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A Gesture of Criminal Law: Jews and the Criminalization of Hate Speech in Canada

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Abstract

In June 2020, the fiftieth anniversary of the criminalization of hate speech in Canada passed with little notice. Since their enactment in 1970, the hate-speech provisions in the Criminal Code have seldomly been enforced. They are commonly viewed as ineffective. In light of this half-century of experience, it is beneficial to re-examine the history of the criminalization of hate speech for lessons this story may hold. This article does so by exploring the genesis of the legislation from the perspective of the Canadian Jewish community. It focuses on the Jewish community because Canadian Jewry—especially the Canadian Jewish Congress—was the primary driver behind the bill. Accordingly, a focus on the Jewish community is essential to understanding why hate speech was criminalized, how the language of the provisions was decided upon, and why they are infrequently invoked. Commentators have acknowledged Jewish efforts, but the singular contribution of Canada’s Jews has not received full attention. This article fills this gap. Relying extensively on archival research and oral history, this article’s central claim is that the main goal of the legislation was not to prosecute hatemongers. Rather, its purpose was predominantly symbolic: to enshrine equality principles in the criminal law and to send the message that Canada was a multicultural and tolerant society. In fact, Congress leadership long resisted this type of legislation and came to support a group libel provision only under intense pressure from its community grassroots, especially Holocaust survivors, who demanded a forceful response to rising neo-Nazism. However, Congress and other advocates of the bill were focused on the symbolism of getting the legislation passed and were unconcerned with how it would later be used. In doing so, they ignored the vigorous protests of Holocaust survivors who accurately predicted that the law would be difficult to implement. At bottom, this is a tale of the risks and potential benefits of the symbolic use of the criminal law.

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A Gesture of Criminal Law: Jews and the Criminalization of Hate Speech in Canada

KENNETH GRAD*

In June 2020, the fiftieth anniversary of the criminalization of hate speech in Canada passed with little notice. Since their enactment in 1970, the hate-speech provisions in the *Criminal Code* have seldomly been enforced. They are commonly viewed as ineffective. In light of this half-century of experience, it is beneficial to re-examine the history of the criminalization of hate speech for lessons this story may hold. This article does so by exploring the genesis of the legislation from the perspective of the Canadian Jewish community. It focuses on the Jewish community because Canadian Jewry—especially the Canadian Jewish Congress—was the primary driver behind the bill. Accordingly, a focus on the Jewish community is essential to understanding why hate speech was criminalized, how the language of the provisions was decided upon, and why they are infrequently invoked. Commentators have acknowledged Jewish efforts, but the singular contribution of Canada's Jews has not received full attention. This article fills this gap. Relying extensively on archival research and oral history, this article's central claim is that the main goal of the legislation was not to prosecute hatemongers. Rather, its purpose was predominantly symbolic: to enshrine equality principles in the criminal law and to send the message that Canada was a multicultural and tolerant society. In fact, Congress leadership long resisted this type of legislation and came to support a group libel provision only under intense pressure from its community grassroots, especially Holocaust survivors, who demanded a forceful response to rising neo-Nazism. However, Congress and other advocates of the bill were focused on the

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ON 11 JUNE 2020—AMID THE COVID-19 PANDEMIC and a disturbing rise in hatred and xenophobia¹—the fiftieth anniversary of the criminalization of hate speech in Canada passed with little comment.² The hate-speech provisions have not

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- Examples abound. See e.g. “COVID-19 pandemic unleashing ‘tsunami of hate,’ says UNI chief,” *CBC News* (8 May 2020), online: <cbc.ca/news/world/coronavirus-un-fear-xenophobia-1.5561069>; Julie Posetti & Kalina Bontcheva, “Disinfodemic: Deciphering COVID-19 disinformation” (2020) at 3, online (pdf): unesco.org/sites/default/files/disinfodemic_deciphering_covid19_disinformation.pdf; Irene Connelly, “Online anti-Semitism thrives around coronavirus, even on mainstream platforms,” *The Forward* (11 March 2020), online: <forward.com/news/441421/anti-semitic-coronavirus-response-thrives-online-even-on-mainstream>; Gerald Chan, “The virus of anti-Asian prejudice,” *Toronto Star* (13 April 2020), online: <thestar.com/opinion/contributors/2020/04/13/the-virus-of-anti-asian-prejudice.html>. See also Kenneth Grad & Amanda Turnbull, “Harmful Speech and the COVID-19 Penumbra” (2021) 19 *CJLT* 1.
 - For a rare exception, see Jason Proctor, “The difficult history of prosecuting hate speech in Canada,” *CBC News* (13 June 2020), online: <cbc.ca/news/canada/british-columbia/racists-attacks-court-hate-crimes-1.5604912>.

been widely enforced and, when invoked, the rate of conviction has been low.³ As William Kaplan writes, “If number of prosecutions and convictions is the standard used for assessment, the legislation has clearly failed.”⁴ There is a general view that the laws have been ineffective.⁵ Hate speech is far more widespread in Canada today than it was a half-century ago. At the time of its enactment, even

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

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

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

4. William Kaplan, “Maxwell Cohen and the Report of the Special Committee on Hate Propaganda” in William Kaplan & Donald McRae, eds, *Law, Policy, and International Justice: Essays in Honour of Maxwell Cohen* (McGill-Queen’s University Press, 1993) 243 at 266. Kaplan does note, however, that the legislation may be deemed a success if its goals are more broadly conceived, which is an argument I return to in this article’s conclusion in Part V, below.
5. See *e.g.* Moon, *supra* note 3 at 25-26; Andrea Huncair, “Far-right extremists getting bolder as threatening behaviour goes unchecked, police warned,” *CBC News* (11 May 2020), online: <cbc.ca/news/canada/edmonton/ramadan-bombathon-edmonton-mosque-far-right-extremists-police-charges-1.5564323>; Franklin Bialystok, *Delayed Impact: The Holocaust and the Canadian Jewish Community* (McGill-Queen’s University Press, 2000) at 168; Jacky Habib, “Far-right extremist groups and hate crime rates are growing in Canada,” *The Passionate Eye* (n.d.), online: *CBC News* <web.archive.org/web/20210201094729/http://cbc.ca/passionateeye/features/right-wing-extremist-groups-and-hate-crimes-are-growing-in-canada>.

proponents of the legislation acknowledged that the volume of hate propaganda was low.⁶ Fifty years later, racist speech has risen to unprecedented levels, aided by the ease of dissemination and anonymity provided by social media and the internet.⁷

