 281.2(2), now s 319(2) of the *Criminal Code*): (1) removing the word "wilfully" from the section; (2) clarifying that the burden of all defences (rather than only the defence of truth) was on the accused; (3) deleting the requirement of the Attorney General's consent to a prosecution (*supra* note 664 at 69-71). The CJC continued to agree with the first two suggested amendments.
[666] 8 March 1985 JPRC Meeting, *supra* note 406 at 4.
[667] See Sandler Interview, *supra* note 191 at 15-16. Note however that it is not clear what B'nai Brith's position was on this issue prior to the Keegstra and Zundel trials.

international Jewish conspiracy.[668] In July 1985—three days after Keegstra's conviction—Julius Israeli, a retired chemistry professor and Holocaust survivor living in New Brunswick, filed a complaint with the RCMP alleging that Ross had committed the offence of wilful promotion of hatred against the Jewish people.[669] Israeli's complaint was met with an unsympathetic reception from community leaders. Irwin Lampert, chairman of the CJC's Atlantic Region, questioned "the wisdom of the prosecution at this time" and declined to lend Congress's support.[670] Lampert suggested that Ross instead be ignored.[671] Bernie Vigod, head of the Atlantic Region of the B'nai Brith League for Human Rights, said that while he supported the spirit of Israeli's complaint, he had reservations about moving forward with a trial: "The law itself was touch and go even when the evidence (against Zundel and Keegstra) was overwhelming," Vigod explained; "With this case, we have our doubts about the ability to obtain a conviction."[672] Furthermore, Canadian Jewish leaders privately admitted that they did not want Ross prosecuted because they feared the Jewish community "may not be able to withstand being put through an emotional wringer again."[673] When, following an investigation, New Brunswick Attorney General David Clark announced that he would not consent to a prosecution, Congress leadership breathed a sigh of relief. Shimon Fogel, executive director of the CJC's Atlantic Region, applauded the government's decision, stating that "It would not have been in the best interest of the Jewish community to prosecute."[674] Ultimately, in 1988, a Jewish parent filed a complaint against Ross with the Human Rights Commission of New Brunswick; the Human Rights Commission placed Ross on a leave of absence and ordered that he be moved to a non-teaching position, a decision that was later upheld by the Supreme Court of Canada.[675]

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[668] See *Ross v. New Brunswick School District No. 15*, [1996] 1 SCR 825 at para 3 [*Ross*]; Kathryn Harley, "One teacher's prejudice," *Maclean's* (27 April 1987), online: https://archive.macleans.ca/article/1987/4/27/one-teachers-prejudice.
[669] Harley, *supra* note 668. Israeli filed a similar complaint in 1978 that was dismissed (*ibid*).
[670] Ron Csillag, "More hate activities are alleged," *Canadian Jewish News* (22 August 1985) 4.
[671] *Ibid*.
[672] *Ibid*.
[673] Ron Csillag, "Moncton Writer Accused of Hatemongering against Jews," *Jewish Star* (Calgary) (13 September 1985) 1.
[674] Ron Csillag, "AG: no prosecution for Malcolm Ross," *Canadian Jewish News* (14 August 1986) 1.
[675] See *Ross*, *supra* note 668 at paras 7, 112.

VIII. Conclusion

The Zundel and Keegstra trials were incredibly painful for Canadian Jews. Each trial turned into a spectacle that became nearly possible to avoid. During Zundel's trial, the agony of watching Holocaust survivors being subjected to withering cross-examination by Doug Christie—and the headlines that followed—were particularly difficult for the community to bear. The Keegstra trial, although far removed from the main Jewish population centres in eastern Canada, became its own traumatic spectacle, especially for Alberta's Jews. The anguish caused by the trials reverberated throughout the community and caused many, including leaders of Congress, to question the wisdom of prosecuting hatemongers in the future.

No matter one's view of the wisdom of the trials, there seemed one silver lining: at least they were over. What much of the community failed to realize was that in a sense the proceedings were only just beginning. Because while it is one thing to obtain a conviction, it is another matter to sustain that conviction on appeal. I take up this issue in the next chapter.

CHAPTER 5 – End of an Era: The Culmination of the Zundel and Keegstra Affairs, 1985-2017

The year 1985 was a critical year for the Canadian Jewish community. Paradoxically, the trials of Ernst Zundel and James Keegstra brought the community together while at the same time threatening to tear it apart. With Zundel's and Keegstra's convictions behind them, Canadian Jews were eager to move on.

But the Zundel and Keegstra affairs were far from over. Indeed, the hard-earned victories at trial were merely a first step. Both Zundel and Keegstra—backed by their indefatigable lawyer, Doug Christie—promised to keep fighting. They would make good on this promise: both men would reach the Supreme Court of Canada, with Zundel achieving a stunning victory at Canada's highest court. As the cases ground their way through the legal system, the Jewish community would once again question the merits of turning to the law in the fight against antisemitism.

This chapter tells the story of the resolution of the Zundel and Keegstra affairs. It picks up following their convictions at trial. Zundel's and Keegstra's first stop post-conviction was their respective provincial Courts of Appeal. Both were successful, with the convictions quashed in each case. Accordingly, the hard-earned legal victories of 1985 had been suddenly wiped out. Each case then proceeded to the Supreme Court, with some stops along the way. Keegstra arrived at the Supreme Court first, in 1989. In its decision released one year later, a sharply divided Court declared the offence of wilful promotion of hatred constitutional, as a justifiable limit to the right of freedom of expression guaranteed by Section 2(b) of the *Canadian Charter of Rights and Freedoms*.[1] Zundel's case then reached the Supreme Court in 1991, following a second trial (and conviction) and an unsuccessful appeal in the Court of Appeal for Ontario. In another monumental decision, the Supreme Court overturned Zundel's conviction, declaring the crime of spreading

[1] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

false news an unjustifiable limit on freedom of expression. Zundel's shocking victory riled the Jewish community and brought further soul-searching over the decision to prosecute Zundel in the first place.

Yet the Supreme Court's rulings did not end the legal proceedings against either Zundel or Keegstra. In response to the Zundel's acquittal, his opponents—Sabina Citron chief among them—tried a different tact, initiating a prosecution against him under the *Canadian Human Rights Act*.[2] This proceeding set off a chain of events that led to Zundel's conviction, flee from Canada, and eventual deportation to Germany. Keegstra, for his part, returned to the Alberta courts for yet another criminal trial. Convicted again of wilful promotion of hatred, Keegstra's case wound up back in the Supreme Court. After his conviction was upheld and his criminal proceedings concluded in 1996—twelve years after their initiation—Keegstra returned to a quiet life.

Keegstra and Zundel died in 2014 and 2017, respectively. A landmark era had at last come to a close.

I. "Zundel, you're a shithead": Zundel in the Court of Appeal for Ontario, 1986-87

Ernst Zundel was convicted by a jury on 28 February 1985 on one count of spreading false news.[3] On 25 March 1985 he was sentenced to fifteen months in prison.[4] Zundel spent one night in jail but obtained bail pending appeal the next day.[5] One condition of Zundel's bail precluded him from writing or speaking in public anything in support or furtherance of the views expressed in the Holocaust-denial pamphlet *Did Six Million Really Die? Truth At Last Exposed*.[6] The appeal was scheduled for oral argument in the Court of Appeal for Ontario in September 1986.[7]

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[2] RSC, 1985, c H-6.
[3] Kirk Makin, "Crown asks for long prison term; Zundel guilty, but unrepentant," *Globe and Mail* (1 March 1985).
[4] "Judge jails Zundel for 15 months brands him a 'danger' to Canada" *Montreal Gazette* (26 March 1985) A1.
[5] Paul Lungen, "Judge hopes sentence will deter other racists," *Canadian Jewish News* (4 April 1985).
[6] *R v Zundel*, No. 251/85, Order on Bail Pending Appeal (26 March 1985) at para 5. See also *Did Six Million Really Die? Truth At Last Exposed* (Toronto: Samisdat Publishers) [*Did Six Million Really Die?*].
[7] See Chisholm MacDonald, "Barred windows protect Ernst Zundel while awaiting appeal of jail sentence," *The Expositor* (10 May 1986) D4. Note that at the relevant time (and until 1990), the Court of Appeal for Ontario was known as the Supreme Court of Ontario, Court of Appeal. See Christopher Moore, *The Court of Appeal for Ontario: Defining the Right of Appeal, 1792-2013* (Toronto: University of Toronto Press for Osgoode Society, 2014) at 163.

The Canadian Jewish Congress, League for Human Rights of B'nai Brith Canada, and Canadian Civil Liberties Association all applied for leave to intervene in the appeal – meaning, to participate in the appeal and make submissions as non-parties to assist the Court.[8] The CJC and B'nai Brith sought to intervene in support of the Crown's position that the Court should uphold the conviction.[9] Congress and B'nai Brith submitted a joint application for leave to intervene, reflecting their close working relationship in the Zundel case.[10] The CCLA applied to intervene on Zundel's behalf, arguing that the criminal offence of spreading false news was an unconstitutional infringement of freedom of expression guaranteed by Section 2(b) of the *Charter*.[11] The CCLA argued that its intervention was necessary because Zundel's and Christie's primary objective was to advance Holocaust denial, not to protect freedom of speech.[12] The Court of Appeal rejected all three applications, explaining that the right to intervene in criminal proceedings is granted sparingly.[13] According to Manuel Prutschi, the CJC's National Director of Community Relations, Congress was unsurprised that leave was denied and considered it a success that Congress was seen upholding the Jewish community's interests.[14] In addition, they were

[8] As in prior chapters, I will refer to the Canadian Jewish Congress as "CJC" or "Congress", to the League for Human Rights of B'nai Brith Canada as "B'nai Brith" and to the Canadian Civil Liberties Association as the "CCLA". An intervention is a procedural advice that allows a non-party to participate in a proceeding. The purpose of an intervention is to present the court with submissions from the perspective of a non-party who has a special interest or particular expertise in the subject matter of the appeal. The role of an intervener is to provide a unique perspective or specialized form of expertise to assist the court in deciding complex issues that have effects transcending the interests of the particular parties before it. See *R v Barton*, 2019 SCC 33 at paras 52-53 [*Barton*], citing *R v Morgentaler*, [1993] 1 SCR 462 at p 463. In the Court of Appeal for Ontario, anyone seeking to leave to intervene may apply to the Court under s 30 of the *Criminal Appeal Rules*, online (pdf): ontariocourts.ca/coa/files/rules-forms/criminal-rules-en.pdf.

[9] *R v Zundel* (Ont CA) No 251/85, Notice of Application of Canadian Jewish Congress and League for Human Rights of B'nai Brith Canada (22 July 1986). Note that although I refer here and below to Jewish and other organizations intervening to support one side or another in an appeal, interveners are not parties to the appeal and have a limited role; they must widen the points at issue nor assume the role of third-party prosecutors. See *Barton*, *supra* note 8 at para 53.

[10] Minutes of the Meeting of the Joint Community Relations Committee, Ontario Region (30 July 1986), Montreal, Alex Dworkin Canadian Jewish Archives [henceforth "CJA"] (DA21, Box 19, File 13) at 5.

[11] *R v Zundel* (Ont CA), No 251/85, Affidavit of Kenneth P Swan in support of Application for Leave to Intervene of Canadian Civil Liberties Association.

[12] *Ibid* at paras 10-13. See also Thomas Claridge, "Right to argue for Zundel appeal is sought by civil liberties group," *Globe and Mail* (21 August 1986) A16 ["Right to argue for Zundel"].

[13] *R v Zundel* (Ont CA), Decision on Motion by League for Human Rights of B'nai Brith Canada and the Canadian Jewish Congress to Intervene (Howland CJO) (undated); *R v Zundel* (Ont CA), Decision on Motion by Canadian Civil Liberties for Leave to Intervene (Howland CJO) (21 August 1986).

[14] Memo from Manuel Prutschi, National & Ontario Region Director, Community Relations to Members, National Council, Canadian Jewish Congress, CJA (DA21, Box 21, File 13) at 2 [Memo from Prutschi to National Council].

pleased that Christie had flown from Victoria to Toronto at considerable expense to oppose the application.[15]

The CCLA's attempt to intervene on Zundel's behalf put its General Counsel Alan Borovoy in a difficult position. He was a proud member of the Jewish community and abhorred Zundel.[16] Borovoy continued to serve on the CJC's Joint Public Relations Committee, as he had for many years.[17] Borovoy had been a vocal opponent of Zundel's prosecution, for which he was heavily criticized; as he later recalled, "Long-time friends and colleagues within the Jewish community denounced the position I had taken. Some members of the Jewish community reportedly accused me of being a 'self-hating Jew.'"[18] When it came time to decide whether the CCLA would seek leave to intervene in Zundel's case, Borovoy was conscious that if the CCLA took Zundel's side, "we were very likely to aggravate the already tense situation between our long-time allies and ourselves."[19] Nevertheless, Borovoy and the rest of the CCLA's board of directors decided they had no principled choice but to oppose the false news law.[20]

This did not mean Borovoy was *ad idem* with Zundel or his lawyer, Doug Christie. Christie's public statements supporting Zundel and Keegstra—including comments that veered

[15] Minutes of the Meeting of the Joint Community Relations Committee, Ontario Region (24 September 1986), CJA (DA21, Box 19, File 13) at 3.
[16] See A Alan Borovoy, *"At the Barricades": A memoir* (Toronto: Irwin Law, 2013) at 129-131 [*At the Barricades*]. In his memoir, Borovoy recalled an interesting anecdote exhibiting his distaste for Zundel: "A few days after the trial, I was invited to appear on an open-line radio program that was devoted to the case. At one point, the moderator announced that Ernst Zundel himself was on the line and, right after the ensuing commercial, he would be given a chance to speak with me. Fortunately, the commercial gave me an opportunity to think through how I was going to handle the situation. Of course, I had no wish to speak with him, either publicly or privately. After the commercial, Zundel expressed praise and admiration for my various public comments on his case—all of which made me squirm in my chair. When the microphone was handed to me, I simply said, 'While I feel obliged to defend Mr. Zundel's legal rights, I have no comparable obligation to treat him with respect.' With that, we pulled the plug on him. And so, I did not talk directly with him then or, to my knowledge, at any other time."
[17] As previously noted, the Joint Public Relations Committee of the Canadian Jewish Congress and B'nai Brith Canada changed its name in the 1960s to the "Joint Community Relations Committee" and the CJC ended its partnership with B'nai Brith in the early 1980s, although the word "joint" continued to be used in the Committee's title until 1991. For simplicity, I will continue to refer to this organization as the "JPRC" in this chapter. See generally Michael Friesen, "The Joint Public Relations Committee Series at the Ontario Jewish Archives: Some New Questions" (2019) 28 Canadian Jewish Studies 125.
[18] *Ibid* at 129.
[19] *Ibid* at 130.
[20] *Ibid*.

into Holocaust denial—upset Borovoy.[21] Shortly after filing the motion for leave to appeal, Borovoy wrote to Christie asking that Christie clarify whether he shared his clients' position on the Holocaust, failing which Borovoy said the CCLA would cooperate with Christie only "as may be strictly required in the case."[22] Christie did not take kindly to Borovoy's letter, calling it a "vicious, arrogant, and prejudiced diatribe, [dripping] with the hatred of one whose tribal prejudices superseded any real love for civil and human rights."[23] Zundel deemed the letter "immature, unprofessional and unworthy of the CCLA."[24] Borovoy derived satisfaction from the "open hostility that we received from the Zundel entourage."[25] As Borovoy recalled: "Following the inevitable publicity of this skirmish, one of my executive members telephoned me asking, 'How much did you pay them to denounce you in this way?'"[26]

The CCLA's motion for leave to intervene was argued by prominent Jewish criminal defence lawyer Edward (Eddie) Greenspan, who also faced backlash.[27] Greenspan took on the case for free.[28] Like Borovoy, Greenspan found Zundel repugnant, but prioritized his objection to the false news law.[29] Many of Greenspan's family members had perished in the Holocaust and he naturally found Zundel's views distasteful.[30] Greenspan emphasized that the CCLA was not supporting Zundel's views, but "protecting the right to speak," even for "obnoxious people."[31]

As with Zundel's trial, Jewish organizations helped the Crown prepare for and argue the appeal. The lead Crown attorney was Doug Hunt, who was then Assistant Deputy Attorney-

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[21] See eg *ibid* at 129-31; See Paul Lungen, "Flyer pleads for funds to support Keegstra," *Canadian Jewish News* (18 July 1985) 5; Chris Morris, "Legal gunslinger ready to rise to aid of Keegstra, Ross," (18 December 1990) B1; "CCLA wanted Christie to clarify his position," *Canadian Jewish News* (28 August 1986) 1 ["CCLA wanted Christie to clarify"].
[22] Letter from A Alan Borovoy to Douglas Christie (28 July 1986), Ottawa, Library and Archives Canada [henceforth, "LAC"] (Fonds R9833-817-4-E, Vol 36, File number: FF-HP-207) [Letter from Borovoy to Christie].
[23] Borovoy, *supra* note 16 at 132.
[24] Claridge, "Right to argue for Zundel," *supra* note 12. As noted in chapter 3, Zundel was at one time a member of the CCLA. It is not clear when (or if) he gave up his membership.
[25] *At the Barricades*, *supra* note 16 at 132.
[26] *Ibid*.
[27] Paul Lungen, "No intervention allowed," *Canadian Jewish News* (28 August 1986) 1.
[28] June Callwood, "Border between moral, unethical conduct like a Twilight Zone," *Globe and Mail* (24 September 1986) A2.
[29] *Ibid*.
[30] *Ibid*.
[31] Lungen, "No intervention allowed," *supra* note 27.

General of Ontario for Criminal Law.[32] David Finley, a junior Crown attorney, assisted Hunt.[33] Crown counsel met with representatives of the CJC and B'nai Brith in advance of the appeal.[34] Jewish organizations provided the Crown with documentation and research, including relevant case law and legislation from foreign jurisdictions.[35]

Oral argument took place from 22-26 September 1986.[36] The case was heard by a panel of five judges instead of the usual three, signaling that the Court of Appeal viewed this as a particularly important appeal.[37] The appeal attracted considerable media and public attention. Finley recalled the courtroom being packed.[38] Security was tight.[39] The hearing was held in the largest courtroom in the District Court of Ontario (now the Ontario Superior Court of Justice) at 361 University Avenue, instead of the Court of Appeal building at Osgoode Hall, to accommodate the large crowd.[40] Zundel appeared with supporters wearing his now-trademark bulletproof vest.[41] Zundel was pleased to have his case debated in the Court of Appeal and to once again be in the public eye; as he remarked to a supporter following the hearing, whatever the result, "it will be a victory for us" because "we have in effect made [the Holocaust] an issue that is a perfectly logical issue to be debated, whereas onetime it was a dogma."[42]

The Court of Appeal rendered its decision in January 1987. It sided with Zundel and ordered a new trial.[43] The Court held that the trial judge, Hugh Locke, had committed two primary

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[32] Interview of Doug Hunt (30 May 2022) [on file with author] [Hunt Interview] at 3.
[33] Interview of Catharine and David Finley (28 March 2022) [on file with author] [Finley Interview] at 8. Peter Griffiths (the main prosecutor at Zundel's trial) also appeared as Crown counsel for the appeal, but did not participate in any of the appeal work. See Interview of Peter Griffiths (6 May 2022) [on file with author] at 8.
[34] See Letter from Manuel Prutschi to Douglas Hunt (18 September 1986), CJA (Fonds DA9, Box 51, File 1) [Letter from Prutschi to Hunt]; Finley Interview, *supra* note 33 at 13-14; Minutes of the Meeting of the Joint Community Relations Committee of the Canadian Jewish Congress (28 April 1986) at 3-4.
[35] Letter from Prutschi to Hunt, *supra* note 34; Memo from Prutschi to National Council, *supra* note 14 at 2.
[36] Memo from Prutschi to National Council, *supra* note 14 at 2.
[37] See Finley Interview, *supra* note 33 at 30; Hunt Interview, *supra* note 32 at 4. This procedure is colloquially referred to as "sitting five."
[38] Finley Interview, *supra* note 32 at 13.
[39] Alfred Holden, "Zundel has right to spread beliefs, court told," *Toronto Star* (23 September 1986) A9.
[40] *Ibid* at 13.
[41] "Zundel judge erred: appeal lawyer," *Globe and Mail* (23 September 1986) D16.
[42] Committee for Open Debate on the Holocaust, "The Great Holocaust Appeal of Ernst Zundel," A film by David McCalden, at 1h:45m:30s, online (video): *altCensored* <altcensored.com/watch?v=RZLginOPc9s>.
[43] *R v Zundel*, 18 OAC 161, 1987 CarswellOnt 83 (CA) at para 230 [*Zundel* 1987].

errors. First, Justice Locke erred by refusing the defence application to challenge jurors for cause – in other words, to question the jury panel about their personal beliefs.[44] Although it sided with the defence on this point, the Court of Appeal criticized some of Christie's proposed questions, including Christie's attempt to exclude all Jewish people from the jury, which it deemed inappropriate.[45] (According to Prutschi, during oral argument a "number of the Justices openly expressed themselves on the complete impropriety of the questions that Christie had proposed."[46]) Nevertheless, the Court of Appeal found that Christie should have been provided the opportunity to rephrase some of his questions.[47] Second, the Court held that the trial judge misstated the burden of proof, insofar as Justice Locke told the jury that to find Zundel guilty it must conclude Zundel had no honest belief in the pamphlet's truth.[48] According to the Court of Appeal, the trial judge was required to tell that jury specifically that to sustain a guilty verdict it must find Zundel *knew* the pamphlet was false when he published it.[49] (This was not one of the grounds of appeal raised by Christie; the Court of Appeal identified this error on its own initiative.[50]) The Court of Appeal agreed with the trial judge, however, that the false news provision of the *Criminal Code of Canada*[51] did not infringe Section 2(b) of the *Charter* and was therefore constitutional.[52] The Court also found that Justice Locke properly exercised his judicial discretion in denying the Crown's request for judicial notice of the Holocaust.[53]

Many in the Jewish community were, understandably, disappointed by the Court of Appeal's judgment. As we have seen, Zundel's lengthy trial took an immense toll on observers; now that hard-earned guilty verdict had been quashed, and it appeared the community would have to endure the traumatic experience of another trial. The CJC issued a press release in which it

[44] See *ibid* at paras 86-112.
[45] *Ibid* at paras 103-06.
[46] Memo from Prutschi to National Council, *supra* note 14 at 3.
[47] Zundel 1987, *supra* note 43 at para 107.
[48] See *ibid* at paras 178-86.
[49] *Ibid* at para 184.
[50] Memorandum from Manuel Prutschi to Charles Zaionz and Rose Wolfe (29 January 1987), CJA (Fonds DA21, Box 21, File 13) at 3 [Memo from Prutschi to Zaionz and Wolfe].
[51] RSC, 1985, c C-46.
[52] See *ibid* at paras 121-85.
[53] *Ibid* at para 172.

"recoil[ed] at the possibility of a second trial, which would grant the accused a renewed opportunity to stage-manage a circus."[54] (Congress was pleased, however, that the Court of Appeal declared the false news provision constitutional and recognized that the maintenance of racial and religious harmony is a matter of public interest in Canada.[55]) Helen Smolack, chairman of the Canadian Holocaust Remembrance Association (CHRA), which had initiated Zundel's prosecution, expressed "shock and outrage" that the Court sided with Zundel.[56] Holocaust survivors were upset with the decision and feared the pain of a second trial.[57]

However, as with reaction to the trial verdict, the Jewish community did not speak with one voice. Greenspan remarked that he "was opposed to this prosecution from the very first day I learned of it" and called for repeal of the false news provision.[58] Borovoy described the decision as "the worst of both worlds" because it granted Zundel a victory while leaving the criminal offence of spreading false news intact.[59]

Zundel, of course, was pleased. He promised "a magnificent new trial" featuring new and better experts.[60] And Zundel took pleasure that "Our Zionist enemies and their stooges are outraged and there is a great wailing and gnashing of teeth within their ranks."[61]

Several days after the appeal verdict was rendered, CHRA founder Sabina Citron was scheduled to appear on a Canadian Broadcasting Corporation (CBC) Radio call-in show called "Radio Noon." The topic of the program was whether the Crown should re-prosecute Zundel. Unbeknownst to Citron, Zundel had contacted CBC Radio the day before the interview and convinced them to allow him to appear on the program to provide "journalistic balance." Citron

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[54] "Canadian Jewish Congress Disappointed with Zundel Appeal Decision" (Press Release) (23 January 1987), CJA (DB15, Box 22, File 11).
[55] *Ibid*; Memo from Prutschi to Zaionz and Wolfe, *supra* note 50; Manuel Prutschi, "Zundel verdict validated use of 'false news' law," *Canadian Jewish News* (19 February 1987) 11.
[56] Jim Emmerson, "Appeal court's ruling outrages Jews who say new trial will restage 'circus'," *Toronto Star* (24 January 1987) A4 ["Appeal ruling outrages Jews"].
[57] Nancy Knickerbocker and Peter Trask, "New trial for Zundel upsets Holocaust survivors," *Vancouver Sun* (24 January 1987).
[58] "Appeal ruling outrages Jews" *supra* note 56.
[59] *Ibid*.
[60] Kirk Makin, "New trial ordered for Zundel but 'false news' law upheld," *Globe and Mail* (24 January 1987) A1.
[61] "Power Newsletter," Vol 1, Issue 2 (26 February 1987), Calgary, Legal Archives Society of Alberta ["LASA"] (Fonds 120-00-01, Vol 6, File 40).

learned that Zundel would participate only when she arrived on set. To make matters worse, CBC accidentally cut off Citron's microphone when she attempted to field calls from listeners. Citron then stormed off the program. Zundel was thus permitted several minutes of uninterrupted airtime, in which he launched into a diatribe of Holocaust denial and promised that a second trial would be even more painful than the first. Zundel vowed, "if the Holocaust survivors, with their fairy tales and their collective hallucinations and their regurgitated lies, think they had a rough time the last time they were on the witness stand, just watch it this time. The cross-examination, I guarantee you, will be merciless." Zundel attacked Citron personally, calling her a malcontent who was kicked out of the Canadian Jewish Congress.[62]

Citron hit back. She once again commenced a private prosecution against Zundel for spreading false news, this time citing Zundel's statements about the Holocaust during his radio appearance. The Crown withdrew the charge in September 1987. In the midst of the hearing someone from the body of the court yelled: "Zundel, you're a shithead."[63] Many no doubt agreed.

II. "We don't want that trial. We don't need it." Zundel's re-trial, 1987-88

Although the Court of Appeal had quashed Zundel's conviction, it was not clear whether the Crown would prosecute Zundel a second time. Here again the Jewish community was divided over the issue. There was some reluctance among CJC leadership to advocate for a new trial.[64] Rose Wolfe, chairman of the JPRC, commented that a second trial would be "the worst thing that could happen" as it would provide Zundel with "another chance to propagate his Holocaust-denial

[62] Regarding this entire paragraph, see Transcript of CBC Radio Noon – The Phone-In Hour with David Schatzky, Topic: "Should Ernst Zundel be Tried Again?" (30 January 1987), filed as Ex F to *R v Zundel* (1988) (Ont Dist Ct); Margaret Polanyi, "Activist angry as Zundel gets equal time," *Globe and Mail* (31 January 1987) A11 ["Activist angry"]; Letter from Charles Zaoinz and Rose Wolfe to Michael McEwan (4 February 1987), CJA (Fonds DA9, Box 51, File 1).

[63] Regarding this entire paragraph, see Thomas Claridge, "Zundel in court again over interview on CBC," *Globe and Mail* (5 September 1987) A10; Transcript of Proceedings, *R v Zundel* (Prov Ct Crim Div) (18 September 1987), file as Ex G to *R v Zundel* (1988) (Ont Dist Ct); Paul Lungen, "Second set of charges against Zundel dropped," *Canadian Jewish News* (23 September 1987) 23.

[64] Minutes of the Meeting of the Joint Community Relations Committee, Ontario Region (28 January 1987), CJA (DA21, Box 19, File 14) at 1 [28 January 1987 JPRC Minutes]. See also Duncan McMonagle and Patricia Poirier, "New trial for Zundel pledged by Ontario," *Globe and Mail* (5 June 1987) A1.

views."[65] Prutschi, on the other hand, said: "we see this as a fight and we will continue fighting."[66] B'nai Brith felt that another trial under the false news provision would be a mistake, as it would give Zundel a new platform which he would again use to inflict trauma on the Jewish community – "except this time it would be even worse."[67] B'nai Brith thought the best solution would be to prosecute Zundel for wilful promotion of hatred, which it felt would be less painful for the community because the Crown would not be required to prove the truth of the Holocaust.[68]

Others were less equivocal on the question of proceeding to another trial. The CHRA insisted a new trial was required despite the pain it might cause.[69] The Jewish Students' Network, which had 30,000 members in Canada, also lobbied for another trial.[70] On the other hand, Borovoy and the CCLA argued forcefully that the matter should be dropped.[71] Borovoy advanced the same position internally within the CJC.[72] Nor was Borovoy alone in opposing another prosecution. Edmonton Rabbi Haim Kemelman, for instance, told a reporter that he hoped Zundel would not be put on trial again because of "the pain this causes Jews," adding: "We don't want that trial. We don't need it."[73] Once again Elie Wiesel weighed in on the matter, urging Ontario not to re-prosecute Zundel so as to avoid giving him another platform for his views.[74]

After an unsuccessful attempt to obtain leave to appeal to the Supreme Court, Attorney General of Ontario Ian Scott decided to re-prosecute Zundel for spreading false news.[75] In the second trial the only pamphlet at issue would be *Did Six Million Really Die?*, as Zundel had been

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[65] Paul Lungen, "Crown may appeal after court orders new Zundel trial," *Canadian Jewish News* (29 January 1987) 1.
[66] "Don't ignore Zundel, Scott told," *Globe and Mail* (5 February 1987) A17.
[67] "The League for Human Rights & Regina vs. Ernst Zundel" (29 January 1987), Winnipeg, Provincial Archives of Manitoba [henceforth, "PAM"] (Fonds G-6-6-5, File 31) at 3-4.
[68] *Ibid* at 4-5. B'nai Brith ultimately took the position that, although it preferred a trial for wilful promotion of hatred, another prosecution under the false news provision would be preferable to dropping the matter. See "Continued legal action against Zundel sought," *Canadian Jewish News* (12 February 1987) 3 ["Continued legal action sought"].
[69] "Crown may appeal," *supra* note 65; "Continued legal action sought," *supra* note 68.
[70] "Activist angry," *supra* note 62.
[71] "Crown may appeal," *supra* note 65. See also Conrad Winn, "Zundel trial didn't heighten racism" (letter to the editor) *Toronto Star* (12 February 1987) A22.
[72] 28 January 1987 JPRC Minutes, *supra* note 64.
[73] "Ernst Zundel sees a chance to move onto political stage," *Edmonton Journal* (25 January 1987) D12.
[74] David Vienneau, "Shun Nazi apologists Wiesel tells meeting," *Toronto Star* (4 November 1987) A35.
[75] See Legislative Assembly of Ontario, *Evidence*, 33-3, L022 (4 June 1987) (Mr Scott), online: http://hansardindex.ontla.on.ca/hansardeissue/33-3/l022.htm.

acquitted at his first trial with respect to *The West, War and Islam!* and the Crown did not appeal this acquittal.[76]

The lead Crown prosecutor in the second trial was John Pearson. Pearson was very experienced—he was at the time Deputy Director of Ontario's Crown Law Office, Criminal Division—and significantly more experienced than the lead Crown in the first trial, Peter Griffiths.[77] Pearson's assignment to the prosecution signaled to the Jewish community the seriousness with which the government approached the case.[78] Pearson was assisted by Catharine Finley—a junior Crown attorney (and wife of David Finley) who had also worked alongside Griffiths in the first trial—and Jamie Klukach, then an articling student.[79] Klukach is, as of this writing, still a Crown attorney and Ontario's Criminal Law Division lead for hate crimes.[80] She recalled that working on the Zundel trial as an articling student was a "fantastic experience" and "in many ways a tough act to follow."[81]

Jewish organizations assisted the Crown. Members of the CJC met with Pearson in advance of the trial and provided research assistance, names of potential witnesses, and other materials.[82] B'nai Brith assisted, too, with Mark Sandler—a criminal defence lawyer and the organization's National Legal Chairman—conducting mock cross-examinations of Crown witnesses to prepare them for what they would face from Christie.[83] The Crown also received strategic advice from Robert McGee, counsel for the CHRA.[84]

The CHRA unsuccessfully attempted to participate in the trial as an intervener. Third-party

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[76] See Indictment, *R v Ernst Zundel* (Ont Court of General Sessions of the Peace) (28 July 1984); Ernst Zundel, "The West, The War, and Islam!" CJA (Fonds DA21, Box 21, File 12); *Did Six Million Really Die?*, *supra* note 6.
[77] Memorandum from Joseph J Wilder to Members, National Council of Canadian Jewish Congress (10 December 1987), CJA (Fonds DA21, Box 21, File 13) at 1 [Wilder Memo].
[78] *Ibid*.
[79] Finley Interview, *supra* note 33 at 6; Interview of Jamie Klukach (26 January 2022) [on file with author] [Klukach Interview].
[80] Klukach Interview, *supra* note 79 at 1.
[81] *Ibid* at 15.
[82] Letter from Manuel Prutschi to John Pearson (10 August 1987), CJA (Fonds DA9, Box 51, File 1). See also Klukach Interview, *supra* note 79 at 9; *R v Zundel*, Ont Dist Ct (1987) at 1161; Wilder Memo, *supra* note 77 at 9.
[83] Interview of John Pearson (8 April 2022) [on file with author] [Pearson Interview] at 3.
[84] *Ibid* at 6.

intervention at a trial—as opposed to an appeal—is extremely unusual and rarely granted.[85] McGee argued that the CHRA should be permitted to intervene solely on the question of whether the court should take judicial notice of the Holocaust.[86] Both the defence and Crown opposed the CHRA's application; Klukach recalled that the Crown opposed the application out of concern over the appearance of fairness.[87] Citron and Smolack testified in support of the CHRA's motion.[88] The trial judge, Ron Thomas, denied the application, finding that the CHRA's participation was neither required nor necessary for him to determine the judicial notice issue.[89]

Despite the CHRA's lack of participation, the Crown persuaded Justice Thomas to take judicial notice of the Holocaust.[90] Specifically, Justice Thomas directed the jury that "the mass murder and extermination of Jews in Europe by the Nazi regime during the Second World War is a historical fact which is so notorious as not to be the subject of dispute among reasonable persons."[91] The Crown faced an uphill battle in obtaining judicial notice of the Holocaust in the second trial because the application for judicial notice had been denied in the first trial, and the Court of Appeal for Ontario concluded that the trial judge had properly exercised his discretion in rejecting the application for judicial notice.[92] Nevertheless, Pearson successfully argued that the Court of Appeal's ruling left the door open for Justice Thomas to exercise his discretion differently in the second trial.[93] The court's granting of judicial notice was symbolically important for the Jewish community, as it signalled that the truth of the Holocaust was not a debatable issue.[94]

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[85] See Klukach Interview, *supra* note 79 at 11-12.
[86] Submissions of Robert McGee, *R v Zundel*, Ont Dist Ct (1987) at 6. As noted in the previous chapter, by taking judicial notice a court declares that the fact in question exists, relieving the parties of the need to bring proof. A court may take judicial notice of any fact so generally accepted that it is not debatable among reasonable persons or of facts that are capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy. See *R v Find*, 2001 SCC 32 at para 48.
[87] Klukach Interview, *supra* note 79 at 11-12.
[88] Evidence of Helen Smolack and Sabina Citron, *R v Zundel*, Ont Dist Ct (1987) at 9-37.
[89] Ruling, *R v Zundel*, Ont Dist Ct (1987) at 89.
[90] As noted in a prior chapter, a court may take judicial notice of any fact so generally accepted that it cannot be the subject of reasonable debate or of facts that are capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy. See *R v Find*, 2001 SCC 32 at para 48.
[91] Remarks to the Jury, *R v Zundel*, Ont Dist Ct (1987) at 1207.
[92] *Zundel* 1987, *supra* note 43 at para 171.
[93] See generally Submissions by Mr Pearson, *R v Zundel*, Ont Dist Ct (1987) at 48-177.
[94] See eg "Have a nice weekend!" *Montreal Daily News* (14 May 1988).

