R. *v.* Keegstra, [1990] 3 S.C.R. 697

Her Majesty The Queen *Appellant*

v.

James Keegstra *Respondent*

and

**The Attorney General of Canada,
the Attorney General for Ontario,
the Attorney General of Quebec,
the Attorney General for New Brunswick,
the Attorney General of Manitoba,
the Canadian Jewish Congress,
the League for Human Rights of B'nai Brith,
Canada, Interamicus, the Women's Legal
Education and Action Fund, and the
Canadian Civil Liberties Association**
Interveners

indexed as: r. *v.* keegstra

File No.: 21118.

1989: December 5, 6; 1990: December 13.

Present: Dickson C.J.* and Wilson, La Forest, L'Heureux-Dubé, Sopinka, Gonthier and McLachlin JJ.

on appeal from the court of appeal for alberta

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*Chief Justice at the time of hearing.

Constitutional law -- Charter of Rights -- Freedom of expression -- Hate propaganda -- Criminal Code prohibiting wilful promotion of hatred against identifiable groups (s. 319(2)) -- Defence of truth to be established by accused on balance of probabilities (s. 319(3)(a)) -- Whether s. 319(2) of Criminal Code infringes s. 2(b) of Canadian Charter of Rights and Freedoms -- If so, whether infringement justifiable under s. 1 of Charter.

Constitutional law -- Charter of Rights -- Presumption of innocence -- Reverse onus provision -- Criminal Code prohibiting wilful promotion of hatred against identifiable groups (s. 319(2)) -- Defence of truth to be established by accused on balance of probabilities (s. 319(3)(a)) -- Whether s. 319(3)(a) of Criminal Code infringes s. 11(d) of Canadian Charter of Rights and Freedoms -- If so, whether infringement justifiable under s. 1 of Charter.

Constitutional law -- Charter of Rights -- Reasonable limits -- General approach to s. 1 of Canadian Charter of Rights and Freedoms.

The accused, an Alberta high school teacher, was charged under s. 319(2) of the *Criminal Code* with wilfully promoting hatred against an identifiable group by communicating anti-semitic statements to his students. Prior to his trial, the accused applied to the Court of Queen's Bench for an order quashing the charge. The court dismissed the application on the ground that s. 319(2) of the *Code* did not violate freedom of expression as guaranteed by s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*. The court, for want of proper notice to the Crown, did not entertain the accused's argument that s. 319(3)(*a*) of the *Code* violated the presumption of innocence protected by s. 11(*d*) of the *Charter*. Section 319(3)(*a*) affords a defence of "truth" to the wilful promotion of hatred but only where the accused proves the truth of the communicated statements on a balance of probabilities. The accused was thereafter tried and convicted. On appeal the accused's *Charter* arguments were accepted, the

Court of Appeal holding that ss. 319(2) and 319(3)(*a*) infringed ss. 2(*b*) and 11(*d*) of the *Charter* respectively, and that the infringements were not justifiable under s. 1 of the *Charter*.

Held (La Forest, Sopinka and McLachlin JJ. dissenting): The appeal should be allowed. Sections 319(2) and 319(3)(*a*) of the *Code* are constitutional.

(1) *Freedom of Expression*

Per Dickson C.J. and Wilson, L'Heureux-Dubé and Gonthier JJ.: Communications which wilfully promote hatred against an identifiable group are protected by s. 2(*b*) of the *Charter*. When an activity conveys or attempts to convey a meaning, through a non-violent form of expression, it has expressive content and thus falls within the scope of the word "expression" as found in the guarantee. The type of meaning conveyed is irrelevant. Section 2(*b*) protects all content of expression. In enacting s. 319(2) of the *Code*, Parliament sought to prohibit communications which convey meaning. Section 319(2), therefore, represents an infringement of s. 2(*b*).

Communications which are intended to promote hatred against identifiable groups do not fall within the ambit of a possible s. 2(*b*) exception concerning expression manifested in a violent form. This exception refers only to expression communicated directly through physical harm. Hate propaganda is not analogous to violence. It conveys a meaning that is repugnant, but the repugnance stems from the content of the message and not from its form. As for threats of violence, they are not excluded from the definition of expression envisioned by s. 2(*b*).

Sections 15 and 27 of the *Charter*, which deal with equality and multiculturalism, and the international agreements signed by Canada on the prohibition of racist statements, should not be used to interpret the scope of s. 2(*b*). It is inappropriate to attenuate the s. 2(*b*) freedom on the grounds that a particular context so requires. The large and liberal interpretation given to freedom of expression indicates that the preferable course is to weigh the various contextual values and factors in s. 1 of the *Charter*. This section both guarantees and limits *Charter* rights and freedoms by reference to principles fundamental in a free and democratic society.

Section 319(2) of the *Code* constitutes a reasonable limit upon freedom of expression. Parliament's objective of preventing the harm caused by hate propaganda is of sufficient importance to warrant overriding a constitutional freedom. Parliament has recognized the substantial harm that can flow from hate propaganda and, in trying to prevent the pain suffered by target group members and to reduce racial, ethnic and religious tension and perhaps even violence in Canada, has decided to suppress the wilful promotion of hatred against identifiable groups. Parliament's objective is supported not only by the work of numerous study groups, but also by our collective historical knowledge of the potentially catastrophic effects of the promotion of hatred. Additionally, the international commitment to eradicate hate propaganda and Canada's commitment to the values of equality and multiculturalism in ss. 15 and 27 of the *Charter* strongly buttress the importance of this objective.

Section 319(2) of the *Code* is an acceptably proportional response to Parliament's valid objective. There is obviously a rational connection between the criminal prohibition of hate propaganda and the objective of protecting target group members and of fostering harmonious social relations in a community dedicated to equality and multiculturalism. Section 319(2) serves to illustrate to the public the severe reprobation with which society holds messages of hate directed towards racial and religious groups. It makes that kind of expression less

attractive and hence decreases acceptance of its content. Section 319(2) is also a means by which the values beneficial to a free and democratic society in particular, the value of equality and the worth and dignity of each human person can be publicized.

Section 319(2) of the *Code* does not unduly impair freedom of expression. This section does not suffer from overbreadth or vagueness; rather, the terms of the offence indicate that s. 319(2) possesses definitional limits which act as safeguards to ensure that it will capture only expressive activity which is openly hostile to Parliament's objective, and will thus attack only the harm at which the prohibition is targeted. The word "wilfully" imports into the offence a stringent standard of *mens rea* which significantly restricts the reach of s. 319(2) by necessitating the proof of either an intent to promote hatred or knowledge of the substantial certainty of such a consequence. The word "hatred" further reduces the scope of the prohibition. This word, in the context of s. 319(2), must be construed as encompassing only the most severe and deeply felt form of opprobrium. Further, the exclusion of private communications from the scope of s. 319(2), the need for the promotion of hatred to focus upon an identifiable group and the presence of the s. 319(3) defences, which clarify the scope of s. 319(2), all support the view that the impugned section creates a narrowly confined offence. Section 319(2) is not an excessive impairment of freedom of expression merely because the defence of truth in s. 319(3)(*a*) does not cover negligent or innocent error as to the truthfulness of a statement. Whether or not a statement is susceptible to classification as true or false, such error should not excuse an accused who has wilfully used a statement in order to promote hatred against an identifiable group. Finally, while other non-criminal modes of combatting hate propaganda exist, it is eminently reasonable to utilize more than one type of legislative tool in working to prevent the spread of racist expression and its resultant harm. To send out a strong message of condemnation, both reinforcing the values underlying s. 319(2) and deterring the few individuals who would harm target group members and the

larger community by communicating hate propaganda, will occasionally require use of the criminal law.

The effects of s. 319(2) are not of such a deleterious nature as to outweigh any advantage gleaned from the limitation of s. 2(*b*). The expressive activity at which s. 319(2) is aimed constitutes a special category, a category only tenuously connected with the values underlying the guarantee of freedom of expression. Hate propaganda contributes little to the aspirations of Canadians or Canada in either the quest for truth, the promotion of individual self-development or the protection and fostering of a vibrant democracy where the participation of all individuals is accepted and encouraged. Moreover, the narrowly drawn terms of s. 319(2) and its defences prevent the prohibition of expression lying outside of this narrow category. Consequently, the suppression of hate propaganda represents an impairment of the individual's freedom of expression which is not of a most serious nature.

Per La Forest, Sopinka McLachlin JJ. (dissenting): Section 319(2) of the *Code* infringes the guarantee of freedom of expression. Where, as in this case, an activity conveys or attempts to convey a meaning or message through a non-violent form of expression, this activity falls within the sphere of the conduct protected by s. 2(*b*). This section protects all content of expression irrespective of the meaning or message sought to be conveyed, no matter how offensive it may be. The government's purpose in enacting s. 319(2) was to restrict freedom of expression by curtailing what people may say. Section 319(2), therefore, imposes a limit on s. 2(*b*).

The promotion of hatred in this case does not assume a form which falls outside the protected sphere of s. 2(*b*). The accused's communications were offensive and propagandistic, but they do not constitute threats in the usual sense of that word. The accused's statements did

not urge violence against the Jewish people. They were not made with the intention and do not have the effect of compelling Jewish people or anyone else to do one thing or another. Nor do the accused's statements constitute violence. Violence, as discussed in *Dolphin Delivery* and *Irwin Toy*, connotes actual or threatened physical interference with the activities of others. Moreover, statements promoting hatred are not akin to threats or violence. There is nothing in the form of such statements which subverts democracy or our basic freedoms in the way in which violence or threats of violence may. Finally, to suggest that speech, like hate propaganda, which undermines the credibility of speakers belonging to particular groups does not fall within s. 2(*b*) of the *Charter*, is to remove from the protection of the *Charter* an enormous amount of speech which has long been accepted as important and valuable.

Sections 15 and 27 of the *Charter* and the international convenants signed by Canada on the prohibition of racism do not reduce the scope of expression protected by s. 2(*b*) so as to exclude the accused's statements. First, to do so would be to exclude statements from the protection of s. 2(*b*) on the basis of their content, an approach which this Court has rejected. Second, given that the protection under s. 2(*b*) is aimed at protecting individuals from having their expression infringed by the government, it would be a misapplication of *Charter* values to thereby limit the scope of that individual guarantee with an argument based on s. 15, which is also aimed at circumscribing the power of the state. Third, it would be extremely difficult to balance in the abstract conflicting values such as equality and multiculturalism against freedom of expression. Assuming such balancing were to be done, it would be more appropriately made under s. 1 of the *Charter* than under s. 2(*b*). Fourth, Canada's international obligations, and the accords negotiated between international governments, may well be helpful in placing *Charter* interpretation in a larger context but these obligations are not determinative or limitative of the scope of the *Charter* guarantees. The provisions of the *Charter*, though drawing on a political and social philosophy shared with other democratic

societies, are uniquely Canadian. As a result, considerations may point, as they do in this case, to a conclusion regarding a rights violation which is not necessarily in accord with those international covenants. Unlike the international covenants, which exclude hate propaganda from the guarantee of speech, the *Charter* posits a broad and unlimited right of expression under s. 2(*b*), a right which can only be cut back under s. 1.

Section 2(*b*) does not protect only justified or meritorious expression. Historical legal limitations on expression which conflict with the larger Canadian conception of free speech must be rejected. While in this case it may be easy to achieve near-unanimous consensus that the statements contribute nothing positive to our society, experience shows that in other cases it may be difficult to draw the line between speech which has value to democracy or social issues and speech which does not. Attempts to confine the guarantee of free expression only to content which is judged to possess redeeming value or to accord with the accepted values strike at the very essence of the value of the freedom, reducing the realm of protected discussion to that which is comfortable and compatible with current conceptions. If the guarantee of free expression is to be meaningful, it must protect expression which challenges even the very basic conceptions about our society. A true commitment to freedom of expression demands nothing less.

Section 319(2) of the *Code* does not constitute a reasonable limit upon freedom of expression. While the legislative objectives of preventing the promotion of hatred, of avoiding racial violence and of promoting equality and multiculturalism are of sufficient importance to warrant overriding the guarantee of freedom of expression, s. 319(2) fails to meet the proportionality test.

Section 319(2) does, to some degree, further Parliament's objective. However, the rational connection between s. 319(2) and its goals is tenuous as there is not a strong and evident connection between the criminalization of hate propaganda and its suppression. Section 319(2) may in fact detract from the objectives it is designed to promote by deterring legitimate expression. Law-abiding citizens, who do not wish to run afoul of the law, could decide not to take the chance in a doubtful case. Creativity and the beneficial exchange of ideas could be adversely affected. At the same time, it is unclear that s. 319(2) provides an effective way of curbing hate-mongers. Not only does the criminal process attract extensive media coverage and confer on the accused publicity for his dubious causes, it may even bring him sympathy.

Section 319(2) of the *Code* does not interfere as little as possible with freedom of expression. Section 319(2) is drafted too broadly, catching more expressive conduct than can be justified by the objectives of promoting social harmony and individual dignity. The term "hatred" in s. 319(2) is capable of denoting a wide range of diverse emotions and is highly subjective, making it difficult to ensure that only cases meriting prosecution are pursued and that only those whose conduct is calculated to dissolve the social bonds of society are convicted. Despite the requirement of "wilful promotion", people who make statements primarily for non-nefarious reasons may also be convicted under s. 319(2). A belief that what one says about a group is true and important to political and social debate is quite compatible with, and indeed may inspire, an intention to promote active dislike of that group. Such a belief is equally compatible with foreseeing that promotion of such dislike may stem from one's statements. The absence of any requirement that actual harm or incitement to hatred be shown further broadens the scope of s. 319(2), and it is unclear, in practice, if the s. 319(3) defences, including the defence of truth, significantly narrow the ambit of s. 319(2). Moreover, not only is the category of speech caught by s. 319(2) defined broadly, the

application of the definition of offending speech i.e., the circumstances in which the offending statements are prohibited is virtually unlimited. Only private conversations are exempt from state scrutiny. Given the vagueness of the prohibition of expression in s. 319(2), there is again a danger that the legislation may have a chilling effect on legitimate activities important to our society by subjecting innocent persons to constraints born out of a fear of the criminal process. Finally, the process by which the prohibition is effected -- the criminal law -- is the severest our society can impose and is arguably unnecessary given the availability of alternate and more appropriate and effective remedies.

Any questionable benefit conferred by s. 319(2) of the *Code* is outweighed by the significant infringement on the guarantee of freedom of expression. Section 319(2) does not merely regulate the form or tone of expression, it strikes directly at its content. It is capable of catching not only statements like those at issue in this case, but works of art and the intemperate statement made in the heat of social controversy. While few may actually be prosecuted to conviction under s. 319(2) and imprisoned, many fall within the shadow of its broad prohibition. Section 319(2) touches on the vital values upon which s. 2(*b*) of the *Charter* rests: the value of fostering a vibrant and creative society through the marketplace of ideas; the value of the vigourous and open debate essential to democratic government and preservation of our rights and freedoms; and the value of a society which fosters the self-actualization and freedom of its members. An infringement of this seriousness can only be justified by a countervailing state interest of the most compelling nature. However, the claims of gains to be achieved at the cost of the infringement of free speech represented by s. 319(2) are tenuous. Indeed, it is difficult to see how s. 319(2) fosters the goals of social harmony and individual dignity.

(2) *Presumption of Innocence*

Per Dickson C.J. and Wilson, L'Heureux-Dubé and Gonthier JJ.: Section 319(3)(*a*) of the *Code*, which provides that no person shall be convicted of wilfully promoting hatred "if he establishes that the statements communicated were true", infringes the presumption of innocence guaranteed in s. 11(*d*) of the *Charter*. The real concern under s. 11(*d*) is not whether the accused must disprove an element of the offence or prove a defence. What is decisive is the final effect of the impugned provision on the verdict. If, as in this case, an accused is required to prove some fact on a balance of probabilities to avoid conviction, the impugned provision violates the presumption of innocence because it permits a conviction in spite of a reasonable doubt in the mind of the trier of fact as to the guilt of the accused.

Section 319(3)(*a*) of the *Code* constitutes a reasonable limit on the presumption of innocence. Parliament's objective in employing a reverse onus is pressing and substantial. The objective behind s. 319(3)(*a*) is closely connected with the purpose of s. 319(2). Harm is created whenever statements are made with the intention of promoting hatred, whether or not they contain an element of truth. If the defence of truth is too easily used, Parliament's objective under s. 319(2) will suffer unduly. It is therefore in the furtherance of that same objective that truthfulness must be proved by the accused on a balance of probabilities.

Section 319(3)(*a*) meets the proportionality test. First, the section has a rational connection to the purpose of preventing the harm caused by hate propaganda. The reverse onus in the truth defence operates so as to make it more difficult to avoid conviction where the wilful promotion of hatred has been proven beyond a reasonable doubt. Second, the section also represents a minimal impairment of the presumption of innocence. By requiring the accused to prove that his statements are true on a balance of probabilities, Parliament made a concession to the importance of truth in freedom of expression values without excessively compromising the effectiveness of s. 319(2). Any less onerous burden would severely skew

the equilibrium. Third, the importance of preventing the harm caused by hate propaganda is not outweighed by Parliament's infringement of s. 11(*d*). The reverse onus found in the truth defence represents the only way in which the defence can be offered while still enabling Parliament to prohibit hate propaganda effectively through criminal legislation; to require that the state prove beyond a reasonable doubt the falsity of a statement would excuse much of the harmful expressive activity caught by s. 319(2) despite minimal proof as to its worth.

Per Sopinka and McLachlin JJ. (dissenting): Section 319(3)(*a*) of the *Code* infringes s. 11(*d*) of the *Charter*. Under s. 319(2), where the Crown proves beyond a reasonable doubt that the accused wilfully promoted hatred against an identifiable group, the accused will escape liability if, under s. 319(3)(*a*), he "establishes that the statements communicated were true". By placing the burden of establishing the truth of the statements on the accused, Parliament has contravened the basic principle that the accused need not prove a defence. When an accused is required to prove some fact on a balance of probabilities to avoid conviction, the provision violates the presumption of innocence because it permits a conviction in spite of a reasonable doubt in the mind of the trier of fact as to the guilt of the accused.

Section 319(3)(*a*) of the *Code* does not constitute a reasonable limit upon the right to be presumed innocent. The section lacks the required degree of proportionality. It is difficult to discern a rational connection between the aims of s. 319(3)(*a*) and its requirement that the accused prove the truth of his statements. Further, s. 319(3)(*a*) does not impair s. 11(*d*) as little as possible. Because of its superior resources, the state is in a better position than the accused to determine whether or not a statement is true or false. If such a determination is impossible, it should not be ruled out that the statements could be more valuable than harmful. These considerations suggest that s. 319(3)(*a*)'s infringement of the presumption of innocence is neither minimal nor, given the importance of the infringement in the context of prosecutions

under s. 319(2), sufficient to outweigh the dubious benefit of such a provision. Parliament intended the truth to be a defence and falsehood to be an important element of the offence created by s. 319(2). That fact, coupled with the centrality of the presumption of innocence in our criminal law, indicates that only a countervailing state interest of the most compelling kind could justify the infringement. It is difficult to see, however, what benefits s. 319(2) in fact produces in terms of stemming hate propaganda and promoting social harmony and individual dignity.

Per La Forest J. (dissenting): It is unnecessary to consider the issues respecting the right to be presumed innocent in s. 11(*d*) of the *Charter*.

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By Dickson C.J.

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Communication No. 104/1981, Report of the Human Rights Committee, 38 U.N. GAOR, Supp. No. 40 (A/38/40) 231 (1983), decision reported in part at (1983), 5 C.H.R.R. D/2097; *R. v. Carrier* (1951), 104 C.C.C. 75; *R. v. Zundel* (1987), 58 O.R. (2d) 129; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326; *R. v. Buzzanga and Durocher* (1979), 49 C.C.C. (2d) 369; *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *United States of America v. Cotroni*, [1989] 1 S.C.R. 1469; *R. v. Jones*, [1986] 2 S.C.R. 284; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713; *Garrison v. Louisiana*, 379 U.S. 64 (1964); *Ashton v. Kentucky*, 384 U.S. 195 (1966); *Cohen v. California*, 403 U.S. 15 (1971); *Anti-Defamation League of B'nai B'rith v. Federal Communications Commission*, 403 F.2d 169 (1968); *Tollett v. United States*, 485 F.2d 1087 (1973); *Doe v. University of Michigan*, 721 F. Supp. 852 (1989); *R. v. Rahey*, [1987] 1 S.C.R. 588; *Roth v. United States*, 354 U.S. 476 (1957); *New York v. Ferber*, 458 U.S. 747 (1982); *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986); *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788 (1985); *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486; *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252; *Felderer v. Sweden* (1986), 8 E.H.R.R. 91; *X. v. Federal Republic of Germany*, Eur. Comm. H. R., Application No. 9235/81, July 16, 1982, D.R. 29, p. 194; *Lowes v. United Kingdom*, Eur. Comm. H. R., Application No. 13214/87, December 9, 1988, unreported; *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143; *R. v. Andrews* (1988), 65 O.R. (2d) 161, aff'd [1990] 3 S.C.R. 000; *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 000.

By McLachlin J. (dissenting)

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Mart Ltd., [1985] 1 S.C.R. 295; *R. v. Holmes*, [1988] 1 S.C.R. 914; *R. v. Schwartz*, [1988] 2 S.C.R. 443; *R. v. Morgentaler*, [1988] 1 S.C.R. 30; *R. v. Andrews* (1988), 65 O.R. (2d) 161, aff'd [1990] 3 S.C.R. 000; *Re Warren and Chapman* (1984), 11 D.L.R. (4th) 474; *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 000; *Saskatchewan (Human Rights Commission) v. Engineering Students' Society* (1989), 56 D.L.R. (4th) 604; *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

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APPEAL from a judgment of the Alberta Court of Appeal (1988), 60 Alta. L.R. (2d) 1, 87 A.R. 177, 43 C.C.C. (3d) 150, 65 C.R. (3d) 289, 39 C.R.R. 5, [1988] 5 W.W.R. 211, allowing the accused's appeal from his conviction on a charge of wilfully promoting hatred contrary to s. 319(2) of the *Criminal Code*. Appeal allowed, La Forest, Sopinka and McLachlin JJ. dissenting.

Bruce R. Fraser, Q.C., for the appellant.

Douglas H. Christie, for the respondent.

D. Martin Low, Q.C., *Stephen B. Sharzer* and *Irit Weiser*, for the intervener the Attorney General of Canada.

Gregory J. Fitch, for the intervener the Attorney General for Ontario.

Jean Bouchard and *Marise Visocchi*, for the intervener the Attorney General of Quebec.

Bruce Judah, for the internener the Attorney General for New Brunswick.

Aaron Berg and *Deborah Carlson*, for the intervener the Attorney General of Manitoba.

John I. Laskin, for the intervener the Canadian Jewish Congress.

Mark J. Sandler, for the intervener the League for Human Rights of B'nai Brith, Canada.

Joseph Nuss, Q.C., *Irwin Cotler* and *Ann Crawford*, for the intervener Interamicus.

Kathleen Mahoney and *Linda A. Taylor*, for the intervener the Women's Legal Education and Action Fund.

Marc Rosenberg, for the intervener the Canadian Civil Liberties Association.

//*Dickson C.J.*//

The judgment of Dickson C.J. and Wilson, L'Heureux-Dubé and Gonthier was delivered by

DICKSON C.J. -- This appeal was heard in conjunction with the appeals in *R. v. Andrews*, [1990] 3 S.C.R. 000, and *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 000. Along with *Andrews* it raises a delicate and highly controversial issue as to the constitutional validity of s. 319(2) of the *Criminal Code*, R.S.C., 1985, c. C-46, a legislative provision which prohibits the wilful promotion of hatred, other than in private conversation, towards any section of the public distinguished by colour, race, religion or ethnic origin. In particular, the Court must decide whether this section infringes the guarantee of freedom of expression found in s. 2(*b*) of the *Canadian Charter of Rights and Freedoms* in a manner that cannot be justified under s. 1 of the *Charter*. A secondary issue arises as to whether the presumption of innocence protected in the *Charter*'s s. 11(*d*) is unjustifiably breached by reason of s. 319(3)(*a*) of the *Code*, which affords a defence of "truth" to the wilful promotion of hatred, but only where the accused proves the truth of the communicated statements on the balance of probabilities.

I. Facts

Mr. James Keegstra was a high school teacher in Eckville, Alberta from the early 1970s until his dismissal in 1982. In 1984 Mr. Keegstra was charged under s. 319(2) (then s. 281.2(2)) of the *Criminal Code* with unlawfully promoting hatred against an identifiable group by communicating anti-semitic statements to his students. He was convicted by a jury in a trial before McKenzie J. of the Alberta Court of Queen's Bench.

Mr. Keegstra's teachings attributed various evil qualities to Jews. He thus described Jews to his pupils as "treacherous", "subversive", "sadistic", "money-loving", "power hungry" and "child killers". He taught his classes that Jewish people seek to destroy Christianity and are

responsible for depressions, anarchy, chaos, wars and revolution. According to Mr. Keegstra, Jews "created the Holocaust to gain sympathy" and, in contrast to the open and honest Christians, were said to be deceptive, secretive and inherently evil. Mr. Keegstra expected his students to reproduce his teachings in class and on exams. If they failed to do so, their marks suffered.

Prior to his trial, Mr. Keegstra applied to the Court of Queen's Bench in Alberta for an order quashing the charge on a number of grounds, the primary one being that s. 319(2) of the *Criminal Code* unjustifiably infringed his freedom of expression as guaranteed by s. 2(*b*) of the *Charter*. Among the other grounds of appeal was the allegation that the defence of truth found in s. 319(3)(*a*) of the *Code* violates the *Charter*'s presumption of innocence. The application was dismissed by Quigley J., and Mr. Keegstra was thereafter tried and convicted. He then appealed his conviction to the Alberta Court of Appeal, raising the same *Charter* issues. The Court of Appeal unanimously accepted his argument, and it is from this judgment that the Crown appeals.

The Attorneys General of Canada, Quebec, Ontario, Manitoba and New Brunswick, the Canadian Jewish Congress, Interamicus, the League for Human Rights of B'nai Brith, Canada, and the Women's Legal Education and Action Fund (L.E.A.F.) have intervened in this appeal in support of the Crown. The Canadian Civil Liberties Association has intervened in support of striking down the impugned legislation.

II. Issues

The following constitutional questions were stated on August 1, 1989:

1. Is s. 281.2(2) of the *Criminal Code* of Canada, R.S.C. 1970, c. C-34 (now s. 319(2) of the *Criminal Code* of Canada, R.S.C., 1985, c. C-46) an infringement of freedom of expression as guaranteed under s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*?

2. If s. 281.2(2) of the *Criminal Code* of Canada, R.S.C. 1970, c. C-34 (now s. 319(2) of the *Criminal Code* of Canada, R.S.C., 1985, c. C-46) is an infringement of s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*, can it be upheld under s. 1 of the *Canadian Charter of Rights and Freedoms* as a reasonable limit prescribed by law and demonstrably justified in a free and democratic society?

3. Is s. 281.2(3)(*a*) of the *Criminal Code* of Canada, R.S.C. 1970, c. C-34 (now s. 319(3)(*a*) of the *Criminal Code* of Canada, R.S.C., 1985, c. C-46) an infringement of the right to be presumed innocent, as guaranteed under s. 11(*d*) of the *Canadian Charter of Rights and Freedoms*?

4. If s. 281.2(3)(*a*) of the *Criminal Code* of Canada, R.S.C. 1970, c. C-34 (now s. 319(3)(*a*) of the *Criminal Code* of Canada, R.S.C., 1985, c. C-46) is an infringement of s. 11(*d*) of the *Canadian Charter of Rights and Freedoms*, can it be upheld under s. 1 of the *Canadian Charter of Rights and Freedoms* as a reasonable limit prescribed by law and demonstrably justified in a free and democratic society?

III. Relevant Statutory and Constitutional Provisions

The relevant legislative and *Charter* provisions are set out below:

Criminal Code

> **319.** . . .
>
> (2) Every one who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of
>
> (*a*) an indictable offence and is liable to imprisonment for a term not exceeding two years; or
>
> (*b*) an offence punishable on summary conviction.
>
> (3) No person shall be convicted of an offence under subsection (2)

(*a*) if he establishes that the statements communicated were true;

(*b*) if, in good faith, he expressed or attempted to establish by argument an opinion on a religious subject;

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

(*d*) if, in good faith, he intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred towards an identifiable group in Canada.

. . .

(6) No proceeding for an offence under subsection (2) shall be instituted without the consent of the Attorney General.

(7) In this section,

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

"identifiable group" has the same meaning as in section 318;

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

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

318. . . .

(4) In this section, "identifiable group" means any section of the public distinguished by colour, race, religion or ethnic origin.

Canadian Bill of Rights, R.S.C., 1985, App. III

The Parliament of Canada, affirming that the Canadian Nation is founded upon principles that ackowledge the supremacy of God, the dignity and worth of the human person and the position of the family in a society of free men and free institutions;

Affirming also that men and institutions remain free only when freedom is founded upon respect for moral and spiritual values and the rule of law;

And being desirous of enshrining these principles and the human rights and fundamental freedoms derived from them, in a Bill of Rights which shall reflect the respect of Parliament for its constitutional authority and which shall ensure the protection of these rights and freedoms in Canada:

Therefore Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

. . .

1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely, . . .

(d) freedom of speech;

Canadian Charter of Rights and Freedoms

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

2. Everyone has the following fundamental freedoms:

. . .

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

11. Any person charged with an offence has the right

. . .

(*d*) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

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

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

IV. Judgments of the Alberta Courts

A. *Alberta Court of Queen's Bench* (1984), 19 C.C.C. (3d) 254

In the Court of Queen's Bench, only the s. 2(*b*) issue was given substantial consideration, the argument on s. 11(*d*) not being entertained for lack of proper notice to the Crown. In dismissing Mr. Keegstra's s. 2(*b*) submission, Quigley J. was of the view that there exists a discernible Canadian concept of freedom of expression, a concept emanating from four principles found in the preamble to the *Canadian Bill of Rights* and the introductory words to s. 1 of the Bill, namely, i) an acknowledgment of the supremacy of God; ii) the dignity and worth of the human person; iii) respect for moral and spiritual values; and iv) the rule of law. Quigley J. saw the affirmation of these principles in s. 15 of the *Charter*, that section enshrining as it does the dignity and worth of every individual (p. 268). Of further interpretive use was the *Charter*'s s. 27, which he felt required a view of freedom of expression which is compatible with the preservation and enhancement of Canada's multicultural heritage (p. 268).

Using the principles provided by the *Canadian Bill of Rights* and affirmed in ss. 15 and 27 of the *Charter*, Quigley J. observed that the wilful promotion of hatred against a section of the Canadian public distinguished by colour, race, religion or ethnic origin is antithetical to the dignity and worth of the members of an identifiable group. As such, it negates their rights and freedoms, in particular denying them the right to the equal protection and benefit of the law without discrimination. Quigley J. thus decided that s. 319(2) does not infringe s. 2(*b*) of the *Charter*, stating (at p. 268):

> . . . it is my opinion that s. 281.2(2) [now s. 319(2)] of the *Code* cannot rationally be considered to be an infringement which limits "freedom of expression", but on the contrary it is a safeguard which promotes it. The protection afforded by the proscription tends to banish the apprehension which might otherwise inhibit certain segments of our society from freely expressing themselves upon the whole spectrum of topics, whether social, economic, scientific, political, religious, or spiritual in nature. The unfettered right to express divergent opinions on these topics is the kind of freedom of expression the *Charter* protects.

