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**Malcolm Ross:
Anti-Semitism, Hate and Free Speech In Canada**

M. Antonietta Bellezza

**A Thesis
In
The Department
Of
History**

**Presented in Partial Fulfillment of the Requirements
For the Degree of Master of Arts at
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ABSTRACT

Malcolm Ross:
Anti-Semitism, Hate and Free Speech in Canada

M. Antonietta Bellezza

This thesis examines the affair surrounding the Moncton, New Brunswick schoolteacher and Holocaust denier, Malcolm Ross. After the Attorney General refused to charge Ross under Canada's anti-hate legislation, those who wanted action taken against Ross had to act creatively. First, the school board was left to handle the citizens' complaints. Its slow reaction and reluctance to reprimand a teacher for personal beliefs, led one parent to lodge a complaint against the school board with the New Brunswick Human Rights Commission. A Human Rights Tribunal then heard the case. A long legal battle ensued, which ultimately removed Ross from the classroom but maintained his right to continue publishing hate literature. The Supreme Court ruling in this case and that of Alberta Holocaust denier, James Keegstra, demonstrate that the courts are unwilling to curtail the freedom of expression through criminal legislation. Therefore cases such as these are increasingly handled by Human Rights legislation. If this continues, Human Rights legislation will need to be expanded to address hate speech directly.

There are many people who played a role in allowing me to present my research here. First I would like to thank my advisor, Professor Stephen Scheinberg, for luring me away from another topic to work on one to which I could bring much more and for his patient support. I am also grateful to the Concordia Institute for Canadian Jewish Studies and Professor Norman Ravvin for funding my trip to New Brunswick, which allowed me to meet and interview many of the people involved with the case. I must also thank Malcolm Ross, Julius Israeli, Charles Perry, David Attis, Joseph Weir, Carl Ross, Brian Bruce, Marvin Kurz, and Thomas Kuttner for giving of their time, sharing their views and insights with me, and helping me access documents that would otherwise have been near impossible to find. I would like to thank and acknowledge my family: my mother, who allowed me to create utter disorder in her home and helped me maintain a positive outlook when the topic drove me to dejection; my father, who first instilled my curiosity and taught me that we must always continue to learn; and my brother for understanding that which I could never explain. Lastly, I must acknowledge that there have been many others who have helped me remain optimistic, have bolstered my morale, and continue to convince me that there can be beauty and truth in this world if we seek it.

Tonia Bellezza.
March 2002.

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Foreword

When I first encountered what I now call the Malcolm Ross affair, most of the information I could glean was from newspaper accounts and brief references in broader studies of the far right and hate literature. From these sources, I was able to piece together a loose chronology of the events that followed the publication of Ross' first book, *Web of Deceit*, in 1978. There were many pieces to the puzzle, however, that were missing, and so, the picture was initially unclear. While I do not claim to have found every last shred of evidence, I have many more pieces to the puzzle at my disposal today. Interviews with several of the main actors in the drama greatly helped me to illuminate portions of the larger picture.

When I left for New Brunswick, the story, as far as I knew it from other sources, might have been recounted as follows. Malcolm Ross was a Moncton, New Brunswick schoolteacher who began publishing Holocaust denial literature in 1978. After having received complaints from Professor Julius Israeli on several occasions, the Attorneys General under the Hatfield and McKenna governments in New Brunswick both opted against prosecuting Ross under Canada's anti-hate legislation. In 1987, David Attis, a Moncton Jew and past president of the Atlantic Jewish Council, who had several children attending school in the district where Ross taught, made a complaint, against the school board, to the New Brunswick Human Rights Commission. This led to the case being dealt with using human rights legislation instead of criminal legislation. The case then went through a series of legal procedures, which eventually brought the Human Rights Commission Board of Inquiry ruling on the matter before the Supreme Court of Canada.

The end result was that Ross was removed from his teaching position but his right to freedom of expression was not limited. Therefore, by the end of it all, Ross was given a non-teaching position in the school board and was free to continue publishing hate literature if he chose to.

Many of the accounts of the Ross case given in broader studies of the far right and hate literature were written before the case had come to an end. Therefore, in many instances, a reader was not offered much more than a brief recounting of the major, and often legal, events that occurred. Newspaper articles chronicled the more “important” events surrounding the case, while neglecting other events or factors. For example, statements made by the Attorney General about whether Ross would be charged under Canadian anti-hate legislation might be proclaimed in headlines. In other instances, editorial pieces often examined the issues of freedom of expression, the media’s role in the reporting on hate mongers or academic freedom. There were many other facets of the Ross affair, however, that were missing from these sources. For example, there was no clear image of Ross as an individual nor was Moncton differentiated from any other place where a Holocaust denier might surface. It was aspects such as these that I sought to understand when I met with key figures in the affair. While all of these interviews helped create the foundation upon which I have built the story, four of these interviews were particularly enlightening and bear discussing briefly before I begin.

The first person I met upon my arrival in New Brunswick was Julius Israeli. This was quite apt as Israeli was the first to take note of Ross’s writing and to make complaints to the Attorneys General, David Clark and later James Lockyer. Israeli figured prominently in many newspaper articles about the Ross affair while he was

actively trying to set legal wheels in New Brunswick in motion. After he stopped doing so, he quickly disappeared from newspaper accounts.

In speaking to him, I learned that he had taken a very active role in attempting to have Ross's writings outlawed. Aside from his complaints to the Attorney Generals, Israeli had complained directly to the school board that had Ross in its employ. Israeli also corresponded with Ross directly and bought up as many of Ross's books as he could find to prevent them being sold. More important than learning about what actions he took, though, I learned about what motivated the man who first focused public attention on Ross. Israeli is a Rumanian Holocaust survivor, and, as he explained, he saw some frightening similarities between the anti-Semitism of the Iron Guard in Rumania and Ross' brand of anti-Semitism. Unlike German Nazis, Israeli maintained that the Iron Guard's anti-Semitism was religion-based and not based on a concept of race. He saw something similar in Ross's claims to being a defender of the Christian race. This moved Israeli to the actions he took to stop the sale of Ross's books. It also explains Israeli's unique perspective on the matter. While there were others who wished to see Ross's publications banned, nobody else had experienced the extreme to which "mere" ideas and words could be taken. Thus there was an urgency in Israeli's actions and motivations that was not shared by others and this earned him a reputation as a maverick. By the time the case was heard by the Human Rights Commission's Board of Inquiry, however, Israeli had turned away from the legal process in equal measures of disgust and defeat.

Meeting Ross was equally revealing. While saying that he is unexceptionally ordinary in every way except for his views might not sound like much of a description, it tells what Ross was not. He was not in any way aberrant as one might expect of someone

who holds such deviant views. Ross was raised Presbyterian and his father was a minister. When we met, though, he told me that he had unofficially become a Catholic because he was more comfortable with the Church Fathers' teachings. He also said that his defense of Canada's Christian "race" was part of his ancestral duties because he came from Scottish ancestry with a "strong tradition of standing up for the crown rights of King Christ."¹ As he spoke about these subjects, it was clear that Ross took his ancestry and religion very seriously. In these two things one sees the roots of Ross's die-hard individualism. He was reluctant to explain his connections to the Christian Defense League, for which he was at one point the executive director of the Maritime branch. This, taken together with Ross's discussion of his religious beliefs and pride in his ancestry, led me to believe that Ross saw his "challenge" as a personal and individual one. He did not see himself as part of a broader movement.

What Ross did see was a conspiracy against himself and against Canada's Christian underpinnings. These were subjects that he was more willing to discuss than his possible links to groups of known anti-Semites. It was only when Ross began to speak about conspiracy that what was deviant about him became apparent. He (erroneously) spoke of the Canadian Jewish Congress removing crosses, the Lord's Prayer and Bible reading from classrooms, of refugees let into Canada only to then turn around say "what we can and can't do," and of general attacks on his faith.² He also spoke of the Holocaust becoming a state religion in Canada, commenting that one could deny Jesus and still be an MP but one could not question the Holocaust. From that point,

¹ Malcolm Ross, Interview by M.A. Bellezza, August 24, 2000, audio cassette and notes in personal files. Ross's work record is also very "ordinary." He worked for the school board for 22 years, five or six of which were in the school board office in a non-teaching position.

² *Ibid.*

Ross moved to the types of arguments he had made in his books, which will be discussed later. The overall image I was left with, however, was of a man who felt righteous in performing what he saw as his duty to protect his beliefs. Where his beliefs met with opposition he saw conspiracy.

My interviews with Charles Perry, a reporter with the *Moncton Times-Transcript* who covered the Ross case when it went before the Human Rights Commission's Board of Inquiry, and with Carl Ross (no relation), who was the Chair of the School Board, were very useful, as well. These interviews helped me discover the community's reaction to Ross and the general atmosphere in Moncton at the time. Carl Ross pointed out that there was a fair degree of public outcry in response to Malcolm Ross and that it was not coming exclusively from the Jewish community. Charles Perry, perhaps by virtue of his profession, was very helpful in describing the general milieu into which the Ross affair emerged. For example, he spoke at length about the skinhead phenomenon in Moncton and the way in which it was a real concern for the citizens of the small city. He also spoke of the atmosphere in the room where the Board of Inquiry held its hearings. He told me of faithful supporters of Ross who were there every day of the hearings and of others who sold Ross's books on street corners. While this was not all that I learned from Perry and Ross, it was the most important. It helped me to understand the environment in which the events unfolded. It also made it clear to me that the Attorneys General's inaction did not only ignore the complaints made by Julius Israeli but also the public outcry against Ross that was heard in Moncton.

Generally, the interviews I conducted helped me to understand several aspects of the case that were not easily gleaned from other sources. However, unless it is to discuss

a specific comment made or fact stated by an interviewee, these interviews are not presented as the main topic of this essay. Instead they are used as a foundation upon which other information can be more solidly built in order to better understand a case that often followed such a circuitous route as to be confusing. These interviews helped me to understand how a case that may have simply been dealt with using anti-hate legislation was instead dragged out and eventually dealt with using human rights legislation. Therefore, I argue that the Ross case set a unique precedent, paving the way for more cases involving hate mongers to be dealt with using human rights legislation instead of criminal legislation.

Chapter I

Anti-Semitism in Canada: A Historiography

Malcolm Ross is not a name that would have rung any bells prior to the mid-nineteen-eighties. Today, perhaps with some prodding, many Canadians will slowly recognize the name and nod while saying, “Ah, yes, the Holocaust denier from the Maritimes,” or something to that effect. The Malcolm Ross affair was often spoken and written about in the press in the mid-nineteen-eighties and until recently as his legal battles continued.¹ The case began with the publication of Ross’s first book, *Web of Deceit*, in 1978, when the first complaints were heard. A middle school teacher in Moncton, New Brunswick, Ross was also a very proud Scottish-Canadian. He was equally proud of his Christian heritage and in his first book he purported to speak out in the name of protecting Canada’s Christian heritage. In *Web of Deceit*, he alleged that there was an international conspiracy perpetrated by a group he referred to alternately as Trilateralists or Humanists. This conspiracy, Ross argued, aimed at world domination and the destruction of Canada’s Christian way of life. Ross did not, however, spell out very clearly that he believed that Jews were behind this plot. This only became clearer after he had published several more books, pamphlets and letters to the editors of various New Brunswick newspapers.

There is a sense, beginning with *Web of Deceit* and carrying through all his subsequent writings, that Ross was upset with the changes he saw occurring around him.

¹ There are two Ross cases that are spoken about in the media. The first, and the focus of this paper, is the one that began with the New Brunswick Human Right’s Commission inquiry into Ross. It was appealed all the way to the Supreme Court of Canada. It is indexed by the Supreme Court as *Ross v. New Brunswick*

When he began to write, Ross was witnessing a nation that was not only changing but a country that was becoming more open to existing diversity and was therefore making efforts to legally recognize that diversity existed within its borders.

The reasons for Ross's extreme alienation from this process are difficult to discern. When asked, he averred that all he sought to accomplish was the defense of his Christian-Scottish heritage.² Feelings of alienation from mainstream society are often experienced by Holocaust deniers and hate mongers. Also, it is not unusual to find that they have connections to a larger network of like-minded individuals. Ross's voice, however, was initially a lone one coming from a relatively small community in the Maritimes. Furthermore, it is unclear where, in his immediate environment, Ross would have found a sense that his way of life was in any way threatened. By all accounts, Ross was a very able teacher with a particular talent for reaching problem students. He held a steady job and led an inconspicuously average family life. There is no obvious indicator that Ross's lifestyle was endangered. Yet, as Canada moved toward recognizing, respecting and acknowledging its diversity, Ross felt threatened. The only thing that was clearly threatened, however, was the hegemony of white Canadians of British descent in government and society.³

Ross's case, which was eventually brought before the Supreme Court of Canada, is important in several ways. In part, it is important because it was one of the first to

School District No. 15. The legal process lasted from 1988 to 1996. The second, which only ended last year, was a legal battle between Ross and cartoonist Josh Beutel, whom Ross sued for libel.

² Malcolm Ross, interview by M.A. Bellezza, August 24, 2000, audio cassette and notes in authors' personal files.

³ Perhaps Trudeaumania and all that brought with it was enough to make Ross feel threatened, or perhaps, as a Maritimer, he was worried about the Maritimes place in a Canada rent by Quebec's possible secession. If anything like this played into his thoughts, Ross did not acknowledge it.

which Canada's anti-hate legislation might have been applied.⁴ There was no precedent for the use of this legislation when the New Brunswick Attorney General was faced with the decision of whether to charge Ross with wilfully promoting hatred against an identifiable group. The Attorney General's decision not to apply the criminal law eventually led to the case being dealt with using human rights legislation instead, making it the first of its kind to be handled in this way. The Ross case is also important because, before it, New Brunswick, and the Maritimes, were rarely, if ever, mentioned in histories of anti-Semitism in Canada. Indeed, the Maritimes get very little coverage in books discussing the history of Jews in Canada because its Jewish population is relatively small. Thus, while other works examining the history of Jews in Canada and anti-Semitism in Canada offer clues about how the Ross case might be treated, they offer very little that might explain the appearance of anti-Semitism in the Maritimes.

Canada's Jewish community is an old one predating the arrival of many other immigrant groups. Canada's first synagogue was inaugurated in Montreal on 30 December 1768.⁵ There have been several works that examine the history of Jews in Canada and others that focus specifically on anti-Semitism in Canada. When scholars address the topic of anti-Semitism in Canada the tendency is to focus on incidents in which the situation was exacerbated. Thus the studies that are produced often focus on specific regions of the country at times when anti-Semitism was most overt. While there are practical reasons why a scholar might choose to do this, the impression that it creates

⁴ The only other case to which the 1965 legislation was applied was the case of the Alberta Holocaust denier James Keegstra. Keegstra was first charged with promoting hate in 1978, and therefore there was no legal precedent of the law being used.

⁵ Gerald Tulchinsky, *Taking Root: The Origins of the Canadian Jewish Community*, (Toronto: Lester Publishing Limited, 1992) p.8. This book offers a comprehensive history of the Canadian Jewish experience until the First World War. Any reader interested in more about the early settlement of Jews in pre-Confederation Canada should refer to it.

is that there is very little anti-Semitism outside Western Canada, Ontario and Quebec. Although this might be explained by the fact that Canada's three largest Jewish communities are located in Vancouver, Toronto and Montreal, it is deceptive.⁶ There are Jewish communities in many other Canadian cities. Many of these communities have, at one time or another, had to confront the anti-Semitism of their fellow citizens. Most of the histories examine a specific portion of the long history of Jews in Canada and the anti-Semitism they faced. The only exception is perhaps Gerald Tulchinsky's impressive effort to give an all-encompassing account of the history of Jews in Canada from pre-Confederation to the 1980's in two volumes. For the most part, works examining anti-Semitism in Canada are not as ambitious as Tulchinsky's.

The authors considered here examine the history of Jews in Canada, the history of anti-Semitism, the extreme right in Canada, and Holocaust denial. It is important to keep in mind that anti-Semitism is a subset of Jewish history and, similarly, that Holocaust denial is a subset of anti-Semitism.⁷ Also, it is vital to remember that although anti-Semitism can at times be more overt, there is a certain continuity linking anti-Semitic outbursts like those of the 1930's to periods of apparent tolerance. That is to say, that periods of seeming acceptance do not necessarily indicate the disappearance of anti-Semitism.

A number of works will be examined in this chapter. Gerald Tulchinsky's two-volume chronicle, *Taking Root and Branching Out* examines the history of Jews in

⁶ Tulchinsky, *Branching Out: The Transformation of the Canadian Jewish Community*, (Toronto: Stoddart Publishing Co., Inc., 1998) p.358. The city with the largest Jewish population in Western Canada, today, is Vancouver. However, this was not always the case. Until recently, the Western city with the largest Jewish population was Winnipeg. Therefore the studies of anti-Semitism in Western Canada in different eras might focus on other cities. Other studies examine Western Canada as a homogeneous unit.

Canada from pre-Confederation to the present.⁸ Those works which consider the history of the far right are Stanley R. Barrett's *Is God a Racist* and Warren Kinsella's *Web of Hate*. The history of anti-Semitism in Canada from pre-Confederation to the present is explored in Alan Davies's collection of articles, *Antisemitism in Canada*.⁹ The works discussed here that examine moments in history when anti-Semitism became more overt are Lita-Rose Betcherman's *The Swastika and the Maple Leaf*, Martin Robin's *Shades of Right*, and Janine Stingel's *Social Discredit*, Harold Troper and Irving Abella's *None is Too Many*, and Esther Delisle's *Le Traître et le Juif*.¹⁰ Another category consists of studies which examine anti-Semitism in the form of hate literature and Holocaust denial.

The phenomenon of Holocaust denial is relatively young in comparison to other forms of anti-Semitism. This partially explains why there are so few studies and still fewer histories of it. The first books that addressed denial were those that straightforwardly refuted deniers' claims. Two examples, examined here, are Georges Wellers's *La Solution Finale et la Mythomanie Néo-Nazie* and Maxime Steinberg's *Les*

⁷ This is, of course, a question of perspective. To say that anti-Semitism and Holocaust denial are subsets of Jewish history does not mean they are the exclusive domains of Jewish studies. It could be argued that they are subsets of Christian pathology.

⁸ See footnotes 5 and 6. I examine only Tulchinsky's work in this category because it is the only comprehensive history of Canadian Jews by a professional historian.

⁹ Stanley R. Barrett, *Is God a Racist? The Right Wing in Canada*, (Toronto: University of Toronto Press, 1987).

Warren Kinsella, *Web of Hate: Inside Canada's Far Right Network*, (Toronto: Harper Collins Publishers, Ltd., 1994).

Alan Davies, ed., *Antisemitism in Canada: History and Interpretation*, (Waterloo, Ontario: Wilfred Laurier University Press, 1992).

¹⁰ Lita-Rose Betcherman, *The Swastika and the Maple Leaf: Fascist Movements in Canada in the Thirties*, (Toronto: Fitzhenry and Whiteside, Ltd., 1975).

Janine Stingel, *Social Discredit: Anti-Semitism, Social Credit and the Jewish Response*, (Montreal: McGill-Queen's University Press, 2000).

Martin Robin, *Shades of Right: Nativist and Fascist Politics in Canada, 1920-1940*, (Toronto: University of Toronto Press, 1992).

Esther Delisle, *Le Traître et le Juif: Lionel Groulx, Le Devoir, et le délire du nationalisme d'extrême droite dans la province de Québec 1929-1939*, (St-Laurent, Quebec: l'Étincelle éditeur Inc., 1992).

Irving Abella and Harold Troper, *None is Too Many: Canada and the Jews of Europe 1933-1948*, (Toronto: Lester and Orpen Dennys Limited, 1982).

Yeux du Témoin et le Regard du Borgne.¹¹ The work of Pierre Vidal-Naquet, *Assassins of Memory*, offers an early warning against the dangers of refuting deniers' claims.¹² The media attention given to several court battles involving Holocaust deniers has garnered the interest of both journalists and scholars. This is seen in David Bercuson and Douglas Wertheimer's *A Trust Betrayed* and Steve Mertl and James Ward's *Keegstra*.¹³ This is also the case with Gabriel Weimann and Conrad Winn's examination of the media's role in the Zundel Affair in *Hate on Trial*, Nicholas Russell's article, "Handling Hate: Reporting of the Zundel and Keegstra Trials," and Tom W. Smith's statistical survey, *Holocaust Denial: What the Survey Data Reveal*.¹⁴ Other scholars are interested in other issues related to denial. This is what is examined by Deborah Lipstadt in *Denying the Holocaust*, Michael Shermer and Alex Grobman in *Denying History*, and James Najarian's "Gnawing at History: The Rhetoric of Holocaust Denial."¹⁵

¹¹ Maxime Steinberg, *Les Yeux du Témoin et le Regard du Borgne: L'Histoire Face au Révisionnisme*, (Paris: Les Éditions du Cerf, 1990).

Georges Wellers, *La Solution Finale et la Mythomanie Néo-Nazie: L'existence de Chambres à Gaz et le Nombre de Victimes*, Beate et Serge Klarsfeld, eds. (New York: The Beate Klarsfeld Foundation, 1979).

¹² Pierre Vidal-Naquet, *Assassins of Memory: Essays on the Denial of the Holocaust*, (New York: Columbia University Press, 1992).