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

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

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6. See e.g. Maxwell Cohen et al, *Report of the Special Committee on Hate Propaganda in Canada* (Queen's Printer and Controller of Stationery, 1966) at 27 [Cohen Committee Report].
 7. See e.g. Tavia Grant, "Hate crimes in Canada surge with most not solved," *The Globe and Mail* (30 April 2019), online: <theglobeandmail.com/canada/article-hate-crimes-in-canada-surge-with-most-not-solved>; Habib, *supra* note 5; "Online hate speech in Canada is up 600 percent. What can be done?" *Macleans* (2 November 2017), online: <macleans.ca/politics/online-hate-speech-in-canada-is-up-600-percent-what-can-be-done>; League for Human Rights, "Annual Audit of Antisemitic Incidents 2020" (2021) at 11, online (pdf): *B'nai Brith Canada* <drive.google.com/file/d/1IqrqxVoO0tCXxMxvC0_12rsSn5xPgMpu/view> [www.bnaibrith.ca/antisemitic-incidents]. B'nai Brith, which has published an annual audit of total antisemitic incidents in Canada since 1982, reported that antisemitic incidents reached a record high in 2020 for the fifth consecutive year.
 8. "The Hate Propaganda Amendments: Reflections on a Controversy" (1971) 9 *Alta L Rev* 103 at 112 [Cohen, "Reflections on a Controversy"].

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

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

This article proceeds in five parts. First, I situate this article within existing scholarship on the origins of Canada's hate-speech legislation. Second, I outline efforts by Congress in the 1950s to lobby the government for legislation that would restore protection for incitement to violence against groups. Third, I discuss the rise of neo-Nazism and the renewed push for legislation in the 1960s, culminating with the formation of the Cohen Committee in 1965. Fourth, I explore Jewish lobbying and community tension during the legislative and public debate that followed the government's tabling of hate-speech legislation until its enactment in 1970. I then offer some concluding remarks.

A few clarificatory comments may be helpful before proceeding. The goal of this study is to outline Jewish contributions to the hate-speech legislation—an account that is missing from the literature—as accurately as possible and to help explain why the legislation has been infrequently invoked. I take no position in the debate between Jewish leadership, which was skeptical of a group libel bill, and the community's grassroots, which demanded it. Viewed through contemporary eyes, Congress may come across as uncaring of the Holocaust survivors or

unreasonable in its advocacy for a weakened bill. We should be cautious with such interpretations. Among other motivations behind their reticence, Jewish leadership was undoubtedly concerned with sacrificing its hard-earned credibility on a risky venture with uncertain benefits. This was a logical position to take—squandering the community's goodwill would make it harder to achieve other, potentially more beneficial, legislative gains.

Furthermore, simply because the CJC's civil libertarians reflected a minority view does not mean they were wrong. Whether hate speech should be criminalized within a legal order seriously committed to free expression is a difficult and complex question, which has been addressed by others.⁹ Moreover, the Supreme Court of Canada only narrowly upheld the offence of wilful promotion of hatred—the heart of the hate-speech legislation—as a reasonable limit on free speech in its 1990 decision in *R. v. Keegstra* (“*Keegstra*”).¹⁰ Thus, Congress was prescient in its concern that the bill not go too far; legislation that further impeded on freedom of expression would almost certainly have been later struck down under the *Canadian Charter of Rights and Freedoms* (“*Charter*”). And on account of *Keegstra*, a stronger bill appears impossible within our constitutional framework, which suggests, as the civil libertarians had argued, that the fight against hate speech must take place largely outside of the *Criminal Code*.

I will return to these themes in my conclusion. However, these issues, while important, are outside the scope of this article and I leave deeper discussion of them to others.

9. See e.g. Jeremy Waldron, *The Harm in Hate Speech* (Harvard University Press, 2012); Anthony Lewis, *Freedom for the Thought That We Hate: A Biography of the First Amendment* (Basic Books, 2007).

10. [1990] 3 SCR 697 [*Keegstra*].

I. SITUATING THIS RESEARCH WITHIN THE RELEVANT SCHOLARSHIP

Discussion of the genesis of Canadian hate-speech laws is scattered throughout the literature. Several articles on the provisions appeared around the time of their enactment, taking positions either for or against the legislation.¹¹ Since then, the topic has primarily received attention in two categories of scholarship. The first pertains to the history of Canadian Jews. However, leading scholars of Canadian-Jewish history—except for Franklin Bialystok, whom I address shortly—give surprisingly limited attention to the hate-speech campaign.¹² The second is doctrinal literature concerning hate speech and freedom of expression under Canadian law. These works often provide a brief overview of the Cohen Committee and its findings, without going into significant detail regarding the Jewish role in creating the Committee or obtaining passage of the legislation.¹³

Also relevant is literature on the history of human rights advocacy in Canada. This scholarship pays significant attention to earlier lobbying efforts by the

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11. See e.g. Walter S Tarnopolsky, “Freedom of Expression v. Right to Equal Treatment: The Problem of Hate Propaganda and Racial Discrimination” in Special Issue, *Centennial Edition* (1967) UBC L Rev 43; BG Kayfetz, “The story behind Canada’s new anti-hate law” (1970) 4 *Patterns of Prejudice* 5 [Kayfetz, “The story behind”]; Mark R MacGuigan, “Hate Control and Freedom of Assembly” (1966) 31 *Sask Bar Rev* 232 [MacGuigan, “Hate Control”]; Mark R MacGuigan, “Proposed Anti-hate Legislation – Bill S-5 and the Cohen Report” (1967) 15 *Chitty’s LJ* 302 [MacGuigan, “Bill S-5 and the Cohen Report”]; Robert E Hage, “The Hate Propaganda Amendment to the Criminal Code” (1970) 28 *UT Fac L Rev* 63; Cohen, “Reflections on a Controversy,” *supra* note 8; Stephen S Cohen, “Hate Propaganda—The Amendments to the Criminal Code” (1971) 17 *McGill LJ* 740.
 12. See Gerald Tulchinsky, *Canada’s Jews: A People’s Journey* (University of Toronto Press, 2008) at 460; Gerald Tulchinsky, *Branching Out: The Transformation of the Canadian Jewish Community* (Stoddart, 1998) at 323; Allan Levine, *Seeking the Fabled City: The Canadian Jewish Experience* (McLelland & Stewart, 2018) at 277-78 [Levine, *Seeking*]; Ira Robinson, *A History of Antisemitism in Canada* (Wilfried Laurier University Press, 2015) at 133-34; Harold Troper, *The Defining Decade: Identity, Politics, and the Canadian Jewish Community in the 1960s* (University of Toronto Press, 2010) at 99, 106-07.
 13. See e.g. Sanjeev S Anand, “Expressions of Racial Hatred and Racism in Canada: An Historical Perspective” (1998) 77 *Can Bar Rev* 181 at 184-87; Ronda Bessner, “The Constitutionality of the Group Libel Offences in the Canadian Criminal Code” (1987) 17 *Man LJ* 183 at 183-86; Bruce P Elman, “Combatting Racist Speech: The Canadian Experience” (1994) 32 *Alta L Rev* 623 at 625-26; Martine Valois, “Hate Propaganda, Section 2(b) and Section 1 of the Charter: A Canadian Constitutional Dilemma” (1992) 26 *RJT* 373 at 378-85.