In the event that he was wrong in this conclusion, Quigley J. went on to ask whether s. 319(2) was justified under s. 1 of the *Charter*. He noted that persons maligned by hate propaganda may respond aggressively and be stripped of their sense of personal dignity and self-worth, while those whom the hate-monger seeks to influence are harmed because "it is beyond doubt that breeding hate is detrimental to society for psychological and social reasons and that it can easily create hostility and aggression which leads to violence" (p. 273). In light of these harms, Quigley J. saw s. 319(2) as a rational means of preventing real and serious damage to both individuals and society generally. Moreover, he felt that the various restrictions and defences built into s. 319(2) ensure that it has "a very minimal effect on the over-all right of freedom of expression" (p. 274). In Quigley J.'s view, the balance struck between free expression and the broader interests of social cohesion and the common good thus justified s. 319(2) as a reasonable limit to s. 2(*b*) under s. 1.

B. *Alberta Court of Appeal* (*per* Kerans J.A., Stevenson and Irving JJ.A. concurring) (1988), 43 C.C.C. (3d) 150

In the Alberta Court of Appeal, two *Charter* provisions were invoked by Mr. Keegstra. First, s. 2(*b*) was used as it had been in the pre-trial application before the Court of Queen's Bench, and second, the presumption of innocence protected in s. 11(*d*) was used to attack the reverse onus placed upon an accused by the defence of truth in s. 319(3)(*a*). On both issues Kerans J.A., writing for a unanimous court, found that the *Charter* had been violated. As a result, the appeal was allowed and the impugned provision struck down, and it became unnecessary to deal with a number of other grounds of appeal raised by Mr. Keegstra.

Kerans J.A. began by noting that under s. 319(3)(*a*) an accused could be convicted of wilfully promoting hatred upon failure to prove on a balance of probabilities the truth of his

or her statements. In this way, the onus of proving innocence was on the accused, and s. 319(3)(*a*) therefore violated s. 11(*d*). Under s. 1, Kerans J.A. could only envision one justification for a reverse onus, namely "where the inference commanded by the statutory presumption is so persuasive that only a perverse jury would have a doubt" (p. 160). In his opinion, statements intended to promote hatred could quite conceivably be true, and he consequently ruled that the reverse onus in s. 319(3)(*a*) was not saved under s. 1.

Turning next to the freedom of expression issue, Kerans J.A. was willing to accept that knowingly false expression was not covered by s. 2(*b*). Section 319(2) extended beyond knowingly false communications, however, covering all falsehoods, including those innocently and negligently made. The relevant question under s. 2(*b*) was therefore whether falsehoods unknowingly made were protected by the *Charter*. Invoking John Stuart Mill's "marketplace of ideas", Kerans J.A. decided in the affirmative, stating that "s. 2(*b*) should be understood as protecting both innocent error and imprudent speech" (p. 164). As s. 319(2) did neither, he held that it infringes s. 2(*b*) of the *Charter*.

Moving on to the s. 1 analysis, Kerans J.A. first considered whether the challenged legislation bore a rational relationship to a valid legislative objective. He accepted that preventing harm to the reputation and psychological well-being of target-group members was a valid s. 1 objective, stating that the making of unjust or capricious distinctions is "an attack on the dignity of the victim, and can result in a debilitating sense of alienation from society" (p. 169). Kerans J.A. nevertheless saw a difference between pain suffered by the target of isolated abuse and the crushing effect of systemic discrimination. He remarked that feelings of outrage and frustration caused by name-calling may be bearable if the abuse is rejected by the community as a whole, while in contrast name-calling becomes unbearable when, "it indeed cools one's friends and heats one's enemies" (p. 169). Consequently, he viewed injury

stemming from hate propaganda as serious enough to require the sanction of the criminal law only where people actually hate a group as a result of abuse.

The protection of individuals from actual hatred being alone sufficient reason to limit imprudent speech, Kerans J.A. found that s. 319(2) fails the proportionality test through overbreadth, permitting as it does the conviction of a person who merely intends to cause hatred. In coming to this result, Kerans J.A. viewed as insufficient, safeguards said to prevent the use of s. 319(2) to prosecute "harmless cranks" or persons in the public eye who utter an "unfortunate" remark that is picked up by the media. He also dismissed the Crown's contention that it would be impossible to prove actual harm from a particular hate-promoting communication, and refused to see prosecutorial discretion in s. 319(6) as a sufficient antidote to the offence's overbreadth. Finally, he did not view ss. 15 and 27 of the *Charter* as working to justify s. 319(2) under s. 1. In Kerans J.A.'s opinion, these *Charter* provisions do not forbid Canadians from criticizing the values of equality and multiculturalism, and while accepting that no Canadian should be asked to suffer simply because of his or her racial or ethnic heritage, he concluded that the challenged law "catches more than that" (p. 178). In the result, he found that the impugned legislative provision was not saved under s. 1.

V. The History of Hate Propaganda Crimes in Canada

The history of attempts to prevent the propagation of scurrilous statements about particular groups is, not surprisingly, extremely old. The earliest instance where such expression was made criminal occurred in 1275, when the offence of *De Scandalis Magnatum* was created, prohibiting "any false News or Tales, whereby discord, or occasion of discord or slander may grow between the King and his People, or the Great Men of the Realm". As Sir William Holdsworth noted, the aim of the statute was to prevent false statements which, in a society

dominated by extremely powerful landowners, could threaten the security of the state (see *A History of English Law* (5th ed. 1942), vol. III, at p. 409).

De Scandalis Magnatum was rarely employed, and was abolished in England in 1887, but its legacy survives in s. 181 of our *Criminal Code*, which makes it an offence to spread knowingly false news that is likely to cause injury or mischief to a public interest. Section 181 does not on its face address the problem of "hate propaganda", a term which I use for convenience to denote expression intended or likely to create or circulate extreme feelings of opprobrium and enmity against a racial or religious group, but it has been used recently to prosecute an individual for the distribution of anti-semitic material (see *R. v. Zundel* (1987), 58 O.R. (2d) 129 (C.A.)). In the more distant past, a forerunner of s. 181 was employed against the disseminator of a pamphlet decrying the plight of Jehovah's Witnesses in Quebec. This earlier case, *R. v. Carrier* (1951), 104 C.C.C. 75 (Que. K.B.), interpreted the provision narrowly, holding that the requirement of injury or the likelihood of injury to the public interest was not satisfied by simply a desire to fan hatred and ill-will between different groups, but rather needed something more in the nature of an intention to disobey openly or to act violently against the established authority.

Prior to 1970, s. 181 was the only provision of the *Criminal Code* with links (albeit mainly historical) to an offence of group defamation. Our common law has long seen defamation as a tortious action, but only where a litigant can show that reputation has been damaged by offending statements directed towards him or her as an individual. Similarly, until the amendments creating s. 319(2), Canadian criminal law made defamation an offence only in the case of attacks upon a person, as is evident from the combined effect of what are now ss. 298 and 300 of the *Criminal Code*. The scope of "person" set out in s. 2 of the *Code* extends somewhat beyond the individual, covering additionally public bodies, corporations, societies

and companies, but groups having common characteristics such as race, religion, colour and ethnic origin are not included in the definition.

Section 300 was not, before 1970, the only *Criminal Code* offence prohibiting a type of libel. There also existed the crime of seditious libel, now found in s. 59, prohibiting the speaking or publishing of seditious words. This offence required the existence of a "seditious intention", a state of mind which, without limiting the scope of the phrase, was statutorily presumed to be present in those advocating the unlawful use of force as a means of accomplishing a governmental change within Canada. In *Boucher v. The King*, [1951] S.C.R. 265, this Court interpreted "seditious intention" restrictively, however, finding the term to require proof of an intention to incite acts of violence or public disorder. The decision in *Boucher* has been long regarded as a strong defence of the merits of freedom of expression. Not surprisingly, for this reason it was relied upon in *Carrier* for the narrow interpretation of the offence of spreading false news.

While the history of attempts to prosecute criminally the libel of groups is lengthy, the *Criminal Code* provisions discussed so far do not focus specifically upon expression propagated with the intent of causing hatred against racial, ethnic or religious groups. Even before the Second World War, however, fears began to surface concerning the inadequacy of Canadian criminal law in this regard. In the 1930s, for example, Manitoba passed a statute combatting a perceived rise in the dissemination of Nazi propaganda (*The Libel Act*, R.S.M. 1913, c. 113, s. 13A (added S.M. 1934, c. 23, s. 1), now *The Defamation Act*, R.S.M. 1987, c. D20, s. 19(1)). Following the Second World War and revelation of the Holocaust, in Canada and throughout the world a desire grew to protect human rights, and especially to guard against discrimination. Internationally, this desire led to the landmark *Universal Declaration of Human Rights* in 1948, and, with reference to hate propaganda, was eventually manifested in two

international human rights instruments. In Canada, the post-war mood saw an attempt to include anti-hate propaganda provisions in the 1953 revision of the *Criminal Code*, but most influential in changing the criminal law in order to prohibit hate propaganda was the appointment by Justice Minister Guy Favreau of a special committee to study problems associated with the spread of hate propaganda in Canada.

The Special Committee on Hate Propaganda in Canada, usually referred to as the Cohen Committee, was composed of the following members: Dean Maxwell Cohen, Q.C., Dean of the Faculty of Law, McGill University, chair; Dr. J.A. Corry, Principal, Queen's University; L'Abbé Gérard Dion, Faculty of Social Sciences, Laval University; Mr. Saul Hayes, Q.C., Executive Vice-President, Canadian Jewish Congress; Professor Mark R. MacGuigan, Associate Professor of Law, University of Toronto; Mr. Shane MacKay, Executive Editor, Winnipeg Free Press; and Professor Pierre-E. Trudeau, Associate Professor of Law, University of Montreal. This was a particularly strong Committee, and in 1966 it released the unanimous *Report of the Special Committee on Hate Propaganda in Canada*.

The tenor of the Report is reflected in the opening paragraph of its Preface, which reads:

> This Report is a study in the power of words to maim, and what it is that a civilized society can do about it. Not every abuse of human communication can or should be controlled by law or custom. But every society from time to time draws lines at the point where the intolerable and the impermissible coincide. In a free society such as our own, where the privilege of speech can induce ideas that may change the very order itself, there is a bias weighted heavily in favour of the maximum of rhetoric whatever the cost and consequences. But that bias stops this side of injury to the community itself and to individual members or identifiable groups innocently caught in verbal cross-fire that goes beyond legitimate debate.

In keeping with these remarks, the recurrent theme running throughout the Report is the need to prevent the dissemination of hate propaganda without unduly infringing the freedom of

expression, a theme which led the Committee to recommend a number of amendments to the *Criminal Code*. These amendments were made, essentially along the lines suggested by the Committee, and covered the advocation of genocide (s. 318), the public incitement of hatred likely to lead to a breach of peace (s. 319(1)) and the provision challenged in this appeal and presently found in s. 319(2) of the *Code*, namely, the wilful promotion of hatred.

VI. Section 2(*b*) of the *Charter* -- Freedom of Expression

Having briefly set out the history of attempts to prohibit hate propaganda, I can now address the constitutional questions arising for decision in this appeal. The first of these concerns whether the *Charter* guarantee of freedom of expression is infringed by s. 319(2) of the *Criminal Code*. In other words, does the coverage of s. 2(*b*) extend to the public and wilful promotion of hatred against an identifiable group. Before looking to the specific facts of this appeal, however, I would like to comment upon the nature of the s. 2(*b*) guarantee. Obviously, one's conception of the freedom of expression provides a crucial backdrop to any s. 2(*b*) inquiry; the values promoted by the freedom help not only to define the ambit of s. 2(*b*), but also come to the forefront when discussing how competing interests might co-exist with the freedom under s. 1 of the *Charter*.

In the recent past, this Court has had the opportunity to hear and decide a number of freedom of expression cases, among them *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573; *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123; and *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232. Together, the

judgments in these cases provide guidance as to the values informing the freedom of expression, and additionally indicate the relationship between ss. 2(*b*) and 1 of the *Charter*.

That the freedom to express oneself openly and fully is of crucial importance in a free and democratic society was recognized by Canadian courts prior to the enactment of the *Charter*. The treatment of freedom of expression by this Court in both division of powers and other cases was examined in *Dolphin Delivery Ltd.*, *supra*, at pp. 583-88, and it was noted that well before the advent of the *Charter* -- before even the *Canadian Bill of Rights* was passed by Parliament in 1960, S.C. 1960, c. 44 -- freedom of expression was seen as an essential value of Canadian parliamentary democracy. This freedom was thus protected by the Canadian judiciary to the extent possible before its entrenchment in the *Charter*, and occasionally even appeared to take on the guise of a constitutionally protected freedom (see, e.g., *Reference re Alberta Statutes*, [1938] S.C.R. 100, *per* Duff C.J., at pp. 132-33; and *Switzman v. Elbling*, [1957] S.C.R. 285, *per* Abbott J., at p. 326).

Without explicit protection under a written constitution, however, the freedom of expression was not always accorded careful consideration in pre-*Charter* cases (see Clare Beckton, "Freedom of Expression" in G.-A. Beaudoin and E. Ratushny, eds., *The Canadian Charter of Rights and Freedoms* (2nd ed. 1989), 195, at pp. 197-98). Moreover, pre-*Charter* jurisprudence used freedom of expression primarily in relation to political expression, a context which restricted somewhat the content of the freedom and led this Court to remark in *Ford*, *supra*. at p. 764:

> The pre-*Charter* jurisprudence emphasized the importance of political expression because it was a challenge to that form of expression that most often arose under the division of powers and the "implied bill of rights", where freedom of political expression could be related to the maintenance and operation of the institutions of democratic government. But political expression is only one form of the great range of expression that is deserving of

> constitutional protection because it serves individual and societal values in a free and democratic society.

While the pre-*Charter* era saw a role for the freedom of expression, then, with the *Charter* came not only its increased importance, but also a more careful and generous study of the values informing the freedom.

As is evident from the quotation just given, the reach of s. 2(*b*) is potentially very wide, expression being deserving of constitutional protection if "it serves individual and societal values in a free and democratic society". In subsequent cases, the Court has not lost sight of this broad view of the values underlying the freedom of expression, though the majority decision in *Irwin Toy* perhaps goes further towards stressing as primary the "democratic commitment" said to delineate the protected sphere of liberty (p. 971). Moreover, the Court has attempted to articulate more precisely some of the convictions fueling the freedom of expression, these being summarized in *Irwin Toy* (at p. 976) as follows: (1) seeking and attaining truth is an inherently good activity; (2) participation in social and political decision-making is to be fostered and encouraged; and (3) diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in a tolerant and welcoming environment for the sake of both those who convey a meaning and those to whom meaning is conveyed.

Although *Ford* commented upon the values generally seen to support the freedom of expression, the decision was also sensitive of the need to consider these values within the textual framework of the *Charter*. Consequently, the Court stated at pp. 765-66 that,

> While . . . attempts to identify and define the values which justify the constitutional protection of freedom of expression are helpful in emphasizing the most

> important of them, they tend to be formulated in a philosophical context which fuses the separate questions of whether a particular form or act of expression is within the ambit of the interests protected by the value of freedom of expression and the question whether that form or act of expression, in the final analysis, deserves protection from interference under the structure of the Canadian *Charter* and the Quebec *Charter*. These are two distinct questions and call for two distinct analytical processes.

It is the presence of s. 1 which makes necessary this bifurcated approach to Canadian freedom of expression cases. Indeed, the application of this approach in *Ford* in part permitted the Court to give a large and liberal interpretation to s. 2(*b*), on the facts of the case leading to the inclusion of commercial expression within its ambit, and to state that the weighing of competing values would "in most instances" take place in s. 1 (p. 766).

Irwin Toy can be seen as at once clarifying the relationship between ss. 2(*b*) and 1 in freedom of expression cases and reaffirming and strengthening the large and liberal interpretation given the freedom in s. 2(*b*) by the Court in *Ford*. These aspects of the decision flow largely from a two-step analysis used in determining whether s. 2(*b*) has been infringed, an approach affirmed by this Court in subsequent cases, for example *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.), supra*, and *Royal College of Dental Surgeons*, *supra*.

The first step in the *Irwin Toy* analysis involves asking whether the activity of the litigant who alleges an infringement of the freedom of expression falls within the protected s. 2(*b*) sphere. In outlining a broad, inclusive approach to answering this question, the following was said (at p. 968):

> "Expression" has both a content and a form, and the two can be inextricably connected. Activity is expressive if it attempts to convey meaning. That meaning is its content. Freedom of expression was entrenched in our Constitution and is guaranteed in the Quebec *Charter* so as to ensure that everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream. Such protection is, in the words of both the Canadian and Quebec Charters,

> "fundamental" because in a free, pluralistic and democratic society we prize a diversity of ideas and opinions for their inherent value both to the community and to the individual.

Apart from rare cases where expression is communicated in a physically violent form, the Court thus viewed the fundamental nature of the freedom of expression as ensuring that "if the activity conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of the guarantee" (p. 969). In other words, the term "expression" as used in s. 2(*b*) of the *Charter* embraces all content of expression irrespective of the particular meaning or message sought to be conveyed (*Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.), supra,* at p. 1181, *per* Lamer J.).

The second step in the analysis outlined in *Irwin Toy* is to determine whether the purpose of the impugned government action is to restrict freedom of expression. The guarantee of freedom of expression will necessarily be infringed by government action having such a purpose. If, however, it is the effect of the action, rather than the purpose, that restricts an activity, s. 2(*b*) is not brought into play unless it can be demonstrated by the party alleging an infringement that the activity supports rather than undermines the principles and values upon which freedom of expression is based.

Having reviewed the *Irwin Toy* test, it remains to determine whether the impugned legislation in this appeal -- s. 319(2) of the *Criminal Code* -- infringes the freedom of expression guarantee of s. 2(*b*). Communications which wilfully promote hatred against an identifiable group without doubt convey a meaning, and are intended to do so by those who make them. Because *Irwin Toy* stresses that the type of meaning conveyed is irrelevant to the question of whether s. 2(*b*) is infringed, that the expression covered by s. 319(2) is invidious and obnoxious is beside the point. It is enough that those who publicly and wilfully promote

hatred convey or attempt to convey a meaning, and it must therefore be concluded that the first step of the *Irwin Toy* test is satisfied.

Moving to the second stage of the s. 2(*b*) inquiry, one notes that the prohibition in s. 319(2) aims directly at words -- in this appeal, Mr. Keegstra's teachings -- that have as their content and objective the promotion of racial or religious hatred. The purpose of s. 319(2) can consequently be formulated as follows: to restrict the content of expression by singling out particular meanings that are not to be conveyed. Section 319(2) therefore overtly seeks to prevent the communication of expression, and hence meets the second requirement of the *Irwin Toy* test.

In my view, through s. 319(2) Parliament seeks to prohibit communications which convey meaning, namely, those communications which are intended to promote hatred against identifiable groups. I thus find s. 319(2) to constitute an infringement of the freedom of expression guaranteed by s. 2(*b*) of the *Charter*. Before moving on to see whether the impugned provision is nonetheless justified under s. 1, however, I wish to canvas two arguments made in favour of the position that communications intended to promote hatred do not fall within the ambit of s. 2(*b*). The first of these arguments concerns an exception mentioned in *Irwin Toy* concerning expression manifested in a violent form. The second relates to the impact of other sections of the *Charter* and international agreements in interpreting the scope of the freedom of expression guarantee.

Beginning with the suggestion that expression covered by s. 319(2) falls within an exception articulated in *Irwin Toy*, it was argued before this Court that the wilful promotion of hatred is an activity the form and consequences of which are analogous to those associated with violence or threats of violence. This argument contends that Supreme Court of Canada

precedent excludes violence and threats of violence from the ambit of s. 2(*b*), and that the reason for such exclusion must lie in the fact that these forms of expression are inimical to the values supporting freedom of speech. Indeed, in support of this view it was pointed out to us that the Court in *Irwin Toy* stated that "freedom of expression ensures that we can convey our thoughts and feelings in non-violent ways without fear of censure" (p. 970). Accordingly, we were urged to find that hate propaganda of the type caught by s. 319(2), insofar as it imperils the ability of target group members themselves to convey thoughts and feelings in non-violent ways without fear of censure, is analogous to violence and threats of violence and hence does not fall within s. 2(*b*).

The proposition in *Irwin Toy* that violent expression is not afforded protection under s. 2(*b*) has its origin in a comment made by McIntyre J. in *Dolphin Delivery Ltd.*, in which he stated that the freedom of expression guaranteed picketers would not extend to protect violence or threats of violence (p. 588). Restricting s. 2(*b*) in this manner has also been mentioned in more recent Supreme Court of Canada decisions, in particular by Lamer J. in *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)* and by a unanimous Court in *Royal College of Dental Surgeons.* It should be emphasized, however, that no decision of this Court has rested on the notion that expressive conduct is excluded from s. 2(*b*) where it involves violence.

Turning specifically to the proposition that hate propaganda should be excluded from the coverage of s. 2(*b*), I begin by stating that the communications restricted by s. 319(2) cannot be considered as violence, which on a reading of *Irwin Toy* I find to refer to expression communicated directly through physical harm. Nor do I find hate propaganda to be analogous to violence, and through this route exclude it from the protection of the guarantee of freedom of expression. As I have explained, the starting proposition in *Irwin Toy* is that all activities conveying or attempting to convey meaning are considered expression for the purposes of s.

2(*b*); the content of expression is irrelevant in determining the scope of this *Charter* provision. Stated at its highest, an exception has been suggested where meaning is communicated directly via physical violence, the extreme repugnance of this form to free expression values justifying such an extraordinary step. Section 319(2) of the *Criminal Code* prohibits the communication of meaning that is repugnant, but the repugnance stems from the content of the message as opposed to its form. For this reason, I am of the view that hate propaganda is to be categorized as expression so as to bring it within the coverage of s. 2(*b*).

As for threats of violence, *Irwin Toy* spoke only of restricting s. 2(*b*) to certain forms of expression, stating at p. 970 that,

> [w]hile the guarantee of free expression protects all content of expression, certainly violence as a form of expression receives no such protection. It is not necessary here to delineate precisely when and on what basis a form of expression chosen to convey a meaning falls outside the sphere of the guarantee. But it is clear, for example, that a murderer or rapist cannot invoke freedom of expression in justification of the form of expression he has chosen. [Emphasis in original.]

While the line between form and content is not always easily drawn, in my opinion threats of violence can only be so classified by reference to the content of their meaning. As such, they do not fall within the exception spoken of in *Irwin Toy*, and their suppression must be justified under s. 1. As I do not find threats of violence to be excluded from the definition of expression envisioned by s. 2(*b*), it is unnecessary to determine whether the threatening aspects of hate propaganda can be seen as threats of violence, or analogous to such threats, so as to deny it protection under s. 2(*b*).

The second matter which I wish to address before leaving the s. 2(*b*) inquiry concerns the relevance of other *Charter* provisions and international agreements to which Canada is a party

in interpreting the coverage of the freedom of expression guarantee. It has been argued in support of excluding hate propaganda from the coverage of s. 2(*b*) that the use of ss. 15 and 27 of the *Charter* -- dealing respectively with equality and multiculturalism -- and Canada's acceptance of international agreements requiring the prohibition of racist statements make s. 319(2) incompatible with even a large and liberal definition of the freedom (see, e.g., I. Cotler, "Hate Literature", in R. S. Abella and M. L. Rothman, eds., *Justice Beyond Orwell* (1985), 117, at pp. 121-22). The general tenor of this argument is that these interpretative aids inextricably infuse each constitutional guarantee with values supporting equal societal participation and the security and dignity of all persons. Consequently, it is said that s. 2(*b*) must be curtailed so as not to extend to communications which seriously undermine the equality, security and dignity of others.

Because I will deal extensively with the impact of various *Charter* provisions and international agreements when considering whether s. 319(2) is a justifiable limit under s. 1, I will keep my comments here to a minimum. Suffice it to say that I agree with the general approach of Wilson J. in *Edmonton Journal, supra,* where she speaks of the danger of balancing competing values without the benefit of a context. This approach does not logically preclude the presence of balancing within s. 2(*b*) -- one could avoid the dangers of an overly abstract analysis simply by making sure that the circumstances surrounding both the use of the freedom and the legislative limit were carefully considered. I believe, however, that s. 1 of the *Charter* is especially well suited to the task of balancing, and consider this Court's previous freedom of expression decisions to support this belief. It is, in my opinion, inappropriate to attenuate the s. 2(*b*) freedom on the grounds that a <u>particular</u> context requires such; the large and liberal interpretation given the freedom of expression in *Irwin Toy* indicates that the preferable course is to weigh the various contextual values and factors in s. 1.

I thus conclude on the issue of s. 2(*b*) by finding that s. 319(2) of the *Criminal Code* constitutes an infringement of the *Charter* guarantee of freedom of expression, and turn to examine whether such an infringement is justifiable under s. 1 as a reasonable limit in a free and democratic society.

VII. Section 1 Analysis of Section 319(2)

A. *General Approach to Section 1*

Though the language of s. 1 appears earlier in these reasons, it is appropriate to repeat its words:

> **1.** The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

In *R. v. Oakes*, [1986] 1 S.C.R. 103, this Court offered a course of analysis to be employed in determining whether a limit on a right or freedom can be demonstrably justified in a free and democratic society. Under the approach in *Oakes*, it must first be established that impugned state action has an objective of pressing and substantial concern in a free and democratic society. Only such an objective is of sufficient stature to warrant overriding a constitutionally protected right or freedom (p. 138). The second feature of the *Oakes* test involves assessing the proportionality between the objective and the impugned measure. The inquiry as to proportionality attempts to guide the balancing of individual and group interests protected in s. 1, and in *Oakes* was broken down into the following three segments (at p. 139):

> First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question. . . . Third, there must be a proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of "sufficient importance".

The analytical framework of *Oakes* has been continually reaffirmed by this Court, yet it is dangerously misleading to conceive of s. 1 as a rigid and technical provision, offering nothing more than a last chance for the state to justify incursions into the realm of fundamental rights. From a crudely practical standpoint, *Charter* litigants sometimes may perceive s. 1 in this manner, but in the body of our nation's constitutional law it plays an immeasurably richer role, one of great magnitude and sophistication. Before examining the specific components of the *Oakes* approach as they relate to this appeal, I therefore wish to comment more generally upon the role of s. 1.

In the words of s. 1 are brought together the fundamental values and aspirations of Canadian society. As this Court has said before, the premier article of the *Charter* has a dual function, operating both to activate *Charter* rights and freedoms and to permit such reasonable limits as a free and democratic society may have occasion to place upon them (*Oakes*, at pp. 133-34). What seems to me to be of significance in this dual function is the commonality that links the guarantee of rights and freedoms to their limitation. This commonality lies in the phrase "free and democratic society". As was stated by the majority in *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at p. 1056:

> The underlying values of a free and democratic society both guarantee the rights in the *Charter* and, in appropriate circumstances, justify limitations upon those rights.

Obviously, a practical application of s. 1 requires more than an incantation of the words "free and democratic society". These words require some definition, an elucidation as to the values that they invoke. To a large extent, a free and democratic society embraces the very values and principles which Canadians have sought to protect and further by entrenching specific rights and freedoms in the Constitution, although the balancing exercise in s. 1 is not restricted to values expressly set out in the *Charter* (*Slaight*, *supra*, at p. 1056). With this guideline in mind, in *Oakes* I commented upon some of the ideals that inform our understanding of a free and democratic society, saying (at p. 136):

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

Undoubtedly these values and principles are numerous, covering the guarantees enumerated in the *Charter* and more. Equally, they may well deserve different emphases, and certainly will assume varying degrees of importance depending upon the circumstances of a particular case.

It is important not to lose sight of factual circumstances in undertaking a s. 1 analysis, for these shape a court's view of both the right or freedom at stake and the limit proposed by the state; neither can be surveyed in the abstract. As Wilson J. said in *Edmonton Journal*, *supra*, referring to what she termed the "contextual approach" to *Charter* interpretation (at pp. 1355-56):

> . . . a particular right or freedom may have a different value depending on the context. It may be, for example, that freedom of expression has greater value in a political context than it does in the context of disclosure of the details of a matrimonial dispute. The contextual approach attempts to bring into sharp relief the aspect of the right or freedom which is truly at stake in the case as well as the relevant aspects of any values in competition with it. It seems to be more sensitive to the reality of the dilemma posed by the particular facts and therefore more conducive to finding a fair and just compromise between the two competing values under s. 1).

Though Wilson J. was speaking with reference to the task of balancing enumerated rights and freedoms, I see no reason why her view should not apply to all values associated with a free and democratic society. Clearly, the proper judicial perspective under s. 1 must be derived from an awareness of the synergetic relation between two elements: the values underlying the *Charter* and the circumstances of the particular case.

From the discussion so far, I hope it is clear that a rigid or formalistic approach to the application of s. 1 must be avoided. The ability to use s. 1 as a gauge which is sensitive to the values and circumstances particular to an appeal has been identified as vital in past cases, and La Forest J. admirably described the essence of this flexible approach in *United States of America v. Cotroni*, [1989] 1 S.C.R. 1469, at pp. 1489-90:

> In the performance of the balancing task under s. 1, it seems to me, a mechanistic approach must be avoided. While the rights guaranteed by the *Charter* must be given priority in the equation, the underlying values must be sensitively weighed in a particular context against other values of a free and democratic society sought to be promoted by the legislature.

See also *R. v. Jones*, [1986] 2 S.C.R. 284, *per* La Forest J., at p. 300; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, *per* Dickson C.J., at pp. 768-69; and *Irwin Toy*, *supra*, *per* the majority, at pp. 989-90. The sentiments of La Forest J. correctly suggest that the application

of the *Oakes* approach will vary depending on the circumstances of the case, including the nature of the interests at stake.

B. *The Use of American Constitutional Jurisprudence*

Having discussed the unique and unifying role of s. 1, I think it appropriate to address a tangential matter, yet one nonetheless crucial to the disposition of this appeal: the relationship between Canadian and American approaches to the constitutional protection of free expression, most notably in the realm of hate propaganda. Those who attack the constitutionality of s. 319(2) draw heavily on the tenor of First Amendment jurisprudence in weighing the competing freedoms and interests in this appeal, a reliance which is understandable given the prevalent opinion that the criminalization of hate propaganda violates the Bill of Rights (see, e.g., L. H. Tribe, *American Constitutional Law* (2nd ed. 1988), at p. 861, n. 2; K. Greenawalt, "Insults and Epithets: Are They Protected Speech?" (1990), 42 *Rutgers L. Rev.* 287, at p. 304). In response to the emphasis placed upon this jurisprudence, I find it helpful to summarize the American position and to determine the extent to which it should influence the s. 1 analysis in the circumstances of this appeal.

A myriad of sources -- both judicial and academic -- offer reviews of First Amendment jurisprudence as it pertains to hate propaganda. Central to most discussions is the 1952 case of *Beauharnais v. Illinois*, 343 U.S. 250, where the Supreme Court of the United States upheld as constitutional a criminal statute forbidding certain types of group defamation. Though never overruled, *Beauharnais* appears to have been weakened by later pronouncements of the Supreme Court (see, e.g., *Garrison v. Louisiana*, 379 U.S. 64 (1964); *Ashton v. Kentucky*, 384 U.S. 195 (1966); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Brandenburg v. Ohio*, 395 U.S. 444 (1969); and *Cohen v. California*, 403 U.S. 15 (1971)). The trend reflected in

many of these pronouncements is to protect offensive, public invective as long as the speaker has not knowingly lied and there exists no clear and present danger of violence or insurrection.