Moreover, because of the ruling the Crown elected not to call any Holocaust survivors in the second trial, sparing the Jewish community significant trauma.[95] However, although he granted judicial notice, Justice Thomas consciously avoided reference to the number of Jews killed by the Nazis and to the question of whether the Jews were killed through a deliberate Nazi policy of extermination.[96] This left room for the defence—just as it did in the first trial—to call witnesses who questioned the number of persons killed and whether the Nazis had carried out a specific policy of genocide against the Jewish people during the Second World War.

Because it did not rely on the evidence of Holocaust survivors, the Crown's case in the second trial hinged primarily on expert evidence concerning the truth of the Holocaust and the falsity of *Did Six Million Really Die*. The Crown's expert witness at the first trial had been Raul Hilberg, a professor at the University of Vermont who published the first comprehensive history of the Holocaust.[97] Pearson wanted to use Hilberg again, but Hilberg refused to testify at the second trial, citing work commitments while admitting that he did not want to endure another round of cross-examination from Christie.[98] Nevertheless, Pearson made a successful application to read Hilberg's evidence from the first trial into evidence at the second trial.[99] Accordingly, the Crown had the benefit of Hilberg's testimony even though he declined to appear as a witness. In addition, the Crown called another Holocaust expert, Christopher Browning. Browning was a history professor then teaching at Pacific Lutheran University in Tacoma, Washington, who had

[95] See "Ruling altered the course of 2nd Zundel trial," *Canadian Jewish News* (16 June 1988) 3; Pearson Interview, *supra* note 83 at 10.
[96] See Submissions by Mr Christie, *R v Zundel*, Ont Dist Ct (1987) at 1037; See Submissions by Mr Christie, *R v Zundel*, Ont Dist Ct (1987) at 1501.
[97] See Daniel Blatman, "The Holocaust as Genocide: Milestones in the Historiographical Discourse" in Simone Gigliotti & Hilary Earl, eds, *A Companion to the Holocaust* (Hoboken, NJ: John Wiley & Sons, 2020) at 99-100; Kirk Makin, "One-way rail fares point to slaughter, Zundel trial is told," *Globe and Mail* (16 January 1985) M5.
[98] See Letter from Raul Hilberg to John C Pearson (5 October 1987), Ex D to *R v Zundel* (1987 Ont Dist Ct) [5 October 1987 Letter from Hilberg to Pearson]; Letter from Raul Hilberg to John C Pearson (6 January 1988), Ex G to *R v Zundel* (1987 Ont Dist Ct).
[99] See Ruling, *R v Zundel*, Ont Dist Ct (1987) at 976. The authority to read in evidence from a previous trial on the same charge where the witness is absent from Canada is provided in what is now *Criminal Code* s. 715(1). At the relevant time this section was *Criminal Code* s 643(1). See eg *R v Potvin*, [1989] 1 SCR 525.

been recommended by Hilberg.[100] Browning was apprehensive about testifying and facing Christie's cross-examination; but, he recalled, "it was a challenge that I was not going to shirk from."[101] As it turned out, Christie subjected Browning to four days of intense questioning – even longer than Christie's cross-examination of Hilberg at the first trial.[102]

As in the first trial, the central theme of Zundel's defence was that *Did Six Million Really Die?* was essentially true – in other words, the Holocaust was a hoax.[103] The defence called twenty-three witnesses, most of whom denied the Holocaust.[104] As before, many of the defence witnesses were associated with the Institute for Historical Review (IHR).[105] Several defence witnesses were repeat performers from the first trial. Ditlieb Felderer, for instance, again testified that Auschwitz had a swimming pool, bakery, and brothel, and that inmates were treated well.[106]

Other witnesses were new. Perhaps most controversial among the new defence witnesses at the second trial was Fred Leuchter. Leuchter, who resided in Boston, was a specialist in the construction and installation of execution apparatus, and had worked with many American states on improving their equipment for the administration of capital punishment.[107] Prior to trial, Zundel paid Leuchter $35,000 to make a trip to Auschwitz to investigate whether the gas chambers were genuine.[108] Leuchter, recently married, took his wife on the trip and referred to it as their honeymoon.[109] Without permission to do so, Leuchter chiselled samples from the bricks and cement of a number of buildings at Auschwitz, apparently unaware that these buildings were post-

[100] 5 October 1987 Letter from Hilberg to Pearson, *supra* note 98. Browning subsequently moved to the University of North Carolina, where he is, as of this writing, Frank Porter Graham Professor Emeritus. See https://history.unc.edu/emeritus/christopher-r-browning/.
[101] Interview of Christopher Browning (13 December 2021) [on file with author] [Browning Interview] at 10.
[102] See eg Don Downey, "Lawyer for Zundel disputes use of gas vans," *Globe and Mail* (20 February 1988) A12.
[103] See Opening Address to the Jury by Mr Christie, *R v Zundel* (1987 Ont Dist Ct) at 4211.
[104] See Paul Bilodeau, "Zundel found guilty for lies on Holocaust," *Toronto Star* (12 May 1988) A1.
[105] See Paul Bilodeau, "The Zundel trial: dark memories, snickers in court," *Toronto Star* (12 May 1988) A22. On the Institute for Historical Review, see generally, Deborah Lipstadt, *Denying the Holocaust: The Growing Assault on Truth and Memory* (London: Penguin, 1994) at 137-56
[106] See Examination-in-chief of Ditlieb Felderer, *R v Zundel* (1987 Ont Dist Ct) at 4257-4266.
[107] Lipstadt, *supra* note 105 at 162-3; Fred A Leuchter, "Inside the Auschwitz 'Gas Chambers'," LAC (Fonds R9833-849-6-E, Vol 38, File FF-HP).
[108] *Ibid* at 162.
[109] See Errol Morris, dir. *Mr. Death: The rise and fall of Fred A Leuchter, Jr* , Santa Monica, CA, Lionsgate Films, 1999, 32:00ff [*Mr. Death*].

war reconstructions of the originals.[110] Upon his return to the United States, Leuchter submitted these samples for chemical analysis.[111] The results revealed little-to-no presence of hydrogen cyanide, which Leuchter relied on to conclude there was no evidence Auschwitz had been used for homicidal gassings.[112] When he submitted the samples, Leuchter did not tell the laboratory how he had collected them; the laboratory manager later stated that the samples had not been properly collected and that the findings were of no significance.[113] Nevertheless, Leuchter's report was—and remains—deeply influential among Holocaust deniers.[114]

David Irving was another new defence witness at Zundel's second trial. Irving, who resided in England, had been a professional historian for twenty-five years and written about twenty-five books.[115] He was qualified at trial as an expert on the history of the Second World War.[116] Prior to his testimony in Zundel's case, Irving had already stoked controversy for his view that the Holocaust was carried out without Hitler's knowledge.[117] Irving had, however, apparently refrained from publicly denying the Holocaust.[118] But Irving's views seemingly changed at Zundel's second trial; Irving now testified that, in part because of Leuchter's report, he was increasingly convinced the Holocaust was a hoax.[119] As Klukach remembered, Irving's reversal came as a shock:

> I mean there was this procession of world-class hate-players [at the trial]. … And then [Christie] calls David Irving, who's such a narcissist that he got annoyed – he turns on the stand, right there, right in front of us, David Irving who although sort of a second-tier, paperback historian, still had some legitimacy, right – suddenly turns and aligns himself forever and irrevocably with these movements – right there during that

[110] Lipstadt, *supra* note 105 at 162-3; Paul Lungen, "Witness disputes view 6 million killed," *Canadian Jewish News* (28 April 1988) 6.
[111] Lipstadt, *supra* note 105 at 163.
[112] *Ibid*; "Witness disputes view 6 million killed," *supra* note 110.
[113] See *Mr. Death*, *supra* note 109 at 55:00ff.
[114] See Lipstadt, *supra* note 105 at 163; Klukach Interview, *supra* note 79 at 7; Sandro Contenta, "Germany confronts the virus of hate; Holocaust denier remains defiant, looks for recruits," *Toronto Star* (8 November 2005) A8.
[115] See Examination-in-chief of David Irving, *R v Zundel* (1987 Ont Dist Ct) at 9312 [Irving in-chief].
[116] Ruling, *R v Zundel* (1987 Ont Dist Ct) at 9346.
[117] Browning Interview, *supra* note 101 at 11; Bernie M Farber, Notes of a meeting re. the Canadian Association for Free Expression: David Irving, History's Misinterpretation (undated), CJA (Fonds DA23, Box 23, File 9) at 1; "Small group fails to stop talk on Hitler by historian," *Globe and Mail* (3 November 1986) A13.
[118] See "The Zundel trial: Accused publisher decides not to testify in his own defence," *Toronto Star* (27 April 1988) A4 ["Zundel trial"].
[119] See Irving in-chief, *supra* note 115 at 9413; Cross-examination of David Irving, *R v Zundel* (1987 Ont Dist Ct) at 9474.

trial.[120]

Irving's sudden emergence as a Holocaust denier made him a celebrity in neo-Nazi circles but destroyed his credibility as a historian.[121] Irving's reputation would fall further in the coming years, particularly after his failed attempt to sue Holocaust historian Deborah Lipstadt for libel.[122]

Unlike the first trial, Zundel did not testify at his second trial. His choice not to testify likely arose from his disastrous performance on the witness stand in the first trial.[123] Zundel's decision surprised many observers.[124] As Pearson put it, "I was surprised that he didn't testify. I would have thought that that's exactly what he would have wanted: an opportunity to continue his charade."[125] Zundel explained that he declined to testify because people already knew "where Ernst Zundel stands. How often do I have to tell you the world is round, that the Holocaust was a hoax?"[126]

Atmosphere at the trial was tense. The second trial, like the first, attracted large crowds. There were lineups to claim one of the spots in the packed gallery, although interest in the trial waned over time.[127] Spectators once again included a strange mix of Holocaust survivors and neo-Nazis.[128] Browning recalled: "the courtroom was very bizarre because about half the courtroom was filled with survivors and about half the courtroom was filled with the denier all-stars that they brought in from all over the world. I mean some of these guys were absolutely psychotic."[129] There

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[120] Klukach Interview, *supra* note 79 at 6.
[121] Browning Interview, *supra* note 101 at 12; *Irving v. Penguin Books Limited, Deborah E Lipstat* [2000] EWHC QB 11 [*Irving v Penguin*]. Irving's lawsuit arose from Lipstadt's description of Irving in *Denying the Holocaust*, *supra* note 105. This case was chronicled by Lipstadt in *History on Trial: My Day in Court with a Holocaust Denier* (New York: Penguin, 2006), subsequently made into a 2016 film called *Denial* starring Rachel Weisz and others (see https://en.wikipedia.org/wiki/Denial_(2016_film)**).**
[122] Sarah Lyall, "Critic of a Holocaust Denier Is Cleared in British Libel Suit," *New York Times* (12 April 2000) A1; Deborah E Lipstadt, *Denial: Holocaust History on Trial* (New York: Penguin, 2016).
[123] See Interview of Peter Griffiths (6 May 2022) [on file with author] [Griffiths Interview] at 8; Claude Adams, "Through the Fingers," *Canadian Lawyer* (April 1985) at 18.
[124] See "Zundel angry because press shuns his trial," *Vancouver Sun* (30 April 1988) B1 ["Zundel angry"].
[125] Pearson Interview, *supra* note 83 at 8.
[126] "Zundel angry," *supra* note 124.
[127] See Paul Bilodeau, "The Zundel trial: dark memories, snickers in court," *Toronto Star* (12 May 1988) A22 ["Dark memories"]; Stephen Bindman, "Jury still out in Zundel case," *Ottawa Citizen* (11 May 1988) A5; Paul Bilodeau, "Surprises mark 1st week of Zundel trial," *Toronto Star* (8 February 1988) A11.
[128] "Dark memories," *supra* note 127.
[129] Browning Interview, *supra* note 101 at 8.

was obvious animosity between the two groups. Zundel's followers taunted the Jewish observers with comments like "the best Jew is a dead Jew" and "you Jews will burn again."[130] ("It isn't hard making fun of the Holocaust if you believe it didn't happen," explained a Zundel supporter.[131]) One Jewish man was spat upon by a Zundel acolyte.[132] Despite the abuse, many Holocaust survivors attended the trial to bear witness.[133] Miklas Winkler, a survivor of Auschwitz, explained that he came to the trial because "I want to see how people can think like this."[134]

Listening to the evidence was painful for the survivors and other Jewish observers. Fanny Pillersdorf, another Auschwitz survivor, explained: "Since I'm in court, everything came back to me. I don't sleep nights, I'm nervous. … [B]ut I cannot stay home."[135] Paul Lungen, a reporter who covered the trial for the *Canadian Jewish News*, commented that the "sheer numbing weight of the repeated denials of the Holocaust, the anti-Jewish accusations, as ridiculous and unbelievable as they are, took their toll on court observers, myself included. As a Jew, one felt under constant assault, mired in the Nazis' hateful slime, the subject of so much animosity and lies."[136] Doris Epstein, a psychotherapist who specialized in working with Holocaust survivors and their children, explained that the Zundel trial had opened "the floodgates of memories" causing her clients to become depressed, anxious, and feel physically ill.[137] However, the emotional toll exacted by the second trial was reduced by the fact that Holocaust survivors did not testify and face cross-examination by Christie.[138]

The second trial attracted less media attention than the first. Media organizations consciously played down the second trial, with most newspapers, news agencies, and television

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[130] Paul Lungen, "Reporter tells of twilight world of Zundel trial," *Canadian Jewish News* (26 May 1988) 3 ["Twilight world"].
[131] "Dark memories," *supra* note 127.
[132] *Ibid*.
[133] See eg "**S**pectators at Zundel trial come from same time, different worlds," *Montreal Gazette* (16 Mar 1988) B5; "Dark memories," *supra* note 127.
[134] "Twilight world," *supra* note 130.
[135] *Ibid*. See also Paul Lungen, "Survivors turn pain into anger," *Canadian Jewish News* (2 June 1988) 32 ["Survivors turn pain into anger"].
[136] "Twilight world," *supra* note 130.
[137] "Survivors turn pain into anger," *supra* note 135.
[138] "Survivors turn pain into anger," *supra* note 135.

broadcasts ignoring it.[139] In fact, various media outlets conceded that they tamped down coverage purposely to avoid being used by Zundel to advance his cause.[140] The dearth of media attention upset Zundel, who complained that the media had "acted with the utmost of cowardice and lack of morality." [141] In contrast, the Jewish community was pleased. Indeed, eager to avoid the widespread media attention of the first trial, the CJC had met with various media representatives in advance of the second trial, asking them to minimize coverage of the proceedings.[142] Congress then took credit for the minimal coverage, concluding that the media had taken its concerns seriously.[143]

As Zundel predicted, the second trial lasted far longer than the first, taking nearly four months to complete. But the result was the same: Zundel was once again found guilty.[144] The verdict was a huge relief for some. After the verdict was rendered, two elderly Holocaust survivors in the courtroom broke into tears.[145] Another survivor yelled at Zundel: "I am one of the survivors of the Holocaust that you said never happened. I hope you never walk the earth."[146] (Zundel told the man "not to get so excited."[147]) Jewish organizations praised the outcome. The CJC issued a statement calling the guilty verdict an important victory for all minorities.[148] Similarly, the CHRA lauded the jury for recognizing Zundel's "obnoxious views."[149] Justice Thomas sentenced Zundel to fifteen months' imprisonment followed by three years' probation.[150] In his reasons for sentence,

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[139] "Spectators at Zundel trial come from same time, different worlds," *Montreal Gazette* (16 March 1988) B5.
[140] See Paul Lungen, "Media rethink coverage of Zundel," *Canadian Jewish News* (8 October 1987) 20.
[141] "Zundel angry," *supra* note 124.
[142] See generally Memo from Manuel Prutschi to Rose Wolfe and Charles Zaionz (4 December 1987), CJA (Fonds DA9, Box 51, File 1); Wilder Memo, *supra* note 77.
[143] See JCRC Ontario Region Report September 1987-April 1988, CJA, DA21, Box 19, File 21 at 6.
[144] See Donn Downey, "Jury at 2nd trial convicts Zundel on account of spreading false news," *Globe and Mail* (12 May 1988) A1.
[145] Stephen Bindman, "Convicted Zundel vows to fight on," *Ottawa Citizen* (12 May 1988) A1 ["Zundel vows to fight on"]. See also Paul Lungen, "Court condemns Zundel yet again," *Canadian Jewish News* (19 May 1988) 1 ["Court condemns Zundel"].
[146] "Zundel vows to fight on," *supra* note 145.
[147] *Ibid*.
[148] Canadian Jewish Congress, President's Newsletter, Vol 2, No 4 (Summer 1988), Winnipeg, Jewish Heritage Centre of Western Canada (JHC451, File 13) at 4.
[149] "Zundel vows to fight on," *supra* note 145.
[150] See "Court condemns Zundel," *supra* note 145.

Justice Thomas said: "It was not the Holocaust that was a fraud; Ernst Zundel is a fraud."[151]

III. "He has the right to be stupid": Keegstra in the Court of Appeal of Alberta, 1987-88

Jim Keegstra was convicted of wilful promotion of hatred on 20 June 1985.[152] Shortly thereafter, Christie filed an appeal in the Court of Appeal of Alberta.[153] The Crown cross-appealed the sentence, arguing that Keegstra's punishment—a $5,000 fine—was too lenient.[154]

Keegstra kept busy while his appeal was being prepared. In late August 1985, he traveled to West Germany for a tour of Dachau.[155] Keegstra was unimpressed, remarking that his visit to Dachau "confirmed what I already said, that it's not a mass extermination centre."[156] "The whole thing was built on deception," he added.[157] Upon his return to Canada, Keegstra ran for leadership of the federal Social Credit Party.[158] Keegstra lost the leadership vote at the Party's convention in Toronto, coming in second to Harvey Lainson.[159] Hearing that Keegstra would be in Toronto, Meir Halevi Weinstein, head of the Jewish Defence League, attended the convention and confronted Keegstra. According to Weinstein, it was a dramatic scene:

> It was on a Friday before *Shabbat*. … I went to the Social Credit Party Leadership Convention at this hotel. … I wanted to make it back … with enough time to be able to get ready for *Shabbat*. So I'm watching my watch and I'm going, you know, when am I going to finally stand up and say something here at this? I got to leave soon. So I realize, okay, now – now is the right time. I stand up and I actually go to the podium. I grab the mic. Jim Keegstra is up there, too. I said, "I've been tracking you. I came out to Edmonton to confront you. And now you're here in Ontario, in Toronto, where I live. And I'm not turning a blind eye to you. You're a rabid anti-Semite. And you think you're going to run for a federal party and try to have influence here in Canada? Not as far as I'm concerned." Then I put down the mic. And you had half the room is screaming anti-Semitic stuff. The other half are these Christians – "God bless Israel" and all that [laughs]. I go to Keegstra and I grab him by his suit around his neck. And I'm shaking him and I said, "And I'm never going

[151] *Ibid*.
[152] See *R v Keegstra* (ABQB 1985), Speaking to sentence (20 July 1985), Vol 29 at 5399.
[153] "Keegstra appeal cites free speech," *Calgary Herald* (15 August 1985) A3.
[154] See "Keegstra ruling reserved," *Red Deer Advocate* (11 April 1987) 2B ["Keegstra ruling reserved"].
[155] See "Controversy dogs Keegstra to Bonn," *Calgary Herald* (30 August 1985) A3. Doug Christie and Keegstra's wife Lorraine accompanied him on the trip. See "Keegstra unconvinced," *Calgary Herald* (9 September 1985) B3 ["Keegstra unconvinced"].
[156] "Keegstra unconvinced," *supra* note 155.
[157] *Ibid*.
[158] Stanley Oziewicz, "Evangelist wins Socred leadership, attacked as a racist by Keegstra," *Globe and Mail* (23 June 1986) A1.
[159] *Ibid*.

> to let you get away with it." And then I throw him back into his chair and then I leave. And there's pandemonium in this meeting and I make it back in time for *Shabbat*.[160]

Oral argument in Keegstra's appeal was held over five days in the Court of Appeal of Alberta in April 1987.[161] Jewish organizations decided not to seek leave to intervene, out of concern that doing so would create the appearance that the Jewish community, rather than the Crown, was prosecuting Keegstra.[162] Representatives of the CJC and B'nai Brith did, however, attend the appeal hearing.[163] So did representatives of the Jewish Defence League, who picketed outside the courthouse and confronted Keegstra's supporters.[164] In addition, Jewish groups were in ongoing communication with the Crown leading up to the appeal.[165]

The Court of Appeal did not render judgment in the case until well over one year later, on 6 June 1988.[166] The Court sided with Keegstra, overturned the conviction, and entered an acquittal.[167] It ruled that the offence of wilful promotion of hatred contravened the right to freedom of expression in Section 2(b) of the *Charter* and that such infringement could not be justified as a reasonable limit in a free and democratic society under *Charter* Section 1.[168] The Court of Appeal reached this conclusion primarily because the law does not require proof that the accused actually promoted hatred – in other words, that the accused had *succeeded* in promoting hatred of a targeted group, rather than merely having the *intention* to do so.[169] This created the possibility that the law could expose a "harmless crank" to prosecution.[170] The law, in the Court's view, might also chill public debate, where emotions often run high on contentious issues "and people are often guilty of embarrassing overstatement and terrible *ad hominem* argument."[171]

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[160] Interview of Meir Halevi Weinstein (2 May 2022) [on file with author] at 15.
[161] "Keegstra ruling reserved," *supra* note 154.
[162] "Jews Won't Seek Status in Keegstra Appeal Case," *Jewish Star* (Calgary Edition) 1.
[163] Paul Lungen, "Hating evil is valid Keegstra court told," *Canadian Jewish News* (16 April 1987) 1.
[164] Paul Lungen, "Protesters keep vigil during Keegstra appeal," *Canadian Jewish News* (30 April 1987) 4.
[165] Minutes of a meeting of the National Joint Community Relations Committee (19 January 1987), CJA (Fonds DA21, Box 19, File 20) at 5.
[166] See *R v Keegstra*, 1988 ABCA 234 [Keegstra ABCA].
[167] See Keegstra ABCA, *supra* note 166 at paras 99-101.
[168] See *ibid* at paras 26-92.
[169] See *ibid* at paras 84-85.
[170] *Ibid* at para 95.
[171] *Ibid* at para 96.

The Court of Appeal also found that the offence of wilful promotion of hatred violated Section 11(d) of the *Charter*, which enshrines the presumption of innocence, in a manner that could not be justified under Section 1 (even though the s 11(d) question was not argued at the trial level).[172] The violation of Section 11(d) stemmed from the fact that under the legislation the defence bears the burden of proving the truth of the statement(s) in question, rather than the Crown having to disprove this defence beyond a reasonable doubt.[173]

Fascinatingly, unbeknownst to the public, a primary reason for the long delay is that an intense debate was raging behind the scenes among the judges of the Court of Appeal over the whether the offence of wilful promotion of hatred was constitutional. The initial draft judgment circulated by the three-judge panel, authored by Justice Roger Kerans, found that the offence violated Section 2(b) but that it was a reasonable limit on freedom of expression pursuant to Section 1.[174] In other words, the initial draft would have upheld the hate-speech law. However, following circulation of Kerans' initial draft reasons, members of the Court who were not on the panel weighed in, criticizing the draft judgment and arguing that the offence of wilful promotion of hatred should be struck down. Justices Jean Côté and David Prowse—neither of whom were on the appeal panel—led the charge to have Kerans's decision reversed.[175] Justice Kerans initially

[172] See *ibid* at paras 7-25; *R v Keegstra*, 1984 CarswellAlta 428, 19 CCC (3d) 254 (ABQB) at para 122 (during argument on the pre-trial motion, Christie attempted to raise the 11(d) issue, but the Court refused to consider it because the defence had failed to give proper notice to the Crown that it would be presenting this argument (*ibid*)).

[173] See *ibid*; *Criminal Code*, *supra* note s 319(3)(a) (then s 281.2(3)(a)). As noted in chapter 4, as with all defences for which the accused bears the burden of proof (called a "reverse onus"), the evidentiary burden is the balance of probabilities, not the more exacting standard of proof beyond a reasonable doubt. See *ibid* at 790-91. As for the other defences in s 319(2) (then s 281.2(3)) (which are not subject to a reverse onus), as per the general rule applicable to all defences, they need only be disproven by the Crown if the defence raises an "air of reality," meaning there is sufficient evidence that a reasonably instructed trier of fact might acquit based on the evidence tendered in support of that defence. See *R v Osolin*, [1993] 4 SCR 595 at 682-83.

[174] See *R v Keegstra*, Appeal Nos 17699 and 17701, Draft No 4 (19 January 1988), Edmonton, Provincial Archives of Alberta [henceforth, "PAA"] (PR1994.0193/70, Box 1) at p 41 [Keegstra Draft #1]. Although the initial draft found a violation of *Charter* s 11(d), it would have read in language to then s 281.2(3)(a) (now s 319(3)(a)) to delete the reverse onus with respect to the defence of truth. Accordingly, it would not have struck down the entire offence of wilful promotion of hatred. See *ibid* at p 49.

[175] See Memorandum from Côté JA to Kerans JA copying other members of the Court re Keegstra (29 January 1987), PAA (PR1994.0193/70, Box 1); Memorandum from Prowse JA to all members of the Court of Appeal (8 February 1988), Edmonton, Provincial Archives of Alberta (PR1994.0193/70, Box 1).

stood his ground[176] but eventually yielded and rewrote the draft, such that the offence of wilful promotion of hatred was now struck down as an unjustifiable infringement on freedom of expression.[177] In an internal memo, Justice Kerans apologetically admitted: "I think we should have a hate law, and… I fear that Parliament will never act again. Perhaps I let that cloud my analysis."[178] Justice Côté congratulated Justice Kerans on the amended decision, calling this a result he was more comfortable with.[179] Several other members of the Court echoed Côté's view.[180]

Jewish organizations were disappointed with the result – unaware, of course, of the circumstances under which the initial draft had been reversed. The Jewish community was particularly upset with Court's decision to strike down the hate-speech law. As Len Dolgoy, spokesman for the Jewish Federation of Edmonton, explained: "some people in the community were just shocked [by the decision] because the law itself was overturned. We expected after the long delay that a new trial would be ordered, but we didn't expect the statute would be thrown out."[181] In a letter to Alberta Attorney General Ken Horsman, the CJC voiced its dismay that the hate-speech law had been in effect for eighteen years but had rarely been used and had now been declared unconstitutional.[182] On 13 June 1988 representatives of the Jewish Federation of Edmonton, the CJC, and B'nai Brith met with Horsman, urging the province to pursue an appeal to the Supreme Court.[183] The National Holocaust Remembrance Committee (a committee of the CJC) also lobbied the Alberta government to launch an appeal to the Supreme Court.[184] Other

[176] See Memorandum from Kerans JA to Côté JA copying all members of the Court of Appeal (10 February 1988), PAA (PR1994.0193/70, Box 1).
[177] See Memorandum from Kerans JA to Côté JA (31 March 1988), PAA (PR1994.0193/70, Box 1).
[178] *Ibid*.
[179] Memorandum from Côté JA to Kerans JA (6 April 1988), PAA (PR1994.0193/70, Box 1).
[180] Memorandum from Kerans JA to Stevenson JA and Irving JA (3 May 1988), LASA (Fonds 79-00-04, Vol 21, File 99-2).
[181] Paul Lungen, "Alberta's overturning hate law prompts call for appeal," *Canadian Jewish News* (16 June 1988) 1.
[182] Letter from Dorothy Reitman and Joseph J Wilder to Ken Horsman (10 June 1988), CJA (Fonds CJC DA21, Box 13, File 2).
[183] Edmonton JCRC Report (September 1987-April 1988), CJA (Fonds DA21, Box 19, File 21) [Edmonton JCRC Report].
[184] See Telegram from Gerda Frieberg to Jim Horsman (7 June 1988), CJA (Fonds CJC DA17.1, Box 1, File 4A).

minority groups, including the Chinese Canadian National Council, the United Church of Canada, and the Garneau United Church of Edmonton likewise urged the Crown to appeal.[185]

Not all members of the Jewish community wanted to pursue the case further. Alberta's leading Jewish newspaper, the *Jewish Star*, echoing its prior views on the Keegstra matter, declared that attempting to stamp out antisemitism through the courts was a "fruitless endeavour" that reflected "the anger and insecurity" of the Jewish community.[186] It called for hate speech to be decriminalized and for emphasis to instead be placed on other measures such as civil remedies for group defamation.[187] Ron Ghitter, chairman of Alberta's Committee on Tolerance and Understanding, expressed a similar view. In a speech delivered the day after the Keegstra decision was released, Ghitter welcomed the Court of Appeal's ruling, adding that Keegstra had the "right to be stupid."[188] People like Keegstra genuinely believe their ignorant views, Ghitter explained, and therefore do not have a criminal mind.[189] He called on Alberta to invest resources into areas other than the criminal justice system to encourage racial tolerance.[190]

Compounding any trauma wrought by the Court of Appeal's judgment, on 5 June 1988, one day before the decision was released, Calgary police arrested two Ku Klux Klan members in connection with a plot to murder a prominent member of Calgary's Jewish community and to blow up the Calgary Jewish Centre.[191] Furthermore, around the same time a number of Holocaust-denying leaflets were found distributed throughout the City of Calgary.[192] These events, combined with the Keegstra decision, put Alberta's Jewish community on edge. The *Jewish Star* reported

[185] Edmonton JCRC Report, *supra* note 183.
[186] "Listen to the High Court" (editorial), *Jewish Star* (Calgary edition) (10 June 1988) 4.
[187] *Ibid*.
[188] "Ghitter says Keegstra has 'right to be stupid'," *Calgary Herald* (8 June 1988) A3.
[189] *Ibid.*
[190] *Ibid.*
[191] See "2 held in anti-Jewish bomb plot," *Calgary Herald* (5 June 1988) A1; Calgary Jewish Community Council's Community Relations Committee Report (May 15 – October 15 1988), CJA (Fonds DA21, Box 19, File 21) at 3-4. The two men subsequently pleaded guilty and received five years in prison (see Douglas Wertheimer, "Sensationalized Bombing Case Ends," *Jewish Star* (Calgary edition) 1.
[192] See "City is Hit by a Spate of Anti-Semitic Incidents," *Jewish Star* (Calgary edition) 3.

that at a community meeting held at the Calgary Jewish Centre on 16 June 1988, "a general feeling of unease and uncertainty about the position of Jews in Calgary permeated the evening."[193]

IV. "We all breathed a sigh of relief": Keegstra in the Supreme Court, 1988-90

On 4 August 1988 the Alberta government announced it would seek leave to appeal to the Supreme Court.[194] According to the *Calgary Herald*, the province did not initially intend on appealing the decision but changed its mind in response to the Court of Appeal for Ontario's judgment in *R v Andrews*.[195] *Andrews* was the appeal of the conviction of Donald Clarke Andrews and Robert Wayne Smith, leaders of the white supremacist Nationalist Party, who were convicted in Ontario of wilfully promoting hatred in 1985.[196] In *Andrews* the Court of Appeal for Ontario had upheld the hate-speech law as constitutional.[197] Accordingly, there was now a difference of opinion between Ontario and Alberta on the law's constitutionality. Alberta recognized that it was important for the Supreme Court to resolve the disagreement.[198]

The Supreme Court granted leave to appeal in June 1989.[199] The Court granted leave solely on the issue of whether the hate-speech law was constitutional under Sections 2(b) and 11(d) of the *Charter*.[200] The Keegstra case was scheduled to be heard in December 1989 in conjunction with the appeals in *Andrews* and *Canada (Human Rights Commission) v Taylor*.[201] The latter case concerned a finding of guilt rendered against John Ross Taylor, leader of the neo-Nazi Western Guard Party, under Section 13(1) of the *Canadian Human Rights Act*.[202]

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[193] "Security, Keegstra are Topics at Local Forum," *Jewish Star* (Calgary edition) 1.
[194] Kathy Kerr, "Alberta appeals ruling on hate," *Calgary Herald* (5 August 1988) A1.
[195] 65 CR (3d) 320, 1988 CarswellOnt 80 [*Andrews*]. See 'Time to make amends," *Calgary Herald* (4 August 1988) A4.
[196] See *Andrews*, *supra* note 195 at paras 2-4, 13 (per Cory JA).
[197] The majority opinion of Grange JA (Krever JA concurring) held that the offence of wilful promotion of hatred did not violate *Charter* Section 2(b) (see at para 96). The concurring opinion of Cory JA held that the provision violated Section 2(b), but was a justifiable infringement on freedom of expression pursuant to Section 1 (see at para 91).
[198] See Kerr, *supra* note 194.
[199] "Supreme Court to hear Keegstra hate-law appeal," *Toronto Star* (8 June 1989) A1.
[200] See *R v Keegstra et al*, [1990] 3 SCR 697, 1990 CarswellAlta 192 at para 1 [*Keegstra* SCC].
[201] [1990] 3 SCR 892, 1990 CarswellNat 1030 at para 3 [*Taylor*].
[202] Section 13(1) of the CHRA declared that it was a discriminatory practice for a person or a group of persons acting in concert to communicate telephonically or to cause to be so communicated, repeatedly, in whole or in part by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament, any matter that is

Several groups were granted leave to intervene in the Keegstra appeal and the companion appeals. The CJC and B'nai Brith both obtained leave to argue that the offence of wilful promotion of hatred was constitutional.[203] In deciding to seek leave to intervene, Prutschi explained that Congress had a duty to advocate on behalf of a provision the Jewish community had worked so hard to create. As he put it, the "Canadian Jewish Congress played a very significant role in the formulation and enactment of [the hate-speech provisions] and it would be difficult to excuse a Congress absence in a situation where the very life of the legislation was in question."[204] Congress and B'nai Brith coordinated submissions to avoid duplication.[205] In addition, the Women's Legal Education and Action Fund (LEAF) and an organization called Interamicus obtained leave to intervene on the Crown's side.[206] Interamicus was an international rights advocacy centre run out of McGill University, chaired by former CJC president—and future Attorney General of Canada—Irwin Cotler, who was then a law professor at McGill's Faculty of Law.[207] LEAF was established in 1985 primarily for the purpose of advocating for gender equality.[208] LEAF intervened in the

likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination." Section 13(1) will be discussed in further detail below in regard to a prosecution against Zundel initiated in 1996 under that provision. Section 13 was repealed by the federal Conservative government in 2014 (see Jonathan Kay, "Good riddance to section 13 of the Canadian Human Rights Act," *National Post* (7 June 2012), online: webarchive.loc.gov/all/20130105111536/http://fullcomment.nationalpost.com/2012/06/07/jonathan-kay-good-riddance-to-section-13-of-the-canadian-human-rights-act/.) As discussed in chapter 3, Taylor was found liable under Section 13 of the CHRA in July 1979 in connection with a series of racist telephone messages. Taylor and the Western Guard were ordered to cease using the telephone to communicate the subject matter which formed the contents of the tape-recorded messages. Taylor promptly violated the Tribunal's order by recording another phone message in August 1979 similar in content to his previous recordings; he was found guilty of contempt of court and received a suspended sentence of one year. In addition, the Western Guard received a $5,000 suspended fine. Taylor violated the order again, whereupon he was ordered to serve his prison term and the Western Guard ordered to pay its fine. After serving his sentence, Taylor re-commenced his telephone messages and was once again found in contempt of court; this time, however, he challenged s 13 of the *Canadian Human Rights Act* as a violation of his right to freedom of expression under Section 2(b) of the newly-enacted *Canadian Charter of Rights and Freedoms*.