Jewish community to secure anti-discrimination laws, particularly in Ontario.¹⁴ But this literature pays very little attention to Jewish advocacy for hate-speech legislation. Ross Lambertson, for example, claims that by 1960 Congress had ceased to take a central role in the struggle for human rights.¹⁵ I will remedy this misconception below.

There are three secondary sources that deal with the origins of the legislation in detail, which I will build on in this article.

The first is William Kaplan's article entitled "Maxwell Cohen and the Report of the Special Committee on Hate Propaganda" and contained in a collection of essays in Cohen's honour.¹⁶ Kaplan's central contribution is his fascinating insider account of the Committee's work, drawing on archival research from Cohen's papers.¹⁷ Of particular note, Kaplan reports that it was Cohen, alongside Congress, who approached the Liberal government about appointing a committee to look into the criminalization of hate speech—not the other way around, as many had assumed.¹⁸

The second is Allyson M. Lunny's *Debating Hate Crime: Language, Legislatures, and the Law in Canada*, which presents a semiotic analysis of the hate-speech debate.¹⁹ Lunny's focus is Parliament, and her primary resource is Hansard. She devotes her first chapter to the legislative arguments that preceded the enactment of the hate-speech provisions in the *Criminal Code* in 1970.²⁰ Lunny notes that supporters tended to emphasize the symbolic nature of the law, rather than effective criminal justice policy.²¹ Although I have supplemented Lunny's research with my own review of the legislative debates, her work is useful for recognizing what the language used by parliamentarians signifies about their underlying motivations.

14. See e.g. Ross Lambertson, *Repression and Resistance: Canadian Human Rights Activists 1930-1960* (University of Toronto Press, 2005) at 196-242; Carmela Patrias & Ruth Frager, "This is Our Country, These Are Our Rights: Minorities and the Origins of Ontario's Human Rights Campaigns" (2001) 82 *Can Historical Rev* 1; James W St G Walker, "The 'Jewish Phase' in the Movement for Racial Equality in Canada" (2002) 34 *Can Ethnic Studies* 1; Irving Abella, "Jews, Human Rights, and the Making of a New Canada" (2000) 11 *J Can Historical Assoc* 3.

15. *Supra* note 14 at 241-42.

16. *Supra* note 4.

17. See *ibid* at 244-56.

18. *Ibid* at 247.

19. (UBC Press, 2017).

20. *Ibid* at 30-55.

21. *Ibid* at 51-52.

The third is Franklin Bialystok's *Delayed Impact: The Holocaust and the Canadian Jewish Community*.²² Bialystok draws on archival research and interviews to chart the impact of Holocaust survivors and Holocaust memory in Canada from 1945–1985.²³ His work is vital to understanding the often-fraught relations between Holocaust survivors and Jewish leadership. Unlike other scholars of Canadian-Jewish history, Bialystok recognizes that “[t]he predominant issue in the Jewish community in the late 1960s was the hate-propaganda legislation” and devotes significant attention to this topic.²⁴

Bialystok's emphasis is on community relations rather than legal history or doctrine, and I have conducted my own archival research and interviews to focus on the latter as well as the former. In addition, I part company with Bialystok's analysis in two central respects. First, according to Bialystok, any disagreements between the survivors and Congress regarding the content of the legislation “were based more on misperception than on reality.”²⁵ This is incorrect. The survivors and community leadership fundamentally disagreed with respect to doctrine, with the former desiring a group libel bill and the latter refusing to go any further than incitement of violence. Congress changed position only amid calls for the resignation of its leadership. Second, Bialystok suggests that once the government introduced its bill in the fall of 1966 the survivors deferred to leadership on the issue.²⁶ Again, this is, respectfully, a misunderstanding of the situation. The survivor community was unsatisfied with the draft legislation and felt betrayed by the CJC's decision to endorse it.

Thus, far from bringing the community together, passage of the hate-speech legislation arguably left the Jewish community more divided than ever. I turn to this history now.

II. *BOUCHER V. THE KING* AND CONGRESS LOBBYING IN THE 1950S

In 1951, the Supreme Court of Canada curtailed the criminal offence of seditious libel through its decision in *Boucher v. The King* (“*Boucher*”).²⁷ *Boucher* was an appeal by a farmer convicted for distributing a pamphlet that criticized the

22. *Supra* note 5.

23. *Ibid* at 6.

24. *Ibid* at 165.

25. *Ibid* at 153.

26. *Ibid* at 147, 167.

27. [1951] SCR 265 [*Boucher*].

Quebec government, the Catholic Church, and “mobs” of Catholic lay people for their persecution of Jehovah’s Witnesses.²⁸ The Court split over the definition of “seditious intention” required to constitute seditious libel.²⁹ In allowing the appeal and acquitting the accused, the majority found that seditious libel must include the intention to incite violence against the government.³⁰ Only Chief Justice Thibaudefeu Rinfret would have applied a broader definition, which was generally accepted at the time Boucher was charged, that included the intention “to produce feelings of hatred and ill-will between different classes of His Majesty’s subjects.”³¹ Justice Ivan Rand, reflecting the majority’s views on this issue, found that the mere “baiting or denouncing of one group by another or others without an aim directly or indirectly at government,” amounted to the common law offence of public mischief, but not seditious libel.³²

The decision in *Boucher* attracted the attention of the Canadian Jewish Congress. The CJC, an umbrella coalition of Jewish organizations, was the leading voice of Canada’s Jews.³³ Headquartered in Montreal, it was divided into regional components with each region allocated a number of representatives elected every three years.³⁴ Despite its purportedly democratic framework, Congress’s agenda was controlled by a small group of administrative officials under national executive director Saul Hayes.³⁵ Until the mid-1960s, leading members of Congress were drawn from a narrow group of men born or raised in Canada. Immigrants, women, and Orthodox Jews were vastly under-represented.³⁶

In March 1953, Congress sent a delegation to testify before a Special Committee of the House of Commons tasked with a general revision of the

28. *Ibid* at 284-85, Rand J.

29. See *Criminal Code*, *supra* note 3, s 59(2) (seditious libel is defined as “a libel that expresses a seditious intention”).

30. See *Boucher*, *supra* note 27 at 283, Kerwin J; *Ibid* at 288-89, Rand J; *Ibid* at 296, 301, Kellock J; *Ibid* at 315, Estey J; *Ibid* at 331, Locke J.

31. *Ibid* at 276, Rinfret CJ.