In the wake of subsequent developments in the Supreme Court, on several occasions *Beauharnais* has been distinguished and doubted by lower courts (see, e.g., *Anti-Defamation League of B'nai B'rith v. Federal Communications Commission*, 403 F.2d 169 (D.C. Cir. 1968), at p. 174, n. 5; *Tollett v. United States*, 485 F.2d 1087 (8th Cir. 1973), at p. 1094, n. 14; *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), at pp. 331-32; and *Doe v. University of Michigan*, 721 F. Supp. 852 (E.D. Mich. 1989), at p. 863). Of the judgments expressing a shaken faith in *Beauharnais*, *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978), *certiorari* denied, 439 U.S. 916 (1978), is of greatest relevance to this appeal. In *Collin*, the Court of Appeal for the Seventh Circuit invalidated a municipal ordinance prohibiting public demonstrations inciting "violence, hatred, abuse or hostility toward a person or group of persons by reason of reference to religious, racial, ethnic, national or regional affiliation" (p. 1199), and thereby allowed members of the American Nazi Party to march through Skokie, Illinois, home to a large number of Jewish Holocaust survivors (despite the ruling, however, no march was held in Skokie; I. Horowitz, "First Amendment Blues: On Downs, *Nazis in Skokie*", [1986] *Am. B. Found. Res. J.* 535, at p. 540).

The question that concerns us in this appeal is not, of course, what the law is or should be in the United States. But it is important to be explicit as to the reasons why or why not American experience may be useful in the s. 1 analysis of s. 319(2) of the *Criminal Code*. In the United States, a collection of fundamental rights has been constitutionally protected for over two hundred years. The resulting practical and theoretical experience is immense, and should not be overlooked by Canadian courts. On the other hand, we must examine American

constitutional law with a critical eye, and in this respect La Forest J. has noted in *R. v. Rahey*, [1987] 1 S.C.R. 588, at p. 639:

> While it is natural and even desirable for Canadian courts to refer to American constitutional jurisprudence in seeking to elucidate the meaning of *Charter* guarantees that have counterparts in the United States Constitution, they should be wary of drawing too ready a parallel between constitutions born to different countries in different ages and in very different circumstances ....

Canada and the United States are not alike in every way, nor have the documents entrenching human rights in our two countries arisen in the same context. It is only common sense to recognize that, just as similarities will justify borrowing from the American experience, differences may require that Canada's constitutional vision depart from that endorsed in the United States.

Having examined the American cases relevant to First Amendment jurisprudence and legislation criminalizing hate propaganda, I would be adverse to following too closely the line of argument that would overrule *Beauharnais* on the ground that incursions placed upon free expression are only justified where there is a clear and present danger of imminent breach of peace. Equally, I am unwilling to embrace various categorizations and guiding rules generated by American law without careful consideration of their appropriateness to Canadian constitutional theory. Though I have found the American experience tremendously helpful in coming to my own conclusions regarding this appeal, and by no means reject the whole of the First Amendment doctrine, in a number of respects I am thus dubious as to the applicability of this doctrine in the context of a challenge to hate propaganda legislation.

First, it is not entirely clear that *Beauharnais* must conflict with existing First Amendment doctrine. Credible arguments have been made that later Supreme Court cases do not

necessarily erode its legitimacy (see, e.g., K. Lasson, "Racial Defamation as Free Speech: Abusing the First Amendment" (1985), 17 *Colum. Hum. Rts. L. Rev.* 11). Indeed, there exists a growing body of academic writing in the United States which evinces a stronger focus upon the way in which hate propaganda can undermine the very values which free speech is said to protect. This body of writing is receptive to the idea that, were the issue addressed from this new perspective, First Amendment doctrine might be able to accommodate statutes prohibiting hate propaganda (see, e.g., R. Delgado, "Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling" (1982), 17 *Harv. C.R.-C.L. L. Rev.* 133; I. Horowitz, "Skokie, the ACLU and the Endurance of Democratic Theory" (1979), 43 *Law & Contemp. Probs.* 328; Lasson, op. cit., at pp. 20-30; M. Matsuda, "Public Response to Racist Speech: Considering the Victim's Story" (1989), 87 *Mich. L. Rev.* 2320, at p. 2348; "*Doe v. University of Michigan*: First Amendment -- Racist and Sexist Expression on Campus -- Court Strikes Down University Limits on Hate Speech" (1990), 103 *Harv. L. Rev.* 1397).

Second, the aspect of First Amendment doctrine most incompatible with s. 319(2), at least as that doctrine is described by those who would strike down the legislation, is its strong aversion to content-based regulation of expression. I am somewhat skeptical, however, as to whether this view of free speech in the United States is entirely accurate. Rather, in rejecting the extreme position that would provide an absolute guarantee of free speech in the Bill of Rights, the Supreme Court has developed a number of tests and theories by which protected speech can be identified and the legitimacy of government regulation assessed. Often required is a content-based categorization of the expression under examination. As an example, obscenity is not protected because of its content (see, e.g., *Roth v. United States*, 354 U.S. 476 (1957)) and laws proscribing child pornography have been scrutinized under a less than strict First Amendment standard even where they extend to expression beyond the realm of the obscene (see *New York v. Ferber*, 458 U.S. 747 (1982)). Similarly, the vigourous protection of

free speech relaxes significantly when commercial expression is scrutinized (see, e.g., *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986)), and it is permissible to restrict government employees in their exercise of the right to engage in political activity (*Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788 (1985)).

In short, a decision to place expressive activity in a category which either merits reduced protection or falls entirely outside of the First Amendment's ambit at least impliedly involves assessing the content of the activity in light of free speech values. As Professor F. Schauer has said, it is always necessary to examine the First Amendment value of the expression limited by state regulation ("The Aim and the Target in Free Speech Methodology" (1989), 83 *Nw. U.L. Rev*. 562, at p. 568). To recognize that content is often examined under the First Amendment is not to deny that content neutrality plays a real and important role in the American jurisprudence. Nonetheless, that the proscription against looking at the content of expression is not absolute, and that balancing is occasionally employed in First Amendment cases (see Professor T. A. Aleinikoff, "Constitutional Law in the Age of Balancing" (1987), 96 *Yale L.J*. 943, at pp. 966-68), reveals that even in the United States it is sometimes thought justifiable to restrict a particular message because of its meaning.

Third, applying the *Charter* to the legislation challenged in this appeal reveals important differences between Canadian and American constitutional perspectives. I have already discussed in some detail the special role of s. 1 in determining the protective scope of *Charter* rights and freedoms. Section 1 has no equivalent in the United States, a fact previously alluded to by this Court in selectively utilizing American constitutional jurisprudence (see, e.g., *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, *per* Lamer J., at p. 498). Of course, American experience should never be rejected simply because the *Charter* contains a balancing

provision, for it is well known that American courts have fashioned compromises between conflicting interests despite what appears to be the absolute guarantee of constitutional rights. Where s. 1 operates to accentuate a uniquely Canadian vision of a free and democratic society, however, we must not hesitate to depart from the path taken in the United States. Far from requiring a less solicitous protection of *Charter* rights and freedoms, such independence of vision protects these rights and freedoms in a different way. As will be seen below, in my view the international commitment to eradicate hate propaganda and, most importantly, the special role given equality and multiculturalism in the Canadian Constitution necessitate a departure from the view, reasonably prevalent in America at present, that the suppression of hate propaganda is incompatible with the guarantee of free expression. (In support of this view, see the comments of Professors K. Mahoney and J. Cameron in "Language as Violence v. Freedom of Expression: Canadian and American Perspectives on Group Defamation" (1988-89), 37 *Buffalo L. Rev.* 337, beginning at pp. 344 and 353 respectively).

In sum, there is much to be learned from First Amendment jurisprudence with regard to freedom of expression and hate propaganda. It would be rash, however, to see First Amendment doctrine as demanding the striking down of s. 319(2). Not only are the precedents somewhat mixed, but the relaxation of the prohibition against content-based regulation of expression in certain areas indicates that American courts are not loath to permit the suppression of ideas in some circumstances. Most importantly, the nature of the s. 1 test as applied in the context of a challenge to s. 319(2) may well demand a perspective particular to Canadian constitutional jurisprudence when weighing competing interests. If values fundamental to the Canadian conception of a free and democratic society suggest an approach that denies hate propaganda the highest degree of constitutional protection, it is this approach which must be employed.

C. *Objective of Section 319(2)*

I now turn to the specific requirements of the *Oakes* approach in deciding whether the infringement of s. 2(*b*) occasioned by s. 319(2) is justifiable in a free and democratic society. According to *Oakes*, the first aspect of the s. 1 analysis is to examine the objective of the impugned legislation. Only if the objective relates to concerns which are pressing and substantial in a free and democratic society can the legislative limit on a right or freedom hope to be permissible under the *Charter*. In examining the objective of s. 319(2), I will begin by discussing the harm caused by hate propaganda as identified by the Cohen Committee and subsequent study groups, and then review in turn the impact upon this objective of international human rights instruments and ss. 15 and 27 of the *Charter*.

(i) Harm Caused by Expression Promoting the Hatred of Identifiable Groups

Looking to the legislation challenged in this appeal, one must ask whether the amount of hate propaganda in Canada causes sufficient harm to justify legislative intervention of some type. The Cohen Committee, speaking in 1965, found that the incidence of hate propaganda in Canada was not insignificant (at p. 24):

> . . . there exists in Canada a small number of persons and a somewhat larger number of organizations, extremist in outlook and dedicated to the preaching and spreading of hatred and contempt against certain identifiable minority groups in Canada. It is easy to conclude that because the number of persons and organizations is not very large, they should not be taken too seriously. The Committee is of the opinion that this line of analysis is no longer tenable after what is known to have been the result of hate propaganda in other countries, particularly in the 1930's when such material and ideas played a significant role in the creation of a climate of malice, destructive to the central values of Judaic-Christian society, the values of our civilization. The Committee believes, therefore, that the actual and potential danger caused by present hate activities in Canada cannot be measured by statistics alone.

> Even the statistics, however, are not unimpressive, because while activities have centered heavily in Ontario, they nevertheless have extended from Nova Scotia to British Columbia and minority groups in at least eight Provinces have been subjected to these vicious attacks.

In 1984, the House of Commons Special Committee on Participation of Visible Minorities in Canadian Society in its report, entitled *Equality Now!*, observed that increased immigration and periods of economic difficulty "have produced an atmosphere that may be ripe for racially motivated incidents" (p. 69). With regard to the dissemination of hate propaganda, the Special Committee found that the prevalence and scope of such material had risen since the Cohen Committee made its report, stating (at p. 69):

> There has been a recent upsurge in hate propaganda. It has been found in virtually every part of Canada. Not only is it anti-semitic and anti-black, as in the 1960s, but it is also now anti-Roman Catholic, anti-East Indian, anti-aboriginal people and anti-French. Some of this material is imported from the United States but much of it is produced in Canada. Most worrisome of all is that in recent years Canada has become a major source of supply of hate propaganda that finds its way to Europe, and especially to West Germany.

As the quotations above indicate, the presence of hate propaganda in Canada is sufficiently substantial to warrant concern. Disquiet caused by the existence of such material is not simply the product of its offensiveness, however, but stems from the very real harm which it causes. Essentially, there are two sorts of injury caused by hate propaganda. First, there is harm done to members of the target group. It is indisputable that the emotional damage caused by words may be of grave psychological and social consequence. In the context of sexual harassment, for example, this Court has found that words can in themselves constitute harassment (*Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252). In a similar manner, words and writings that wilfully promote hatred can constitute a serious attack on persons belonging to a racial or religious group, and in this regard the Cohen Committee noted that these persons are humiliated and degraded (p. 214).

In my opinion, a response of humiliation and degradation from an individual targeted by hate propaganda is to be expected. A person's sense of human dignity and belonging to the community at large is closely linked to the concern and respect accorded the groups to which he or she belongs (see I. Berlin, "Two Concepts of Liberty", in *Four Essays on Liberty* (1969), 118, at p. 155). 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. This impact may cause target group members to take drastic measures in reaction, perhaps avoiding activities which bring them into contact with non-group members or adopting attitudes and postures directed towards blending in with the majority. 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.

A second harmful effect of hate propaganda which is of pressing and substantial concern is its influence upon society at large. The Cohen Committee noted that individuals can be persuaded to believe "almost anything" (p. 30) if information or ideas are communicated using the right technique and in the proper circumstances (at p. 8):

> . . . we are less confident in the 20th century that the critical faculties of individuals will be brought to bear on the speech and writing which is directed at them. In the 18th and 19th centuries, there was a widespread belief that man was a rational creature, and that if his mind was trained and liberated from superstition by education, he would always distinguish truth from falsehood, good from evil. So Milton, who said "let truth and falsehood grapple: who ever knew truth put to the worse in a free and open encounter".
>
> We cannot share this faith today in such a simple form. While holding that over the long run, the human mind is repelled by blatant falsehood and seeks the good, it is too often true, in the short run, that emotion displaces reason and individuals perversely reject the demonstrations of truth put before them and forsake the good they know. The successes of modern advertising, the triumphs of impudent propaganda such as Hitler's, have qualified sharply our belief in the rationality of man. We know that under strain and pressure in times of irritation and frustration, the individual is swayed and even swept away by hysterical, emotional appeals. We act irresponsibly if we ignore the way in which emotion can drive reason from the field.

It is thus not inconceivable that the active dissemination of hate propaganda can attract individuals to its cause, and in the process create serious discord between various cultural groups in society. Moreover, the alteration of views held by the recipients of hate propaganda may occur subtlely, and is not always attendant upon conscious acceptance of the communicated ideas. Even if the message of hate propaganda is outwardly rejected, there is evidence that its premise of racial or religious inferiority may persist in a recipient's mind as an idea that holds some truth, an incipient effect not to be entirely discounted (see Matsuda, op. cit., at pp. 2339-40).

The threat to the self-dignity of target group members is thus matched by the possibility that prejudiced messages will gain some credence, with the attendant result of discrimination, and perhaps even violence, against minority groups in Canadian society. With these dangers in mind, the Cohen Committee made clear in its conclusions that the presence of hate propaganda existed as a baleful and pernicious element, and hence a serious problem, in Canada (at p. 59):

> The amount of hate propaganda presently being disseminated and its measurable effects probably are not sufficient to justify a description of the problem as one of crisis or near crisis proportions. Nevertheless the problem is a serious one. We believe that, given a certain set of socio-economic circumstances, such as a deepening of the emotional tensions or the setting in of a severe business recession, public susceptibility might well increase significantly. Moreover, the potential psychological and social damage of hate propaganda, both to a desensitized majority and to sensitive minority target groups, is incalculable. As Mr. Justice Jackson of the United States Supreme Court wrote in *Beauharnais v. Illinois*, such "sinister abuses of our freedom of expression . . . can tear apart a society, brutalize its dominant elements, and persecute even to extermination, its minorities".

As noted previously, in articulating concern about hate propaganda and its contribution to racial and religious tension in Canada, the Cohen Committee recommended that Parliament use the *Criminal Code* in order to prohibit wilful, hate-promoting expression and underline Canada's commitment to end prejudice and intolerance.

The close connection between the recommendations of the Cohen Committee and the hate propaganda amendments to the *Criminal Code* made in 1970 indicates that in enacting s. 319(2) Parliament's purpose was to prevent the harm identified by the Committee as being caused by hate-promoting expression. More recent reports have echoed the findings and concerns of the Cohen Committee, lending further support to the substantial nature of the legislative objective. The 1981 *Report Arising Out of the Activities of the Ku Klux Klan in British Columbia by John D. McAlpine noted evidence of racism and racial violence in British Columbia, and among its conclusions recommended the strengthening of existing remedies, including the criminal offence of the wilful promotion of hatred. The 1984 report of the Special Committee on Participation of Visible Minorities in Canadian Society, investigated, among many topics, legal and justice issues pertaining to and affecting members of visible minority groups in Canada. The Committee suggested a wider ranging prohibition in s. 319(2), most notably by removing reference to the mental element of wilfulness, as a response to the threat to equality and multiculturalism presented by hate propaganda (Recommendations 35-37). Also in 1984, the Canadian Bar Association's Report of the Special Committee on Racial and Religious Hatred* found that the law had a role to play, both at the criminal and civil level, in restricting the dissemination of hate propaganda (p. 12). With regard to s. 319(2), this conclusion was affirmed two years later in Working Paper 50 of the Law Reform Commission of Canada, entitled *Hate Propaganda* (1986).

(ii) International Human Rights Instruments

There is a great deal of support, both in the submissions made by those seeking to uphold s. 319(2) in this appeal and in the numerous studies of racial and religious hatred in Canada, for the conclusion that the harm caused by hate propaganda represents a pressing and substantial concern in a free and democratic society. I would also refer to international human rights principles, however, for guidance with respect to assessing the legislative objective.

Generally speaking, the international human rights obligations taken on by Canada reflect the values and principles of a free and democratic society, and thus those values and principles that underlie the *Charter* itself (*Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, *per* Dickson C.J., at p. 348). Moreover, international human rights law and Canada's commitments in that area are of particular significance in assessing the importance of Parliament's objective under s. 1. As stated in *Slaight Communications Inc. v. Davidson*, *supra*, at pp. 1056-57:

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

In the context of justifying an infringement of s. 2(*b*), the majority in *Slaight* made a point of noting that a value enjoying status as an international human right is generally to be ascribed a high degree of importance under s. 1 of the *Charter* (pp. 1056-57).

No aspect of international human rights has been given attention greater than that focused upon discrimination. The large emphasis placed upon eradicating discrimination is evident in the fact that all but one of the major international human rights instruments (the *European Social Charter*) proscribe it in an article of general application (P. Sieghart, *The International Law of Human Rights* (1983), at p. 75). This high concern regarding discrimination has led to the presence in two international human rights documents of articles forbidding the dissemination of hate propaganda.

In 1966, the United Nations adopted the *International Convention on the Elimination of All Forms of Racial Discrimination*, Can. T.S. 1970 No. 28 (hereineafter "*CERD*"). The

Convention, in force since 1969 and including Canada among its signatory members, contains a resolution that States Parties agree to:

> . . . adopt all necessary measures for speedily eliminating racial discrimination in all its forms and manifestations, and to prevent and combat racist doctrines and practices in order to promote understanding between races and to build an international community free from all forms of racial segregation and racial discrimination.

Article 4 of the *CERD* is of special interest, providing that:

> ARTICLE 4
>
> States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or other ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, *inter alia*:
>
> (a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

Further, the *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171 (1966) (hereinafter "*ICCPR*"), adopted by the United Nations in 1966 and in force in Canada since 1976, in the following two articles guarantees the freedom of expression while simultaneously prohibiting the advocacy of hatred:

> *Article 19. . . .*
>
> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless

of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

Article 20.1. Any propaganda for war shall be prohibited by law.

2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

It appears that the protection provided freedom of expression by *CERD* and *ICCPR* does not extend to cover communications advocating racial or religious hatred. In *CERD*, Article 5 guarantees a number of civil rights, including freedom of expression, but it is generally agreed that this guarantee does not prevent a State Party from prohibiting hate propaganda (*Study on the Implementation of Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination*, prepared by Special Rapporteur Mr. José D. Inglés, A/CONF. 119/10, May 18, 1983, para. 108). As for *ICCPR*, in 1981 a complaint against Canada was submitted by Mr. John Ross Taylor and the Western Guard Party (also appealing to this Court) to the United Nations Human Rights Committee under the *Optional Protocol to the International Covenant on Civil and Political Rights*. The complaint alleged that s. 13(1) of the *Canadian Human Rights Act*, S.C. 1976-77, c. 33 (now R.S.C., 1985, c. H-6), which prohibits the communication of hate messages by telephone, had been applied against Mr. Taylor and his organization in violation of Article 19 of *ICCPR*. The Committee rejected this argument, however, holding that it was incompatible with the provisions of *ICCPR*, and in particular with Article 20, stating that,

> . . . the opinions which Mr. [Taylor] seeks to disseminate through the telephone system clearly constitute the advocacy of racial or religious hatred which Canada has an obligation under article 20(2) of the Covenant to prohibit.
>
> (*Taylor and Western Guard Party v. Canada*, Communication No. 104/1981, Report of the Human Rights Committee, 38 U.N. GAOR, Supp. No. 40 (A/38/40) 231 (1983), para. 8(b), decision reported in part at (1983), 5 C.H.R.R. D/2397.)

In discussing the stance taken toward hate propaganda in international law, it is also worth mentioning the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 U.N.T.S. 221 (1950), to which twenty-one states are parties. The Convention contains a qualified guarantee of free expression in Article 10, which reads as follows:

> *Article 10*
>
> (1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. . . .
>
> (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Article 10(2), the language of which bears significant resemblance to that of s. 1 of the *Charter*, has been interpreted by the European Commission of Human Rights so as to permit the prohibition of racist communications as a valid derogation from the protection of free expression (see *Felderer v. Sweden* (1986), 8 E.H.R.R. 91; *X. v. Federal Republic of Germany*, Eur. Comm. H. R., Application No. 9235/81, July 16, 1982, D.R. 29, p. 194; and *Lowes v. United Kingdom*, Eur. Comm. H. R., Application No. 13214/87, December 9, 1988, unreported). In the leading pronouncement of the Commission, however, Article 17 of the Convention was invoked in order to justify hate propaganda laws (*Glimmerveen v. Netherlands*,

Eur. Comm. H. R., Applications Nos. 8348/78 and 8406/78, October 11, 1979, D.R. 18, p. 187). Article 17 prevents the interpretation of any Convention right so as to imply a "right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention". The decision in *Glimmerveen* also utilized Article 14, which provides that the enjoyment of Convention rights and freedoms shall be secured without discrimination on any ground such as, *inter alia*, race or colour.

CERD and *ICCPR* demonstrate that the prohibition of hate-promoting expression is considered to be not only compatible with a signatory nation's guarantee of human rights, but is as well an obligatory aspect of this guarantee. Decisions under the *European Convention for the Protection of Human Rights and Fundamental Freedoms* are also of aid in illustrating the tenor of the international community's approach to hate propaganda and free expression. This is not to deny that finding the correct balance between prohibiting hate propaganda and ensuring freedom of expression has been a source of debate internationally (see, e.g., N. Lerner, *The U.N. Convention on the Elimination of All Forms of Racial Discrimination* (1980), at pp. 43-54). But despite debate Canada, along with other members of the international community, has indicated a commitment to prohibiting hate propaganda, and in my opinion this Court must have regard to that commitment in investigating the nature of the government objective behind s. 319(2) of the *Criminal Code*. That the international community has collectively acted to condemn hate propaganda, and to oblige State Parties to *CERD* and *ICCPR* to prohibit such expression, thus emphasizes the importance of the objective behind s. 319(2) and the principles of equality and the inherent dignity of all persons that infuse both international human rights and the *Charter*.

(iii) Other Provisions of the Charter

Significant indicia of the strength of the objective behind s. 319(2) are gleaned not only from the international arena, but are also expressly evident in various provisions of the *Charter* itself. As Wilson J. noted in *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, at p. 218:

> . . . it is important to bear in mind that the rights and freedoms set out in the *Charter* are fundamental to the political structure of Canada and are guaranteed by the *Charter* as part of the supreme law of our nation. I think that in determining whether a particular limitation is a reasonable limit prescribed by law which can be "demonstrably justified in a free and democratic society" it is important to remember that the courts are conducting this inquiry in light of a commitment to uphold the rights and freedoms set out in the other sections of the *Charter*.

Most importantly for the purposes of this appeal, ss. 15 and 27 represent a strong commitment to the values of equality and multiculturalism, and hence underline the great importance of Parliament's objective in prohibiting hate propaganda.

Looking first to s. 15, in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, I said that "[a] free society is one which aims at equality with respect to the enjoyment of fundamental freedoms and I say this without any reliance upon s. 15 of the *Charter*" (p. 336). Section 15 lends further support to this observation, for the effects of entrenching a guarantee of equality in the *Charter* are not confined to those instances where it can be invoked by an individual against the state. Insofar as it indicates our society's dedication to promoting equality, s. 15 is also relevant in assessing the aims of s. 319(2) of the *Criminal Code* under s. 1. In *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, this Court examined the equality guarantee of s. 15, McIntyre J. noting (at p. 171):

> It is clear that the purpose of s. 15 is to ensure equality in the formulation and application of the law. The promotion of equality entails the promotion of a society in

> which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration. It has a large remedial component.

As noted in *Big M Drug Mart*, promoting equality is an undertaking essential to any free and democratic society, and I believe that the words of McIntyre J. support this position. The principles underlying s. 15 of the *Charter* are thus integral to the s. 1 analysis.

In its written submission to the Court, the intervenor L.E.A.F. made the following comment in support of the view that the public and wilful promotion of group hatred is properly understood as a practice of inequality:

> Government sponsored hatred on group grounds would violate section 15 of the *Charter*. Parliament promotes equality and moves against inequality when it prohibits the wilful public promotion of group hatred on these grounds. It follows that government action against group hate, because it promotes social equality as guaranteed by the *Charter*, deserves special constitutional consideration under section 15.

I agree with this statement. In light of the *Charter* commitment to equality, and the reflection of this commitment in the framework of s. 1, the objective of the impugned legislation is enhanced insofar as it seeks to ensure the equality of all individuals in Canadian society. The message of the expressive activity covered by s. 319(2) is that members of identifiable groups are not to be given equal standing in society, and are not human beings equally deserving of concern, respect and consideration. The harms caused by this message run directly counter to the values central to a free and democratic society, and in restricting the promotion of hatred Parliament is therefore seeking to bolster the notion of mutual respect necessary in a nation which venerates the equality of all persons.

Section 15 is not the only *Charter* provision which emphasizes values both important to a free and democratic society and pertinent to the disposition of this appeal under s. 1. Section 27 states that:

> **27.** This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

This Court has where possible taken account of s. 27 and its recognition that Canada possesses a multicultural society in which the diversity and richness of various cultural groups is a value to be protected and enhanced. Section 27 has therefore been used in a number of judgments of this Court, both as an aid in interpreting the definition of *Charter* rights and freedoms (see, e.g., *Big M Drug Mart*, *supra*, *per* Dickson J., at pp. 337-38, *Edwards Books*, *supra*, *per* Dickson C.J., at p. 758; and *Andrews v. Law Society of British Columbia*, *supra*, *per* McIntyre J., at p. 171) and as an element in the s. 1 analysis (see, e.g., *Edwards Books*, *per* La Forest J., at p. 804, and Wilson J., at p. 809).

The value expressed in s. 27 cannot be casually dismissed in assessing the validity of s. 319(2) under s. 1, and I am of the belief that s. 27 and the commitment to a multicultural vision of our nation bear notice in emphasizing the acute importance of the objective of eradicating hate propaganda from society. Professor J. E. Magnet has dealt with some of the factors which may be used to inform the meaning of s. 27, and of these I expressly adopt the principle of non-discrimination and the need to prevent attacks on the individual's connection with his or her culture, and hence upon the process of self-development (see Magnet "Multiculturalism and Collective Rights: Approaches to Section 27", in G.-A. Beaudoin and E. Ratushny, eds., op. cit., at p. 739). Indeed, the sense that an individual can be affected by treatment of a group to which he or she belongs is clearly evident in a number of other *Charter* provisions not yet

mentioned, including ss. 16 to 23 (language rights), s. 25 (aboriginal rights), s. 28 (gender equality) and s. 29 (denominational schools).

Hate propaganda seriously threatens both the enthusiasm with which the value of equality is accepted and acted upon by society and the connection of target group members to their community. I thus agree with the sentiments of Cory J.A. who, in writing to uphold s. 319(2) in *R. v. Andrews* (1988), 65 O.R. (2d) 161, said (at p. 181):

> Multiculturalism cannot be preserved let alone enhanced if free rein is given to the promotion of hatred against identifiable cultural groups.

When the prohibition of expressive activity that promotes hatred of groups identifiable on the basis of colour, race, religion, or ethnic origin is considered in light of s. 27, the legitimacy and substantial nature of the government objective is therefore considerably strengthened.

(iv) Conclusion Respecting Objective of Section 319(2)

In my opinion, it would be impossible to deny that Parliament's objective in enacting s. 319(2) is of the utmost importance. Parliament has recognized the substantial harm that can flow from hate propaganda, and in trying to prevent the pain suffered by target group members and to reduce racial, ethnic and religious tension in Canada has decided to suppress the wilful promotion of hatred against identifiable groups. The nature of Parliament's objective is supported not only by the work of numerous study groups, but also by our collective historical knowledge of the potentially catastrophic effects of the promotion of hatred (*Jones*, *supra*, *per* La Forest J., at pp. 299-300). Additionally, the international commitment to eradicate hate propaganda and the stress placed upon equality and multiculturalism in the *Charter* strongly

buttress the importance of this objective. I consequently find that the first part of the test under s. 1 of the *Charter* is easily satisfied and that a powerfully convincing legislative objective exists such as to justify some limit on freedom of expression.

D. *Proportionality*

The second branch of the *Oakes* test -- proportionality -- poses the most challenging questions with respect to the validity of s. 319(2) as a reasonable limit on freedom of expression in a free and democratic society. It is therefore not surprising to find most commentators, as well as the litigants in the case at bar, agreeing that the objective of the provision is of great importance, but to observe considerable disagreement when it comes to deciding whether the means chosen to further the objective are proportional to the ends. (Among the more recent Canadian legal articles supporting the validity of a provision in the nature of s. 319(2) see: D. Bottos, "Keegstra and Andrews: A Commentary on Hate Propaganda and the Freedom of Expression" (1989), 27 *Alta. L. Rev.* 461; Cotler, op. cit.; A. Fish, "Hate Promotion and Freedom of Expression: Truth and Consequences" (1989), 2 *Can. J.L. & Juris.* 111; A. W. MacKay, "Freedom of Expression: Is It All Just Talk?" (1989), 68 *Can. Bar Rev*. 713; N. N. Rauf, "Freedom of Expression, the Presumption of Innocence and Reasonable Limits: An Analysis of Keegstra and Andrews" (1988), 65 C.R. (3d) 356; A. Regel, "Hate Propaganda: A Reason to Limit Freedom of Speech" (1984-85), 49 *Sask. L. Rev*. 303. Canadian writers taking the opposite view include R. Bessner, "The Constitutionality of the Group Libel Offences in the Canadian Criminal Code" (1988), 17 *Man. L.J.* 183; A. A. Borovoy, "Freedom of Expression: Some Recurring Impediments" in R. S. Abella and M. L. Rothman, eds., op. cit., at p. 125; S. Braun, "Social and Racial Tolerance and Freedom of Expression in a Democratic Society: Friends or Foes? *Regina* v. *Zundel*" (1987), 11 *Dalhousie L. J.* 471.)

(i) Relation of the Expression at Stake to Free Expression Values

In discussing the nature of the government objective, I have commented at length upon the way in which the suppression of hate propaganda furthers values basic to a free and democratic society. I have said little, however, regarding the extent to which these same values, including the freedom of expression, are furthered by permitting the exposition of such expressive activity. This lacuna is explicable when one realizes that the interpretation of s. 2(*b*) under *Irwin Toy*, *supra* gives protection to a very wide range of expression. Content is irrelevant to this interpretation, the result of a high value being placed upon freedom of expression in the abstract. This approach to s. 2(*b*) often operates to leave unexamined the extent to which the expression at stake in a particular case promotes freedom of expression principles. In my opinion, however, the s. 1 analysis of a limit upon s. 2(*b*) cannot ignore the nature of the expressive activity which the state seeks to restrict. While we must guard carefully against judging expression according to its popularity, it is equally destructive of free expression values, as well as the other values which underlie a free and democratic society, to treat all expression as equally crucial to those principles at the core of s. 2(*b*).

In *Rocket v. Royal College of Dental Surgeons of Ontario*, *supra*, McLachlin J. recognized the importance of context in evaluating expressive activity under s. 1, stating with regard to commercial speech (at pp. 246-47):

> While the Canadian approach does not apply special tests to restrictions on commercial expression, our method of analysis does permit a sensitive, case-oriented approach to the determination of their constitutionality. Placing the conflicting values in their factual and social context when performing the s. 1 analysis permits the courts to have regard to special features of the expression in question. As Wilson J. notes in *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, not all expression is equally worthy of protection. Nor are all infringements of free expression equally serious. [See also *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, *per* Dickson C.J., at p. 1135.]

Using this contextual approach, McLachlin J. evaluated the expression jeopardized by government regulation in light of s. 2(*b*) values. She thus went on to consider those interests which argued for restriction only after having assessed the importance of the freedom of expression interest at stake on the facts of the case.