[203] See eg Factum of the Intervenant Canadian Jewish Congress (filed 29 November 1989), *R v Keegstra; R v Andrews and Smith,* Court File Nos 2118 and 21034.

[204] Minutes of a meeting of the National Joint Community Relations Committee (30 October 1988), CJA (Fonds DA21, Box 19, File 21) at 15-16.

[205] See Interview of Mark Sandler (16 February 2022) [on file with author] at 17. See also Interview of David Matas (21 July 2021) at 10.

[206] See generally, Factum of the Women's Legal Education and Action Fund (filed 1 December 1989) [LEAF SCC factum].

[207] See generally Factum of the Intervener, Interamicus (filed 28 November 1989), *R v Keegstra*, Court File No 21118.

[208] See Women's Legal Education & Action Fund, "Our Story," online: leaf.ca/our-story/.

Keegstra case to argue that the equality guarantee in Section 15 of the *Charter* should be given a broad interpretation and should inform the Court's decision with respect to Section 2(b); stated otherwise, the Court should keep in mind the equality rights of minority groups when elucidating the scope of freedom of expression.[209] Leslie Hardy, a staff lawyer for LEAF, explained that "LEAF got involved because the cases [we]re really equality rights cases. The section of the Criminal Code that addresses hate literature is there to protect vulnerable groups and to further equality rights."[210]

The CCLA was granted leave to intervene on the defence side, arguing that the hate-speech law was unconstitutional and should be struck down.[211] The CCLA was represented by Marc Rosenberg, a well-regarded Jewish criminal defence lawyer (who would go on to become a well-regarded justice of the Court of Appeal for Ontario), then law partners with Eddie Greenspan.[212] Borovoy was heavily involved behind the scenes, but as per his general practice was not counsel of record.[213] Oddly, even though the CCLA was the only intervener backing Zundel's position, Christie opposed the CCLA's application to intervene. Christie was still upset by Borovoy's letter of two years prior in which Borovoy had criticized Christie. In his submissions to the Supreme Court contesting the CCLA's application, Christie attached Borovoy's letter, calling the CCLA a meddlesome special interest group equivalent to other Jewish organizations like the CJC and B'nai Brith.[214] He thus rejected "any suggestion of assistance from the Canadian Civil Liberties Association who have no more right than any other group of people to intervene in a private criminal dispute between the Crown and the accused."[215] In addition to facing criticism from

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[209] See generally, LEAF SCC factum, *supra* note 206. Note that in addition the Attorneys General of Quebec, Ontario, Manitoba, and New Brunswick intervened to argue that the hate-propaganda law should be upheld.
[210] Beth Ryan, "Free speech case attracts a crowd," *Now* (16-22 November 1989) 13.
[211] See generally, Factum of the Intervener, Canadian Civil Liberties Association (filed 17 November 1989), *R v Keegstra; R v Andrews and Smith*, Court File Nos 21118 and 21034.
[212] See Factum of the Intervener Canadian Civil Liberties Association, *R v Keegstra; R v Andrews and Smith*, Case File Nos 2118 and 21034; "Marc Rosenberg remembered for his big smile, brilliant mind, and love of teaching," *Canadian Lawyer* (28 August 2015), online: canadianlawyermag.com/news/general/marc-rosenberg-remembered-for-his-big-smile-brilliant-mind-and-love-of-teaching/273363. See also Letter from David Schneiderman to Marc Rosenberg (29 June 1988), LAC (R9833-4450-6-E, Vol 225, File Taylor Correspondence 1986-1993).
[213] See Interview of Harry Arthurs (18 March 2020) [on file with author] at 20.
[214] See Submission of Doug Christie (filed 28 August 1989), *R v Keegstra*, Court File No 21118.
[215] *Ibid*.

Christie, the CCLA faced backlash from the Jewish community. Smolack accused the CCLA of "outrageous interference" and of promoting racial hatred.[216] Prutschi also piled on, saying the CCLA endorsed the "wanton slandering" of Jews.[217]

Oral argument in the Supreme Court of Canada took place on 5-6 December 1989 before a packed courtroom.[218] The Court rendered judgment about one year later, on 13 December 1990.[219] The Court sided with the Crown, overturned the Court of Appeal, and upheld the offence of wilful promotion of hatred.[220] The vote was 4-3, reflecting sharp division on the issues.

All members of the Supreme Court agreed that hate speech constitutes expression within the ambit of Section 2(b) of the *Charter*.[221] In so doing, the Court set down a broad approach to freedom of expression, ruling that all communications that convey meaning or attempt to convey meaning, irrespective of the meaning sought to be conveyed, are protected by Section 2(b).[222] Accordingly, the entire Court agreed that the offence of wilful promotion of hatred infringed the right to freedom of expression.[223]

The disagreement between the majority and dissent centred on whether the provision was a reasonable limit under Section 1. The majority opinion, authored by Chief Justice Brian Dickson,[224] remains a standard-bearer for the scope and limits of freedom of speech in Canada.[225] Chief Justice Dickson's opinion explicitly separated Canada from the more protective American approach to freedom of expression – a distinction that has remained manifest in Canadian law.[226] Chief Justice Dickson had lost a leg fighting in the Second World War and was sensitive to the

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[216] See Harold Levy, "Should hate merchants be silenced?" *Toronto Star* (28 February 1989) A21; "Defense of Hatemonger Draws Attack on CCLA," *Jewish Star* (31 March 1989) 1.
[217] See *ibid*.
[218] Oral argument in *Andrews* took place on 4-5 December 1989 (see *R v Andrews*, [1990] 3 SCR 870); oral argument in *Taylor* took place on 3-4 December 1989 (see *Taylor*, *supra* note 201); 'Hate lies" could return, *Calgary Herald* (6 December 1989) A2.
[219] See *Keegstra* SCC, *supra* note 200.
[220] See *ibid* at paras 157-63 (per Dickson CJ).
[221] See *Keegstra*, *supra* note 200 at paras 37 (per Dickson CJ) and 285-86 (per McLachlin J, dissenting).
[222] See *ibid* at paras 31-37, 40-41, 87.
[223] See *ibid* at paras 37.
[224] Justices Wilson, L'Heureux-Dubé and Gonthier concurring.
[225] See eg Robert J Sharpe & Kent Roach, *The Charter of Rights and Freedoms* (Toronto: Irwin Law, 2005) at 153.
[226] See *Keegstra*, *supra* note 200 at 61. See also eg *Saskatchewan (Human Rights Commission) v Whatcott*, [2013] 1 SCR 467.

plight of disadvantaged and vulnerable persons.[227] In deeming the law a reasonable limit on freedom of expression, he emphasized the harms of hate speech for affected groups:

> Disquiet caused by the existence of such material is not simply the product of its offensiveness … but stems from the very real harm that it causes. … In my opinion, a response of humiliation and degradation from an individual targeted by hate propaganda is to be expected. … The derision, hostility and abuse encouraged by hate propaganda therefore have a severely negative impact on the individual's sense of self-worth and acceptance. … Such consequences bear heavily in a nation that prides itself on tolerance and the fostering of human dignity through, among other things, respect for the many racial, religious and cultural groups in our society.[228]

With respect to Keegstra's speech in particular, Chief Justice Dickson called it "deeply offensive, hurtful and damaging to target group members, misleading to his listeners, and antithetical to the furtherance of tolerance and understanding in society."[229] Chief Justice Dickson cited extensively from the Report of the Special Committee on Hate Propaganda in Canada (the "Cohen Committee"), highlighting the Cohen Committee's findings that hate speech poses a threat to the self-dignity of target groups and exposes such groups to the risk of violence.[230] Consequently, he deemed Parliament's objective in enacting the hate-speech laws to be of utmost importance.[231] Dickson CJ further held that the hate-speech law had been drafted in a manner that minimally impaired the right to freedom of speech.[232] He emphasized that the law does not target private communications and that the accused is afforded several very broad defences.[233] Furthermore, Chief Justice Dickson noted that the promotion of hatred must be "wilful."[234] In so doing, he adopted the narrow interpretation of "wilfully" set out by the Court of Appeal for Ontario in the 1979 case of *R v Buzzanga and Durocher*; as previously discussed, *Buzzanga and Durocher* held that the mental element of wilful promotion of hatred was satisfied only where an accused subjectively desires the promotion of hatred or foresees such a consequence as certain or

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[227] See Robert J Sharpe, *Brian Dickson: a judge's journey* (Toronto: Osgoode Society for Canadian Legal History, 2003) 61.
[228] *Keegstra*, *supra* note 200 at paras 64-65.
[229] *Ibid* at para 90.
[230] *Keegstra*, *supra* note 200 at paras 24-25, 63-68, 119.
[231] *Ibid* at para 85.
[232] See generally *ibid* at paras 109-138.
[233] *Ibid* at paras 112, 125.
[234] *Ibid* at para 114.

substantially certain to result from an act done in order to achieve some other purpose.[235] Chief Justice Dickson commented that this strict interpretation of the mental component of the offence "imports a difficult burden for the Crown to meet and, in so doing, serves to minimize the impairment of freedom of expression."[236] Additionally, the majority defined "hatred" narrowly, as "restricted to the most severe and deeply felt form of opprobrium."[237] In sum, the Court found Parliament's careful means of criminalizing wilful promotion of hatred proportionate to Parliament's "immensely important" objective of protecting target group members and fostering harmonious social relations in a community dedicated to equality and multiculturalism.[238]

The dissenting judgment, authored by future Chief Justice Beverley McLachlin,[239] was skeptical that hate-propaganda laws contribute to the cause of multiculturalism and equality.[240] Justice McLachlin emphasized that she was sensitive to "the wrenching impact" hate speech can have on members of target groups, particularly for "Jews, many of whom have personally been touched by the terrible consequences of the degeneration of a seemingly civilized society into unparalleled barbarism". [241] Nevertheless, she viewed the criminal law as an inappropriate mechanism for combating harmful speech. Citing to Borovoy's 1988 book *When Freedoms Collide: The Case for Our Civil Liberties*, Justice McLachlin noted that Weimar Germany had anti-hate laws which did not prevent the rise of Hitler and the Holocaust.[242] Accordingly, there was no rational connection between the hate-speech provision and the goals it promoted.[243]

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[235] *Ibid* at paras 114-117, citing *R v Buzzanga and Durocher*, [1979] OJ No 4345 at pp 384-85.
[236] *Ibid* at para 117.
[237] *Ibid* at para 137. See also *ibid* at paras 121-123.
[238] See *ibid* at paras 102, 142. With respect to the s 11(d) issue, the majority found that the reverse-onus for the defence of truth under s 319(3)(a) of the *Criminal Code* violated s 11(d) of the *Charter* but was a reasonable limit under s 1. See *ibid* at paras 147, 156.
[239] Justice Sopinka concurred with Justice McLachlin. Justice La Forest wrote a short, separate, judgment. He agreed with Justice McLachlin on the Section 2(b) issue and declared that it was unnecessary to address the s 11(d) issue. See *ibid* at para 164. Beverley McLachlin was appointed Chief Justice in 2000. See See Supreme Court of Canada, "The Right Honourable Beverley McLachlin, PC, CC," online: scc-csc.ca/judges-juges/bio-eng.aspx?id=beverley-mclachlin. Accordingly, I will continue to refer to her as Justice McLachlin in this chapter.
[240] *Ibid* at para 322.
[241] *Ibid* at para 335.
[242] *Ibid* at para 322, quoting Alan Borovoy, *When Freedoms Collide: The Case for Our Civil Liberties* (Toronto: Lester & Orpen Dennys, 1988) at 50.
[243] *Ibid* at para 323.

Furthermore, in Justice McLachlin's opinion, the legislation did not minimally impair the right to freedom of expression. She argued that the law "strikes… at viewpoints in widely diverse domains, whether artistic, social or political [and] is capable of catching not only statement like those at issue in this case, but works of art and the intemperate statement made in the heat of social controversy."[244] Justice McLachlin was thus very concerned over the chilling effect the law might have on public debate. As she wrote: "Novelists may steer clear of controversial characterizations of ethnic characteristics, such as Shakespeare's portrayal of Shylock in the Merchant of Venice. Scientists may well think twice before researching and publishing results of research suggesting difference between ethnic or racial groups."[245] The dissenting judgment therefore deemed the hate-speech provision an "inappropriate means of protecting our society against the evil of hate propaganda" and would have struck it down as unreasonable limit on freedom of expression.[246]

Jewish groups applauded the Supreme Court's decision. CJC President Les Scheininger stated that the Court had "provided the necessary impetus to attorneys-general departments and human rights commissions to fulfill their important mandate of upholding the right of members of identifiable groups to lead their lives free from vilification, in equality and with dignity."[247] Ian Kagedan, Director of Public Relations for B'nai Brith, deemed the Court's decision "a victory for all Canadians."[248] Jewish organizations were particularly impressed with Chief Justice Dickson's reasoning and the manner in which he expressed sensitivity toward minority groups while recognizing the harms of hate speech and the need to protect vulnerable members of society from attack.[249] Sandler thought Dickson's opinion was "a very strongly worded endorsement of the hate propaganda laws," as "Justice Dickson recognized that a multicultural society requires protection

[244] *Ibid* at 347.
[245] *Ibid* at para 340.
[246] See *ibid* at para 357.
[247] "CJC Heartened By Supreme Court Ruling on Anti-Hate Laws" (press release) (13 December 1990), CJA (Fonds DA21, Box 13, File 10).
[248] Ian J Kagedan, "If Canada can fight acid rain and smoking, it can act against bigots, too," *Globe and Mail* (14 December 1990) A19.
[249] See eg Paul Lungen, "High Court backs anti-hate law," *Canadian Jewish News* (20 December 1990) 1 ["High Court backs law"].

– including criminal sanctions against those who promote hatred."[250] Cotler called the majority opinion "the most comprehensive decision ever rendered by any Supreme Court anywhere in the world on free speech and hate propaganda," predicting: "This judgment will resonate not only in Canada, but [also] internationally."[251] Bernie Farber recalled that "we all breathed a sigh of relief" when the judgment came out and that they were pleased with the strength and clarity of Chief Justice Dickson's reasons.[252] Sol Littman, Director of the Friends of Simon Wiesenthal Center for Holocaust Studies, concluded that Chief Justice Dickson's opinion was a direct challenge to the authorities: "The Supreme Court has spoken and the message is quite clear. If provincial attorneys-general don't take action, one wonders at their sympathies."[253]

Non-Jewish groups celebrated the Court's judgment, too. Fil Fraser, chairman of the Alberta Human Rights Commission, said the majority opinion struck a sensible balance between free speech and the rights of society.[254] Fraser added: "I'm pleased with the court having said the kinds of things Keegstra was saying were creating an environment harmful to certain groups."[255] Andrew Cardozo of the Canadian Ethnocultural Council called the decision a victory for all visible minorities.[256] And Valmond Romilly, chair of the Harambee Foundation, an organization representing Black Canadians, praised the SCC judgment as wonderful and long overdue; "I am ecstatic," Romilly said.[257]

But reactions to the judgment were mixed. Borovoy was predictably disappointed, calling the decision regrettable because the law would have a chilling effect on freedom of speech.[258]

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[250] "High court backs law," *supra* note 249.
[251] Graham Fraser and Miro Cernetig, "Supreme Court upholds curbs on free expression; Criminal Code hate laws declared unconstitutional," *Globe and Mail* (14 December 1990) A1.
[252] Interview of Bernie Farber (2 February 2021) [on file with author] at 8.
[253] Kevin Griffin, "B.C. urged to prosecute racists in wake of ruling," *Vancouver Sun* (14 December 1990) B6 ["B.C. urged to prosecute"]. The Simon Wiesenthal Center is a global Jewish human rights organization founded in 1977 in Los Angeles, California. Its Canadian branch is called the Friends of Simon Wiesenthal Center for Holocaust Studies. See Letter from John Rosen to Michael P Glynn (25 April 1997), CJA (DA21, Box 21, File 1). In the remainder of this chapter I will refer to the Friends of Simon Wiesenthal Centre as the "Simon Wiesenthal Center."
[254] "Jewish groups hope judgment muzzles racists," *Edmonton Journal* (14 December 1990) A3.
[255] *Ibid*.
[256] David Vienneau, "Jewish groups hail ruling on hate law," *Toronto Star* (14 December 1990) A11.
[257] "B.C. urged to prosecute," *supra* note 253.
[258] Joscelyn Proby, "'Welcome Soviet Republic of Canada'," *Red Deer Advocate* (14 December 1990) 2A.

Terry Long, leader of the white supremacist group the Aryan Nations, expressed an analogous, albeit less eloquent, opinion: "Congratulations [and] welcome to the Soviet Republic of Canada," he commented upon learning of the result.[259] (The *Red Deer Advocate* wryly observed that a "civil libertarian, three Supreme Court justices and a white supremacist see eye to eye on [the] Supreme Court decision."[260]) Doug Christie's view echoed Long's, predicting the Court's judgment would lead to a "reign of intellectual terror" over Canadians with controversial opinions.[261] Keegstra's perspective was equally dire: "This is the end of freedom in Canada," he said.[262] Keegstra promised he would not be intimidated and Christie predicted that the legal battle would continue.[263] In contrast, Eckville's then mayor, Bill Scott, told a reporter: "The subject has been beaten to death, and I hope it is over."[264] He was soon to be disappointed.

Christie was proved correct; the Supreme Court's decision did not end the matter. The Court remanded the case back to the Court of Appeal of Alberta to deal with the other arguments Christie had raised before the Court of Appeal in 1987.[265] The Court of Appeal did not address the other grounds because it decided the case solely based on the *Charter* issue.[266] Ironically, the initial draft circulated by Justice Kerans—which had proposed to uphold the hate-speech law—would have dealt directly with these remaining issues, finding that the trial judge erred in two respects. First, the Court of Appeal would have held that the trial judge erred by declining to permit the defence to challenge jurors for cause (recall that the Court of Appeal for Ontario found an analogous error in its review of Zundel's first conviction).[267] Second, the Court of Appeal would have held that the trial judge erred in his instructions on the mental element of the offence, by failing to inform the jury that to convict Keegstra it must find that Keegstra subjectively desired

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[259] *Ibid*.
[260] *Ibid*.
[261] "Judgment muzzles racists," *supra* note 254.
[262] Jack Danylchuk, "Eckville's relief remains guarded; Keegstra's beliefs unchanged," *Edmonton Journal* A3 ["Eckville remains guarded"].
[263] "Hate law debate; Jewish groups, civil libertarians disagree on consequences of court ruling," *Ottawa Citizen* (14 December 1990) A4; Eckville remains guarded, *supra* note 262.
[264] Eckville remains guarded, *supra* note 262.
[265] *Keegstra* SCC, *supra* note 200 at para 163.
[266] See Keegstra ABCA, *supra* note 166 at para 102.
[267] Keegstra Draft #1, *supra* note 174 at pp 3-9.

the promotion of hatred or foresaw such a consequence as certain or substantially certain to result from an act done in order to achieve some other purpose (in accordance with *Buzzanga and Durocher*).[268] In an internal memo following the Supreme Court's judgment, Justice Kerans sounded annoyed with the higher court, writing to his colleagues: "How the devil can the Supreme Court tell us to **re**-consider something?"[269] Kerans explained that he thought the Supreme Court would address these issues on its own rather than remanding the case back to the Court of Appeal.[270] The Court of Appeal now resurrected the relevant parts of its prior draft and released new reasons in March 1991, quashing Keegstra's conviction and ordering a new trial.[271]

Although it overturned Keegstra's conviction, the Court of Appeal evidently did not think highly of Keegstra nor did it think it wise to prosecute him again. As Justice Kerans explained in another memo: "We all abhor the prospect of a new trial because it again guarantees to Mr. Keegstra something that he cannot presently now get, that is an audience to listen to his opinions."[272] However, the Court decided that the decision should rest with the government.[273]

V. "The Holocaust is finished": Zundel's appeals, 1988-1992

Following Zundel's conviction for spreading false news at his second trial in 1988, Christie again filed an appeal in the Court of Appeal for Ontario.[274] Oral argument on the appeal was scheduled for the week of 18 September 1989.[275]

Prior to the hearing, Zundel received a boost from an unexpected quarter. In May 1988 the Law Reform Commission of Canada tabled a report in the House of Commons in which it urged

[268] Keegstra Draft #1, *supra* note 174 at pp 10-12.
[269] Memorandum from Kerans JA to Irving JA, Stevenson JA, and Laycroft CJA re Keegstra (18 December 1990) at 2 (emphasis in original), LASA (Fonds 79-00-04, Vol 23, File 111).
[270] *Ibid*.
[271] See *R v Keegstra*, 1991 ABCA 97; Memorandum from JP Ford to Douglas Christie and Bruce Fraser (6 February 1991), Calgary, LASA (Fonds 79-00-04, Vol 23, File 112).
[272] Memorandum from Kerans JA to all members of the Court of Appeal (15 February 1991), LASA (Fonds 79-00-04, vol 24, file 112).
[273] *Ibid*.
[274] See Paul Bilodeau, "'False news' law may violate rights lawyers contend," *Toronto Star* (13 May 1988) A23.
[275] See Minutes of a meeting of the National Joint Community Relations Committee (11 September 1989), CJA (DA21, Box 19, File 21) at 1.

the government to repeal the crime of spreading false news.[276] The Commission, chaired by notable Jewish lawyer (and later judge) Allen Linden, was created to undertake a systematic review of Canadian law, including the *Criminal Code*.[277] It deemed the false news law both anachronistic and overly broad.[278] The Law Reform Commission specifically found that the false news provision should not be used to prosecute hatemongers like Zundel.[279] The Commission opined that Holocaust denial should be dealt with under the hate propaganda sections, and—with a nod to Sabina Citron, although it did not mention her by name—the Commission stated that it should not be open to circumvent the requirement of the Attorney General's consent in the hate-propaganda legislation by launching a private prosecution for spreading false news.[280] Even though the report mentioned Zundel specifically, Linden claimed that the Commission's recommendation had nothing to do with Zundel: "We started working on this long before anyone ever heard of Zundel and we're not really thinking of Zundel as we do this," he explained.[281] Linden stated that he hoped the government would act on the Commission's recommendation soon.[282] As it turned out, the government failed to act prior to the Supreme Court's decision in Zundel's case.[283]

Zundel lost his appeal of his second conviction in the Court of Appeal for Ontario.[284] Among other things, the Court of Appeal ruled that the trial judge had properly taken judicial

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[276] See "Take Zundel's 'false news' crime off the books, law commission urges," *Montreal Gazette* (20 May 1989) B1 ["Take false news crime off the books"]. The Law Reform Commission first published its recommendation in 1986, although it was not tabled in the House of Commons until two years later. See Law Reform Commission of Canada, *Hate Propaganda* (Ottawa: Law Reform Commission of Canada, 1986) at 29-30 [*Hate Propaganda*].

[277] See Patricia G Bailey, "Law Reform Commission of Canada," *Canadian Encyclopedia*, online: thecanadianencyclopedia.ca/en/article/law-reform-commission-of-canada. The Commission was created in 1971, disbanded in 1993, reconstituted in 1997 and disbanded again in 2007 (*ibid*). The Canadian government recently announced that it plans to revive the Committee yet again (David Fraser, "Ottawa 'eager' to bring back federal body offering advice on reforming laws," *Global News*, online: globalnews.ca/news/9440854/law-commission-revival-canada/. Allen Linden was president of the Commission from 1983 to 1990 prior to his elevation to the Federal Court of Appeal (See "The Hon Allen M Linden," *University College*, online: uc.utoronto.ca/alumni-influence/hon-allen-m-linden).

[278] *Hate Propaganda*, *supra* note 277 at 29.

[279] *Ibid* at 30.

[280] *Ibid*.

[281] Take false news crime off the books," *supra* note 276. See also *Hate Propaganda*, *supra* note 277 at 29-30.

[282] Take false news crime off the books," *supra* note 276.

[283] *Ibid*.

[284] See *R v Zundel*, 53 CCC (3d) 161, 1990 CarswellOnt 1075 (CA) at para 160 [Zundel OCA #2].

notice of the Holocaust, a finding many in the Jewish community were pleased with.[285] Many were also pleased that the Court of Appeal went out of its way to criticize Christie.[286] The Court opined that although "Mr. Christie mounts a virulent attack on practically every aspect of the trial judge's conduct," Justice Thomas had, in fact, demonstrated "remarkable restraint" in dealing with the defence.[287] This restraint was particularly remarkable "because it was shown in the face of Mr. Christie's refusals to obey his rulings and Mr. Christie's attempts to interject irrelevant issues into the trial."[288] Furthermore, the Court of Appeal held that, "On the occasions when the trial judge reprimanded Mr. Christie, the record discloses that such reprimands were deserved."[289] The Court thus deemed Christie's "charges of personal bias against a judicial officer … irresponsible and reprehensible."[290] Christie did not take this criticism lightly, telling reporters: "I think it's a strange country that would permit people to terminate human life but not permit them to choose to read a book and decide on it."[291]

Zundel sought leave to appeal to the Supreme Court of Canada. On 15 November 1990, the Court granted leave.[292] As in Keegstra's case, the Supreme Court granted leave solely on the constitutional issue – that is, whether the offence of spreading false news infringed Section 2(b) of the *Charter* and, if so, whether this was a reasonable limit under Section 1.[293] Jewish organizations were disappointed.[294] They had hoped the Court of Appeal's judgment would be the

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[285] See Paul Lungen, "Court accepts Holocaust as fact as Zundel's appeal is turned down," *Canadian Jewish News* (15 February 1990) 18 ["Court accepts Holocaust as fact"]. See also Zundel OCA #2, *supra* note 284 at paras 26-27.
[286] See "Court accepts Holocaust as fact," *supra* note 285.
[287] Zundel OCA #2, *supra* note 284 at para 114.
[288] *Ibid*.
[289] *Ibid*.
[290] *Ibid* at para 153.
[291] Donn Downey, "Zundel jailed after appeal dismissed," *Globe and Mail* (6 February 1990) A10.
[292] See "Zundel gets another chance in court," *Vancouver Sun* (16 November 1990) A18.
[293] Order Stating the Constitutional Questions (28 January 1991), *R v Zundel*, SCC Case No 21811, Case on Appeal at 7-9. Note that Christie later sought and obtained leave to appeal on the question of whether the false news provision violated Section 7 of the *Charter* and, if so, whether such an infringement was justifiable under Section 1. See Order Stating the Constitutional Questions (14 June 1991), *R v Zundel*, SCC Case No 21811, Case on Appeal at 10-12. Section 7 of the *Charter* enshrines 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. In its judgment, however, the Supreme Court (both the majority and dissent) declined to deal with the Section 7 issue. See *R v Zundel*, [1992] 2 SCR 731, 1992 CarswellOnt 109 at paras 73, 258-59 [Zundel SCC].
[294] "Supreme Court to allow Zundel to appeal conviction," *Canadian Jewish News* (22 November 1990) 1.

final word on the matter.[295] Zundel also sounded displeased, even though he had been thrown a potential lifeline. "I'm not all flushed and happy the Supreme Court is going to hear my case," he said; "I consider it long overdue."[296] Zundel added that he was disgusted that he had to go through seven years of litigation to get to this stage.[297]

Many of the same players now lined up against one another. Congress and B'nai Brith obtained leave to intervene on the side of upholding the false news law.[298] The CCLA was granted leave to intervene to argue that the law should be struck down.[299] The CCLA was once again the only intervenor to participate on the defence side. The CHRA, too, applied for leave to intervene; surprisingly, their application was denied (as is customary, no reasons were provided for the application's dismissal).[300] The Simon Wiesenthal Center's application was likewise dismissed.[301]

The Supreme Court heard oral argument on 10 December 1991.[302] The Crown was represented by Jim Blacklock and Jamie Klukach.[303] Crown counsel approached Zundel's hearing with some trepidation. Because Zundel had been charged with spreading false news and not wilful promotion of hatred, the Supreme Court was not obliged to follow *Keegstra*. Furthermore, both Blacklock and Klukach felt the false news provision was more vulnerable to *Charter* scrutiny than wilful promotion of hatred had been.[304] This was primarily because the offence of spreading false news could potentially capture more speech than wilful promotion of hatred and had almost never been used despite its presence in the *Criminal Code* since 1892.[305] As noted previously, as early

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[295] *Ibid*.
[296] "Zundel gets another chance in court," *Vancouver Sun* (16 November 1990) A18.
[297] *Ibid*.
[298] "BB, CJC get legal standing at Ernst Zundel's appeal," *Canadian Jewish News* (7 February 1991) 5.
[299] See Affidavit of Alan Borovoy (18 January 1991), *R v Zundel*, Supreme Court of Canada, Court File No 21811.
[300] See Notice of Motion of Canadian Holocaust Remembrance Association (25 January 1991), *R v Zundel* (SCC), Court File No 21811.
[301] See Application for Leave to Intervene by Simon Wiesenthal Center (22 January 1991), *R v Zundel*, Court File No 21811. The other interveners in the case were the Attorney General of Manitoba and the Attorney General of Canada, both of whom advocated for upholding the false news law. See generally Zundel SCC, *supra* note 293. It appears that LEAF did not apply for leave to intervene, unlike *Keegstra*.
[302] See Transcript, *Ernst Zundel v Her Majesty the Queen* (10 December 1991) [Zundel Transcript].
[303] See generally Zundel SCC, *supra* note 293.
[304] See Interview of Jim Blacklock (12 April 2022) [on file with author] at 5 [Blacklock Interview]; Klukach Interview, *supra* note 79 at 13.
[305] See *ibid*.

as 1953 Congress argued the phrase "public interest" in the provision was unduly vague and that Parliament should define the term with greater precision – a suggestion Parliament ignored.[306] Parliament's failure to do so now worked to the Crown's detriment. As Blacklock recounted: "I remember struggling to try to define the public interest and come up with a definition of the section that you could anchor somewhere logically that didn't make the section too broad and it was a difficult task."[307] Nevertheless, Klukach hoped the Court might find Zundel so repugnant that it would uphold the false news provision despite its flaws.[308] "Just uphold it and [we] promise we won't use it again," Klukach recalled thinking.[309]

In addition to dealing with a different law, Zundel's case was heard by a different panel. Zundel's appeal, like Keegstra's, was argued before seven judges rather than the full bench of nine.[310] All three dissenting judges from *Keegstra*—Beverley McLachlin, John Sopinka, and Gérard La Forest—were on the panel in *Zundel*.[311] However, only two judges from the *Keegstra* majority—Charles Gonthier and Claire L'Heureux-Dubé—were still on the bench.[312] Former Chief Justice Dickson, who had written the majority opinion in *Keegstra*, retired in 1990.[313]

Assuming—correctly, as it turned out—that the dissenting justices from *Keegstra* would vote to strike down the false news provision in *Zundel*, the Crown could not afford to lose any of the remaining four judges. However, oral argument made clear that Justice L'Heureux-Dubé—despite her vote in favour of the Crown in *Keegstra* (and her reputation as a prosecution-friendly judge[314])—was highly skeptical of the false news law. Justice L'Heureux-Dubé interjected several times during the Crown's argument, asking, among other things, whether the law could be used to

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[306] See House of Commons, Special Committee on Bill No 93, *Evidence*, 21-7, vol 1, No 2 (3 March 1953) at 58-59 (Mr Hayes).
[307] Blacklock Interview, *supra* note 304 at 5.
[308] Klukach Interview, *supra* note 79 at 13.
[309] *Ibid*.
[310] The Supreme Court is entitled to sit any number of judges not less than five and, as per its usual practice, did not explain its reason for doing so in either the Keegstra or Zundel appeals. See *Supreme Court Act*, RSC 1985, c S-26, s 25. Most appeals in the SCC are heard by panels of seven or nine judges (See Supreme Court of Canada, "Role of the Court," online: scc-csc.ca/court-cour/role-eng.aspx).
[311] See generally Zundel SCC, *supra* note 254 and Keegstra SCC, *supra* note 200.
[312] See *ibid*.
[313] Sharpe, *supra* note 227.
[314] Constance Backhouse, *Claire L'Heureux-Dubé: A Life* (Vancouver: UBC Press, 2017) at 360-61, 363-65.

prosecute someone like Salman Rushdie (who had recently published *The Satanic Verses* to much controversy in 1988) or someone who said that Jesus Christ was never crucified.[315] Both Blacklock and Klukach recalled this as the moment they feared the appeal was lost.[316] As Klukach recounted:

> [W]e figured L'Heureux-Dubé was the swing on it and that she was going to be with us and she asks … "Mr. Blacklock, couldn't Jesus Christ have been charged under this section?" Because of course she's a Catholic. … [S]ometimes you have a moment where you're like ok, that's it, she's swung. … Yeah, one of those moments [laughs].[317]

Additionally, Justice L'Heureux-Dubé and others queried why the false news provision was needed to combat hate speech when the hate-propaganda provisions could be used instead.[318] The Crown struggled to offer a convincing response.[319] Rosenberg on the CCLA's behalf argued that the false news law was not narrowly drafted in the same way as the hate-literature provisions, which featured broad defences limiting their intrusion on freedom of expression.[320]

The Supreme Court released its decision on 27 August 1992.[321] Once again the vote was 4-3, but this time the decision went in favour of the accused.[322] The Court struck down the crime of spreading false news and acquitted Zundel.[323] As she had signaled during oral argument, Justice L'Heureux-Dubé joined the majority opinion, authored by Justice McLachlin.[324]

As with the Keegstra decision, the majority and dissenting judges agreed that the false news provision violated Section 2(b) of the *Charter*.[325] Their disagreement was once again over whether the infringement was justified under Section 1. The majority deemed the provision's overbreadth its fatal flaw.[326] Justice McLachlin called attention to the "undefined and virtually unlimited reach of the phrase 'injury or mischief to a public interest.'"[327] The majority also cited the vagueness of

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[315] See Zundel Transcript, *supra* note 302 at 94.
[316] Blacklock Interview, *supra* note 304 at 5; Klukach Interview, *supra* note 79 at 12.
[317] Klukach Interview, *supra* note 79 at 12.
[318] See Zundel Transcript, *supra* note 302 at 75-77, 115.
[319] See *ibid* at 75-77, 96.
[320] *Ibid* at 53-54. See also *ibid* at 94.
[321] See generally Zundel SCC, *supra* note 293.
[322] *Ibid*.
[323] *Ibid* at para 72.
[324] Justices Sopinka and La Forest also concurred with Justice McLachlin.
[325] See Zundel SCC, *supra* note 293 at paras 36 (majority) and 75 (dissent).
[326] *Ibid* at para 62.
[327] *Ibid* at para 58.