¹³ David Bercuson and Douglas Wertheimer, *A Trust Betrayed: The Keegstra Affair*, (Toronto: Doubleday Canada Limited, 1985).

Steve Mertl and James Ward, *Keegstra: The Trial, the Issues, the Consequences*, (Saskatoon, Saskatchewan: Western Producer Prairie Books, 1985).

¹⁴ Gabriel Weimann and Conrad Winn, *Hate on Trial: The Zundel Affair, the Media and Public Opinion in Canada*, (Oakville, Ontario: Mosaic Press, 1986).

Nicholas Russell, "Handling Hate: Reporting of the Zundel and Keegstra Trials," *Trials and Tribulations: An Examination of the Coverage Given Three Prominent Canadian Trials*, Nicholas Russell, ed., (Regina: University of Regina, 1986).

Tom W. Smith, *Holocaust Denial: What the Survey Data Reveal*, (New York: The American Jewish Committee, 1995).

¹⁵ Deborah Lipstadt, *Denying the Holocaust: The Growing Assault on Truth and Memory*, (Toronto: Maxwell Macmillan Canada, 1993).

Michael Shermer and Alex Grobman, *Denying History: Who Says the Holocaust Never Happened and Why Do They Say It?*, (Los Angeles: University of California Press, 2000).

James Najarian, "Gnawing at History: The Rhetoric of Holocaust Denial," *The Midwest Quarterly*, v.39, Autumn 1997.

In order to understand denial in Canada, it is necessary first to place Canadian anti-Semitism in its proper context. In other words, it is essential to understand the character of Canadian anti-Semitism – its scope, its virulence, etc. Tulchinsky establishes the relatively “minor,” generally non-violent, nature of Canadian anti-Semitism. His work is important because it establishes that, although Canada, like many other countries, experienced upswings in anti-Semitism during the 1920’s and still more in the 1930’s, the Canadian Jewish experience in this period was distinct from that of Jews elsewhere. In fact, he argues that Canadian Jews had it relatively easier.¹⁶

In his first volume, *Taking Root*, Tulchinsky touches on anti-Semitism and prejudice in his accounts of the difficulties that many Jews faced, for example, in attempting to purchase property in certain communities, in conducting everyday business, or in finding a place in Quebec’s parochial school system. There are, however, a few instances in which his examination of anti-Semitism is more direct. A first example is found in his discussion of the election of Ezekiel Hart to the Legislative Assembly of Lower Canada, which resulted in Hart being banned.¹⁷ A second is his examination of credit reports which reflect preconceptions about Jews in their business dealings.¹⁸ His chapter devoted to examining the prejudice against Jews that existed in Canada in the late nineteenth and early twentieth centuries is a third example.¹⁹

In his second volume, *Branching Out*, Tulchinsky examines the anti-Semitism of the interwar years and in contemporary Canada. Specific examples include his

¹⁶ Tulchinsky, *Taking Root*, p.202. In this instance Tulchinsky was referring to the anti-Semitism faced by Canadian Jews in the 1930’s. Although it is only one example, it is a recurrent theme in Tulchinsky’s work.

¹⁷ *Ibid.*, pp.24-27.

¹⁸ *Ibid.*, pp.61-64.

¹⁹ *Ibid.*, pp. 231-254.

discussion of the “*Achetez chez nous*” movement in Quebec²⁰, the anti-Semitic entrance policies of McGill University and the University of Toronto²¹, and the appearance of Holocaust denial.²² Although it is not as clearly stated as in his first volume, *Branching Out* gives the reader the impression that Tulchinsky believes the Canadian Jewish experience to be less fraught with anti-Semitism than elsewhere. Generally, Tulchinsky succeeds in giving a fair account of the experiences of Jews in Canada and of the anti-Semitism they faced. His work is particularly enlightening because it places anti-Semitism within the broader context of the Canadian Jewish experience.

Antisemitism in Canada, edited by Alan Davies, is a collection of articles on moments in Canadian history when anti-Semitism flared up. Davies’s book focuses on the problem of anti-Semitism in Canada from pre-Confederation to the present. Individual articles discuss specific incidents of anti-Semitism in Canada ranging, topically, from Richard Menkis’s study of anti-Judaism in pre-Confederation Quebec to Manuel Prutschi’s discussion of the Zundel affair. Davies and his collaborators’ contribution is that they demonstrate through their articles that there was no single, overarching model of anti-Semitism in Canada, but rather that it took different forms in different places at different times. For example, in interwar Germany all the people had essentially the same motivations for hating Jews: the well-known “stab in the back” theory to explain Germany’s loss in the First World War, their disgust with the way Germany was treated in the Treaty of Versailles, the reparations issue that stemmed from it. These immediate factors acted in combination with a tradition of anti-Semitism and were already there for Hitler to exploit and magnify in the 1930’s. In France, too, there

²⁰ Tulchinsky, *Branching Out*, pp.172-176.

²¹ *Ibid.*, pp.190-194.

were sporadic incidents of politically driven anti-Semitism, such as the infamous Dreyfus Affair around the turn of the century, which polarized virtually the entire French nation into *Dreyfusards* and *anti-Dreyfusards*. In Canada, on the other hand, in part because of regional and cultural diversity, anti-Semitism was more diffuse. It was diffuse in Canada in the sense that there was no single form of anti-Semitic expression common to the entire nation. The possible exception is Quebec, where anti-Semitic thought was disseminated by the Catholic Church with at least the tacit endorsement of the Duplessis government, creating a form of anti-Semitism common to the entire province.²³

Clearly, anti-Semitism in Canada is not a new phenomenon. There are several documented instances of overt anti-Semitism that mar Canada's history from pre-Confederation to the present. There are two periods, however, when anti-Semitism became so overt and lasted long enough to draw the attention of scholars. The first one occurred in the 1920's and 1930's, and the second began in the late 1970's and is arguably still happening.

In *The Swastika and the Maple Leaf*, Betcherman examines the upsurge of anti-Semitism that occurred in Canada in the 1930's. Although Betcherman's goal is to discuss fascist movements in Canada, she concentrates most of her effort on Quebec, and specifically on Adrien Arcand's efforts to promote fascism in other parts of the country. Such an approach allows Betcherman to examine related issues more closely, such as why Quebec was so susceptible to fascism and anti-Semitism. More generally, Betcherman links the rise of fascism in Canada to the Depression and the Bennett government's early mismanagement of the crisis. However, this is a partial explanation

²² *Ibid.*, pp.330-336.

²³ Betcherman, p.4.

for Betcherman. Her main emphasis is that the rise of fascism in Canada was mostly due to pre-existing, albeit latent, Canadian anti-Semitism.²⁴

In her examination of Lionel Groulx, *l'Action Nationale des Jeune Canada* and *Le Devoir*, Delisle focuses very specifically on Quebec anti-Semitism. Two things are interesting about her work. The first is that she chooses to examine a group who could be argued to be an intellectual élite.²⁵ The second is that she argues that the anti-Semitism of this élite pre-dated that of Adrien Arcand's fascist movement and also pre-dated the Depression.²⁶ Thus, in some ways, Delisle's work explains the anti-Semitism that existed prior to, and perhaps helped develop, the rise of fascism in Quebec.²⁷

Like Betcherman, Martin Robin examines the rise of fascism and nativist sentiment between 1920 and 1940. Unlike Betcherman, though, Robin looks at different Canadian fascist movements that arose independently of one another. Whereas Betcherman concentrates on Quebec and Adrien Arcand, Robin offers a comprehensive recounting of the rise in popularity of the far right in many parts of the country. Where Betcherman's account gives the reader the impression that the bastion of fascism in Canada was Quebec, Robin demonstrates that many Canadians did not need the leadership of Arcand to spur them toward nativism. For example, he looks at the role of other right wing leaders and groups to explain the swell of fascism. Robin also examines the roles of religion and nationalist sentiment brought to Canada by recent immigrants. Notably, Robin explores the way in which Italian-Canadians maintained strong ties to

²⁴ Betcherman, p.3.

²⁵ Delisle, p.27. More than just an élite, Delisle's work focused on a man, Groulx, who is considered by many to be the father of Quebec's national history.

²⁶ *Ibid.*, p.32.

²⁷ More specifically than the rise of fascism in Quebec, Delisle's account explains the rise of the *Achetez Chez Nous* movement.

their homeland and supported fascism as part of their Italian nationalism.²⁸ Their fascism, by Robin's account, was not a product of their assimilation into Canada but rather a sign of their continued attachment to Italy. This is in sharp contrast to Betcherman, who argues that Arcand attempted to manipulate Italian-Canadian fascism in his efforts to win the support of Mussolini for his Canadian brand of fascism.²⁹

In her book, *Social Discredit*, Janine Stingel examines the Social Credit Party in Western Canada and details the anti-Semitic underpinnings of the Social Credit movement. Stingel covers the period from the party's inception in the 1930's to the late 1940's. Her innovation is that, unlike others who examine anti-Semitic groups, she discusses the history of Social Credit's anti-Semitism in conjunction with the Canadian Jewish Congress' responses. Stingel was fortunate in that she had access to the Canadian Jewish Congress records, which helped her give the targets of anti-Semitism a voice. Of all the other works examined thus far, the only other one that gave the "other side" a voice was Tulchinsky's.³⁰

Betcherman's examination of anti-Semitism in the Depression era was published in 1975, in other words before Holocaust deniers had truly begun to be noted, while Stingel's study on the same era was published in 2000. The advent of the deniers may partially explain one of the main differences between the two books. Betcherman's account discusses the sources of anti-Semitism without looking at its victims or their reactions to persecution. Stingel's effort is indicative of the importance of giving the

²⁸ Robin, p.209.

²⁹ Betcherman, p.83.

³⁰ In discussing the Quebec school problem, for example, Tulchinsky explained the constitutional problems created by Quebec's unique position within Canada.

victims a voice that was brought about by the persistence of Holocaust denial.³¹ Since Holocaust deniers rob Holocaust victims of the truth, it becomes imperative to give all victims a voice.

While the works of Betcherman, Delisle, Robin and Stingel all examined anti-Semitism during the 1930's, Troper and Abella's book, *None is Too Many*, adds an extra dimension to such studies. They go beyond examining the anti-Semitism that existed between 1933 and 1948 and examine how this led to Canada being virtually closed to European Jewish immigrants. In other words, they examine the way anti-Semitism affected Canadian policy. Also, they are not satisfied to look to the Depression as a reason why immigration was cut off, especially in light of the fact that it was a world phenomenon and that it had not prevented other countries suffering it from accepting refugees.³² Instead, they argue, the Depression gave Canadian government officials an opportunity to completely block off a group that had already been at the bottom of a hierarchy of acceptable immigrants in the 1920's.³³ Thus, unlike the works of Betcherman, Delisle, Robin and Stingel, Troper and Abella's work looks at the consequences anti-Semitism had in the political arena and the implementation of policy.

The first period of overt anti-Semitism in Canadian history that has drawn scholars' attention was that of the interwar years. The second period began in the 1970's with the appearance of Holocaust denial. The question, then, is whether anti-Semitic

³¹ This is not to say that, in other fields of study, scholars were unaware of the importance of giving voice to the victims. The works about anti-Semitism examined here focus primarily on the acts of anti-Semitism and not the communities' reactions. Furthermore, in studies of denial, initially at least, so much focus is put on the deniers and their claims that there is a sense that its victims are forgotten. Also, it must be noted that there are several groups of victims of denial, the Jewish community is only one of them. It might be argued that the community at large is harmed by the propagation of hatred.

³² Troper and Abella, p.xi.

³³ *Ibid.*, p.5. The hierarchy had British citizens at the top, then Northern Europeans, then Eastern and Southern Europeans and at the bottom were Asian, black and Jewish immigrants.

sentiments were sustained and kept alive until the 1970's, when outbursts of anti-Semitism and neo-Nazism began being noted by the media. The answer is an emphatic yes. It may have mutated and hate mongers may have changed their tactics repeatedly with the passage of time, but anti-Semitism has long been a part of Canada's history. The norm, however, is for anti-Semitism to be noted by scholars, journalists and ordinary citizens only when it is most overt. That is to say that anti-Semitism is most noted when it drives people to acts of violence or slander. In the interim, though, it does not cease to exist, it thrives in everyday prejudices that are, unfortunately, so common that they do not seem newsworthy.

The work of sociologist Stanley Barrett stands out as an exception to the academic tendency to ignore anti-Semitism when it goes underground. That is because Barrett's interest is in the far right and the fringe groups that compose it. These groups often operate behind the scenes and therefore are hidden from mainstream consciousness. When Barrett's research was published in 1987 it made its entrance into a society that was becoming aware of this underworld because of the publicity surrounding the Keegstra and Zundel trials. However, when Barrett first began interviewing members of the far right and researching their networks in 1980 he might have been one of the earliest Canadian scholars to recognize the threat posed by the appearance of Holocaust deniers in Canada. In his book, *Is God a Racist?*, Barrett gives a descriptive account of the right wing in Canada and attempts to explain its existence in several ways. He questions the existence of the right wing by examining how it took root in Canada, given Canada's reputation for tolerance, and what drives its members towards racism and anti-

Semitism.³⁴ Barrett divides his study into four parts, the relevant chapter for this discussion being part three, “The Fringe Right,” which examines the efforts of Paul Fromm, Ron Gostick and James Keegstra to promote their ideas in the late 1970’s.

Barrett’s first task is to explain the existence of the right wing in Canada. He explains this through a recounting of its history and roots, particularly its emergence in the 1920’s in response to the perceived threat created by Communism. His second question, why the right exists from the perspective of its members, is neatly answered by a series of interviews with members of the right. Barrett points out that, despite the many different paths that led individuals to the right, their common theme is the perception that Western Christian civilization is in decay.³⁵ At a time when Ross had not yet begun to make national headlines, Barrett was already very familiar with Ross’s writings and already had an inkling of Ross’s later defense for his work.

Kinsella’s book, *Web of Hate*, is much like Barrett’s in that its main contribution to the literature on anti-Semitism is a comprehensive description of Canada’s extreme right.³⁶ Unlike Barrett, however, Kinsella’s effort to explain the beginnings of contemporary right wing groups does not include an adequate discussion of their predecessors. Indeed, his initial claim that he will explain why these groups continue to grow is left largely unanswered.³⁷ He does, however, give a comprehensive account of who makes up the far right in contemporary Canada, what threat they pose and where they are found. His narrative includes descriptions of groups such as the Ku Klux Klan

³⁴ Barrett, p.5.

³⁵ *Ibid.*, p.327.

³⁶ Kinsella’s interest, like Barrett’s, also predates the rise in public interest in Holocaust deniers. Also, it should be noted that the title of Kinsella’s book seems to be a pun on the title of Ross’ first book, *Web of Deceit*. Kinsella’s reasons for this, however, are not explained. Similar to Kinsella’s pun, is the title of James Beverly’s pamphlet, *Web of Error*. Beverly’s pamphlet, though, is directly related to the Ross case.

³⁷ Kinsella, *Web of Hate*, p.4.

in Canada, and of several individuals such as Douglas Christie.³⁸ While these descriptions are thorough and give an ample understanding of contemporary issues, they often fail to explain the roots of today's reality. Another problem with Kinsella's book is that it often reads like tabloid news. His vivid descriptions of the actions of far right groups are not often accompanied with adequate commentary. Thus, while Kinsella provides his audience with many facts, the value of his book is greatly diminished by the absence of meaningful analysis.

By the time Kinsella's and Barrett's books were published, the Canadian public was becoming increasingly aware of Holocaust denial and scholars were beginning to pay more serious attention to it. Before one can even consider the changes that were occurring in the treatment of denial by scholars, however, one must first be aware of the changes that had taken place in the methods and tactics of deniers. Early works of denial, including Ross's first book, *Web of Deceit*, were rather poorly printed and hackneyed recitations of old accusations. They often made reference to the ever-popular *Protocols of the Elders of Zion*.³⁹ Early deniers might have been printing these in their basement for all their sophistication. Also, the claims made by deniers were more outrageous and less likely to be taken seriously. This is not to say that their later claims were more believable, but rather that their later claims were more subtly worded.

In his book, *Delayed Impact*, Franklin Bialystok argues that there was an interval of one generation before Canadian Jews were able to begin coming to terms with the reality of the Holocaust and commemorate it. He says that it was a series of disturbing events between 1960 and 1973, which included the emergence of Neo-Nazism, that led

³⁸ Christie is a Victoria based lawyer who has gained notoriety for defending such equally notorious clients as Toronto's Ernst Zundel, Eckville's James Keegstra, and this paper's subject, Malcom Ross.

Canadians to the realization that anti-Semitism had merely been dormant immediately following the war and that there was a need to memorialize the Holocaust.⁴⁰ Moving one step further than Bialystok, however, it is argued here that in turn the efforts of deniers were hardened by remembrance of the Holocaust. For example, Bialystok talks about the NBC miniseries, *Holocaust*, as one of the signs that the Holocaust had entered the realm of popular culture. This film drew the disdain of several Holocaust deniers, including Malcolm Ross and Robert Faurisson. This is but one example but it illustrates the point that while Bialystok might be right in arguing that the actions of Neo-Nazis spurred Canadians to commemorate the Holocaust, deniers felt more compelled to improve their methods because they saw the memorializing of the Holocaust as further proof of a conspiracy.

With the passage of time, and in some cases the strengthening of links between individual deniers, deniers began to mimic the works of legitimate authors. For example, they began using scholarly style and citations. Together with the increasing subtlety of their claims, these efforts made their works more credible to readers. Even later, deniers began to borrow more than just the outward trappings of scholarly style; they began to borrow scholarly methods. Borrowing from studies of literature, they began to look at texts and deconstruct them. Similarly, borrowing from the historical profession, deniers began mimicking the style of revisionist historians. The Institute for Historical Review, a California-based group which has among its collaborators such men as David Irving and Fred Leuchter, began to publish a journal that strives to be indistinguishable from true

³⁹ More on the *Protocols*, their origins and Ross' use of them will follow in the next chapter.

⁴⁰ Franklin Bialystok, *Delayed Impact: The Holocaust and the Canadian Jewish Community*, (Montreal: McGill-Queen's University Press, 2000) p.8. The bulk of Bialystok's book, however focuses on

scholarly journals.⁴¹ As denial literature becomes increasingly indistinguishable from true scholarship, it begins to pose a much greater threat. Those who have the Holocaust within their living memory are passing away. Those who do not are more likely to question its reality and perhaps accept works like those found in the *Journal for Historical Review*.⁴² By now, deniers can no longer be viewed as a deviant minority that can be ignored; they have persisted in their attempts to negate history long enough and have refined their methods sufficiently for scholars and the public to take their actions more seriously.

With the apparent resurgence of anti-Semitism in the 1970's, there appeared a new weapon in the arsenal of anti-Semites. Holocaust denial made its appearance.⁴³ As the actions of hate-mongers made headlines and the problem did not fade away, scholars began to pay attention to the phenomenon of Holocaust denial and the conspiracy theories which often accompany it.

There are several different ways in which scholars have attempted to describe and analyze Holocaust denial literature.⁴⁴ The first and perhaps the most important question

understanding the process that led to Canadians coming to terms with the Holocaust *before* they were able to commemorate it.

⁴¹ Lipstadt, p. 179-182. Fred Leuchter's claim to fame is for having professed to have found conclusive, scientific evidence that gas chambers could not have been used for mass extermination. See for example, Lipstadt, chapter nine, pp. 157-182. David Irving is known for two reasons. The first is that he began by arguing that there existed no order from Hitler to carry out the Final Solution and later moved on to full fledged denial. Secondly, Irving made international headlines for suing Lipstadt and her publisher for libel.

⁴² For more on the *Journal for Historical Review* and its the Institute for Historical Review's leadership see chapter eight in Lipstadt. Lipstadt, pp. 137-156.

⁴³ While conspiracy theories have been around for a long time (indeed the Protocols of the Elders of Zion are a nineteenth century creation), Holocaust denial became a new accusation that has perhaps replaced older accusations such as the blood libel which maintained that Jews stole Christian children to use their blood in ritual ceremonies.

⁴⁴ The most comprehensive studies of denial, unfortunately, consider Canada very little. Thus one must in this instance briefly turn to works that examine similar questions in other countries. Considering that most of these works discuss the same issue in the United States and France, it may be safely assumed that questions of freedom of expression and respect for minority rights are treated with equal importance in all three countries.

which must be answered before an author can begin to consider denial is whether or not to refute the claims of deniers. The initial reaction of many outraged responders was in fact not to question *whether* to reply to deniers' claims but to do so immediately and almost reflexively. Such is the case, for example, in Wellers's *La Solution Finale et la Mythomanie Néo-Nazie*. He refutes two of the most common claims made by deniers, namely that the gas chambers were not used for mass extermination and that the number of deaths was grossly exaggerated. Others pondered the question and decided that deniers' attacks on the truth not only warranted a reply but in fact demanded one. Steinberg, for example, decided to examine the diary of the SS doctor Johann Paul Kremer to show that Robert Faurisson had misinterpreted the primary documents. His methodology, therefore, is less emotional and more academic than Wellers's.⁴⁵ Thus the most basic approach was to systematically refute the deniers' claims.⁴⁶

At a time when most responders were refuting deniers' claims directly, however, a lone voice stood out warning of the dangers of engaging deniers in debate. Pierre Vidal-Naquet was a pioneer in arguing that to refute deniers' claims is to engage them in debate, thereby erroneously making it seem as though their claims were one side of a legitimate argument. That is to say, it makes it seem as though the reality of the

⁴⁵ There are many other examples of books and articles that aim to refute the claims of specific deniers. For example, some have set out to disprove the findings of the Leuchter Report which claimed to have proof that gas chambers were not used to kill people. Others examine the same documents cited by deniers to show the ways in which the texts have been manipulated. There are works which juxtapose deniers' claims with the truth in a very straight-forward manner. Most of these authors, however, limit themselves to refuting deniers' claims without analysing the phenomenon of denial.