32. *Ibid* at 289, Rand J.

33. See Levine, *Seeking*, *supra* note 12 at 338-45. Congress lost its position of primacy around the early 2000s and was dissolved in 2011.

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

35. See Troper, *supra* note 12 at 30-32; Levine, *Seeking*, *supra* note 12 at 339. Hayes was executive director from 1942-1959 and national executive vice president from 1959-1974. See “Saul Hayes Dead at 73,” *Jewish Telegraphic Agency* (15 January 1980), online: <www.jta.org/archive/saul-hayes-dead-at-73>.

36. Bialystok, *supra* note 5 at 5.

Criminal Code.³⁷ The delegation included Saul Hayes and Bora Laskin. Laskin, then a professor at the University of Toronto, was introduced as Congress's "expert on the law."³⁸ Although Laskin was instrumental to the CJC's anti-discrimination campaigns in the 1940s and 50s, this was a rare instance of him taking a public position on Congress's behalf.³⁹

The bill under consideration would abolish all common law criminal offences, thus invalidating Justice Rand's conclusion in *Boucher* that the baiting or denouncing of one group by another would constitute the common law offence of public mischief.⁴⁰ In order to restore protection deprived by this change and the decision in *Boucher* to narrow seditious libel, the CJC requested two amendments to the *Criminal Code*.

First, Congress asked that Parliament add a new section after the seditious libel provisions to criminalize incitement to violence against groups. Second, it requested an amendment to then section 166 of the *Criminal Code*, which prohibited the spreading of false news causing injury to "a public interest." Predicting the reasoning of the majority of the Supreme Court of Canada in *R. v. Zundel*, which declared the provision unconstitutional forty years later,

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37. Although I have focused on the post-war period, Congress's advocacy for criminal legislation to combat anti-Semitic speech goes back further. In the 1930s, in light of a rise in anti-Semitic literature produced by Canadian fascist groups, the CJC asked the federal government on several occasions to enact legislation to combat racial hatred, including amending the *Criminal Code*. A legislative proposal submitted by Congress in 1935 suggested an amendment to then section 201 of the *Criminal Code*, which outlawed the disturbance of persons assembled for religious worship (an analogous provision is now s 176(2)). Congress reported that the Law Committee of the Senate approved the amendment, but the legislation was abandoned after a meeting of the Council of Ministers. See David Rome, *Clouds in the Thirties: On Antisemitism in Canada 1929-1939*, vol 2 (CJC National Archives, 1977) at 60, 68-69. In 1937, Congress wrote directly to Prime Minister William Lyon Mackenzie King to request that legal measures be adopted which would make libellous accusations against Jews and other groups a criminal offence. King forwarded the request to Minister of Justice Ernest Lapointe, who dismissed the idea. See Letter from HM Caiserman to WL Mackenzie King (25 August 1937), Montreal, Canadian Jewish Archives (CJC ZA 1937, Box 1, File 16); Letter from WL Mackenzie King to E Lapointe (10 September 1937), Montreal, Canadian Jewish Archives (CJC ZA 1937, Box 1, File 16); Confidential Memorandum of AA Heaps (17 September 1937), Montreal, Canadian Jewish Archives (CJC ZA, Box 2, File 23A).
38. House of Commons, Special Committee on Bill No 93, *Evidence*, 21-7, vol 1, No 2 (3 March 1953) at 58 (Saul Hayes) [House of Commons, Bill No 93].
39. Philip Girard, *Bora Laskin: Bringing Law to Life* (University of Toronto Press, 2005) at 248, 266-67.
40. See *Criminal Code*, *supra* note 3, s 9.

the Congress delegation argued that its wording was overly vague.⁴¹ Congress suggested adding a new subsection to define public interest as including the promotion of “disaffection among or ill will or hostility between different sections of persons in Canada.”⁴²

The delegation emphasized the narrowness of its submissions. Laskin stressed that he concurred with the Court’s definition of seditious libel and agreed that group libel (*i.e.*, “produc[ing] feelings of hatred and ill-will between different classes of His Majesty’s subjects”) should not be criminalized.⁴³ As Laskin put it, Congress was not suggesting “that people should be prohibited from talking simply because they happen to injure the feelings of others.”⁴⁴

The CJC’s recommendations did not make it into the revised *Criminal Code* in 1955.⁴⁵ Notwithstanding this failed effort, Congress did not view hate speech as a pressing concern at this time.⁴⁶ Moreover, its leadership felt that the best way to deal with hate speech was to simply ignore it and not provide hatemongers with any exposure—euphemistically referred to as the “quarantining” approach.⁴⁷

Congress’s lobbying of the federal government in 1953 fit within its broader push for human rights legislation that ramped up in the post-war period. This campaign was carried out primarily through the Joint Public Relations Committee of Congress and B’nai Brith Canada (JPRC).⁴⁸ Formed in 1938, the JPRC was a collaborative effort by Congress and B’nai Brith to fight anti-Semitism.⁴⁹ Representation was equal between the two groups, but all

41. See House of Commons, Bill No 93, *supra* note 38 at 57 (Saul Hayes); *R v Zundel*, [1992] 2 SCR 731 at 769-70.

42. House of Commons, Bill No 93, *supra* note 38 at 59 (Saul Hayes).

43. *Boucher*, *supra* note 27 at 276, Rinfret CJ.

44. House of Commons, Bill No 93, *supra* note 38 at 62 (Bora Laskin).

45. It is unclear why Congress’s suggestions were not adopted. For further explanation, see Kaplan, *supra* note 4 at 269, n 4. Kaplan reports that “[i]n early 1953 the federal government actually considered some draft legislation. However, the consideration was brief, and the decision was made not to proceed” (*ibid*).

46. See Letter from Ben Kayfetz to J Alex Edmison (13 June 1952), Toronto, Ontario Jewish Archives (Fonds 17, Series 5-4-6, File 5).

47. See *e.g.* W Gunther Plaut, *Unfinished Business: An Autobiography* (Lester & Orpen Dennys, 1981) at 243.

48. See Michael Friesen, “The Joint Public Relations Committee Series at the Ontario Jewish Archives: Some New Questions” (2019) 28 *Can Jewish Studies* 125 at 126. In 1962, the JPRC changed its name to the “Joint Community Relations Committee, Central Region.” For simplicity, it will be referred to as the JPRC throughout this article. In the late 1970s, B’nai Brith ended its relationship with the JPRC, although the word “joint” was not dropped until 1991. The JPRC was dissolved along with the Congress in 2011 (*ibid* at 127).