Royal College dealt with provincial limitations upon the freedom of dentists to impart information to patients and potential patients via advertisements. In these circumstances, the Court found that the expression regulated was of a nature that made its curtailment something less than a most serious infringement of the freedom of expression, the limitation affecting neither participation in the political process nor the ability of the individual to achieve spiritual or artistic self-fulfillment. The resulting conclusion was that "restrictions on expression of this kind might be easier to justify than other infringements" (p. 247). At the same time, however, it was recognized that an interest existed in those who wished to make an informed choice as to a dentist, and in so far as access to such information was restricted the infringement of s. 2(*b*) could not be lightly dismissed (p. 247). Moreover, unlike in *Irwin Toy*, the information was not aimed at children, a group hampered in making informed choices, and hence any heightened state interest that might arise in protecting a vulnerable group was absent (p. 248).

Applying the *Royal College* approach to the context of this appeal is a key aspect of the s. 1 analysis. One must ask whether the expression prohibited by s. 319(2) is tenuously connected to the values underlying s. 2(*b*) so as to make the restriction "easier to justify than other infringements." In this regard, let me begin by saying that, in my opinion, there can be no real disagreement about the subject matter of the messages and teachings communicated by the respondent, Mr. Keegstra: it is deeply offensive, hurtful and damaging to target group members, misleading to his listeners, and antithetical to the furtherance of tolerance and understanding in society. Furthermore, as will be clear when I come to discuss in detail the

interpretation of s. 319(2), there is no doubt that all expression fitting within the terms of the offence can be similarly described. To say merely that expression is offensive and disturbing, however, fails to address satisfactorily the question of whether, and to what extent, the expressive activity prohibited by s. 319(2) promotes the values underlying the freedom of expression. It is to this difficult and complex question that I now turn.

From the outset, I wish to make clear that in my opinion the expression prohibited by s. 319(2) is not closely linked to the rationale underlying s. 2(*b*). Examining the values identified in *Ford* and *Irwin Toy* as fundamental to the protection of free expression, arguments can be made for the proposition that each of these values is diminished by the suppression of hate propaganda. While none of these arguments is spurious, I am of the opinion that expression intended to promote the hatred of identifiable groups is of limited importance when measured against free expression values.

At the core of freedom of expression lies the need to ensure that truth and the common good are attained, whether in scientific and artistic endeavors or in the process of determining the best course to take in our political affairs. Since truth and the ideal form of political and social organization can rarely, if at all, be identified with absolute certainty, it is difficult to prohibit expression without impeding the free exchange of potentially valuable information. Nevertheless, the argument from truth does not provide convincing support for the protection of hate propaganda. Taken to its extreme, this argument would require us to permit the communication of all expression, it being impossible to know with <u>absolute</u> certainty which factual statements are true, or which ideas obtain the greatest good. The problem with this extreme position, however, is that the greater the degree of certainty that a statement is erroneous or mendacious, the less its value in the quest for truth. Indeed, expression can be used to the detriment of our search for truth; the state should not be the sole arbiter of truth,

but neither should we overplay the view that rationality will overcome all falsehoods in the unregulated marketplace of ideas. There is very little chance that statements intended to promote hatred against an identifiable group are true, or that their vision of society will lead to a better world. To portray such statements as crucial to truth and the betterment of the political and social milieu is therefore misguided.

Another component central to the rationale underlying s. 2(*b*) concerns the vital role of free expression as a means of ensuring individuals the ability to gain self-fulfillment by developing and articulating thoughts and ideas as they see fit. It is true that s. 319(2) inhibits this process among those individuals whose expression it limits, and hence arguably works against freedom of expression values. On the other hand, such self-autonomy stems in large part from one's ability to articulate and nurture an identity derived from membership in a cultural or religious group. The message put forth by individuals who fall within the ambit of s. 319(2) represents a most extreme opposition to the idea that members of identifiable groups should enjoy this aspect of the s. 2(*b*) benefit. The extent to which the unhindered promotion of this message furthers free expression values must therefore be tempered insofar as it advocates with inordinate vitriol an intolerance and prejudice which view as execrable the process of individual self-development and human flourishing among all members of society.

Moving on to a third strain of thought said to justify the protection of free expression, one's attention is brought specifically to the political realm. The connection between freedom of expression and the political process is perhaps the linchpin of the s. 2(*b*) guarantee, and the nature of this connection is largely derived from the Canadian commitment to democracy. Freedom of expression is a crucial aspect of the democratic commitment, not merely because it permits the best policies to be chosen from among a wide array of proffered options, but additionally because it helps to ensure that participation in the political process is open to all

persons. Such open participation must involve to a substantial degree the notion that all persons are equally deserving of respect and dignity. The state therefore cannot act to hinder or condemn a political view without to some extent harming the openness of Canadian democracy and its associated tenet of equality for all.

The suppression of hate propaganda undeniably muzzles the participation of a few individuals in the democratic process, and hence detracts somewhat from free expression values, but the degree of this limitation is not substantial. I am aware that the use of strong language in political and social debate -- indeed, perhaps even language intended to promote hatred -- is an unavoidable part of the democratic process. Moreover, I recognize that hate propaganda is expression of a type which would generally be categorized as "political", thus putatively placing it at the very heart of the principle extolling freedom of expression as vital to the democratic process. Nonetheless, expression can work to undermine our commitment to democracy where employed to propagate ideas anathemic to democratic values. Hate propaganda works in just such a way, arguing as it does for a society in which the democratic process is subverted and individuals are denied respect and dignity simply because of racial or religious characteristics. This brand of expressive activity is thus wholly inimical to the democratic aspirations of the free expression guarantee.

Indeed, one may quite plausibly contend that it is through rejecting hate propaganda that the state can best encourage the protection of values central to freedom of expression, while simultaneously demonstrating dislike for the vision forwarded by hate-mongers. In this regard, the reaction to various types of expression by a democratic government may be perceived as meaningful expression on behalf of the vast majority of citizens. I do not wish to be construed as saying that an infringement of s. 2(*b*) can be justified under s. 1 merely because it is the product of a democratic process; the *Charter* will not permit even the

democratically elected legislature to restrict the rights and freedoms crucial to a free and democratic society. What I do wish to emphasize, however, is that one must be careful not to accept blindly that the suppression of expression must always and unremittingly detract from values central to freedom of expression (L. C. Bollinger, *The Tolerant Society: Freedom of Speech and Extremist Speech in America* (1986), at pp. 87-93).

I am very reluctant to attach anything but the highest importance to expression relevant to political matters. But given the unparalleled vigour with which hate propaganda repudiates and undermines democratic values, and in particular its condemnation of the view that all citizens need be treated with equal respect and dignity so as to make participation in the political process meaningful, I am unable to see the protection of such expression as integral to the democratic ideal so central to the s. 2(*b*) rationale. Together with my comments as to the tenuous link between communications covered by s. 319(2) and other values at the core of the free expression guarantee, this conclusion leads me to disagree with the opinion of McLachlin J. that the expression at stake in this appeal mandates the most solicitous degree of constitutional protection. In my view, hate propaganda should not be accorded the greatest of weight in the s. 1 analysis.

As a caveat, it must be emphasized that the protection of extreme statements, even where they attack those principles underlying the freedom of expression, is not completely divorced from the aims of s. 2(*b*) of the *Charter*. As noted already, suppressing the expression covered by s. 319(2) does to some extent weaken these principles. It can also be argued that it is partly through a clash with extreme and erroneous views that truth and the democratic vision remain vigorous and alive (see Braun, op. cit., at p. 490. In this regard, judicial pronouncements strongly advocating the importance of free expression values might be seen as helping to expose prejudiced statements as valueless even while striking down legislative restrictions that

proscribe such expression. Additionally, condoning a democracy's collective decision to protect itself from certain types of expression may lead to a slippery slope on which encroachments on expression central to s. 2(*b*) values are permitted. To guard against such a result, the protection of communications virulently unsupportive of free expression values may be necessary in order to ensure that expression more compatible with these values is never unjustifiably limited.

None of these arguments is devoid of merit, and each must be taken into account in determining whether an infringement of s. 2(*b*) can be justified under s. 1. It need not be, however, that they apply equally or with the greatest of strength in every instance. As I have said already, I am of the opinion that hate propaganda contributes little to the aspirations of Canadians or Canada in either the quest for truth, the promotion of individual self-development or the protection and fostering of a vibrant democracy where the participation of all individuals is accepted and encouraged. While I cannot conclude that hate propaganda deserves only marginal protection under the s. 1 analysis, I can take cognizance of the fact that limitations upon hate propaganda are directed at a special category of expression which strays some distance from the spirit of s. 2(*b*), and hence conclude that "restrictions on expression of this kind might be easier to justify than other infringements of s. 2(*b*)" (*Royal College, supra*, at p. 247).

As a final point, it should be stressed that in discussing the relationship between hate propaganda and freedom of expression values I do not wish to be taken as advocating an inflexible "levels of scrutiny" categorization of expressive activity. The contextual approach necessitates an open discussion of the manner in which s. 2(*b*) values are engaged in the circumstances of an appeal. To become transfixed with categorization schemes risks losing

the advantage associated with this sensitive examination of free expression principles, and I would be loath to sanction such a result.

Having made some preliminary comments as to the nature of the expression at stake in this appeal, it is now possible to ask whether s. 319(2) is an acceptably proportional response to Parliament's valid objective. As stated above, the proportionality aspect of the *Oakes* test requires the Court to decide whether the impugned state action: i) is rationally connected to the objective; ii) minimally impairs the *Charter* right or freedom at issue; and iii) does not produce effects of such severity so as to make the impairment unjustifiable. I will now address these segments of the proportionality inquiry, beginning with the question of whether a rational connection exists between s. 319(2) and the legislative objective.

(ii) Rational Connection

Section 319(2) makes the wilful promotion of hatred against identifiable groups an indictable offence, indicating Parliament's serious concern about the effects of such activity. Those who would uphold the provision argue that the criminal prohibition of hate propaganda obviously bears a rational connection to the legitimate Parliamentary objective of protecting target group members and fostering harmonious social relations in a community dedicated to equality and multiculturalism. I agree, for in my opinion it would be difficult to deny that the suppression of hate propaganda reduces the harm such expression does to individuals who belong to identifiable groups and to relations between various cultural and religious groups in Canadian society.

Doubts have been raised, however, as to whether the actual effect of s. 319(2) is to undermine any rational connection between it and Parliament's objective. As stated in the

reasons of McLachlin J., there are three primary ways in which the effect of the impugned legislation might be seen as an irrational means of carrying out the Parliamentary purpose. First, it is argued that the provision may actually promote the cause of hate-mongers by earning them extensive media attention. In this vein, it is also suggested that persons accused of intentionally promoting hatred often see themselves as martyrs, and may actually generate sympathy from the community in the role of underdogs engaged in battle against the immense powers of the state. Second, the public may view the suppression of expression by the government with suspicion, making it possible that such expression -- even if it be hate propaganda -- is perceived as containing an element of truth. Finally, it is often noted, citing the writings of A. Neier, *Defending My Enemy: American Nazis, the Skokie Case, and the Risks of Freedom* (1979), that Germany of the 1920s and 1930s possessed and used hate propaganda laws similar to those existing in Canada, and yet these laws did nothing to stop the triumph of a racist philosophy under the Nazis.

If s. 319(2) can be said to have no impact in the quest to achieve Parliament's admirable objectives, or in fact works in opposition to these objectives, then I agree that the provision could be described as "arbitrary, unfair or based on irrational considerations" (*Oakes*, *supra*, at p. 139). I recognize that the effect of s. 319(2) is impossible to define with exact precision -- the same can be said for many laws, criminal or otherwise. In my view, however, the position that there is no strong and evident connection between the criminalization of hate propaganda and its suppression is unconvincing. I come to this conclusion for a number of reasons, and will elucidate these by answering in turn the three arguments just mentioned.

It is undeniable that media attention has been extensive on those occasions when s. 319(2) has been used. Yet from my perspective, s. 319(2) serves to illustrate to the public the severe reprobation with which society holds messages of hate directed towards racial and religious

groups. The existence of a particular criminal law, and the process of holding a trial when that law is used, is thus itself a form of expression, and the message sent out is that hate propaganda is harmful to target group members and threatening to a harmonious society (see Rauf, op. cit., at p. 359). As I stated in my reasons in *R. v. Morgentaler*, [1988] 1 S.C.R. 30, at p. 70:

> The criminal law is a very special form of governmental regulation, for it seeks to express our society's collective disapprobation of certain acts and omissions.

The many, many Canadians who belong to identifiable groups surely gain a great deal of comfort from the knowledge that the hate-monger is criminally prosecuted and his or her ideas rejected. Equally, the community as a whole is reminded of the importance of diversity and multiculturalism in Canada, the value of equality and the worth and dignity of each human person being particularly emphasized.

In this context, it can also be said that government suppression of hate propaganda will not make the expression attractive and hence increase acceptance of its content. Similarly, it is very doubtful that Canadians will have sympathy for either propagators of hatred or their ideas. Governmental disapproval of hate propaganda does not invariably result in dignifying the suppressed ideology. Pornography is not dignified by its suppression, nor are defamatory statements against individuals seen as meritorious because the common law lends its support to their prohibition. Again, I stress my belief that hate propaganda legislation and trials are a means by which the values beneficial to a free and democratic society can be publicized. In this context, no dignity will be unwittingly foisted upon the convicted hate-monger or his or her philosophy, and that a hate-monger might see him or herself as a martyr is of no matter to the content of the state's message.

As for the use of hate propaganda laws in pre-World War Two Germany, I am skeptical as to the relevance of the observation that legislation similar to s. 319(2) proved ineffective in curbing the racism of the Nazis. No one is contending that hate propaganda laws can in themselves prevent the tragedy of a Holocaust; conditions particular to Germany made the rise of Nazi ideology possible despite the existence and use of these laws (see A. Doskow and S. B. Jacoby, "Anti Semitism and the Law in Pre-Nazi Germany" (1940), 3 *Contemporary Jewish Record* 498, at p. 509). Rather, hate propaganda laws are one part of a free and democratic society's bid to prevent the spread of racism, and their rational connection to this objective must be seen in such a context. Certainly West Germany has not reacted to the failure of pre-war laws by seeking their removal, a new set of criminal offences having been implemented as recently as 1985 (see E. Stein, "History Against Free Speech: The New German Law Against the `Auschwitz' -- and other -- `Lies'" (1987), 85 *Mich. L. Rev.* 277). Nor, as has been discussed, has the international community regarded the promulgation of laws suppressing hate propaganda as futile or counter-productive. Indeed, this Court's attention has been drawn to the fact that a great many countries possess legislation similar to that found in Canada (see, e.g., England and Wales, *Public Order Act 1986* (U.K.), 1986, c. 64, ss. 17 to 23; New Zealand, *Race Relations Act 1971* (N.Z.), No. 150, s. 25; Sweden, *Penal Code*, c. 16, s. 8; Netherlands, *Penal Code*, ss. 137c, 137d and 137e; India, *Penal Code*, ss. 153-A and 153-B, and generally, the United Nation's *Study on the Implementation of Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination*). The experience of Germany represents an awful nadir in the history of racism, and demonstrates the extent to which flawed and brutal ideas can capture the acceptance of a significant number of people. One aspect of this experience is not, however, determinative in deciding whether or not hate propaganda laws are effective.

In sum, having found that the purpose of the challenged legislation is valid, I also find that the means chosen to further this purpose are rational in both theory and operation, and therefore conclude that the first branch of the proportionality test has been met. Accordingly, I move now to the issue of whether s. 319(2) minimally impairs the s. 2(*b*) guarantee of freedom of expression.

(iii) Minimal Impairment of the Section 2(*b*) Freedom

The criminal nature of the impugned provision, involving the associated risks of prejudice through prosecution, conviction and the imposition of up to two years imprisonment, indicates that the means embodied in hate propaganda legislation should be carefully tailored so as to minimize impairment of the freedom of expression. It therefore must be shown that s. 319(2) is a measured and appropriate response to the phenomenon of hate propaganda, and that it does not overly circumscribe the s. 2(*b*) guarantee.

The main argument of those who would strike down s. 319(2) is that it creates a real possibility of punishing expression that is not hate propaganda. It is thus submitted that the legislation is overbroad, its terms so wide as to include expression which does not relate to Parliament's objective, and also unduly vague, in that a lack of clarity and precision in its words prevents individuals from discerning its meaning with any accuracy. In either instance, it is said that the effect of s. 319(2) is to limit the expression of merely unpopular or unconventional communications. Such communications may present no risk of causing the harm which Parliament seeks to prevent, and will perhaps be closely associated with the core values of s. 2(*b*). This overbreadth and vagueness could consequently allow the state to employ s. 319(2) to infringe excessively the freedom of expression or, what is more likely, could have a chilling effect whereby persons potentially within s. 319(2) would exercise self-

censorship. Accordingly, those attacking the validity of s. 319(2) contend that vigorous debate on important political and social issues, so highly valued in a society that prizes a diversity of ideas, is unacceptably suppressed by the provision.

The question to be answered, then, is whether s. 319(2) indeed fails to distinguish between low value expression that is squarely within the focus of Parliament's valid objective and that which does not invoke the need for the severe response of criminal sanction. In order to answer this question, and thus to determine whether s. 319(2) minimally impairs the freedom of expression, the nature and impact of specific features of the provision must be examined in some detail. These features relate to both the terms of the offence and the available defences enumerated in s. 319(3), and I find it convenient to utilize this slightly arbitrary division for the purposes of the following discussion. As well, in examining this aspect of the proportionality test I will comment upon the relevance of alternative modes of combatting the harm caused by hate propaganda.

a. *Terms of Section 319(2)*

In assessing the constitutionality of s. 319(2), especially as concerns arguments of overbreadth and vagueness, an immediate observation is that statements made "in private conversation" are not included in the criminalized expression. The provision thus does not prohibit views expressed with an intention to promote hatred if made privately, indicating Parliament's concern not to intrude upon the privacy of the individual. Indeed, that the legislation excludes private conversation, rather than including communications made in a public forum, suggests that the expression of hatred in a place accessible to the public is not sufficient to activate the legislation (see Fish, op. cit., at p. 115). This observation is supported by comparing the words of s. 319(2) with those of the prohibition against the incitement of

hatred likely to lead to a breach of peace in s. 319(1). Section 319(1) covers statements communicated "in any public place", suggesting that a wider scope of prohibition was intended where the danger occasioned by the statements was of an immediate nature, while the wording of s. 319(2) indicates that private conversations taking place in public areas are not prohibited. Moreover, it is reasonable to infer a subjective *mens rea* requirement regarding the type of conversation covered by s. 319(2), an inference supported by the definition of "private communication" contained in s. 183 of the *Criminal Code*. Consequently, a conversation or communication intended to be private does not satisfy the requirements of the provision if through accident or negligence an individual's expression of hatred for an identifiable group is made public.

Is s. 319(2) nevertheless overbroad because it captures all public expression intended to promote hatred? It would appear not, for the harm which the government seeks to prevent is not restricted to certain mediums and/or locations. To attempt to distinguish between various forms and fora would therefore be incongruent with Parliament's legitimate objective.

A second important element of s. 319(2) is its requirement that the promotion of hatred be "wilful". The nature of this mental element was explored by Martin J.A. in *R. v. Buzzanga and Durocher* (1979), 49 C.C.C. (2d) 369 (Ont. C.A.). In that case, the two accused were charged under s. 319(2) (then s. 281.2(2)), after distributing handbills containing statements attacking the French Canadian public in Essex County. At the time, the francophone minority in the county was attempting to have the school board build a French language secondary school. The accused persons identified with French-speaking Canadians and were responding to opposition to the construction of the school. According to them, the pamphlet was intended as a satire that would bring a quick solution by provoking government reaction, thereby

exerting pressure on the school board, but in spite of this explanation a conviction was entered at trial.

On appeal, Martin J.A. overturned the conviction. He noted that the word "wilfully" does not have a fixed meaning in criminal law, and thus sought to divine the use and import of the word as it appears in s. 319(2) (pp. 379-81). Comparing the section with s. 319(1) (then s. 281.2(1)), which prohibits incitement to hatred in a public place where such incitement is likely to lead to a breach of peace, he said (at pp. 381-82):

> The insertion of the word "wilfully" in [s. 319(2)] was not necessary to import *mens rea* since that requirement would be implied in any event because of the serious nature of the offence: see *R. v. Prue*, *supra*. The statements, the communication of which are proscribed by [s. 319(2)], are not confined to statements communicated in a public place in circumstances likely to lead to a breach of the peace and they, consequently, do not pose such an immediate threat to public order as those falling under [s. 319(1)]; it is reasonable to assume, therefore, that Parliament intended to limit the offence under [s. 319(2)] to the intentional promotion of hatred. It is evident that the use of the word "wilfully" in [s. 319(2)], and not in [s. 319(1)], reflects Parliament's policy to strike a balance in protecting the competing social interests of freedom of expression on the one hand, and public order and group reputation on the other hand.

More specifically, Martin J.A. went on to elaborate on the meaning of "wilfully", concluding that this mental element is satisfied only where an accused subjectively desires the promotion of hatred or foresees such a consequence as certain or substantially certain to result from an act done in order to achieve some other purpose (pp. 384-85). On the facts in *Buzzanga*, the trial judge had informed the jury that "wilfully" could be equated with the intention to create "controversy, furor and an uproar" (p. 386). This interpretation was clearly incompatible with Martin J.A.'s requirement that the promotion of hatred be intended or foreseen as substantially certain, and a new trial was therefore ordered.

The interpretation of "wilfully" in *Buzzanga* has great bearing upon the extent to which s. 319(2) limits the freedom of expression. This mental element, requiring more than merely negligence or recklessness as to result, significantly restricts the reach of the provision, and thereby reduces the scope of the targeted expression. Such a reduced scope is recognized and applauded in the Law Reform Commission of Canada's Working Paper on Hate Propaganda, op. cit., it being said that (at p. 36):

> The principle of restraint requires lawmakers to concern themselves not just with whom they want to catch, but also with whom they do not want to catch. For example, removing an intent or purpose requirement could well result in successful prosecutions of cases similar to *Buzzanga*, where members of a minority group publish hate propaganda against their own group in order to create controversy or to agitate for reform. This crime should not be used to prosecute such individuals.

I agree with the interpretation of "wilfully" in *Buzzanga*, and wholeheartedly endorse the view of the Law Reform Commission Working Paper that 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. It is clear that the word "wilfully" imports a difficult burden for the Crown to meet and, in so doing, serves to minimize the impairment of freedom of expression.

It has been argued, however, that even a demanding *mens rea* component fails to give s. 319(2) a constitutionally acceptable breadth. The problem is said to lie in the failure of the offence to require proof of actual hatred resulting from a communication, the assumption being that only such proof can demonstrate a harm serious enough to justify limiting the freedom of expression under s. 1. It was largely because of this lack of need for proof of actual hatred that Kerans J.A in the Court of Appeal held s. 319(2) to violate the *Charter*.

While mindful of the dangers identified by Kerans J.A., I do not find them sufficiently grave to compel striking down s. 319(2). First, to predicate the limitation of free expression upon proof of actual hatred gives insufficient attention to the severe psychological trauma suffered by members of those identifiable groups targeted by hate propaganda. Second, it is clearly difficult to prove a causative link between a specific statement and hatred of an identifiable group. In fact, to require direct proof of hatred in listeners would severely debilitate the effectiveness of s. 319(2) in achieving Parliament's aim. It is well accepted that Parliament can use the criminal law to prevent the risk of serious harms, a leading example being the drinking and driving provisions in the *Criminal Code*. The conclusions of the Cohen Committee and subsequent study groups show that the risk of hatred caused by hate propaganda is very real, and in view of the grievous harm to be avoided in the context of this appeal, I conclude that proof of actual hatred is not required in order to justify a limit under s. 1.

The next feature of the provision that must be explored is the phrase "promotes hatred against any identifiable group". Given the purpose of the provision to criminalize the spreading of hatred in society, I find that the word "promotes" indicates active support or instigation. Indeed the French version of the offence uses the verb "*fomenter*", which in English means to foment or stir up. In "promotes" we thus have a word that indicates more than simple encouragement or advancement. The hate-monger must intend or foresee as substantially certain a direct and active stimulation of hatred against an identifiable group. As for the term "identifiable group", s. 318(4) states that an ""identifiable group" means any section of the public distinguished by colour, race, religion or ethnic origin". The act to be targeted is therefore the intentional fostering of hatred against particular members of our society, as opposed to any individual.

The meaning of "hatred" remains to be elucidated. Just as "wilfully" must be interpreted in the setting of s. 319(2), so must the word "hatred" be defined according to the context in which it is found. A dictionary definition may be of limited aid to such an exercise, for by its nature a dictionary seeks to offer a panoply of possible usages, rather than the correct meaning of a word as contemplated by Parliament. Noting the purpose of s. 319(2), in my opinion the term "hatred" connotes emotion of an intense and extreme nature that is clearly associated with vilification and detestation. As Cory J.A. stated in *R. v. Andrews*, *supra*, at p. 179:

> Hatred is not a word of casual connotation. To promote hatred is to instil detestation, enmity, ill-will and malevolence in another. Clearly an expression must go a long way before it qualifies within the definition in [s. 319(2)].

Hatred is predicated on destruction, and hatred against identifiable groups therefore thrives on insensitivity, bigotry and destruction of both the target group and of the values of our society. Hatred in this sense is a most extreme emotion that belies reason; an emotion that, if exercised against members of an identifiable group, implies that those individuals are to be despised, scorned, denied respect and made subject to ill-treatment on the basis of group affiliation.

Those who argue that s. 319(2) should be struck down submit that it is impossible to define with care and precision a term like "hatred". Yet, as I have stated, the sense in which "hatred" is used in s. 319(2) does not denote a wide range of diverse emotions, but is circumscribed so as to cover only the most intense form of dislike. It was also argued on appeal, however, that regardless of the definition given "hatred" by the courts, the trier of fact must make a subjective decision in deciding whether "hatred" is indeed what the accused intended to promote. To determine if the promotion of hatred was intended, the trier will usually make an inference as to the necessary *mens rea* based upon the statements made. The subjective nature of this inferential exercise is said to create a danger that hatred of the type required by

s. 319(2) will be found, though unjustifiably, in every instance where the trier dislikes or finds offensive the content of the accused's statements.

The danger that a trier will improperly infer hatred from statements he or she personally finds offensive cannot be dismissed lightly, yet I do not think that the subjectivity inherent in determining whether the accused intended to promote hatred, as opposed to an emotion involving a lesser degree of antipathy, represents an unbridled license to extend the scope of the offence. Recognizing the need to circumscribe the definition of "hatred" in the manner referred to above, a judge should direct the jury (or him or herself) regarding the nature of the term as it exists in s. 319(2). Such a direction should include express mention of the need to avoid finding that the accused intended to promote hatred merely because the expression is distasteful. If such a warning is given, the danger referred to above will be avoided and the freedom of expression limited no more than is necessary.

b. *The Defences to Section 319(2)*

The factors mentioned above suggest that s. 319(2) does not unduly restrict the s. 2(*b*) guarantee. The terms of the offence, as I have defined them, rather indicate that s. 319(2) possesses definitional limits which act as safeguards to ensure that it will capture only expressive activity which is openly hostile to Parliament's objective, and will thus attack only the harm at which the prohibition is targeted. The specific defences provided are further glosses on the purview of the offence, and I repeat them here.

> **319.** . . .
>
> (3) No person shall be convicted of an offence under subsection (2)
>
> (*a*) if he establishes that the statements communicated were true;

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

A careful reading of the s. 319(3) defences shows them to take in examples of expressive activity that generally would not fall within the "wilful promotion of hatred" as I have defined the phrase. Thus the three defences which include elements of good faith or honest belief -- namely, s. 319(3)(*b*), (*c*) and (*d*) -- would seem to operate to negate directly the *mens rea* in the offence, for only rarely will one who intends to promote hatred be acting in good faith or upon honest belief. These defences are hence intended to aid in making the scope of the wilful promotion of hatred more explicit; individuals engaging in the type of expression described are thus given a strong signal that their activity will not be swept into the ambit of the offence. The result is that what danger exists that s. 319(2) is overbroad or unduly vague, or will be perceived as such, is significantly reduced. To the extent that s. 319(3) provides justification for the accused who would otherwise fall within the parameters of the offence of wilfully promoting hatred, it reflects a commitment to the idea that an individual's freedom of expression will not be curtailed in borderline cases. The line between the rough and tumble of public debate and brutal, negative and damaging attacks upon identifiable groups is hence adjusted in order to give some leeway to freedom of expression.

The overlap between s. 319(2) and the defences is less pronounced in the case of the defence of truth, s. 319(3)(*a*) being more likely than the other defences to excuse the wilful promotion of hatred. This increased likelihood reveals the defence in para. (*a*) to be an especially

poignant indicator of Parliament's cautionary approach and care in protecting freedom of expression. Of course, if statements of truth are made without the intention to promote hatred towards identifiable groups, the offence as defined in s. 319(2) has not been committed. On the other hand, if a situation arises where an individual uses statements of truth in order to promote hatred against identifiable groups, the accused is acquitted despite the existence of the harm which Parliament seeks to prevent. Excusing the accused who intentionally promotes hatred through the communication of truthful statements is thus a circumspect measure associated with the importance attributed to truth -- and hence to free expression -- in our society.

It has been forcefully argued before us that the defence of truth is insufficient protection against an overly broad hate propaganda law. In this vein, it is rightly pointed out that many (if not most) of the communications coming within s. 319(2) are not susceptible to a true/false categorization, existing instead as ideas or opinions in the mind of the communicator. The accused could therefore sincerely believe in the worth of his or her viewpoint and yet be unable to utilize the s. 319(3)(*a*) defence. Moreover, it is said that, even where a statement is capable of categorization as true or false, the individual honestly mistaken as to the validity of his or her position (even if innocently so) is left unprotected, a result which dangerously restricts freedom of expression, causing a "chill" on communications as those who fear that their statements may be false exercise self-censorship. Finally, one might wonder if the courts are not on dangerous ground in attempting to distinguish between truthfulness and falsehood. The potential for bias in making such a determination, be it intentional or subconscious, is a danger frequently noted in freedom of expression theory (this potential is equally evident in s. 319(3)(*c*), insofar as ideas are assessed in light of "reasonableness" and the "public benefit").

The way in which I have defined the s. 319(2) offence, in the context of the objective sought by society and the value of the prohibited expression, gives me some doubt as to whether the *Charter* mandates that truthful statements communicated with an intention to promote hatred need be excepted from criminal condemnation. Truth may be used for widely disparate ends, and I find it difficult to accept that circumstances exist where factually accurate statements can be used for no other purpose than to stir up hatred against a racial or religious group. It would seem to follow that there is no reason why the individual who intentionally employs such statements to achieve harmful ends must under the *Charter* be protected from criminal censure.

Nevertheless, it is open to Parliament to make a concession to free expression values, whether or not such is required by the *Charter*. Deference to truth as a value central to free expression has thus led Parliament to include the defence in s. 319(3)(*a*), even though the accused has used truthful statements to cause harm of the type falling squarely within the objective of the legislation. When the statement contains no truth, however, this flicker of justification for the intentional promotion of hatred is extinguished, and the harmful malice of the disseminator stands alone. The relationship between the value of hate propaganda as expression and the Parliamentary objective of eradicating harm, slightly altered so as to increase the magnitude of the former where the statement of the accused is truthful, thus returns to its more usual condition, a condition in which it is permissible to suppress the expression.