the false news provision.[328] Additionally, expressly agreeing with the CCLA, Justice McLachlin argued that the law was counterproductive to the goal of multiculturalism because it could have a chilling effect on the freedom of expression of minority groups, who might be more likely to voice unpopular views.[329] Furthermore, the offence of wilful promotion of hatred was a more targeted provision and could be used instead.[330] Indeed, according to the majority, at virtually every stage of the analysis, "one is struck with the substantial difference between [the false news provision] and the provision at issue in Keegstra."[331] There was little need for another, more ambiguous, law targeting the same conduct. Justice McLachlin also emphasized that the Law Reform Commission had previously recommended the law's repeal, "a conclusion which flies in the face of the suggestion that [the false news section] is directed to a pressing and substantial social concern."[332]

The dissenting judgment, jointly authored by Peter Cory and Frank Iacobucci, focused on the harms of hate speech. They emphasized that Zundel was involved in "the deliberate and wilful publication of lies which were extremely damaging to members of the Jewish community, misleading to all who read his words and antithetical to the core values of a multicultural democracy."[333] In contrast to the majority opinion, the dissenting justices opined that the false news provision provided important protection for vulnerable communities, thus stimulating their full participation in Canadian society. Citing the Cohen Committee, the dissent stated that pernicious speech has a deleterious impact on minority groups, who "respond to the humiliation and degradation of such 'expression' by being fearful and withdrawing from full participation in society."[334] This withdrawal has a negative impact on society as a whole by undermining the core values of freedom and democracy.[335] Justices Cory and Iacobucci underlined the particularly devastating effect of Holocaust denial, which they declared an affront upon all Canadians and

[328] *Ibid* at para 48.
[329] See *ibid* at para 61.
[330] *Ibid* at para 51.
[331] *Ibid* at para 70.
[332] *Ibid* at para 50.
[333] *Ibid* at para 140.
[334] *Ibid* at para 158.
[335] *Ibid*.

especially Holocaust survivors.[336] In fact, according to the dissenting judges, "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."[337] Weighed against these evils, the dissenting judgment deemed the offence in question narrowly targeted to outlaw only deliberate lies that caused or were likely to cause injury to the public interest.[338] This type of speech has little value and is scarcely in need of protection.[339] Consequently, the dissenting justices would have deemed the false news provision a justifiable infringement on freedom of expression and upheld Zundel's conviction.[340]

Reaction to the decision was swift. While disappointed with the result, Congress struck a tone of resiliency, emphasizing in a press release that the Supreme Court had not exonerated Zundel by virtue of declaring the false news law unconstitutional.[341] Other communal leaders also claimed victory in the face of defeat. David Satok, chairman of the Ontario JPRC, stated: "We don't think the Supreme Court ruling changes the finding of two separate juries that Ernst Zundel, in purveying Holocaust denial was deliberately propagating falsehoods that were injurious to the public interest."[342] Gerda Frieberg, a Holocaust survivor who was then Chair of the CJC's Ontario Region, said that in spite of the outcome, "The seven years of battling Zundel in the courts was fully worth it" because Zundel's reputation had been ruined: "Zundel has become a synonym for despicable, malicious falsehood and group libel."[343] B'nai Brith spokesman Marvin Kurz argued that because Zundel had been prosecuted and convicted by two juries, Zundel "has been exposed before the Canadian people."[344] Manuel Prutschi took solace in the dissenting judgment, which he

[336] *Ibid* at para 161.
[337] *Ibid*.
[338] *Ibid* at paras 253-54.
[339] *Ibid* at para 252.
[340] *Ibid* at para 255.
[341] Canadian Jewish Congress, "Supreme Court Ruling on False News Law No Exoneration for Zundel Stresses CJC" (press release) (27 August 1992), CJA (DB15, Box 22, File 1) ["False news law no exoneration for Zundel"].
[342] David Vienneau, "Pro-Nazi's false news conviction overturned," *Toronto Star* (28 August 1992) A16 ["Pro-Nazi's conviction overturned"].
[343] False news law no exoneration for Zundel, *supra* note 341.
[344] Paul Lungen, "CJC seeks new charges," *Canadian Jewish News* (3 September 1992) 1.

felt "gave eloquent voice" to the history of Jewish suffering throughout history caused by the publication of falsehoods.[345]

Notwithstanding such expressions of resiliency, there could be no doubt Zundel's acquittal was a crushing blow for Canadian Jews. A front-page headline above the fold in the *Canadian Jewish News* called it "a rotten decision."[346] In contrast to Gerda Frieberg's public comments, at a meeting of the Ontario JPRC held on 21 September 1992 Frieberg admitted: "Despite the fact that the Supreme Court made it clear that it was in no way exonerating Zundel, the perception [in the Jewish community] was rather different."[347] Indeed, Frieberg noted that Holocaust "survivors in our community were extremely disturbed."[348] The CHRA was predictably outraged. Citron called the Supreme Court's decision "a retrogressive step," while Smolack accused the Court of giving "the green light to the most extreme racists in Canada".[349] Other survivors echoed these words. Allan Pryce, a survivor of Auschwitz, called the decision "very disappointing" and Philip Mendlowicz, a survivor of five camps including Buchenwald, remarked that if someone like Zundel could get away with his conduct other "people will think they too will get away with it."[350] As Alan Shefman, B'nai Brith's National Director, summed up, the Supreme Court decision was a "great disappointment, [causing] a lot of sadness for the Holocaust survivors who, with great personal pain, testified at the trials and had to suffer every day in face of the media barrage that took place, especially during the first trial."[351]

The Zundel decision was particularly difficult to bear because if Zundel had simply been charged with wilful promotion of hatred rather than spreading false news—as the CHRA repeatedly demanded in the early 1980s, and as others had urged before Zundel's second trial—his conviction would have been upheld in accordance with *Keegstra*. Instead, the government's

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[345] Manuel Prutschi, "Don't forget the victims of hatred," *Globe and Mail* (3 September 1992) A15.
[346] Paul Lungen, "A rotten decision," *Canadian Jewish News* (10 September 1992) 1 ["Rotten decision"].
[347] Minutes of the meeting of the Joint Community Relations Committee Ontario Region (21 September 1992), CJA (Fonds DA21, Box 19, File 8) at 3 [21 September 1992 JPRC meeting].
[348] *Ibid*.
[349] "CJC seeks new charges," *supra* note 344.
[350] "Rotten decision," *supra* note 345.
[351] Sean Fine, "Jewish congress seeks new charges," *Globe and Mail* (29 August 1992) A9 ["Congress seeks charges"].

refusal to charge Zundel under the hate-speech provision had reaped disastrous consequences, handing Zundel a shocking victory.[352]

Even those in the Jewish community who were opposed to prosecuting Zundel were disappointed with the result. "It was not possible to have a happy outcome in this case," Borovoy explained. "A creep like Zundel will try to portray this as a vindication of his malevolent obscenities. On the other hand, I have to say the judgment was correct."[353] (In his memoir, Borovoy recounted: "Certain officers of the Canadian Jewish Congress subsequently expressed gratitude to me for the 'sensitive' nature of my comments."[354]) Bert Raphael, a Toronto lawyer and President of the Jewish Civil Rights Educational Foundation of Canada, lamented that if Zundel had never been charged, "He would have remained a virtually unknown kook surrounded by a handful of racist goons."[355] Raphael called for increased Holocaust education, rather than criminal trials, as the proper antidote for Holocaust denial: "With an informed public, there would have been no need to try an Ernst Zundel and have a court establish what should have been an irrefutable historical fact."[356] Michael Mandel, a renowned Jewish, criminal law professor at York University's Osgoode Hall Law School was outraged by the Supreme Court's opinion, even though he felt the prosecution was "ill-advised."[357] Mandel thought it outrageous that the Supreme Court had grouped Zundel with dissidents like Salman Rushdie.[358] In Mandel's view, even if the false news provision was a bad law, "it should have been repealed before Holocaust survivors had to go through two trials and two convictions only to have four smug judges of the Supreme Court of Canada wade in with a judgment that was both stupid and harmful."[359]

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[352] *Ibid*.
[353] Sean Fine, "Top court quashes Zundel's conviction; Back in business, publisher says," *Globe and Mail* (28 August 1992) A1 ["Back in business"].
[354] *At the Barricades*, *supra* note 16 at 133-34.
[355] Bert Raphael, "Zundel case should never have happened" (Letter to the Editor), *Globe and Mail* (3 September 1992) A20 ["Zundel case should never have happened"]. See also Ron Csillag, "Lawyer remembered as a fighter for human rights," *Canadian Jewish News* (24 November 2016), online: thecjn.ca/news/canada/lawyer-remembered-fighter-human-rights/.
[356] "Zundel case should never have happened," *supra* note 355.
[357] Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada*, 2nd ed (Toronto: Thompson Educational Publishing, 1994) at 375-6.
[358] See *ibid*. See also Zundel SCC, *supra* note 293 at para 28.
[359] Mandel, *supra* note 357 at 375-6.

Zundel was triumphant. Shortly after the verdict was rendered, surrounded by brown-shirted disciples under a photo of Adolf Hitler, Zundel gave a press conference from his house on Carlton Street in Toronto.[360] "Ernst Zundel is back," he announced; "I've exposed this racket for what it is."[361] Zundel promised to redouble his efforts at disproving the Holocaust myth.[362] Unsurprisingly, Zundel voiced little sympathy for the Jewish community: "they have only themselves to blame," he said. "They tried to do something evil and it carried within itself the seeds of its own destruction. So here they are with egg all over their face."[363] Zundel appeared on CFRB Radio in Toronto on 27 August 1992, telling his interviewer: "I don't need the Supreme Court to tell me what I may believe or may not believe. In my opinion … the Holocaust is an extortion racket."[364] (Congress turned over this audio to the police.[365]) At a "Victory Day" rally held in October, Zundel proudly displayed a B'nai Brith newsletter with his face on it under the headline: "Arrest this Man."[366] Zundel bragged that he had delivered the Jews a "stunning defeat" and proved that the Jewish people are not all powerful.[367] "Our enemies are in a near panic," he reported.[368] Zundel read approvingly from Justice McLachlin's majority judgment, calling McLachlin a "good looking Aryan blonde" and taking satisfaction that an Aryan had stuck it to the Jews.[369] Zundel vowed to continue publishing *Did Six Million Really Die?*.[370] To rousing applause, he declared: "The Holocaust is finished."[371]

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[360] See "CJC seeks new charges," *supra* note 344; League for Human Rights of B'nai Brith Canada, *1992 Audit of Anti-Semitic Incidents*, PAM (Fonds G-6-6-7, File 5) at 11.
[361] Tim Naumetz and Bill Dunphy, "Zundel boasts about court win," *Ottawa Sun* (28 August 1992) 4.
[362] "Back in business," *supra* note 353.
[363] *Ibid*.
[364] Sections of Transcript re Ernst Zundel Interview with Jane Hawtin, CFRB (27 August 1992), CJA (Fonds DA21, Box 21, File 9).
[365] See Cal Millar and Caroline Mallan, "New charges for Zundel up to ministry," *Toronto Star* (1 September 1992) A4.
[366] Samisdat, "Ernst Zundel's Victory Day – 17 Oct 1992," online: altcensored.com/watch?v=UDSepP0cMKU 00h:02m:00s.
[367] *Ibid* at 00h:2m:35s.
[368] *Ibid* at 00h:4m:30s.
[369] *Ibid* at 00h:5m:00s.
[370] *Ibid* at 00h:27m:15s.
[371] *Ibid* at 00h:30m:15s.

VI. "I'm just beginning to fight": Renewed efforts to prosecute Zundel, 1992-1996

Zundel's celebrations were soon interrupted. Efforts to have Zundel charged with wilful promotion of hatred began almost immediately. Some of these efforts were spearheaded by the Canadian Jewish Congress and B'nai Brith. They wasted little time: on 27 August 1992—the same day the Supreme Court's judgment was released—Congress asked the Ontario Ministry of the Attorney General to initiate a prosecution against Zundel for wilful promotion of hatred for comments Zundel made to reporters following the decision's release.[372] Congress also filed a complaint with Metropolitan Toronto Police.[373] When some members of Congress queried why the organization had acted with such haste, Satok explained "that the [Jewish] community was in terrible angst and that we had no choice but to act and act immediately."[374] B'nai Brith, too, immediately called for Zundel's arrest, and distributed thousands of "stop Zundel" posters in September 1992 in an attempt to pressure the government to lay charges.[375] Other voices from the Jewish community joined in. The Jewish Students' Network organized a rally outside of the Ontario Ministry of the Attorney General's office demanding charges.[376] Once again the Canadian Holocaust Remembrance Association sprung into action. Citron said she had needed an hour to recover from the Supreme Court's decision, but vowed: "I'm just beginning to fight."[377]

Jewish groups lobbied the Ontario government intensely in the weeks, months, and years following the Zundel decision. In November 1992 Citron submitted a brief to Ontario Attorney General Howard Hampton, pleading with the government to charge Zundel with wilful promotion of hatred.[378] The CHRA's lawyers also reached out to Hampton and Crown prosecutors.[379] Not to

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[372] "Canadian Jewish Congress Calls on Attorney General to Charge Ernst Zundel" (27 August 1992) (press release), CJA (Fonds DA 19.1, Box 33, File 28B).
[373] Minutes of the meeting of the Joint Community Relations Committee, Ontario Region (24 March 1993), CJA (DA21, Box 19, File 15) at 4 [24 March 1993 JPRC meeting].
[374] 21 September 1992 JPRC meeting, *supra* note 347.
[375] Pearl Gladman, "Posters pressure AG in Zundel case," *The B'nai Brith Covenant* (September 1992) 4, Toronto, City of Toronto Archives [henceforth "CTA"] (Fonds 1684, Series 1382, File 572).
[376] Network Canada, "STOP ZUNDEL!!! DEMONSTRATE!" (flyer), CJA (DA21, Box 21, File 8).
[377] "Congress seeks charges," *supra* note 351.
[378] Brief to The Hon G Hampton, Attorney General of Ontario – November 3, 1992, CJA (DA21, Box 21, File 2).
[379] Ron Csillag, "Groups hopeful Zundel will still be charged," *Canadian Jewish News* (18 March 1993) 4.

be outdone, Congress representatives met directly with Hampton and Ontario premier Bob Rae.[380] In May 1993, delegates from a coalition of Jewish groups including Congress, B'nai Brith, and the CHRA, met with leaders of the Ministry of the Attorney General to push for Zundel's prosecution (notes from the meeting indicate that a representative of the City of Toronto, Norm Gardner, joined the Jewish delegation).[381] In the coming years, as the Crown failed to take action, envoys from the Jewish community continued to meet periodically with the premier, attorney general, other government officials, and the police. [382] Numerous letters and public statements from Jewish organizations followed.[383]

Lobbying was not confined to Jewish groups. Another prominent organization pushing the Crown to charge Zundel was the Toronto Mayor's Committee on Community and Race Relations (the "Mayor's Committee"). The Mayor's Committee was formed in January 1981 to promote diversity and counter racism in Toronto.[384] Its composition included members of Toronto City Council and representatives from various community groups.[385] At a news conference held soon after the Supreme Court's judgment was rendered, Janice Dembo, co-ordinator of the Mayor's Committee, called on Toronto Police and Hampton "to apply all the necessary resources to investigate and commence prosecution" of Zundel.[386] Failure to lay charges, Dembo added, would

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[380] *Ibid*; Letter from David Satok to Howard Hampton (16 December 1992), CJA (DA 21, Box 21, File 6); Cover letter of fax from Manuel Prutschi to Mary Morison (17 March 1993), CJA (DA21, Box 21, File 8) [Morison fax].
[381] Notes from meeting with AG's people (14 May 1993), CJA (DA21, Box 21, File 8).
[382] See eg Minutes of the meeting of the Joint Community Relations Committee, Ontario Region (1 March 1994), CJA (DA21, Box 19, File 15) at 5-7 [1 March 1994 JPRC meeting]; Minutes of the National Community Relations Committee meeting (18 September 1995), CJA (DA21, Box 19, File 22) at 17 [18 September 1995 NCRC meeting]; Minutes of the meeting of the Community Relations Committee, Ontario Region (1 October 1996), CJA (DA21, Box 19, File 16) at 6; Minutes of the meeting of the Community Relations Committee, Ontario Region (17 December 1996), CJA (DA21, Box 19, File 16) at 5-6 [17 December 1996 JCRC meeting].
[383] See eg Canadian Jewish Congress (press release), "Province must find resolve to charge Zundel, Congress says" (8 March 1993), CJA (DA21, Box 21, File 6) ["Province must find resolve"]; League for Human Rights of B'nai Brith Canada (press release), "Refusal to charge Zundel not final, says League for Human Rights" (9 March 1993), CJA (DA21, Box 21, File 8); Dianne Rinehart, "B'nai Brith calls for prosecution of Ernst Zundel," *The Canadian Press* (14 March 1996); Letter from Steven Shulman to Margo Boyd (14 March 1996), CJA (DA21, Box 21, File 5) [14 March 1996 letter to Boyd]; Minutes of the meeting of the Community Relations Committee, Ontario Region (17 June 1996), CJA (DA21, Box 19, File 16) at 3 [17 June 1996 JCRC meeting].
[384] See Final Argument of the Complainants Sabina Citron and the Toronto Mayor's Committee on Community & Race Relations, *Citron v Zundel*, Canadian Human Rights Tribunal File No T460/1596 at paras 1-3.
[385] *Ibid*.
[386] Rudy Platiel, "Coalition aims to combat racism," *Globe and Mail* (11 September 1992) A12.

encourage racist attacks on minorities.[387] The Mayor's Committee continued lobbying the government to take action against Zundel in the coming months and years;[388] in May 1993, Mayor of Toronto June Rowlands, in her capacity as Chair of the Committee, wrote to new Ontario Attorney General Marian Boyd, "urg[ing] you to lay new charges against Ernst Zundel for wilful promotion of hatred against an identifiable group, and further urg[ing] the Provincial Government to do everything possible to expedite the police investigation of the matter."[389] Other organizations echoed these calls. The City of North York's Committee on Community, Race and Ethic Relations wrote to Hampton in September 1992 pleading with him "in the strongest terms" to lay charges against Zundel for wilful promotion of hatred.[390] The Presbyterian Church in Canada similarly wrote to the Attorney General in October 1992 asking that he do everything within his power to bring Zundel to justice.[391] A petition from student organizations at York University in March 1993 calling on the government to charge Zundel was endorsed by an impressive array of groups, including the African Students Association, Bisexual, Lesbian & Gay Alliance, Muslim Students Federation, and the Pan African Law Society.[392] Numerous other organizations lobbied the government to prosecute Zundel for wilful promotion of hatred, including the Black Coalition of Quebec, the Canadian Jamaican Association, and the Urban Alliance on Race Relations.[393]

But the authorities steadfastly refused. In March 1993, the Ontario Provincial Police (OPP) wrote to the CJC, advising them that, based on legal advice they had received from the Ministry of the Attorney General, the police did not believe Zundel's public statements denying the Holocaust amounted to wilful promotion of hatred.[394] Amidst outrage from the Jewish community, newspaper reports emerged that the Attorney General had no knowledge of the OPP's letter and

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[387] *Ibid.*
[388] See Chronology Re: Zundel, CTA (Fonds 1684, Series 1382, File 572).
[389] Letter from June Rowlands to Marion Boyd (11 May 1993), CTA (Fonds 1684, Series 1382, File 572).
[390] Letter from JA Mercury to Howard Hampton (2 September 1992), CJA (DA 21, Box 21, File 6).
[391] Letter from H Glen Davis to Howard Hampton (2 October 1992), CJA (DA 21, Box 21, File 6).
[392] Fax to JSF York U re Zundel petition (23 March 1993), CJA (DA21, Box 21, File 8).
[393] See *ibid*; Paul Lungen, "Newspapers debate free speech following Ernst Zundel verdict," Canadian Jewish News (September 10, 1992); Phinjo Gombu, "Charge Zundel under hate law, Ontario urged," *Toronto Star* (11 September 1992) A13.
[394] Letter from RE Matthews to Bernie Farber (5 March 1993), CJA (DA21, Box 21, File 6). See also "Province must find resolve," *supra* note 383.

might be willing to bring charges.[395] Yet, while the government subsequently indicated an openness to prosecuting Zundel, its actions suggested it had little interest in doing so. On 26 May 1993, Attorney General Boyd wrote to Congress, assuring them that the Ministry took hate speech very seriously.[396] She added: "It is important that the full weight of available criminal sanctions be brought to bear on such activities."[397] Nevertheless, Boyd only promised that the police would continue to investigate.[398]

In subsequent correspondences and public statements, Boyd struck a similar tone – professing her concern about hate speech while simultaneously making clear the government was reluctant to act. Writing to Mayor Rowlands in September 1994, Boyd reiterated her stance that hate crimes should be "prosecuted vigorously."[399] Still, no charges followed. And in an April 1995 letter to the Mayor's Committee, Boyd once again provided her assurance that the government took Zundel and the dissemination of hate propaganda very seriously.[400] But now Boyd disclaimed responsibility, noting that criminal charges are the responsibility of the police.[401] The police, meanwhile, continued to take the position that it could not charge Zundel because the Attorney General had concluded that Zundel's public statements did not constitute wilful promotion of hatred.[402] Congress eventually concluded, quite reasonably, that the failure to prosecute Zundel was due to a lack of political will, not a lack of evidence.[403]

Hope emerged when Ontario's NDP government was replaced by the Progressive Conservatives in June 1995.[404] Indeed, while they were in the opposition, now premier Mike Harris and Attorney General Charles Harnick had heavily criticized Boyd and the NDP for failing

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[395] 24 March 1993 JPRC meeting, *supra* note 373 at 4.
[396] Letter from Marion Boyd to Louis Lenkinski (26 May 1993), CJA (DA21, Box 21, File 6).
[397] *Ibid*.
[398] *Ibid*.
[399] Letter from Marion Boyd to June Rowlands (6 September 1994), CJA (DA21, Box 21, File 11).
[400] Letter from Marion Boyd to Janice Dembo (24 April 1995), CTA (Fonds 1684, Series 1382, File 572).
[401] *Ibid*.
[402] Letter from Robert Strathdee to Steven Shulman (13 May 1996), CJA (DA21, Box 21, File 5); Letter from Robert Strathdee to Steven Shulman (29 August 1996), CJA (DA21, Box 21, File 5).
[403] See 1 March 1994 JPRC meeting, *supra* note 382 at 6; 17 December 1993 JCRC meeting, *supra* note 382 at 6; Ben Rose, "Film prompts call for prosecution of Zundel," *Canadian Jewish News* (6 April 1995).
[404] Memorandum from Ed Morgan to Moshe Ronen (25 July 1995), CJA (DA21, Box 21, File 9); 18 September 1995 NCRC meeting, *supra* note 382.

to charge Zundel.[405] However, once in power the Progressive Conservatives sounded very much like their predecessors. Harnick blamed the police for not charging Zundel while also suggesting that the government lacked the necessary factual foundation to win at trial.[406]

As the authorities dithered, Zundel grew emboldened. Following the Supreme Court's decision, Zundel promptly resumed publication and distribution of Holocaust-denial material including *Did Six Million Really Die?*[407] Zundel expanded his reach by starting two shortwave radio shows and a television program in the United States, although Congress succeeded in having the television program pulled from the air.[408] The Canadian media helped Zundel remain in the public eye. In February 1993, Zundel appeared on the popular CBC News program the *Fifth Estate*, engaging in his usual valorization of Adolf Hitler and Nazi Germany.[409] Zundel claimed that he was sending out millions of books, pamphlets, and videos every year, including to Germany, where Zundel was an influential figure in the neo-Nazi movement.[410] Zundel's appearance on the *Fifth Estate* was upsetting to many observers and led to renewed calls for his prosecution.[411]

Seemingly protected by the government, Zundel taunted the Jewish community. In March 1993, after the OPP's announcement that it would not be laying charges, Zundel wrote to Congress and B'nai Brith offering a meeting "to calm the frayed tempers of some of your leaders and members of your community".[412] (Congress forwarded this letter to Premier Rae, to no avail.[413]) Soon thereafter, Zundel wrote to the *Jewish Western Bulletin*, touting the findings of a recent

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[405] *Legislative Assembly of Ontario*, 35-3 (2 June 1993) (Mr Michael D Harris); *Legislative Assembly of Ontario*, 35-3 (17 November 1994) (Mr Charles Harnick); *Legislative Assembly of Ontario*, 35-3 (28 November 1994) (Mr Michael D Harris).
[406] *Legislative Assembly of Ontario*, 36-1 (21 March 1996) (Hon Mr Charles Harnick).
[407] Mary Nemeth & Tom Fennell, "Deny, deny, deny," *Maclean's* (30 August 1993) 56.
[408] Nemeth & Fennell, "Deny, deny, deny," *supra* note 407; Paul Lungen, "Zundel TV show pulled off the air in Texas town" *Canadian Jewish News* (20 January 1994) 4. It appears that Zundel later succeeded in resuming broadcast of his television program. See Doug Barney, "Controversy on the web," *Network World* (8 January 1996) 8.
[409] The 5th estate, Transcript of "'Gift to this world' with Victor Malarek" (23 February 1993), CJA (DA21, Box 21, File 3).
[410] *Ibid*.
[411] Paul Lungen, "CJC seeks new Zundel charges," *Canadian Jewish News* (4 March 1993) 1; Letter from Louis Lenkinski to Marion Boyd (24 February 1993), CJA (DA21, Box 21, File 6).
[412] Letter from Ernst Zundel to The Leadership of The Canadian Jewish Congress and B'nai Brith, CJA (DA21, Box 21, File 8).
[413] Morison fax, *supra* note 380.

American poll concerning public knowledge of the Holocaust; the poll, according to Zundel, had found that one out of every three Americans did not believe "in some or all of the Hollywood version of the Holocaust.".[414] Zundel proposed that he and the *Jewish Western Bulletin* jointly commission a study to probe Canadian public opinion on the issue, which Zundel suggested might assist with "community healing".[415] Several other Jewish newspapers and Jewish organizations received similar invitations, much to their consternation.[416]

Further evidence of Zundel's chutzpah emerged when he linked up with the information superhighway. In or around October 1995 Zundel started his own website, which he called the Zündelsite.[417] According to its "Mission Statement," the Zündelsite's objective was to rehabilitate "the honor and reputation of the German nation and people" by challenging "the traditional version of the 'Holocaust'."[418] On his website Zundel published several classics from the Holocaust-denial canon, including *Did Six Million Really Die?* complete with a new foreword written by Zundel himself.[419] Zundel's beachhead on the Internet expanded his reach. Zundel proudly claimed that the number of visitors to his website eventually grew to 1.2 million per month.[420]

Frustration was growing. While the government declined to press charges, Zundel's opponents resorted to other means. At 5:15am on 7 May 1995—the 50th anniversary of Nazi Germany's surrender—an arsonist (described by the *Globe and Mail* as having "a sense of history") set Zundel's house ablaze.[421] The fire caused an estimated $500,000 in damage.[422] The crime was never solved; four suspects, including Meir Weinstein, were arrested on a nearby side street, but they denied involvement and were released after twenty minutes of questioning

[414] Letter from Ernst Zundel to The Jewish Western Bulletin, CJA (DA21, Box 21, File 8).
[415] *Ibid*.
[416] See eg Ernst Zundel, "An Open Letter" (August 1994), CJA (DA 19.2, Box 3, File 14); "No thank you, Mr. Zundel" (editorial), *Jewish Free Press* (8 September 1994) 18.
[417] See *Citron v Zündel*, 2002 CarswellNat 4364 at paras 5-6.
[418] "Mission Statement," archived from http://www.webcom.com/ezundel/english/disclaimer/mission.html, CTA (Fonds 1684, Series 1382, File 572).
[419] See *Citron v Zündel*, CHRT File No T460/1596, "Book of Zündelsite Documents Referred to by the Commission," CTA (Fonds 1684, Series 1382, File 574).
[420] See *Zündel, Re*, 2005 FC 295 at para 69.
[421] Gil Kezwer, "Hitler Gallery," *The Globe and Mail* (24 February 1996) D3.
[422] *Ibid*.

(Weinstein claimed he was merely taking photos of the damage).[423] A man purportedly affiliated with the "Jewish Armed Resistance Movement" subsequently called the *Toronto Sun* and claimed responsibility.[424] Things only got worse for Zundel: two days after the fire, someone mailed a six-pound pipe bomb filled with nails to his house; Zundel grew suspicious because of the package's size and brought it to the police where it was safely exploded.[425] Around the same time, another person mailed him a mousetrap with razorblades attached to it.[426] All of this unnerved Zundel.[427] Elisa Hategan, then a Zundel acolyte who spent much time at his home during this period, recalled that Zundel grew paranoid, going so far as to drape his whole house in a plastic bag that they jokingly referred to as a condom.[428] Yet Zundel's predicament evoked little sympathy. As one letter to the editor put it after Zundel's house was set on fire: "Are not Torontonians outraged that their tax dollars should support firefighters in putting out a fire at the alleged home of Ernst Zundel when we have proof that such a place obviously never existed?"[429]

VII. "An uncomfortable guest at a bar mitzvah": Zundel's human rights case, 1996-2001

The main threat to Zundel remained legal, not extralegal. Once again Citron stepped into the void created by the government's inaction. Returning to her old playbook, in November 1995 Citron commenced a private criminal prosecution against Zundel. Seeking to do an end run around the requirement of the Attorney General's consent, Citron charged Zundel with *conspiracy* to wilfully promote hatred; Citron argued that because the underlying charge was conspiracy, not wilful promotion of hatred, the Attorney General's consent was not necessary.[430] She also charged

[423] See Gil Kezwer, "Holocaust denier in Canada blames Jews for letter bomb," *Jewish Telegraphic Agency Daily News Bulletin* (26 May 1995) 3.
[424] Bill Dunphy, "Zionist group claims arson," *Toronto Sun* (9 May 1995).
[425] "Holocaust denier blames Jews," *supra* note 423; Fabrice Taylor, Police explode parcel bomb mailed to Zundel last week," *The Globe and Mail* (22 May 1995) A3.
[426] "Power, Zündelists vs. Zionists" (newsletter), CJA (DA21, Box 21, File 9) [Power newsletter].
[427] See Power Newsletter, *supra* note 426; Interview of Elisa Hategan (14 October 2021) [on file with author] at 6 [Hategan Interview].
[428] Hategan Interview, *supra* note 427 at 6.
[429] Christopher Levenson (letter to the editor), "Ernst Zundel" (13 May 1995) D7.
[430] "Crown withdraws charges against pro-Nazi Zundel," *Canadian Jewish News* (21 March 1996) 6.

Zundel with several counts of defamatory libel.[431] Reprising their prior roles, Citron's actions annoyed Congress leadership, which refused to support her.[432] Congress's annoyance was magnified by the fact that Citron was now herself a member of the CJC's executive.[433] The Crown promptly took over the case and withdrew all charges, taking the position that there was insufficient evidence to proceed.[434] After the charges were withdrawn, Citron launched a lawsuit for defamation against Zundel seeking $3.5 million in damages.[435] Zundel countersued for $8.5 million.[436] Once again Citron acted without Congress support.[437]

Citron remained unbowed and undeterred. In September 1996 Citron tried yet another route: she filed a complaint against Zundel with the Canadian Human Rights Commission.[438] This time Citron had institutional support. The Mayor's Committee had filed a parallel complaint against Zundel with the Commission in July 1996. It is unclear who had the idea first; the complaints were similar and they were subsequently joined together.[439] The Mayor's Committee decided to file its complaint on the recommendation of Kurz, who was then the National Co-Chair of B'nai Brith's League for Human Rights and who also sat on the Mayor's Committee.[440] Kurz suggested a human rights complaint out of frustration with the police and Crown.[441] Toronto

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[431] *Ibid*.
[432] See Minutes of the meeting of the Community Relations Committee, Ontario Region (19 December 1995), CJA (DA21, Box 19, File 15) at 7-8 [19 December 1995 JCRC meeting]; Minutes of the meeting of the Community Relations Committee, Ontario Region (18 March 1996), CJA (DA21, Box 19, File 16) at 5; 14 March 1996 letter to Boyd, *supra* note 383.
[433] 19 December 1995 JCRC meeting, *supra* note 432 at 7.
[434] "Province drops hate charges against Ernst Zundel," *Canadian Press Newswire* (15 March 1996).
[435] "Zundel's Net site prompts lawsuit," *Vancouver Sun* (29 July 1996) A6.
[436] *Ibid*.
[437] 17 June 1996 JCRC meeting, *supra* note 383 at 3.
[438] See *Citron v Zündel*, *supra* note 417 at para 6. I will sometimes refer to the Canadian Human Rights Commission as "the Commission" below.
[439] See Interview of Marvin Kurz (2 May 2024) [on file with author] at 10 [Kurz Interview]; Letter from P Alwyn Child to Members of the Canadian Human Rights Commission (15 October 1996), CTA (Fonds 1684, Series 1382, File 572) [Letter from Alwyn to CHRC].
[440] Kurz Interview, *supra* note 439 at 3, 6, 16-17; Fax from Marvin Kurz to TMCCRR and Mayor Barbara Hall (26 March 1996), CTA (Fonds 1684, Series 1382, File 572); Toronto Mayor's Committee on Community and Race Relations minutes meeting no 96-03 (1 May 1996), CTA (Fonds 1684, Series 1382, File 572) at 5.
[441] Kurz Interview, *supra* note 440 at 9.

Mayor Barbara Hall was very supportive of Kurz's idea.[442] Kurz recalled that Hall "really stood up for the Jewish community" and "took the issue very seriously."[443]

Both complaints alleged that Zundel had violated Section 13(1) of the *Canadian Human Rights Act*.[444] This provision prohibited repeated telephonic communications likely to expose persons to hatred or contempt based on a prohibited ground of discrimination, such as religion.[445] As noted above, Section 13(1) of the *Canadian Human Rights Act* had been used successfully against John Ross Taylor. In its 1990 decision in *Taylor*, released the same day as *Keegstra*, the Supreme Court had upheld Section 13(1) as a justifiable infringement on freedom of expression.[446] The complaints against Zundel alleged that he breached Section 13(1) by publishing antisemitic material on the Zündelsite, including *Did Six Million Really Die?*[447]

In November 1996 the Human Rights Commission referred the complaints to the Canadian Human Rights Tribunal for a hearing.[448] Once a hearing was ordered, Citron and the Mayor's Committee attracted additional support from the Jewish community. B'nai Brith, the Canadian Holocaust Remembrance Association, and the Simon Wiesenthal Center were all granted the right to participate as interveners.[449] Congress initially declined to get involved. Some within the CJC feared that the matter would be difficult to win and might consume resources better spent elsewhere.[450] Hal Joffe, who served as National Director of Community Relations, explained that Congress felt the public was tired of going after Zundel and wanted to move on.[451] But after other

[442] Kurz Interview, *supra* note 440 at 18.
[443] Kurz Interview, *supra* note 440 at 18.
[444] Letter from Alwyn to CHRC, *supra* note 439.
[445] See *Citron v Zündel*, *supra* note 417 at para 12.
[446] *Taylor*, *supra* note 202. The Court divided in the same 4-3 split as in *Keegstra*, with Justice McLachlin authoring the dissent.
[447] *Citron v Zündel*, *supra* note 417 at para 6.
[448] *Citron v Zündel*, *supra* note 417 at para 11. This is normal procedure for the Canadian Human Rights Commission when it feels that further inquiry before an impartial body is warranted. The Canadian Human Rights Commission is not itself authorized to decide whether a claim of discrimination has been established. See "About the Process," *Canadian human rights commission*, chrc-ccdp.gc.ca/en/complaints/about-the-process [accessed June 27, 2024].
[449] *Citron v Zündel*, *supra* note 417 at para 11.
[450] Minutes of the meeting of the Community Relations Committee, Ontario Region (25 February 1997), CJA (DA21, Box 19, File 16) at 5; Minutes of the meeting of the Community Relations Committee, Ontario Region (21 October 1997), CJA (DA21, Box 19, File 16) at 3 [21 October 1997 JCRC Meeting].
[451] Interview of Hal Joffe (17 January 2022) [on file with author] at 21 [Joffe Interview].