⁴⁶ There is one particularly noteworthy refutation of Ross that must be mentioned here. It is James A. Beverley's pamphlet, "Web of Error." In it Beverley lists the claims Ross had made in his writings and refutes them in several different ways. Beverley refutes Ross' claims in terms of their sources and Ross' lack of scholarship, research and logic. As a professor of theology, Beverley also refutes Ross' interpretation of religious texts. See: James A. Beverley, *Web of Error: An Analysis of the Views of Malcolm Ross*. Sackville, New Brunswick: Department of Religious Studies, Mount Allison University, 1990.

Holocaust were in dispute.⁴⁷ He is also one of the first to examine denial as a phenomenon and to attempt to place deniers within the broader context of French politics, history and cultural landscapes. Although Vidal-Naquet's book was only published in 1992, it is a collection of articles that he wrote between 1980 and 1987.⁴⁸ Thus he was ahead of other scholars in his treatment of deniers and in his warning to resist the temptation to engage deniers in debate. Vidal-Naquet's warning is borne out in the works of Steinberg, Wellers and others who engaged deniers.

While denial was the subject of a wide-ranging public debate in early 1980's France, thanks in large part to the Faurisson scandal, in North America most of academia dismissed deniers as deviants, not to be taken seriously. The few who did examine the problem were funded by Jewish organizations with a vested interest in challenging deniers' claims. These works were often straightforward refutations of deniers' claims in the style of Wellers and aimed to reassert the truth of the Holocaust. In France, the media stir created by the Faurisson case can be explained in part by the French media's long-standing involvement in public cases of anti-Semitism, one of the most notorious being the Dreyfus affair (1894-1906) in which their role was instrumental. In Canada, however, no comparable situation had yet arisen. Canada had not experienced a case that drew nationwide attention and polarized the populace as the Dreyfus case did in France. Moreover, as Tulchinsky underlines, Canadian anti-Semitism was relatively more benign

⁴⁷ In France deniers were labelled "revisionists" and those who countered them were labelled "exterminationists." Whether it was the deniers or newspapers or others who began using the terms is unclear. However, these labels create the sense that there are two legitimate schools of thought. This is erroneous and it is exactly what Vidal-Naquet warned against. It should also be noted, that the terms were in some ways accepted, as some authors referred to deniers using this terminology. Other authors opted for the more accurate label for deniers in France, *negationistes*, which captured what they were attempting to do: negate history.

⁴⁸ The version referenced herein, is the English translation of Vidal-Naquet's work, which was published in 1992. It was originally published in 1987 in France.

than its counterparts in Europe. This meant that Canadians were less likely to be drawn into individual cases. And because there was little public interest in these cases beyond the local or regional level, there was less propensity for Canadian academics to become seriously involved in the debate until the prosecution of deniers began to make national headlines.

By the mid-1980's the Keegstra and Zundel cases had begun to draw national attention. As they did, reporters were assigned to cover the stories for the duration of the trials. It is no surprise, then, that the first people to write about the deniers were these very same reporters. It is equally unsurprising that they chose to examine the legal proceedings. Two such studies demonstrate that the authors' level of familiarity with the case can lead to markedly different results.

On the one hand, Bercuson and Wertheimer were not afforded great familiarity with the actors and were often refused interviews by Eckville citizens who understandably did not always appreciate the often negative depiction of them and their small town in the media.⁴⁹ Their book, *A Trust Betrayed*, therefore presents Keegstra as more of a monster than might have been the case if they had been better acquainted with the main actors. In comparison, Mertl and Ward had a distinct advantage in bringing the actors in their story to life because they met several of them and were present at Keegstra's first trial. They used this advantage to the fullest throughout their recounting of events, for example by bringing descriptions of courtroom dramas to life and making it impossible for any reader to ignore that these were real events that involved real people.

⁴⁹ This might be because Bercuson and Wertheimer attempted to interview the main actors later than Mertl and Ward had. Another possible explanation might be that because Douglas Wertheimer was the editor of the *Jewish Star* Keegstra and his entourage were less willing to speak to them.

Because they had access to the main actors, Mertl and Ward were better able to paint a realistic and human picture of Keegstra and of Eckville.

The move toward recognizing that deniers were not a deviant minority marks an important step forward in the way scholars understood Holocaust denial. Once they began to grasp this, scholars were closer to realizing its more subtle threat — that is, the threat of hate mongers going undetected.⁵⁰ A second step in the evolution of the way denial was treated by scholars occurred when journalists and media experts began to step away from their role as reporters and examine the effects that their work may have had. In doing this, scholars were moving away from looking at *deniers* and approaching the topic of *denial*.

The public attention and debate surrounding deniers creates questions about the possible effects these events might have on society. One question that often surfaces when Holocaust denial is given much media attention is whether the coverage aids the denier in the dissemination of his message.⁵¹ Afraid that news coverage might provide an unmerited platform, some argue that the media should ignore the trials of Holocaust deniers. Journalists and freedom of speech advocates argue that doing such a thing would imperil the journalist's integrity. In response to fears about media coverage, several studies have been done to detect whether media coverage can or does affect the opinions of the public about such topics as the Holocaust or the Jews. The results of one such study are presented in Gabriel Weimann and Conrad Winn's book, *Hate on Trial: The Zundel Affair, the Media, and Public Opinion in Canada*. Ernst Zundel, the Toronto-

⁵⁰ This is even scarier when combined with the fact that two of Canada's most well known deniers, Ross and Keegstra, were teachers and therefore entrusted with young minds.

⁵¹ The use of masculine pronouns here is apt. Most known and vocal deniers are men; all of those who have been charged with criminal offenses have been men.

based distributor and publisher of Holocaust denial literature, used various tactics during his trial in 1984 to grab and manipulate media attention. Weimann and Winn sought to assess the effects of such tactics on public opinion through a survey and presented their findings in their book. Combining graphs and charts with descriptions and explanations for their findings, they argue that media coverage did not increase sympathy for deniers.⁵²

In a comparative examination of the media coverage given to the Zundel and Keegstra trials, Nicholas Russell considers whether any factors led to one of the two trials being given more space in the press and television news reports. Given that Zundel often deliberately attempted to create a media circus around his trial and that his preceded the trial of the Alberta teacher who taught his views to his students Russell was eager to discover if Keegstra received less media attention.⁵³ Russell's conclusions, though he states that they are only preliminary, find that the attention afforded each denier was mostly determined by proximity; the closer readers and viewers were to the city where the trial was taking place the more likely it was for them to hear and read about them.⁵⁴ The studies of Weimann and Winn and Russell directly address the concerns of scholars who worry about the effects of using legislation to curb Holocaust denial.

In another presentation of survey data, Tom W. Smith sought to measure the acceptance that Holocaust denial had won with the American public. Unlike Weimann and Winn, Smith did not seek to connect attitudes to a specific trial but simply measured people's knowledge of the Holocaust and their attitudes towards it. He concludes that lack of awareness of the Holocaust is higher in the United States than in Europe and that

⁵² Weimann and Winn, p.163.

⁵³ Russell, N.B. there are no page numbers used in this article.

⁵⁴ *Ibid.*

this is not attributable to greater acceptance of neo-Nazi ideas but to ignorance.⁵⁵ While the Canadian studies show that perhaps one need not worry unduly about the public being swayed by deniers' views being aired publicly, Smith's research points to the need to ensure that education programs include efforts to encourage awareness of the Holocaust and bolster tolerance. Writers suggesting possible reactions to Holocaust deniers do not always consider the results and presentation of survey data but in many instances they should.

When scholars began to look at deniers as a group, and not as individuals, they were able to examine the phenomenon of denial, its effects and other issues. In other words, they had begun to move away from direct refutation. In doing so, other scholars had caught up to Vidal-Naquet's early admonition about engaging deniers in debate. Because deniers failed to disappear from public view, scholars had to begin grappling with the fact that denial was not a passing phenomenon. Deniers did not quickly disappear from public scrutiny; in fact more deniers were making headlines.⁵⁶ Deniers were also becoming more adept in their attempts to have their work mistaken for true scholarship. Furthermore, deniers were forming an increasingly far-ranging network.⁵⁷ Clearly, scholars had to begin taking denial more seriously.

⁵⁵ Smith, p.22.

⁵⁶ There were several instances in which deniers made headlines because they were being prosecuted. However, there is a sense that deniers are generally a litigious group. Other instances of deniers' legal wrangling making headlines were those when deniers sued their critics for libel. David Irving, Malcolm Ross, and others did this. David Irving sued Deborah Lipstadt for her portrayal of him in an academic study. Malcolm Ross sued the cartoonist Josh Beutel for his portrayal of Ross in his editorial cartoons. There is a sense that hate mongers like the publicity that comes with these legal cases. The most obvious example is perhaps, Ernst Zundel, who tried to turn one of his trials into a media circus.

⁵⁷ See above about the Institute for Historical Review, which hosts yearly conferences and invites noted deniers as guest speakers. It should also be noted that deniers were becoming involved in each other's legal battles. Fred Leuchter wrote his report about gas chambers (offering supposedly scientific evidence that they could not have been used for mass extermination) for use in one of Zundel's trials.

While in some ways Deborah Lipstadt, as well as Michael Shermer and Alex Grobman do refute the claims of deniers, this is not their only contribution to the topic. These authors attempt to avoid directly engaging deniers' claims but combine their discussions of deniers with assertions that show how and why a denier's claim is false.

Deborah Lipstadt's book, *Denying the Holocaust: The Growing Assault on Truth and Memory*, relates the history of Holocaust denial and her refutations come in the form of assertions and explanations that are interspersed in her discussion of deniers and their claims. While it is not Lipstadt's goal to refute deniers' claims, she gives explanations and comments about why they cannot be true. Like Vidal-Naquet, Lipstadt believes that to engage deniers in debate is to lend them legitimacy. Unlike him, however, she is unable to restate deniers' views without repeatedly pointing out their falseness and at times she borders on engaging them. Although Vidal-Naquet is more able to keep to his word about not engaging deniers, the reason why Lipstadt is unable to do this may be found in the very reasons why she believes that denial presents a great danger. She is particularly concerned about the susceptibility of the younger generations, notably those who do not have the Holocaust or the Second World War in their living memory, and this explains her need to point out the falseness of what she is relating. As deniers increasingly assume a more pseudo-academic style, decrease their overt attachments to extreme groups and make themselves increasingly indistinguishable from real scholars, Lipstadt fears they will find a receptive audience among disenfranchised youths.⁵⁸ It is not surprising, then, that Lipstadt ends her history of denial with her views on the remedies and actions that should be taken to thwart the efforts of deniers. She believes that using legislation to curb hate literature transforms deniers into martyrs to the cause of

freedom of expression, but that to ignore them can be equally dangerous.⁵⁹ Since engaging in debate with deniers would be to give their claims equal standing with the truth, Lipstadt concludes that the only viable and advisable solution is to educate people.⁶⁰

Shermer's and Grobman's book, *Denying History: Who Says the Holocaust Never Happened and Why Do They Say It?*, is divided into four parts, one of which is called, "Arguments and Refutations."⁶¹ Unlike straight-forward refutations as discussed above, however, Shermer's and Grobman's work identifies the three major claims made by deniers and gives proof that these claims are false without replying directly to any one Holocaust denier in particular.⁶² Also, the context within which Sherman and Grobman place their refutation is much broader. They use denial as a case study of how history can be distorted to attain ideological or political ends.⁶³ They then proceed to give a brief recounting of the development of the American historical profession from the Rankean vision of events speaking for themselves to relativism and postmodernism.⁶⁴ In Shermer's and Grobman's view, historical relativism made denial possible, but they argue that there is a difference between the way revisionism disputes aspects of an event and the way deniers dispute that the Holocaust ever occurred.⁶⁵ They believe the next stage in historical practice to be something they call "historical science" and insist that

⁵⁸ Lipstadt, pp.208, 218-219.

⁵⁹ *Ibid.*, pp.220-221.

⁶⁰ *Ibid.*, p.221. Indeed, survey data shows that Holocaust denial is more likely to be accepted by those who have less education. On the other hand, several Holocaust deniers are rather well educated.

⁶¹ Shermer and Grobman

⁶² The three major claims Sherman and Grobman identify are that gas chambers were not used to kill people, that the number of Jews killed in the Holocaust was not six million, and that there was never any direct, written order from Hitler calling for the elimination of Jews.

⁶³ *Ibid.*, p.2.

⁶⁴ *Ibid.*, pp.21-22; pp.26-27; and p.30.

⁶⁵ *Ibid.*, p.27.

historical facts can only be proven by a convergence of evidence on one conclusion.⁶⁶ It is by showing the way evidence converges on the fact that six million Jews were killed during the Holocaust, that gas chambers were used to murder people, and that there was a plan to exterminate the Jewish population that Shermer and Grobman refute deniers.⁶⁷ Despite the negative aspects of refuting deniers' claims, Shermer and Grobman make a significant contribution to the literature by placing their focus on the way deniers pretend to be legitimate scholars to achieve their goals and differentiating their efforts from those of professional historians.

One aspect of denial that many authors consider and several analyze is the methods employed by deniers. Shermer and Grobman note the way in which deniers demand a single proof when the reality is that there are several pieces of evidence which taken together prove that something was the way it was.⁶⁸ Almost anyone who reads Holocaust denial literature can quickly discern the way in which deniers choose to believe evidence that suits them and ignore or dismiss evidence that does not; scholars often note this. Shermer and Grobman also point out that deniers often equivocate, trying to argue that the Nazis did nothing worse than any of their wartime enemies.⁶⁹

The only author who is completely successful in not engaging deniers in debate is Najarian. In his article examining the methods of deniers, Najarian considers the way in which the methods used by post-modern historians are borrowed by deniers. Like Vidal-Naquet, Najarian argues that one should avoid engaging in a debate with deniers. He

⁶⁶ *Ibid.*, pp.30-33.

⁶⁷ *Ibid.*, pp. 123-230. Oddly, Shermer and Grobman are the only authors who point out a rather obvious point: the obsession with gas chambers and Zyklon-B might exist because popular understanding of the Holocaust focuses on them and this neglects the fact that the Nazis employed several methods in attempting to implement their Final Solution.

⁶⁸ Shermer and Grobman, p.102.

⁶⁹ *Ibid.*, pp.103-105.

goes one step further, though, by pointing out the emphasis on discourse and other ways in which deniers borrow methods from scholars.⁷⁰ In particular, Najarian states that deniers use linguistic tools to help them make their claims. They reject emotion and euphemisms, reading documentary sources literally; deniers rely on the late twentieth century distrust of rhetoric and try to imitate scientific prose in their writings.⁷¹

Najarian's arguments are very convincing

Attempting to refute the claims of Holocaust deniers is obviously a risky pursuit if one wishes to avoid lending them credibility. The efforts of Lipstadt, Shermer and Grobman, however, have shown that if one does not engage in a debate directly but refutes the claims of deniers at the same time as describing them, refutation can be part of a broader study. An examination of the methods employed by deniers is essential to any study if one is to demonstrate that deniers are often not crude deviants but average looking and sounding individuals who have often honed their skills of mimicry to lend their efforts an academic-looking patina of genuine scholarship. However, case studies can be particularly useful as well, because they allow the writer a better chance of succeeding in giving the denier a human face and showing that one need not wave Nazi flags or look different to be a hater.

The examination of Ross offered here will attempt to accomplish several goals. It will also accept the conclusions of other scholars as premises. The first such premise is borrowed from Tulchinsky: anti-Semitism need not be overt for it to exist as a part of

⁷⁰ James Najarian, p.82.

⁷¹ *Ibid.*, pp.75-76 and p.86. By refusing to acknowledge euphemisms for more than what they literally mean deniers can claim that any euphemism for murder or extermination did not mean this. Although the method employed as described by Najarian is a post-modern method, it is not always the case that deniers follow such a method. Their methods can also be more sinister and devious; for example, deniers have been known to give faulty translations of their sources.

daily life. Thus the fact that there is little evidence of overt anti-Semitism in the Maritimes does not mean that the region was free of anti-Semitic sentiment. That is to say that although Ross's may have been a lonely voice in the Maritimes, there were certainly people who shared his views. The second premise is borrowed from Barrett: a sense that Western Christianity is in decay can be great enough motivation to make bigots embrace anti-Semitism and Holocaust denial. Specifically, Ross need not have felt personally threatened in order to feel that the values he cherished were being threatened.⁷²

Unlike some of the works considered above, this one will not offer a comprehensive account of all Canadian Holocaust deniers but will instead compare the Ross case to that of James Keegstra. This is because the cases were nearly coterminous and are often compared because both men were school teachers as well as Holocaust deniers. Like Mertl's and Ward's examination of Keegstra, this discussion of Ross will try to give him a human face. It will attempt to dispel the myth that hate mongers are monsters who can be easily recognized. Lastly, this essay will show, through an examination of Ross's writings and methods, that hate mongers no longer write crude and transparent recitations of hate but more insidious works that strive to be indistinguishable from legitimate scholarly works.⁷³

Based on these premises, this examination of the Ross case will do several things. First, it will introduce Ross as the ordinary man that he is. After familiarizing the reader with Ross's writings, it will explain why the case was not dealt with using criminal

⁷² The idea that hate-mongers tend to be the disenfranchised is very misleading. While Holocaust deniers might find a susceptible audience among the disenfranchised, many writers of Holocaust denial and other hate literature are rather well educated and what might be comfortably labelled middle class.

legislation designed specifically to deal with hate mongers. It will then consider the difficult position into which the school board was thrust when the Attorney General decided against pressing criminal charges. Next, it will discuss the way in which a complaint to the New Brunswick Human Rights Commission led to an inquiry into the school board's actions and Ross's activities. This will be followed by a description of the legal battle that ensued. The differences between the Supreme Court's decisions in the James Keegstra and Malcolm Ross cases will then be compared and contrasted. The last section will posit what kind of precedent the Ross case will be.

⁷³ Ross' works are rather well printed, use footnotes and are carefully worded to avoid being overly obvious in their goals.

Chapter II

Ross, His Writings, and Reactions to Them

Moncton, New Brunswick is a small city with a population of approximately 113,000.¹ It is located near New Brunswick's east coast and is a short drive away from beaches along the Atlantic coast. Its downtown core is made up of a short strip along Main Street that is speckled with a few restaurants and bars. It is the home of one of New Brunswick's French universities, the Université de Moncton. Its tourist attractions include Magnetic Hill, which is an optical illusion that makes visitors believe their cars are rolling backward up a slope, and the aptly named Tidal Bore on the Petitcodiac River that is affected by the Bay of Fundy's tides. Generally, it is a quiet community that garners very little attention in the Canadian media. It, and several of its citizens, did however become the focus of quite some attention in the 1980's and 1990's as the case of Malcolm Ross made national headlines.

Malcolm Ross does not stand out in a crowd. There is nothing about his appearance that would make someone who did not know about his views take note of him. Unlike the skinheads who made their appearance in Moncton about the same time as Ross's first book, Ross did not make his beliefs public through his appearance. He probably looked and dressed no differently than his fellow teachers in Moncton's District 15 School Board. Polite and well spoken, not even Ross's behavior betrayed his views.

¹ Statistics Canada, "Population Statistics for Moncton (Census Agglomeration), New Brunswick," *Statistics Canada Internet Site*, February 7, 2002.
<<http://ww2.statcan.ca/english/profil/Details/details1.cfm?ID=97&PSGC=13&SGC=30500&DataType=1&LANG=E&Province=13&PlaceName=moncton&CMA=305&CSDNAME=Moncton&A=&TypeNameE=Census%20Agglomeration>> (February 7, 2002).

The only adjective that springs to mind when describing Ross's appearance and manners is average. Furthermore, by all accounts he did not bring his views to the classroom. If he shared his views with fellow teachers, none of them ever revealed this. Even when asked to speak about his views, Ross was not particularly vehement. He spoke slowly, clearly and calmly. He did not embark upon a rant about how he believed the decay of Western Christian society was being perpetrated by Jews. Instead, he explained his Christian upbringing and his pride in his Scottish heritage. He explained that this heritage was part of the reason that he felt the need to speak out against the moral decline he perceived in Canadian society. Addressing his anti-Semitic views, Ross maintained that he did not believe that Jews were behind the decline in Western civilization but that perhaps they numbered highly among those who were behind the alleged plot to destroy it. All else that he might have said about his views was quietly accomplished as he handed me a package containing his three books and one pamphlet, a copy of one of his supporters' books, and a collection of newspaper articles about himself duly underlined and annotated.²

To label Malcolm Ross a Holocaust denier is perhaps to miss the point. His denial of the Holocaust is only one facet of the much broader goal of proving the existence of an international "Humanist" conspiracy.³ Holocaust denial is one part of a long list of accusations that Ross makes in order to argue that there is a plot to destroy

² The closest Ross came to revealing his views on Jews was before we sat down for our interview when he asked me if I was Jewish. Malcolm Ross, interview by M.A. Bellezza, August 24, 2000, audio cassettes and notes in personal files.