Because the presence of truth, though legally a defence to a charge under s. 319(2), does not change the fact that the accused has intended to promote the hatred of an identifiable group, I cannot find excessive impairment of the freedom of expression merely because s. 319(3)(*a*) does not cover negligent or innocent error. Whether or not a statement is susceptible to classification as true or false, my inclination is therefore to accept that such error should not

excuse an accused who has wilfully used a statement in order to promote hatred against an identifiable group. That the legislative line is drawn so as to convict the accused who is negligent or even innocent regarding the accuracy of his or her statements is perfectly acceptable, for the mistake is not as to the use to which the information is put, namely, the promotion of hatred against an identifiable group. As for the argument that the courts and legislature should not involve themselves in the evaluation of "truth", "reasonable grounds for finding truth" or "public interest", the same response applies. Where the likelihood of truth or benefit from an idea diminishes to the point of vanishing, and the statement in question has harmful consequences inimical to the most central values of a free and democratic society, it is not excessively problematic to make a judgment that involves limiting expression.

Before looking at the effect which alternative responses to hate propaganda have upon the proportionality of s. 319(2), I should comment on a final argument marshalled in support of striking down s. 319(2) because of overbreadth or vagueness. It is said that the presence of the legislation has led authorities to interfere with a diverse range of political, educational and artistic expression, demonstrating only too well the way in which overbreadth and vagueness can result in undue intrusion and the threat of persecution. In this regard, a number of incidents are cited where authorities appear to have been overzealous in their interpretation of the law, including the arrest of individuals distributing pamphlets admonishing Americans to leave the country and the temporary holdup at the border of a film entitled *Nelson Mandela* and Salman Rushdie's novel *Satanic Verses* (see, e.g., Borovoy, op. cit., at p. 141; note that the latter two examples involve not s. 319(2), but similar wording found in *Customs Tariff*, S.C. 1987, c. 49, s. 114, Schedule VII, Code 9956(*b*)).

That s. 319(2) may in the past have led authorities to restrict expression offering valuable contributions to the arts, education or politics in Canada is surely worrying. I hope, however,

that my comments as to the scope of the provision make it obvious that only the most intentionally extreme forms of expression will find a place within s. 319(2). In this light, one can safely say that the incidents mentioned above illustrate not over-expansive breadth and vagueness in the law, but rather actions by the state which cannot be lawfully taken pursuant to s. 319(2). The possibility of illegal police harassment clearly has minimal bearing on the proportionality of hate propaganda legislation to legitimate Parliamentary objectives, and hence the argument based on such harassment can be rejected.

c. *Alternative Modes of Furthering Parliament's Objective*

One of the strongest arguments supporting the contention that s. 319(2) unacceptably impairs the s. 2(*b*) guarantee posits that a criminal sanction is not necessary to meet Parliament's objective. Thus, even though the terms of s. 319(2) and the nature of the available defences expose an individual to conviction only in narrow and clearly defined circumstances, it is said that non-criminal responses can more effectively combat the harm caused by hate propaganda. Most generally, it is said that discriminatory ideas can best be met with information and education programmes extolling the merits of tolerance and cooperation between racial and religious groups. As for the prohibition of hate propaganda, human rights statutes are pointed to as being a less severe and more effective response than the criminal law. Such statutes not only subject the disseminator of hate propaganda to reduced stigma and punishment, but also take a less confrontational approach to the suppression of such expression. This conciliatory tack is said to be preferable to penal sanction because an incentive is offered the disseminator to cooperate with human rights tribunals and thus to amend his or her conduct.

Given the stigma and punishment associated with a criminal conviction and the presence of other modes of government response in the fight against intolerance, it is proper to ask whether s. 319(2) can be said to impair minimally the freedom of expression. With respect to the efficacy of criminal legislation in advancing the goals of equality and multicultural tolerance in Canada, I agree that the role of s. 319(2) will be limited. It is important, in my opinion, not to hold any illusions about the ability of this one provision to rid our society of hate propaganda and its associated harms. Indeed, to become overly complacent, forgetting that there are a great many ways in which to address the problem of racial and religious intolerance, could be dangerous. Obviously, a variety of measures need be employed in the quest to achieve such lofty and important goals.

In assessing the proportionality of a legislative enactment to a valid governmental objective, however, s. 1 should not operate in every instance so as to force the government to rely upon only the mode of intervention least intrusive of a *Charter* right or freedom. It may be that a number of courses of action are available in the furtherance of a pressing and substantial objective, each imposing a varying degree of restriction upon a right or freedom. In such circumstances, the government may legitimately employ a more restrictive measure, either alone or as part of a larger programme of action, if that measure is not redundant, furthering the objective in ways that alternative responses could not, and is in all other respects proportionate to a valid s. 1 aim.

Though the fostering of tolerant attitudes among Canadians will be best achieved through a combination of diverse measures, the harm done through hate propaganda may require that especially stringent responses be taken to suppress and prohibit a modicum of expressive activity. At the moment, for example, the state has the option of responding to hate propaganda by acting under either the *Criminal Code* or human rights provisions. In my view,

having both avenues of redress at the state's disposal is justified in a free and democratic society. I see no reason to assume that the state will always utilize the most severe tool at hand, namely, the criminal law, to prevent the dissemination of hate propaganda. Where use of the sanction provided by s. 319(2) is imprudent, employing human rights legislation may be the more attractive route to take, but there may equally be circumstances in which the more confrontational response of criminal prosecution is best suited to punish a recalcitrant hate-monger. To send out a strong message of condemnation, both reinforcing the values underlying s. 319(2) and deterring the few individuals who would harm target group members and the larger community by intentionally communicating hate propaganda, will occasionally require use of the criminal law.

d. *Conclusion as to Minimal Impairment*

To summarize the above discussion, in light of the great importance of Parliament's objective and the discounted value of the expression at issue I find that the terms of s. 319(2) create a narrowly confined offence which suffers from neither overbreadth nor vagueness. This interpretation stems largely from my view that the provision possesses a stringent *mens rea* requirement, necessitating either an intent to promote hatred or knowledge of the substantial certainty of such, and is also strongly supported by the conclusion that the meaning of the word "hatred" is restricted to the most severe and deeply-felt form of opprobrium. Additionally, however, the conclusion that s. 319(2) represents a minimal impairment of the freedom of expression gains credence through the exclusion of private conversation from its scope, the need for the promotion of hatred to focus upon an identifiable group and the presence of the s. 319(3) defences. As for the argument that other modes of combatting hate propaganda eclipse the need for a criminal provision, it is eminently reasonable to utilize more than one type of legislative tool in working to prevent the spread of racist expression and its

resultant harm. It will indeed be more difficult to justify a criminal statute under s. 1, but in my opinion the necessary justificatory arguments have been made out with respect to s. 319(2).

I thus conclude that s. 319(2) of the *Criminal Code* does not unduly impair the freedom of expression, and it remains only to examine whether its effects nonetheless present so grave a limitation upon the s. 2(*b*) guarantee so as to outweigh the benefits to be gained from a measure otherwise proportional to an important legislative objective.

(iv) Effects of the Limitation

The third branch of the proportionality test entails a weighing of the importance of the state objective against the effect of limits imposed upon a *Charter* right or guarantee. Even if the purpose of the limiting measure is substantial and the first two components of the proportionality test are satisfied, the deleterious effects of a limit may be too great to permit the infringement of the right or guarantee in issue.

I have examined closely the significance of the freedom of expression values threatened by s. 319(2) and the importance of the objective which lies behind the criminal prohibition. It will by now be quite clear that I do not view the infringement of s. 2(*b*) by s. 319(2) as a restriction of the most serious kind. The expressive activity at which this provision aims is of a special category, a category only tenuously connected with the values underlying the guarantee of freedom of speech. Moreover, the narrowly drawn terms of s. 319(2) and its defences prevent the prohibition of expression lying outside of this narrow category. Consequently, the suppression of hate propaganda affected by s. 319(2) represents an impairment of the individual's freedom of expression which is not of a most serious nature.

It is also apposite to stress yet again the enormous importance of the objective fueling s. 319(2), an objective of such magnitude as to support even the severe response of criminal prohibition. Few concerns can be as central to the concept of a free and democratic society as the dissipation of racism, and the especially strong value which Canadian society attaches to this goal must never be forgotten in assessing the effects of an impugned legislative measure. When the purpose of s. 319(2) is thus recognized, I have little trouble in finding that its effects, involving as they do the restriction of expression largely removed from the heart of free expression values, are not of such a deleterious nature as to outweigh any advantage gleaned from the limitation of s. 2(*b*).

E. *Analysis of Section 319(2) Under Section 1 of the Charter: Conclusion*

I find that the infringement of the respondent's freedom of expression as guaranteed by s. 2(*b*) should be upheld as a reasonable limit prescribed by law in a free and democratic society. Furthering an immensely important objective and directed at expression distant from the core of free expression values, s. 319(2) satisfies each of the components of the proportionality inquiry. I thus disagree with the Alberta Court of Appeal's conclusion that this criminal prohibition of hate propaganda violates the *Charter*, and would allow the appeal in this respect.

VIII. Section 319(3)(*a*) and the Presumption of Innocence

As already noted, s. 319(3)(*a*) of the *Criminal Code* provides that no person shall be convicted of wilfully promoting hatred "if he establishes that the statements communicated were true". This provision is challenged as breaching the presumption of innocence guaranteed in s. 11(*d*) of the *Charter*. The Court must therefore decide whether permitting an accused to raise the defence of truth on the balance of probabilities creates a reverse onus,

thereby infringing s. 11(*d*). If s. 11(*d*) is so infringed, the focus of the inquiry shifts to examine the justifiability of the reverse onus under s. 1 of the *Charter*.

A. Section 319(3)(a) and Infringement of Section 11(d) of the Charter

In a prosecution under s. 319(2), the Crown must prove beyond a reasonable doubt the various elements of the offence, namely, that the accused, by communicating statements other than in private conversation, wilfully promoted hatred against a group identifiable by colour, race, religion or ethnic origin. Determining whether an accused falls within the terms of s. 319(2) does not require that the trier of fact examine the truth or falsity of the statements. The defence of truth, to be established by the accused on the balance of probabilities, is thus only considered if the Crown proves the components of s. 319(2) beyond a reasonable doubt.

The judgments of the appeal courts in this case and in the accompanying appeal of *Andrews* reveal a divergence of opinion as to whether s. 11(*d*) of the *Charter* is infringed by the truth defence. In the Alberta Court of Appeal, Kerans J.A. viewed as crucial the possibility that an accused can be convicted of wilfully promoting hatred though there exists a reasonable doubt that the statements communicated are true. As the defence places an onus on the accused to prove truth on the balance of probabilities, he thus found it to infringe s. 11(*d*). In contrast to this conclusion, the Ontario Court of Appeal in *R. v. Andrews, supra,* found that s. 319(3)(*a*) does not place a true reverse onus upon the accused. Relying upon the majority judgment in *R. v. Holmes,* [1988] 1 S.C.R. 914, Grange J.A. felt that s. 319(3)(*a*) provides a defence which becomes applicable only after all elements of the offence have been proven beyond a reasonable doubt, a circumstance which was said to avoid infringing the presumption of innocence (p. 193). Grange J.A. distinguished this Court's decision in *R. v. Whyte,* [1988] 2

S.C.R. 3, on the grounds that the statutory presumption challenged in that case related to the proof of an essential element of the offence.

It is not overly difficult to settle the disagreement between the Alberta and Ontario Appeal Courts. Though some confusion may have existed after the decision of this Court in *Holmes*, since *Whyte* it is clear that the presumption of innocence is infringed whenever the accused is liable to be convicted despite the existence of a reasonable doubt as to guilt in the mind of the trier of fact. As was stated by a unanimous bench in *Whyte* (at p. 18):

> . . . the distinction between elements of the offence and other aspects of the charge is irrelevant to the s. 11(*d*) inquiry. The real concern is not whether the accused must disprove an element or prove an excuse, but that an accused may be convicted while a reasonable doubt exists. When that possibility exists, there is a breach of the presumption of innocence.
>
> The exact characterization of a factor as an essential element, a collateral factor, an excuse, or a defence should not affect the analysis of the presumption of innocence. It is the final effect of a provision on the verdict that is decisive. If an accused is required to prove some fact on the balance of probabilities to avoid conviction, the provision violates the presumption of innocence because it permits a conviction in spite of a reasonable doubt in the mind of the trier of fact as to the guilt of the accused. The trial of an accused in a criminal matter cannot be divided neatly into stages, with the onus of proof on the accused at an intermediate stage and the ultimate onus on the Crown.

As is evident from the above quotation, the categorization of a factual finding as forming an element "essential" to the offence is of no consequence when determining whether s. 11(*d*) has been breached.

Applying the approach taken in *Whyte* to this appeal, it is obvious that s. 319(3)(*a*) runs afoul of the presumption of innocence. Contrary to the arguments of those who would find s. 319(3)(*a*) compatible with s. 11(*d*), it matters not that the defence of truth may be intended to play a minor role in providing relief from conviction. What is of essence is not the "essential

nature" of the crime, but that the trier of fact will have to convict even where there is a reasonable doubt as to the truth of an accused's statements. This result means that s. 11(*d*) is infringed, making necessary an inquiry as to whether s. 319(3)(*a*) can be justified under s. 1 of the *Charter*.

B. Justifiability of Section 319(3)(*a*) Under Section 1 of the *Charter*

In seeing whether the truth defence is justifiable as a reasonable limit in a free and democratic society, my general comments regarding the role of s. 1 and the *Oakes* test obviously apply. As well, much of what has been said in discussing s. 319(2) is pertinent, though it remains necessary to undertake a separate inquiry into the validity of s. 319(3)(*a*)'s reverse onus.

The impetus behind s. 319(3)(*a*) represents somewhat of a caveat to the broad objectives underlying the offence in s. 319(2). As explored earlier, domestic and international commitments to freedom of expression, equality, and respect for human dignity and multiculturalism lay the foundation for the offence of the wilful promotion of hatred. Without rejecting this broad foundational base, the objective of s. 319(3)(*a*) is attributable to the importance given the expression of truth by Parliament (see the Cohen Committee, op. cit., at p. 66, and the Law Reform Commission of Canada, op. cit., at p. 36). Specifically, the truth defence allows an accused to escape liability based on the possibility that the statements made, while intended to promote hatred, nonetheless possess increased merit (in relation to free expression values) because of their truthful nature.

That a defence may be warranted by reason of the merit associated with truthful statements does not, however, make clear Parliament's objective in requiring that the accused prove

truthfulness on a balance of probabilities. The objective behind the defence's reverse onus is closely connected with the purpose fueling the offence in s. 319(2). Harm is created whenever statements are made with the intention of promoting hatred, whether or not they contain an element of truth. If the defence is too easily used, the pressing and substantial objective of Parliament in preventing such harm will suffer unduly, and it is therefore in the furtherance of that same objective that truthfulness must be proved by the accused on the balance of probabilities. For the reasons given in discussing the purpose behind s. 319(2), I consequently find that Parliament's objective in employing a reverse onus in s. 319(3)(*a*) is pressing and substantial.

Moving on to examine the proportionality of the reverse onus measure to the legislative objective, the first question to ask is whether s. 319(3)(*a*) evinces a rational connection to the purpose of preventing the harm caused by hate-promoting expression. In my view, such a connection plainly exists. The reverse onus in the truth defence operates so as to make it more difficult to avoid conviction where the wilful promotion of hatred has been proven beyond a reasonable doubt. As the wilful promotion of hatred is hostile to Parliament's aims, placing such a burden upon the accused is rationally connected to a valid s. 1 objective.

The second component of the proportionality inquiry asks whether the impugned measure impairs the right or freedom as little as possible. Instrumental in reaching a conclusion as to minimal impairment is the nature of the defence in issue, and most especially its relation to the offence set out in s. 319(2). As I have stated in discussing the proportionality of s. 319(2), the defence of truth is in some ways at odds with Parliament's purpose of preventing the damage to target group members and inter-group harmony caused by hate propaganda; it works to excuse the actions of an accused even though the harm sought to be prevented is present. To provide the accused with such an escape route may not be required under the

Charter, but neither is it illogical. Out of caution Parliament has made a concession to the importance of truth in freedom of expression values, a concession designed to allow an accused person to benefit from the tangential possibility that his or her statements, though admittedly defamatory of targeted groups, may have some social utility as part of legitimate public dialogue.

In the overall context of the s. 319(2) offence, it is therefore evident that Parliament has used the reverse onus provision to strike a balance between two legitimate concerns. Requiring the accused to prove on the civil standard that his or her statements are true is an integral part of this balance, and any less onerous burden would severely skew the equilibrium. To include falsity as a component of s. 319(2) for example, or even to require only that the accused raise a reasonable doubt as to the truthfulness of the statements, would excessively compromise the effectiveness of the offence in achieving its purpose. The former option would especially hinder Parliament's objective, for many statements are not susceptible to a true/false categorization. In either instance, however, where a reasonable doubt existed as to the falsity of an accused's statements an acquittal would be entered. To accept such a result it would have to be agreed that this relatively small possibility of truthfulness outweighs the harm caused through the wilful promotion of hatred. Yet to my mind the crucial objective of Parliament in this appeal justifies requiring a more convincing demonstration that a hate-monger's statements may be true, as a successful defence provides an excuse <u>despite</u> the presence of the harm sought to be eradicated (see Rauf, op. cit., at pp. 368-69). Having the accused prove truthfulness on the balance of probabilities is an understandable and valid precaution against too easily justifying such harm, and I hence conclude that the reverse onus provision in s. 319(3)(*a*) represents a minimal impairment of the presumption of innocence.

As for the final segment of the *Oakes* proportionality inquiry, I have no difficulty in finding that the importance of preventing the harm caused by hate-promoting expression is not outweighed by Parliament's infringement of s. 11(*d*) of the *Charter*. In reaching this conclusion I would refer to the approach taken by this Court in *Whyte*. There, the accused challenged what is now s. 258(1)(*a*) of the *Criminal Code*, which creates the presumption that a person in the driver's seat of a vehicle has care or control of the vehicle for the purposes of the impaired driving provisions. This presumption can only be overcome if the accused proves that he or she occupied the driver's seat for some purpose other than setting the vehicle in motion. In upholding the statutory presumption under s. 1, this Court stated the following regarding the proportionality between the effects of the measure and the objective (at p. 27):

> . . . [258(1)(*a*)] satisfies [the] final element in s. 1 analysis. The threat to public safety posed by drinking and driving has been established by evidence in this case and recognized by this Court in others. While [s. 258(1)(*a*)] does infringe the right guaranteed by s. 11(*d*) of the *Charter*, it does so in the context of a statutory setting which makes it impracticable to require the Crown to prove an intention to drive. The reverse onus provision, in effect, affords a defence to an accused which could not otherwise be made available.

In *Whyte*, the impugned statutory presumption was found to be justified despite its effect upon the presumption of innocence only after an examination of the history of drinking and driving legislation, and a recognition of both the serious societal danger of drinking and driving and the difficulties associated with requiring the Crown to prove an intention to drive. As already noted, similar factors operate to justify the reverse onus provision challenged in this appeal, in particular the significant importance attached to preventing the harm caused by hate-promoting expression and the fact that the truth defence operates despite the presence of such harm. The infringement of s. 11(*d*) thus occurs in the context of a statutory and practical setting that makes it unworkable to require the Crown to prove the falsity of the statements in

issue, and using the words of *Whyte* I conclude that the reverse onus provision in s. 319(3)(*a*), in effect, affords a defence to an accused which could not otherwise be made available.

C. *Conclusion Respecting Section 319(3)(a)*

In sum, having followed this Court's decision in *Whyte* in deciding that s. 319(3)(*a*) infringes s. 11(*d*) of the *Charter*, I nonetheless find the impugned provision to be justified under s. 1. The reverse onus found in the truth defence represents the only way in which the defence can be offered while still enabling Parliament to prohibit effectively hate-promoting expression through criminal legislation; to require that the state prove beyond a reasonable doubt the falsity of a statement would excuse much of the harmful expressive activity caught by s. 319(2) despite minimal proof as to its worth. In my opinion, justification for this reverse onus must therefore reside in the fact that it only applies where the Crown has proven beyond a reasonable doubt an intent to promote harm-causing hatred, and in the recognition that excessive deference to the possibility that a statement is true will undermine Parliament's objective.

IX. Conclusion

In so far as its purpose is to prohibit the expression of certain meanings, s. 319(2) of the *Criminal Code* infringes the guarantee of freedom of expression found in s. 2(*b*) of the *Charter*. Given the importance of Parliament's purpose in preventing the dissemination of hate propaganda and the tenuous connection such expression has with s. 2(*b*) values, however, I have found the narrowly drawn parameters of s. 319(2) to be justifiable under s. 1. Similarly, although the reverse onus provision contained in s. 319(3)(*a*) conflicts with the s. 11(*d*) presumption of innocence, it can be seen as a justifiable means of excusing truthful statements

without undermining the objective of preventing harm caused by the intentional promotion of hatred.

Having come to these conclusions, I answer the constitutional questions in the following manner:

1. Is s. 281.2(2) of the *Criminal Code* of Canada, R.S.C. 1970, c. C-34 (now s. 319(2) of the *Criminal Code* of Canada, R.S.C., 1985, c. C-46) an infringement of freedom of expression as guaranteed under s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*?

Answer: Yes.

2. If s. 281.2(2) of the *Criminal Code* of Canada, R.S.C. 1970, c. C-34 (now s. 319(2) of the *Criminal Code* of Canada, R.S.C., 1985, c. C-46) is an infringement of s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*, can it be upheld under s. 1 of the *Canadian Charter of Rights and Freedoms* as a reasonable limit prescribed by law and demonstrably justified in a free and democratic society?

Answer: Yes.

3. Is s. 281.2(3)(*a*) of the *Criminal Code* of Canada, R.S.C. 1970, c. C-34 (now s. 319(3)(*a*) of the *Criminal Code* of Canada, R.S.C., 1985, c. C-46) an infringement of the right to be presumed innocent, as guaranteed under s. 11(*d*) of the *Canadian Charter of Rights and Freedoms*?

Answer: Yes.

4. If s. 281.2(3)(*a*) of the *Criminal Code* of Canada, R.S.C. 1970, c. C-34 (now s. 319(3)(*a*) of the *Criminal Code* of Canada, R.S.C., 1985, c. C-46) is an infringement of s. 11(*d*) of the *Canadian Charter of Rights and Freedoms*, can it be upheld under s. 1 of the *Canadian Charter of Rights and Freedoms* as a

> reasonable limit prescribed by law and demonstrably justified in a free and democratic society?

Answer: Yes.

I would thus reverse the decision of the Alberta Court of Appeal and allow the appeal. This case should return to the Court of Appeal in order to resolve those issues left unexamined by reason of its decision to strike down the impugned provisions.

//*La Forest J.*//

The following are the reasons delivered by

LA FOREST J. (dissenting) -- I agree with Justice McLachlin on the issues respecting freedom of expression and I would accordingly dispose of the appeal and answer the first two constitutional questions as she does. I find it unnecessary to consider the issues respecting the right to be presumed innocent and, in consequence, to answer the other constitutional questions.

//*McLachlin J.*//

The reasons of Sopinka and McLachlin JJ. were delivered by

MCLACHLIN J. (dissenting) --

Introduction

The issue on this appeal is whether ss. 319(2) and 319(3) of the *Criminal Code*, R.S.C., 1985, c. C-46, creating the offence of unlawfully promoting hatred, should be struck down on the ground that they infringe the guarantees of free expression and the presumption of innocence embodied in the *Canadian Charter of Rights and Freedoms*.

Mr. Keegstra, a secondary school teacher in Eckville, a small town in Alberta, was convicted of unlawfully promoting hatred under s. 319(2). The evidence established that he had systematically denigrated Jews and Judaism in his classes. He described Jews by such epithets as "revolutionists", "treacherous", "imposters", "communists", "secret", "sneaky", "manipulative", and "deceptive". He taught that the Jewish people are "barbaric", "subversive", "sadistic", "materialistic", "money-loving" and "power hungry". He maintained that anyone Jewish must be evil and that anyone evil must be Jewish. Not only did he maintain these things; he advised the students that they must accept his views as true unless they were able to contradict them. Moreover, he expected his students to regurgitate these notions in essays and examinations. If they did so, they received good marks. If they did not, their marks were poor.

Prior to his trial, Mr. Keegstra had applied to a judge of the Alberta Court of Queen's Bench for an order quashing the charge on the ground that s. 319(2) of the *Criminal Code* violates the right of freedom of expression guaranteed by the *Charter*. Quigley J. rejected this contention: (1984), 19 C.C.C. (3d) 254. He regarded the section, not as a limit on freedom of expression, but rather as a safeguard promoting freedom of expression. In his view, "freedom of expression" in s. 2(*b*) of the *Charter* does not mean an absolute freedom conferring an unabridged right of speech or expression. He added that if he were wrong in concluding that s. 319(2) did not infringe s. 2(*b*), he would find that the limit was a reasonable one, demonstrably justified in a free and democratic society within s. 1 of the *Charter*.

The Court of Appeal, however, reversed this decision, and quashed the conviction entered at trial: (1988), 43 C.C.C. (3d) 150. In its view, s. 319(2) of the *Criminal Code* violated the *Charter* in two ways. First, it infringed the presumption of innocence by making the truth of statements promoting hatred a defence, but placing the burden of proving them on the accused. Second, it violated the guarantee of free speech in s. 2(*b*) of the *Charter*. The court, *per* Kerans J.A., held that "imprudent promotion of hatred falls within the definition of freedom of expression" (p. 162) in that section, and that mistakes of fact by speakers -- even by speakers who have no reasonable grounds for the mistake -- are protected under the *Charter*.

Nor was the violation saved by s. 1 of the *Charter*, in the opinion of the Court of Appeal. "[T]his rule is overly broad", Kerans J.A. observed, pointing out that the section does not require that anyone actually come to hate a member of the protected group as a result of the promotion of hatred by the offender. He accepted that the spread of hatred against target groups might be justifiably regulated, but found the fact that the law criminalizes mere attempts to do so and leaves no room for the defence of honest mistake precluded its justification as a reasonable measure justified in a democratic society. Nor, in the view of Kerans J.A., did the values of multiculturalism and equality enshrined in the *Charter* make the limit imposed on free expression by s. 319(2) of the *Criminal Code* reasonable under s. 1. Section 15 is restricted to government action, while the concern of s. 319(2) is individual expression -- expression protected by s. 2(*b*) of the *Charter*. In Kerans J.A.'s view, nothing in the *Charter* suggests a legally enforceable orthodoxy in matters of expression. On the contrary, our commitment to the marketplace of ideas precludes us from presuming that those who promote hatred will be successful in fomenting it among the majority of Canadians. Moreover, freedom of expression is an individual liberty of such importance that it can be overridden only by an extraordinarily weighty public goal. In the end the Court of Appeal held

that the *Charter* protected even imprudent promotion of hatred, up to the point where it actually caused listeners to hate target groups.

The Crown appeals to this Court.

Statutory Provisions

The respondent was charged under s. 319(2) of the *Criminal Code*, which provides:

> **319.** . . .
>
> (2) Every one who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of
>
> (*a*) an indictable offence and is liable to imprisonment for a term not exceeding two years; or
>
> (*b*) an offence punishable on summary conviction.
>
> (3) No person shall be convicted of an offence under subsection (2)
>
> (*a*) if he establishes that the statements communicated were true;
>
> (*b*) if, in good faith, he expressed or attempted to establish by argument an opinion on a religious subject;
>
> (*c*) if the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true; or
>
> (*d*) if, in good faith, he intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred toward an identifiable group in Canada.
>
> . . .
>
> (6) No proceeding for an offence under subsection (2) shall be instituted without the consent of the Attorney General.
>
> (7) In this section,

> "communicating" includes communicating by telephone, broadcasting or other audible or visible means;
>
> "identifiable group" has the same meaning as in section 318;
>
> "public place" includes any place to which the public have access as of right or by invitation, express or implied:
>
> "statements" includes words spoken or written or recorded electronically or electro-magnetically or otherwise, and gestures, signs or other visible representations.

"Identifiable group" is defined as follows:

> **318.** . . .
>
> (4) In this section, "identifiable group" means any section of the public distinguished by colour, race, religion or ethnic origin.

It will be observed that what is prohibited is the wilful promotion of hatred of identifiable groups. Casual slips of the tongue are not actionable. On the other hand, it is not necessary that the statements actually have the effect of promoting hatred. Truth is a defence, but the burden of establishing it lies on the accused.

This provision must be tested against the principles established in the *Charter*, and in particular, the following sections:

> **1.** The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
>
> **2.** Everyone has the following fundamental freedoms:
>
> . . .
>
> (*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

11. Any person charged with an offence has the right

. . .

(*d*) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

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

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

Issues

The issues are the following:

1. Does s. 319(2) of the *Criminal Code* breach s. 2(*b*) of the *Charter*?

2. Do ss. 319(2) and 319(3) of the *Criminal Code* breach s. 11(*d*) of the *Charter*?

3. If the answer to either questions 1 or 2 is affirmative, can the infringements be justified under s. 1 of the *Charter*?

The following constitutional questions stated by the Dickson C.J. reflect these issues:

1. Is s. 281.2(2) of the *Criminal Code* of Canada, R.S.C. 1970, c. C-34 (now s. 319(2) of the *Criminal Code* of Canada, R.S.C., 1985, c. C-46) an infringement of freedom of expression as guaranteed under s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*?

2. If s. 281.2(2) of the *Criminal Code* of Canada, R.S.C. 1970, c. C-34 (now s. 319(2) of the *Criminal Code* of Canada, R.S.C., 1985, c. C-46) is an infringement of s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*, can it be upheld under s. 1 of the *Canadian Charter of Rights and Freedom*s as a reasonable limit prescribed by law and demonstrably justified in a free and democratic society?

3. Is s. 281.2(3)(*a*) of the *Criminal Code* of Canada, R.S.C. 1970, c. C-34 (now s. 319(3)(*a*) of the *Criminal Code* of Canada, R.S.C., 1985, c. C-46) an infringement of the right to be presumed innocent, as guaranteed under s. 11(*d*) of the *Canadian Charter of Rights and Freedoms*?

4. If s. 281.2(3)(*a*) of the *Criminal Code* of Canada, R.S.C. 1970, c. C-34 (now s. 319(3)(*a*) of the *Criminal Code* of Canada, R.S.C., 1985, c. C-46) is an infringement of s. 11(*d*) of the *Canadian Charter of Rights and Freedoms*, can it be upheld under s. 1 of the *Canadian Charter of Rights and Freedoms* as a reasonable limit prescribed by law and demonstrably justified in a free and democratic society?

Analysis

I. *Background*

This case poses questions of great importance and difficulty. In order to situate them in their proper context, I preface my analysis of the issues with a brief philosophical and historical perspective of the role of free expression in our society, both in general terms and in relation to hate propaganda.

A. A Philosophical View of Freedom of Expression and the *Charter*

Various philosophical justifications exist for freedom of expression. Some of these posit free expression as a means to other ends. Others see freedom of expression as an end in itself.

Salient among the justifications for free expression in the first category is the postulate that the freedom is instrumental in promoting the free flow of ideas essential to political democracy and the functioning of democratic institutions. This is sometimes referred to as the political process rationale: see A. W. MacKay, "Freedom of Expression: Is it All Just Talk?" (1989), 68 *Can. Bar Rev*. 713. The *locus classicus* of this rationale is A. Meiklejohn, *Free Speech and its Relation to Self-Government* (1948).

A corollary of the view that expression must be free because of its role in the political process is that only expression relating to the political process is worthy of constitutional protection. However, within these limits protection for expression is said to be absolute. The political process rationale has played a significant role in the development of First Amendment doctrine in the United States, and various justices of the U.S. Supreme Court (though never a majority) have embraced its theory that protection of speech is absolute within these restricted bounds. Its importance has also been affirmed by Canadian courts, both before and since the advent of the *Charter*.

A variant on the political process theory ascribes to freedom of expression a central role as the pivotal freedom on which all others depend. Without the freedom to comment and criticize, other fundamental rights and freedoms may be subverted by the state. This argument gives freedom of expression an enhanced status in relation to other rights.