49. *Ibid* at 126.

public statements were made by the CJC as the official voice of Canada's Jews.⁵⁰ As with Congress, leadership of the JPRC was insular and unrepresentative of the wider community.⁵¹ For example, out of thirty-one members who attended a JPRC meeting on 24 June 1965, only eight were born in Europe and none came to Canada after 1926. It included "no survivors, no small businessmen, no tradesmen, no women, no one under age thirty-five, and no representatives of the Orthodox community."⁵²

The JPRC achieved some success during the Second World War, notably in lobbying for Ontario's *Racial Discrimination Act* (1944), but came into its own after the war on account of a more favourable climate and the hiring of Ben Kayfetz as its executive director in 1947.⁵³ In Ontario, lobbying by the JPRC and affiliated groups led to the enactment of the *Fair Employment Practices Act* (1951) and the *Fair Accommodations Practices Act* (1954) and to the amendment of the *Conveyancing and Law of Property Act* in 1950 to outlaw future discriminatory property covenants.⁵⁴ In fact, the Frost government accepted draft bills provided by the Jewish community with little amendment.⁵⁵ The JPRC exported its techniques across the country and the legislation it successfully promoted in Ontario was copied by all other provinces and the federal government.⁵⁶

Congress's post-war activism was successful but cautious. Jewish leadership never demanded more than the government could give and in its legislative campaigns advanced the least controversial proposal available.⁵⁷ Some criticized this apparent unassertiveness, but it had achieved results and Jewish leaders saw no reason to abandon it. Events in the new decade would put increasing strain on this approach.

50. Lambertson, *supra* note 14 at 201.

51. See Girard, *supra* note 39 at 248.

52. Bialystok, *supra* note 5 at 139.

53. Friesen, *supra* note 48 at 126; Girard, *supra* note 39 at 253.

54. Patrias & Frager, *supra* note 14 at 14-19; Walker, *supra* note 14 at 5-15. With the assistance of Bora Laskin, the JPRC also sponsored legal challenges to the validity of existing restrictive covenants. See Lambertson, *supra* note 14 at 211-14, 220-22, 228-37.

55. Girard, *supra* note 39 at 261.

56. *Ibid* at 248.

57. *Ibid* at 262.

III. 1960–65: NEO-NAZISM, COMMUNITY TENSION, AND THE COHEN COMMITTEE

A. “THERE’S NOTHING WE CAN DO ABOUT IT, IT’S A FREE COUNTRY”: THE EMERGENCE OF NEO-NAZISM AND A RENEWED PUSH FOR LEGISLATION, 1960–61

Despite Canada’s shameful record concerning Jewish refugees leading up to and during World War II,⁵⁸ many Holocaust survivors found a home in Canada after the war. Thirty to thirty-five thousand survivors and their families immigrated to and remained in Canada between 1945 and 1956.⁵⁹ Holocaust survivors constituted a high percentage of Canadian Jewry; by the late 1950s, 13 to 15 per cent of the community were survivors (significantly more than the 4 per cent of American Jews during the same period).⁶⁰

The seeming rise of a worldwide neo-Nazi movement in the early 1960s shocked Canadian Jews and particularly the survivors. On Christmas Eve 1959, vandals painted swastikas on a synagogue in Cologne, Germany that had three months earlier been inaugurated on the site of a Jewish shrine burned down by the Nazis in 1938.⁶¹ Subsequently, anti-Semitic vandalism spread across the globe. Similar incidents were reported over the next month in thirty-four countries.⁶²

This anti-Semitic outburst reached Canada. In early January, fifty swastikas were found painted on a Montreal building.⁶³ In Toronto, among other incidents, a swastika and the words *Juden raus* (“Jews get out”) were scratched into a plaster cast at the Royal Ontario Museum, and the Bais Yahuda Synagogue in downtown

58. See Irving Abella and Harold Troper, *None is Too Many: Canada and the Jews of Europe, 1933-1948* (University of Toronto Press, 1983).

59. Bialystok, *supra* note 5 at 73.

60. *Ibid.*; Troper, *supra* note 12 at 26.

61. “Synagogue Smeared with Swastikas,” *Toronto Daily Star* (28 December 1959) 25; Joseph Unger, “Germany’s Jewish Leaders Claim Police Did Not Protect Synagogue,” *Canadian Jewish News* (1 January 1960) 1.

62. See Howard J Ehrlich, “The Swastika Epidemic of 1959-1960: Anti-semitism and community characteristics” (1962) 9 *Social Problems* 264; “Swastika Wave Grows,” *Toronto Daily Star* (4 January 1960) 1; “Swastikas Daubed in 13 Lands,” *The Globe and Mail* (6 January 1960) 4 [“Swastikas Daubed in 13 Lands”].

63. “Swastikas in Montreal,” *Toronto Daily Star* (5 January 1960) 1.

Toronto was vandalized.⁶⁴ Synagogues in other communities in Ontario and British Columbia were also defaced.⁶⁵

Congress preached caution. Its message to the Jewish community was to ignore the hatemongers and not be alarmed. The vandalism was the work of a “lunatic fringe” that was looking for publicity and it was important “not to overestimate the doings of an obscure group of nonentities.”⁶⁶ Indeed, the anti-Semitic incidents in Canada and elsewhere appeared uncoordinated and died out shortly after they began.⁶⁷

The CJC’s caution did not sit well with some in the community. A group of Holocaust survivors in Toronto demanded that Congress explain why it was not being more aggressive—the first time survivors had openly challenged Congress policy.⁶⁸ Communal leaders responded by downplaying the events and discouraging any form of vigilantism.⁶⁹ In a letter to a concerned rabbi from Sudbury, Kayfetz minimized the threat while emphasizing that Congress was considering renewing its efforts at obtaining anti-hate legislation.⁷⁰

Storm clouds gathered again in late 1960. On October 30, the CBC dedicated an episode of its *Newsmagazine* program to neo-Nazism. It interviewed George Lincoln Rockwell, head of the American Nazi Party, who claimed that there were “two fairly large sections of the Nazi party” operating in Canada.⁷¹ Nine days later, Congress issued a press release reiterating its position that there was no imminent threat.⁷²

Holocaust survivors who viewed the CBC program were astounded that Nazism existed in Canada and was apparently legal. In Montreal, a group of fifty survivors discussed the program the day after it aired and decided to send

64. “Recent Swastika Craze in Toronto Abating,” *Canadian Jewish News* (15 January 1960) 1 at 8 [“Swastika Craze Abating”]; “Swastikas Daubed in 13 Lands,” *supra* note 62; “Swastikas in Canada,” *The Globe and Mail* (9 January 1960) 6.

65. Bialystok, *supra* note 5 at 99.

66. Letter from Ben Kayfetz to Rabbi William Rosenthal (3 November 1960), Toronto, Ontario Jewish Archives (Fonds 17, Series 5-4-6, File 7) [Letter from Kayfetz to Rosenthal]; CJC News Release (10 January 1960), Toronto, Ontario Jewish Archives (Fonds 17, Series 5-4-6, File 7).