Jewish organizations joined the proceedings, the CJC decided to obtain intervener status, too.[452] Joffe conceded that Congress "got dragged into" the case.[453]

Zundel once again retained Christie.[454] Christie was assisted by co-counsel Barbara Kulaszka.[455] In addition, the Canadian Association for Free Expression, represented by Toronto-area schoolteacher and alleged white supremacist Paul Fromm, intervened on Zundel's side.[456]

Zundel and Christie squared off against an impressive array of lawyers. The Commission was initially represented by Ian Binnie, then a senior partner with McCarthy Tétrault LLP in Toronto.[457] In January 1998 Binnie was appointed to the Supreme Court of Canada.[458] He was replaced as Commission counsel by Mark Freiman, another partner of McCarthy Tétrault LLP.[459] Freiman was subsequently appointed Deputy Attorney General of Ontario.[460] B'nai Brith was represented by Kurz, who was later appointed a Justice of the Superior Court of Ontario. Robert Armstrong, later appointed to the Court of Appeal for Ontario, represented Citron and the CHRA, as did Wendy Matheson, now a Justice of the Superior Court of Ontario. Yet another future judge, Robyn Bell, represented the Simon Wiesenthal Center; she did so alongside John Rosen, a widely-respected criminal defence lawyer who had represented Paul Bernardo.[461] Congress was

[452] B'nai Brith, the CHRA, and Simon Wiesenthal Center were all granted intervenor status in May 1997. In contrast, the CJC, which applied later, was granted intervenor status in October 1997. See *Citron v Zündel*, *supra* note 417 at para 11; Letter from Joel Richler to Diane Desormeaux, CJA (DA21, Box 21, File 15). Minutes from an October 1997 meeting of the JPRC explained that the JPRC had decided not to intervene in the case, but that this decision was later overruled by the executive of the Canadian Jewish Congress. See 21 October 1997 JCRC Meeting, *supra* note 450.
[453] Joffe Interview, *supra* note 451 at 22.
[454] Dale Anne Freed, "Rights panel to rule on fate of 'Zundelsite'," *Toronto Star* (27 May 1997) A18.
[455] Joseph Brean, "Far-right extremists converge at memorial for Toronto lawyer," *National Post* (12 July 2017), online: nationalpost.com/news/canada/canadas-far-right-extremists-to-converge-at-memorial-for-lawyer-unless-venue-relents-to-pressure.
[456] See *Citron v Zündel*, *supra* note 417 at para 11; Paul Lungen, "Web site decision seen as precedent-setting," *Canadian Jewish News* (8 March 2001) 3. On Paul Fromm, see eg Jill Mahoney, "Activists confront controversial educator," *Globe and Mail* (20 April 2007) A16.
[457] Donn Downey, "Rights panel's jurisdiction over 'Zundelsite' disputed," *Globe and Mail* (27 May 1997) A10.
[458] "The Honourable Justice William Ian Corneil Binnie," Supreme Court of Canada, online: scc-csc.ca/judges-juges/bio-eng.aspx?id=william-ian-corneil-binnie (accessed 5 September 2024).
[459] Interview of Mark Freiman (8 April 2024) [on file with author] at 2 [Freiman Interview].
[460] Ron Csillag, "Freiman takes over as deputy attorney general," *Canadian Jewish News* (12 April 2001) 14.
[461] See Interview of John Rosen (4 April 2024) [on file with author] at 11-12 [Rosen Interview].

represented by several lawyers from the powerful law firm Blake, Cassels & Graydon LLP.[462] Counsel for the Commission and the intervenors coordinated effectively throughout the case.[463]

The hearing commenced in May 1997. The matter was heard by a three-member panel, consisting of Claude Pensa (Chair), Reva Devins, and Harish Jain. Pensa and Devins were lawyers, while Jain was a professor in the School of Business at McMaster University. Jain resigned from the panel in December 1998, explaining that his sabbatical was ending and he had not expected the hearing to go on so long.[464] Accordingly, the matter proceeded to conclusion with only two panel members.

To prove its case under Section 13(1) of the *Canadian Human Rights Act*, the main items the prosecution needed to prove were:

(1) The material on the Zündelsite was likely to expose Jewish persons to hatred or contempt;

(2) The material on the Zündelsite was communicated "telephonically"; and

(3) Ernst Zundel controlled the Zündelsite.

Notably, because this was a civil proceeding, not a criminal proceeding, the burden of proof on the prosecution was the balance of probabilities rather than proof beyond a reasonable doubt.[465] In other words, the prosecution needed to establish only that it was more likely than not that Zundel had contravened Section 13(1).

That the material posted to the Zündelsite was likely to expose Jewish persons to hatred or contempt was easiest to establish. As the Tribunal put it, the overarching theme of the Zündelsite was "an unrelenting questioning of the truth related to the extent of the persecution of Jews by Nazi Germany during the Second World War."[466] In the process, Jews were "branded as liars,

[462] For a complete list of counsel, see generally *Citron v Zündel*, *supra* note 417.
[463] See Interview of Ian Binnie (18 April 2024) [on file with author] at 6 [Binnie Interview]; Rosen Interview, *supra* note 461 at 12-13.
[464] Letter from Harish Jain to Anne Mactavish (1 December 1998), CJA (DA19.2, Box 3, File 13).
[465] *Citron v Zündel*, *supra* note 417 at para 133.
[466] *Ibid* at para 137.

swindlers, racketeers and extortionists."[467] Although the material spoke for itself, the prosecution called two expert witnesses—one in the field of discourse analysis and one in the field of antisemitism and Jewish-Christian relations—to support its position.[468] The panel found this evidence persuasive.[469]

Whether the material on the Zündelsite was communicated "telephonically" presented a more difficult question. The Internet did not exist when the provision was introduced in 1977.[470] Only in 2001 did the government amend the legislation to specifically state that it applied to the Internet.[471] Nevertheless, the prosecution successfully argued that the Internet should be considered "telephonic" because it operated over the telephone network.[472] The prosecution called an expert who convincingly opined that—at least at the time of the hearing—the transmission of sound, data, video or graphic communications over the Internet occurred through conventional telephone lines.[473] The panel also stated that human rights legislation should be given a broad, purposive interpretation to support the underlying objectives of the legislation.[474]

Zundel vigorously contested the Commission's allegation that he controlled the Zündelsite. Zundel's position was that the website was owned and operated by Ingrid Rimland, who lived in California and later became Zundel's third wife.[475] The prosecution belied this assertion through a surprise witness: Irene Zundel, Ernst's second wife. Irene married Ernst Zundel in March 1996, but separated from him in July 1997.[476] Thereafter she moved to Pennsylvania.[477] Freiman recalled

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[467] *Ibid* at para 139.
[468] *Ibid* at paras 121-131.
[469] *Ibid* at para 141.
[470] See Richard Moon, "Report to the Canadian Human Rights Commission Concerning Section 13 of the *Canadian Human Rights Act* and the Regulation of Hate Speech on the Internet," Report commissioned by the Canadian Human Rights Commission, October 2008 at 5.
[471] *Ibid* at 6; Paul Lungen, "Anti-terrorism bill takes aim at hate propaganda," (25 October 2001) 5.
[472] *Citron v Zündel*, *supra* note 417 at para 89.
[473] See *ibid* at paras 52-54, 101-02.
[474] *Ibid* at para 82.
[475] *Ibid* at para 14; Paul Lungen, "Human rights body to explore Zundel's material on internet," *Canadian Jewish News* (5 June 1997) 3. Zundel and his second wife Irene (discussed below) divorced in December 1999 and he married Ingrid Rimland in January 2000. See *Zundel, Re* (FC Docket No DES-2-03), Transcript of Proceedings at 3426 [Transcript of Immigration Proceedings].
[476] *Citron v Zündel*, *supra* note 417 at para 28.
[477] Paul Lungen, "Zundel linked to Internet site," *Canadian Jewish News* (22 October 1997) 5.

that they got wind Irene was "pissed off" with Ernst; Freiman and his co-counsel flew to rural Pennsylvania to meet with her, and she agreed to testify.[478] Irene's evidence caught Zundel off-guard and proved damning to his case. As Freiman recounted:

> it was one of those great moments where you call out the name and she comes walking into the courtroom wearing a black-and-white polka-dot dress, and Ernst – his face falls into his lap as he realizes what's going to happen. And in inimitable fashion [Binnie] leads her through evidence that, yes, she watched as he wrote his editorials by hand, as he went over them when they came back and corrected them by hand, and he was the publisher, he was responsible for publishing the articles—including the ones that we say are hateful—he was responsible for publishing Zundelsite; it was he and no other who was responsible for all of the content. And that basically was our entire case and everything after that was really going to be gravy.[479]

Irene proved resistant to cross-examination. When Christie attempted to damage her character, she responded: "Doug, you weren't this mean to me when I was cooking pancakes for you for breakfast, were you?"[480] Said Freiman: "After a while [Christie] just gave up. And didn't puncture her evidence whatsoever. He just made it worse."[481] Binnie similarly recalled that Irene's evidence was devastating for the defence; "it just pulled [Zundel] to pieces."[482]

Strategic choices made by Zundel's legal team also made things worse for him. Christie opened Zundel's defence by requesting permission from the panel to show them the Zündelsite. As Freiman recalled, this proved beneficial to the prosecution:

> The first thing [Christie] did—probably at Ernst Zundel's bidding—was to ask permission of the panel to show the Zundelsite. He said, 'I want to demystify all of this. I want to show you what this Zundelsite that we've heard so many bad things about really is.' The panel says sure. So they arranged for a demonstration. … First thing that happens is we hear: 'brring, brring, brring!' Because it's dial-up internet. And on the screen you see a picture of a telephone ringing. As it rings and it whirrs and you see a picture of a telephone connecting. And I couldn't help myself. Out of turn I say: 'You see? There's the telephone ringing the internet.' … I could not have wished for a more compelling demonstration that the internet is a telephone connected by a telephone.[483]

Once the web page finally loaded, the first image to show up was a picture of Zundel, suggesting his control over the website.[484] Furthermore, as with his criminal proceedings, Zundel's witnesses seemingly all came from the Holocaust-denial community. The Tribunal found their evidence

[478] Freiman Interview, *supra* note 459 at 14.
[479] *Ibid* at 6.
[480] *Ibid*.
[481] *Ibid*.
[482] Binnie Interview, *supra* note 463 at 3.
[483] *Ibid* at 7.
[484] *Ibid* at 8.

generally unhelpful, biased, and not credible.[485] To again quote Freiman: "I went into the hearings despising Doug Christie for the way he bullied witnesses, but in some sense having a good deal of trepidation with respect to his skill and cunning. I left the hearings with absolute contempt for Doug Christie as a lawyer and for his intelligence. Because the number of unforced errors and absolute strategic blunders that he was guilty of was incredible."[486] As Rosen described: "sometimes [Christie] took unreasonable positions, and honestly you wanted to go over there and say, like, don't ask for the sun, the moon, and the stars. Just ask for what's reasonable and you're going to get it. But you couldn't tell them anything. They were hostile to us. We weren't hostile to them."[487]

Zundel's case was further damaged by the Tribunal's ruling that truth is not a defence to a charge under the *Canadian Human Rights Act*.[488] This ruling was consistent with the Supreme Court's holding in *Taylor* that a statement's veracity is irrelevant in the context of a human rights proceeding, where the central question is the impact of the impugned speech on the target group, not the intent of the speaker.[489] This confounded the defence and helped prevent Zundel from sensationalizing the hearing.[490]

In fact, the case attracted little media attention. This was partly by design. The prosecution was determined from the outset to avoid media coverage.[491] Their aim was to prevent Zundel from using the hearing as a propaganda tool.[492] Freiman explained that his goal was to keep a low profile by making the evidence as boring as possible, using non-Jewish witnesses, and not calling any Holocaust survivors.[493] This method seemed to work. Zundel's attempts to dramatize the proceedings went nowhere. For instance, during one week of proceedings Zundel showed up with

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[485] *Citron v Zündel*, *supra* note 417 at paras 103, 146-154.
[486] Freiman Interview, *supra* note 459 at 7.
[487] Rosen Interview, *supra* note 461 at 15.
[488] *Citron v Zündel*, *supra* note 417 at paras 185-86, 211.
[489] *Ibid* at paras 185-86; *Taylor*, *supra* note 201 at paras 73-75.
[490] Mark Freiman, "Litigating hate on the Internet," *Canadian Issues* (Summer 2006) at 66 ["Litigating hate on the Internet"].
[491] *Ibid*.
[492] *Ibid*.
[493] *Ibid* at 67; Freiman Interview, *supra* note 459 at 10.

a *yarmulke* (a ritual head covering) on. Christie explained that Zundel had decided to self-identify as a Jew so that he could receive better treatment under the law. But in stark contrast to his criminal trials, no one from the press was there to report on this stunt. Consequently, as Freiman described, "Zundel was left looking like an uncomfortable guest at a bar mitzvah, wearing ill-fitting headgear that made it impossible to take him seriously."[494] Zundel's and Christie's decision to wear bullet-proof vests on the first day of hearing was likewise ill-advised and quickly abandoned.[495] Another consequence of the hearing's low profile was that much of the Jewish community seemed unaware of it. As Rosen remembered, "nobody really knew except the people who were directly connected [to it]."[496]

Although the hearing commenced in May 1997, it did not conclude until March 2001, and the decision was not rendered until January 2002.[497] Prior to this case, the longest hearing in the history of the Canadian Human Rights Tribunal had taken up five hearing days; Zundel's consumed fifty-two hearing days.[498] The main reason for the length of the hearing was the conduct of the defence, which, in the words of the Tribunal, "Literally, from the day the hearing convened to the final days … brought a series of motions requesting that the hearing be adjourned or stayed."[499] All of these motions were ultimately denied.[500] However, Zundel and Christie did score some legal victories along the way. Most notably, in April 1999 Christie convinced the Federal Court that panel member Devins should be dismissed for reasonable apprehension of bias.[501] Devins's alleged bias arose from a 1988 news release issued by the Ontario Human Rights Commission that applauded Zundel's criminal conviction for spreading false news; the news release was unsigned, but Devins was a member of the Human Rights Commission at that time.[502]

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[494] "Litigating hate on the Internet," *supra* note 490 at 67.
[495] *Ibid*.
[496] Rosen Interview, *supra* note 461 at 15.
[497] Paul Lungen, "Web site decision seen as precedent-setting," *Canadian Jewish News* (8 March 2001) 3.
[498] Kirk Makin, "Angry Zundel bows out of hearing," *The Globe and Mail* (28 November 2000) A7 ["Zundel bows out"]; Paul Lungen, "Web site decision seen as precedent-setting," *Canadian Jewish News* (8 March 2001) 3.
[499] *Citron v Zündel*, *supra* note 417 at para 11.
[500] *Ibid*.
[501] *Zündel v Citron*, 1999 CarswellNat 852 (FC) at para 26.
[502] Paul Lungen, "Zundel's appeals rejected [by Federal Court of Appeal]," *Canadian Jewish News* (8 June 2000) 3.

The Federal Court of Appeal overturned the decision and reinstated Devins.[503] Despite their lack of success, the numerous motions brought by the defence slowed down the hearing, which undoubtedly motivated Zundel and Christie to bring them in the first place.

Yet these tactics came at a steep price. In criminal proceedings, for sound policy reasons, only in rare instances will a court order the losing party to pay the winning side's legal costs. In contrast, cost consequences are a routine feature of civil proceedings. Accordingly, Zundel's numerous unsuccessful motions left him on the hook for a significant portion of the prosecution's legal fees. Zundel estimated that he spent about $140,000 defending the case.[504]

Perhaps because of the mounting financial toll, in May 2000 Zundel left Canada to join Ingrid Rimland in the United States.[505] They eventually settled in Tennessee.[506] Zundel later explained that he had initially intended to return to Canada to continue defending himself before the Tribunal, but that Rimland convinced him to stay in the United States.[507] In November 2000 Zundel announced that he had thrown in the towel. As he told *The Globe and Mail*, "I would rather save my money and appeal [the Tribunal's] grotesque ruling when it comes out."[508] (Ms. Rimland explained: "We didn't want to spend all our time fighting with the Jews."[509]) Accordingly, Christie withdrew from the hearing.[510] Kulaszka did, however, continue to attend and represent Zundel's interests, although she did not present any final arguments.[511] In February 2001 Kulaszka brought a motion seeking to have the matter dismissed because of Zundel's absence, but this was denied.[512]

In the end, the Tribunal found that Zundel had violated Section 13(1) of the *Canadian Human Rights Act.*[513] The Tribunal ordered him to cease communicating telephonically the type

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[503] *Zündel v Citron*, 2000 CarswellNat 947 (FCA), leave to appeal ref'd 2000 SCCA No 322.
[504] "Zundel bows out," *supra* note 498.
[505] Transcript of Immigration Proceedings, *supra* note 475 at 3431.
[506] *Ibid* at 3432-33.
[507] *Ibid* at 3431.
[508] "Zundel bows out," *supra* note 498.
[509] Peter Cheney, "The weives, the marriages of chameleon Ernst Zundel," *Globe and Mail* (8 March 2003) A4.
[510] *Citron v Zündel*, *supra* note 417 at para 11.
[511] *Ibid*.
[512] *Ibid*; Letter from Barbara Kulaszka to Canadian Human Rights Tribunal (22 February 2001), CJA (DA 19.2, Box 3, File 8).
[513] *Citron v Zündel*, *supra* note 417 at para 302.

of material found on the Zündelsite.[514] Zundel—now ensconced in Tennessee—did not take his website down, still claiming that his wife had complete control over it.[515]

Jewish groups were pleased with the result, even if the Tribunal had little means to enforce its order. Zundel's departure from Canada was itself an important victory.[516] Citron was particularly gratified, although she still wanted Zundel criminally charged.[517] Yet Citron—much like her adversary Zundel—sounded tired from her long battle. "I'm not going to do this forever," she told a reporter after the hearing. "I did my share for 35 years, now it's time for younger people to pursue this."[518] Zundel also sounded ready to move on. "You're talking to the new Ernst Zundel," he said. "They used to accuse me of Holocaust denial. Well, now I'm in Canada-denial. I have put Canada behind me."[519]

VIII. "Justice has been done": Zundel's deportation, conviction, and death, 2001-2017

Zundel found life in the United States agreeable. He sold his infamous house on Carlton Street in Toronto in May 2001 for $358,000.[520] Zundel and Rimland bought a chalet in rural Tennessee and purchased another property that they intended to use as an art gallery.[521] According to Zundel, he spent his time painting and hoped to make money selling prints.[522]

But Zundel's sojourn did not last long. In February 2003 he was arrested by American immigration authorities for overstaying his temporary visa and sent back to Canada.[523] Zundel was promptly detained upon arrival.[524] He had never obtained Canadian citizenship, despite two failed

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[514] *Ibid* at para 303.
[515] See Transcript of Immigration Proceedings, *supra* note 475 at 2043-44.
[516] Paul Lungen, "Zundel's departure seen as victory against racism," *Canadian Jewish News* (15 March 2001) 12; Carolyn Blackman, "Zundel case considered to be a victory: Canadian Human Rights Commission," *Canadian Jewish News* (5 April 2001) 5.
[517] Paul Lungen, "Citron gratified at tribunal's Zundel Website decision," *Canadian Jewish News* (14 February 2002) 26 ["Citron gratified"]; Paul Lungen, "Tribunal rules against Internet hate," *Canadian Jewish News* (24 January 2002) 3.
[518] "Citron gratified," *supra* note 517.
[519] Kirk Makin, "Rights group orders Zundel to kill hate site," *Globe and Mail* (12 January 2002) A7.
[520] Colin Freeze, "Canada turns Zundel back, wife says," *Globe and Mail*
[521] Transcript of Immigration Proceedings, *supra* note 475 at 3434-36.
[522] *Ibid*.
[523] Paul Lungen, "Zundel coming to Canada?" *Canadian Jewish News* (20 February 2003) 1 ["Coming to Canada"].
[524] Campbell Clark, "Zundel probed as risk to national security," *Globe and Mail* (21 February 2003) A1.

attempts to do so.[525] Zundel had lost his permanent residency due to his time away from Canada; he now applied for refugee status.[526] However, the federal government declared Zundel a threat to national security and initiated proceedings to deport him back to Germany.[527] Jewish organizations applauded the government's decision.[528]

A lengthy proceeding followed in Federal Court to determine whether the government's decision to label Zundel a security threat was reasonable. Once again, Christie acted on Zundel's behalf.[529] But Christie resigned partway through the hearing because of his wife's illness.[530] Toronto lawyers Peter Lindsay and Chi Kun-Shi took over Zundel's case.[531] Christie, in fact, was later called by Zundel as a witness.[532] Christie's evidence centred on his view that Zundel was a non-violent person and encouraged others to refrain from violent activities.[533] The final judgment in the case suggests that Christie's testimony did little to advance Zundel's position and that the judge may not have found Christie credible.[534] Comments made by the judge during the hearing strongly suggest that Christie had once again annoyed the Court through his conduct as counsel.[535]

During the hearing Lindsay tried to subpoena representatives from Congress and B'nai Brith to testify.[536] Jewish organizations had been loudly and publicly calling on the government to deport Zundel after he was returned to Canada in February 2003.[537] Lindsay wanted to explore whether the government's decision to declare Zundel a security risk may have been influenced by

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[525] As discussed in chapter 3, Zundel first applied for Canadian citizenship in 1967 but was denied, possibly in part due to lobbying from the Canadian Jewish Congress. Zundel applied for citizenship again in 1994. Once again Jewish organizations (and others) vigorously objected, and Zundel was denied a second time. See Letter from Irving Abella to Sergio Marchi (28 July 1994), CJA (DA21, Box 21, File 9); Letter from Art Eggleton to Janice Dembo (31 January 1995) CJA (DA21, Box 21, File 9); Coming to Canada, *supra* note 523.
[526] Colin Freeze & Campbell Clark, "Holocaust denier wants refugee status, group says," *Globe and Mail* (20 February 2003) A1.
[527] Estanislao Oziewicz, "Zundel declared threat to national security," *Globe and Mail* (3 May 2003) A13.
[528] *Ibid*.
[529] Bruce Cheadle, "Zundel tied to terrorism, federal document state," *Globe and Mail* (8 May 2003) A8.
[530] Transcript of Immigration Proceedings, *supra* note 475 at 4809-10.
[531] See Interview of Peter Lindsay (5 May 2024) [on file with author] [Lindsay Interview].
[532] See *ibid* at 4872ff.
[533] See eg *ibid* at 4895-96; 4924-27.
[534] *Zündel, Re*, *supra* note 420 at paras 48-49, 63-64.
[535] Transcript of Immigration Proceedings, *supra* note 475 at 4809-11.
[536] Transcript of Immigration Proceedings, *supra* note 475 at 4198-99.
[537] See *ibid* at 2717-18.

political pressure, and by extension whether Zundel had been unfairly targeted.[538] The subpoenas were quashed.[539] In the process, the judge referred to some of Lindsay's suggestions of Jewish influence over the proceedings as "disgusting."[540]

Looking back recently, Lindsay argued that it was reasonable to believe Zundel may have been selectively targeted and that the decision to do so may have derived from political pressure. The purpose of the subpoenas was to conduct further inquiry along these lines. Indeed, Greenspan and others had expressed concerns with the manner in which the government was seeking to deport non-citizens like Zundel on security grounds without providing them with sufficient evidence to make full answer and defence.[541] Lindsay recalled that he received assistance and encouragement from Jewish lawyers, one of whom told Lindsay that he could only work behind the scenes because his mother would have killed him if she knew he was helping Zundel. As Lindsay remembered, the depth of feeling in the Jewish community was both palpable and understandable; but this was a separate question from whether Zundel had been singled out:

> [It was] hard to stand on Zundel's side because he in many ways was a reviled figure. … It's not so easy to stand up for an unpopular figure who many people understandably had very strong feelings about. Jewish people and people generally are going to find it very hurtful that someone's going to deny this horrendous event where six million died, and the systemic evilness of it is almost incomprehensible. I'm not Jewish so I can't speak to that viscerally, but I think any human being can say oh my God that must be totally scarring on all Jewish people forever probably. So I mean I understand that, but it's the old debate that the rules have to apply to everyone. You can't rip down the forest to get to the devil.[542]

Kurz, who represented B'nai Brith at the hearing to quash the subpoenas, noted that to the best of his knowledge Jewish groups were not responsible for the government's decision to seek Zundel's

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[538] Lindsay Interview, *supra* note 531 at 6-7; Transcript of Immigration Proceedings, *supra* note 475 at 4250.
[539] See Transcript of Immigration Proceedings, *supra* note 475 at 4798.
[540] *Ibid* at 4300.
[541] Lindsay Interview, *supra* note 531 at 9. Some of these concerns were vindicated when the Supreme Court of Canada declared elements of the statutory regime for "security certificate" proceedings, like the one Zundel was subjected to, unconstitutional in 2007 – by which time Zundel had already been deported. See *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9. See also *Charkaoui v. Canada (Citizenship and Immigration)*, 2008 SCC 38. This issue, including the statutory regime for these proceedings under the *Immigration and Refugee Protection Act*, SC 2001, c 27, is complex and has been taken up elsewhere; I leave aside further discussion here. See Graham Hudson, "As Good as It Gets: Security, Asylum, and the Rule of Law after the Certificate Trilogy" (2016) 52:3 Osgoode Hall LJ 905.
[542] With respect to this quote and everything above in this paragraph, see Lindsay Interview, *supra* note 531 at 6-9.

deportation.[543] He also recalled that when he attended court—in an "irony of ironies"—he wound up sitting at counsel table right next to Zundel.[544]

On 24 February 2005, the Federal Court ruled that the deportation order was lawful.[545] The government then wasted little time; Zundel was flown back to Germany on March 1.[546] Zundel was arrested immediately upon arrival in Germany and remanded to jail.[547] He was arrested on an outstanding warrant that had been issued in Germany in 2003, charging Zundel with the criminal offence of inciting hatred.[548] The charge focused on statements about the Holocaust made on the Zündelsite.[549] In February 2007 Zundel was convicted and sentenced to five years in prison.[550] The presiding judge called him an "extreme anti-Semite" who sought to glamorize Hitler.[551] Zundel's conviction and sentence were upheld on appeal.[552]

Jewish groups were naturally pleased with Zundel's deportation and conviction. Congress president Ed Morgan said: "The court's decision sends a strong message to those who practice this pernicious form of anti-Semitism. The message should be clear that Holocaust denial is neither an expression of historical research nor free speech. It is anti-Semitism, pure and simple."[553] Frank Dimant, executive vice-president of B'nai Brith called on "Canada and other nations to emulate the German example, by explicitly recognizing Holocaust denial as a hate crime and giving teeth to this law through its consistent application."[554] Arnold Friedman, a Holocaust survivor who had testified in the first Zundel trial, expressed satisfaction: "It took a while, but a dog has been taken off the street," Friedman said; "Some justice has been done."[555] Others cheered the result. Sid

[543] Kurz Interview, *supra* note 439 at 15.
[544] *Ibid*.
[545] *Zündel, Re*, *supra* note 420 at para 132.
[546] Kirk Makin, "Holocaust denier is returned to Germany," *Globe and Mail* (2 March 2005) A7.
[547] "Zundel arrested on arrival in Germany," *Edmonton Journal* (3 March 2005) A4.
[548] Adrian Humphreys, "Zundel deported; in custody in Germany: Holocaust denier facing charges of inciting hatred," *National Post* (2 March 2005) A4.
[549] Sandro Contenta, "Germany confronts the virus of hate; Holocaust denier remains defiant," *Toronto Star* (8 November 2005) A8; Katie Lewis, "Ernst Zundel trial resumes in Germany," *Times-Colonist* (Victoria, BC) A8.
[550] Paul Lungen, "Zundel gets five years for inciting hate," *Canadian Jewish News* (22 February 2007) 40.
[551] "Zundel Will Stay in Jail, Court Rules," *Canadian Jewish News* (26 September 2007) 2.
[552] *Ibid*.
[553] *Ibid* (ellipsis omitted).
[554] *Ibid*.
[555] Peter Cheney, "Zundel verdict satisfies camp survivor," *Globe and Mail* (16 February 2007) A14.

Ryan, president of the Canadian Union of Public Employees, praised the Canada for deporting Zundel and Germany for placing him behind bars.[556]

In March 2010 Zundel was released from prison.[557] Canadian federal Justice Minister Vic Toews made clear that Zundel was not welcome in Canada.[558] Accordingly, Zundel re-settled in the Black Forest region of Germany where he was born.[559] It was there that he died in August 2017, aged 78.[560] The Center for Israel and Jewish Affairs, which had taken over from the Canadian Jewish Congress as one of Canada's leading Jewish advocacy organizations, provided the following epitaph: "Ernst Zundel's death brings to a close an especially pernicious saga that plagued Canadians for decades."[561] Deborah Lipstadt struck a different tone: "On a strategic level, sometimes I wondered if the various trials did not create a modicum of sympathy for a man who deserved not sympathy but utter contempt," she told a reporter.[562]

IX. "You fought the good fight, and you lost": Keegstra's second trial, 1991-1992

As we have seen, in December 1990 the Supreme Court of Canada in *Keegstra* allowed the Crown's appeal, overturned the Court of Appeal of Alberta, and declared the offence of wilful promotion of hatred constitutional. But this did not end Keegstra's prosecution. The Supreme Court remanded the matter back to the Court of Appeal, which ordered a new trial. Behind the scenes, members of the Court of Appeal expressed hope that the government would not proceed with a new prosecution.

Some in the Jewish community held the same view. Sheldon Chumir, justice critic for the Alberta Liberal Party, warned that a new trial might turn Keegstra into a martyr.[563] Chumir said that as a politician, lawyer, and Jew, he couldn't see any purpose served by a renewed airing of

[556] Sid Ryan, "No place for hate" (letter to editor) *National Post* (17 February 2007) A21.
[557] "Zundel released, banned from Canada," *Canadian Jewish News* (11 March 2010) 2.
[558] *Ibid*.
[559] Sewell Chan, "Ernst Zundel, 78, Promulgator of Holocaust Denial," *New York Times* (8 August 2017) B14.
[560] *Ibid*.
[561] *Ibid*.
[562] *Ibid*.
[563] "Retrial of Keegstra could be counterproductive," *Jewish Post & News* (Winnipeg) (10 April 1991) 4.

Keegstra's teachings.[564] Winnipeg's *Jewish Post & News* suggested that most Jewish Canadians opposed further prosecution, and urged Jewish organizations to "consider letting the matter die without making any more public statements on the issue."[565] (Alberta's *Jewish Star*, a longtime opponent of Keegstra's prosecution, folded in 1990.) These opinions were shared by many Eckville residents, who resented the spotlight on their town and thought Keegstra had been punished enough, even if they did not agree with his worldview.[566]

These calls went unheeded. Both Congress and B'nai Brith publicly urged the government to proceed with another trial.[567] They took this position even though the CJC privately admitted that many Jews seemed tired of the Keegstra affair.[568] As Satok put it, "we cannot afford to get tired of these issues."[569]

In April 1991 the Alberta government announced that it would re-prosecute Keegstra.[570] Keegstra's second trial commenced in March 1992.[571] This time Keegstra represented himself, claiming that he could not afford a lawyer.[572] He was still working as an auto mechanic.[573] Keegstra said he had approached Legal Aid Alberta for assistance, but refused to accept their conditions.[574] Because of the Court of Appeal's ruling, Keegsta was permitted to challenge prospective jurors for cause, including whether they had already formed an opinion about the case or whether they were easily influenced by the news media.[575]

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[564] Mark Tait, "Rostad to review hatred case," *Calgary Herald* (17 March 1991) A1.
[565] "Retrial could be counterproductive," *supra* note 565.
[566] Richard Helm and Richard Houghton, "Rostad orders new trial for Keegstra; says he has little choice," *Edmonton Journal* (26 April 1991) A1. See also Pat Roche, "A sense of deja vu in Eckville," *Red Deer Advocate* (11 July 1992) A2; Randy Fiedler, "Eckville received rough ride from big city media," *Red Deer Advocate* (16 November 1996) E15.
[567] "Jews demand new Keegstra trial," *Red Deer Advocate* (17 March 1991) 3; Canadian Jewish Congress, "CJC welcomes Alberta decision to proceed with new trial for Keegstra" (press release) (25 April 1991), CJA (DA21, Box 19, File 23).
[568] Minutes of a meeting of the National Joint Community Relations Committee (5 October 1992), CJA (DA21, Box 19, File 22) 10.
[569] *Ibid*.
[570] "Keegstra faces new trial on hate issues," *Calgary Herald* (26 April 1991) A1.
[571] Patrick Nagle, "Keegstra back in court today," *Calgary Herald* (2 March 1992) A2.
[572] Patrick Nagle, "Keegstra claims he's persecuted," *The Ottawa Citizen* (3 March 1992) A5.
[573] Michele Jarvie, "Trial atmosphere not so stringent," *Red Deer Advocate* (30 April 1992) B1.
[574] "Keegstra decides against legal aid," *Calgary Herald* (16 November 1991) A9.
[575] "Hate trial jury selection starts," *Windsor Star* (3 March 1992) C8.