³ Ross, and other conspiracy theorists, will often term the alleged conspiracy a "Humanist" one in which Jews play a prominent role. Such verbal acrobatics are often cited to prove that their writings are not hate literature. As it became clearer to Ross that he would not be prosecuted under Canadian anti-hate legislation, however, it became equally clear that he believed the conspiracy to be a Jewish plot.

Western Christian civilization. A close examination of Ross's beliefs and the controversy surrounding the so-called Malcolm Ross affair will show that his conspiracy theory is a threat to a much broader segment of the population than Moncton, New Brunswick's Jewish community.⁴ Furthermore, an analysis of the ways in which Canadian and New Brunswick laws were applied will show that there exist serious deficiencies in the legal system if it is to help maintain a tolerant, multicultural society.

Malcolm Ross published his first book, *Web of Deceit*, in 1978 but it was not until 1996 that the Supreme Court of Canada handed down its decision concerning Ross.⁵ The large time gap, as well as the extensive media coverage devoted to Ross over that time, is the first indicator that the Canadian legal system is ill equipped to deal with writers of hate literature.⁶ In this first book Ross refers to the late nineteenth century forgery commonly referred to as the *Protocols of the Elders of Zion* as one of the proofs that there exists a conspiracy for the creation of a one-world government.⁷ In his 1978 book Ross also claims that there is "an international move to destroy our Christian way of life."⁸ He goes on to state that there are three components of this conspiracy; namely International Communism, Finance and Zionism.⁹ He refers to those allegedly involved in this plot as Trilateralists and includes Alan Hockin, the then president of the Toronto

⁴ In *Web of Deceit* Ross decries Canada's multiethnic composition (including its French minority), the move away from Christian scriptural laws, and the denunciation of the Monarchy.

⁵ Malcolm Ross, *Web of Deceit*, (Moncton: Stronghold Publishing Company, Ltd.), 1978. Stronghold Publishing is Ross's own publishing company. He has not published anyone else's work but his own.

⁶ One might argue that Ross was condemned in the media long before he was in the courts.

⁷ Atlantic Jewish Council Brief on Malcolm Ross to District 15 School Board, February 1987. P.2. For scholarship on the *Protocols* and their origins see: Norman Cohn, *Warrant for Genocide: The Myth of the Jewish World Conspiracy and the Protocols of the Elders of Zion*, (London: Eyre and Spottiswoode, 1967). Briefly, the *Protocols* were plagiarized from Maurice Joly's satirical work "Dialogues in Hell Between Machiavelli and Montesquieu" (1864) by a Russian anti-Semite and novelist named Hermann Goedsche.

⁸ Ross, *Web of Deceit*, p.1.

⁹ *Ibid.*, p.11.

Dominion Bank, and Jimmy Carter in their ranks.¹⁰ Everything from the media to rock music is also believed to play a role in the conspiracy. For all of his accusations Ross is careful to avoid labeling the conspiracy a Jewish plot. He instead maintains that the conspiracy is predominantly led by Jews.¹¹ He writes:

One thing that cannot be avoided is the presence of a large number of Khazar-Ashkenazim “Jews” in all three branches of the Conspiracy. Lest this be construed as an attack against all Jews, I would remind you that among those who have suffered most because of Zionism has been a large number of Jews and many Orthodox Jews violently oppose the claims of this sinister quasi-religious movement.¹²

Verbal ploys, statements such as this are perhaps what prevented criminal charges being brought against Ross. Instead of calling the Conspiracy a Jewish plot, Ross also couches his arguments in terms of protecting Christianity and when he makes particularly inflammatory comments he is careful to attribute them to another source. For example, in trying to refute arguments justifying the creation of Israel, Ross quotes Arthur Koestler, the author of *The Thirteenth Tribe*, to say that he believes that the Jews in the world today are not Israelites and therefore, by Ross’s logic, Zionism “is not so much a hoax as a Plan.”¹³ Part of the reason why Ross might have been careful with his words might have been to avoid criminal prosecution.

¹⁰ *Ibid.*, pp. 8-9. He also states that: “Canada’s newly appointed human-rights commissioner Gordon Fairweather is a Trilateralist, and one of decidedly leftist sentiments as his record as M.P. will show.” On page 14 P.E. Trudeau is accused of being part of the Communist plot. The accusations continue throughout the book.

¹¹ In his chapter on Zionism, pp.39-47, Ross comes closest to making such an accusation. He argues that the desire for Israel is spurred by its important geographical position in geopolitical terms. Jerusalem is, according to Ross, to be the center of a one-world government.

¹² *Ibid.*, p.40. One must keep in mind that Ross puts quotation marks around the word, Jews, because he argues that today’s Jews are not descendants of Biblical Jews.

¹³ *Ibid.*, p.41-43. See, also, Arthur Koestler, *The Thirteenth Tribe: The Khazar Empire and its Heritage*, (London: Hutchinson, 1976). In this book Koestler argues that modern Jews are the descendants of the Khazar Empire and are Caucasian and therefore not Semitic people.

Canada's anti-hate legislation was adopted by Parliament in 1970. It was the end result of the findings of a committee formed in 1965 by the Minister of Justice, Guy Favreau.¹⁴ Its mandate was to investigate the scope of hate propaganda in Canada and, if necessary, to recommend ways in which it could be suppressed or controlled.¹⁵ Chaired by the then dean of McGill's law school, Maxwell Cohen, the Committee also included Pierre Trudeau, who was teaching law at the Université de Montréal at the time.¹⁶ The Cohen Committee's final report called for the anti-hate legislation to be enacted because, it argued, it would be irresponsible to "ignore the way in which emotion can drive reason from the field."¹⁷ From the moment the committee tabled its report to the time when the law was adopted and even afterwards, however, there was much disagreement and debate surrounding the law because it would set limits on freedom of expression. Therefore, when the law was passed in 1970, there were several differences between it and the Cohen Committee's recommendations. For example, section 318(4) defines an identifiable group as one that is distinguished by colour, race, religion or ethnic origin. The Cohen Committee would have also included groups united by language and by national origin as identifiable groups.¹⁸ Another difference is that the law allows for four defenses against being charged under the law: that the statements be true; that the opinions held are religiously held and expressed in good faith; that the statements were relevant to a topic of public interest and were believed to be true on reasonable grounds;

¹⁴ N. Kathleen Sam Banks, "Could Mom Be Wrong? The Hurt of Names and Words: Hate Propaganda and Freedom of Expression," *E Law Murdoch University Electronic Journal of Law*, Vol. 6, No 2., June 1999, <http://www.murdoch.edu.au/elaw/issues/v6n2/banks62_text.html>(April 7, 2002).

¹⁵ *Ibid.*

¹⁶ Mertl and Ward, p.35.

¹⁷ *Ibid.* Cohen report as quoted by Mertl and Ward.

and that the statements were made in good faith “to point out for removal matters tending to produce feelings of hatred of an identifiable group.”¹⁹ The Cohen report would only have allowed the first and third defenses.²⁰ A final difference between the Cohen Committee report and the law is that, instead of criminalizing the “wilful promotion of hatred of an identifiable group,” the Cohen Committee would have also included the promotion of “contempt” for an identifiable group.²¹ These differences indicate the care with which the law was phrased in order to prevent its possible use as a tool of censorship.

Despite Ross’s efforts to protect himself against prosecution under Canada’s anti-hate legislation, one man found the book offensive enough to lodge a complaint with the New Brunswick Attorney General’s Office.²² Dr. Julius Israeli, a chemistry professor retired from the University of Moncton and residing in Miramichi, was a Rumanian Holocaust survivor who had lost several family members to the Third Reich.²³ This first complaint in 1978 was not followed by legal action on the part of the New Brunswick

¹⁸ Philip Rosen, “Current Issue Review: Hate Propaganda,” *Parliamentary Research Branch, Virtual Library*, January 24, 2000, <<http://www.parl.gc.ca/information/library/PRBpubs/856-e.htm>> (April 7, 2002).

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ *Ibid.*

²² Paul Lungen, “Julius Israeli: the man who refuses to give up,” *The Canadian Jewish News*, hereafter cited as *CJN*, May 7, 1987, p.3.

²³ Julius Israeli, Interview by M.A. Bellezza, August 21, 2000, audio cassette and notes in personal files. Ross, in an attempt to divert attention, has stated that Israeli was not a Holocaust survivor because he was never placed in a concentration camp. Israeli, as a young boy of seven or eight years of age, lived in a Rumanian village that was under the control of the fascist Iron Guard. He attributes his survival to competition between different fascist segments competing for power of his home town. An interesting point made by Israeli was that the Iron Guard’s form of fascism embraced religious and not racial superiority as German Nazis did. Israeli points out that Ross’s views bear an important similarity to those of the Iron Guard. Israeli’s complaints about Ross to the Attorney General and school board were accompanied by active interest in the case. Israeli was one of the people who found copies of *Web of Deceit* for sale when the Attorney General said they no longer were. He says that he bought up hundreds of Ross’s books and sent them to different organizations. He also exchanged letters with Ross. Unfortunately, he was written off as fanatical by the school board.

Attorney General's Office; indeed, by 1987 Israeli had filed three separate complaints against Ross, with little result.²⁴ Although Israeli's first complaint was made soon after the book was published, little, if any, note was taken by the media. There was scant attention paid to the case between 1978 and 1985 because there was very little being done about it by the Attorney General and the school board. After 1985, however, Ross and the controversy were often written about as the Attorney General, David Clark, pondered the merits of charging Ross.

In 1983 Ross published a second book: *The Real Holocaust: The Attack on Unborn Children and Life Itself*. In this book Ross furthered the arguments made in *Web of Deceit* by adding the accusation that abortion is part of the plot to destroy the Christian "race."²⁵ Once more, he maintained that the attack was headed by so-called Humanists but this time he included those involved with Planned Parenthood and the Sex Information and Education Council of the United States among the conspirators.²⁶ The method employed in the book is to compare what Ross terms "alleged" atrocities committed by the Nazis to the facts, as compiled by Statistics Canada, about abortion.²⁷ Ever careful not to blatantly call the conspiracy a Jewish plot, Ross relies on the term Humanist. At the same time, however, one must bear in mind that the front cover of the book features a doctor throwing tiny coffins into graves. The sign beside him reads: "Welcome to Dr. Herod's abortion clinic." Also, the doctor is drawn to portray a

²⁴ Paul Lungen, "Julius Israeli: the man who refuses to give up," *CJN*, May 7, 1987, p.3. In interview, Israeli stated that he also made complaints to the School Board of District 15. The chairman of the school board, Carl Ross, admitted to having received the complaint but added that Israeli did not reside in the district. The exact date when the complaint was made to the school board is unknown.

²⁵ Ross, *The Real Holocaust: The Attack on Unborn Children and Life Itself*, (Moncton: Stronghold Publishing Company, Ltd.), 1983, p.7.

²⁶ *Ibid.*, pp.9-11.

²⁷ See pp.20-25.

stereotypical image of the Jew as would perhaps befit Nazi propaganda posters. To deny that Ross believes that the alleged conspiracy is anything but a Jewish plot becomes difficult when one bears this in mind. The reaction of the Attorney General, David Clark, did not, however, reflect this.

After the publication of *The Real Holocaust*, Julius Israeli filed his second complaint with the Attorney General.²⁸ He cited both *Web of Deceit* and *The Real Holocaust* as being offensive in July of 1985.²⁹ Ross was subsequently investigated by the RCMP, which then submitted its findings to Attorney General Clark.³⁰ The file on Ross, though, was to be passed from office to office before Clark reached a decision. The Attorney General announced, in August of the following year, that Ross would not be charged with promoting hatred because his offensive book about abortion was not deemed to be hate literature and *Web of Deceit* was no longer available.³¹ One might surmise that the sensitivity of the abortion issue deterred Clark from labeling *The Real Holocaust* as hate literature because a broad segment of the public might share Ross's pro-life stance.³² However, by refusing to press charges against Ross because *Web of Deceit* was out of print, Clark practically admitted that he deemed it to be hate literature as defined by Criminal Code 319 section two:

Every one who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of (a) an indictable offense and is liable to imprisonment for a term

²⁸ "Israeli says he's filed complaint against Ross," *The Moncton Times-Transcript*, July 24, 1984. The article also points out that Clark had been reluctant to act on the first complaint because it would have been too difficult to build a case. Furthermore, Israeli's complaint included Ross's letters to the editor of the *Times-Transcript*.

²⁹ Ron Csillag, "NB's attorney general is examining the Ross case," *CJN*, November 14, 1985, p.3.

³⁰ *Ibid.*

³¹ Ron Csillag, "Ross ruling to be reviewed," *CJN*, August 21, 1986, p.12.

³² The Attorney General did not say this but it might have been wise to avoid publicly connecting Ross's views with the pro-life stance.

not exceeding two years; or (b) an offense punishable on summary conviction.³³

Soon after Clark had made his announcement, though, it was discovered by several journalists that *Web of Deceit* was available in several New Brunswick libraries.³⁴ Once more, the Ross file was examined by the Attorney General's Office. In September of 1986 Clark stated that there would be no charges laid against Ross for the same reasons he had given the previous month.³⁵ Despite the fact that Ross's book was indeed available, it seemed that Ross would not be charged and the investigation was dismissed until Julius Israeli filed a third complaint in March of 1987 after having found three copies of *Web of Deceit* in a local supermarket.³⁶ Attorney General Clark responded the following month by stating that he believed there to be insufficient evidence with which to convict Ross and that because the author was no longer distributing the books he could not be held responsible if the book was still in circulation.³⁷

The reluctance of the Attorney General to press criminal charges probably played a role in Ross's publication of another book and a pamphlet in 1987. By the time he wrote the book, *Spectre of Power*, Ross, perhaps feeling confident because no charges had been brought against him, stated his views much more explicitly. He began this book

³³ Department of Justice Canada, "Section 319: Public Incitement of Hatred," *Consolidated Statutes and Regulations: Criminal Code*, August 31, 2001, <<http://laws.justice.gc.ca/en/C-46/39387.html>> (March 17, 2002). Unlike the first section of the statute, this section does not make the likelihood of an ensuing breach of the peace a condition for prosecution and it would therefore seem that Ross could be convicted under the second section.

³⁴ Ron Csillag, "Ross ruling to be reviewed," *CJN*, August 21, 1986, p.12.

³⁵ Ron Csillag, "No charges against Ross," *CJN*, September 25, 1986.

³⁶ Paul Lungen, "Another complaint filed against Malcolm Ross," *CJN*, March 26, 1987. In interview Israeli stated he found many more than three copies of the book (but could not say when) and that he bought up to two hundred copies and sent them to the Attorney General, Canadian Jewish organizations and others.

³⁷ Paul Lungen, "Ross decision draws fire," *CJN*, April 30, 1987, p.1. This would soon prove to be a loophole for distributing Ross's books. One of Ross's supporters, Matin Yaczan, a professor of mathematics at the University of New Brunswick, and his wife sold Ross's books. However, because none of them were ever deemed to be hate literature in a court of law, the Yaczans were free to do so.

by countering his critics because by this point Julius Israeli's was not the only voice of discontent.³⁸ Often, Ross's attempts to respond to his critics amount to name calling and accusations of being part of the alleged conspiracy. After detailing the way in which he was investigated Ross concluded:

In this summary of Zionist, media, and government attempts to silence, intimidate, or else discredit me, I hope I have been able to show how their use of buzz words, smear tactics, and repetition has been used to condition the public into believing that I am guilty regardless of whether or not charges were laid. In my correspondence with Prof. R. Clarence Lang, Ph.D., I came to the realization that I was a victim of a most clever set-up which had often been used in the past against others.³⁹

Considering that Ross had just recounted the efforts of the Canadian Jewish Congress, Audrey Lampert (the only Jewish School Board trustee), and B'nai Brith in a way that suggests they were asserting an abnormal amount of "control" over such offices as the Attorney General's, the New Brunswick Teacher's Association and the School Board it is clearest in *Spectre of Power* that Ross believes his original "conspiracy" to be a Jewish plot. The second part of the book includes chapters titled "Is There a Conspiracy," "Judaism on Jesus and Christianity," "The Historic Church and Judaism," and "The Church and Society After the Holocaust."⁴⁰ These titles make the target of Ross's venom obvious enough. The same themes touched upon in these chapters make up the arguments presented in the pamphlet called *Christianity vs. Judeo-Christianity (The*

³⁸ Ross, *Spectre of Power*, (Moncton: Stronghold Publishing Company, Ltd.), 1987, see pp.1-37. In these chapters Ross recounts the events that have been unfolding and states that he has been attacked by several detractors.

³⁹ *Ibid.*, p.36. Clarence Lang is a fellow Holocaust denier who has published articles in the Institute for Historical Revisionism's journal.

⁴⁰ *Ibid.* The direction, which these chapters take, is seen in the following: "My chief concern regarding Judaism is the definite tendency to belittle the Christian Faith and its Founder." P. 53.

Battle for Truth). The theme of each of these is summed up best in the introduction to the pamphlet:

I believe the greatest enemy Christianity faces today is that which Jesus Christ referred to in His warning, "Beware of the leaven of the Pharisees." I hope to show that the religion he warned his disciples about is alive and well today, and that in fact it has been joined to Christianity in the most unusual of unions, forming what is known as Judeo-Christianity.⁴¹

What is interesting about the pamphlet, other than the direct way in which Ross attacks Judaism and Jews, is that it is the transcript of a lecture given by Ross and that he identifies himself as the Executive Director of the Maritime Branch of the Christian Defense League on the title page.⁴²

The clarity with which Ross expounded his views in *Spectre of Power* gave many people in New Brunswick who had complained about him hope that it would be possible to prosecute Ross under hate literature laws. Another reason why they believed action might be taken was that there had been a change in provincial government by late 1987. When he was leader of the opposition in the Conservative Hatfield government Frank McKenna had been a vocal opponent of Malcolm Ross.⁴³ Therefore, when he became Premier and replaced Attorney General David Clark with James Lockyer, a Moncton native, legal action against Ross was expected. As early as December of 1987, however, Lockyer had made a public statement saying that he would not reopen the case because federal law would guarantee Ross protection if his views were deemed to be sincerely

⁴¹ Ross, *Christianity vs. Judeo-Christianity (The Battle for Truth)*, (Moncton: Stronghold Publishing Company, Ltd.), 1987, p.3.

⁴² When, where and to whom this lecture was given is unknown. Very little is known about the Christian Defense League. Warren Kinsella says that they are the group who raised money for James Keegstra's defense. Ross denies really knowing who they were or what they might stand for when he agreed to become their executive director in the Maritimes. He did not explain who they were either. It is unclear whether there was any link between this group and a group of the same name in the United States.

⁴³ "McKenna won't intervene to oust anti-Semitic teacher," *The Montreal Gazette*, March 26, 1988, p.A10.

held religious beliefs.⁴⁴ By March of 1988, Lockyer announced that, despite there having been no complaint about it, *Spectre of Power* was being examined by the Attorney General's Office with the hope that it might provide the evidence necessary to suggest an amendment to the federal hate laws.⁴⁵

If there were many citizens who felt that justice had not been served by the Attorney General, a spark of hope was ignited as the possibility of criminal charges became less and less likely. On April 21, 1988 David Attis, the father of three children who went to school in the district where Malcolm Ross taught, filed a complaint with the New Brunswick Human Rights Commission.⁴⁶ Attis's complaint was aimed at the school board's inaction. It argued that by keeping Ross on staff, the school board tacitly approved of his views and therefore tainted the school environment with anti-Semitism.⁴⁷ Although this complaint was lodged in April of 1988, the Board of Inquiry set up by the New Brunswick Human Rights Commission did not commence hearing testimony until December of 1990. This was because the proceedings were hindered by a barrage of legal delay tactics by the school board and by Ross who had by this point hired Douglas Christie as his attorney.

Before one can continue with a discussion of the legal battle which ensued, Ross's choice of lawyer, his self-identification as Executive Director of the Maritime Branch of the Christian Defense League, and his statements to the media must be

⁴⁴ Don Richardson, "Province Won't Reopen Case Against Teacher Malcolm Ross," *The Telegraph Journal*, Saint John N.B., December 10, 1987, p.7. Indeed, as the case dragged on the view that his views were religious beliefs was never questioned in a court of law. Instead it was argued that there are justifiable limitations on speech and religious freedom as guaranteed under the Canadian Charter of Rights and Freedoms, thus by-passing the need to examine this aspect of Ross's beliefs.

⁴⁵ "Lockyer hopes new book brings revised hate laws," *The Telegraph Journal*, March 9, 1988.