67. “Experts agree swastika spree not planned,” *The Globe and Mail* (26 January 1961) 25; Martin Deutsch, “The 1960 Swastika-Smearings: Analysis of the Apprehended Youth” (1962) 8 *Merrill-Palmer Q Behavior & Development* 99.

68. Bialystok, *supra* note 5 at 99-100.

69. *Ibid* at 100; “Swastika Craze Abating,” *supra* note 64.

70. Letter from Kayfetz to Rosenthal, *supra* note 66.

71. Bialystok, *supra* note 5 at 103.

72. *Ibid*.

a delegation to meet with Saul Hayes. According to Lou Zablow, a Holocaust survivor from Łódź, Poland, Hayes told them, “There’s nothing we can do about it, it’s a free country.”⁷³ Appalled by this response, the Montreal group, led by Zablow, formed the Association of Former Concentration Camp Inmates/Survivors of Nazi Oppression (“Association of Holocaust Survivors”). Adopting the motto “Homage to the Dead, Warning to the Living,” its central aims were to preserve Holocaust memory and counteract neo-Nazism. The Association of Holocaust Survivors would become the largest and most influential Holocaust survivor group in Canada.⁷⁴

Even though Jewish leadership remained unconcerned,⁷⁵ the CJC renewed its push for legislative reform. In the summer of 1961, a Congress delegation met with federal Minister of Justice Davie Fulton. Congress advanced essentially the same proposal it had submitted in 1953.⁷⁶ The meeting seemed to have gone well; the *Canadian Jewish News* reported that Fulton was “very impressed” with Congress’s presentation.⁷⁷ In 1962, the Progressive Conservative government referred the possibility of amending the *Criminal Code* to the Conference of Commissioners on Uniformity of Legislation in Canada (CCULC). However, as the CCULC deals with areas of provincial jurisdiction where laws differ among provinces, it is a reasonable inference that the federal government was looking to bury the issue. In fact, the Commissioners advised against accepting Congress’s proposals and the government took no action.⁷⁸

73. *Ibid* at 104.

74. *Ibid*; Myra Giberovitch, *The Contributions of Montreal Holocaust Survivor Organizations to Jewish Communal Life* (MA Thesis, McGill University, 1988) at 96-97 [unpublished]. See also Interview of Ludwig Zabłudowski (Lou Zablow) by Paulana Layman (28 August 1997), USC Shoah Foundation Visual History Archive (Segment 48). Zablow recounted that “hearing of a neo-Nazi party being formed in Canada alarmed all survivors, who were shocked to learn that there was no such thing as a law against [the] neo-Nazi party” (*ibid* at 00h:22m:42s). Upon founding the Association of Holocaust Survivors, Zablow discovered that very few people, including Jews, knew anything about the Holocaust, prompting the survivors to take steps to encourage Holocaust education.

75. See e.g. “Antisemitism Here Abating,” *Canadian Jewish News* (13 January 1961) 1.

76. Letter from Monroe Abbey & Saul Hayes to Hon E Davie Fulton (8 September 1961), Toronto, Ontario Jewish Archives (Fonds 17, Series 5-4-6, File 14).

77. Max Bookman, “Parliament Hill Notebook,” *Canadian Jewish News* (27 October 1961) 4.

78. See *House of Commons Debates*, 26-2, vol 1 (24 February 1964) at 132-33 (Hon Guy Favreau). See also Report on Community Relations (1965), Toronto, Ontario Jewish Archives (Fonds 17, Series 5-4-6, File 33) [Report on Community Relations].

**B. “WE MUST KNOW WHAT SMALL AND FUTILE ENEMIES WE NOW HAVE”:
THE RE-EMERGENCE OF NEO-NAZISM AND CONGRESS’S RESPONSE,
1963–64**

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

But neo-Nazism re-emerged in 1963, consisting primarily of the distribution of anti-Semitic pamphlets and other material, much of which originated in the United States.⁷⁹ In May 1963, swastikas were painted on several Jewish communal buildings and synagogues in Toronto.⁸⁰ Perhaps most shockingly, on 11 November 1963, hundreds of leaflets were dropped from a downtown Toronto building, each reading on both sides, “Hitler was Right” and “Communism is Jewish.”⁸¹

The neo-Nazi campaign intensified in 1964. For example, in February, several hundred recipients, including synagogues, Jewish agencies, and communal leaders, received a membership card to the National White Americans Party (NWAP) based in Atlanta, Georgia. A cover letter explained that “[t]he NWAP is a party of the Whiteman and...believe[s] in the superiority of the Aryan race.” It advocated “sending all negroes back to Africa whence they came.” “On the Jewish Question,” however, the NWAP stated, “our policy is much stricter. We *demand* the arrest of all Jews involved in Communist or Zionist plots, public trials and executions. All other Jews would be immediately [*sic*] sterilized so that they could not breed more Jews.”⁸²

Although Toronto was worst affected, other municipalities were not immune. On 30 June 1963, in Winnipeg Beach, Manitoba, a man driving a sound truck called out over a loudspeaker, “This is Adolf Eichman! All Jews must report for the

79. See e.g. Cohen Committee Report, *supra* note 6 at 12–24.

80. Report by Sydney M Harris—Community Meeting (1 December 1963), Toronto, Ontario Jewish Archives (Fonds 17, Series 5-4-6, File 13) [Report by Harris]; “Swastika on a Synagogue,” *Canadian Jewish News* (17 May 1963) 4; Dave Kagan, “Police Investigates Vandalism,” *Canadian Jewish News* (24 May 1963) 6; “Swastikas in Toronto,” *Canadian Jewish News* (31 May 1963) 1.

81. See Ken Lefolii, “Of course hate-mongering should be stamped out. But not by passing censorship laws,” Editorial, *Maclean’s* (4 April 1964) 4, online: <archive.macleans.ca/article/1964/4/4/editorial#1&cpid=4>; Don Watson, “Hate From The Sky,” *Canadian Jewish News* (15 November 1963) 1.