As with the first trial, the Crown's case consisted primarily of evidence from Keegstra's former students, and particularly their notes, essays, and exams.[576] Most of these students were now in their late 20s.[577] The students' testimony revealed that several were still inclined to believe Keegstra.[578] The Crown also called Dick Hoeksema and Robert David, both of whom testified in the first trial; Hoeksema was the teacher who had taken over Keegstra's class after Keegstra's firing, while David was the former superintendent of the Lacombe County School Board.[579] In addition, the Crown called a new witness, Dr. Eliezer Segal, a professor in the Department of Classics and Religion at the University of Calgary. Segal was qualified as an expert on Judaism and the Talmud.[580]

Surprisingly, Keegstra did not present any defence evidence.[581] However, he made his point of view clear through his lengthy cross-examinations of Crown witnesses and closing address to the jury.[582] As with the first trial, Keegstra did not deny his teachings. Rather, he contended that everything he taught was accurate, and that it was his Christian duty to warn his students.[583] Keegstra particularly relished the opportunity to debate Segal. Indeed, Segal recalled Keegstra thinking it was the chance of a lifetime to confront a real Jew on theological topics.[584] Keegstra spent much of his time reading passages from the New Testament and asking Segal to respond.[585] The Crown deliberately decided not to object to this line of questioning, preferring to let Keegstra

[576] Michele Jarvie, "Teachings of Keegstra outlined by prosecutor," *Red Deer Advocate* (10 March 1992) B1.
[577] Judy Monchuk, "I taught the truth, Keegstra says," *Toronto Star* (26 June 1992) A12.
[578] Michele Jarvie, "Different opinion taught: student," *Red Deer Advocate* (20 March 1992) B1; Michele Jarvie, "Students wrote essay for marks, not beliefs on conspiracy theory," *Red Deer Advocate* (21 March 1992) B1; Brenda Kossowan, "Student accepted theory," *Red Deer Advocate* (9 April 1992) B1; Michele Jarvie, "Valedictorian essays presented," *Red Deer Advocate* (1 May 1992) B1.
[579] Michele Jarvie, "Teacher first to take stand," *Red Deer Advocate* (10 March 1992) B1; Michele Jarvie, "Lessons 'alarmed" ex-boss," *Red Deer Advocate* (20 May 1992) B1.
[580] Brenda Kossowan, "Court debate heated," *Red Deer Advocate* (12 June 1992) B1.
[581] "Keegstra case nearing end," *Red Deer Advocate* (17 June 1992) B1.
[582] See eg Michele Jarvie, "Death camps never existed: Keegstra," *Red Deer Advocate* (7 May 1992) B1; Brenda Kosswan, "Keegstra's information based on lies: witness," *Red Deer Advocate* (16 June 1992) B1; Patrick Nagle, "Keegstra stands by Jewish-conspiracy theory," *Vancouver Sun* (29 June 1992) A4.
[583] Brenda Kossowan, "Keegstra claims to be hate victim," *Red Deer Advocate* (30 June 1992) B1.
[584] Interview of Eliezer Segal (7 May 2024) [on file with author] at 3-4 [Segal Interview].
[585] Segal Interview, *supra* note 584 at 3-4.

hang himself.[586] Segal at one point accused Keegstra of trying to convert him.[587] He also told Keegstra his Jewish conspiracy theories were absolute lies.[588] Looking back, Segal remembered enjoying his time on the witness stand and finding the situation amusing.[589] In the acknowledgments section of a subsequent book he published on Talmudic interpretations of the Book of Esther, Segal thanked Keegstra for the insights he gave him.[590]

The atmosphere surrounding Keegstra's second trial was much calmer than his first. The gallery was largely empty for much of the trial aside from a handful of Keegstra's supporters.[591] The Jewish community mostly stayed away.[592] Riki Heilik, who represented the Alberta Region of the Canadian Jewish Congress, visited the trial only a couple times a week "because it was so boring."[593] When she attended, the gallery consisted of Keegstra's supporters on one side and Heilik and the media on the other side.[594] Nor did the second trial receive much media attention.[595] Segal recalled that most Jews did not know the trial was going on.[596] The lack of media coverage suited community leaders, who wanted to minimize publicity of the case.[597] Heilik remembered that people were by then less interested in Keegstra, both in Jewish and non-Jewish circles.[598]

On 10 July 1992—after four months of trial—Keegstra was found guilty of wilful promotion of hatred.[599] He had once again squandered a sympathetic jury. The jury deliberated for 32 hours across four days, and a few jurors wiped tears away when the verdict was read (although,

[586] Segal Interview, *supra* note 584 at 4.
[587] "Court debate heated," *supra* note 580.
[588] Keegstra's information based on lies," *supra* note 588.
[589] Segal Interview, *supra* note 584 at 13.
[590] Segal Interview, *supra* note 584 at 5.
[591] "Keegstra trial delayed until Thursday," *Red Deer Advocate* (14 May 1992) B2; Brenda Kossowan, "Keegstra trial settles into a routine," *Jewish Post & News* (6 May 1992) 2.
[592] Segal Interview, *supra* note 584 at 19.
[593] Interview of Riki Heilik (20 January 2022) [on file with author] 8 [Heilik Interview].
[594] *Ibid* at 7, 10.
[595] See "Keegstra trial settles into a routine," *supra* note 591; Heilik Interview, *supra* note 593 at 22.
[596] Segal Interview, *supra* note 584 at 1, 21.
[597] See National JCRC Report, Alberta – North (fax dated 17 May 1991), CJA (DA21, Box 19, File 22).
[598] Heilik Interview, *supra* note 593 at 22.
[599] Michele Jarvie, "Jury declares Keegstra guilty," *Red Deer Advocate* (11 July 1992).

unlike the first trial, no one offered to pay Keegstra's fine).[600] In contrast, Keegstra showed little emotion except to shake his head.[601]

The Crown's victory also seemingly came despite the sympathies of the trial judge, Arthur Lutz. Following Keegstra's closing address to the jury—during which, among other things, he described "Judeo-socialism" as "AIDS of the mind"—Justice Lutz told Keegstra that many lawyers who had appeared before him could learn from Keegstra's closing argument.[602] In his charge to the jury, Justice Lutz was highly critical of two important Crown witnesses. He told the panel that Robert David had no right as a non-expert to express his opinion that Keegstra's Jewish conspiracy theory was not reputably held.[603] Justice Lutz reserved harsher words for Segal. He instructed the jury that Segal had provided rude, unsolicited, negative, unusual, and "perhaps insulting" responses to Keegstra's cross-examination.[604] (Unsurprisingly, Keegstra deemed the jury instructions "quite all right."[605]) Following the charge, with the jury out of the room, the Crown objected to the way the trial judge had described David's and Segal's evidence.[606] Justice Lutz pushed back and called Segal obnoxious.[607] Nevertheless, he agreed to re-charge the jury, telling the panel to disregard his personal opinions about David and Segal.[608]

Justice Lutz confirmed his sympathetic view of Keegstra on sentencing. The Crown asked for a term of imprisonment, arguing that Keegstra deserved a higher penalty than Zundel, who had received nine months in jail following conviction at his second trial in 1987.[609] The Crown argued that Keegstra's conduct was worse than Zundel's because Keegstra was teaching a class of students.[610] But Keegstra would not be serving time in jail; instead, he was fined $3,000 – less

[600] *Ibid*.
[601] *Ibid*.
[602] *R v Keegstra* (ABQB 1992), Transcript of Proceedings at 3121, 3195.
[603] *Ibid* at 3323-24.
[604] *Ibid* at 3333-34, 3339.
[605] *Ibid* at 3386.
[606] See *ibid* at 3397.
[607] *Ibid* at 3394-95.
[608] *Ibid* at 3398.
[609] *Ibid* at 3420-22.
[610] *Ibid* at 3422.

than the $5,000 fine Keegstra received in his first trial.[611] In his reasons for sentence, Justice Lutz told Keegstra: "You fought the good fight, and you lost."[612] Justice Lutz commented that the punishment was slight "compared with the loss of your teaching certificate, your loss of reputation, and the scorn that you have suffered as you have been ground through 10 years in the court system, and will suffer in the future."[613] He added: "I recognize the hurt you so eloquently expressed in your final address to the jury … and I know you will never accept the verdict."[614]

Despite the lenient sentence and the judge's remarks, Jewish organizations praised the result. (The Jewish public seemed largely unaware, or at least surprisingly unbothered, by Justice Lutz's jarring comments during sentencing.) "Today's verdict reflects the feelings of all Canadians that those who would sow bigotry and hatred are an unwelcome intrusion in Canadian society," said Irving Abella, then the CJC's president.[615] "Justice has been done," echoed B'nai Brith's chairman Stephen Scheinberg.[616] Dolgoy, then vice-president of the Jewish Federation of Edmonton, said the important point was not the punishment but the conviction.[617] However, the Jewish Defence League disagreed, calling the $3,000 fine "a mockery of justice."[618] Striking a similar tone—if for the opposite reason—Keegstra called the decision "a dark day for Canada," and vowed another appeal.[619]

X. "The people of Canada rightly scorn his crime": Keegstra's case concludes, 1992-2014

Keegtra filed his appeal a few weeks later.[620] Christie returned as Keegstra's counsel.[621] The Crown cross-appealed, arguing the sentence was too low. Keegstra explained that the Crown

[611] *Ibid* at 3427.
[612] *Ibid* at 3425.
[613] *Ibid*.
[614] *Ibid* at 3425.
[615] "Keegstra is found guilty, fined for promoting hatred," *Globe and Mail* (11 July 1992) A3.
[616] *Ibid*.
[617] "Jewish league claims Keegstra 'getting away with murder,'" *Vancouver Sun* (13 July 1992) A4.
[618] *Ibid*.
[619] Patrick Nagle, "Keegstra stands by Jewish-conspiracy theory," *Vancouver Sun* (29 June 1992) A4.
[620] Sylvia Strojek, "Keegstra appeals latest conviction," *Calgary Herald* (1 August 1992) B4.
[621] *Ibid*.

had initiated the sentence appeal at the behest of B'nai Brith: "They are the terrorist organization of Canada," Keegstra told a reporter.[622] Waiting for his appeal to be heard, Keegstra kept busy by publishing lengthy letters to the editor in the *Red Deer Advocate* in which he railed against sex education—predicting it would destroy civilization—and promoted Holocaust denial.[623]

The Court of Appeal of Alberta heard Keegstra's appeal in February 1994 and released its ruling in September of the same year.[624] The Court of Appeal once again quashed Keegstra's conviction. But the Court split 2-1. Two members of the panel held that the trial judge committed reversable error by declining to provide the jury with a copy of Robert David's evidence after the jury requested it a few hours into its deliberations.[625] Justice René Foisy dissented. As he noted, both Keegstra and the Crown had asked the trial judge not to hand over the three-hundred-page transcript of David's testimony; indeed, David's evidence was damaging to Keegstra.[626] Moreover, the trial judge suggested the jury come back with a more targeted question and they declined to do so.[627]

In granting the appeal, the majority pleaded with the Crown not to proceed with a third trial. In the words of Justice Milt Harradence:

> I question whether public respect for the criminal justice system would be enhanced by a third four-month trial. A new trial would provide at public expense yet another opportunity for the Appellant to propound his views at length. It would expose the witnesses (who in the main have no independent recollection of the facts) and the community to a third ordeal of a four-month trial in a decade. Whatever the results, it can only serve to exacerbate the harm and injury already done to both the target group and society in general. The administration of justice would be best served by bringing the case to an end.[628]

Jewish groups disagreed, urging the Crown to appeal the ruling or prosecute Keegstra again.[629] Congress wrote directly to Alberta's Attorney General Ken Rostad, arguing that a failure to pursue

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[622] Michele Jarvie, "Keegstra appeal launched," *Red Deer Advocate* (8 August 1992) B1.
[623] Jim Keegstra, "Schools teach promiscuity" (letter to the editor) *Red Deer Advocate* (27 January 1993) A4; Jim Keegstra, "Are all the facts taught at school?" (letter to the editor) *Red Deer Advocate* (27 February 1993) A5; Jim Keegstra, "Get the facts straight, Tom," *Red Deer Advocate* (29 January 1994) A4.
[624] David Climenhaga, "Keegstra appeals hate conviction," *Calgary Herald* (3 February 1994) B4; *R v Keegstra*, 1994 ABCA 293 [*Keegstra* 1994].
[625] *Keegstra* 1994, *supra* note 624 at paras 112 (Harradence JA), 154 (Hetherington JA, concurring).
[626] *Keegstra* 1994, *supra* note 624 at paras 174, 180 (Foisy JA, dissenting). See also *ibid* at para 70.
[627] *Ibid* at para 187. See also *ibid* at para 147.
[628] *Ibid* at paras 144-45. See also *ibid* at para 157.
[629] David Climenhaga, "Keegstra verdict quashed," *Calgary Herald* (8 September 1994) A1.

the matter further "would send the wrong message to those who seek to sow the seeds of hatred in both Alberta and across the country.[630]

Adding insult to injury, the Court of Appeal released its judgment on Rosh Hashanah, the Jewish new year. "Whoever was responsible for [this timing] was extraordinarily insensitive," said Abella. "They ought to be taken to task."[631] Dennis Urstein, a Holocaust survivor who had testified against Zundel, recalled in a letter to the editor that Rosh Hashanah was one of the most dreaded days in Auschwitz, bringing out special cruelty from their Nazi oppressors. Urstein said this "memory came back to me this morning when I read that the judges of the Alberta Court of Appeal picked this day, the Jewish New Year, to hear and overturn Keegstra's conviction."[632]

The Crown appealed to the Supreme Court.[633] In fact, it was entitled to do so without leave because the Court of Appeal had divided on a legal issue.[634] Christie then sought leave to cross-appeal to once again argue that the offence of wilful promotion of hatred was unconstitutional on freedom of expression and other grounds.[635] The Court turned him down.[636]

The matter was heard and decided by the Supreme Court 28 February 1996.[637] Although typical for the appellant—here, the Crown—to present its argument first, the Court decided it did not need to hear from the prosecution. Almost undoubtedly this was because the panel had already decided to allow the Crown's appeal. Instead, the Court called on Christie to present his argument. Christie began by arguing that Keegstra was a fine and upstanding man. Furthermore, Christie alleged that Keegstra had been improperly convicted because the Jewish people are not an identifiable group. Christie then expounded on the purportedly solid foundation for Keegstra's beliefs; Christie asserted, among other things, that Jews are extremely anti-Christian, and pointed

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[630] Letter from Irving Abella & Hal Joffe to Ken Rostad (9 September 1994), CJA (DA19.1, Box 21, File 3).
[631] *Ibid*. See also David Climenhaga, "Jews demand fight continue," *Calgary Herald* (10 September 1994) B7.
[632] Dennis Urstein, "Court's timing brought back memories of Auschwitz" (letter to the editor) *Calgary Herald* (19 September 1994) A5.
[633] Brenda Kossowan, "Keegstra case goes to Supreme Court," *Red Deer Advocate* (23 September 1994) B1.
[634] See *R v Keegstra*, [1995] 2 SCR 381 at para 23 [*Keegstra* 1995], citing *Criminal Code*, *supra* note 51, s 693(1)(a).
[635] *Keegstra* 1995, *supra* note 634 at paras 38.
[636] *Ibid* at para 39. The Court did, however, rule that Keegstra could argue that the defence of truth in *Criminal Code* s 319(3)(a) violated *Charter* s 11(d) (the presumption of innocence), as the Court held this ground did not require leave to appeal. See *ibid* at para 37.
[637] See *ibid*.

out that Jews had been responsible for bombing the King David Hotel in Jerusalem in 1946. These arguments brought a smile to Keegstra's face, but even Christie seemed unsure of their relevance; he occasionally asked the judges whether they wanted him to keep going. Chief Justice Antonio Lamer assured Christie they wanted to hear him out. However, when Christie began to argue that Keegstra was being persecuted because of his "unpopular views," Justice L'Heureux-Dubé finally had enough. "It bothers me that you use the term 'unpopular views," she said. "We are dealing with something different here, with the promotion of hatred." Christie replied: "It isn't hatred if it's true."[638]

When Christie concluded, the judges took a fifteen-minute recess before returning with their verdict, which Justice Iacobucci delivered orally. This time there would be no months'-long delay or lengthy reasons. In a brief ruling, the Court allowed the Crown's appeal substantially for the dissenting reasons of Justice Foisy in the court below. The Supreme Court remitted the case back to the Court of Appeal to deal with the Crown's appeal of Keegstra's sentence.[639] Christie's face appeared drained, while Keegstra sat motionless, a smile still plastered on his face.[640]

Keegstra's legal odyssey concluded on 26 September 1996 with the Court of Appeal's decision on the Crown's sentence appeal. A different panel of three judges decided this appeal from that which had allowed Keegstra's conviction appeal two years prior.[641] The tenor of this judgment is much different than previous rulings from the Court of Appeal of Alberta in the Keegstra case. For the first time the Court of Appeal sided with the Crown and unequivocally denounced Keegstra's conduct.

The Court of Appeal agreed that a $3,000 fine was too lenient; the appropriate sentence, said the panel, was one year in jail. However, the Court noted that Keegstra's criminal proceedings

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[638] With respect to this entire paragraph, see "Keegstra conviction restored by top court," *Canadian Jewish News* (7 March 1996) 19. Three groups (B'nai Brith and the Attorneys General of Ontario and Canada) intervened in the case. The Court did not hear from them, either, although they submitted written arguments. See *ibid* and *Keegstra* 1995, *supra* note 634.

[639] *R v Keegstra*, [1996] 1 SCR 458 at paras 1, 4. The Court also dismissed Keegstra's *Charter* s 11(d) argument (noting that its earlier decision in 1990 was a "complete answer" on this point) and other arguments raised by the defence. (*Ibid* at paras 2-3).

[640] "Keegstra conviction restored by top court," *supra* note 239.

[641] The panel consisted of Roger Kerans, John Agrios, and D Blair Mason. See *R v Keegstra*, 1996 ABCA 308.

had gone on for twelve years, with nine "major" court hearings during that time. "In the light of these very special circumstances, and for no other reason" the Court suspended the prison sentence and released Keegstra on one year's probation. The Court stipulated that one term of probation was to be that Keegstra could not attempt to preach hatred of the Jewish people, "including hatemongering that is thinly disguised as historical research." In addition, Keegstra was ordered to perform two-hundred hours of community service, "preferably in service of those who have come to Canada as victims of racial, religious, or ethnic hatred elsewhere."[642]

The Court of Appeal disavowed the trial judge's reasons for sentence, stressing that Keegstra was not "fighting the good fight" when he promoted hatred against Jews; rather, "he was attempting to twist the minds of young people. And the people of Canada rightly scorn his crime, and him for never evincing the slightest remorse or regret." The Court also took issue with Justice Lutz's comment Keegstra had been "ground down" by the legal system, seemingly casting him as a victim.[643]

The Court of Appeal reserved its harshest criticism for Keegstra. It described Keegstra's teachings as "a half-baked rehash of every calumny or slander against the Jewish people over the course of western history, of which we must sadly acknowledge there have been many." The panel lamented that Keegstra "persists in his pathetic and rejected claim that he is merely an honest student of history." And the Court demolished any notion that Keegstra was interested in free speech or honest debate:

> The [Keegstra] case stirred a debate in Canada about the limits of free speech, about what 'truths' are beyond public debate, and about the marketplace of ideas. But one should not associate the accused with the more libertarian view expressed during that debate. In his work as a teacher, he showed a reckless disregard for the truth. He heaped abuse on the Jewish people in complete disregard, as came out clearly at trial, of any and all conflicting opinion. And he would show no tolerance of anybody who disagreed with him. He did not give the Jewish people the benefit of a careful inquiry into the fairness of the claims he made against them. Nor did he make any effort to offer what he had to say in Mr. Christie's vaunted marketplace of ideas, where he would, of course, suffer public scrutiny, and criticism. He slyly used instead his dominant position in the classroom with children.

[642] With respect to this entire paragraph, see *ibid* at paras 11, 21-22.
[643] *Ibid* at paras 11, 19.

Perhaps most surprisingly, the Court of Appeal offered a full-throated defence of the hate-speech law. The panel took umbrage with "Mr. Christie's persistent attacks" on the legislation, which Christie had repeated in the sentence appeal. The Court explained that promotion of hatred against identifiable groups "is a crime in Canada because widespread hatred of discreet groups is the antithesis of democracy." And while "Mr. Christie before us commented upon the paradox of a law that, in the name of free speech, forbids some speech … the greater paradox is offered by the argument that the principle of free speech justifies freedom for those who would end free speech." As such, the Court said, the "Canadian hate law condemns hatred of groups defined by race, gender, religion, or ethnic origin simply because in the recent history of western society these are the kinds of hatred that have led to persons ceasing to have civil rights in any meaningful sense." In sum, rejecting this "irrational hatred" was "essential if democracy shall be preserved."[644]

Internal correspondence among the Court of Appeal judges indicate that the Court intended to send a clear message to the Jewish community. In the words of Justice Kerans, "We tried to tell them they are part of society in the minds of almost all Albertans."[645] Justice Kerans was frustrated that media outlets did not comment on these aspects of the judgment, asking whether a full copy of the reasons could be published in a newspaper for the benefit of the Jewish community.[646] Indeed, it seemed many Canadian Jews had not received the Court's message. The *Canadian Jewish News* headlined the news item as "Keegstra fined $3,000," even though the Court had overturned the trial judge's decision to impose a $3,000 fine.[647] (The article was also relegated to page six, suggesting the diminished importance of the case to the community.) Congress and Calgary Jewish Community Council praised the Court of Appeal's decision to increase the penalty, although they did not comment on specific aspects of the reasons.[648] The CJC also criticized the community service portion of the sentence. "We would not want [Keegstra] engaged in community

[644] *Ibid* at para 17.
[645] Memorandum from Kerans JA to Paperny J, et al (30 September 1996), LASA (Fonds 79-00-02, vol 12, file 54).
[646] *Ibid*.
[647] "Keegstra fined $3,000 (by Alberta Court of Appeal)," *Canadian Jewish News* (3 October 1996) 6.
[648] *Ibid*.

service in our community," said Congress president Goldie Hershon. He has nothing to offer."[649] B'nai Brith was more critical, deeming the Court decision "a very light tap on the fingers."[650] As Rubin Friedman put it on behalf of the organization (in a comment suggesting he had not read the decision): "It's amazing the Alberta Court of Appeal has not yet received the message of the Supreme Court that promoting hate propaganda is illegal in Canada."[651] Friedman called the community-service order "so vague and indefinite to make it unenforceable."[652] Jewish groups were not alone in finding the community-service aspect of the sentence misguided; the Red Deer-based Central Alberta Refugee Effort thought involving Keegstra in community work would risk re-traumatizing victim groups and poisoning young minds.[653] It is not clear if Keegstra ever performed the community service.

His criminal proceedings finally behind him, Keegstra returned to a quiet life, settling in Red Deer.[654] Keegstra continued his job as a mechanic, then worked as a farmer with his brother John for several years, before picking up employment as a custodian and handyman at an apartment building.[655] Keegstra still believed his opinions were important to share. He wrote letters to the editor; in one published by the *Red Deer Advocate* in 1997, Keegstra railed against the absence of religious education from the public school curriculum.[656] In another published two years later, Keegstra defended creationism, describing science as "the occupation of discovering what is already in existence due to the creative mind of the Creator God."[657] In 2002 Keegstra spoke at a meeting of the Red Deer City Council, urging the city to ban strip bars.[658] (The Council voted to

[649] *Ibid*.
[650] James McCarten, "Keegstra's sentence increased on appeal," *Vancouver Sun* (27 September 1996) A10.
[651] *Ibid*.
[652] *Ibid*.
[653] Penny Caster, "Keegstra to do community work," *Red Deer Advocate* (27 September 1996) A2.
[654] Chris Zdeb, "March 28, 1983: Eckville split by teacher Keegstra's firing," *Edmonton Journal* (28 March 2014) A2.
[655] "Holocaust denier dead at age 80," *Red Deer Advocate* (13 June 2014) A1; "Holocaust denier Jim Keegstra dead at age 80," *Central Alberta Life* (19 June 2014) A4.
[656] Jim Keegstra, "Education is thought control – Keegstra" (letter to the editor) *Red Deer Advocate* (25 November 1997) A4.
[657] Jim Keegstra, "Creation, science and reality," *Red Deer Advocate* (3 September 1999) A4.
[658] Paul Cowley, "Strip club limits imposed by council," *Red Deer Advocate* (12 February 2002) A1.

restrict where strip bars could operate, but stopped short of a ban.) Thereafter, Keegstra fell from view, perhaps because the media stopped publishing and reporting on his opinions.

Keegstra also appeared in the headlines in 2000 when allegations surfaced that Canadian Alliance leader Stockwell Day and Keegstra were friends; Day had lived in Bentley, Alberta, at the same time Keegstra worked there as a mechanic.[659] Day strongly denied the allegation, explaining through a lawyer that he and Keegstra had merely spoken at the local garage.[660] Day also responded angrily to allegations linking him to Doug Christie.[661]

Keegstra passed away in June 2014, aged 80.[662] Reaction from the Jewish community was surprisingly muted. Kurz described Keegstra's passing to a reporter as "the end of an era," explaining that "old style, true neo-Nazis, overt anti-Semites, [and] conspiracy theorists have given way to more subtle racists and anti-Semites, like the ones that tie anti-Semitism to Zionism."[663] In addition, Paula Simons, then a journalist with the *Edmonton Journal* and now a Canadian Senator, argued that Keegstra's disciples had transmogrified into "the Truthers, the Birthers, the False Flaggers, the homophobes, the conspiracy theorists of all strains – flourish[ing] in today's social media ecosystem."[664] But, she continued, the lesson from Keegstra was that a different approach against these modern purveyors of hate is needed:

> Here's what I learned from Keegstra. Courts and cops can't stop hate. We must fight lies with truth, ignorance with knowledge. Since we cannot silence all the evil, noxious speech in the world, we must instead teach our children and ourselves to think critically and debate freely.[665]

XI. Conclusion

With Zundel's and Keegstra's passings, an era had indeed come to a close. Although the trials of 1985 seemed endless, in fact, as the Jewish community would learn, the proceedings

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[659] Graham Thomson, "Day angrily denies rumoured tie to Keegstra," *Edmonton Journal* (21 June 2000) A8.
[660] *Ibid*.
[661] Mike Trickey & Peter O'Neil, "Liberal charges of racism rile Day," *Calgary Herald* (16 November 2000) A9.
[662] "Holocaust denier dead at age 80," *supra* note 655.
[663] Joseph Brean, "Holocaust denier Keegstra dead at 80," *National Post* (14 June 2014) A2.
[664] Paula Simons, "Jim Keegstra's haunted legacy," *Edmonton Journal* (14 June 2014), online: https://edmontonjournal.com/news/local-news/paula-simons-jim-keegstras-haunted-legacy-hate-monger-forced-alberta-to-confront-its-dark-demons.
[665] *Ibid*.

against these two men were only getting started. Zundel faced a second trial and fought his convictions relentlessly, ultimately securing a landmark victory in the Supreme Court. However, Zundel's opponents, galvanized as before by Holocaust survivor Sabina Citron, found another path through the Canadian Human Rights Tribunal. This set off a chain events that led eventually to Zundel's flight from Canada, deportation, and criminal conviction in Germany. Keegstra, in a similar manner, refused to accept defeat, even after losing his constitutional challenge before Canada's highest court. When his criminal proceedings finally ended in 1996, Keegstra continued to voice his opinions in the public sphere, unchastened as always.

While both Zundel and Keegstra have passed, many others have picked up their mantle. And the debate rages on around the topics of freedom of expression, hate speech, vulnerable communities, and legal tools for countering racism. What can the story of these two hatemongers teach us about these issues? I turn to that question in my conclusion.

CHAPTER 6 – Conclusion

The historical background to the Zundel and Keegstra cases has received surprisingly little scholarly attention. I have sought to remedy that gap in this work. The history of *Keegstra*, *Zundel*, and the Jewish community is a rich one, touching on many themes. What lessons can we extract from this study to inform the contemporary debate surrounding the topics of hate speech, freedom of expression, legal tools for countering racism, and how best to protect vulnerable groups?

In this conclusion I suggest three such lessons: first, that to understand and respect vulnerable communities, we must acknowledge divisions within these groups; second, that the criminal law is a poor mechanism for countering hate speech; and third, that civil law remedies and non-legal approaches should be relied on to supplement the criminal law in the fight against harmful expression. I expand on these points below.

I. Treating vulnerable communities with dignity demands respect for diversity of opinion

Scholars who have written about the history of the Keegstra and Zundel cases have tended to frame them as unifying exercises; in other words, as an example of how the Jewish community came together to fight antisemitism. There is some truth to this perspective. As I have recounted, Jewish organizations and individuals with varying political, religious, and philosophical alignments worked hand in hand to bring Zundel and Keegstra to justice. The extent of cooperation within the Jewish community was extraordinary. Numerous interviewees, archival documents, newspaper articles, and other sources speak to extensive collaboration among Jewish organizations and individuals during the campaign to obtain the hate-speech legislation and throughout the Zundel and Keegstra affairs. This level of cooperation is commendable. Canadian-Jewish scholar Franklin Bialystok described this unifying effect well in writing that, once the charges against

Zundel and Keegstra were laid, "Long-held divisions and animosities were set aside … [and] fissures between survivors and Canadian Jews were closed."[1]

But a central theme that arises time and again in this story is how much the hate-speech issue, and Zundel and Keegstra specifically, created and exacerbated divisions within the Jewish community. Peter Griffiths, who prosecuted the first Zundel trial, eloquently described these dynamics. It is worth quoting him again here:

> [T]he Jewish community, to my observation as an outsider, was divided on the issue. They were divided during the trial. They were divided after the trial. And I had the opportunity to speak, I don't know, a dozen different times to different Jewish groups, synagogues, conferences. That was the same at every conference and every group that I spoke with. There were people who said this never should have happened. And there were people who said, "This history, our memories of that time of our loved ones that were murdered, should not be stripped away from us through the lies of this man." And he should be held accountable for those lies. And that by running a successful prosecution, you prove to the world that they're lies.[2]

Cracks first appeared in the 1960s over the question of whether to criminalize hate speech. Community leadership, represented by the Canadian Jewish Congress and the League for Human Rights of B'nai Brith Canada (and jointly through the Joint Public Relations Committee),[3] was initially hostile to the criminalization of hate speech. Many Holocaust survivors, in contrast, loudly called for hate-speech legislation. The tireless efforts of the Association of Former Concentration Camp Inmates/Survivors of Nazi Oppression (the "Association of Holocaust Survivors") finally pushed communal leaders to act. Even though the Association of Holocaust Survivors worked with community leadership to secure passage of the provisions, the survivors loudly dissented on the legislation's final wording, predicting it was too weak and would be difficult to enforce. They have been proved correct.

Divisions festered throughout the 1970s and early 1980s as neo-Nazism and Holocaust denial gained prominence. Once the hate-speech legislation was enacted, Canadian Jewish leaders were sometimes apathetic and sometimes openly hostile to using it. This stance came under increasing pressure as a worldwide Holocaust denial movement emerged. News that arguably the

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[1] Franklin Bialystok, *Delayed Impact: The Holocaust and the Canadian Jewish Community* (Montreal & Kingston: McGill-Queen's University Press, 2000) at 234-35.

[2] Interview of Peter Griffiths (6 May 2022) [on file with author] at 16 [Griffiths Interview].

[3] In this conclusion, I will again refer to the Canadian Jewish Congress as "CJC" or "Congress," to the League for Human Rights of B'nai Brith Canada as "B'nai Brith," and to the Joint Public Relations Committee as the "JPRC."

world's leading Holocaust denier—Ernst Zundel—lived in Toronto further enflamed the situation. Holocaust survivors and others demanded his prosecution. Although charges were blocked by Ontario Attorney General Roy McMurtry, some within community leadership were content with to leave Zundel alone. However, the effort to prosecute Zundel continued to gather momentum, led by a new survivor-advocacy group created by Sabina Citron and Helen Smolack, the Canadian Holocaust Remembrance Association (CHRA). Citron and the CHRA broke the impasse, charging Zundel privately with spreading false news. Divisions also arose around the same time over the question of how to deal with James Keegstra in Alberta; revelation of his teachings sent shockwaves through the Jewish community, but, as with Zundel, many Jews did not want Keegstra charged. Indeed, Keegstra's prosecution was initiated without any significant lobbying from the Jewish community. In fact, Alberta's leading Jewish newspaper, the *Jewish Star*, loudly and consistently argued that the prosecution was a bad idea.[4] The *Jewish Star* was far from alone in this view.

The prosecutions of Zundel and Keegstra in 1985 threatened to tear the Jewish community apart. The *Canadian Jewish News* called 1985 "a year of memory and pain."[5] Zundel's trial was especially painful. Brutal cross-examination of Holocaust survivors by Doug Christie led many to question the wisdom of prosecution. One poignant example is Arnold Friedman's recollection that after he testified, "when I walked into the synagogue, people shunned me."[6] The Keegstra trial, too, was agonizing for many. As the *Jewish Star* put it, the "result of the trial was that in carrying out the legal process, Jews got dragged through the mud."[7] One consequence of this trauma was intense debate among Canadian Jews over the use of the criminal law to combat hate speech. This debate played out in kitchens, synagogues, conference rooms, school auditoriums, newspapers, and television programs, among countless venues. The view of then Congress president Milton

[4] See eg "Unfinished business," *Jewish Star* (Calgary Edition) (15 July – 12 August 1983) 4.
[5] Patricia Rucker, "Long hate trials taught us that we are all survivors," *Canadian Jewish News* (12 September 1985) 10.
[6] Interview of Arnold Friedman by Dave Harris (27 March 1995) [on file with the USC Shoah Foundation Visual History Archive].
[7] "Was it worth it?" (editorial), *Jewish Star* (Calgary) (23 August – 12 September 1985) 4.

Harris is representative of those who opposed further prosecutions. Here again it is worth re-quoting Harris in full:

> It's time … that we who claim to be leaders in the Jewish community apprise our constituency of the consequences of these trials. This has never been done. We somehow had the idea when we lobbied for legislation that there would be a prosecution it would be consented to by the Attorney General, there would be a great blanket of secrecy at that point and the next thing we would hear is that the accused was behind bars and silenced. Anybody who suggests that to our community is being totally irresponsible. It is impossible to avoid the severe consequences of these trials.[8]

Such soul-searching did not end in 1985. Zundel's and Keegstra's prosecutions were in a sense only getting started. In the coming years both men continued to move through the criminal justice system. Zundel faced a second trial—and second conviction—before his case reached the Supreme Court of Canada in 1992. Zundel's victory at the Supreme Court was a crushing blow for Canadian Jews; in the words of the *Canadian Jewish News*, it felt like "a rotten decision."[9] Zundel's success brought renewed accusations and recriminations within the Jewish community over the decision to prosecute him in the first place. But Zundel's victory was short-lived. Ultimately, it was a civil prosecution, under Section 13(1) of the *Canadian Human Rights Act*,[10] that finally brought Zundel to heel. This proceeding led to Zundel's flight from Canada, his deportation to Germany, and his criminal conviction there. Keegstra, for his part, found less success at the Supreme Court, losing his appeal in 1990. However, Keegstra's criminal proceedings dragged on for several more years. All the while, calls from many Canadian Jews to drop the Keegstra case continued, but were ignored by both community leadership and the government. Keegstra's criminal prosecution finally ended in 1996 with one year of probation and 200 hours of community service. This light sentence—achieved after 12 long years of criminal proceedings—left some asking whether resources might have been better spent elsewhere.

The Zundel and Keegstra cases are, then, arguably representative more of community division than unity. The alphabet soup of organizations involved in the prosecutions in one form

[8] Minutes of the Joint Community Relations Committee, Ontario Region (8 March 1985), Montreal, Alex Dworkin Canadian Jewish Archives (Fonds DA21, Box 19, File 12) at 3 [8 March 1985 JCRC meeting].
[9] Paul Lungen, "A rotten decision," *Canadian Jewish News* (10 September 1992) 1.
[10] RSC, 1985, c H-6.

or another—the CJC, BB,[11] JPRC, CHRA, JDL,[12] FSWC,[13] JFE,[14] CJCC,[15] and CCLA,[16] to provide a non-exhaustive list—were amoebas, sometimes coming together, sometimes diverging in the fight against antisemitism. Nor was opinion uniform within these organizations. The CJC offers a salient example, reflected in the minutes from countless meetings over the years in which the hate-speech issue was discussed and debated. And division among these institutions reflected further divisions among individuals in the broader community, which broke down along other lines including sex, gender, religious observance, and even geography (as evidenced by the divide between eastern-Canadian and western-Canadian Jews, noticeable during the Keegstra affair). Accordingly, while I have referred in this study to "the Jewish community"—and will continue to do so below—in fact this is a story not about one community but about multiple communities.

Reflecting on this rift, two fault lines are particularly notable. Embedded in these fault lines are important historiographical lessons about segments of the Jewish community whose contributions are frequently elided and underappreciated.