⁴⁶ Brian Bruce, "Board of Inquiry Report," as published in *The University of New Brunswick Law Journal*, v.41, 1992, p.238.

discussed. Douglas Christie is a Victoria, British Columbia-based lawyer who has gained notoriety for having defended the equally notorious Holocaust denier Ernst Zundel and the Alberta school teacher James Keegstra. Keegstra's legal battle was almost coterminous with the beginning of Ross's and bears several similarities that certainly must have played a role in the New Brunswick Attorney General's decision against prosecuting Ross. Like Ross, Keegstra was a school teacher, but, unlike Ross, Keegstra taught his views to his young students in the Alberta town of Eckville where he was also the mayor. Keegstra was prosecuted using Canada's anti-hate legislation; the same law that was being considered to prosecute Ross. Zundel, on the other hand, published Holocaust denial literature in Canada for distribution around the world. He was prosecuted under an older law banning the spreading of false news. Both of these cases found their way to the Supreme Court of Canada and proved difficult for the provinces to win. The difficulty faced by the Ontario and Alberta governments certainly deterred the New Brunswick Attorney General from pressing charges against Ross.⁴⁸ The fact that Ross retained the same lawyer as Keegstra and Zundel is particularly enlightening when considered in conjunction with his public announcement that he was the Executive Maritime Director of the Christian Defense League. The Christian Defense League, as Warren Kinsella points out in his book about extreme-right groups in Canada, is a group whose leaders are known anti-Semites and which had raised funds for the defense of James Keegstra.⁴⁹

⁴⁷ *Ibid.*, p.239. See Appendix I for the full text of the Attis complaint.

⁴⁸ It should be noted, however, that the first complaints against Ross were made before these cases had begun. It was only because swift action was not taken that the Ross case actually began later.

⁴⁹ Warren Kinsella, *Web of Hate*, (Toronto: Harper Collins Publishers, Ltd.), 1994, pp.317-318.

By the time that David Attis had filed his complaint with the New Brunswick Human Rights Commission, Malcolm Ross was no longer a name familiar only to the residents of Moncton. As early as 1979, Ross had written a letter to *Speak Up*, a publication whose readership could easily be said to share Ross's anti-Semitic views, in which he identified himself as a member of the "Right."⁵⁰ The breadth of the readership of *Speak Up* is perhaps narrow, but, in the time leading up to the Human Rights Commission's hearings, Ross had taken opportunities to make himself heard in other public forums. The *Moncton Times-Transcript* published two of Ross's letters in 1984 and 1985.⁵¹ Both of these letters are signed, Malcolm Ross, Executive Director, Maritime Branch, Christian Defense League of Canada. In the second letter, Ross describes the views held by Keegstra, Zundel and himself:

Keegstra and Zundel are concerned with the Holocaust as an exaggeration which has brought about much negative feeling towards the German people. They also see it as propaganda designed to undermine confidence in the values of our Western Christian civilization. But the Holocaust is not the central part of their message as is indicated by Attis and the various Jewish groups. Their main message is the existence of an *international Jewish conspiracy* working in and through secret societies that have long been associated with world revolution. *We believe* the important obligation concerned Canadians should undertake is to find and unmask the forces destroying our society.⁵²[emphasis added]

If his views were in any way hidden in his books, this portion of his letter to the editor clearly and undeniably labels the alleged conspiracy as a Jewish plot. Furthermore, Ross does not simply say that these are Zundel's and Keegstra's views he says, "we believe,"

⁵⁰ Malcolm Ross, "Letters," *Speak Up*, January-February 1979, p.2.

⁵¹ "Public Opinion: Letters to the Editor," *The Moncton Times-Transcript*, hereafter cited as *Times-Transcript*, June 27, 1984; and "Letter to the Editor," *Times-Transcript*, July 10, 1985.

⁵² "Letter to the editor," *Times-Transcript*, July 10, 1985. See also the letter: "Ross will keep writing, distributing his books," *The Miramichi Leader*, October 22, 1986. Before signing the letter, Ross gives the address of his publishing company for those interested in buying his books!

and therefore shows that he, too, believes in an international Jewish conspiracy.⁵³ Ross's access to public forums was not limited to these letters however. In October of 1986 Ross was the subject of a two-part interview published in the *Northumberland News* where he was once more given the opportunity to air his views clearly to the reading public.⁵⁴ Ross was also the subject, and the guest, of a CBC Radio broadcast during this period.⁵⁵ David Attis's lawyer, Joseph Weir, would use the publicity surrounding Ross to show the Human Rights Commission's Board of Inquiry that his views were well known in the Moncton community and therefore the School Board's inaction amounted to condoning those views.

Douglas Christie is an interesting character and awareness of his background sheds light on Ross's choice of him as his lawyer. Christie has a reputation among his fellow lawyers for defending peculiar clients and for taking on what others term lost causes.⁵⁶ Besides a reputation for taking on strange cases, Christie is also known for his support of a western Canadian separation movement.⁵⁷ At the same time, Christie is difficult to pin down. He is careful to dissociate himself from his clients' beliefs. What he does admit to is a firm belief in the importance of freedom of speech and his

⁵³ These letters were included in Israeli's second complaint to Attorney General David Clark. See note 18.

⁵⁴ "Malcolm Ross Responds to Accusations," *The Northumberland News*, October 15, 1986, p.6; and "Malcolm Ross Interview, Part Two," *The Northumberland News*, October 22, 1986, p. 10.

⁵⁵ Interview with Carl Ross (no relation), Chairman of the District 15 School Board, August 24, 2000. Ross's public airing of his views contributed to the Attis argument before the Human Rights Commission's Board of Inquiry; that is that the public nature of Ross's views helped create a poisoned environment in District 15, and that by not dismissing Ross the School Board was condoning his views. Interview with David Attis and Joseph Weir, August 24, 2000. Ross was the subject of CBC Sunday Morning on January 26, 1987. In December of 1991, the CBC radio show, *As It Happens*, would again focus on Ross.

⁵⁶ Kirk Makin, "Lawyer is called a maverick," *The Globe and Mail*, March 1, 1985, pp. 1 & 14. One example cited in this article is of Christie defending a man who stole a turkey because it had mistakenly been advertised as selling for \$0.00.

⁵⁷ *Ibid.*

willingness to fight for it.⁵⁸ It is this willingness to fight that has led him to defend Ernst Zundel, James Keegstra and Malcolm Ross. In defending all three Christie argued that it was their *Charter Rights* that were being infringed upon.

Before David Attis filed his complaint with the New Brunswick Human Rights Commission there were other efforts that were made to resolve the “Ross problem.” Although they were perhaps not calling for charges to be laid, several Christian leaders spoke out against Ross’s beliefs and denied the evangelical basis of his claims.⁵⁹ Ross was openly condemned by the Roman Catholic archdiocese of Saint John and by Reverend James Leiland of the United Church.⁶⁰ The president of the National Society of Acadians, who was also the co-chairman of the Canadian Council of Christians and Jews, Leger Comeau, decried the inadequacy of the Criminal Code if it could not be used to charge Ross.⁶¹ By 1987, the United Church was amongst those calling for Ross to be charged with wilfully promoting hatred.⁶² The League for Human Rights of B’nai Brith also demanded that the Attorney General’s Office take legal action against Ross.⁶³ The Maritime Jewish community, too, became vocal in its demand that Ross be prosecuted. In a press statement released by the Atlantic Jewish Council in April of 1987, M. Lee

⁵⁸ Kathy Gannon, “Face to Face: The Herald’s Kathy Gannon chats with WCC founder and Jim Keegstra’s lawyer, Doug Christie,” *The Lethbridge Herald*, June 30, 1984. The WCC is the Western Concept party, which stood for western separatism and of which Christie was a founding member. See also: Shona McKay, “The unpopular defender,” *Macleans*, March 11, 1985.

⁵⁹ Tom Harpur, “A question for all Churches: How did anti-Semitism start?” *The Toronto Star*, July 28, 1985. Before this date, there was relatively little written about Ross’s case in any of the major Canadian newspapers. Most of what was written was found in the *CJN* and local newspapers. Following Keegstra’s first conviction (ultimately, Keegstra was tried and convicted twice and his case went before the Supreme Court of Canada twice), the media across Canada began paying more attention to the Ross case.

⁶⁰ Paul Lungen, “Ross statements draw Catholic ire,” *CJN*, December 18, 1986. One of Ross’s staunchest supporters during the HRC Board of Inquiry, though, was a Catholic priest, Father Mercereau. Interview with Charles Perry, reporter for *The Moncton Times-Transcript*, August 25, 2000.

⁶¹ Wendy Rosen, “Acadian leader Comeau slams Ross,” *CJN*, June 11, 1987.

⁶² Wendy Rosen, “United Church calls for probe of Ross,” *CJN*, May 28, 1987.

⁶³ “N.B. rules out charge of hate literature,” *The Montreal Gazette*, April 23, 1987, p.C16.

Cohen, the group's president at the time, expressed the Atlantic Jewish community's dissatisfaction with the way the case had been handled by the Attorney General:

Mr. Clark, as Attorney General is charged with the responsibility of upholding the Criminal Code of Canada. In declining to prosecute on the basis of uncertainty of winning a conviction, he has negated his role as Attorney General and has assumed the role of a judge. There is a statute in our country which categorizes hate-mongering as a crime. Refusing to prosecute a man who labels Jews as the "Synagogue of Satan" and as a "cancer within Christianity," can only be understood as a refusal to recognize section 281.2 of the Criminal Code. [N.B.: The same statute is now number 319 of the Criminal Code.]⁶⁴

Other means of putting a stop to Ross, who continued to write books throughout most of this time, were also being suggested. The Atlantic Jewish Council began to demand that the District 15 School Board investigate and decertify Ross.⁶⁵

The School Board did investigate Ross's classroom activities but, unlike the Keegstra case, it was found that Ross did not bring his views into the classroom and therefore could not be decertified.⁶⁶ According to the then Chairman of the School Board, Carl Ross (no relation), the Board had long been trying to find a way to do away with the problems that having Malcolm Ross as a teacher created.⁶⁷ Indeed, the Board received many complaints from people within the Moncton community. It also received mail from groups as varied as the Aryan Nations, commending the School Board for its

⁶⁴ Press Statement, M. Lee Cohen, President, Atlantic Jewish Council, April 27, 1987. A confidential memorandum of the Atlantic Jewish Council, which Julius Israeli purportedly sent to Ross, and which Ross reprinted as Appendix E in *Spectre of Power*, ranks the decertification of Ross as well as the introduction of Human Rights and Holocaust studies into the New Brunswick school curriculum as extremely important. In interview, Israeli claimed that the assurance that Human Rights and Holocaust studies would be introduced into the curriculum was crucial in making the AJC accept that Ross would not be prosecuted. Considering that David Attis was an active member and one-time president of the AJC, it seems that the turn toward the Human Rights Commission was a new tack attempted when it became clear that Attorney General would not act and not a "double deal" to win an addition to the curriculum as Israeli believes.

⁶⁵ Wendy Rosen, "Council urges Ross Decertification," *CJN*, April, 1987.

⁶⁶ Wendy Rosen, "Cannot decertify Ross now," *CJN*, March 19, 1987.

⁶⁷ Interview with Carl Ross, August 24, 2000.

inaction, and the Atlantic Jewish Council, demanding action.⁶⁸ Furthermore, the Board began to feel that the issue was drawing attention away from other issues more relevant to education.⁶⁹ In response, the School Board created a three member, full-time committee devoted solely to the Malcolm Ross issue. This committee consisted of the chair, Carl Ross, the Superintendent, Ross MacCallum, and a lawyer for the School Board. The method employed by the School Board, which had elicited the opinions of leading labor lawyers in Moncton, was to reprimand Ross for his activities. The idea behind such action was that once the first, verbal reprimand had been made, subsequent actions by Ross would be deemed to be insubordination and therefore the issue would not be his outside activity.⁷⁰ This was the method preferred because the School Board wanted to avoid setting a precedent where a teacher's expressions outside the classroom could be used to dismiss him or her. On the other hand, Carl Ross maintains that if a single individual had come forward when the School Board was investigating Ross and said that Ross had aired his views in the classroom the Board would have been eased out of its dilemma because it would have had the grounds to dismiss Ross.⁷¹ Israeli had complained to the School Board three times in the spring of 1978. The Chairman of the Human Rights Commission, Noel Kinsella, wrote of his concern to the School Board in the summer of 1978. Ross had published his first book earlier in 1978. Therefore it is difficult to believe that the School Board dealt with the problem as swiftly as possible if

⁶⁸ *Ibid.* Carl Ross testified that the Board was receiving 10 to 20 letters a week about Ross.

⁶⁹ *Ibid.* Carl Ross claims to have spent approximately ten hours a week dealing with the issue; time he feels could have been more appropriately spent on improving curriculum and the education system.

⁷⁰ *Ibid.*

⁷¹ *Ibid.* There were in fact claims that Ross had made racist statements about "blacks in Rhodesia" but they were hearsay accusations and nobody came forward who had personally heard Ross make any racist remarks.

so little had been achieved by 1987.⁷² On the other hand, it is quite likely that it wanted to deal with the issue as quietly as possible to avoid confrontation with the New Brunswick Teacher's Association and perhaps Ross as well. Responding to the accusation that the School Board acted too slowly, Carl Ross said that the School Board was never slow in reacting but that there were elements involved in the issue, such as children, employers and employees, that made it difficult to deal with before the media.⁷³ Indeed, all indications show that the School Board wanted the Malcolm Ross "problem" to go away quietly.

While it may be true that the School Board found that having to justify its actions to the media might infringe upon the right to privacy of the students and the employees, it is also true that the Board was reluctant to act on two suggestions made to it by one of its own members, Audrey Lampert, in 1987.⁷⁴ In one case Lampert made a motion recommending that the Board release the findings of the Review Committee and in the second she suggested that the Board make a public statement "rejecting all forms of racism and hatemongering."⁷⁵ These suggestions failed because nobody on the Board seconded them. In March of 1988, though, the Board issued Ross a written reprimand which warned that further publication would be followed by disciplinary action and

⁷² In all fairness, it must be admitted that it should not have fallen to the school board to deal with a matter that the Attorney General refused to resolve. On the other hand, there were instances in which the Board refused to take simple measures to denounce racism.

⁷³ *Ibid.* The same argument would be made when the School Board refused to submit the findings of its investigation, Ross's employment record and the names of Ross's students to the Board of Inquiry. It should be noted, though, that despite its apparent lack of decisive action, the School Board did try to ensure that Ross was not teaching his views to his students by monitoring his classes.

⁷⁴ Audrey Lampert's son, Leigh, was one of the two children who testified before the Board of Inquiry. She was also the only Jewish member of the School Board.

⁷⁵ Brian Bruce, "Board of Inquiry Report," *The University of New Brunswick Law Journal* hereafter cited as *UNB L-J*, v.41, 1992, p.244. The argument that the investigation results should not be released to protect the privacy of students and employees of the school board is acceptable. That nobody seconded a motion to reject racism, however, is astounding and quite beyond comprehension.

perhaps even dismissal.⁷⁶ This reprimand, which came to be called the “gag order,” was only held in place until September of 1989.⁷⁷ Like the Review Committee which hoped to discover someone who had witnessed Ross making racial slurs in the classroom, the “gag order” would only help remove Ross from the classroom if Ross published again or made his views known in a public forum. By 1988 Ross had published the last of his books and when the Board of Inquiry began hearings in December of 1990 Ross and the School Board would find themselves on the same side of the courtroom.

Following David Attis’s complaint against the School Board, the New Brunswick Human Rights Commission took on the role of mediator and attempted to resolve the issue without resorting to a hearing.⁷⁸ When it was determined that the issue could not be resolved through mediation, the Commission established a one man Board of Inquiry to be chaired by University of New Brunswick law professor, Brian Bruce.⁷⁹ It should be noted that this was not so simple a procedure. The Human Rights Commission, specifically, its Chairman, Noel Kinsella, had to request that the Minister of Labour, Mike McKee, create the Board of Inquiry. Therefore, even though the Attis complaint was filed in April, it was not until September of 1988 that the Board of Inquiry was established.⁸⁰ The hearings that were to be held by the Board of Inquiry did begin until December of 1990. This was because of a barrage of suits attempting to prevent it from moving forward.

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

⁷⁸ Brian Bruce, Interview by M.A. Bellezza, August 22, 2000, audio cassette and notes in personal files.

⁷⁹ *Ibid.* Brian Bruce was selected because his field of expertise is labour legislation and he is active in labour mediation, not human rights issues.

⁸⁰ Brian Bruce, “Board of Inquiry Report,” *UNB L-J*, v.41, 1992, p.238.

Chapter III

The Legal Side: The Human Rights Tribunal, Appeals and Cross-Appeals, and the Supreme Court

Other than Canada's anti-hate legislation, there is no law that addresses cases such as Ross's. There is no portion of the New Brunswick *Human Rights Act* that addresses hate literature. Nor there is there any section that deals with teachers who espouse anti-Semitic views.¹ Therefore, when David Attis decided to file a complaint against Ross, he and his lawyer, Joseph Weir, had to read the legislation creatively.

Section 5 of the New Brunswick *Human Rights Act* reads:

5(1) No person, directly or indirectly, alone or with another, by himself or by the interposition of another, shall

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

because of race, colour, religion, national origin, ancestry, place of origin, age, physical disability, mental disability, marital status, sexual orientation or sex.²

In his complaint, David Attis contended that by its inaction and failure to remedy the situation created by Ross's presence as an employee of the school district the School Board had violated this section of the *Human Rights Act*. Thus it was not Ross, directly, who would be investigated by the Board of Inquiry but the School Board of District 15. It is therefore not surprising that the first attempt to prevent the Board of Inquiry from

¹ Most of the legislation is geared toward discrimination in the public sector and the rendering of services.

² *The New Brunswick Human Rights Act*, R.S.N.B. 1973, c. H-11.

beginning its hearings was made by the Board of School Trustees of District 15 and the New Brunswick Teachers' Federation.

In their applications to the Court of the Queen's Bench of New Brunswick these parties sought, by way of judicial review, to prohibit the proceedings of the inquiry. In his decision, Judge Miller examined the definitions and previous uses by the courts of the words service, discrimination and aggrieved. In looking at the word service he cited *Gay Alliance v. Vancouver Sun*, 97 D.L.R. (3d) 577, a case in which the Gay Alliance argued they had been discriminated against when the *Vancouver Sun* refused to print an advertisement for a gay phone service, and quoted Justice Martland, for the majority, in limiting services to those offered in bars, restaurants, service stations, public transport and utilities.³ He then added that it was the role of the legislature and not the court to broaden the definition of the terms within the *Act*.⁴ In examining the word discrimination, Judge Miller referred back to the *Act* and stated that the complaint of discrimination had to specify in what way the aggrieved party had been discriminated against.⁵ He found that the Attis complaint was not clear enough to give the Board of Inquiry an exact description of what it should be examining and the School Board a clear understanding of the allegations with which it would be faced.⁶ Judge Miller stated that because neither David Attis, nor his children, had ever had contact with Ross they could

³ *In the Court of the Queen's Bench of New Brunswick, Trial Division, Judicial District of Moncton, In the Matter of the New Brunswick Human Rights Act, R.S.N.B. 1973, c. H-11. And in the Matter of a Board of Inquiry Appointed to Investigate a Complaint Against the Board of School Trustees, District No. 15.* M/M/278/88 and M/M/279/88. Judgment, p. 15.

⁴ *Ibid.*, p. 19.

⁵ *Ibid.*, p. 22.

⁶ *Ibid.*

not be considered to be aggrieved parties.⁷ Referring to a Saskatchewan Human Rights Commission case, Judge Miller used the following definition of discrimination:

Discrimination in a human rights context is exclusion, restriction or preference of treatment based on one of a number of protected characteristics the result of which is the prevention or impairment of the exercise of human rights and freedoms guaranteed in the Code.⁸

Using this definition, Judge Miller did not find that the School Board had discriminated against the Attis family. He thus concluded that because the complaint to the New Brunswick Human Rights Commission had not been lodged by someone who he considered to be an aggrieved party the order establishing the Board of Inquiry had to be quashed.⁹ In deciding this matter Judge Miller went beyond the issues that are normally considered for judicial review and delved into the details of the case.

Normally it would be the role of the Board of Inquiry to decide whether discrimination had occurred. Thus the Minister of Labour, the Human Rights Commission, the Canadian Jewish Congress and David Attis decided to appeal the decision to the Court of Appeal of New Brunswick arguing that Judge Miller had “usurp[ed] the Board of Inquiry’s statutorily assigned rights and duties to hear and adjudicate upon the matter.”¹⁰ In his judgment for the Appeal Court’s majority, Chief Justice Stratton stated that while the case did lend itself to judicial review to determine jurisdiction, it should be left to that tribunal to determine the meaning of words used in

⁷ *Ibid.*, p.23.

⁸ *Ibid.*, p.24.

⁹ *Ibid.*, p.25. N.B. Judge Miller used the term “quash” incorrectly in this instance. The Court of Appeal would point this out.