The validity of the political process rationale for freedom of expression is undeniable. It is, however, limited. It justifies only a relatively narrow sector of free expression -- one much narrower than either the wording of the First Amendment or s. 2(*b*) of the *Charter* would suggest.

Another venerable rationale for freedom of expression (dating at least to Milton's *Areopagitica* in 1644) is that it is an essential precondition of the search for truth. Like the political process model, this model is instrumental in outlook. Freedom of expression is seen as a means of promoting a "marketplace of ideas", in which competing ideas vie for supremacy to the end of attaining the truth. The "marketplace of ideas" metaphor was coined by Justice Oliver Wendell Holmes, in his famous dissent in *Abrams v. United States*, 250 U.S. 616 (1919). This approach, however, has been criticized on the ground that there is no guarantee that the

free expression of ideas will in fact lead to the truth. Indeed, as history attests, it is quite possible that dangerous, destructive and inherently untrue ideas may prevail, at least in the short run.

Notwithstanding the cogency of this critique, it does not negate the essential validity of the notion of the value of the marketplace of ideas. While freedom of expression provides no guarantee that the truth will always prevail, it still can be argued that it assists in promoting the truth in ways which would be impossible without the freedom. One need only look to societies where free expression has been curtailed to see the adverse effects both on truth and on human creativity. It is no coincidence that in societies where freedom of expression is severely restricted truth is often replaced by the coerced propagation of ideas that may have little relevance to the problems which the society actually faces. Nor is it a coincidence that industry, economic development and scientific and artistic creativity may stagnate in such societies.

Moreover, to confine the justification for guaranteeing freedom of expression to the promotion of truth is arguably wrong, because however important truth may be, certain opinions are incapable of being proven either true or false. Many ideas and expressions which cannot be verified are valuable. Such considerations convince me that freedom of expression can be justified at least in part on the basis that it promotes the "marketplace of ideas" and hence a more relevant, vibrant and progressive society.

But freedom of expression may be viewed as more than a means to other ends. Many assert that free expression is an end in itself, a value essential to the sort of society we wish to preserve. This view holds that freedom of expression "derives from the widely accepted premise of Western thought that the proper end of man is the realization of his character and

potentialities as a human being". It follows from this premise that all persons have the right to form their own beliefs and opinions, and to express them. "For expression is an integral part of the development of ideas, of mental exploration and of the affirmation of self": T. I. Emerson, "Toward a General Theory of the First Amendment" (1963), 72 *Yale L.J.* 877, at p. 879. It is demeaning of freedom of expression and wrong, the proponents of this view argue, to conceive the right only in terms of the ends it may assist in achieving. "[I]t is not a general measure of the individual's right to freedom of expression that any particular exercise of the right may be thought to promote or retard other goals of the society" (p. 880). Freedom of expression is seen as worth preserving for its own intrinsic value.

Those who assert that freedom of expression is worth protecting for its intrinsic value to the self-realization of both speaker and listener tend to combine this rationale with others. (See for example Emerson, op. cit., at pp. 879-80 and L. Tribe, *American Constitutional Law* (2nd ed. 1988), at pp. 785-89.) On its own, this justification for free expression is arguably too broad and amorphous to found constitutional principle. Furthermore, it does not answer the question of why expression should be deserving of special constitutional status, while other self-fulfilling activities are not. Nevertheless, an emphasis on the intrinsic value of freedom of expression provides a useful supplement to the more utilitarian rationales, justifying, for example, forms of artistic expression which some might otherwise be tempted to exclude.

Arguments based on intrinsic value and practical consequences are married in the thought of F. Schauer (*Free Speech: A Philosophical Enquiry* (1982)). Rather than evaluating expression to see why it might be worthy of protection, Schauer evaluates the reasons why a government might attempt to limit expression. Schauer points out that throughout history, attempts to restrict expression have accounted for a disproportionate share of governmental blunders -- from the condemnation of Galileo for suggesting the earth is round to the suppression as

"obscene" of many great works of art. Professor Schauer explains this peculiar inability of censoring governments to avoid mistakes by the fact that, in limiting expression, governments often act as judge in their own cause. They have an interest in stilling criticism of themselves, or even in enhancing their own popularity by silencing unpopular expression. These motives may render them unable to carefully weigh the advantages and disadvantages of suppression in many instances. That is not to say that it is always illegitimate for governments to curtail expression, but government attempts to do so must *prima facie* be viewed with suspicion.

Schauer's approach reminds us that no one rationale provides the last word on freedom of expression. Indeed, it seems likely that theories about freedom of expression will continue to develop.

How do these diverse justifications of freedom of expression relate to s. 2(*b*) of the *Charter*? First, it may be noted that the broad wording of s. 2(*b*) of the *Charter* is arguably inconsistent with a justification based on a single facet of free expression. This suggests that there is no need to adopt any one definitive justification for freedom of expression. Different justifications for freedom of expression may assume varying degrees of importance in different fact situations. However, each of the above rationales is capable of providing guidance as to the scope and content of s. 2(*b*).

The interpretation which has been placed on s. 2(*b*) of the *Charter* confirms the relevance of both instrumental and intrinsic justifications for free expression. This Court has adopted a purposive approach in construing the rights and freedoms guaranteed by the *Charter*. When placed in the context of the judicial history of freedom of expression in Canada, it suggests that it is appropriate to consider the ends which freedom of speech may serve in determining its scope and the justifiability of infringements upon it. These ends include the maintenance

of our democratic rights and the benefits to be gained from the pursuit of truth and creativity in science, art, industry and other endeavours. At the same time, the emphasis which this Court has placed upon the inherent dignity of the individual in interpreting *Charter* guarantees suggests that the rationale of self-actualization should also play an important part in decisions under s. 2(*b*) of the *Charter*.

In accordance with this eclectic approach, the Court in *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, identified three values as underlying the guarantee of freedom of expression in s. 2(*b*) of the *Charter*: the value of seeking and attaining truth; the value of participation in social and political decision-making; and individual self-fulfillment and human flourishing.

Free expression is a fundamental value in our society for any and all of these reasons. Nevertheless, it is not an absolute value. Like other liberties which we prize so highly, freedom of expression must in certain circumstances give way to countervailing considerations. The question is always one of balance. Freedom of expression protects certain values which we consider fundamental -- democracy, a vital, vibrant and creative culture, the dignity of the individual. At the same time, free expression may put other values at risk. It may harm reputations, incite acts of violence. It may be abused to undermine our fundamental governmental institutions and undercut racial and social harmony. The law may legitimately trench on freedom of expression where the value of free expression is outweighed by the risks engendered by allowing freedom of expression.

The framers of the *Charter* recognized both the fundamental nature of freedom of expression and the necessity of sometimes limiting it where the risks it poses are too great for society to tolerate. Its importance is reflected in the broad and untrammelled definition of expression

embodied in s. 2(*b*). The guarantee of free expression is not internally limited as are certain other *Charter* rights (e.g., s. 8 of the *Charter*) or as are the equivalent guarantees in the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 U.N.T.S. 221 (1950), and the *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171 (1966). The guarantees of free expression in those documents explicitly permit a wide variety of limitations on free expression -- limitations which the person asserting the right of free expression must observe. By contrast, the Canadian guarantee of free expression is more comprehensive. The provision is a very broad guarantee, and all expression is *prima facie* protected. Any infringement must be justified by the state under s. 1. Moreover, as will be observed *infra*, freedom of expression had achieved a near-constitutional status in Canada long before its specific entrenchment by the *Charter*. All this suggests that the framers of the *Charter* envisaged freedom of expression as a comprehensive, fundamental right of great importance.

At the same time, the *Charter* permits freedom of speech to be restricted by law where this is justified by the need to protect more important countervailing values. Thus the broad guarantee of freedom of expression in s. 2(*b*) of the *Charter* is made subject to s. 1 which permits such reasonable limitations on the right as may be justified in a free and democratic society.

B. The Historical Perspective

Freedom of speech and the press had acquired quasi-constitutional status well before the adoption of the *Charter* in 1982. In a series of cases dealing with legislation passed by repressive provincial regimes, the Supreme Court endorsed the proposition that the right to

express political ideas could not be trammelled by the legislatures: see *MacKay*, op. cit., at pp. 715-16.

The focus of these decisions was the division of powers between the provinces and the federal government. The Alberta Press reference (*Reference re Alberta Statutes*, [1938] S.C.R. 100) provides a good example. At issue was a bill introduced by the Alberta Legislature to compel newspapers to disclose their sources of news information and to print government statements correcting previous articles. The bill was struck down on the basis that the province had no jurisdiction over the free working of the political institutions of the state. Political expression, vital to the country as a whole, could not be limited by provincial legislation.

This approach to free expression was accepted and amplified by some judges of this Court in *Saumur v. City of Quebec*, [1953] 2 S.C.R. 299, and *Switzman v. Elbling*, [1957] S.C.R. 285. Rand J. and Abbott J. spoke of an implied bill of rights arising out of the provision in the *Constitution Act, 1867*, for "a constitution similar in principle to that of the United Kingdom."

These decisions confirmed the fundamental importance of freedom of speech and the press in Canada. The conception of freedom of speech embodied in these cases, however, was largely limited to the political process model. Subsequent cases, such as *Cherneskey v. Armadale Publishers Ltd.*, [1979] 1 S.C.R. 1067, suggested an unwillingness to promote a broad concept of freedom of expression. Furthermore, in the pre-*Charter* context fundamental notions of free speech were ultimately recognized as subservient to legislative limits. The concept of an implied bill of rights put forward in *Saumur* and *Switzman* was rejected by the Court in *Attorney General for Canada and Dupond v. City of Montreal*, [1978] 2 S.C.R. 770, and

the overriding power of legislatures to define the limits of free speech was confirmed in *Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307.

Nevertheless, one thing has remained constant through all the decisions. That is the recognition that freedom of speech is a fundamental Canadian value.

Other pre-*Charter* cases reflected a broader approach to the scope of free speech concerns. In *Boucher v. The King*, [1951] S.C.R. 265, this Court affirmed the fundamental value of freedom of speech not only in our political system, but also in society generally. Rand J. wrote at p. 288:

> Freedom in thought and speech and disagreement in ideas and beliefs, on every conceivable subject, are of the essence of our life. The clash of critical discussion on political, social and religious subjects has too deeply become the stuff of daily experience to suggest that mere ill-will as a product of controversy can strike down the latter with illegality.... Controversial fury is aroused constantly by differences in abstract conceptions; heresy in some fields is again a mortal sin; there can be fanatical puritanism in ideas as well as in mortals; but our compact of free society accepts and absorbs these differences and they are exercised at large within the framework of freedom and order on broader and deeper uniformities as bases of social stability.

The enactment of s. 2(*b*) of the *Charter* represented both the continuity of these traditions, and a new flourishing of the importance of freedom of expression in Canadian society. As Professor MacKay has stated, op. cit., at p. 714:

> Freedom of expression was not invented by the Charter of Rights and Freedoms but it has acquired new dimensions as a consequence of its entrenchment.

Continuity has been stressed in cases such as *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573. McIntyre J., at p. 583, recognized both the deep roots of freedom of expression in Canadian society, and the key role it has played in our democratic development:

> Freedom of expression is not, however, a creature of the *Charter*. It is one of the fundamental concepts that has formed the basis for the historical development of the political, social and educational institutions of western society. Representative democracy, as we know it today, which is in great part the product of free expression and discussion of varying ideas, depends upon its maintenance and protection.

At the same time, bearing in mind the breadth of the wording of the guarantee in s. 2(*b*), and the need for a broad and liberal interpretation to realize the purposes of the guarantee, this Court has shown its preference for the broad approach set forth by Rand J. in *Boucher*. Rejecting the proposition that the *Charter*'s guarantee of freedom of expression is confined to political matters, this Court held in *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, and *Irwin Toy, supra*, that the *Charter* applies to commercial expression. All activities which convey or attempt to convey meaning *prima facie* fall within the scope of the guarantee: *Irwin Toy, per* Dickson C.J., Lamer and Wilson JJ. Within the framework of this general principle, however, some of the classic rationales for protecting freedom of expression have been given a limited role in interpreting s. 2(*b*). Where a government measure limits expressive activity not by design but in its effects, to make out a violation of s. 2(*b*) the claimant must show that the expressive activity relates to those values identified in *Irwin Toy* as underlying the guarantee of freedom of expression in s. 2(*b*) of the *Charter*: the value of seeking and attaining truth; the value of participation in social and political decision-making; and individual self-fulfillment and human flourishing.

C. Hate Propaganda and Freedom of Speech -- An Overview

Before entering upon the analysis of whether s. 319(2) of the *Criminal Code* is inconsistent with the *Charter* and must be struck down, it may be useful to consider the conflicting values underlying the question of the prohibition of hate literature and how the issue has been treated in other jurisdictions.

Hate literature presents a great challenge to our conceptions about the value of free expression. Its offensive content often constitutes a direct attack on many of the other principles which are cherished by our society. Tolerance, the dignity and equality of all individuals; these and other values are all adversely affected by the propagation of hateful sentiment. The problem is not peculiarly Canadian; it is universal. Wherever racially or culturally distinct groups of people live together, one finds people, usually a small minority of the population, who take it upon themselves to denigrate members of a group other than theirs. Canada is no stranger to this conduct. Our history is replete with examples of discriminatory communications. In their time, Canadians of Asian and East Indian descent, black, and native people have been the objects of communications tending to foster hate. In the case at bar it is the Jewish people who have been singled out as objects of calumny.

The evil of hate propaganda is beyond doubt. It inflicts pain and indignity upon individuals who are members of the group in question. Insofar as it may persuade others to the same point of view, it may threaten social stability. And it is intrinsically offensive to people -- the majority in most democratic countries -- who believe in the equality of all people regardless of race or creed.

For these reasons, governments have legislated against the dissemination of propaganda directed against racial groups, and in some cases this legislation has been tested in the courts. Perhaps the experience most relevant to Canada is that of the United States, since its

Constitution, like ours, places a high value on free expression, raising starkly the conflict between freedom of speech and the countervailing values of individual dignity and social harmony. Like s. 2(*b*), the First Amendment guarantee is conveyed in broad, unrestricted language, stating that "Congress shall make no law . . . abridging the freedom of speech, or of the press". The relevance of aspects of the American experience to this case is underlined by the factums and submissions, which borrowed heavily from ideas which may be traced to the United States.

The protections of the First Amendment to the U.S. Constitution, and in particular free speech, have always assumed a particular importance within the U.S. constitutional scheme, being regarded as the cornerstone of all other democratic freedoms. As expressed by Jackson J., in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein" (p. 642). The U.S. Supreme Court, particularly in recent years, has pronounced itself strongly on the need to protect speech even at the expense of other worthy competing values.

Nevertheless, tolerance for unpopular speech, especially speech which was perceived as a threat to vital security interests, was not initially a hallmark of the U.S. Supreme Court. When the socialist labour leader Eugene Debs made a speech critical of United States involvement in the First World War, the court was content to uphold his conviction for "wilfully caus[ing] or attempt[ing] to cause . . . insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces . . . or . . . wilfully obstruct[ing] . . . the recruiting or enlistment service": *Debs v. United States*, 249 U.S. 211 (1919). A companion case set out the classic test for the justifiability of an abridgement of free speech:

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

(Schenck v. United States, 249 U.S. 47 (1919), at p. 52.)

The test was stiffened in the famous dissents of Holmes J. in *Abrams v. United States, supra*, at p. 628 ("present danger of immediate evil or an intent to bring it about") and Brandeis J. (Holmes J. concurring) in *Whitney v. California,* 274 U.S. 357 (1927), at pp. 377-78:

> To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. . . .
>
> Moreover, even imminent danger cannot justify resort to prohibition of these functions essential to effective democracy, unless the evil apprehended is relatively serious . . . . There must be the probability of serious injury to the State.

This stricter formulation of the "clear and present danger" test came to be accepted as the standard for a justified infringement of the free speech guarantee, but it too was subject to varying interpretation. In the crisis atmosphere of the cold war, the court upheld convictions of communists for conspiring to advocate the overthrow of the United States government in *Dennis v. United States*, 341 U.S. 494 (1951). Purporting to apply the above test, the court endorsed the following formulation (at p. 510):

> In each case [courts] must ask whether the gravity of the "evil", discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.

This is how matters stood when hate propaganda first came to the attention of the court.

In *Beauharnais v. Illinois*, 343 U.S. 250 (1952), a closely divided court upheld the constitutionality of a statute bearing some resemblance to s. 319(2) of the Canadian *Criminal Code*, prohibiting exhibition in any public place of any publication portraying "depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion [which exposes such citizens] to contempt, derision or obloquy or which is productive of breach of the peace or riots". Frankfurter J., writing the court's opinion, held that the statute prohibited libelous utterances directed against groups, and that these utterances were outside of the ambit of the First Amendment. Quoting from the court's decision in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), he stated (at pp. 255-57):

> Today, every American jurisdiction . . . punish[es] libels directed at individuals. "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words -- those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality . . . "

But the full flowering of First Amendment doctrine came after the *Beauharnais* case. Later cases have weakened its authority to the extent that many regard it as overruled. In the first place, the U.S. Supreme Court has recognized that libel laws do indeed "raise constitutional problems". *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), held that a public official, in order to bring an action for libel, had to show that the defamatory statement was directed at the official personally, and that the maker of the statement had actual knowledge that it was false. Secondly, the "clear and present danger" test went through yet another metamorphosis. *Brandenburg v. Ohio*, 395 U.S. 444 (1969), struck down a statute forbidding a person to "advocat[e] the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform", in a prosecution of

a Klansman who showed a film that was derogatory of Negroes and Jews and implied that "revengeance" should be taken against them. The test that emerges from *Brandenburg* is much stricter than the earlier formulations -- advocacy of the use of force or violation of the law cannot be proscribed "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action" (p. 447).

The U.S. Supreme Court subsequently refused to grant *certiorari* in two more recent cases which call *Beauharnais* into question. In *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978), a federal court struck down an ordinance forbidding the dissemination of any material (including public displays of symbolic significance) promoting and inciting racial or religious hatred, in a case where neo-Nazis proposed a march, complete with swastikas, through the predominantly Jewish village of Skokie, Illinois. And in *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), an ordinance forbidding the display of "graphic sexually explicit subordination of women" was held to be unconstitutional. The effect of these cases has been to undermine the authority of *Beauharnais, supra*. As Tribe, op. cit., at p. 861, n. 2, puts it:

> The continuing validity of the Beauharnais holding is very much an open question. See, e.g., Smith v. Collin, 439 U.S. 916, 919 (1978) (Blackmun, J., dissenting from denial of certiorari) (noting that Beauharnais "has not been overruled or formally limited"). In recent years, courts have given Beauharnais a very limited reading. In Collin v. Smith... the Seventh Circuit stated that "(i)t may be questioned after such cases as Cohen v. California, (403 U.S. 15 (1971)), Gooding v. Wilson, (405 U.S. 518 (1972)), and Brandenburg v. Ohio, (395 U.S. 444 (1969) (per curiam)), whether the tendency to induce violence approach sanctioned implicitly in Beauharnais would pass constitutional muster today."... In American Booksellers Ass'n, Inc. v. Hudnut... the Seventh Circuit stated that subsequent cases "had so washed away the foundations of Beauharnais that it could not be considered authoritative."

It is worth describing a few doctrines associated with free speech that form part of the reasoning in the U.S. cases, and which are cited in the factums. One is a hierarchy of possible

abridgements on free speech. Legislation against the content of speech has been distinguished from legislation restricting speech in other ways, with the former attracting stricter judicial scrutiny. For example, while "time, place and manner" regulation of speech has traditionally been given some latitude, an ordinance preventing picketing other than labour picketing near schools has been struck down because it draws a distinction based on content of the speech: *Police Department of the City of Chicago v. Mosley*, 408 U.S. 92 (1972). Viewpoint-based abridgments of speech, in which the Government selects between viewpoints, will very rarely be justifiable. Section 319(2) of the *Criminal Code* is probably best described as content-based rather than viewpoint-based, because the Government itself does not choose between viewpoints directly. For example, a statement declaring the superiority of a particular race is not preferred over a declaration suggesting the reverse hierarchy. Rather, all discussion of the superiority of a particular race over another is potentially suspect. This content-based provision is similar in this regard to the statute forbidding demonstrations critical of foreign governments within 500 feet of embassies that was struck down as an impermissible content-based restriction on speech in *Boos v. Barry*, 108 S. Ct. 1157 (1988). Although not as offensive as viewpoint-based restrictions, content-based restrictions on speech have attracted "most exacting scrutiny" from the U.S. Supreme Court, being upheld only if "necessary to serve a compelling state interest and . . . narrowly drawn to achieve that end": *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983), at p. 45.

The distinction between content-based and form-based restrictions on freedom of speech has been incorporated, although in a different form, into the analysis under s. 2(*b*) of the *Charter*: *Irwin Toy*, *supra*.

Two other concepts employed in the United States in cases dealing with the prohibition of dissemination of racist literature figured in argument before us. These are the concepts of overbreadth and vagueness. Overbreadth is defined by Tribe, op. cit., at p. 1056, as follows:

> Statutes which open-endedly delegate to administering officials the power to decide how and when sanctions are applied or licenses issued are overbroad because they grant such officials the power to discriminate -- to achieve indirectly through selective enforcement a censorship of communicative content that is clearly unconstitutional when achieved directly.

If legitimate activity protected by the First Amendment would come within the terms of the statute, the statute may be void on its face. Even where the actions of the litigant are not themselves worthy of protection, the litigant may rely on the constitutional defect of overbreadth. Alternatively, an argument of overbreadth may sometimes be met by a construction of the statute that clearly confines it within constitutional bounds, if one is available (i.e., reading down). If one is not, however, the statute is void on its face.

Vagueness is distinct from overbreadth, and carries different consequences in American constitutional law. To quote Tribe again at pp. 1033-34:

> Vagueness is a constitutional vice conceptually distinct from overbreadth in that an overbroad law need lack neither clarity nor precision, and a vague law need not reach activity protected by the first amendment. As a matter of due process, a law is void on its face if it is so vague that persons "of common intelligence must necessarily guess at its meaning and differ as to its application." Such vagueness occurs when a legislature states its proscriptions in terms so indefinite that the line between innocent and condemned conduct becomes a matter of guesswork . . . .
>
> But vagueness is not calculable with precision . . . [T]he Supreme Court will not ordinarily invalidate a statute because some marginal offenses may remain within the scope of a statute's language. The conclusion that a statute is too vague and therefore void as a matter of due process is thus unlikely to be triggered without two findings: that the individual challenging the statute is indeed one of the entrapped innocent, and that it would have been practical for the legislature to draft more precisely. [Citations omitted.]

Thus, vagueness of a statute is a defence only in more restrictive circumstances: where the statute is vague as applied to the conduct of the litigant, or where it is vague in all possible applications. An example of the latter was an ordinance making it illegal for "three or more persons to assemble . . . on any of the sidewalks . . . and there conduct themselves in a manner annoying to persons passing by", struck down in *Coates v. City of Cincinnati*, 402 U.S. 611 (1971).

The rationale for invalidating statutes that are overbroad (even in a case where the litigant's conduct is clearly not protected by the First Amendment) or vague is that they have a chilling effect on legitimate speech. Protection of free speech is regarded as such a strong value that legislation aimed at legitimate ends and in practice used only to achieve those legitimate ends may be struck down, if it also tends to inhibit protected speech.

In the United States, a provision similar to s. 319(2) of the *Criminal Code* was struck down in *Collin v. Smith, supra*, on the ground that is was fatally overbroad. In addition, the Seventh Circuit Court of Appeals hinted that the provision might also be void for vagueness. The ordinance in *Collin* prohibited:

> . . . [t]he dissemination of any materials within the Village of Skokie which promotes and incites hatred against persons by reason of their race, national origin, or religion, and is intended to do so.

The court found that the activity in question in the case -- a proposed neo-Nazi demonstration in Skokie, Illinois -- was a form of expression entitled to protection under the First Amendment. The ordinance, it found, was overbroad in that it "could conceivably be applied to criminalize dissemination of *The Merchant of Venice* or a vigorous discussion of the merits of reverse racial discrimination in Skokie" (p. 1207).

Legislation against the dissemination of racial propaganda has also been tested under various international instruments, providing a counter-example to the U.S. experience. The *European Convention for the Protection of Human Rights and Fundamental Freedoms* contains the following articles:

Article 10

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

The European Commission on Human Rights has had little difficulty in holding that prosecutions for dissemination of racist ideas and literature are permitted under the article: see, e.g., *Glimmerveen v. Netherlands*, Eur. Comm. H. R., Applications Nos. 8348/78 and 8406/78, October 11, 1979, D.R. 18, p. 187. In view of the breadth of the limitations clause, which specifically mentions the protection of "health or morals" and "the reputation or rights of others", this is unsurprising. In other contexts, protection for free expression under this article has at times been decidedly lukewarm, as befits an international instrument which is designed to limit as little as possible the sovereignty of the nations that signed it. For example, the European Court of Human Rights also upheld prosecution of a bookseller in Northern Ireland for distributing *The Little Red Schoolbook*, an educational book on sexuality aimed at 12- to 18-year-olds, on the grounds that the prosecution was "for the protection of health or morals": Eur. Court H. R., *Handyside* case, judgment of 7 December 1976, Series A No. 24.

Other international instruments go further, and require state parties to prohibit some forms of hate propaganda. The *International Covenant on Civil and Political Rights*, to which Canada is a party, provides as follows:

> *Article 19. . . .*
>
> 2. Everyone shall have the right to freedom of expression . . .
>
> 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary;
>
> (*a*) For respect of the rights or reputations of others;
>
> (*b*) For the protection of national security or of public order . . . ., or of public health or morals.
>
> *Article 20. . . .*
>
> 2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

The U.N. Human Rights Committee has dismissed a complaint against Canada brought by Mr. Taylor (also appealing to this Court) on the grounds that Canada was merely carrying out its international obligations in proceeding against Mr. Taylor for the dissemination of hatred against ethnic groups: see *Taylor and Western Guard Party v. Canada*, Communication No. 104/1981, Report of the Human Rights Committee, 38 U.N. GAOR, Supp. No. 40 (A/38/40) 231 (1983) (decision reported in part at (1983), 5 C.H.R.R. D/2097).

Similar obligations are set forth in another convention to which Canada is a party, the *International Convention on the Elimination of All Forms of Racial Discrimination*, Can. T.S. 1970 No. 28. Article 4 provides that States Parties:

> ARTICLE 4

. . .

(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

(b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;

(c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

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

Both the American and international approach recognize that freedom of expression is not absolute, and must yield in some circumstances to other values. The divergence lies in the way the limits are determined. On the international approach, the objective of suppressing hatred appears to be sufficient to override freedom of expression. In the United States, it is necessary to go much further and show clear and present danger before free speech can be overridden.

The *Charter* follows the American approach in method, affirming freedom of expression as a broadly defined and fundamental right, and contemplating balancing the values protected by and inherent in freedom of expression against the benefit conferred by the legislation limiting

that freedom under s. 1 of the *Charter*. This is in keeping with the strong liberal tradition favouring free speech in this country -- a tradition which had led to conferring quasi-constitutional status on free expression in this country prior to any bill of rights or *Charter*. At the same time, the tests are not necessarily the same as in the United States.

Having reviewed the American and international experience on the subject of hate propaganda, I conclude with a brief history of the attempts to curb such expression in Canada.

Two crimes with ancient roots have been treated as being relevant to hate propaganda in Canada. In *Boucher v. The King, supra*, the Crown attempted to charge a Jehovah's Witness, who had accused Quebeckers and Catholics of persecuting the Witnesses, with the crime of seditious libel (currently s. 59 of the *Criminal Code*). This Court, however, held that intention to produce feelings of hatred and ill will between different classes of His Majesty's subjects fell short of seditious intent. Something more, such as intention to disturb order or to resist authority, was needed.

The other offence of general application that has been considered relevant to hate propaganda is that of spreading false news (currently s. 181 of the *Criminal Code*). This crime, which may be traced back to the offence *De Scandalis Magnatum* (1275), was originally intended to prohibit the spreading of false rumours that would sow discord between the King and great men of the realm. The same pamphlet that was adjudged not to be a seditious libel in *Boucher* was the subject of a prosecution for spreading false news in *R. v. Carrier* (1951), 104 C.C.C. 75 (Que. K.B.). The Court acquitted, holding that s. 181 was similarly circumscribed, and could not be applied to a pamphlet that was not intended to arouse disorder. More recently, however, s. 181 was applied to attacks on Jews that the accused was

found to have known to be false in *R. v. Zundel* (1987), 58 O.R. (2d) 129 (C.A.). Its application to hate propaganda, like the hate propaganda offences themselves, has been controversial.

These provisions, especially in light of the limiting court decisions, were regarded by many as being inadequate to deal with the perceived problem of hate propaganda. In response to the representations of various groups, and after a reported upsurge in neo-Nazi activity in the early 1960's in Canada, the U.S. and Britain, the Minister of Justice in 1965 set up a Special Committee to study hate propaganda (the Cohen Committee). The Committee reported in 1966, and recommended the addition of new offences to the *Criminal Code*. In 1970, after former Committee member Pierre-Elliot Trudeau had become Prime Minister, these recommendations were acted upon. The *Criminal Code* was amended by the addition of new offences of advocating genocide (s. 318), public incitement of hatred likely to lead to a breach of the peace (s. 319(1)), and wilful promotion of hatred (s. 319(2)).

Strategies for the curtailment of hate propaganda have not been confined to the *Criminal Code*. As far back as 1934, s. 19(1) of the Manitoba *Defamation Act*, R.S.M. 1987, c. D20 (then s. 13A of the Manitoba *Libel Act*), provided injunctive relief for members of a libelled racial or religious group, where such libel was "likely to expose persons belonging to the race, or professing the religious creed, to hatred, contempt or ridicule, and tend[ed] to raise unrest or disorder among the people". Subsequently, provisions with potential application to hate propaganda were included in various human rights statutes. The first of these was Ontario's *Racial Discrimination Act, 1944*, S.O. 1944, c. 51, s. 1, which prevented the publication or display of "any notice, sign, symbol, emblem or other representation indicating discrimination or an intention to discriminate against any person or any class of persons for any purpose because of the race or creed of such person or class of persons". Gradually, all Canadian jurisdictions enacted comparable provisions, the most recent and far-reaching of these being

s. 13 of the *Canadian Human Rights Act*, S.C. 1976-77, c. 33 (now R.S.C., 1985, c. H-6) which is under attack in the companion appeal of *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 000.

The provisions in the provincial Acts prohibiting the publication of a "notice, sign, symbol, emblem or other representation" apply paradigmatically to signs with messages such as "No Blacks Allowed". Some attempt has been made to apply them to hate propaganda, but the courts have foreclosed such a broad interpretation. Application of the Manitoba provision to a series of allegedly discriminatory newspaper articles was rejected in *Re Warren and Chapman* (1984), 11 D.L.R. (4th) 474 (Man. Q.B.), and an editorial in a student newspaper (including cartoons) that was offensive to women was held not to be a "representation" within the meaning of s. 14(1) of *The Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1, in *Saskatchewan (Human Rights Commission) v. Engineering Students' Society* (1989), 56 D.L.R. (4th) 604 (Sask. C.A.), leave to appeal refused, [1989] 1 S.C.R. xiv. Besides being limited in scope, many of these provisions contain an exemption for "free speech" or "free expression of opinion": see, e.g., *The Saskatchewan Human Rights Code*, s. 14(2).

Section 13 of the federal Act is unique among human rights provisions. It declares to be a discriminatory practice the repeated communication by telephone of "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". It contains no explicit exemption for free speech or expression. Enforcement is by "cease and desist" order registrable with the Federal Court, which, if violated, can give rise to contempt proceedings.