The first is between Holocaust survivors and community leadership. Scholars like Bialystok and Myra Giberovitch have shown how the vast contributions made by Holocaust survivors in Canada have gone largely unrecognized.[17] The history provided in this dissertation can likewise be viewed as a story of Holocaust survivor advocacy – a story that has received little attention in the scholarly record. At every stage of this history Holocaust survivors played a central role. This began with lobbying to criminalize hate speech; survivors pushed the issue forward in the face of steadfast opposition from community leaders. With the rise of neo-Nazism and Holocaust denial in the 1970s, it was survivors who spearheaded opposition. After breaking off with the CJC over its allegedly passive stance against antisemitism, Citron and the CHRA

[11] B'nai Brith.
[12] Jewish Defence League.
[13] Friends of Simon Wiesenthal Centre for Holocaust Studies.
[14] Jewish Federation of Edmonton.
[15] Calgary Jewish Community Council.
[16] Canadian Civil Liberties Association.
[17] See Bialystok, *supra* note 1; Myra Giberovitch, *The Contributions of Montreal Holocaust Survivor Organizations to Jewish Communal Life* (MA Thesis, McGill University, 1988) [unpublished].

relentlessly pursued antisemites. They first went after John Ross Taylor under Section 13(1) of the *Canadian Human Rights Act*. Taylor was found guilty and eventually served jail time for breaching a cease-and-desist order. Taylor's conviction was ultimately upheld by the Supreme Court of Canada.[18] The CHRA then turned its sights on Zundel. When the government refused to consent to a prosecution for wilful promotion of hatred, Citron obtained a ban on Samisdat's mailing privileges under the *Canada Post Corporations Act*.[19] After this ban was overturned, Citron initiated a private prosecution against Zundel for spreading false news. In so doing she forced both the government and leading Jewish organizations to support the prosecution despite their reservations. Although this prosecution ended in failure when the Supreme Court invalidated the false news provision in 1992, Citron still did not relent. In her words, she took an hour to recover before renewing the fight.[20] When the government again refused to prosecute Zundel, it was Citron who found another path, commencing a prosecution against Zundel under Section 13(1) of the *Canadian Human Rights Act*. As before, she did so in the face of opposition from the CJC, which initially refused to support her and tried to discourage her from bringing the case forward.

In short, at every stage of this history the survivors led and community leadership followed. Citron and her fellow survivors deserve credit for these efforts. Arriving in Canada after the war, they rebuilt their shattered lives and contributed immensely to communal life and to the fight against antisemitism. Citron, who died in 2023,[21] is a paradigmatic example.

The second notable fault line is between civil libertarians and others in the Jewish community. Numerous founding and leading members of the Canadian Civil Liberties Association were Jewish lawyers who were also active in Jewish community leadership. The CCLA's ties to the Jewish community deserve greater recognition than they have received. Most prominent among these civil libertarians was Alan Borovoy, General Counsel and intellectual driving force of the

[18] *Canada (Human Rights Commission) v Taylor*, [1990] 3 SCR 892 [*Taylor*].
[19] As noted previously, Samisdat was the name of Zundel's publishing house.
[20] Sean Fine, "Jewish congress seeks new charges," *Globe and Mail* (29 August 1992) A9.
[21] "Sabina Citron Z"L Survivor, Activist, Author, Mother, and Friend," *The Times of Israel* (11 December 2023), online: https://www.timesofisrael.com/spotlight/sabina-citron-zl-survivor-activist-author-mother-and-friend/.

CCLA for more than forty years. Concurrent with his time leading the CCLA, Borovoy was a devoted member of the Canadian Jewish Congress and the JPRC. Borovoy abhorred the hate-speech legislation and fought against its enactment and use at every turn – a fight that pitted him against many of his co-religionists. In so doing, Borovoy and the CCLA repeatedly stepped in to defend the rights of Zundel, Keegstra, and other hatemongers. Examples are legion.

Let us take Zundel first. After Samisdat's mailing privileges were revoked in the early 1980s, the CCLA supplied Zundel with a lawyer *pro bono*. The CCLA also intervened in the case, with future Ontario Attorney General Ian Scott supplying representation at the hearing. (Notably, Zundel was himself a member of the CCLA at this time.) Borovoy continued to back Zundel's rights in the coming years. As one may recall, Borovoy even called in to Tom Cherington's television show on CHCH TV in November 1983 to defend Zundel's freedom of speech when Zundel appeared on the program alongside Citron. After Zundel was convicted of spreading false news in 1985, the CCLA attempted unsuccessfully to intervene on his behalf before the Court of Appeal for Ontario, with famed Jewish criminal defence lawyer Eddie Greenspan arguing the application. The CCLA then intervened before the Supreme Court of Canada—the only intervener on Zundel's side—represented again by Marc Rosenberg.

So too with Keegstra. After Keegstra was charged with wilful promotion of hatred, Borovoy unsuccessfully lobbied the government to refer the constitutionality of the legislation directly to the Supreme Court of Canada, which would have avoided putting Keegstra on trial. Borovoy tried to have the CJC support this effort, arguing convincingly that referring the matter to the Supreme Court was in the Jewish community's best interests as it would prevent Keegstra from proclaiming himself a civil rights hero. After this attempt failed, the CCLA later intervened on Keegstra's behalf at the Supreme Court—again, the only intervener to do so—with Rosenberg providing oral argument.[22] Thereafter, Borovoy continued to argue that the case should be dropped.

[22] The CCLA also intervened on the defence side in the companion cases of *Taylor*, *supra* note 18 and *R v Andrews and Smith*, [1990] 3 SCR 870. Rosenberg acted for the CCLA in all three cases.

Such direct assistance provided by the CCLA to Zundel and Keegstra was supplemented by countless public and private statements arguing that speech regulation was wrong in principle and bad for the Jewish community.[23] Borovoy publicly and privately debated fellow Jews on this issue innumerable times.[24]

Borovoy and his fellow Jewish civil libertarians embodied the dogma that one should "provide freedom to the thought that we hate."[25] Indeed, Borovoy—a proud Jew—despised Zundel, Keegstra, and their ilk. He was also disturbed by the pain the CCLA's position was visiting on Holocaust survivors, who, in Borovoy's words, "simply did not deserve such unremitting repetition of this affront to their dignity."[26] And it saddened Borovoy to watch Zundel celebrate his Supreme Court win, lamenting that a "creep like Zundel will try to portray this as a vindication of his malevolent obscenities."[27] But in his pursuit of freedom for all he was prepared to defend the rights of his enemies. This is what it means to stand on principle.

For their efforts, Borovoy and fellow CCLA members were vilified by both sides. As Borovoy recalled in his memoir, longtime friends and colleagues in the Jewish community denounced his position on the hate-speech issue, with some accusing him of being a "self-hating Jew."[28] Some of this criticism came from Holocaust survivors who were understandably upset by the CCLA's stance. One may remember Borovoy being shouted down at a Holocaust-commemoration event in 1985.[29] Helen Smolack accused the CCLA of "outrageous interference"

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[23] Recall that Marc Rosenberg also represented the accused in *R v Buzzanga and Durocher*, 25 OR (2d) 705, 1979 CanLII 1927 (CA), in which the Court of Appeal for Ontario adopted a narrow definition of "wilful" for purposes of the offence of wilful promotion of hatred. Rosenberg's co-counsel, Morris Manning, was also Jewish and a strong civil libertarian.

[24] With respect to Borovoy's public debates, see eg Flyer entitled "Hate, Freedom of Speech, and the Law: A Debate Between Alan Borovoy and David Matas," Calgary, Legal Archives Society of Alberta (Fonds 113-00-02, Vol 2, File 41); Flyer entitled "Propagation of Hate" (1 April 1985), Montreal, Alex Dworkin Canadian Jewish Archives (DB15 Box 23 File 5); Interview of Les Scheininger (9 February 2021) at 4-6 [on file with author] [Scheininger Interview]; Griffiths Interview, *supra* note 2 at 26.

[25] This line originates from American Supreme Court Justice Oliver Wendell Holmes's dissenting judgment in *United States v Schwimmer*, 279 US 644 (1929).

[26] A Alan Borovoy, *"At the Barricades": A memoir* (Toronto: Irwin Law, 2013) at 130 [*At the Barricades*].

[27] Sean Fine, "Top court quashes Zundel's conviction; Back in business, publisher says," *Globe and Mail* (28 August 1992) A1.

[28] *Ibid* at 129.

[29] "Criminal Code hate laws are dangerous, Jews told," *Red Deer Advocate* (1 May 1985) 3A.

and of promoting racial hatred.[30] But criticism also came from communal leaders; Prutschi, for example, claimed the CCLA had endorsed "wanton slandering" of Jews.[31]

Criticism from the other side was equally strident, even though the CCLA was lending Zundel and Keegstra invaluable assistance. After Borovoy in his letter of July 1986 accused Christie of engaging in Holocaust denial,[32] Christie began treating the CCLA as his antagonist. Christie called Borovoy's letter a "vicious, arrogant, and prejudiced diatribe, [dripping] with the hatred of one whose tribal prejudices superseded any real love for civil and human rights."[33] Christie then opposed the CCLA's application to intervene in support of Zundel at the Supreme Court—calling the CCLA a meddlesome special interest group—apparently because Christie was still upset by Borovoy's letter.[34] In other words, Christie, out of petty grievance, would have denied Zundel the assistance of the only organization prepared to stand up for him.

One of the great ironies of the Zundel and Keegstra prosecutions is that these antisemites' most effective advocates came from the Jewish community – namely, Borovoy, Greenspan, Rosenberg, and others in the CCLA. Indeed, Zundel's and Keegstra's legal victories may have been impossible without the CCLA's tireless support (support that was, not incidentally, supplied *pro bono* by some of the country's most well-respected counsel). For example, Zundel's shocking success before the Board of Review in the early 1980s, which restored Samisdat's mailing privileges, may be explained by the CCLA's advocacy at the hearing. Zundel, who had turned to the Borovoy in desperation, was provided with his own lawyer (Lynn McGaw) and a future Attorney General as intervenor (Ian Scott). Moreover, Zundel's greatest legal victory—his win at the Supreme Court—owes much to the CCLA. As the vote was 4-3, it is reasonable to speculate that Rosenberg's advocacy at the hearing may have tipped the balance; if nothing else, the CCLA lent Zundel's position an aura of respectability, making clear that Zundel's support was not

[30] Defense of Hatemonger Draws Attack on CCLA," *Jewish Star* (31 March 1989) 1.
[31] *Ibid*.
[32] Letter from A Alan Borovoy to Douglas Christie (28 July 1986), Ottawa, Library and Archives Canada Fonds R9833-817-4-E, Vol 36, File number: FF-HP-207).
[33] *At the Barricades*, *supra* note 26 at 132.
[34] Submission of Doug Christie (filed 28 August 1989), *R v Keegstra*, Court File No 21118.

confined to fringe, xenophobic circles. Notably, in her majority reasons, Justice McLachlin (as she then was) explicitly adopted the CCLA's argument that the offence of spreading false news was counterproductive to the goal of multiculturalism because it could have a chilling effect on the freedom of expression of minority groups, who might be more likely to voice unpopular views.

Christie provides a useful foil for Borovoy. Christie, who passed away in 2013,[35] liked to present himself as an advocate for free expression. In fact, Christie's website claims he "was Canada's most prolific defender of free speech."[36] But Christie's affinity for freedom of expression seemed less enthusiastic when it came to views that did not align with his own. Christie at least twice sued his critics for defamation.[37] (Said Gary Botting: "I'm all in favour of a free marketplace of ideas. But Christie always seemed to go that one step farther."[38]) In contrast, Borovoy, who passed away in 2015,[39] spoke up for his enemies at great personal cost. Who then was Canada's most prolific defender of free speech?

Thus, in a very real sense the story of Zundel and Keegstra is not one of the Jewish community battling racism. It is of different factions of the Jewish community battling each other. Zundel, Keegstra, and Christie merely provided the screen upon which a deeper legal, political, and philosophical debate among Canadian Jews could be projected.

This conclusion has salience beyond the Jewish community. There is a tendency to treat vulnerable communities as monoliths. They are not. It is this tendency that leads people to express shock when they learn that millions of Latino and Hispanic voters in the 2024 American presidential election supported Donald Trump,[40] that the first openly transgender member of the

[35] Sarah Boesveld, "The Battling Barrister's final fight," (13 March 2013) A3.
[36] "Douglas Christie," https://www.douglaschristie.com (accessed 20 November 2024).
[37] *Christie v Greiger*, 1986 ABCA 206; *Christie v Westcom Radio Group Ltd*, 1990 CanLII 775 (BCCA). Christie won the former case and lost the latter. Christie also threatened Borovoy with legal action in response to Borovoy's July 1986 letter. See *At the Barricades*, *supra* note 26 at 132.
[38] Jody Paterson, "An uneasy peace," *Times Colonist* (Victoria) (3 March 2002) D1.
[39] Martin Levin, "Civil rights champion fought tough battles," *Globe and Mail* (30 May 2015) S12. Marc Rosenberg also passed away in 2015 (Kirk Makin, "Supreme jurist never sat on top court," *Globe and Mail* (5 September 2015) S10) and Eddie Greenspan died in 2014 (Sean Fine, "Greenspan was a force of nature – and a lawyer to his core," *Globe and Mail* (26 December 2014) A1).
[40] Geraldo Cadava, "Understanding Latino Support for Donald Trump," *The New Yorker* (18 November 2024), online: newyorker.com/news/the-lede/understanding-latino-support-for-donald-trump; Rogé Karma, "Why Democrats Got

United States Congress is also a proud Zionist,[41] or that eighty percent of Palestinian citizens of Israel opposed the 7 October 2023 attack by Hamas, which purported to liberate them.[42] Minority groups are not abstractions, capable of manipulation to support positions that others tell them is in their best interests. These are living, breathing communities, whose members have agency to think for themselves and express their own viewpoints.

Treating vulnerable communities with dignity demands respect for their diversity of thought. Failure to acknowledge diversity of opinion infantilizes minority groups and leaves us impoverished in our understanding of how these groups function. Communities rarely speak with one voice. And when they do not, it is imperative that we engage deeply with these communities and make an effort to understand them, instead of labeling unpopular opinions aberrations or depicting those who voice them as heretics.

Indeed, as pioneering scholar of critical race theory Kimberlé Crenshaw writes: "The problem with identity politics is not that it fails to transcend difference … but rather the opposite – that it frequently conflates or ignores intragroup differences."[43] And as Crenshaw further argues, "ignoring difference *within* groups contributes to tension *among* groups."[44] This is because treating minority groups as monoliths evidences a lack of consideration and respect for these communities that invariably promotes inter-group conflict. Furthermore, aside from inter-group conflict, ignoring intra-group differences may also lead to intra-group tension. We saw this in the story of Zundel and Keegstra, where tension frequently arose within the Jewish community over a failure to meaningfully engage with dissenting views, such as those advanced by Holocaust

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the Politics of Immigration So Wrong for So Long," *The Atlantic* (12 December 2024), online: theatlantic.com/ideas/archive/2024/12/democrats-latino-vote-immigration/680945/.

[41] Drew Burnett Gregory, "Sarah McBride Is a Zionist," *autostraddle* (15 November 2014), online: autostraddle.com/sarah-mcbride-is-a-zionist/.

[42] Rachel Friedman, "Arab-Israelis are facing a crisis. But there's a way out." *MENASource* (2 February 2024), online: atlanticcouncil.org/blogs/menasource/arab-israelis-crisis/. At the end of 2022 Palestinian citizens of Israel numbered approximately 1.7 million, comprising 17% of Israel's total population. Muhammed Khalaily, et al, *Statistical Report on Arab Society in Israel 2023* (Jerusalem: Israel Democracy Institute, 2023), online (pdf): en.idi.org.il/media/24717/summary-the-arab-community24-en-web.pdf at 4.

[43] Kimberlé Williams Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color" in Crenshaw et al, eds, *Critical Race Theory: The Key Writings That Formed the Movement* (New York: The New Press, 1995) 357 at 357.

[44] *Ibid*.

survivors or civil libertarians. These opinions were too often dismissed as unrepresentative by those who disagreed with them. We see this same phenomenon playing out in the Jewish community today, with anti-Zionist Jews—amidst a devastating and seemingly intractable conflagration in the Middle East—portrayed as "fringe" or "self-hating" rather than what they are: members of the community expressing a different opinion.[45] (As mentioned above, some in the Jewish community tried to delegitimize Borovoy's position on hate speech by calling him a "self-hating Jew.") As Holocaust survivor Judy Cohen commented when I interviewed her in 2021: "God forbid, you shouldn't be a staunch Zionist. … You're not really a Jew then [laughs]. You're a self-hating Jew as they love to say. Oh, I hate that expression – self hating Jew."[46]

There is also the matter of intersectionality. People generally have multiple, overlapping identities. Sabina Citron, for instance, was not only Jewish and a Holocaust survivor; among other things, she was a woman operating in the male-dominated world of community politics, and she was also a wealthy factory owner, high on the socioeconomic scale. These and other aspects of her identity informed Citron's worldview – and influenced how others interacted with her. As Richard Delgado and Jean Stefancic, two other leading scholars of critical race theory, point out, "Many races are divided along lines of socioeconomic status, politics, religion, sexual orientation, and national origin, each of which generates intersectional individuals. Even within groups that are seemingly homogenous, one finds attitudinal differences."[47] Indeed, the Jewish community is not even racially or ethnically homogenous, consisting, for example, of significant numbers of Sephardim and Mizrahim (whose roots trace back to traditionally Muslim countries), who make up about 25% of the worldwide Jewish population and 45% of Israel's Jewish population.[48] (A

[45] See Sue-Ann Levy, "Self-hating Jews Who Enable the Evils of Anti-Semitism" (op-ed), *TheJ.ca*, online: thej.ca/2020/05/24/self-hating-jews-who-enable-the-evils-of-anti-semitism/; "'Fringe' activists condemned by Jewish groups after Parliament Hill occupation," *National Post* (4 December 2024), online: nationalpost.com/news/canada/fringe-jewish-anti-israel-activists-condemned. For an example of this phenomenon outside the Jewish community, see River Page, "The Smearing of Gay Republicans," *The Free Press* (30 October 2024), online: thefp.com/p/gay-republicans-trans-rights-trump-republicans-democrats.

[46] Interview of Judy Cohen (2 April 2021) [on file with author] at 21.

[47] Richard Delgado & Jean Stefancic, *Critical Race Theory: An Introduction*, 3rd ed (New York: New York University Press, 2017) 62.

[48] Noah Lewin-Epstein & Yinon Cohen, "Ethnic origin and identity in the Jewish population of Israel," (2018) Journal of Ethnic and Migration Studies, online (pdf): https://people.socsci.tau.ac.il/mu/noah/files/2018/07/Ethnic-origin-and-

nuance that seems to have been missed by those telling Jews to "go back to Europe."[49]). Within these racial and ethnic divisions, one finds myriad other distinctions based on gender, religious observance, sexual orientation, socioeconomic status, politics, national origin, and the like (as reflected by even a cursory glance at contemporary Israeli politics.) All of this is to say that to envision Jews as a homogeneous category is, by definition, to misunderstand them. And by misunderstanding them, we perpetuate stereotypes and inaccuracies that are unhelpful at best, discriminatory at worst, and bound to lead to inter- and intra-group tension. We also risk silencing and othering those who do not fit within our preconceived idea of what a Jew should look and sound like. The same is true of any other minority group. As Delgado and Stefancic put it, "Categories and subgroups … are not just matters of theoretical interest. How we frame them determines who has power, voice, and representation and who does not."[50]

II. The criminal law is an ineffective tool for countering hate speech

Although the Canadian Jewish community was long divided over the criminalization of hate speech, much of this division appears to have evaporated. Faced with a disturbing rise in antisemitic incidents in recent years,[51] Canadian Jewish organizations have called for increased enforcement of Canada's hate-speech provisions and the creation of new criminal law tools.[52]

identity-in-Israel-JEMS-2018.pdf at 8. Sephardic Jews trace back to the Iberian Peninsula and settled primarily in North Africa following the Spanish Inquisition. Mizrahi Jews descend from Jews who lived for millennia in or around modern-day Iraq, Iran, Egypt, Syria, Jordan, Turkey, and Yemen (and other countries in this region). Ashkenazim, who originated in northern, eastern, and central Europe, comprise a majority of Jews worldwide but only about 48% of Israeli Jews. (See *ibid*. The authors divide this population between Ashkenazi Jews and Jews who immigrated to Israel from the former USSR; I have combined these populations for simplicity and as others have done.) In addition to Israel's Sephardi, Mizrahi, and Ashkenazi populations, about 3% of Israeli Jews are of Ethiopian origin and 8% are mixed (*ibid*).

[49] Jo-Ann Mort, "'Israelis, go back to Europe? Some on the left need to rethink their slogans," *The Guardian* (15 May 2024), online: theguardian.com/commentisfree/article/2024/may/15/israelis-go-back-to-europe-slogan; Ari Blaff, "Anti-Israel protesters shout 'Go back to Europe' outside synagogue north of Toronto," *National Post* (8 March 2024), online: https://nationalpost.com/news/toronto/thornhill-synagogue-protest.

[50] Delgado & Stefancic, *supra* note 47 at 62.

[51] Steve Paikin, "What can we do about antisemitism in Canada?" *TVO Today* (23 September 2024), online: tvo.org/article/what-can-we-do-about-antisemitism-in-canada.

[52] See B'nai Brith Canada, "Canada Must Enforce Its Existing Hate Crime Laws," online: .bnaibrith.ca/hate_crimes_canada/ (accessed 25 November 2024); CIJA, "Reform the justice system to fight hate crimes," online: cija.ca/reform_the_justice_system_to_fight_hate_crimes (accessed 25 November 2024); Friends of Simon Wiesenthal Center for Holocaust Studies, "FSWC Welcomes New Federal Legislation to Combat Hate in

Support from the Jewish community was essential to the Canadian government's decision to criminalize Holocaust denial in 2022.[53] Moreover, Jewish organizations have praised the *Online Harms Act*, recently tabled by the federal Liberal government, which proposes to enact new regulations to combat harmful content on the Internet, re-introduce Section 13 of the *Canadian Human Rights Act*, and significantly increase the maximum penalties available under the hate-speech provisions in the *Criminal Code*.[54] Dissenting voices within the Jewish community on the issue of speech regulation and criminalization are difficult to find.

Jewish support for criminalization of hate speech aligns with views expressed by other minority groups. Like Jewish organizations, the National Council for Canadian Muslims has demanded that the Canadian government to do more to prosecute hate crimes—in the shadow of alarming increases in Islamophobia—and praised the *Online Harms Act*.[55] In addition, Indigenous groups have lobbied the federal government to criminalize residential school denialism; Member of Parliament for the New Democratic Party Leah Gazan recently introduced a private member's bill in the House of Commons that seeks to criminalize the "condoning, denying, downplaying or justifying the Indian residential school system in Canada or by misrepresenting facts related to it."[56] (This language is similar to that employed in the *Criminal Code* provision that outlaws

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Canada" (27 February 2024), online: fswc.ca/news/fswc-welcomes-new-federal-legislation-to-combat-hate-in-canada.

[53] Marie Woolf, "Holocaust denial – and downplaying the Nazis' murder of Jews – to be outlawed," *Canadian Press* (8 April 2022). See *Criminal Code*, RSC 1985, c C-46, s 319(2.1) [*Criminal Code*].

[54] On praise from the Jewish community for the *Online Harms Act*, see "FSWC Welcomes New Federal Legislation to Combat Hate in Canada," *supra* note 52; CIJA, "CIJA Welcomes Long-Awaited Online Harms Legislation" (26 February 2024), online: cija.ca/cija_welcomes_long_awaited_online_harms_legislation. B'nai Brith called the *Online Harms Act* "a step in the right direction" but has asked for more punitive measures and greater recognition of antisemitism (B'nai Brith Canada, "B'nai Brith Canada Calls For Concrete Measures to Combat Antisemitism Following Introduction of Online Harms Act" (26 February 2024), online: bnaibrith.ca/bnai-brith-canada-calls-for-concrete-measures-to-combat-antisemitism-following-introduction-of-online-harms-act/).

[55] Dylan Robertson, "National Council of Canadian Muslims cancels Trudeau meeting over hate crimes," *CTV News* (30 January 2024), online: globalnews.ca/news/10259379/nccm-cancels-trudeau-meeting/; Marie Woolf, "Controversy over new human rights chief threatens support for online harms bill," *Globe and Mail* (10 July 2024), online: theglobeandmail.com/politics/article-controversy-over-new-human-rights-chief-threatens-support-for-online/.

[56] Alessia Passafiume, "Survivors call on Canada to criminalize residential school denialism," *CBC News* (31 October 2024), online: https://www.cbc.ca/news/politics/residential-school-denialism-1.7369449.

Holocaust denial.) This bill enjoys significant support.[57] Even the federal Conservative Party, which opposes the *Online Harms Act*,[58] has thus far been careful not to criticize Gazan's bill.[59]

Canada's embrace of the criminal law to counter hate speech is reflective of a worldwide trend. As noted, in just the last two years, Australia, South Africa, Scotland, Sweden, Ireland, and Nigeria have proposed or enacted new criminal laws targeting hate speech, to provide a non-exhaustive list.[60] Even in the United States, where the First Amendment seemingly makes it impossible to criminalize speech (absent an additional factor such as incitement to violence[61]), some commentators have recently called for hate speech to be criminalized.[62]

Let us then return to the question posed at the outset of this dissertation: is this trend a positive one? To be more specific, is the criminal law a useful tool for countering harmful speech and uplifting marginalized groups?

The Keegstra and Zundel cases suggest that the criminal law is, in fact, an intrinsically flawed mechanism for combating hate speech and empowering vulnerable communities. I say this for three reasons. First, hate-speech prosecutions may undermine the group dignity and sense of inclusion of minority groups. Second, criminal laws against hate speech do not serve the primary

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[57] *Ibid*.

[58] Stephanie Taylor, "Poilievre promises to scrap Online Harms Act after budget watchdog projects $200M cost," *CBC News* (4 July 2024), online: cbc.ca/news/politics/poilievre-promises-scrapping-online-harms-act-1.7254701 ["Poilievre promises to scrap Online Harms Act"].

[59] Olivia Stefanovich, "Bill before Parliament would outlaw residential school 'denialism'," *CBC News* (26 September 2024), online: cbc.ca/news/politics/ndp-mp-private-members-bill-residential-school-denialism-1.7334916.

[60] Natassia Chrysanthos, "Labor's hate speech bill to outlaw vilification," *The Sydney Morning Herald* (26 May 2024), online: smh.com.au/politics/federal/labor-s-hate-speech-bill-to-outlaw-vilification-20240524-p5jgdw.html; Daniel Itai, "South African president signs new hate crimes, hate speech law," *Washington Blade* (12 May 2024), online: washingtonblade.com/2024/05/12/south-african-president-signs-new-hate-crimes-hate-speech-law/; James Cook, "Scotland's new hate crime law comes into force," *BBC* (1 April 2024), online: bbc.com/news/uk-scotland-68703684; "Sweden's Parliament Approves Proposal to Outlaw Holocaust Denial and Distortion," *World Jewish Congress* (22 May 2024), online: worldjewishcongress.org/en/news/swedish-parliament-proposes-resolutions-to-outlaw-holocaust-denial-and-distortion; Joshua Askew, "New hate speech laws kick up a storm in Ireland," *EuroNews* (3 May 2023), online: euronews.com/2023/05/03/new-hate-speech-laws-kick-up-a-storm-in-ireland.

[61] *Brandenburg v Ohio*, 395 US 444 at 447-48.

[62] Richard Stengel, "Why America needs a hate speech law," *Washington Post* (7 November 2019), online: washingtonpost.com/opinions/2019/10/29/why-america-needs-hate-speech-law/; Mannirmal Kaur Jawa, "The 'offensive' oversimplification: An argument for hate speech laws in the modern era," 19:5 *First Amendment Law Review* (2020); Noah Berlatsky, "Is the First Amendment too broad? The case for regulating hate speech in America," *NBC News* (23 December 2017), online: nbcnews.com/think/opinion/first-amendment-too-broad-case-regulating-hate-speech-america-ncna832246.

objectives of criminal justice. Third, hate-speech trials may impede the search for truth, a fundamental purpose of the criminal process.

Before expanding on these arguments, I want to emphasize two additional lessons of the Keegstra and Zundel prosecutions.

First, there is an emotional cost associated with hatemonger trials that must be acknowledged. During the recent trend toward criminalizing hate speech, there is scant evidence that this cost is being considered. As *Zundel* and *Keegstra* illustrate, victimized groups may pay a heavy price in pain and distress by invoking the criminal process. Certainly, every trial is different, and it can be argued that *Zundel* and *Keegstra* were particularly traumatic for the Jewish community given their widespread exposure and the nature of the speech, which involved Holocaust denial. But all hate-speech prosecutions will by definition involve expression that is offensive to vulnerable groups. And it seems difficult if not impossible to put hate speech on trial without platforming the harmful expression that the state is trying to suppress. As one journalist argued in response to complaints about media coverage of the Zundel trial, "We can't have a half-open system of justice. If a Zundel trial takes place, the media have an obligation to report it."[63]

Second, the claimed benefits to such trials assume that a conviction will be obtained. Stated otherwise, if the hatemonger is acquitted, any benefits of prosecuting them decline precipitously or disappear entirely. Indeed, Zundel's acquittal by the Supreme Court of Canada was a devastating blow, following which Zundel declared himself vindicated and resumed his prior activities, now before a much-larger audience. Arguably, the impact would have been much worse if Zundel or Keegstra had been acquitted by a jury at trial, which they no doubt would have triumphed as public support for their views. And the risk of acquittal is high. As noted in chapter 2, the conviction rate for hate-speech crimes in Canada is significantly lower than the average for all criminal offences.

[63] Clair Balfour, "Post-trial photo of smiling Zundel was acceptable," *Montreal Gazette* (7 March 1985) B3.

With these preliminary points in mind, I will now use *Keegstra* and *Zundel* as case studies for interrogating the potential benefits of hate-speech legislation, focusing on three areas: First, whether hate-speech prosecutions promote the dignity and sense of inclusion of vulnerable groups; second, whether hate-speech legislation promotes the objectives of the criminal sanction; and third, whether hate-speech prosecutions advance the search for truth, a fundamental goal of the criminal process.

a. Hate-speech prosecutions undermine group dignity and sense of inclusion

Some have argued that hate-speech legislation promotes the group dignity and sense of inclusion of vulnerable communities. Jeremy Waldron is perhaps the best-known proponent of this view. Waldron has advocated for hate-propaganda laws similar to those found in Canada and other countries outside of the United States on the basis that such laws safeguard the reputation of minority groups while fostering a sense of inclusiveness.[64]

Yet *Keegstra* and *Zundel* suggest that hate-speech prosecutions may actually undermine both of these goals.

Waldron states that hate speech does reputational damage to vulnerable communities, thereby undermining group dignity.[65] This is likely true and is supported by empirical evidence.[66] But it is not clear that criminalizing hate speech decreases the amount of harmful expression present in the public sphere; criminal trials may, in fact, increase hate speech by platforming the very speech they are designed to suppress. Examples of indignities visited upon the Jewish community during the Keegstra and Zundel prosecutions are legion. I have canvassed many examples throughout this study and need not repeat them here; one may recall the *Jewish Star*'s complaint, quoted above, that "Jews got dragged through the mud" during the trials. Many others echoed this sentiment. Zundel correctly recognized that his views were disseminated to a much

[64] See generally Jeremy Waldron, *The Harm in Hate Speech* (Cambridge, MA & London: Harvard University Press, 2012) at 1-17. See also Susan Kelley, "Legal experts discuss hate speech and how to limit it," *Cornell Chronicle* (11 April 2018), online: news.cornell.edu/stories/2018/04/legal-experts-discuss-hate-speech-and-how-limit-it.
[65] See *ibid* at 5.
[66] See Evelyn Kallen, *Human Rights for Human Beings: Ethnicity and Human Rights in Canada* (2020), Kindle e-book, 57-60.

wider audience during his prosecution than before. What's more, his and Keegstra's propaganda were featured on the front-pages of Canada's most reputable newspapers.

Moreover, in arguing that outlawing hate-speech promotes group dignity, Waldron's implicit assumption is that criminalizing hate speech will deter others from engaging in this behaviour. But I am aware of no empirical evidence to support this view and, as I will discuss below, there is little reason to think hate-speech prosecutions will have any meaningful deterrent impact. Accordingly, even if hate speech does emotional harm, Waldron has not shown that criminalization is an antidote.

What of Waldron's argument that hate-speech laws foster a sense of inclusiveness? *Keegstra* and *Zundel* can assist with this question. As outlined in chapter 4, two surveys published after the Zundel and Keegstra trials help clarify the impact of the proceedings on the Jewish community. They bear emphasis again here.

In 1986, political scientist Gabriel Weimann and sociologist Conrad Winn released a short monograph containing results and analysis of a national poll of a random sample of 1,054 Canadians, conducted following Zundel's trial to test public responses to the prosecution.[67] The authors' key finding was that the trial did not alter the feelings of most Canadians toward Jews; if the trials had any impact at all on public perception of Jews, they likely have increased sympathy for the Jewish community.[68] Moreover, the trial increased public awareness of the Holocaust.[69] The authors cited these findings as evidence that the prosecutions were beneficial to Canada's Jews.[70] Other scholars have agreed.[71]

But Weimann and Winn also found that when respondents were asked whether they thought their neighbours had become more or less antisemitic following the trial, most believed

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[67] Gabriel Weimann & Conrad Winn, *Hate on Trial: The Zundel Affair, the Media, and Public Opinion in Canada* (Oakville, Ont: Mosaic Press, 1986) at 37.
[68] *Ibid* at 60.
[69] *Ibid* at 78.
[70] Serge Tittley, "Zundel trial worth emotional cost, says prof," *Canadian Jewish News* (27 February 1986) 6 ["Trial worth emotional cost"].
[71] Bialystok, *supra* note 1 at 235; Ira Robinson, *A History of Antisemitism in Canada* (Waterloo, Ont.: Wilfrid Laurier University Press, 2015) 143.

that antisemitism in others had increased.[72] In other words, even if antisemitism had gone down, most thought that it had went up. This finding suggests that the trials undermined Jewish people's sense of feeling included, creating the impression that Canada had become less hospitable to Jews.