¹⁰ *In the Court of Appeal of New Brunswick, Stratton, C.J.N.B., Hoyt and Ryan, JJ. A, In the Matter of the New Brunswick Human Rights Act, R.S.N.B. 1973, c. H-11. And in the Matter of a Board of Inquiry Appointed to Investigate a Complaint Against the Board of School Trustees, District No. 15. 31/89/CA, 36/80/CA, 37/89/CA. Judgment, p. 6.*

the statute.¹¹ Turning to the question of definition, he also noted that the trend in the Supreme Court of Canada was to adopt broader interpretation in cases like this one.¹² Justice Stratton was therefore willing to accept that public education was meant to be included in the *Human Rights Act*'s protection for access to services.¹³ Addressing the question of whether David Attis and his children could be considered aggrieved parties, Justice Stratton pointed out that Judge Miller, having had limited facts of the case brought before him, risked moving beyond judicial review and judging the merits of the case.¹⁴ To determine whether David Attis could rightfully be considered an aggrieved party, Justice Stratton turned to the *Human Rights Act*, Section 17 which read: "Any person claiming to be aggrieved because of an alleged violation of this Act may make a complaint in writing to the Commission in a form prescribed by the Commission."¹⁵ The wording of the statute made it unnecessary for David Attis to prove himself to be an aggrieved party, thereby negating Judge Miller's argument that he was not. Similarly, the statute simply states that the alleged complaint need be reported on a form provided by the Commission, leaving the specificity of the complaint to the discretion of the Board of Inquiry. This should not have been part of the process of judicial review.¹⁶ In a final, and scathing, reprimand to the lower court, Justice Stratton added that because the Board

¹¹ *Ibid.*, p.8, 10. However, because these issues had been touched upon by Judge Miller, the Court of Appeal had to address them as well. It is clear from the judgment, though, that Justice Stratton believed that Judge Miller had overstepped his role in judicial review.

¹² *Ibid.*, p.16.

¹³ *Ibid.*, p.20.

¹⁴ *Ibid.*

¹⁵ *The New Brunswick Human Rights Act*, R.S.N.B. 1973, c. H-11.

¹⁶ *Court of Appeal, 31 89 CA, 36 89 CA, 37 89 CA*, Judgment, p.25. In this instance, Justice Stratton once more reiterated that the Court had in considering this issue usurped the rights and duties of the Board of Inquiry.

had been created by the Minister of Labour in his administrative capacity the order could not be quashed.¹⁷ The Appeals Court thus set aside Judge Miller's decision.

With this decision, handed down on September 8th, 1989, it seemed that the Board of Inquiry could soon commence hearings. Instead, Malcolm Ross, who had not been directly involved as a respondent nor as an appellant to this point, made two applications to the Court of the Queen's Bench of New Brunswick.¹⁸ The first application made in January of 1990 requested an order of examination for Brian Bruce, the Chair of the Board of Inquiry; the Minister of Labour, Mike McKee; and Noel Kinsella, the New Brunswick Human Rights Commissioner.¹⁹ This request was made because Ross was attempting to argue that he suspected the Board was biased against him. This application was denied because the right to examination for discovery is only granted during an action and not an application. Furthermore, Justice Landry added that for examination to be allowed Ross would have had to submit an affidavit showing proof of bias.²⁰ Ross's affidavit included a listing of remarks made by several New Brunswick politicians with regard to his case and nothing about Brian Bruce.²¹ Justice Landry stated that as there was scant evidence concerning Brian Bruce he could not allow examination on discovery

¹⁷ *Ibid.*, p.26. This remark refers to the fact that Judge Miller had used the wrong legal terminology. The order might have been prohibited but not quashed.

¹⁸ He had earlier (October 26, 1989) tried to appeal the result of the appeal won by David Attis et. al. to the Supreme Court of Canada but his application was dismissed. See the decision of Ross's appeal to the New Brunswick Court of Appeal, p.4, cited in footnote 25.

¹⁹ *In the Court of the Queen's Bench of New Brunswick, Trial Division, Judicial District of Moncton, In the Matter of the New Brunswick Human Rights Act, R.S.N.B. 1973, c. H-11. And in the Matter of a Board of Inquiry Appointed to Investigate a Complaint Against the Board of School Trustees, District No. 15. M/M/265/89. Judgment, pp.3-4. Interestingly, Ross represented himself at this juncture.*

²⁰ *Ibid.*, p.5.

²¹ *Ibid.*

and that examination of the Minister of Labour and the Commissioner of the Human Rights Commission was not warranted or proper.²²

In his second application, made the same day a decision was rendered on the first application, Ross sought judicial review of the Jurisdiction of the Board of Inquiry and again argued “that the Board of Inquiry [was] established in circumstances that g[a]ve rise to a reasonable apprehension of bias.”²³ Justice Landry, in this decision, listed the evidence submitted by Ross:

The appellant has offered, and the court has received in evidence, a total of 24 newspaper clippings, a seven minute video recording consisting of eight items of telecast, and three letters or memos in which government officials and other individuals made or are alleged to have made statements which the appellant pretends give rise to a reasonable apprehension of bias.²⁴

Although Justice Landry gave reasons why each person whose comments he felt were relevant had not exhibited bias toward Ross, the accusation that Brian Bruce might be biased was particularly exaggerated. Brian Bruce was, and still is, a tenured professor of law at the University of New Brunswick whose expertise lies in labour legislation. As Justice Landry noted in his decision, there had been nineteen Boards of Inquiry created by the Human Rights Commission, thirteen different chairs had been appointed, seven of whom had served once and six of whom (including Brian Bruce) had served twice.²⁵ It should also be added that Bruce, aside from being a professor of law, is often involved in settling labour disputes as he is a professional mediator.²⁶ Therefore it should be stressed

²² *Ibid.*

²³ *In the Court of the Queen's Bench of New Brunswick, Trial Division, Judicial District of Moncton, In the Matter of the New Brunswick Human Rights Act, R.S.N.B. 1973, c. H-11. And in the Matter of a Board of Inquiry Appointed to Investigate a Complaint Against the Board of School Trustees, District No. 15. M/M/265/89. Judgment, p. 3.*

²⁴ *Ibid.*, p.4.

²⁵ *Ibid.*, p.8.

²⁶ Interview with Brian Bruce, August 22, 2000.

that Bruce, through his professional experience, was well accustomed to mediating disputes and had no professional or political gain to make. Ross's accusation of bias, which bordered on conspiracy theory, was closely linked to the fact that the Board of Inquiry had been appointed by the Minister of Labour the same day the request was made by the Human Rights Commissioner.

The fact that the Minister had been so quick in appointing a Chair of the Board of Inquiry was to play a key role in Ross's appeal of Justice Landry's decision. At the appeal level, Ross once more represented himself, but it is likely that he had already consulted with Douglas Christie, as his six grounds for appeal show:

1. That the Learned Trial Judge erred in denying the appellant the right to examine the Minister of Labour and the Human Rights Commissioner and the Board of Inquiry, pursuant to Rule 33.03(1).
2. That the Learned Trial Judge erred in his analysis of the concept of reasonable apprehension of bias in saying the bias had to be proven in the Board of Inquiry when it was the alleged systemic bias of the process of appointment which should have been considered.
3. That the Learned Trial Judge erred in his assessment of reasonable apprehension of bias in the process of appointment by not considering the relationship of the Minister of Labour, the Premier and other Cabinet Ministers to the prosecution.
4. That the appointment of the Board of Inquiry offends fundamental justice since the "consummate care" which is reasonable (sic) to be expected when dealing with the human rights of individuals is lacking.
5. That the complaint of David Attis, the method of appointment of the Board of Inquiry, and the requirement to submit to the Inquiry constitute an infringement of the fundamental freedom of the appellant, Malcolm Ross, under the CHARTER OF RIGHTS AND FREEDOMS sections 2a and 2b and the appellant Malcolm Ross seeks an order of this Honourable Court quashing the appointment of the one-man Board of Inquiry, Brian Bruce, by which he was appointed to inquire into the complaint of David Attis on the 1st day of September, A.D. 1988, and ordering the Minister of Labour to cease and desist from further infringement of the appellant's freedom of conscience, religion, thought, belief, and opinion and the expression thereof pursuant to Section 24(1) of the CHARTER OF RIGHTS AND FREEDOMS, such an order being the only appropriate and just remedy in the circumstances.

6. Section 7 of the CHARTER OF RIGHTS AND FREEDOMS where it is noted, “Everyone has the right to life, liberty, and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.” Take further notice that the appellant will argue a breach of section 7 of the Charter for the same grounds as the alleged breach of 2(b) of the Charter, seeking the same remedy under section 24 subsection 2, as outlined in the original Notice of Appeal, a copy whereof is attached.²⁷

Several things are apparent in Ross’s grounds for appeal. That he was likely given legal advice when drawing them up is relatively clear, especially when one considers that Douglas Christie was soon to represent Ross before the Board of Inquiry. He also refers to his charter rights being infringed upon by the Attis complaint and Board of Inquiry despite the fact that it was the School Board that was being accused of discrimination. Perhaps most telling in this statement, however, are the things that later resurfaced as the case dragged on; particularly his reliance on the *Charter of Human Rights and Freedoms* as an argument before the court. Ross’s ill-defined allegation that there was a relationship between different political actors that created systemic bias against him is another theme that continued through the case. One should not forget that the entire affair began because Ross argued in his book that there exists a cabal of world conspirators whose goal it is to eliminate the Christian “race” and rule the planet. In similar paranoid style, it seems that Ross’s allegations insinuated a conspiracy perpetrated against him by the New Brunswick provincial government.

To this day, Ross mysteriously states that there were relationships between members of the School Board, the provincial government, and others involved with his

²⁷ *In the Court of Appeal of New Brunswick, In the Matter of the New Brunswick Human Rights Act, R.S.N.B. 1973, c. H-11. And in the Matter of a Board of Inquiry Appointed to Investigate a Complaint Against the Board of School Trustees, District No. 15. 41/90/CA, Judgment. pp. 5-6.*

case.²⁸ While the small size of New Brunswick's population makes it more likely for people to know their M.L.A.'s personally, the only relationship between Mike McKee and Frank McKenna, for example, was their membership in the Liberal Party of the province. Mike McKee is from Moncton and would certainly know some of the residents. David Attis's first cousin is Audrey Lampert, who was on the School Board at the time. While these relationships are quite normal within a small population, Malcolm Ross perceived a conspiracy at work against him.

In his reasons for the judgment, Chief Justice Stratton, with whom both Justices Ryan and Hoyt concurred, saw three issues raised by the grounds for appeal submitted by Ross. These were whether he was entitled to an Order for the examination for discovery, whether there was reasonable apprehension of bias and the application of Charter rights in the case.²⁹ The entitlement to the right of discovery was denied, using the exact arguments based on the *Rules of Court* that had been used by Justice Landry in the lower court.³⁰ The majority of statements that were made about Ross were found to be in relation to the controversy surrounding his books and the public debate that had surrounded the decision not to charge Ross under Canadian anti-hate legislation.³¹ The comments were made by such actors as Premier Frank McKenna, Noel Kinsella, of the Human Rights Commission, and James Lockyer, the Attorney General in the McKenna government in relation to the Board of Inquiry. They were put to the accepted test taken from the dissenting decision in *The Committee for Justice and Liberty v. The National*

²⁸ Interview with Malcolm Ross, August 24, 2000.

²⁹ *In the Court of Appeal of New Brunswick, In the Matter of the New Brunswick Human Rights Act, R.S.N.B. 1973, c. H-11. And in the Matter of a Board of Inquiry Appointed to Investigate a Complaint Against the Board of School Trustees, District No. 15.* 41/90/CA, Judgment. pp. 6-7.

³⁰ *Ibid.*, pp.8-9.

Energy Board (1978).³² This test requires the reasonable opinion of someone informed of the case to determine bias. Ross had cited *MacBain v. Canadian Human Rights Commission (1985)* that called for “consummate care” from officials when dealing with the rights of individuals.³³ Mike McKee, as the Minister of Labour, was the one who appointed Bruce and because his statements about Ross were made when he was an opposition member questioning David Clark’s refusal to prosecute Ross they were not found to show bias.³⁴ Moving on to the question of Charter Rights, Justice Stratton pointed out that because they had not been mentioned in the lower court they could not be considered at the appeal level. He did, however, add that, “By raising these *Charter* arguments now, Mr. Ross seeks to put in issue the entire scheme of human rights legislation in New Brunswick and other Canadian jurisdictions.”³⁵ In other words, Ross’s appeal to Charter rights to preserve his freedom to publish was also bringing human rights legislation, as such, into question.

With Ross’s appeal denied, the Board of Inquiry was free to begin its proceedings. Eight days of hearings were held in December of 1990, followed by fourteen days in April and May of 1991. The inquiry was originally slated to run for one

³¹ *Ibid.*, p.11.

³² *Ibid.*, p.16.

³³ *Ibid.*, p.17. In the MacBain case, one should note, the Canadian Human Rights Commission had given the tribunal hearing the case “a copy of the resolution substantiating the case” beforehand and the CHRC also played the role of the prosecutor in the case. New Brunswick law separates the duties. The Commissioner of the Human Rights Commission requests that the Minister of Labour appoint a Board of Inquiry, ensuring that the Human Rights Commission does not choose who will chair the Board. Furthermore, one must reiterate Brian Bruce’s estimable credentials as an adjudicator.

³⁴ *Ibid.*, p.25.

³⁵ *Ibid.*, p.29. Ross had gone so far as to argue that the Board of Inquiry was being used to substitute for a police investigation. Indeed, the RCMP had already investigated Ross and some of his writings had by then been determined to constitute hate literature. The difficulty of prosecution and the fact that several of the books were no longer available were among the reasons Ross was not prosecuted. One might also note, that Mike McKee’s allegedly biased comment to David Clark in the Assembly was that by not prosecuting Ross

week. Instead, the proceedings, like the events that had led up to them, dragged on for much longer than had been anticipated. Just before the inquiry began there was an incident in Moncton in which young skinheads desecrated a local synagogue with swastikas, providing an ominous backdrop to the inquiry's commencement.³⁶ Moncton's local library displayed an exhibit of photographs of concentration camps.³⁷ During the proceedings one of those who testified was David Attis, who had made the initial complaint against the school board. In his testimony Attis stated that he wished to see Ross removed from his teaching position even if it was found that Ross did not bring his views into the classroom. Attis argued that Ross's presence alone presented a threat to the students at the school where he taught.³⁸ This was based on the idea that Ross's presence would give students the idea that his views were condoned by the school and its officials. Douglas Christie, Ross's lawyer, spared the witnesses no pains. While cross-examining David Attis he called him the "most intolerant man in existence" and after questioning Attis's fourteen year-old daughter, Christie was assaulted by a spectator who accused him of attacking the girl.³⁹ Christie's co-counsel, James Letcher who

because of the difficulty of winning a conviction, Clark cast himself in the role of judge rather than Attorney General.

³⁶ Chris Morris, "N.B. teacher faces inquiry against background of racist incidents," *The Montreal Gazette*, December 5, 1990, p.B1. For more, see: "Moncton teacher Ross faces human rights inquiry in charged atmosphere," *The Halifax Chronicle Herald*, December 5, 1990, p.A4.

³⁷ Elaine Flaherty, "Hearings set for Holocaust-disputing teacher: Complainants want author out of classroom," *The Vancouver Sun*, December 5, 1990.

³⁸ Kevin Cox, "Teacher's dismissal urged at rights hearing," *The Globe and Mail*, December 7, 1990, p.A5. and Chris Morris, "Lawyers force parent to defend anti-discrimination stance," *The Winnipeg Free Press*, December 7, 1990, p.5. This is what Attis and Joseph Weir, his attorney call the poisoned environment argument which they used in this case.

³⁹ Kevin Cox, "Witness under fire at rights hearing," *The Globe and Mail*, December 8, 1990. and Kevin Cox, "Girl weeps recounting racial taunts," *The Globe and Mail*, December 15, 1990, p.A1&A4. Christie's vicious mode of arguing in court had previously been noted in the Keegstra and Zundel trials. For more, see: Chris Morris, "Tearful Jewish teen spars with Christie," *The Winnipeg Free Press*, December 13, 1990; John Spears, "Girl, 14, weeps as she tells of racial slurs," *The Toronto Star*, December 13, 1990, p.A3; Chris Morris, "Teacher gave Hitler salute, teenager says," *The Montreal Gazette*, December 14, 1990, p.B1;

represented the Moncton school board, went so far as to suggest that it was in fact the students who shared Ross's views who were the real victims because of their "deprived backgrounds!"⁴⁰ The vicious line of questioning pursued by Christie and his co-counsel was also quite lengthy, therefore when the week allotted to the inquiry passed the proceedings were not nearly finished. Instead of putting a halt to the affair, Brian Bruce, who was conducting the inquiry, citing the lack of precedent to grant a motion to end it, decided that the inquiry should be resumed in April of 1991.⁴¹

When the inquiry was reopened on April 22, 1991, it was expected that the emotionally charged atmosphere that had enveloped the first half of the hearings would resurface.⁴² In an interesting twist and change of tactics, though, David Attis's lawyer and life-long friend, Joseph Weir, called Ernest Hodgson as a witness. Hodgson was a professor at the University of Alberta in Edmonton, a former teacher, school board trustee, and board administrator.⁴³ Hodgson "testified that this type of issue could not help but manifest itself in relations within the school and between the school and the community at large."⁴⁴ From there the hearing took on a different tone from its previous session. Christie's line of questioning turned towards questions of academic freedom as he demanded that Hodgson define what ideas or conduct would be improper for a teacher

"Girl cites hatred of Jews in Moncton school," *The Vancouver Sun*, December 13, 1990, p.A6; "Controversial lawyer offers no apologies for hard-hitting defence," *The Halifax Chronicle Herald*, December 18, 1990, p.C15; and Chris Morris, "Legal gunslinger ready to ride to aid Keegstra, Ross," *The Montreal Gazette*, December 18, 1990.

⁴⁰ Chris Morris, "Anti-Semitic pupils painted as real victims: Board defends Jews' tormentors," *Winnipeg Free Press*, December 15, 1990.

⁴¹ Paul Lungen, "Attis keeps composure on stand," *CJN*, January 17, 1991.

⁴² Elaine Flaherty, "N.B. rights commission reopens hearing on teacher Malcolm Ross," *The Montreal Gazette*, April 22, 1991, p.F8.

⁴³ Elaine Flaherty, "Legal wrangling stalls hearing of teacher accused of anti-Semitism," *The Montreal Gazette*, April 23, 1991, p.A11.

⁴⁴ Brian Bruce, "Board of Inquiry Report," *UNB Law Journal*, v.41, 1992, pp.248-249.

to engage in outside the classroom.⁴⁵ The following week, Carl Ross (no relation), the chairman of the Moncton school board, testified, explaining that he had tried to take a middle path in dealing with the situation, had attempted to follow the prescribed course of action for sanctioning a teacher, and could not have been expected to fire Malcolm Ross simply because the community called for him to do so.⁴⁶ With Hodgson and Carl Ross the last of the key witnesses had been heard and it was time for the Human Rights Commission to decide what would become of Malcolm Ross and what his future role as an employee of the School Board would be.

Considering that the complaint made by Attis held that the school board had discriminated against his children, it is not surprising that Bruce considered the testimony of the young witnesses, Yona Attis and Leigh Lampert carefully. Yona's testimony was emotionally charged and Christie's insistent manner of questioning drove the young girl to tears. Christie's brusque manner, did not, however, stop Yona from expressing herself clearly and convincingly. Indeed, young Yona was sharp-witted and even a little sassy in response to Christie.⁴⁷ The Attis complaint was based on an incident which occurred in the spring of 1988. Yona was to go see a friend participate in a gymnastics competition at Riverview High School one afternoon after school. As she and two of her friends awaited their teacher to drive them there one friend told her that the competition had

⁴⁵ Elaine Flaherty, "Lawyer recites Layton's poetry at Moncton anti-Semitism hearings," *The Montreal Gazette*, April 24, 1991, p.B4.

⁴⁶ "Moncton school board head defends policy in Ross case," *The Halifax Chronicle Herald*, April 30, 1991, pA4.

⁴⁷ See verbatim transcript of the hearing, *In the Matter of The Human Rights Act of New Brunswick and Section 5 of the Human Rights Act and A Complaint under the Human Rights Act by Mr. H. David Attis, Complainant, against the Board of School Trustees, District No. 15, Respondent*, Verbatim Inc., Margaret E Graham Discovery Service Court Reporters, Dartmouth, Nova Scotia and St. John New Brunswick, vol. 7. One should note that in nearly two hundred pages of transcript of Yona's testimony the majority (one

been moved. The gymnastics competition was now to be held at the Magnetic Hill School, where Yona's friend warned her, "Yona, you can't go there, that's where the teacher who hates Jews works" and the other friend added, "Yeah, Malcolm Ross."⁴⁸ Yona decided to attend the event despite the warning but soon found herself feeling afraid in the school's gym. She went out into the hall to call her father so that he could come there to get her. In his cross-examination, Christie asked Yona if she knew what an irrational fear was and insinuated that what she felt that spring afternoon was an irrational fear but as her testimony went on she was able to detail several instances of other students harassing her. The harassment included vile verbal attacks and insults by other students, defacing her possessions with swastikas, other students carving swastikas into their own arms and instances in which her cousin, Leigh Lampert was physically assaulted.⁴⁹ Yona also added that at a certain point her complaints about these incidents were being made almost daily to school authorities but with little change in the situation.⁵⁰ Despite Christie's attempts to insinuate that her father had created her fear of Malcolm Ross on that spring afternoon, her enumeration of the incidents at school showed that Yona had indeed had frightening experiences.⁵¹ Her testimony proved most valuable in aiding Joseph Weir's argument that Ross's presence within the School Board

hundred and fifty pages, or 75%) is cross examination by Christie. In some instances Christie went so far as to repeat the same questions in deliberate attempts to frustrate and confuse Yona.