II. *The Scope of Section 2(b) of the Charter*

Section 2(*b*) of the *Charter* guarantees freedom of thought, belief, opinion and expression in this country. It does so in broad terms. The question addressed under this heading is whether s. 319(2) of the *Criminal Code* introduces a limit on this broadly defined freedom.

I turn first to the legal principles governing the construction of s. 2(*b*) of the *Charter*. The theme established in *Dolphin* and the cases that followed was two-fold. The guarantee of freedom of expression in the *Charter* would be viewed in the light of the "large and liberal" interpretation which its history justifies and which is properly accorded to *Charter* rights. At the same time, freedom of expression was not absolute. It may be required to give way to other rights and interests in certain situations.

A series of decisions in this Court have addressed the implications of these propositions. What is the scope of the *Charter* guarantee of freedom of expression? What sorts of expression does it apply to? When can it be defeated by other rights or interests?

The Court has accorded a broad scope to s. 2(*b*). To begin with, it has defined "expression" broadly. All activities which convey or attempt to convey meaning *prima facie* fall within the scope of the guarantee: *Irwin Toy, per* Dickson C.J., Lamer and Wilson JJ. Secondly, it has held that the guarantee applies regardless of the nature of the content of the expression. The nature of the content of expression can never function to exclude it from the protection of the *Charter*. As stated in *Irwin Toy* (at pp. 968-69):

> Freedom of expression was entrenched in our Constitution . . . so as to ensure that everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream.
>
> . . .

> We cannot . . . exclude human activity from the scope of guaranteed free expression on the basis of the content or meaning being conveyed. Indeed, if the activity conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of the guarantee. [Emphasis added.]

Similarly, Lamer J. states in *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123, at p. 1180:

> Activities cannot be excluded from the scope of guaranteed freedom of expression on the basis of the content or meaning conveyed.

At the same time, the Court has affirmed that freedom of speech is not absolute. It may properly be limited. There are several ways in which it can be limited. First, there are forms of expression which can be distinguished from content and which may be excluded from the scope of s. 2(*b*) of the *Charter*. In *Dolphin Delivery* it was suggested, in *obiter dicta*, that violence and threats of violence would be excluded from the protection offered by s. 2(*b*). And in *Irwin Toy*, at p. 970, this Court stated that "a murderer or rapist cannot invoke freedom of expression in justification of the form of expression he has chosen".

Second, s. 2(*b*) is violated only if it can be shown that the purpose or effect of the government action in question (in this case s. 319(2) of the *Criminal Code*) was to restrict freedom of expression. Where the government's aim was not to limit freedom of expression, and this is but an incident of its attempt to accomplish another goal, then the person complaining of the infringement must show that its <u>effect</u> was to infringe his constitutional freedom. Here the composite rationale for freedom of expression suggested by Emerson and others has been given a limited role. To make out a violation of s. 2(*b*) where the government infringement of expression is incidental to its pursuit of another goal, a complainant must show that one of the suggested values underlying the guarantee is infringed, these being three.

First "seeking and attaining the truth is an inherently good activity." Second, "participation in social and political decision-making is to be fostered and encouraged." Third, "the diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in an essentially tolerant, indeed welcoming, environment not only for the sake of those who convey a meaning, but also for the sake of those to whom it is conveyed": *Irwin Toy*, at p. 976. Thus a government action not aimed at suppressing free expression will constitute a violation only if the complainant can show that one of these values is implicated in protecting his or her expression.

Applying these principles, the first step in an analysis under s. 2(*b*) of the *Charter* is to determine whether the impugned activity or legislation, given its form and content, lies within the sphere of conduct protected by the guarantee of freedom of expression. If it does, the next step is to determine whether the purpose or effect of the government action is to restrict freedom of expression. If the answers to both these questions are affirmative, a breach of the section is established and it is necessary to consider whether the government action or legislation is saved under s. 1 of the *Charter*.

I turn then to the question of whether the expression here at issue falls within the sphere of conduct protected by the guarantee of freedom of expression in the *Charter*. As this Court has repeatedly affirmed, the content of a statement cannot deprive it of the protection accorded by s. 2(*b*), no matter how offensive it may be. The content of Mr. Keegstra's statements was offensive and demeaning in the extreme; nevertheless, on the principles affirmed by this Court, that alone would appear not to deprive them of the protection guaranteed by the *Charter*.

Three arguments are advanced in support of the proposition that statements violating s. 319(2) do not fall within the sphere of protection accorded to freedom of speech by s. 2(*b*) of

the *Charter*. The first is the argument that the form of the statements is not protected because they are akin to violence or threats of violence and are thus excluded from s. 2(*b*). The second is the submission that, for a variety of reasons including other provisions of the *Charter* and Canada's international obligations, s. 2(*b*) should be construed as not extending to this type of speech. The third is the argument that the promotion of hatred is evil and of no redeeming value and hence not worthy of protection. I shall consider each of these arguments in turn.

A. The Argument Based on Violence

The first argument is that promoting hatred is equivalent to threats of violence and hence assumes a form which falls outside the protected sphere of s. 2(*b*). As already noted, this Court held in *Dolphin Delivery*, *supra*, that freedom of expression does not extend to protect threats or acts of violence. Relying on this jurisprudence, it was argued before us that in so far as Mr. Keegstra's statements promote hatred, they are analogous to threats of violence and are therefore not protected.

This argument depends on an extension of the category of exceptions to s. 2(*b*), since it is plain that Mr. Keegstra's statements constituted neither a "threat" nor an "act of violence." "Threat" is defined in *Mozley & Whiteley's Law Dictionary* (10th ed. 1988), as follows:

> Any menace of such a nature and extent as to unsettle the mind of the person on whom it operates, and to take away from his acts that free voluntary action which alone constitutes consent.

While many may find Mr. Keegstra's ideas unsettling, it is not suggested that they are made with the intention or have the effect of compelling Jewish people or anyone else to do one thing or another. Nor do they urge violence against the Jewish people. This was the context

in which "threat" was used in *Dolphin Delivery*. Mr. Keegstra's communications were offensive and propagandistic, but they did not constitute threats in the usual sense of that word.

Nor do Mr. Keegstra's words fulfill the requirement of violence. The primary meaning of the word "violence" according to the *Shorter Oxford English Dictionary* (3rd ed. 1987) is "[t]he exercise of physical force so as to inflict injury on or damage to persons or property." This is the sense in which the term was used in *Dolphin Delivery*, as is evident from the following passage at p. 588:

> That freedom, of course, would not extend to protect threats of violence or acts of violence. It would not protect the destruction of property, or assaults, or other clearly unlawful conduct.

Violence as discussed in *Dolphin Delivery* and *Irwin Toy* connotes actual or threatened physical interference with the activities of others.

I conclude that Keegstra's statements do not constitute either violence or threats of violence. This leaves for consideration the alternative argument that statements calculated to promote hatred are akin to threats of violence and should be excluded from s. 2(*b*) on this ground.

In general, I would be reluctant to widen an exception to a *Charter* right or freedom, absent a clear showing of social or logical necessity. Such a necessity is present in the case of violence or threats of violence. Is this equally present in the case of hate propaganda?

I think not. The justification for excluding violence as a protected form of expression is not just that violence is harmful to the victim, it is rather that violence is inimical to the rule of law on which all rights and freedoms depend. Threats of violence are similarly inimical. They are

coercive, taking away free choice and undermining freedom of action. Most fundamentally, they undercut one of the essential justifications of free expression -- the role of free expression in enhancing the freedom to choose between ideas (the argument based on truth) or between courses of conduct (the argument based on democracy). Being antithetical to the values underlying the guarantee of free expression, it is logical and appropriate that violence and threats of violence be excluded from its scope.

How does promotion of hatred compare? In some contexts, it is not inimical to the workings of democracy. For example, in the heat of political debate protagonists frequently make overstated attacks that could easily be described as "promoting hatred". Opponents are called incompetent, or corrupt, or unintelligent -- or worse. Groups of opponents -- for example, cabinet ministers or members of the opposing party -- may be categorically vilified. Yet, even assuming an intention to promote hatred of members of those groups or the foresight that hatred may result, there is nothing in the form of such statements which subverts democracy or our basic freedoms in the way in which violence or threats of violence may. There may of course be a world of difference between such statements and expression covered by s. 319(2), but that is a difference of content, not form.

It has been suggested that hate propaganda undermines the guarantee of free expression by attacking the credibility of speakers belonging to vilified groups, thereby reducing their ability to effectively communicate: see A. Fish, "Hate Promotion and Freedom of Expression: Truth and Consequences" (1989), 2 *Can. J.L. & Juris*. 111. There are several difficulties with this argument. The first is that it rests on the assumption that freedom of expression includes the right to be believed. I know of no historical or philosophical basis for such a proposition. The underlying assumption of the "marketplace of ideas" justification for free speech as well as the justification on political grounds is that many ideas will be rejected. Even the rationale of self-

actualization does not support a right to be considered or believed. Freedom of expression guarantees the right to loose one's ideas on the world; it does not guarantee the right to be listened to or to be believed.

A second difficulty with this argument is that it would justify the suppression of much valuable expression. It is impossible to imagine a vigorous political debate on a contentious issue in which the speakers did not seek to undermine the credibility of the ideas, conclusions and judgment of their opponents. Yet such debate is essential to the maintenance and functioning of our democratic institutions. In support of this argument, it might be asserted that justifiable speech should be confined to rational argument on the issues and should not extend to non-rational attacks on credibility. But who is to decide what is rational argument and what is not? Furthermore, it should be permissible in vigourous debate to go beyond rational arguments on the merits and attack the credibility of one's opponent. Lack of credibility in the proponent of an idea is an important and justifiable reason for rejecting a position. In short, to suggest that speech which undermines the credibility of speakers belonging to particular groups does not fall within s. 2(*b*) of the *Charter*, is to remove from the protection of the *Charter* an enormous amount of speech which has long been accepted as important and valuable. I cannot accept that s. 2(*b*) should be so limited.

I conclude that statements promoting hatred are not akin to violence or threats or violence, and that the argument that they should for this reason be excluded from the protection of s. 2(*b*) of the *Charter* should be rejected.

B. <u>The Construction Arguments</u>

These submissions urge that s. 2(*b*) of the *Charter* should not be construed as extending to statements which offend s. 319(2) of the *Criminal Code*. The arguments are founded on three distinct considerations: s. 15 of the *Charter*; s. 27 of the *Charter*; and Canada's international obligations.

(1) *The Argument Based on Section 15 of the Charter*

The first argument is that the scope of s. 2(*b*) is diminished by s. 15 of the *Charter*. This argument is based on the principle of construction that where possible, the provisions of a statute should be read together so as to avoid conflict. The guarantee of equality in s. 15, it is submitted, is offended by speech which denigrates a particular ethnic or religious group. The competing values reflected by the two sections might therefore be reconciled by informing the content of s. 2(*b*) with the values of s. 15. Accordingly, the freedom of expression guarantee should be read down to exclude from protected expression statements whose content promotes such inequality.

It is important initially to define the nature of the potential conflict between s. 2(*b*) and s. 15 of the *Charter*. This is not a case of the collision of two rights which are put into conflict by the facts of the case. There is no violation of s. 15 in the case at bar, since there is no law or state action which puts the guarantee of equality into issue. The right granted by s. 15 is the right to be free from inequality and discrimination effected by the state. That right is not violated in the case at bar. The conflict, then, is not between <u>rights</u>, but rather between philosophies.

There are two significant considerations which militate against an acceptance of the argument based on s. 15. First, it is important to consider the nature of the two guarantees in

question. On the one hand, s. 2(*b*) confers on each individual freedom of expression, unconstrained by state regulation or action, and subject only to a possible limitation under s. 1. On the other hand s. 15 grants the right to be free from inequality and discrimination effected by the state. Given that the protection under s. 2(*b*) is aimed at protecting individuals from having their expression infringed by the government, it seems a misapplication of *Charter* values to thereby limit the scope of that individual guarantee with an argument based on s. 15, which is also aimed at circumscribing the power of the state.

I do not mean to suggest that different sections of the *Charter* are irrelevant to the task of defining the content of individual guarantees. Indeed, the principles underlying its various provisions reflect many of the fundamental values of Canadian society. In some instances, interpretation of a particular section may be aided by relying on the values expressed in other provisions to place the guarantee in question in its proper historical and philosophical light. In the present case, however, I do not agree that the protection s. 15 provides against government action should be used to erode the scope of protection provided for an individual's expression.

This conclusion is supported by a second factor which weighs against limiting the scope of freedom of expression on the basis of the guarantee of s. 15. The cases where this Court has considered the meaning of s. 2(*b*) have expressly rejected the suggestion that certain statements should be denied the protection of the guarantee on the basis of their content. This Court has repeatedly affirmed that no matter how offensive or disagreeable the content of the expression, it cannot on that account be denied protection under s. 2(*b*) of the *Charter*: *Irwin Toy* and *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.), supra*. The argument based on s. 15 is clearly opposed to this principle, as it suggests that protection be denied expression whose content conflicts with the values underlying the s. 15 guarantee.

Even if these difficulties could be surmounted, one would be faced with the prospect of cutting back a freedom guaranteed by the *Charter* on the basis that the exercise of the freedom may run counter to the philosophy behind another section of the *Charter*. Wilson J. in *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, discusses the impossibility of deciding between competing values under the *Charter* in the abstract, and emphasizes the need to weigh conflicting values in the factual context of the case. The exercise of weighing s. 2(*b*) of the *Charter* against s. 15 would pose just such difficulties. The alleged breach of s. 2(*b*) can be placed in a factual context. But since there is no breach of s. 15, the value to be weighed on that side of the balance cannot be placed in a factual context. This would render the exercise of balancing the conflicting values extremely difficult.

Assuming such balancing were to be done, the further question would arise of whether it would more appropriately take place under s. 1 than under s. 2(*b*). The rejection by the Court of narrowing the scope of s. 2(*b*) on the basis of content in cases such as *Irwin Toy*, the contextual considerations raised by Wilson J. in *Edmonton Journal*, and consideration of where the burden of proof should lie in restricting rights and freedoms -- all these suggest that restrictions on the broad definition of free expression found in s. 2(*b*) may well be more appropriately made under s. 1.

I conclude that this Court should not reduce the scope of expression protected by s. 2(*b*) of the *Charter* because of s. 15 of the *Charter*.

(2) *The Argument Based on Section 27 of the Charter*

Section 27 states that the *Charter* shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians. Similar

considerations apply here as applied to the argument based on s. 15 of the *Charter*. As in the case of the s. 15 argument, there is no conflict of rights, s. 27 embodying not a right or freedom but a principle of construction. As in the case of the s. 15 argument, the submission under s. 27 amounts to advocating that certain statements be denied protection under s. 2(*b*) because of their content, an approach which this court has rejected. Using s. 27 to limit the protection guaranteed by s. 2(*b*) is likewise subject to the objection that it would leave unprotected a large area of arguably legitimate social and political debate. All this is not to mention the difficulty of weighing abstract values such as multiculturalism in the balance against freedom of speech.

Further difficulties are not hard to conjure up. Different people may have different ideas about what undermines multiculturalism. The issue is inherently vague and to some extent a matter of personal opinion. For example, it might be suggested that a statement that Canada should not permit immigration from a certain part of the world is inconsistent with the preservation and enhancement of multiculturalism. Is s. 2(*b*) to be cut back to eliminate protection for such a statement, given the differing opinions one might expect on such a matter? It may be argued, moreover, that a certain latitude for expression of derogatory opinion about other groups is a necessary correlative of a multicultural society, where different groups compete for limited resources.

For example, in *R. v. Buzzanga and Durocher* (1979), 49 C.C.C. (2d) 369 (Ont. C.A.), a case prosecuted under s. 319(2), the alleged hateful statements arose over the question of whether a French school should be built in a predominantly anglophone area. Such statements are regrettable. But before concluding that they should be denied all constitutional protection in all circumstances -- which is the effect of removing them from s. 2(*b*) -- we must ask ourselves hard questions. Will repression of such opinions deepen rather than alleviate irrational

prejudices? Is not the ideal of toleration, fundamental to our traditional concept of free expression, also the essence of multiculturalism, and can multiculturalism truly be promoted by denying that ideal? Given the fact that removal of speech from s. 2(*b*) is to deny it any protection regardless of the circumstances, is it appropriate where such debates exist to remove statements argued to undermine multiculturalism from s. 2(*b*)? Questions such as these point out the difficulty inherent in determining with any precision what statements would be excluded from s. 2(*b*) on the ground that they undermine our multicultural heritage.

Before leaving this point I would add that there is no evidence that the impugned legislation in fact contributes to the enhancement and preservation of multiculturalism in Canada. Reliance, therefore, on s. 27 to tailor or otherwise cut back the protection afforded by s. 2(*b*) risks undercutting the fundamental freedom with no guarantee of a tangible benefit in return. In my opinion, the weighing of interests and values implicit in questions such as these is better accomplished under s. 1 of the *Charter*.

(3) *The Argument Based on International Law*

The third argument based on construction is the international law argument. It is argued that exclusion of hate propaganda from the guarantee of freedom of speech is consistent with various international covenants, to some of which Canada is party. While this Court is not bound to follow international law in its interpretation of *Charter* rights and freedoms (*Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313) it is urged that as a matter of construction this Court should interpret s. 2(*b*) in a manner consistent with the international viewpoint.

I have earlier alluded to the different philosophies toward freedom of speech which inform the international tradition on the one hand and the American tradition on the other. The international tradition tends to define freedom of expression in a way which accommodates state legislation curtailing hate propaganda, thus precluding any debate about whether such measures infringe freedom of expression, and if so, whether they are justified. I have suggested that this is not the model of the Canadian *Charter*, which consistent with the pre-*Charter* quasi-constitutional status accorded to freedom of expression in this country posits a broad and unlimited right of expression under s. 2(*b*), a right which can be cut back only under s. 1 upon the state demonstrating that the limit or infringement of the freedom is reasonably justified in a free and democratic society.

Quite apart from this difference in approach, another consideration persuades me that it would be wrong to cut back the scope of s. 2(*b*) on the ground that Canada has signed treaties which are inconsistent with affording protection to racial propaganda.

This argument, like the arguments under ss. 15 and 27 of the *Charter*, would require cutting down the protection offered by s. 2(*b*) of the *Charter* on the basis of the content of the statements sought to be protected. It would deny certain statements constitutional protection because their content is intended to promote discrimination and hatred of certain groups in society. This Court has expressly rejected such a course.

Canada's international obligations, and the accords negotiated between international governments may well be helpful in placing *Charter* interpretation in a larger context. Principles agreed upon by free and democratic societies may inform the reading given to certain of its guarantees. It would be wrong, however, to consider these obligations as determinative of or limiting the scope of those guarantees. The provisions of the *Charter*,

though drawing on a political and social philosophy shared with other democratic societies, are uniquely Canadian. As a result, considerations may point, as they do in this case, to a conclusion regarding a rights violation which is not necessarily in accord with those international covenants.

I should add that I am not of the view that any measures taken to implement Canada's international obligations to combat racial discrimination and hate propaganda must necessarily be unconstitutional. The obligations expressed in the *International Covenant on Civil and Political Rights* (to prohibit by law "[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence") and the *International Convention on the Elimination of All Forms of Racial Discrimination* (to "declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred") are general in nature. Details of methods to be used are not specified. Nothing in those instruments compels enactment of s. 319(2), as opposed to other provisions combatting racism.

I conclude that none of the arguments which are advanced for construing s. 2(*b*) of the *Charter* narrowly to exclude from its protection statements offending s. 319(2) of the *Criminal Code* can prevail.

C. Absence of Redeeming Value

The fundamental premise of the arguments advanced under this head is that only justified or meritorious expression is protected under s. 2(*b*). These arguments take several forms.

The first is the contention that the protection of the wilful promotion of hatred was never within the contemplation of the framers of the *Charter* and therefore can be criminalized

without the necessity of meeting the standard of justification of s. 1. This argument draws on the language of *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 155, and *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344, to the effect that *Charter* rights must be interpreted purposively, in light of the interests they were meant to protect, and in their proper linguistic, philosophic and historical contexts. Freedom of expression, although historically recognized as an important value in Canadian society, has never been absolute, it is pointed out. Libel and slander laws, as well as the hate-mongering sections of the *Criminal Code*, were accepted as limits on freedom of expression before the adoption of the *Charter* and should continue to be accepted, the argument goes.

This argument amounts to saying that the right to free expression enshrined in the *Charter* must be confined to the ambit of the rules affecting free speech which preceded the *Charter*. Generally this Court has not taken such a restrictive approach to *Charter* rights and freedoms, but has preferred a large and generous interpretation. This is in keeping with the fact that the principles enshrined in the *Charter* are general and fundamental. The spirit of the jurisprudence that preceded the *Charter* may infuse the interpretation of these rights, but it should not unduly constrain the development of principles which may better reflect the broad and progressive spirit of the *Charter*.

The argument, furthermore, is rebutted by the pre-*Charter* cases themselves. For example, the British common law made the promotion of ill-will and hostility between subjects the offence of criminal sedition. This Court in *Boucher*, *supra*, however, held that the principle of free speech required that the traditional definition of criminal sedition be narrowed to encompass only the intention to incite people to actual violence, disorder or unlawful conduct. Thus even before the *Charter*, this Court was not prepared to accept historical legal limitations on expression where they conflicted with the larger Canadian conception of free speech.

Another version of this argument looks to the generally accepted justifications for protecting freedom of speech, such as truth, democracy and self-fulfillment, and asks whether "hate-mongering" does anything to further those values.

The first difficulty with this argument is that none of the previous decisions of this Court involving free speech have followed such an approach. In *Ford*, as already mentioned, the Court declined to apply such an analysis to s. 2(*b*), on the ground that it related more to the consideration of competing claims under s. 1. The arguments from truth, democracy and self-fulfillment were given a limited role in the interpretation of s. 2(*b*) in *Irwin Toy*, but only in cases where there is no clear government purpose of restricting free expression. The expression in issue in *Irwin Toy* had little redeeming value. That was why the government had banned it, a legislative act which the Court upheld as justified under s. 1. Nevertheless, the Court had little difficulty finding that the limitation of such speech infringed the guarantee of freedom of expression in s. 2(*b*) of the *Charter*.

The argument, moreover, is essentially circular. If one starts from the premise that the speech covered by s. 319(2) is dangerous and without value, then it is simple to conclude that none of the commonly-offered justifications for protecting freedom of expression are served by it.

Another problem with this approach is the difficulty of determining when speech has redeeming value. In cases such as the present, it may be easy to achieve near-unanimous consensus that the statements contribute nothing positive to our society. But the proposition underlying this argument is not confined to such cases. In order to make their case, those advancing the argument must establish *inter alia* that all expression potentially affected by s. 319(2) of the *Criminal Code* is irrelevant to the workings of representative democracy. To

come within the ambit of potential prosecution under s. 319(2) speech need only wilfully demean an identifiable group. (To be "wilful", the speaker must have as his conscious purpose the promotion of hatred, or foresee that it is certain or morally certain to occur: *Buzzanga, supra.* However, such purpose or foresight may be readily inferred in cases of highly controversial speech.) Is it unimaginable that questions of public policy should involve speech of this kind? The Canadian Civil Liberties Association raises the example of a native leader making bitter comments about whites in frustration with governmental failure to recognize land claims. Bitter debate arising from the language of schooling has given rise to prosecution under s. 319(2): *Buzzanga*. Experience shows that in actual cases it may be difficult to draw the line between speech which has value to democracy or social issues and speech which does not.

Attempts to confine the guarantee of free expression only to content which is judged to possess redeeming value or to accord with the accepted values strike at the very essence of the value of the freedom, reducing the realm of protected discussion to that which is comfortable and compatible with current conceptions. If the guarantee of free expression is to be meaningful, it must protect expression which challenges even the very basic conceptions about our society. A true commitment to freedom of expression demands nothing less.

D. The Scope of s. 2(*b*) -- Summary

I cannot accept the arguments which have been advanced for the proposition that s. 2(*b*) does not afford protection to statements wilfully promoting hatred under s. 319(2) of the *Criminal Code*. Instead, I return to the affirmation in *Irwin Toy* that if the activity being regulated has expressive content, and does not convey a meaning through a violent form, then it is *prima facie* protected by s. 2(*b*) of the *Charter*. Provided that the further condition is

established that the purpose or effect of the government action in issue is to restrict freedom of expression, the case for infringement of s. 2(*b*) has been made out. Both conditions are met in this case. Section 319(2) is directed at the content of certain statements. It applies where the meaning is conveyed in a non-violent form. And finally, its purpose is to curtail what people may say.

The infringement of s. 2(*b*) is established, and the analysis must proceed to the test of justification under s. 1 of the *Charter*.

III. *Section 11(d) -- The Presumption of Innocence*

Section 319(3) of the *Criminal Code* provides several defences. One of them, s. 319(3)(*a*), is the defence of truth. The origins of this defence may be found in the report of the Cohen Committee, which led to the adoption of s. 319(2). That report affirmed that the truth should be a defence to the criminal charge of promoting hatred.

Under s. 319(3)(*a*), where the Crown proves beyond a reasonable doubt that the accused wilfully promoted hatred against an identifiable group, the accused will escape liability "if he establishes that the statements communicated were true". With regard to this, the first and most important of the defences established by s. 319(3), it is clear that the burden of proof lies on the accused. The question is whether this violates the presumption of innocence in s. 11(*d*) of the *Charter*.

In my view, the answer to this question is governed by this Court's decision *R. v. Whyte*, [1988] 2 S.C.R. 3. There Dickson C.J., writing for the Court, found that the crime of driving or having care or control of a motor vehicle while impaired, combined with a provision that

occupancy of the driver's seat shall be deemed to be having care and control of the vehicle, offended s. 11(*d*) of the *Charter*. The Chief Justice reiterated the view that he had taken earlier in *R. v. Holmes*, [1988] 1 S.C.R. 914, at p. 935, that: "The basic principle of the common law has been that the accused need not prove a defence." He stated at p. 18:

> The exact characterization of a factor as an essential element, a collateral factor, an excuse, or a defence should not affect the analysis of the presumption of innocence. It is the final effect of a provision on the verdict that is decisive. If an accused is required to prove some fact on the balance of probabilities to avoid conviction, the provision violates the presumption of innocence because it permits a conviction in spite of a reasonable doubt in the mind of the trier of fact as to the guilt of the accused.

The fundamental principle that the accused cannot be required to prove a defence without an infringement of s. 11(*d*) resulting was not altered, in my view, by the decision of this Court in *R. v. Schwartz*, [1988] 2 S.C.R. 443. The majority in *Schwartz* accepted the principle enunciated in *Whyte*, but took the view that the production of a firearms certificate by the accused did not constitute a defence, concluding that "[t]here is no reverse onus imposed upon the accused" in that "[h]e is not required to prove or disprove any element of the offence" (p. 485).

It suffices for the purposes of this case to say that that is not so here. Parliament has expressly made falsity an element of the offence by providing that truth constitutes a defence. To say that falsity is not an element of the offence is to say that the offence is established regardless of the truth or falsity of the statement. Clearly this was not Parliament's intention. It made truth a defence. By placing the burden of establishing that truth on the accused it has contravened the basic principle that the accused need not prove a defence.

The argument that it is unworkable to require the Crown to prove the falsity of the statements alleged to contravene s. 319(2) of the *Criminal Code* is more appropriately considered under s. 1 than under s. 11(*d*).

I conclude that s. 319(3)(*a*) of the *Criminal Code* violates s. 11(*d*) of the *Charter*.

IV. *The Analysis under Section 1*

A. Section 1 and the Infringement of Freedom of Expression

The Court's function under s. 1 of the *Charter* is that of weighing and balancing. Before reaching s. 1, the Court must already have determined that the law in question infringes a right or freedom guaranteed by the *Charter*. The infringement alone, however, does not mandate that the law must fall. If the limit the law imposes on the right infringed is "reasonable" and "can be demonstrably justified in a free and democratic society", the law is valid. The demonstration of this justification, the burden of which lies on the state, involves proving that there are other rights or interests which outweigh the right infringed in the context of that case.

The task which judges are required to perform under s. 1 is essentially one of balancing. On the one hand lies a violation or limitation of a fundamental right or freedom. On the other lies a conflicting objective which the state asserts is of greater importance than the full exercise of the right or freedom, of sufficient importance that it is reasonable and "demonstrably justified" that the limitation should be imposed. The exercise is one of great difficulty, requiring the judge to make value judgments. In this task logic and precedent are but of limited assistance. What must be determinative in the end is the court's judgment, based on an understanding of the values our society is built on and the interests at stake in the

particular case. As Wilson J. has pointed out in *Edmonton Journal*, *supra*, this judgment cannot be made in the abstract. Rather than speak of values as though they were Platonic ideals, the judge must situate the analysis in the facts of the particular case, weighing the different values represented in that context. Thus it cannot be said that freedom of expression will always prevail over the objective of individual dignity and social harmony, or vice versa. The result in a particular case will depend on weighing the significance of the infringement on freedom of expression represented by the law in question, against the importance of the countervailing objectives, the likelihood the law will achieve those objectives, and the proportionality of the scope of the law to those objectives.

The test set out in *R. v. Oakes*, [1986] 1 S.C.R. 103, provides a guide for the analysis under s. 1 which reflects the essential task of balancing conflicting values in the context of the case at hand. Two conditions must be satisfied if a law limiting constitutionally guaranteed rights and freedoms is to be sustained under s. 1. First, the objective which the limit is designed to serve must be of sufficient importance to warrant overriding a constitutionally protected right. Second, if such an objective is established, the party invoking s. 1 must show that the means chosen to attain the objective are reasonably and demonstrably justified in a free and democratic society. To conclude that the means chosen are reasonable and demonstrably justified, the court must be satisfied of three things:

1. The measures designed to meet the legislative objective (in this case s. 319(2) of the *Criminal Cod*e) must be rationally connected to the objective;

2. The means used should impair as little as possible the right or freedom in question; and

3. There must be proportionality between the effect of the measures which limit the *Charter* right or freedom and the legislative objective of the limit on those rights. This involves balancing the invasion of rights guaranteed by the *Charter* against the objective to which the limitation of those rights is directed.

(1) *The Objective of Section 319(2) of the Criminal Code*

In *Oakes* Dickson C.J., speaking for the majority, stated that the first consideration in an analysis under s. 1 is that the objective be "of sufficient importance to warrant overriding a constitutionally protected right or freedom" (p. 138). Quoting from *R. v. Big M Drug Mart Ltd., supra*, he observed that the standard must be high in order to ensure that objectives of a trivial nature do not gain s. 1 protection. The objective must be of a pressing and substantial nature before it can be characterized as sufficiently important to override a *Charter* right.

The objective of s. 319(2) of the *Criminal Code* is to prevent the promotion of hatred toward identifiable groups within our society. As the Attorney General of Canada puts it, the objective of the legislation is, "among other things, to protect racial, religious and other groups from the wilful promotion of hatred against them, to prevent the spread of hatred and the breakdown of racial and social harmony, and "to prevent the destruction of our multicultural society"". These aims are subsumed in the twin values of social harmony and individual dignity.

These are laudable goals and serious ones. The objectives are clearly of a substantial nature. Given the history of racial and religious conflict in the world in the past fifty years, they may be said to be pressing, even though it is not asserted that an emergency exists in Canada. The *Report of the Special Committee on Hate Propaganda in Canada* (1966), at pp. 11-15 (the Cohen

Report), provides an empirical foundation for the submission that defamation of particular groups is a pressing and substantial concern in Canada. Evidence of current and continuing public concern about racial and religious tension in Canada generally and the subject matter of s. 319(2) in particular, is found in *Equality Now!* (1984), the report of the House of Commons Special Committee on Participation of Visible Minorities in Canadian Society, at pp. 1-6 and 69-74.