82. Letter from Col JP Fry (17 February 1964), Toronto, Ontario Jewish Archives (Fonds 17, Series 5-4-6, File 11) [emphasis in original]; “Toronto Jews Bombarded by Provocative Hate Mail,” *Canadian Jewish News* (21 February 1964) 1; Letter from Ben Kayfetz to Jack Baker (4 March 1964), Toronto, Ontario Jewish Archives (Fonds 17, Series 5-4-6, File 24).

gas chambers!”⁸³ In February 1964, anti-Semitic material was mailed to students at McGill University and Loyola College in Montreal.⁸⁴ Hateful literature was also disseminated in other cities throughout Canada.⁸⁵

The avalanche of hate literature gave the appearance of a broad and well-organized movement, disturbing the Canadian-Jewish community. However, in reality, it was coordinated by a handful of people, led by David Stanley and John Beattie, both based out of Toronto.⁸⁶ Stanley publicly disavowed his views in August 1965.⁸⁷ Kayfetz recalled that he bumped into Stanley years later, who admitted that he organized the leaflet-dropping incident in November 1963 with a few other people at a cost of only twenty-five dollars, fooling Kayfetz into thinking that it was a highly-organized operation.⁸⁸ Beattie, whose antics will be discussed further below, formed the Canadian Nazi Party in April 1965, but it never numbered more than fifty and by the end of the decade had receded into obsolescence.⁸⁹

In response to the rise in anti-Semitism, Congress reverted to its well-established playbook: Calm the Jewish community and work with the authorities.⁹⁰ The community, however, was not so easily placated. On 2 June 1963, two separate meetings were held by Labour Zionist groups in Toronto to discuss the neo-Nazi situation. At the Borochov Centre in Downsview, with more than six hundred people in attendance—mostly Holocaust survivors—speaker after speaker railed against Congress’s alleged passivity.⁹¹ The situation in Canada was compared “to that which prevailed in pre-war Germany when the Nazis began their activities.”⁹² The attendees passed a resolution demanding immediate action and threatening to take matters into their own hands. At the

83. “What happened in the west?” *Canadian Jewish News* (2 August 1963) 4.

84. “Nazi Underground in Montreal,” *Canadian Jewish News* (7 February 1964) 1; “McGill Daily Revelations,” *Canadian Jewish News* (7 February 1964) 8.

85. “Some Facts about Neo-Nazi Leaflets” (9 March 1964), Toronto, Ontario Jewish Archives (Fonds 17, Series 5-4-6, File 14).

86. See *e.g.* Cohen Committee Report, *supra* note 6 at 27.

87. *Ibid* at 13; “After Stanley’s Defection, Complete Chaos in Nazi Camp Here,” *Canadian Jewish News* (27 August 1965) 1.

88. Bialystok, *supra* note 5 at 111.

89. *Ibid* at 147-48. See also John Garrity, “My sixteen months as a Nazi,” *Maclean’s* (1 October 1966) 11.

90. See *e.g.* “Congress Committee Chairmen Confer With Toronto Police Head About Anti-Jewish Vandalism,” *Canadian Jewish News* (24 May 1963) 1; “Cautions Torontonians Against Swastika Panic,” *Canadian Jewish News* (7 June 1963) 1.

91. MJ Nurenberger, “Dybbuk in Downsview,” *Canadian Jewish News* (7 June 1963) 1.

92. Ray Gould, “Jewish Leaders Meet Continuously on Swastika Wave,” *Canadian Jewish News* (7 June 1963) 1.

other meeting on 2 June 1963, at Toronto's Zionist Centre, a resolution was passed urging Congress to take more aggressive steps and opposing any "quiet politicking" on the question of anti-Semitism.⁹³

Facing increasing pressure, Congress sought to reassure the community that it had the situation under control. It organized separate meetings in Toronto and Montreal on 1 December 1963. In Montreal, at the Queen Elizabeth Hotel with seven hundred delegates present, a resolution was passed demanding legislative action.⁹⁴ In Toronto, at the downtown Young Men's Hebrew Association in front of four hundred representatives of various Jewish organizations, Sydney Harris, national chairman of the JPRC, pledged that Congress would redouble its efforts to secure legislative changes.⁹⁵ Harris defended Congress's policy of not publicizing hatemongers and discouraging violence, arguing that a contrary approach could backfire.⁹⁶

As promised, leadership placed renewed emphasis on its legislative campaign. In December 1963, a delegation including Hayes, Kayfetz, and Harris met with Minister of Justice Lionel Chevrier to discuss the epidemic of hate literature. Congress relied on the same legislative proposals it had previously put forward.⁹⁷ Once again, this led to no significant response.

The survivor community remained unsatisfied. On 8 December 1963, the Association of Holocaust Survivors held a mass meeting at the Young Israel of Montreal Synagogue, attended by approximately one thousand people. The Association adopted a resolution to push for the enactment of laws to prevent the dissemination of hate literature. Milton Klein, the Liberal Member of Parliament (MP) for the predominantly Jewish Montreal riding of Cartier, was in attendance and pledged support for a bill to combat racial hatred.⁹⁸

93. See *ibid*; Nurenberger, *supra* note 91.

94. D Goldman, "Demand Law Against Nazis—400 at CJC Conference in Toronto Warn Nation: Don't Tolerate Bigots," *Canadian Jewish News* (6 December 1963) 1.

95. Letter from Meyer Gasner to Presidents and Secretaries of Jewish Community Organizations and Congregations, Toronto (3 December 1963), Toronto, Ontario Jewish Archives (Fonds 17, Series 5-4-6, File 13); Report by Harris, *supra* note 80.

96. Report by Harris, *supra* note 80.

97. "CJC Presses for Anti-Bias Laws," *Canadian Jewish News* (3 January 1964) 1.

98. "Predict Ottawa Will Ban Dissemination of Hatred—Senator Croll, CJC Former Camp Inmates Press for New Law," *Canadian Jewish News* (27 December 1963) 1.

As neo-Nazism intensified in early 1964, so did criticism of Congress. On March 6, an editorial by Max Bookman⁹⁹ appearing in the *Canadian Jewish Chronicle* mocked leadership for its purported timidity. Bookman wrote that any suggestion that “it is time for something more potent than talk immediately horrifies Jewish leadership....[T]ime and again we have been assured: ‘see, we’ve been successful, we’ve handled anti-Semites, no more swastika smearings, no more vile propaganda, etc., etc., etc.’ Well, gentlemen, what excuse have you got now?”¹⁰⁰ Bookman suggested that if Congress could not deliver, the community would have no choice but to resort to vigilantism:

It has been brought to our attention that certain cases of anti-Semitism in Montreal were handled in a method which brought immediate results. We are not revealing any details except to note that the end result smashed the Jew-haters in the only fashion they really understand. If the “gentlemen” who are now handling the “fight” against anti-Semitism in their manner can give us results we are on their side. But if they cannot achieve even partial success then we suggest to them no hypocritical tears if the Canadian Nazis or what have you are handled in a manner which appears uncouth.¹⁰¹

The mounting criticism seemingly led to a change in Congress’s approach. By then Congress knew who was responsible for the distribution of anti-Semitic material, as it had infiltrated the neo-Nazi group through a paid informer.¹⁰² Congress leadership decided it would abandon its “quarantine” policy and disclose this information to the community.¹⁰³ On 9 April 1964, Harris gave a speech to a crowd of more than one thousand five hundred people at Beth Tzedec Synagogue in Toronto, at an event commemorating the Warsaw Ghetto Uprising. Harris revealed that the neo-Nazi ringleaders were Stanley and Beattie.