⁴⁸ *Ibid.*, p.1132.

⁴⁹ *Ibid.*, these examples run throughout Yona's testimony. Others include having to attend school activities where the children were asked if they "loved Jesus" and being singled out in class. Also, one particularly disturbing incident involved a student and supply teacher exchanging "Heil, Hitler" salutes.

⁵⁰ *Ibid.*, p.1242.

⁵¹ See p. 1191 where Yona retorts, "They did not call me dirty David Attis's daughter, they called me dirty Jew," ending Christie's line of questioning (as to whether her father had created her fear) abruptly and succinctly.

created a poisoned environment in which young students might feel free to behave in ways Yona described.

In his discussion of his decision, Brian Bruce enumerated four points that he had considered. They were: Ross's employment record, Ross's writings and statements, the actions taken by the School Board, and the alleged effects of these. Other than Yona's testimony, the actions of the School Board were probably the deciding factor in Bruce's judgment. The evidence presented showed that there had been rumours of Ross making racist statements about "blacks in Rhodesia;" that the School Board had been informed of the concern about Malcolm Ross by the Chairman of the Human Rights Committee, Noel Kinsella as early as 1978; and that the Board had received letters of complaint from Julius Israeli three times.⁵² The evidence also showed that the School Board had done little other than monitor Ross until the controversy began to garner interest again in the mid-nineteen-eighties.⁵³ The one thing that the School Board did was to create a Review Committee in January of 1987 which investigated Ross and his effect on the community.⁵⁴ Bruce found this Committee to be of little help for several reasons. It defined community as the community linked to the Magnetic Hill School and not the entire community of District 15 and it refused to release parts of its findings.⁵⁵ The reasons given for not wanting to share the information were that they did not want to infringe upon the privacy rights of Ross's students, who were after all students with learning problems, and that they did not want to infringe upon the privacy of a teacher's

⁵² Brian Bruce, "Board of Inquiry Report," *University of New Brunswick Law Journal*, (Fredericton, New Brunswick: University of New Brunswick Law Journal, 1992), v.41, p.241.

⁵³ *Ibid.*, p.242.

⁵⁴ *Ibid.*, p.243.

⁵⁵ *Ibid.*

employment record. The findings of the Committee, though, were of little help when they were disclosed, as it was found:

1. That there appears to be no evidence to suggest that Malcolm Ross is teaching his beliefs or discussing his religious theories with staff or students.
2. That there is not (sic) evidence to suggest that the publicity surrounding Malcolm Ross has had a negative effect on the human relations within the present school or between the school and the community.⁵⁶

Carl Ross, the Chairman of the School Board, insisted that the easiest thing for them would have been for anybody to come forward with evidence that Ross had gone beyond what the Committee found and aired his views in the classroom.⁵⁷ This would have allowed the School Board to terminate Ross, and end the problems that his presence in the school created, without going through a series of reprimands first. However, Bruce stated that the Committee made no mention of a letter dated February 3rd, 1987, from Charles Devona “alleging that Malcolm Ross had expressed racist comments in class while at Birchmount School.”⁵⁸ Nor did it consider ill-effects of Ross’s presence, such as those included in the letter submitted to the Committee by the Atlantic Jewish Council.⁵⁹ What the School Board did do was send Ross a letter of reprimand which forbade him publishing or airing his views in public. This “gag-order,” as it came to be known was lifted when the provincial government introduced Policy 5006 establishing for teachers guidelines about rights and freedoms.⁶⁰

Having considered the evidence, as well as questions of law concerning the *Human Rights Act*, Bruce made his decision with the intent to find a remedy for the

⁵⁶ *Ibid.*

⁵⁷ Interview, August 24, 2000.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*, pp.243-244.

victim rather than punish the offenders. He suggested that the Department of Education follow up on its “Multicultural/Human Rights Education” with an annual review process; he ordered that the School Board adopt a policy to ensure a “learning environment that teaches respect and tolerance for individual differences;” he asked that the Department of Education amend its *Schools Act* to better define the level of professional conduct expected of teachers; and lastly he ordered the School Board to place Malcolm Ross on an unpaid leave of absence for eighteen months during which a non-teaching position was to be found for him.⁶¹ If a non-teaching position could not be found Ross would be terminated and if one was found he would have to refrain from publicizing his views to retain it.⁶²

Bruce’s decision was given in August of 1991 but the court battles were still far from over. By December of that year Malcolm Ross had made an application to the Court of the Queen’s Bench. This time represented by Christie, Ross, upon judicial review sought to have the order made by the Board of Inquiry quashed. The orders directed at the Department of Education were quashed because David Attis had not named the Department in his complaint.⁶³ The School Board was complained against because it kept Ross in its employ. Therefore it could not be asked to act beyond the

⁶⁰ *Ibid.*, p.245. After the gag-order was lifted, Ross was seen on a local television program within two months.

⁶¹ *Ibid.*, p.266-268. It does not seem that Bruce’s call for an unpaid leave of absence was meant as punishment. Indeed, when Ross was found a non-teaching position headlines decried the injustice of his having jumped the queue for the job. A paid leave of absence would certainly have been viewed similarly.

⁶² *Ibid.*, p.268.

⁶³ *In the Court of the Queen’s Bench of New Brunswick, Trial Division, Judicial District of Moncton, In the Matter of the New Brunswick Human Rights Act, R.S.N.B. 1973, c. H-11. And in the Matter of a Board of Inquiry Appointed to Investigate a Complaint Against the Board of School Trustees, District No. 15. M.M. 218 91, Judgment, p.4.*

time when Ross might not be a teacher in the district.⁶⁴ Also, Justice Creaghan was not convinced that there was a link between Ross's outside activities and events that occurred within the schools.⁶⁵ Finding, also, that Ross's Charter rights had been impinged upon, Justice Creaghan quashed the section of the Board's ruling which called for Ross to be terminated from employment should he publicize his views.⁶⁶ All that was left of Bruce's order was that Ross should be put on leave of absence without pay until a non-teaching position could be found or if one could not be found after eighteen months he would be terminated.

Ross, unsatisfied with the ruling, made an appeal while a cross-appeal was made by David Attis, the Human Rights Commission and the Canadian Jewish Congress seeking to reinstate the portions of the ruling quashed in the lower court. Chief Justice Hoyt found that the only real issue was the Charter issue and examined only this portion of the appeal. He argued that because Ross did not voice his views in the classroom and no link could be made between his outside activity and effects on the School District his removal from the classroom was incorrect.⁶⁷ In this light, Justice Hoyt decided that Ross removal from the classroom infringed on his rights in a way that could not be saved by section one of the *Charter of Human Rights and Freedoms*. With this, every section of Bruce's decision had been quashed. While this might be acceptable, legally speaking, because of the importance of respecting Charter rights, it seems that the courts had forgotten that the original complaint had been made against the School Board. The

⁶⁴ *Ibid.*, p.6.

⁶⁵ *Ibid.*, p.11.

⁶⁶ *Ibid.*, p.17.

School Board had been found to have created a poisoned environment by keeping Ross on staff and yet as the case moved beyond the Inquiry the issue became one of Ross's Charter rights. Thus the issues that the attorney generals, Clark and Lockyer, had been trying to avoid had surfaced despite their efforts. This would be the issue considered by the Supreme Court when the case was brought before it in 1995.

When the Supreme Court rendered its unanimous decision in 1996, it left Ross free to continue publishing hate literature but kept him out of the classroom. This decision is often compared to the Supreme Court's decision in the case of the Alberta Holocaust denier and school teacher, James Keegstra, who was eventually found guilty of wilfully promoting hatred. Therefore discussion of the Ross decision will be accompanied by a comparison to the Keegstra decision. It must be borne in mind, however, that the Keegstra case employed criminal legislation as a tool whereas the Ross case used human rights legislation.

⁶⁷ *In the Court of Appeal of New Brunswick, In the Matter of the New Brunswick Human Rights Act, R.S.N.B. 1973, c. H-11. And in the Matter of a Board of Inquiry Appointed to Investigate a Complaint Against the Board of School Trustees, District No. 15. 29/92/CA. Judgment, p.13.*

Chapter IV

James Keegstra and Malcolm Ross: A Comparison

The Malcolm Ross affair is often compared to that of the Eckville, Alberta schoolteacher and conspiracy theorist, James Keegstra. Both men lived in Canada and were teaching at about the same time.¹ Although both men had the same occupation and shared similar anti-Semitic views, there were important differences between the two cases that led to their being concluded very differently. In Alberta, Canada's anti-hate legislation was employed to criminally convict Keegstra of wilfully promoting hatred against an identifiable group. In New Brunswick, two Attorneys General opted against using the legislation and it fell to the New Brunswick Human Rights Commission to remove Ross from the classroom. A brief recounting of the events surrounding the Keegstra affair in comparison to the Malcolm Ross affair will shed light on the reasons why the cases were handled differently and why these led to drastically different outcomes.

Keegstra was a high school teacher wearing several different hats. Originally an auto mechanics shop teacher, he later began teaching social studies as well.² Keegstra was also the mayor of the small community of about eight hundred people.³ The well-liked teacher was therefore entrusted with the minds of the community's youth. Combined with the loose and vague standards then used to guide the Alberta social

¹ Both Ross and Keegstra taught throughout the seventies with very little complaint about their views being made by the parents of their students. It was only in the late seventies and early eighties that complaints began to be heard. Even then, it was 1984 before Keegstra was removed from the classroom and even later before Ross was. Keegstra's criminal trial, however, began in 1985, two years before Ross would have to face the Human Rights Tribunal in New Brunswick.

² Steve Mertl and James Ward, *Keegstra: The Trial, the Issues, and the Consequences*, (Saskatoon, Saskatchewan: Western Producer Prairie Books, 1985), p.3.

studies curriculum, the community's trust left Keegstra free to teach Holocaust denial and conspiracy theories in the classroom for several years.⁴ At Keegstra's trial, students' notebooks and testimonies proved beyond a doubt that Keegstra taught hatred in the classroom. It was never proven, and it is indeed unlikely that Ross ever voiced his opinions to his students while acting as their teacher. This difference between both deniers probably played a critical role in the public reaction to each man's presence within the education system and the community. Whereas Ross's views were confined to his books and perhaps private conversations, Keegstra's were never published but taught to his young students. Grades on old tests and essays also showed that any student who did not share Keegstra's views would do badly in his class.⁵ Thus a significant difference between the two men was that Keegstra was indoctrinating young people with conspiracy theory while Ross's publications had to be sought out by a person who wanted to learn more about his views. This was perhaps an important difference in determining whether the anti-hate legislation, which criminalizes the promotion of hatred, would be used. It was much clearer, in terms of evidence, that by teaching young students conspiracy theory, Keegstra was promoting hatred. To convict Ross, direct evidence that his books promoted hatred would have been more difficult to find.

Another difference was the fact that Keegstra had already been fired and decertified before being criminally charged.⁶ The teacher's association, initially uncomfortable with Keegstra's firing, conducted its own investigation and eventually

³ *Ibid.*, p.2.

⁴ *Ibid.*, p.3.

⁵ *Ibid.*, pp.60-61.

⁶ *Ibid.*, p56.

recommended that the Department of Education decertify Keegstra.⁷ In New Brunswick, the teacher's federation supported Ross and one of the several lawyers on Ross's side of the room before the Board of Inquiry was provided by the teacher's association.⁸ When the Board of Inquiry began its hearings Ross still held his teaching position. Even after he had been ordered out of the classroom, Ross was allowed to continue working within the school in a non-teaching position. Clearly the School Board disagreed with Attis's argument that Ross's mere presence within the school created a poisoned environment. This difference between the two cases played a critical role in determining what kind of action would be taken by outside groups. In Alberta, it was not left to outraged citizens to take action. Keegstra's actions were abhorrent enough for fellow teachers to denounce them. When the question of whether or not to prosecute him arose it was not obscured by doubts about academic freedom; there was sufficient evidence to prove that Keegstra had betrayed the trust given to him by the community. It is possible that part of the attorneys general's reluctance to prosecute Ross was because the New Brunswick Teacher's Federation defended Ross. Similar to the role played by the teacher's federation was that played by the school board. In Eckville, the school board responded swiftly to the complaints of some parents offended by Keegstra's actions.⁹ In Moncton, on the other

⁷ *Ibid.* When Keegstra was fired, the teacher's association did not support the decision. It was only after it had conducted its own investigation that the association decided not to appeal Keegstra's dismissal. That it went so far as to suggest his dismissal to the Board of Education demonstrates the association's desire to dissociate the teaching profession from the likes of Keegstra.

⁸ The solicitor for the New Brunswick Teacher's Federation was George Filliter. The teacher's federation was not complained against directly. Clearly, then, it was because it chose to support Ross that the federation provided a lawyer. Ross's classroom activity was, by all accounts, exemplary; therefore to remove him from the classroom would be to punish him for his outside activities. Thus it is not surprising that other teachers did not want a precedent set where teachers could be dismissed for anything other than their job performances.

⁹ Merti and Ward, pp. 8-9. That is not to say that the citizens of Eckville reacted immediately when they learned of Keegstra's teachings. There were parents who were aware of what Keegstra taught but did not complain. There had also been a complaint about Keegstra's anti-Catholic teachings but he was warned against that and purportedly stopped teaching this part of his lesson. When complaints and reprimands

hand, numerous complaints directed to the school board by concerned parents and other citizens were followed by little effective action. It was because of the school board's inaction that David Attis aimed his complaint against the school board and not Malcolm Ross.¹⁰

Differences such as those discussed above led to the Keegstra and Ross affairs being handled very differently. Keegstra was criminally charged and when indicted the decision was appealed to the Supreme Court questioning the constitutionality of Canada's anti-hate legislation.¹¹ Ross was brought before a Human Rights Commission Board of Inquiry. When he was ordered out of the classroom and banned from publishing, it was the Board's decision that was contested before the Supreme Court. It would prove much easier for the Supreme Court to reverse the Board of Inquiry's decision than to overturn Canadian law.¹² This difference is clearly demonstrated in the individual judgements of the justices of the Supreme Court. The justices who heard the Ross appeal were La Forest, Lamer, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major.¹³ Four of these justices had heard the Keegstra case earlier and, of those four, three had cast dissenting votes.¹⁴ In other words, three of these justices believed that

about conspiracy theory teachings did not stop Keegstra, however, the actions the school board were swift. These complaints did not surface until several years after Keegstra began teaching social studies.

¹⁰ Technically, it was the Attorney General's refusal to prosecute which dropped the issue in the Board's lap.

¹¹ The Keegstra indictment, and therefore the anti-hate legislation, was upheld by a narrow margin of four of seven justices. See: The Supreme Court of Canada, "R. v. Keegstra [1995] 2 S.C.R.," *The Supreme Court of Canada: Decisions*, March 17, 2002, <http://www.lexum.umontreal.ca/csc-scc/Fen%Findex.htmlbin/repere.cgi?corpus=pub_en&tout=james+keegstra&language=en&form=csc-scc%2Fen%2Findex.html> March 17, 2002.

¹² Canada's anti-hate legislation came into being following the study of hate literature and promotion by a committee headed by Maxwell Cohen, then the dean of McGill Law School. Keegstra's trial was the first time the law would be applied. See Mertl and Ward, p.35.

¹³ *Ross v. New Brunswick School District No. 15*, 1 S.C.R., 825, [1996], p.4.

¹⁴ : The Supreme Court of Canada, "R. v. Keegstra [1995] 2 S.C.R.," *The Supreme Court of Canada: Decisions*, March 17, 2002, <<http://www.lexum.umontreal.ca/csc->

Canada's anti-hate legislation was unconstitutional while the fourth believed it to be admissible under the clause allowing for certain exceptions to Charter guarantees. After hearing Ross's appeal the nine justices unanimously agreed that Ross should not be barred from publishing but also that he should not be allowed to teach young children.¹⁵ When there was no question of the constitutionality of a law, the justices favoured protecting the individual's freedom of expression over limiting freedom in order to protect the rights of minorities.

In *R. v. Keegstra*, the Supreme Court stated that the anti-hate legislation was indeed a limitation on the Charter of Rights and Freedoms' guarantee of freedom of expression but that it was permissible under the clause allowing for certain rare exceptions.¹⁶ In the majority decision reasoning in the Keegstra case, Justice Dickson wrote:

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 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 s. 319(3) defences, which clarify the scope of s.

[scc%Fen%Findex.htmlbin/repere.cgi?corpus=pub_en&tout=james+keegstra&language=en&form=csc-scc%2Fen%2Findex.html](http://www.lexum.umontreal.ca/csc-scc/Fen%2Findex.htmlbin/repere.cgi?corpus=pub_en&tout=james+keegstra&language=en&form=csc-scc%2Fen%2Findex.html)> March 17, 2002.

¹⁵ *Ross v. New Brunswick School District No. 15*, 1 S.C.R., 825, [1996], pp.34-35.

¹⁶ : The Supreme Court of Canada, "*R. v. Keegstra* [1995] 2 S.C.R.," *The Supreme Court of Canada: Decisions*, March 17, 2002, <http://www.lexum.umontreal.ca/csc-scc%Fen%Findex.htmlbin/repere.cgi?corpus=pub_en&tout=james+keegstra&language=en&form=csc-scc%2Fen%2Findex.html> March 17, 2002.. The court was careful, however, to state that the law was to be interpreted narrowly so that it could be not be abused and used to limit free speech.

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 deference to 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 statement in order to promote hatred against an identifiable group. Finally, while other non-criminal modes of combating 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 criminal law.¹⁷

This statement makes it clear that it was not simply because the court was reluctant to undo legislation that it upheld the Keegstra indictment. It also wanted to make clear that it would only limit freedoms under very specifically described circumstances. In this way it hoped to avoid the slippery slope toward censorship. The outcome of the Ross case is therefore not surprising. Two New Brunswick Attorneys General had publicly stated that they did not want to use the law because they did not believe the case could be won. New Brunswick had not used the anti-hate legislation. To a court careful to avoid censorship, it might seem that the law was avoided to facilitate muzzling Ross by other means.

Justice Gerard La Forest, who delivered the 9-0 judgement against Ross, expressed the matter before the court as follows:

This appeal concerns the obligation imposed upon a public school board pursuant to provincial human rights legislation to provide discrimination-free educational services. It further involves the fundamental freedom of an individual teacher to publicly express his views and exercise his religious beliefs during his off-duty time. The main issues raised by this appeal are whether a school board, which employs a teacher who publicly makes invidiously discriminatory statements,

¹⁷ : The Supreme Court of Canada, "R. v. Keegstra [1995] 2 S.C.R.," *The Supreme Court of Canada: Decisions*, March 17, 2002, <http://www.lexum.umontreal.ca/csc-scc/%Fen%Findex.html/bin/reperer.cgi?corpus=pub_en&tout=james+keegstra&language=en&form=csc-scc%2Fen%2Findex.html> March 17, 2002.

discriminates with respect to the services it offers to the public pursuant to s.5(1) of the New Brunswick *Human Rights Act*, R.S.N.B. 1973, c.H11, and whether an order to rectify the discrimination, which seeks to remove the teacher from his teaching position, infringes upon the teacher's freedom of expression and freedom of religion under ss. 2(a) and 2(b) of the *Canadian Charter of Rights and Freedoms*.¹⁸

Unlike the Keegstra case, the issue being considered by the court was not about whether or not Ross had promoted hatred. The court accepted that his writings were hateful but at the same time accepted that they were protected expressions and religious beliefs. Obviously, because of the way the case had been handled, it was not about hatred but about equal opportunity for students within the school board district. This allowed the court to protect Ross's freedom of speech while doing what it was called on to do; protecting the children of Moncton from discrimination.

The decision in the Keegstra case upheld the province of Alberta's prosecution under the anti-hate legislation. The Ross decision, however, came following the decisions of the New Brunswick Human Rights Commission's Board of Inquiry. Thus the court was not only asked to decide the constitutionality of the procedure but the constitutionality of the recommendations made by the Board in its findings. In its discussion of the Board's findings the Supreme Court agreed that the School Board of district 15, through neglect, had failed to provide an environment which was free of discrimination and in which Jewish students could feel safe.¹⁹ With regard to barring Ross's writings, on the other hand, the Court found that his freedoms of expression and religion were infringed upon.²⁰ The Court did not consider whether or not the statements

¹⁸ *Ross v. New Brunswick School District No. 15*, I S.C.R., 825, [1996], p.2.

¹⁹ *Ross v. New Brunswick School District No. 15*, I S.C.R., 825, [1996], pp.25-34. More specifically, the Court found that the Board's decisions with regard to the school board were correct.