The continued existence of hateful communication in Canada is symptomatic of an unfortunate reality that while Canadians often pride themselves for maintaining a tolerant and welcoming society, it is undermined by the persistence of racial and religious division. The conflict is harmful both to the individuals and groups who are the target of prejudice, and to society as a whole. Members of minority groups are inclined to consider themselves outsiders in their country, and may be inhibited from contributing to the extent of their desire and ability. The loss of this potential talent and ability threatens to deprive Canada of the skills and talents of those who feel excluded and unwelcome. Moreover, the animosity created by ignorance and hatred further exacerbates the divisions of a nation.

The problem is not new, but neither is it quickly disappearing. As the *Annual Report 1989* (1990) of the Canadian Human Rights Commission strongly remarked, intolerance among Canadians towards members of different groups remains a serious problem (at p. 22):

> The demons of racial and cultural prejudice have never been either officially or unofficially exorcised from Canadian society. We may, on occasion, have been marginally more enlightened than our southern neighbours, but instances of racism and intolerance are deeply etched in the historical record and, for that matter, not hard to find in the daily newspapers.

Given the problem of racial and religious prejudice in this country, I am satisfied that the objective of the legislation is of sufficient gravity to be capable of justifying limitations on constitutionally protected rights and freedoms.

(2) *Proportionality*

(a) General Considerations

The real question in this case, as I see it, is whether the means -- the criminal prohibition of wilfully promoting hatred -- are proportional and appropriate to the ends of suppressing hate propaganda in order to maintain social harmony and individual dignity. The objective of the legislation is one of great significance, such significance that it is capable of outweighing the fundamental values protected by the *Charter*. The ultimate question is whether this objective is of sufficient importance to justify the limitation on free expression effected by s. 319(2) of the *Criminal Code*. In answering this question, the Court must consider not only the importance of the right or freedom in question and the significance of its limitation, but whether the way in which the limitation is imposed is justifiable. How serious is the infringement of the constitutionally guaranteed freedom, in this case freedom of expression? Is the limiting measure likely to further the objective in practice? Is the limiting measure overbroad or unnecessarily invasive? In the final analysis, bearing all these things in mind, does the benefit to be derived from the legislation outweigh the seriousness of the infringement? These are the considerations relevant to the question of the proportionality of the limiting law.

I have said that the contest in this case lies between the fundamental right of free expression on the one hand, and the values of social harmony and individual liberty on the other. In

approaching the difficult task of determining where the balance lies in the context of this case, it is important not to be diverted by the offensive content of much of the speech in question. As this Court has repeatedly stated, even the most reprehensible or disagreeable comments are *prima facie* entitled to the protection of s. 2(*b*). It is not the statements of Mr. Keegstra which are at issue in this case, but rather the constitutionality of s. 319(2) of the *Criminal Code*. That must be our focus.

Another general consideration relevant to the balancing of values involved in the proportionality test in this case relates peculiarly to the nature of freedom of expression. Freedom of expression is unique among the rights and freedoms guaranteed by the *Charter* in two ways.

The first way in which freedom of expression may be unique was alluded to earlier in the context of the philosophical underpinnings of freedom of expression. The right to fully and openly express one's views on social and political issues is fundamental to our democracy and hence to all the other rights and freedoms guaranteed by the *Charter*. Without free expression, the vigourous debate on policies and values that underlies participatory government is lacking. Without free expression, rights may be trammelled with no recourse in the court of public opinion. Some restrictions on free expression may be necessary and justified and entirely compatible with a free and democratic society. But restrictions which touch the critical core of social and political debate require particularly close consideration because of the dangers inherent in state censorship of such debate. This is of particular importance under s. 1 of the *Charter* which expressly requires the court to have regard to whether the limits are reasonable and justified in a free and democratic society.

A second characteristic peculiar to freedom of expression is that limitations on expression tend to have an effect on expression other than that which is their target. In the United States this is referred to as the chilling effect. Unless the limitation is drafted with great precision, there will always be doubt about whether a particular form of expression offends the prohibition. There will always be limitations inherent in the use of language, but that must not discourage the pursuit of the greatest drafting precision possible. The result of a failure to do so may be to deter not only the expression which the prohibition was aimed at, but legitimate expression. The law-abiding citizen who does not wish to run afoul of the law will decide not to take the chance in a doubtful case. Creativity and the beneficial exchange of ideas will be adversely affected. This chilling effect must be taken into account in performing the balancing required by the analysis under s. 1. It mandates that in weighing the intrusiveness of a limitation on freedom of expression our consideration cannot be confined to those who may ultimately be convicted under the limit, but must extend to those who may be deterred from legitimate expression by uncertainty as to whether they might be convicted.

I make one final point before entering on the specific tests for proportionality proposed in *Oakes*. In determining whether the particular limitation of a right or freedom is justified under s. 1, it is important to consider not only the proportionality and effectiveness of the particular law in question, but alternative ways of furthering the objective. This is particularly important at stages two (minimum impairment) and three (balancing the infringement against the objective) of the proportionality analysis proposed in *Oakes*.

Against this background, I turn to the three considerations critical to determining whether the limitation on freedom of expression effected by s. 319(2) of the *Criminal Code* is reasonably and demonstrably justifiable in a free and democratic society.

(b) Rational Connection

The first question is whether s. 319(2) of the *Criminal Code* may be seen as carefully designed or rationally connected to the objectives which it is aimed at promoting. This may be viewed in two ways.

The first is whether Parliament carefully designed s. 319(2) to meet the objectives it is enacted to promote.

Although some evidence of care in linking s. 319(2) to its objectives is clear, it has been argued that it is overbroad, an allegation which I will consider in greater detail in discussing whether s. 319(2) represents a "minimum impairment" of the right of free speech guaranteed by s. 2(*b*) of the *Charter*. Nevertheless it is clear that the legislation does, at least at one level, further Parliament's objectives. Prosecutions of individuals for offensive material directed at a particular group may bolster its members' beliefs that they are valued and respected in their community, and that the views of a malicious few do not reflect those of the population as a whole. Such a use of the criminal law may well affirm certain values and priorities which are of a pressing and substantial nature.

It is necessary, however, to go further, and consider not only Parliament's intention, but whether, given the actual effect of the legislation, a rational connection exists between it and its objectives. Legislation designed to promote an objective may in fact impede that objective. In *R. v. Morgentaler*, [1988] 1 S.C.R. 30, this Court considered the actual effect of abortion legislation designed to preserve women's life and health and found that it had the opposite effect of the legislative goals by imposing unreasonable procedural requirements and delays. This Court was particularly mindful of the effects that these requirements had in practice of

substantially increasing the risks to the health of pregnant women, especially in certain locations. Dickson C.J. treated this in the context of rational connection, stating, "to the extent that s. 251(4) is designed to protect the life and health of women, the procedures it establishes may actually defeat that objective" (pp. 75-76).

This approach recognizes that s. 1 of the *Charter* could easily become diluted if an intention on the part of government to act on behalf of a disadvantaged group sufficed in all cases to establish the necessary rational connection between the legislation and its objective. In some cases the link between the intention of the legislators and the achievement of the goal may be self-evident. In others, there may be doubt about whether the legislation will in fact achieve its ends; in resolving that doubt deference must be paid to the Parliament and the legislatures. But in cases such as *Morgentaler*, where it appears that the legislation not only may fail to achieve its goal but may have a contrary effect, the Court is justified in finding that the rational connection between the measure and the objective is absent. This is only a matter of common sense. How can a measure which takes away a measure of one's constitutional freedom be reasonably and demonstrably justified unless there is some likelihood that it will further the objective upon which its justification rests? Where instead of that probability there is an indication that the measure may in fact detract from the objectives it is designed to promote, the absence of a rational connection between the measure and the objective is clear.

In my view, s. 319(2) of the *Criminal Code* falls in this class of case. Section 319(2) may well have a chilling effect on defensible expression by law-abiding citizens. At the same time, it is far from clear that it provides an effective way of curbing hate-mongers. Indeed, many have suggested it may promote their cause. Prosecutions under the *Criminal Code* for racist expression have attracted extensive media coverage. Zundel, prosecuted not under s. 319(2) but for the crime of spreading false news (s. 181), claimed that his court battle had given him

"a million dollars worth of publicity" : *Globe and Mail*, March 1, 1985, p. P1. There is an unmistakable hint of the joy of martyrdom in some of the literature for which Andrews, in the companion appeal, was prosecuted:

> The Holocaust Hoax has been so ingrained in the minds of the hated "goyim" by now that in some countries . . . challenging its validity can land you in jail.
>
> (*R. v. Andrews* (1988), 65 O.R. (2d) 161, at p. 165 (C.A.).)

Not only does the criminal process confer on the accused publicity for his dubious causes -- it may even bring him sympathy. The criminal process is cast as a conflict between the accused and the state, a conflict in which the accused may appear at his most sympathetic. Franz Kafka was not being entirely whimsical when he wrote, "If you have the right eye for these things, you can see that accused men are often attractive" (*The Trial* (1976), at p. 203).

The argument that criminal prosecutions for this kind of expression will reduce racism and foster multiculturalism depends on the assumption that some listeners are gullible enough to believe the expression if exposed to it. But if this assumption is valid, these listeners might be just as likely to believe that there must be some truth in the racist expression because the government is trying to suppress it. Theories of a grand conspiracy between government and elements of society wrongly perceived as malevolent can become all too appealing if government dignifies them by completely suppressing their utterance. It is therefore not surprising that the criminalization of hate propaganda and prosecutions under such legislation have been subject to so much controversy in this country.

Historical evidence also gives reason to be suspicious of the claim that hate propaganda laws contribute to the cause of multiculturalism and equality. This evidence is summarized by A. A. Borovoy, *When Freedoms Collide: The Case for our Civil Liberties* (1988), at p. 50:

> Remarkably, pre-Hitler Germany had laws very much like the Canadian anti-hate law. Moreover, those laws were enforced with some vigour. During the fifteen years before Hitler came to power, there were more than two hundred prosecutions based on anti-semitic speech. And, in the opinion of the leading Jewish organization of that era, no more than 10 per cent of the cases were mishandled by the authorities. As subsequent history so painfully testifies, this type of legislation proved ineffectual on the one occasion when there was a real argument for it. Indeed, there is some indication that the Nazis of pre-Hitler Germany shrewdly exploited their criminal trials in order to increase the size of their constituency. They used the trials as platforms to propagate their message.

Viewed from the point of view of actual effect, the rational connection between s. 319(2) and the goals it promotes may be argued to be tenuous. Certainly it cannot be said that there is a strong and evident connection between the criminalization of hate propaganda and its suppression.

(c) Minimum Impairment

The second matter which must be considered in determining whether the infringement represented by the legislation is proportionate to its ends is whether the legislation impairs the right to the minimum extent possible.

Those supporting s. 319(2) of the *Criminal Code* point to the fact that it applies only to wilful promotion of hatred, and not to promotion of any lesser emotion. Hatred, they argue, is the most extreme and reprehensible of human emotions. They also point out that s. 319(2) provides a number of defences, including the truth of the statements made, discussion for public benefit of a subject of public importance (provided the statements were believed to be

true on reasonable grounds), and good faith opinion on a religious subject. They add that s. 319(2) does no more than fulfil Canada's international obligations and that similar provisions apply in other western democracies.

Those who maintain the unconstitutionality of s. 319(2) argue that the subjective emotion of hatred is overbroad and vague, that judges and juries will convict only if the speech is unpopular, and that there may be criminal liability even if not a single person was moved to any emotion, hatred or otherwise, by the statement. Moreover, the fact that the accused has the burden of proving the truth of his statement means that convictions may result even for true statements.

Two questions are pertinent to the inquiry into whether s. 319(2) impairs freedom of expression as little as possible. The first is whether s. 319(2) is drafted too broadly, catching more expressive conduct than can be justified by the objectives of promoting social harmony and individual dignity. The second is whether criminalization of hate mongering may in itself be an excessive response to the problem, given the alternatives. I will deal with each in turn.

Despite the limitations found in s. 319(2), a strong case can be made that it is overbroad in that its definition of offending speech may catch many expressions which should be protected.

The first difficulty lies in the different interpretations which may be placed on the word "hatred." The *Shorter Oxford English Dictionary* defines "hatred" as: "The condition or state of relations in which one person hates another; the emotion of hate; active dislike, detestation; enmity, ill-will, malevolence." The wide range of diverse emotions which the word "hatred" is capable of denoting is evident from this definition. Those who defend its use in s. 319(2) of the *Criminal Code* emphasize one end of this range -- hatred, they say, indicates the most

powerful of virulent emotions lying beyond the bounds of human decency and limiting s. 319(2) to extreme materials. Those who object to its use point to the other end of the range, insisting that "active dislike" is not an emotion for the promotion of which a person should be convicted as a criminal. To state the arguments is to make the case; "hatred" is a broad term capable of catching a wide variety of emotion.

It is not only the breadth of the term "hatred" which presents dangers; it is its subjectivity. "Hatred" is proved by inference -- the inference of the jury or the judge who sits as trier of fact -- and inferences are more likely to be drawn when the speech is unpopular. The subjective and emotional nature of the concept of promoting hatred compounds the difficulty of ensuring that only cases meriting prosecution are pursued and that only those whose conduct is calculated to dissolve the social bonds of society are convicted.

But "hatred" does not stand alone. To convict, it must have been "wilfully promote[d]". Does this requirement sufficiently constrain the term to meet the claim that s. 319(2) is overbroad?

In *R. v. Buzzanga and Durocher, supra,* the Ontario Court of Appeal held that the requirement of "wilful promotion" may be satisfied in either of two ways: (1) by proof of intention or conscious purpose of promoting hatred; or (2) by proof that the accused foresaw that the promotion of hatred against an identifiable group is certain, or "morally certain", to result from the communication.

It is argued that the requirement of "wilful promotion" eliminates from the ambit of s. 319(2) statements which are made for honest purposes such as telling a perceived truth or contributing to a political or social debate. The difficulty with this argument is that those

purposes are compatible with the intention (or presumed intention by reason of foreseeability) of promoting hatred. A belief that what one says about a group is true and important to political and social debate is quite compatible with and indeed may inspire an intention to promote active dislike of that group. Such a belief is equally compatible with foreseeing that promotion of such dislike may stem from one's statements. The result is that people who make statements primarily for non-nefarious reasons may be convicted of wilfully promoting hatred.

The absence of any requirement that actual harm or incitement to hatred be shown further broadens the scope of s. 319(2) of the *Criminal Code*. This, in the view of the Court of Appeal, was the section's main defect. In effect, the provision makes a crime not only of actually inciting others to hatred, but also of attempting to do so. The Court of Appeal accepted the argument that this made the crime, at least potentially, a victimless one. In the view of Kerans J.A., while a prohibition on expression that actually spread hatred would be justified, a prohibition on attempts to spread hatred was not.

Though I regard this breadth as a relevant factor, I would be hesitant to treat it as constitutionally determinative. To view hate propaganda as "victimless" in the absence of any proof that it moved its listeners to hatred is to discount the wrenching impact that it may have on members of the target group themselves. For Jews, many of whom have personally been touched by the terrible consequences of the degeneration of a seemingly civilized society into unparalleled barbarism, statements such as Keegstra's may raise very real fears of history repeating itself. Moreover, it is simply not possible to assess with any precision the effects that expression of a particular message will have on all those who are ultimately exposed to it. The process of "proving" that listeners were moved to hatred has a fictitious air about it. These considerations undermine the notion that we can draw a bright line between provisions which

are justifiable because they require proof that hatred actually resulted, and provisions which are unjustifiable because they require only an intent to promote hatred.

The breadth of s. 319(2) is narrowed somewhat by the defences. Statements made in good faith on religious subjects and statements on matters of public interest which the accused reasonably believed to be true, as well as statements made for the purpose of removing hatred, are exempted.

Quite apart from the fact that the onus lies on the accused to prove these defences, it is far from clear that in practice they significantly narrow the ambit of s. 319(2) of the *Criminal Code*. The most important defence is truth -- if the accused establishes that his statements are true, s. 319(2) is not violated. On the other hand, as already mentioned, conviction may result for true statements given that the onus of proof lies on the accused. Moreover, the concepts of "truth" and "reasonable belief in truth" may not always be applicable. Statements of opinion may be incapable of being classified as true or false, communicating not facts so much as sentiments and beliefs. Polemic statements frequently do not lend themselves to proof of truth or falsity. As for the defence of reasonable belief, how is a court to evaluate the reasonableness of diverse theories, political or otherwise? The defence of statements in the public interest poses similar problems. How is a court to determine what is in the public interest, given the wide range of views which may be held on matters potentially caught by s. 319(2)?

Not only is the category of speech caught by s. 319(2) defined broadly. The application of the definition of offending speech, i.e., the circumstances in which the offending statements are prohibited, is virtually unlimited. Only private conversations are exempt from state scrutiny. Section 319(2) is calculated to prevent absolutely expression of the offending ideas

in any and all public forums through any and all mediums. Speeches are caught. The corner soap-box is no longer open. Books, films and works of art -- all these fall under the censor's scrutiny because of s. 319(2) of the *Criminal Code*.

The real answer to the debate about whether s. 319(2) is overbroad is provided by the section's track record. Although the section is of relatively recent origin, it has provoked many questionable actions on the part of the authorities. There have been no reported convictions, other than the instant appeals. But the record amply demonstrates that intemperate statements about identifiable groups, particularly if they represent an unpopular viewpoint, may attract state involvement or calls for police action. Novels such as Leon Uris' pro-Zionist novel, *The Haj*, face calls for banning: *Toronto Star*, September 26, 1984, p. A6. Other works, such as Salman Rushdie's *Satanic Verses*, are stopped at the border on the ground that they violate s. 319(2). Films may be temporarily kept out, as happened to a film entitled *Nelson Mandela*, ordered as an educational film by Ryerson Polytechnical Institute in 1986: *Globe and Mail*, December 24, 1986, p. A14. Arrests are even made for distributing pamphlets containing the words "Yankee Go Home": *Globe and Mail*, July 4, 1975, p. 1. Experience shows that many cases are winnowed out due to prosecutorial discretion and other factors. It shows equally, however, that initially quite a lot of speech is caught by s. 319(2).

Even where investigations are not initiated or prosecutions pursued, the vagueness and subjectivity inherent in s. 319(2) of the *Criminal Code* give ground for concern that the chilling effect of the law may be substantial. The more vague the language of the prohibition, the greater the danger that right-minded citizens may curtail the range of their expression against the possibility that they may run afoul of the law. The danger here is not so much that the legislation will deter those bent on promoting hatred --- in so far as it does so (and of this I remain skeptical) it is arguably not overbroad. The danger is rather that the legislation may

have a chilling effect on legitimate activities important to our society by subjecting innocent persons to constraints born out of a fear of the criminal process. Given the vagueness of the prohibition of expression in s. 319(2), one may ask how speakers are to know when their speech may be seen as encroaching on the forbidden area. The reaction is predictable. The combination of overbreadth and criminalization may well lead people desirous of avoiding even the slightest brush with the criminal law to protect themselves in the best way they can -- by confining their expression to non-controversial matters. 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. Given the serious consequences of criminal prosecution, it is not entirely speculative to suppose that even political debate on crucial issues such as immigration, educational language rights, foreign ownership and trade may be tempered. These matters go to the heart of the traditional justifications for protecting freedom of expression.

This brings me to the second aspect of minimum impairment. The examples I have just given suggest that the very fact of criminalization itself may be argued to represent an excessive response to the problem of hate propagation. The procedures and sanctions associated with the criminal law are comparatively severe. Given the stigma that attaches and the freedom which is at stake, the contest between the individual and the state imposed by a criminal trial must be regarded as difficult and harrowing in the extreme. The seriousness of the imprisonment which may follow conviction requires no comment. Moreover, the chilling effect of prohibitions on expression is at its most severe where they are effected by means of the criminal law. It is this branch of the law more than any other which the ordinary, law-abiding citizen seeks to avoid. The additional sanction of the criminal law may pose little

deterrent to a convinced hate-monger who may welcome the publicity it brings; it may, however, deter the ordinary individual.

Moreover, it is arguable whether criminalization of expression calculated to promote racial hatred is necessary. Other remedies are perhaps more appropriate and more effective. Discrimination on grounds of race and religion is worthy of suppression. Human rights legislation, focusing on reparation rather than punishment, has had considerable success in discouraging such conduct. This is the conclusion of Borovoy, op. cit., at pp. 221-25. After noting the emphasis in human rights codes on amendment of conduct and their general success in effecting settlements before hearing, Borovoy addresses the suggestion that "racial discriminators be prosecuted or sued without having any opportunity to make amends" (p. 223). He concludes that criminal prosecution is not only unnecessary, but may be counterproductive. It is unnecessary because proceedings under the human rights codes show strong success in achieving their essential purpose, the curtailment of discrimination. It may be counterproductive in that: (1) racial discriminators threatened with prosecution may have little or no incentive to cooperate with human rights boards and voluntarily amend their conduct (p. 223); and (2) it leaves open the argument that "where a prosecutorial remedy exists, the state is obliged to adopt such a route first" (p. 225), thereby eliminating the possibility of voluntary amendment of conduct. For these reasons, Borovoy concludes that: "[a]part from collateral matters such as obstructing complaint investigations, the criminal process can safely be eliminated from human rights matters" (p. 225).

It is true that the focus of most human rights legislation is acts rather than words. But if it is inappropriate and ineffective to criminalize discriminatory conduct, it must necessarily be unjustifiable to criminalize discriminatory expression falling short of conduct.

Finally, it can be argued that greater precision is required in the criminal law than, for example, in human rights legislation because of the different character of the two types of proceedings. The consequences of alleging a violation of s. 319(2) of the *Criminal Code* are direct and serious in the extreme. Under the human rights process a tribunal has considerable discretion in determining what messages or conduct should be banned and by its order may indicate more precisely their exact nature, all of which occurs before any consequences inure to the alleged violator.

In summary, s. 319(2) of the *Criminal Code* catches a broad range of speech and prohibits it in a broad manner, allowing only private conversations to escape scrutiny. Moreover, the process by which the prohibition is effected -- the criminal law -- is the severest our society can impose and is arguably unnecessary given the availability of alternate remedies. I conclude that the criminalization of hate statements does not impair free speech to the minimum extent permitted by its objectives.

(d) Importance of the Right versus Benefit Conferred

The third consideration in determining whether the infringement represented by the legislation is proportionate to the ends is the balance between the importance of the infringement of the right in question and the benefit conferred by the legislation. The analysis is essentially a cost-benefit analysis. On the one hand, how significant is the infringement of the fundamental right or freedom in question? On the other hand, how significant is the benefit conferred by the impugned legislation? Weighing these countervailing considerations, has the state met the burden upon it of establishing that the limit on the constitutionally guaranteed freedom or right is reasonable and demonstrably justified in a free and democratic society?

I deal first with the significance of the infringement of the constitutionally guaranteed freedom at issue in this case. Viewed from the perspective of our society as a whole, the infringement of the guarantee of freedom of expression before this Court is a serious one. Section 319(2) of the *Criminal Code* does not merely regulate the form or tone of expression -- it strikes directly at its content and at the viewpoints of individuals. It strikes, moreover, at viewpoints in widely diverse domains, whether artistic, social or political. It is capable of catching not only statements like those at issue in this case, but works of art and the intemperate statement made in the heat of social controversy. While few may actually be prosecuted to conviction under s. 319(2), many fall within the shadow of its broad prohibition. These dangers are exacerbated by the fact that s. 319(2) applies to all public expression. In short, the limitation on freedom of expression created by s. 319(2) of the *Criminal Code* invokes all of the values upon which s. 2(*b*) of the *Charter* rests -- the value of fostering a vibrant and creative society through the marketplace of ideas; the value of the vigourous and open debate essential to democratic government and preservation of our rights and freedoms; and the value of a society which fosters the self-actualization and freedom of its members.

The consequences of the infringement of freedom of speech imposed by s. 319(2) of the *Criminal Code* considered from the viewpoint of the individual caught within its net are equally serious. The exercise of the right of free speech contrary to its provisions may result in a criminal record and imprisonment of up to two years. No warning, other than the description in s. 319(2) itself (which necessarily includes subjective elements), is given as to what speech is liable to result in prosecution. And those individuals not caught may find their expression restricted by the fear of running afoul of a vague and subjective law.

These considerations establish an infringement of the guarantee of freedom of expression of the most serious nature -- much more serious, for example, than that which this Court

upheld under s. 1 in *Irwin Toy*. There the only value which could be prayed in aid of free expression was the right to earn a profit. Section 319(2) of the *Criminal Code*, in contrast, touches on values vital to the preservation of democratic government and our fundamental rights and freedoms, as well as our right to individual self-actualization. And its broad sweep makes the infringement it effects not only serious in nature, but in extent. An infringement of this seriousness can only be justified by a countervailing state interest of the most compelling nature.

I turn then to the other side of the scale and the benefit to be gained by maintenance of the limitation on freedom of expression effected by s. 319(2) of the *Criminal Code*. As indicated earlier, there is no question but that the objectives which underlie this legislation are of a most worthy nature. Unfortunately, the claims of gains to be achieved at the cost of the infringement of free speech represented by s. 319(2) are tenuous. It is far from clear that the legislation does not promote the cause of hate-mongering extremists and hinder the possibility of voluntary amendment of conduct more than it discourages the spread of hate propaganda. Accepting the importance to our society of the goals of social harmony and individual dignity, of multiculturalism and equality, it remains difficult to see how s. 319(2) fosters them.

In my opinion, the result is clear. Any questionable benefit of the legislation is outweighed by the significant infringement on the constitutional guarantee of free expression effected by s. 319(2) of the *Criminal Code*.

(3) *Conclusion -- Section 1 in Relation to Infringement of Free Speech*

Is the limit on free expression effected by s. 319(2) of the *Criminal Code* reasonable and demonstrably justifiable in a free and democratic society? On all three criteria for

proportionality laid down in *Oakes* -- rational connection between the legislation with its objectives, infringement to the minimum extent possible, and the balance between the importance of the infringement of the right of free speech and the benefit conferred by the legislation -- s. 319(2) of the *Criminal Code* emerges wanting. Accepting that the objectives of the legislation are valid and important and potentially capable of overriding the guarantee of freedom of expression, I cannot conclude that the means chosen to achieve them -- the criminalization of the potential or foreseeable promotion of hatred -- are proportionate to those ends.

B. Section 1 and the Infringement of the Presumption of Innocence

I arrive at the same conclusion with respect to the infringement of s. 11(*d*) of the *Charter*, as I did with respect to the infringement of s. 2(*b*) of the *Charter*. Again, the necessary proportionality between infringement and the ends achieved is doubtful.

A rational connection between the aims of s. 319(3)(*a*) and its requirement that the accused prove the truth of his statements is difficult to discern. It is argued that without the reverse onus, it would be difficult if not impossible to obtain convictions for much speech promoting hate. If the objection is that it is merely difficult to prove the statements true or false, the answer is that the burden should be on the state because it has superior resources. If the objection is that it is impossible to know if the statements are true or false (i.e. true opinion), then the answer is that it cannot be ruled out that the statements may be more valuable than harmful, if we accept the ultimate value of the exchange of truthful ideas. The same considerations suggest that s. 319(3)(*a*)'s infringement of the presumption of innocence is neither minimal nor, given the importance of the infringement in the context of prosecutions under s. 319(2), sufficient to outweigh the dubious benefit of such a provision.

Similar considerations arise on the question of whether s. 319(3)(*a*) of the *Criminal Code* impairs the presumption of innocence under s. 11(*d*) as little as possible. It is said that hate promotion against identifiable groups is highly unlikely to be true. But that would be small comfort to a particular accused in the case where such a defence lay but he or she, because of restricted means or for whatever other reason, was unable to prove it. The presumption of innocence should not depend on the percentage of cases in which the defence in question may arise. It is also said that hate promotion consists as much in how it is said as in what is said, and it is sound policy to require individuals who choose to persuade by objectionable means to be certain they are speaking the truth before they make an utterance. But section 319(2) is not confined to expression in an objectionable form. It criminalizes expression not on the basis of its form but its content. Finally, it may be suggested in this context too that it is better to place the onus on the accused because of the difficulty of proving the falsity of negative assertions about identifiable groups. But, as I have pointed out above, proving the truth of such statements may be equally difficult. The accused, lacking the resources of the state, is arguably in a worse position than the Crown to prove his or her assertions to be true.

The final test of proportionality between the effects of the infringement and the objectives it promotes encounters other difficulties. We must start from the proposition that Parliament intended the truth to be a defence and that falsehood is an important element of the offence created by s. 319(2) of the *Criminal Code*. That fact, coupled with the centrality of the presumption of innocence in our criminal law, suggests that only a countervailing state interest of the most compelling kind could justify the infringement. But, as discussed in connection with the infringement of the guarantee of freedom of expression, it is difficult to see what benefits s. 319(2) in fact produces in terms of stemming hate propaganda and promoting social harmony and individual dignity. Thus Fish, op. cit., in defending the proportionality of infringement to benefit, is driven finally to negate the defence itself, concluding at p. 121:

"The defence of truth does not presume falsity so much as it does that truth is not exculpatory of hate promotion." I conclude that s. 319(3)(*a*) is not saved by s. 1 of the *Charter*.

Conclusion

Section 319(2) breaches the guarantee of freedom of expression enshrined in the *Charter*. Moreover, the defence provided under s. 319(3)(*a*) infringes an accused's right to be presumed innocent. The importance of such objectives as avoiding discrimination, racial violence and promoting multiculturalism, is such that a limited and measured infringement of free speech may be justifiable under s. 1 of the *Charter*, provided that the means chosen are proportionate. However, the broad criminalization of virtually all expression which might be construed as promoting hatred effected by s. 319(2) of the *Criminal Code* is not, in my view, a proportionate and appropriate means of achieving the ends to which the legislation is directed. The breadth of the category of speech it catches, the absolute nature of the prohibition it applies to such speech, the draconian criminal consequences it imposes coupled with the availability of preferable remedies, and finally, the counterproductive nature of its actual effects -- all these features of s. 319(2) of the *Criminal Code* combine to make it an inappropriate means of protecting our society against the evil of hate propaganda.

I would dismiss the appeal, and answer the constitutional questions as follows:

1. Is s. 281.2(2) of the *Criminal Code* of Canada, R.S.C. 1970, c. C-34 (now s. 319(2) of the *Criminal Code* of Canada, R.S.C., 1985, c. C-46) an infringement of freedom of expression as guaranteed under s. 2 (*b*) of the *Canadian Charter of Rights and Freedoms*?

Answer: Yes.

2. If s. 281.2(2) of the *Criminal Code* of Canada, R.S.C. 1970, c. C-34 (now s. 319(2) of the *Criminal Code* of Canada, R.S.C., 1985, c. C-46) is an infringement of s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*, can it be upheld under s. 1 of the *Canadian Charter of Rights and Freedoms* as a reasonable limit prescribed by law and demonstrably justified in a free and democratic society?

Answer: No.

3. Is s. 281.2(3)(*a*) of the *Criminal Code* of Canada, R.S.C. 1970, c. C-34 (now s. 319(3)(*a*) of the *Criminal Code* of Canada, R.S.C., 1985, c. C-46) an infringement of the right to be presumed innocent, as guaranteed under s. 11(*d*) of the *Canadian Charter of Rights and Freedoms*?

Answer: Yes.

4. If s. 281.2(3)(*a*) of the *Criminal Code* of Canada, R.S.C. 1970, c. C-34 (now s. 319(3)(*a*) of the *Criminal Code* of Canada, R.S.C., 1985, c. C-46) is an infringement of s. 11(*d*) of the *Canadian Charter of Rights and Freedoms*, can it be upheld under s. 1 of the *Canadian Charter of Rights and Freedoms* as a reasonable limit prescribed by law and demonstrably justified in a free and democratic society?

Answer: No.

Appeal allowed, LA FOREST, SOPINKA *and* MCLACHLIN JJ. *dissenting.*

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