Another survey conducted by sociologists Evelyn Kallen and Lawrence Lam in the early 1990's even more strongly indicates that the trials undermined Canadian Jews' sense of inclusion. Kallen and Lam polled 165 Jewish people in Toronto with the goal of measuring the impact of the Zundel and Keegstra trials on the victim community.[73] They found that almost half of the respondents (47.3%) thought the Keegstra and Zundel trials had increased antisemitism, while relatively few (16.4%) believed the trials had decreased antisemitism.[74] Furthermore, 80% of respondents reported experiencing suffering/psychological harm from the trials, a finding that was consistent between Holocaust survivors and other respondents.[75] Respondents described "psychic harm" and "mental anguish" and reported feeling "a deep and gut-wrenching agony," "insecure," "targeted and exposed," and "angry and frustrated" by the prosecutions.[76] In short, Kallen's and Lam's findings suggest that the Keegstra and Zundel prosecutions had a traumatic and lasting impact on Canadian Jews, and made the victim community feel less secure, despite the convictions in both trials.[77]

In Waldron's defence, it must be acknowledged that the mere existence of hate-speech laws—regardless of whether or how often they are utilized—may send an important symbol to minority groups that the state views them with dignity and respect. Indeed, as I argued in chapter 2, this symbolism was the main purpose behind Canada's decision to criminalize hate speech in 1970. The problem with this position is that the laws' existence will invariably create pressure to

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[72] Weimann & Winn, *supra* note 619 at 78-80.
[73] Evelyn Kallen & Lawrence Lam, "Target for hate: the impact of the Zundel and Keegstra trials on a Jewish-Canadian audience" (1993) 25:1 Canadian Ethnic Studies 9 at 17. As noted previously, the group surveyed included 70 males and 83 females. The results were cross-tabulated with variables of age, sex, education, birthplace and occupation of the respondents; the authors found that none of these variables made any significant difference in their responses to the impact of the trials.
[74] *Ibid* at 20.
[75] *Ibid*. Note that a majority of the respondents were non-survivors and born in Canada, although 86% of respondents reported that they had lost kin or family members in the Holocaust. (*ibid* at 19.)
[76] *Ibid* at 20-21.
[77] See *ibid* at 20.

use them, and if the state fails to do so, the vulnerable group may draw the opposite conclusion: that the government does not care enough about the victim community to actually implement the tools at its disposal. In fact, this is precisely what has happened in Canada, where lack of prosecutions for hate-speech offences is being interpreted by minority groups (including the Jewish community) as evidence that the government is not truly concerned about their welfare despite the alarming increase in racist speech.[78]

b. Hate-speech prosecutions undermine the objectives of criminal sanction

When thinking about the criminal law's purposes—what the criminal law is designed to achieve—the best place to look is sentencing and punishment. The purposes of sentencing are a good proxy for the objectives of the criminal process as a whole.[79]

In Canada, as in other jurisdictions including the United States,[80] the purposes of sentencing are typically categorized as either retributive or utilitarian. Utilitarian theories of punishment, associated with the English philosopher Jeremy Bentham, posit that the purpose of criminal punishment is to ensure the greater good of society and provide a benefit to the community.[81] Because utilitarian theory demands that criminal punishment advance some benefit for the offender or society, it has been referred to as consequentialist in orientation.[82] In contrast, retributive theories of punishment, associated with the German philosopher Immanuel Kant, posit that the only legitimate purpose of sentencing is to provide the offender with the punishment they deserve for their crime – in other words, meting out the offender's "just deserts."[83] Retributive justice is, therefore, anti-utilitarian; it need not serve any additional purpose beyond punishing the

[78] Chris Selley, "'Very narrow': Here's why 'hate crimes' are rarely charged and almost never prosecuted in Canada," *National Post* (17 June 2024), online: nationalpost.com/opinion/why-hate-crimes-are-rarely-charged-and-almost-never-prosecuted-in-canada; Stephanie Taylor, "Canada criminalized 'condoning, denying or downplaying' the Holocaust: is it working?" *CTV News*, online: ctvnews.ca/canada/canada-criminalized-condoning-denying-or-downplaying-the-holocaust-is-it-working-1.6651817.
[79] See Kent Roach, et al, eds, *Criminal Law and Procedure: Cases and Materials* (Toronto: Emond, 2020) at 973.
[80] On the purposes of sentencing in the United States, including the division between retributive and utilitarian theories of punishment, see *US v Blarek*, 7 F.Supp.2d 192 at 198-203 (EDNY 1998) [*Blarek*].
[81] See *Ibid* at 201.
[82] See *R c Bissonnette*, 2019 QCCS 354 (CanLII) at para 360 [*Bissonette*].
[83] *Ibid* at para 353.

criminal in accordance with what they deserve for their crime. In Kant's words, "woe to [one] who rummages around in the winding paths of a theory of happiness looking for some advantage to be gained by releasing the criminal from punishment".[84]

Sentencing under Canadian law serves both retributive and utilitarian justifications.[85] The objectives of sentencing are listed in Section 718 of the *Criminal Code of Canada*. They are:

> (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
>
> (b) to deter the offender and other persons from committing offences;
>
> (c) to separate offenders from society, where necessary;
>
> (d) to assist in rehabilitating offenders;
>
> (e) to provide reparations for harm done to victims or to the community; and
>
> (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.

Another important sentencing objective not listed in the *Criminal Code* is retribution.[86]

None of these objectives has priority over the others. Their relative importance will depend entirely on the case at hand.[87] Denunciation and retribution are retributive theories of punishment.[88] The remainder—deterrence, incapacitation, rehabilitation, reparation, and promoting a sense of responsibility in offenders—are utilitarian.[89]

Proponents of hate-speech legislation have argued that criminalizing hateful expression furthers the objectives of criminal punishment. For example, the Government of Canada has said that its recent proposed amendments to the *Criminal Code* will deter, denounce, and remedy

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[84] Immanuel Kant, *The Metaphysical Elements of Justice (Part I of The Metaphysics of Morals*) (John Ladd ed & trans, Bobbs–Merrill Co, 1965) (1797) 100, quoted in *Blarek*, *supra* note 84 at 201.
[85] Clayton Ruby, *Sentencing*, 10th ed (Toronto: LexisNexis Canada, 2020) §1.14.
[86] *R v M(CA)*, [1996] 1 SCR 500 at para 77 [*M(CA)*].
[87] *Bissonette*, *supra* note 82 at para 396, citing *R v Nasogaluak*, 2010 SCC 6 at para 43.
[88] *Bissonette*, *supra* note 82 at para 405.
[89] *Ibid* at para 395; *R v Gladue*, [1999] 1 SCR 688 at para 43. Note however that the second part of s 718(f) ("acknowledgment of the harm done to victims or to the community") may be viewed as declaratory rather than utilitarian.

discrimination against groups targeted by hate speech.[90] Similarly, supporters of Ireland's proposed hate-speech legislation argue that the law is necessary to prevent future harms and send the message that such conduct is unacceptable.[91]

It is an open question whether this theory holds in practice. In the specific context of hate-speech legislation, do such prosecutions further the ends of the criminal process? Assessing *Keegstra* and *Zundel* through the lens of the objectives of punishment suggests that hate-speech trials are particularly ineffective at advancing the goals of the criminal law.

i. Denunciation and Retribution

Denunciation and retribution, as retributive theories of punishment, serve similar purposes and may be considered together. Denunciation represents public condemnation of the offence committed.[92] Retribution—denunciation's "sibling"—represents society's condemnation of the offender.[93] Thus, the difference between denunciation and retribution is that the latter is aimed at the offender while the former is aimed at the offender's conduct.

A central component of both denunciation and retribution is communication of the punishment. By exacting retribution on the offender and denouncing the offender's conduct, the offender and their crime are held up before the public body as transgressive of society's fundamental values.[94] Denunciation and retribution are, then, reliant on publicization; by publicly shaming and stigmatizing the accused, the criminal law demarcates its bounds of toleration – the "moral bonds" of society.[95] Denunciation and retribution cannot serve their functions without public awareness of the punishment.

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[90] Government of Canada, Bill C-63 Explanatory Note, online: justice.gc.ca/eng/csj-sjc/pl/charter-charte/c63.html.
[91] "Press release: Coalition Against Hate Crime call on Government to ensure Hate Crime Bill is passed as a matter of urgency," *Irish Council for Civil Liberties*, online: iccl.ie/equality-inclusion/coalition-against-hate-crime-call-on-government-to-ensure-hate-crime-bill-is-passed-as-a-matter-of-urgency (accessed 9 August 2024).
[92] *M(CA)*, *supra* note 86 at para 81.
[93] *Ibid*.
[94] See *R v Proulx*, 2000 SCC 5 at para 105.
[95] *M(CA)*, *supra* note 86 at para 63; RP Saunders, *Criminal Law in Canada: an Introduction to the Theoretical, Social and Legal Contexts*, 5th ed (Toronto: Thomson Reuters Canada, 2016) 115, quoted in *Bissonnette*, *supra* note 82 at para 392.

One reason why these retributive theories of punishment are a poor fit for hatemonger trials is because publicization is often precisely what the hatemonger wants. It is reasonable to assume that someone convicted of a different offence—take murder or sexual assault, for example—will perceive denunciation of their conduct as punishment. They may feel immense stigmatization and shame. Few people want to be publicly labeled a murderer or a rapist. But the hatemonger is different. Purveyors of hate speech may welcome publicity and revel in their notoriety. Zundel is the classic example. He desired the public spotlight and sought out society's condemnation. Zundel's prosecution offered him a new and better (and cheaper) way to spread his message. He used his infamy as an effective fundraising tool. Certainly, Zundel never appeared shamed or chastened. Although less comfortable in the limelight, Keegstra was no more susceptible to denunciation. He was unashamed of his public label as a hatemonger. Keegstra's persecution merely reinforced his worldview that there existed an international Jewish conspiracy, and that he had been ensnared in it.[96]

Another important reason why retributive theory adapts poorly to the hate-speech context is that publicization is often precisely what the victim community does *not* want. As we have seen, the attendant publicity from the Zundel and Keegstra prosecutions caused immense trauma to the victim group. In fact, because of this trauma, leaders of the Canadian-Jewish community went to great lengths to minimize coverage of the proceedings as they went on. The Canadian Jewish Congress met with media representatives to discourage reporting on the prosecutions (and then celebrated the lack of media coverage). By the time of Zundel's human rights proceeding in the late 1990s, the prosecution came in with the specific goal of maintaining a low profile, which they were proud of have achieved. In sum, the lesson the victim community took away from *Keegstra* and *Zundel* was that in a hate-speech trial publicity should be minimized at all costs. Recall Milton Harris's comment quoted above that the Jewish community wanted a "blanket of secrecy" over the trials.[97]

[96] Kathryn Warden, "Jim Keegstra: Persecution reinforces his beliefs," *Calgary Herald* (3 June 1983) A5.
[97] 8 March 1985 JCRC meeting, *supra* note 8.

Accordingly, the Canadian experience suggests that hate-speech prosecutions turn retributive theory on its head. Retribution and denunciation assume society should maximize exposure of the criminal process so as to publicly shame the offender, signal intolerance for their conduct, and vindicate society's values. But in a hate-speech prosecution it is the victim community, not the offender, who is more likely to feel ashamed through exposure of the hatemonger's views. If so, the incentives have been completely reversed; the victim community will seek out less, not more, publicity. A public shaming is not very effective if no one is aware it has taken place.

ii. Deterrence

Deeply embedded in the criminal law, the underlying assumption of deterrence theory is that the threat or example of punishment will discourage crime.[98] Deterrence is typically said to work on two levels: individual and general.[99] Individual deterrence theorizes that criminal punishment will discourage the specific offender from repeating their criminal behaviour.[100] General deterrence assumes that punishing the offender will discourage others from engaging in the same conduct.[101]

Hate-speech prosecutions do not well serve individual deterrence. Empirical evidence suggests that debunking misinformation and conspiracy theories like Holocaust denial does little to change—and may further entrench—the views of its proponents.[102] According to Darrell West, senior fellow at the Brookings Institution's Center for Technology Innovation, "people like to believe false information – even when they find out it's inaccurate – if it confirms their existing prejudices or their prior beliefs."[103] This undoubtedly held true for Keegstra and Zundel. If anything, their opinions grew stronger as a by-product of their criminal trials, and they evidenced

[98] Ruby, *supra* note 85 at §1.24
[99] *Ibid* at § 1.27.
[100] *Ibid*.
[101] *Ibid*.
[102] See Stuart A Thompson, "What do conspiracy theorists do when proved wrong? Double down or move on," *New York Times* (7 August 2024), online: nytimes.com/2024/08/07/technology/biden-conspiracy-theories-misinformation.html.
[103] *Ibid*.

little desire to cease sharing these views in the public sphere. Indeed, both trial judges who sentenced Keegstra justified shockingly-low sentences on the basis that no punishment would change Keegstra's views, an opinion that was undoubtedly correct.

Nor do hate-speech trials advance general deterrence. For purposes of maximizing general deterrence, empirical research indicates that certainty of punishment has a far greater impact than severity of punishment.[104] In fact, there is little evidence to indicate that severity of punishment has any effect on crime levels.[105] As such, punishing a few offenders to set an example for the rest will not work. Instead, to achieve meaningful deterrence, it is necessary to apprehend people with relative certainty.[106] This is intuitive: as anyone who has driven by a known speed-trap can attest, you are more likely to refrain from transgressive conduct if you reasonably fear you will be caught in the act.

The difficulty with hate-speech crimes is that it is essentially impossible to apprehend perpetrators with regularity. Thanks to the Internet, this problem has gotten exponentially worse since the time of Keegstra's and Zundel's criminal proceedings. Judicial and police resources are finite; hate speech is almost infinite. Even allowing for a narrow definition of hate speech like that delineated by the Supreme Court of Canada, a veritable deluge of harmful expression exists in modern society, much of it online. To give a sense of the scope of the problem: in the first week after Scotland's hate-speech law recently came into effect, the police were inundated with more than seven thousand online reports of hate crimes.[107] Even if many of these were vexatious complaints, it takes inordinate resources to sort through them.[108] Also, because of the easy anonymity provided by the Internet, it is reasonable to assume that most purveyors of hate speech will never be identified. Recent evidence indicates that purveyors of hate speech online, such as

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[104] See eg Daniel S Nagin, "Deterrence in the Twenty-First Century" (2013) 42 Crime & Just 199 at 201, 252-53.
[105] Anthony N Doob & Cheryl Marie Webster, "Sentence Severity and Crime: Accepting the Null Hypothesis," 30 Crime & Just 143 at 191. See also Nagin, *supra* note 104 at 252.
[106] I have used the word apprehension to reflect Nagin's finding that it is certainty of apprehension, not punishment, that impacts deterrence.
[107] "More than 7,000 hate crime reports in first week of new law," *BBC* (10 April 2024), online: bbc.com/news/articles/c2x3ljydn67o.
[108] *Ibid*.

neo-Nazi groups, also use coded language to avoid detection.[109] And even if identified, offenders may live internationally, outside of the jurisdiction of the country that wishes to prosecute them. Furthermore, if all these obstacles are overcome, it is far too expensive to prosecute more than a handful of hatemongers at a time. Keegstra's first trial alone, for instance, cost taxpayers an estimated $1 million.[110] The full cost of his and Zundel's prosecutions were many times greater accounting for their re-trials and numerous appeals.

In general, more than fifty years of experience with hate-speech laws in Canada suggests that prosecutions will be rare. If so, the best a jurisdiction can hope for is that punishing a minority of hatemongers will set an example for the rest. Unfortunately, this has no basis in empirical evidence. For the same reasons, recent proposals like those in Canada to increase penalties for persons convicted of hate-speech offences are unlikely to provide any significant deterrence.

iii. Separation, rehabilitation, responsibility, and reparations

Nor does criminalizing hate speech advance the remainder of the sentencing purposes set out in Canada's *Criminal Code*.

The objective of separation, also known as incapacitation, rests on the premise that those incarcerated "are unable to commit crime in the community and that therefore adoption of this strategy should result in a reduction of the level of crime."[111] When dealing with a speech crime, however, the offender's hateful speech may be impossible to eradicate—living its own life, as it were, primarily on the Internet—even if the offender is temporarily incapacitated. Once uploaded online, harmful expression can spread throughout the globe in a matter of hours and continue to circulate even if the initial content is taken down.[112] Indeed, the same and similar speech may be easily repeated and amplified by the offender's supporters while the offender is unable to do so.

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[109] See David Gilbert, "TikTok Has a Nazi Problem," *Wired* (29 July 2024), online: wired.com/story/tiktok-nazi-content-moderation/.
[110] Robert Sheppard, "4-month Keegstra trial was landmark legal event," *The Globe and Mail* (22 July 1985) A4.
[111] Ruby, *supra* note 85 at §1.53, quoting CT Griffiths and SN Verdun-Jones, *Canadian Criminal Justice*, 2nd ed (Toronto: Harcourt Brace & Co Canada, 1994) at 410.
[112] See eg Mark Sullivan, "Facebook's AI for detecting hate speech is facing its biggest challenge yet", *Fast Company* (14 August 2020), online: (referring to an August 5, 2020 tweet by Donald Trump claiming that children were "almost immune" from the coronavirus, which was viewed almost 500,000 times in 4 hours).

Accordingly, when it comes to hate speech, separating the offender from society may do very little to stop the actual crime or provide relief for victim groups. In addition, unless society becomes exceedingly punitive, separation is not durable. Eventually the hatemonger will be released, whereupon they are likely to resume their prior activities.

Rehabilitation assumes that offenders can be treated and cured of their criminal tendencies.[113] Yet the Canadian experience with Keegstra and Zundel suggests that any rehabilitation of the offender is unlikely, and certainly will not be achieved by subjecting the offender to a criminal prosecution, which is more apt to retrench their views.[114] For the same reasons, a criminal trial is inapposite for promoting a sense of responsibility among offenders.

And prosecuting hate-speech is a poor way to provide reparations to the victim community. The idea behind a reparatory theory of punishment is that the victim will be placed in the same position they were in prior to the crime being committed.[115] But as a preliminary matter, as discussed, the Canadian experience suggests that the criminal trial may cause additional harm to the victim group, leaving members feeling less secure of their place in majoritarian society, rather than fostering any sense of dignity or healing. Furthermore, as a more general matter, there are better ways to secure reparations than through the criminal process. In Canada, mechanisms under the criminal law to provide reparations through sentencing are discretionary and limited.[116] They also must compete with the other sentencing considerations canvassed here, which emphasize objectives aimed at the offender, rather than repairing the victim group.

c. Hate-speech prosecutions undermine search for truth

A central goal of the criminal trial is to discover the truth.[117] Did the accused murder the victim? Were sexual relations between the accused and complainant consensual or non-consensual? In this vein, some have advanced the theory that hate-speech trials are beneficial

[113] Ruby, *supra* note 85 at §1.59.
[114] See Warden, *supra* note 96.
[115] Ruby, *supra* note 85 at §1.69.
[116] See *Criminal Code*, *supra* note 53 s 738(1).
[117] See *R v Goldfinch*, 2019 SCC 38 at para 1; *Tehan v US* (1966) 382 US 406 at 416. See also Martin Friedland, "Searching for Truth in the Criminal Justice System" (2014) 60 Criminal Law Quarterly 487.

because they help uncover the truth. Weimann and Winn, for example, argued that the Zundel and Keegstra trials were worth their emotional cost because Canadians developed a better understanding of the Holocaust.[118]

There is, however, good reason to doubt that criminalizing hate speech advances the search for truth. Establishing the contours of highly complex historical events is beyond the capacity of the adversarial criminal trial, which provides wide latitude to the defence to present their case as they see fit and demands from the prosecution proof beyond reasonable doubt. For instance, it should be self-evident that the inquiry into the truth of the Holocaust—or, better put, the still ongoing historical investigation into the origins, causes, and lessons of the destruction of European Jewry between 1939-1945—is best revealed through established historiographical methods, like archival research and interviews with survivors and perpetrators. It is not best revealed by putting Holocaust survivors and reputable historians in the witness box and repeatedly insinuating they are dishonest or incompetent, as Doug Christie did for dozens of hours across multiple legal proceedings. Nor is historical inquiry well-served by calling to the witness stand various proponents of Holocaust denial or believers in a worldwide Jewish conspiracy and giving them free reign to present their theories in a court of law. Aside from the obvious trauma extracted by these methods, they are not suitable replacements for diligent and good-faith historical research. Furthermore, the ever-present risk of acquittal creates the possibility that a not-guilty verdict will be interpreted as the court's approval for the historical accounting put forward by the defence, thereby undermining the careful work of historians.

In fact, historical inquiry is better served through amnesty, not prosecution. This is the reason why truth and reconciliation commissions, effectively utilized in numerous instances (including recently in Canada[119]) to excavate the historical and social contexts that gave rise to past human rights violations, have used amnesty as a tool to incentivize an honest accounting from

[118] "Trial worth emotional cost," *supra* note 625.
[119] See Government of Canada, "Canada's residential schools: the final report of the Truth and Reconciliation Commission of Canada," online: publications.gc.ca/site/eng/9.807830/publication.html.

the perpetrators and to stimulate healing and forgiveness.[120] It should go without saying that methods not relied on by truth and reconciliation commissions include platforming the work of leading conspiracy theorists, calling the victims liars, and subjecting survivors to brutal and lengthy cross-examination.

Even if there is some truth-seeking benefit to hate-speech prosecutions—recall Weimann's and Winn's conclusion that the Keegstra and Zundel trials increased public awareness of the Holocaust—the financial cost is simply prohibitive relative to more effective truth-seeking methods. The criminal process is extremely expensive. Numerous research and educational initiatives could have been funded with the millions of government dollars spent prosecuting Keegstra and Zundel. These initiatives also would have saved the exorbitant emotional cost of the criminal proceedings. One must also consider opportunity cost; countless time and resources were expended on Keegstra and Zundel while hatemongers arguably proliferated elsewhere.

The primary lesson of *Keegstra* and *Zundel*, then, may be that hate-speech prosecutions work in theory, but not in practice.

III. A path forward: Emphasis on civil and non-legal tools

If the criminal law is a flawed instrument for addressing harmful speech, what is the appropriate mechanism? This question has particular importance in contemporary society, with rising levels of hatred, disinformation, and social unrest – what United Nations (UN) Secretary General Antonio Guterres has described as a "tsunami of hate, xenophobia, scapegoating and scare-mongering."[121]

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[120] Two examples are the South African Truth and Reconciliation Commission and the East Timorese Commission on Reception Truth and Reconciliation. See Eduardo González and Howard Varney, *Truth Seeking: Elements of Creating an Effective Truth Commission* (Brasilia: Amnesty Commission of the Ministry of Justice of Brazil; New York: International Center for Transitional Justice, 2013), online: ictj.org/sites/default/files/ICTJ-Book-Truth-Seeking-2013-English.pdf at 12.

[121] United Nations (UN), Press Release, SG/SM/20076, "Secretary-General Denounces 'Tsunami' of Xenophobia Unleashed amid COVID-19, Calling for All-Out Effort against Hate Speech" (8 May 2020), online: press.un.org/en/2020/sgsm20076.doc.htm.

One possible solution is greater focus on civil remedies. Human rights proceedings—like the one initiated against Zundel under Section 13(1) of the *Canadian Human Rights Act*—are examples of civil law tools that might be used instead of the criminal law. Although the Conservative government repealed Section 13 of the *Canadian Human Rights Act* in 2014,[122] as mentioned the current Liberal government has proposed introducing this provision as part of Bill C-63, the *Online Harms Act*.[123] Furthermore, three provinces—Alberta, Saskatchewan, and British Columbia—and the Northwest Territories possess human rights legislation that targets hate propaganda.[124]

As evidenced by Zundel's human rights prosecution, civil claims have numerous advantages over criminal law. First, civil proceedings have a lower burden of proof; the plaintiff need only make their case on a balance of probabilities, rather than beyond a reasonable doubt. Second, civil trials may offer less opportunity for grandstanding by the accused. Plainly, Zundel's human rights proceeding provided him with a vastly reduced platform compared to his criminal prosecution. While there may be several reasons for this—including the passage of time and the Canadian Human Rights Commission's conscious effort not to publicize the proceedings—it is reasonable to infer that a human rights case is simply not as newsworthy as a criminal trial, making it harder for Zundel to portray himself as a martyr. Third, as the Canadian Human Rights Tribunal ruled in Zundel's case, in a civil trial the plaintiff is not required to establish that the defendant *intended* to promote hatred – the plaintiff only must show that the plaintiff's speech was likely to

[122] On the repeal of Section 13 of the *Canadian Human Rights Act*, see Allyson M Lunny, D*ebating Hate Crime: Language, Legislatures, and the Law in Canada* (Vancouver: UBC Press, 2017) 135-170.

[123] The text of the former Section 13(1) and the text of the proposed new Section 13(1) are not identical but are substantively the same. The former provision read: "13. (1) It is a discriminatory practice for a person or a group of persons acting in concert to communicate telephonically or to cause to be so communicated, repeatedly, in whole or in part by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament, any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination." The new provision reads: "It is a discriminatory practice to communicate or cause to be communicated hate speech by means of the Internet or any other means of telecommunication in a context in which the hate speech is likely to foment detestation or vilification of an individual or group of individuals on the basis of a prohibited ground of discrimination."

[124] *Alberta Human Rights Act*, RSA 2002, c A-25.5, s 3; *The Saskatchewan Human Rights Code, 2018*, SS 2018, c S-24.2, s 14; *Human Rights Code*, RSBC 1996, c 210, s 7; *Consolidation of Human Rights Act*, RSNWT, 2002, c 18, s 13.

have this *effect*.[125] This relieves a significant burden from the prosecution; it is something of a miracle that the Crown managed to convict Zundel and Keegstra (twice each) given the high *mens rea* required to convict for the offences of wilful promotion of hatred and spreading false news. Moreover, because the defendant's intent is irrelevant, truth is not a defence. This, too, may diminish the defendant's platform and spare the victim community a significant amount of trauma; there was no need, for example, for the Canadian Human Rights Commission to prove the truth of the Holocaust during Zundel's human rights case. As Mark Freiman, who served as Commission counsel during Zundel's proceeding, described:

> Allow a defence of truth and inevitably the "truth" of hateful speech becomes the focus. It is that focus that in effect puts the victim of hate propaganda on trial and under siege in cross-examination, rather than focusing on the perpetrator and the damage the perpetrator's words do. Eliminate the defence of "truth" and the focus is no longer on so-called political speech or the "market place of ideas" but on the real consequences of hate.[126]

Fourth, unlike criminal proceedings—where cost consequences are rare—in civil proceedings it is customary for the losing party to pay a significant portion of the winning party's legal costs. As Zundel discovered in his human rights case, this may serve as a steep penalty for those who bring repeated and unmeritorious motions and appeals. In fact, the repeated cost awards against Zundel likely influenced his decision to throw in the towel and flee to the United States in November 2000. Fifth, civil law proceedings have greater flexibility to order remedies designed to repair the harm to the victim community. As discussed above, criminal law tools for providing reparations through sentencing are discretionary and limited. Sentencing in criminal law tends to focus on punishing the offender rather than healing the victim. In civil proceedings, the opposite is true: the fundamental purpose of civil remedies is to put the victim in the position they would have been in but for the harm. Consequently, a human rights tribunal may order the offender to cease their behaviour and take steps to prevent its repetition, and pay compensation to the victim group.[127]

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[125] See *Citron v Zündel*, 2002 CarswellNat 4364 at para 187, citing *Taylor*, *supra* note 18 at 935-36.
[126] Mark Freiman, "Litigating hate on the Internet," *Canadian Issues* (Summer 2006) at 66.
[127] See proposed s 53.1 of the *Canadian Human Rights Act*, Bill C-63 (first reading 26 February 2024), 44th Parl, 1st Sess, online: parl.ca/DocumentViewer/en/44-1/bill/C-63/first-reading. This provision also allows for the Tribunal to order the defendant to pay a penalty of not more than $50,000 to the government. The available remedies for a breach of the former s 13(1) *Canadian Human Rights Act* were similar, the main difference being that the available penalty under the old provision was only $10,000.

Furthermore, civil proceedings may offer an easier path to the criminal sanction. If the hatemonger violates a cease-and-desist order, they can then be prosecuted for breach of that order rather than for the hate speech itself. The focus of any such prosecution would thus be on whether the accused breached the order rather than on the thornier question of whether they wilfully promoted hatred. (In fact, the *mens rea* required to convict for breach of a court's or tribunal's order is lower than for wilful promotion of hatred, as the former offence permits a conviction on the basis of recklessness.[128]) Had the government not commenced deportation proceedings against Zundel immediately upon his return to Canada in 2003, he could have been prosecuted for breaching the Canadian Human Rights Tribunal's order that he take down the Zündelsite. Indeed, this is what happened to John Ross Taylor, who was convicted for breaching the Tribunal's order that he remove his telephone hate line (which, it may be recalled, offered a "White Power Message"), following which Taylor was sentenced to one year in prison.[129]

Such advantages notwithstanding, human rights bodies may not be in a meaningful position to provide an alternative to the criminal law. One obvious impediment to greater use of human rights legislation is that Section 13(1) of the *Canadian Human Rights Act* is no longer in existence. While the current federal Liberal government has pledged to bring it back, the Conservatives have promised to scrap the *Online Harms Act* should they form government.[130] Moreover, while a handful of provinces and the Northwest Territories have their own legislation permitting human rights claims targeting proponents of harmful speech, most Canadian jurisdictions do not. In addition, human rights commissions and tribunals have been rightfully criticized for being slow,

[128] See eg *UNA v Alberta (Attorney General)*, [1992] 1 SCR 901 at 933. Note that under the *Canadian Human Rights Act*, the Tribunal's order may be filed with the Federal Court following which it will be treated as a court order (*Canadian Human Rights Act*, *supra* note 10, s 57).
[129] *Taylor*, *supra* note 18 at 903-06. Taylor breached the order multiple times and, although the decisions are somewhat unclear on this point, it appears he was sentenced to two separate terms of incarceration for separate breaches of the order. See *Canada (Human Rights Commission v Taylor*, [1987] 3 FC 593 (CA) at 597.
[130] "Poilievre promises to scrap Online Harms Act," *supra* note 58.

inefficient, underfunded, and hopelessly backlogged.[131] Some jurisdictions have, however, recently pledged to increase funding.[132]

Another possible recourse would be to permit lawsuits for group defamation – a civil action directed against persons who make defamatory comments about an entire class of people, such as Jews. However, lawsuits for group defamation are prohibited under the common law.[133] Although someone defamed personally may bring a lawsuit, when an entire group of people is defamed, an individual member generally has no cause of action. (To give an example, a statement declaring that "Jews fabricated the Holocaust" will typically provide insufficient foundation for a defamation suit, unlike a statement that falsely accused a specific Holocaust survivor of fabricating their story.) The common law position can be ousted by legislation, but only one province has done so: Manitoba.[134] Even in Manitoba, however, the provision is almost never used and seems to have

[131] Tribunal Watch Ontario, "The Human Rights Tribunal of Ontario: What Needs to Happen" (January 2023), online (pdf): tribunalwatch.ca/wp-content/uploads/2023/01/The-Human-Rights-Tribunal-What-Needs-to-Happpen.pdf; Canadian Human Rights Commission, "Open letter to the Senate Standing Committee on Human Rights in the context of the Committee's study of Anti-Black Racism, Sexism and Systemic Discrimination in the Canadian Human Rights Commission" (12 May 2023), online: chrc-ccdp.gc.ca/en/resources/open-letter-the-senate-standing-committee-human-rights-the-context-the-committees-study; Vera-Lynn Kubinec, "Manitobans wait 2 years to have human rights complaints assigned to investigators," *CBC News* (27 April 2023), online: cbc.ca/news/canada/manitoba/manitoba-human-rights-complaint-backlog-1.6823168.

[132] See eg "BC boosts funding for Human Rights Tribunal" (4 January 2023) *CBC News*, online: https://www.cbc.ca/news/canada/british-columbia/b-c-boosts-funding-for-human-rights-tribunal-1.6703897.

[133] This applies both to Canada and other common law jurisdictions. For the Canadian position, see *Bou Malhab v. Diffusion Métromédia CMR inc.*, 2011 SCC 9.

[134] *The Defamation Act*, CCSM c D20, s. 19. The word "defamation" encompasses both libel (written defamation) and slander (oral defamation). The Manitoba statute prohibits only libel. In addition to Manitoba, British Columbia might allow for a similar cause of action through the *Civil Rights Protection Act*, RSBC 1996, c 49 ["*CRPA*"]. This legislation, enacted in 1981, creates "a tort actionable without proof of damage" prohibiting "any conduct or communication … that has as its purpose interference with the civil rights of a person or class of persons by promoting (a) hatred or contempt of a person or class of persons, or (b) the superiority or inferiority of a person or class of persons in comparison with another or others, on the basis of colour, race, religion, ethnic origin or place of origin." Although the wording of the statute may thus be construed to permit a group defamation lawsuit (or at least something akin to such a suit), it has apparently never been used for this purpose and the legislation, as interpreted, contains important distinctions from the tort of defamation. For example—unlike in a defamation suit, where the intent of the speaker is presumed—the *CRPA* has been interpreted to require evidence that the defendant "intended to promote hatred, contempt, inferiority or superiority on a prohibited ground and intended to interfere thereby with the civil rights of the person or class of persons against whom the promotion of hatred, contempt or inferiority was directed." *Maughan v. University of British Columbia*, 2008 BCSC 14 at para. 347. See also *Canadian Jewish Congress v. North Shore News and Collins*, 1997 BCHRT 35 at para 208. In general, this legislation has been used infrequently and its utility as a tool for community actions against racism is deserving of additional study. See Benjamin Berger, "Using Statutory Measures to Redress Racism," *Advocates' Quarterly* 24, no 4 (September 2001): 449-466.

been forgotten.[135] In addition, such lawsuits are not free of impediments. For one, funding of a civil action falls on the plaintiff, unlike criminal and human rights proceedings which are financed by the state (although, as noted, it is possible to obtain an award of costs from the losing party). There is also the concern that permitting group defamation actions might disincentivize the government from taking the initiative to protect minority groups, leaving this to the communities themselves. This objection was actually raised by members of the Canadian Jewish Congress when legislation permitting group defamation lawsuits was being considered by the Ontario government in the 1980s.[136] The Ontario government then declined to enact this legislation.

Nevertheless, while civil law mechanisms have drawbacks alongside their benefits, the underlying point is that such proceedings may offer a useful supplement to the criminal law. Accordingly, civil law approaches deserve greater attention in the contemporary debate over legal remedies for harmful speech, which has emphasized the criminal law.

Greater emphasis, too, should be given to approaches outside of the law. Hate speech, like all crime, is the product of a complex set of social forces. Anger and political grievance provide fertile ground for harmful expression.[137] Similarly, belief in conspiracy theories is linked to feelings of powerlessness, lack of socio-economic control, and lower levels of education and income.[138] These feelings have been in abundant supply in recent years in light of the onset of the COVID-19 pandemic, disastrous military conflicts in Ukraine and Russia, Sudan, and the Middle East (among others), and rising inflation and cost of living around the globe. Alleviating these conditions will not be easy but offers the most promising path to combating hateful rhetoric. Indeed, this is the only way to target the root causes of racism and xenophobia. Increased education

[135] I have written about the use (and lack of use) of Manitoba's legislation elsewhere. See Kenneth Grad, "Civil Law Alternatives in the Fight Against Hate Speech: The Case Study of the Marcus Hyman Act" (Spring 2022) 33 *Canadian Jewish Studies; Études Juives Canadiennes* 13.
[136] Paul Lungen, "CJC, McMurtry discuss ways to fight hate literature," *Canadian Jewish News* (9 August 1984) 21; Scheininger Interview, *supra* note 24 at 8 [on file with author].
[137] See Alexei Abrahams & Gabrielle Lim, "Repress/redress: What the 'war on terror' can teach us about fighting misinformation" (2020) 1: Special Issue on COVID-19 and Misinformation Harvard Kennedy School of Misinformation Rev 1, DOI: <10.37016/mr-2020-018>.
[138] See Daniel Freeman et al, "Coronavirus conspiracy beliefs, mistrust, and compliance with government guidelines in England" (2020) Psychological Medicine 1 at 2, DOI: <10.1017/S0033291720001890>.

also holds promise because, as I have argued above, inter-group conflict is often driven by a failure to meaningfully engage with and understand vulnerable communities. Opportunities for cross-cultural education and dialogue seem in short supply; however they may prove very effective at remedying inter-group tension.

We live in a difficult climate for vulnerable communities. The pressure on the Canadian government and other governments around the world to combat hate speech and disinformation is enormous. Politicians are being urged to do something, *anything*, to protect victims. In this climate, it makes sense that many countries will reflexively turn to criminalization. But when we rush, we make mistakes. Paradoxically, the urgency and scope of the problem makes patience especially virtuous in this situation. It is imperative that we use our limited resources wisely and search carefully for optimal solutions to the problem. As of now, it appears we have failed to heed the lessons of the past. This, fundamentally, is what the Zundel and Keegstra cases teach us.

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