²⁰ *Ibid.*, pp.34-55.

made by Ross were true or false because it chose to simply accept them as expression.²¹

It did concede that because Ross's religious beliefs were defamatory to the Jewish faith, they were incompatible with the goals of the *Charter of Rights and Freedoms*.²²

Furthermore, as Justice La Forest explained:

In Canada (Human Rights Commission) v. Taylor. [1990] 3 S.C.R. 892, Dickson C.J. found that the objective of promoting equal opportunity unhindered by discriminatory practices based on race or religion was pressing and substantial. In arriving at his conclusion, he reviewed the harms caused by messages of hatred, including "substantial psychological distress," pressure to renounce cultural differences, and loss of self esteem. As well, he noted that the result of such messages may be to increase discrimination. He then referred to the international community's commitment to the eradication of discrimination. To this end, he reviewed the international conventions to which Canada is a signatory and concluded (at p. 920) that they exhibit that the commitment of the international community to the eradication of discrimination extends prohibiting the dissemination of ideas based on racial or religious superiority. Finally, he stated that ss. 15 and 27 of the *Charter*, in which the values of equality are enshrined, strengthen the "substantial weight" to be given to the objective of preventing the harmful effects associated with hate propaganda.

In my view, all the above factors are relevant in assessing the importance of the objectivity of the impugned order. In the first place, they assert the fundamental commitment of the international community to the eradication of discrimination in general. Secondly, they acknowledge the pernicious effects associated with hate propaganda, and more specifically, anti-Semitic messages, that undermine basic democratic values and are antithetical to the "core" values of the *Charter*. The Board's order asserts a commitment to the eradication of discrimination in the provision of educational services to the public. Based upon the jurisprudence, Canada's international obligations and the values constitutionally entrenched the objective of the impugned order is clearly "pressing and substantial."²³

Despite its reluctance to limit the freedoms guaranteed in the *Charter*, the Supreme Court also wanted to make clear its commitment to equality and curbing discrimination.

Considering the contradictory desires to guarantee freedom and protect minorities, one must examine why it was that the Supreme Court upheld all the Board of Inquiry

²¹ *Ibid.*, p.37.

²² *Ibid.*, p.54.

²³ *Ibid.*, pp.54-55.

orders except for the one that barred Ross from publishing.²⁴ Also one must consider this decision in juxtaposition to the Keegstra decision, which deemed Canada's anti-hate legislation a tolerable limit to constitutional guarantees of freedom. The most important difference between the two appeals was that one asked the Court to decide on the constitutionality of anti-hate legislation while the other appealed the constitutionality of an Order made by a Human Rights Board of Inquiry. Both men, Keegstra and Ross, held similar views, which the court deemed hateful, and both had publicly stated these views. One might surmise that the difference in the decisions stems from the Court's reluctance to overturn law.²⁵ It was certainly less difficult to overturn Brian Bruce's Order than it may have been to decide that the anti-hate legislation was in contradiction to the *Charter*. The Ross decision underlined the court's deference to the *Charter* without having to overturn legislation or impinge upon freedom of expression. Thus the narrow decision in *R. v. Keegstra* was underlined by the decisive statement made in *Ross v. New Brunswick School District No. 15*; the need for extreme caution when curtailing the freedoms of an individual was again borne out in the Ross decision.

While it might seem that the Supreme Court was acting as a conservative body rather than an activist court in this instance, it might be useful to consider briefly the precedents behind the Ross decision. Far from being a long-standing, constitutionally enshrined right, the freedoms of expression and religion in Canada were only formally guaranteed in the *Charter* in 1982.²⁶ Before this, these freedoms were informally protected through the use of precedents from British Common Law. This informal

²⁴ *Ibid.*, pp.59-63.

²⁵ This is particularly true because it was the first time the law had been used. This is unlike the Zundel case in which the law overturned was an archaic one.

protection, however, did not prevent the Canadian and provincial governments from limiting the freedom of expression. Censorship was one of the means used by the Federal Government to ensure loyalty during both World Wars. Also, a series of legal battles were fought by Jehovah's Witnesses in order to win the right to freely express their religious beliefs.²⁷ To some extent, the desire to respect the hard won right of freedom of expression played a role in the Court's deliberations.

On the other hand, it is important to remember that the *Charter* also declares Canada to be multicultural and respectful of the different minority groups within it. The court did acknowledge Canada's commitment to multiculturalism as well as Canada's international obligation to aid in the fight against discrimination. This was part of the reason why the Orders barring Ross from the classroom were upheld. The New Brunswick Human Rights Act calls for discriminatory practices to be altered; it does not call for punitive measures. Thus, in allowing Ross to continue publishing while keeping him out of the classroom, the court was able to prevent the discriminatory practices of the school board without limiting Ross's free speech. This conclusion to a long legal battle is therefore very much a consequence of the different, and sometimes contradictory, values held by Canadian society; it is a compromise.

While Canadian values and the priorities of the Supreme Court may in part explain the differences between the Keegstra and Ross decisions, other significant differences between both deniers are equally important. By upholding the law that would be used to convict Keegstra of promoting hatred the Supreme Court did not really limit

²⁶ There was also Bill C-60, a Canadian Bill of Rights, but it was not constitutionally enshrined as the *Charter* would be.

²⁷ For an account of the Jehovah's Witnesses' struggles and legal battles see: Gary Botting, *Fundamental Freedoms and Jehovah's Witnesses*, (Calgary: University of Calgary Press, 1993).

his freedom to his express his views. His conviction was won primarily because there were students who served as witnesses to his crime. These students were also the victims of his crime. James Keegstra was fined because he used his classroom to indoctrinate his students and not because he simply held hateful views. Following his conviction he was still free to share his views freely. In reality, this is very similar to what happened to Malcolm Ross. He, too, was removed from the classroom but allowed to continue to publish books promoting his anti-Semitic views. The main difference between the two is that Ross, as he proudly reminds those who ask, was never convicted of a crime.²⁸ The reasons for this cannot be found in the precedents that guided the Supreme Court's ruling in his case. The reasons for this must be sought in the actions and reactions of New Brunswick's provincial government, the Moncton community and the District 15 School Board.

²⁸ Malcolm Ross, Interview by M.A. Bellezza, August 24, 2000, audio cassette and notes in personal files.

Chapter V

Conclusions and Predictions

The Malcolm Ross affair began in 1978 with the publication of his first book, *Web of Deceit*, and the first complaints made about it in that year by Julius Israeli and Noel Kinsella. Part of the reason why the case is so important is because it began in the seventies before Ernst Zundel and James Keegstra had been prosecuted.¹ Given the Supreme Court's extremely narrow decision in the Keegstra case, the Ross case stands out as a starting point from which current handling of similar cases has evolved. The final result of the Ross case has helped set a precedent against which future cases will be measured. While the Keegstra case was very much a test run for anti-hate legislation, the Ross case was a test of human rights legislation.²

When the New Brunswick Attorney General, David Clark, first had to decide whether to prosecute Ross under Canada's anti-hate legislation the law had not been used before. He was apprehensive about testing the law because he felt it would be difficult to prove Ross was guilty of wilfully promoting hatred. Certainly Clark foresaw the difficulties that would arise in using a law that would ultimately curtail Ross's civil liberties. Given the difficulty in prosecuting Keegstra, Clark might have been right. Prosecuting Ross for publishing hate literature would have been a far cry from prosecuting Keegstra for teaching conspiracy theory to his students. Even at a time before the *Charter of Rights and Freedoms* had been enacted, the right to freedom of

¹ Keegstra was initially charged in 1978, but his final conviction was only decided upon when the Supreme Court ruled on it a second time in 1995.

² The Court's decision in Keegstra showed that the anti-hate legislation could only be used in very narrowly defined circumstances. The Ross decision underlines the Court's unwillingness to limit freedom of expression.

expression was firmly supported by precedent and would not have been curtailed by the courts without serious reservations.

With the Ross and Keegstra cases as starting points, however, there is evidence that the courts are slowly becoming more willing to curtail individual freedoms in order to protect minority rights. Although carefully worded to avoid sending the message that just anyone whose speech may be offensive can be prosecuted, the Supreme Court's decision in the Keegstra case shows that the Court does not deem freedom of expression to be absolute. While Ross was left with the right to continue writing and publishing hate literature, the result of his trial showed that there are consequences to such behaviour.

By the end of his legal battles, Malcolm Ross was removed from the classroom but was still free to write and distribute hate literature. The Attis complaint did indeed state that it was Ross's presence in the classroom that was the source of discrimination. Yet there is something unsatisfying about the final decision. This contradiction is indicative of the dilemma faced by Canadian legislators and those responsible for enforcing Canadian anti-hate legislation. As a signatory to international conventions devoted to the respect of minority rights, Canada has an obligation to its citizens and the international community to protect its minority groups. Equally important, and just as deeply ingrained in the collective Canadian psyche, however, is the importance of maintaining the rights and freedoms of the individual. In many instances, it may be clearer which of these priorities is most endangered and in need of protection. For example, in the Keegstra case it was clear that the rights of his young students should take precedence over his rights as an individual. Similarly, the argument before the Board of Inquiry in the Ross case sought to prove that it was the students in the District

15 school board who were harmed. The fact that both these men were committed anti-Semites was never, in itself, enough to warrant legal action. In both cases it was necessary to show that the well being of children was at stake before action was taken. While the courts regularly recognized that Ross's beliefs were aberrant and disgusting, his writing was never described as criminal behaviour. This is simply because the Supreme Court, and legislators, wanted to avoid impinging upon freedom of expression. This is obvious in the Supreme Court's narrow definition of what constitutes a reasonable limit to freedom of speech in the Keegstra decision. In this decision, Justice Dickson, writing for the majority, also pointed out that, while in some instances the use of criminal law to curb hatred is necessary, it is not to stand alone as a tool. There are other avenues available and one of these is the use of provincial and national human rights legislation.

While it might be disappointing and frustrating to know that anti-hate legislation was not used against Ross, this is not how the case draws importance. It is important as a measure of the ability of human rights legislation to play a role in curbing discrimination and promoting tolerance. Much like criminal legislation, though, human rights legislation is more geared toward protecting individuals than groups. This does not mean that human rights legislation does not attempt to protect minority groups, but that Canadian law and jurisprudence make it easier for individuals than for groups to seek protection under the law. The Ross case is an example of how difficult it can be for a minority group to seek protection under human rights legislation. If an individual were vilified in the way Ross vilified Jews in his writings, laws protecting individuals from libel could easily be put to use to rectify the situation. When it is a group that is libelled, however, the laws are not as clear. Similar to criminal legislation, human rights

legislation is geared toward protecting individuals from discrimination. As it stands, the *Canadian Human Rights Act* does not address instances in which a group is discriminated against.³ Furthermore, the law is reactive; it is designed to give recourse to those who are discriminated against. In other words, unless an individual can claim that he or she was discriminated against because of a person or institution's actions the law is of little remedial value.

The powers of the Board of Inquiry created to investigate David Attis's complaint were limited to rectifying the situation in the District 15 School Board. Once the School Board removed Ross from the classroom the situation complained about in the Attis complaint was technically rectified. That Ross would be free to continue publishing once he was no longer employed by the School Board was beyond the scope of the Board of Inquiry's powers. This makes it obvious that, as tools to diminish discrimination, Human Rights Commissions and legislation have limitations. They can be used to rectify a situation when a party has been wronged but they cannot prevent discrimination in the first place. Furthermore, where dissemination of hate is concerned, human rights legislation faces the same limitations as criminal legislation does. It comes up against Charter freedoms in the same way anti-hate legislation does. Where human rights legislation and commissions can achieve a great deal is in the realm of countering hate with education. Such tactics can be useful in preventing hate mongers from spreading their messages but cannot prevent them from trying.

³ Department of Justice, "Canadian Human Rights Act," *Consolidated Statutes and Regulations: Human Rights Act*, August 31, 2002, <<http://lois.justice.gc.ca/en/H-6/26172.html>> (March 17, 2002). The same thing may be said about the *New Brunswick Human Rights Act*. If Attis had not complained to the New Brunswick Human Rights Commission it could not have investigated the case. Without a complaint, the Commission was limited to suggestion but had no power to change the situation. This was seen in 1978, when Noel Kinsella, Chair of the New Brunswick Human Rights Commission, expressed his concerns about Ross to the school board.

Despite the difficulties in using human rights legislation to respond to hate-mongers, the Ross case did create an alternative precedent to criminal legislation. In this, it is instructive in several ways. Just as hate-mongers use the *Charter* creatively to protect their so-called religious beliefs, those who feel society is being harmed by their efforts can use human rights legislation creatively. This is what David Attis did when he filed his complaint. Read conservatively, one might say that there is not much in the *New Brunswick Human Rights Act* that can be used to silence hate-mongers. Read creatively, the legislation allows for protection from discrimination in the way the injured party understands it. Certainly, human rights legislation is mostly geared toward righting discrimination in services, mostly in the private sector. The way in which Attis interpreted the legislation, however, has broadened the definition of services to include public services such as education. Also, it has made clear the limitations of existing legislation, so that legislators may amend it to better meet the needs of the population.

It is important to keep in mind that it was most certainly not only the Jewish population in New Brunswick that was harmed by Ross's writings. Broadly speaking, in an environment where hate thrives, everyone is harmed. More specifically, there were many people who were not Jewish who were affected, harmed and concerned by Ross's writings. The most obvious of these are the children of Moncton, who, given the media coverage and small city gossip, were keenly aware of this teacher and his beliefs. Parents were concerned and worried as well. While New Brunswick does not have a history of anti-Semitism it does have a history of discrimination against its Acadian minority. Although this situation has improved, it most likely lived on in the memories of many of the students' parents. Certainly, conscientious parents worried about a known bigot

teaching their children.⁴ Nobody could really tell where discrimination began and ended but the inclusion of other groups and the proliferation of hatred was worrisome to parents. Sharing Attis's concern, parents also worried that a teacher who was a bigot would be a negative role model for their children. Technically, any of these concerned parents might have argued the same things Attis did. Indeed, the fact that the Attis complaint centred on the idea of a poisoned environment creates a precedent in which any concerned citizen, and not just those who are discriminated against, may act in the interest of the community's well being. While this might not necessarily be successful, it has become much more plausible following the Ross case.

In many ways, however, the Ross case is also an anomaly. There have been cases in which hate mongers have had their freedoms limited by both human rights tribunals and by criminal courts.⁵ When Ross published his first book, skinheads were a relatively new phenomenon, as was neo-nazism. Hate mongers published poorly printed pamphlets and had not yet learned to mimic the works of legitimate scholars. James Keegstra had not yet been convicted of promoting hatred. Therefore, when faced with the decision of whether to prosecute Ross under anti-hate legislation, the New Brunswick Attorney General had to decide several things. He had to decide whether the province should break new ground and use the legislation for the first time. He had to decide whether Ross represented a lone voice or whether he was the spokesman for a group that created a

⁴ Among the letters to the editor in Moncton's *Times-Transcript*, there were several from parents who worried about their children being taught by Ross. Others worried about what kind of role model Ross was for their children. It is unclear, however, whether any of the parents who wrote to the newspaper made complaints to the school board.

⁵ Most recently, Ernst Zundel had his web site ordered shut down by the Canadian Human Rights Commission. See: Kirk Makin, "Rights group orders Zundel to kill hate site," *The Globe and Mail*, January 19, 2002, p. A7. Earlier, hate groups operating phone lines that disseminated hateful messages had been shut down as well. There are several cases in which the Canadian Human Rights Commission has ordered hate lines shut down. Ross's is the first case that dealt with hate literature.

threat to the well being of New Brunswick.⁶ While the *Charter* had not yet been enacted in 1978, there was enough precedent for the Attorney General to know that the courts would not take the task of curtailing Ross's freedom of expression lightly. Under these circumstances, the Attorney General opted not to prosecute Ross under Canada's anti-hate legislation. Therefore part of the reason why the Ross issue seems to be an anomaly is that it began so early.

Another reason why the Ross case seems incongruous is because New Brunswick has no significant history of anti-Semitism. New Brunswick has a relatively small Jewish population and is never mentioned by historians as a locale for outbursts of anti-Semitism.⁷ This is another reason why the Ross case is so peculiar. Western Canada, Quebec and Ontario have a history of anti-Semitic outbursts and when new waves of anti-Semitism swell one can look back to find its roots. For example, even though there was a period of apparent tolerance between the height of Social Credit's anti-Semitism and the creation of the Western Guard, historians are able to link the two. In New Brunswick, though, there is no significant history of anti-Semitism to explain the appearance of Malcolm Ross and his supporters. Also, Ross's connections to groups outside of New Brunswick do not seem to predate the publication of his first book. However, over the course of his case, Ross came to label himself the Executive Director of the Maritime Branch of the Christian Defense League, hired Douglas Christie as his lawyer and drew the support of known anti-Semites from as far away as California. Worrisome as it might

⁶ Ross had not yet identified himself as the Executive Director of the Maritime Branch of the Christian Defense League. Indeed, it is likely that in 1978 Ross had not yet formed any connections to any hate groups outside the Maritimes.

⁷ According to Statistics Canada (1991 Census) the Jewish population in New Brunswick was approximately 900 in a population of 716 500. See: Statistics Canada, "Population by Religion, 1991 Census," *Statistics Canada Internet Site*, March 17, 2002, <<http://www.statcan.ca/english/Pgdb/People/Population/demo30a.htm>> (March 17, 2002).

seem, Ross's case might mark the beginning of more overt anti-Semitism in New Brunswick. Otherwise it might be an indicator of the transportability of anti-Semitic ideas. This is certain to increase as hate-sites pop up on the Internet faster than they can be shut down.

The transportability of hateful ideas plays a role in one of the lessons learned from the Ross case. Ross would not have stood out in a crowd and would not have been easily recognized as a hate-monger. Also, he had no apparent connections to any significant group in his region that shared his views. Therefore it seems peculiar that Ross did in fact come to gain a fair amount of notoriety for being a hate-monger. It would seem, then, that the ease with which hateful ideas can be transported and adopted had increased by 1978. Furthermore, with web sites such as Zundel's and Ross's it is that much easier for their ideas to be transported and adopted elsewhere. In other words, in the same way Ross seemed to come out of nowhere in an area that had no significant history of anti-Semitism, it becomes more likely that the same may occur elsewhere where there may be little history of anti-Semitism. Therefore, another lesson learned from the Ross case is that the Human Rights Commissions must develop a fixed procedure for dealing with such cases.⁸ It must develop procedures for handling hate literature if they are to serve as an alternative to criminal legislation. Also, it must develop procedures for handling the proliferation of web sites dedicated to hate if it wishes to prevent the spread of cases like Ross's.

⁸ The Commission's consistent handling of several hate phone lines may very well prove to be a precedent that could be carried over into dealing with hateful web sites. The recent Zundel decision may be a sign that this is indeed the case. See footnote 5 for reference to an article on recent Zundel ruling by a Human Rights Commission.

One of the main lessons of the Ross case is that there need not exist a community of like-minded individuals at hand for an individual to embrace hatred and attempt to proliferate it. Another lesson is that hate-mongers do not have to look the part. That is to say that hate-mongers do not wear their beliefs like badges and can sometimes quietly exist without being noted. The same can be said for their writings. If hate-mongers had continued to publish poorly printed tracts making outlandish claims they probably would have created less of a threat. Instead, they make claims in a more subdued fashion. Gone are the days of outrageous accusations such as the blood libel.⁹ In a world where more and more people find themselves confused by globalization, quieter claims of media and economic control become more plausible to those who find themselves at sea. The more vague the claims, the more plausible they become and the more people are drawn toward conspiracy theory. As hate-mongers mimic the works of legitimate scholars, they increase their odds of gaining audiences that might have otherwise ignored their efforts. In a quieter way, the efforts of hate-mongers are becoming more threatening and insidious.

While the Ross case has shown that there exist alternative actions to criminal legislation, it has also shown that the alternatives must be developed. It must be done quickly. As legal remedies are slow and lumbering in their reactions to hate mongers, the methods of the hate-mongers are being fine-tuned. Therefore, as an example that took too long to be dealt with, the Ross case shows that if action is to be taken, it must be taken quickly and decisively.

⁹ What is commonly referred to as the blood libel is the accusation that Jews stole Christian children to use their blood in religious rituals.

Lastly, it is quite probable that the Ross case will be used as a precedent quite soon. An Ontario arbitration board recently upheld the Peel Board of Education's 1997 firing of Paul Fromm.¹⁰ It is likely that this case will be appealed to the Supreme Court of Canada. Although it will likely be a difficult decision to render, it will be interesting to see how the Ross precedent is considered by the Court.

¹⁰ Heather Sokoloff, "Teacher's firing for racist views upheld," *The National Post*, March 13, 2002. Fromm was, among other things, one of the heads of CAFE (Canadian Association for Free Expression) which has championed the right to freedom of expression of several hate mongers. For more on Fromm, see Kinsella and Barrett.

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Appendix I

David Attis' Complaint
Filed with the New Brunswick Human Rights Commission
April 21, 1988

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

I have reason to believe that Malcolm Ross, a teacher employed by the School Board, made racist, discriminatory and bigoted statements to his students during the 1976-1977 school year. I have reason to believe that the School Board knew of this yet it merely transferred Malcolm Ross to another school.

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

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

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

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

- i) Several students at the Magnetic Hill School intend to present a petition to the Premier of New Brunswick in support of Malcolm Ross.

When asked if they concurred with Ross' (sic) views, the students replied that they didn't know.

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

I have reasonable cause to believe that the Board of School Trustees of District # 15 has violated Section 5 of the Human Rights Act.