99. Bookman was the founder of the *Ottawa Hebrew News*. He wrote syndicated columns that appeared at one time or another in nearly all Canadian Jewish publications. See Lewis Levendel, *A Century of the Canadian Jewish Press: 1880s-1980s* (Borealis Press, 1989) at 233-34.

100. Max Bookman, “Dateline Ottawa,” *Canadian Jewish Chronicle* (6 March 1964), Toronto, Ontario Jewish Archives (Fonds 17, Series 5-4-6, File 14).

101. See *ibid.*

102. Bialystok, *supra* note 5 at 124. In his memoir, W Gunther Plaut, Senior Rabbi of Holy Blossom Temple from 1961-1977, recounts that in February 1964 an anti-Nazi committee was created under Congress’s auspices and that this committee “monitored the Nazis and, in co-operation with the police, placed an undercover agent in their cell.” Plaut, *supra* note 47 at 242.

103. Florence Goldberg, “Canadian Jewry Acts: Move Against Neo-Nazis Here – Congress Decides to Combat Hitlerite Agents in Canada,” *Canadian Jewish News* (21 February 1964) 1.

Promising a more aggressive strategy, he stated that Congress had “for the time being abandoned the policy that has said ‘Don’t publicize the hate-monger.’”¹⁰⁴ Although Harris stressed that these would-be Nazis were so “insignificant in stature and in meaning that we must know what small and futile enemies we now have,” nevertheless exposure was required because “the ever widening tidal waves of his influence, if unchecked by the barriers of public disavowal...may spread to inundate our society before we recognize the disaster.”¹⁰⁵

The goal of Harris’s speech was as much to satisfy Congress’s detractors as it was to silence the hatemongers. Leadership remained concerned that exposing anti-Semites would be ineffectual and would provide them with the publicity they wanted.¹⁰⁶ However, pressure from the community had built to unprecedented levels and Congress needed to show it was doing something. As Harris later put it, while exposure “didn’t shut [Stanley] up, it certainly satisfied the community.”¹⁰⁷ Indeed, subsequent events suggested the merit of Congress’s position, as neo-Nazism continued unabated even after Harris’s address.¹⁰⁸

C. “FOR GOD’S SAKE LET US FORGET THIS YICHUS BUSINESS”: THE KLEIN-WALKER AND ORLIKOW BILLS, 1964

Despite Congress’s change of direction, many in the survivor community remained skeptical of Jewish leadership. Impatient with Congress, the Association of Holocaust Survivors worked on legislation outside of CJC auspices by directly lobbying Milton Klein. Zablow met with Klein on several occasions in 1963 to discuss the issue.¹⁰⁹

On 20 February 1964, Klein introduced a private member’s bill in the House of Commons. Entitled “An Act respecting Genocide,” the bill sought to make genocide a capital offence and impose a minimum of ten years’ imprisonment for anyone who inflicted bodily or mental harm with genocidal intent. However,

104. Speech by Sydney M Harris entitled “And Now The Facts” (9 April 1964), Toronto, Ontario Jewish Archives (Fonds 17, Series 5-4-6, File 14) at 10.

105. *Ibid*; “The Wrong Court,” *The Globe and Mail* (11 April 1964) 6.

106. “Report on Community Relations,” *supra* note 78.

107. Bialystok, *supra* note 5 at 124.

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

109. Bialystok, *supra* note 5 at 115.

the bill's most important clause was arguably its group libel provision, which prescribed five years' imprisonment for anyone who published statements likely to injure a national, ethnic, racial, or religious group by exposing that group to hatred, contempt, or ridicule.¹¹⁰

James Walker, Liberal MP for York Centre, co-sponsored the legislation, which became known as the Klein-Walker bill.¹¹¹ Walker's riding included the Toronto suburb of North York, which following post-war suburbanization of the Toronto Jewish community, by 1961, was home to over forty-five thousand Jews (up from only 3,989 in 1951) out of a total Canadian-Jewish population of approximately 250,000.¹¹²

Also on 20 February 1964, New Democratic Party (NDP) MP David Orlikow, representing Winnipeg North, introduced a private member's bill to amend the *Post Office Act* to deny use of the mails for disseminating hate literature.¹¹³ Orlikow, like Klein, was one of only four Jewish MPs at the time and represented a riding with a large percentage of Jews.¹¹⁴

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

the courageous stand you are taking in connection with the antisemitic literature [*sic*] distributed here. At last somebody has the interest and intestinal fortitude to speak out loud about this very unfortunate social phenomenon.

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

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

112. "Jews of Toronto: New Statistics," *Canadian Jewish News* (27 July 1962) 6. The total Jewish population in Canada in 1961 was 254,368. See Mordecai Hirshenson, "Canadian Panorama," *Canadian Jewish News* (20 July 1962) 7. This was approximately 1.4 per cent of the national population. See Troper, *supra* note 12 at 23.

113. "Bill C-43, An Act to amend the Post Office Act (Hate Literature)," 1st reading, *House of Commons Debates*, 26-2, vol 1 (20 February 1964) at 32 (David Orlikow).

114. "Ottawa Still Has Four Jewish M.P.'s," *Canadian Jews News* (19 April 1963) 1. As of 1961 (and until about 1991, when it was surpassed by Vancouver), Winnipeg had the third-largest Jewish population in Canada, at approximately 19,000. Orlikow represented Winnipeg North, which was traditionally home to most of Winnipeg's Jews, although much of this population migrated south after the Second World War. See Levine, *Seeking*, *supra* note 12 at 260-61, 366.

I have been in this Country for ten years, and whenever I discussed antisemitism with some “leading” personality, suggesting that action be taken whilst there is still time, I was always hooted down—“it can’t happen here”.—That’s what they said in Europe a quarter of a century ago—and yet it did happen, and not in a backward country either.¹¹⁵

In an editorial published on 21 February 1964, the *Canadian Jewish News* endorsed the bills and applauded the Association of Holocaust Survivors for its work at “the forefront of those in Canada fighting for the outlawing of hate literature in the mail.”¹¹⁶ At an event held in the fall of 1964, Klein and Walker received the Association’s “Man of the Year” award.¹¹⁷



SOURCE: Montreal Holocaust Museum Archives.¹¹⁸

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115. Letter from George J Beer to David Orlikow (29 February 1964), Toronto, Ontario Jewish Archives (Fonds 17, Series 5-4-6, File 16).
116. “Time to Act—Anti-Hate Bill,” Editorial, *Canadian Jewish News* (21 February 1964) 4.
117. “Montreal Mass Meeting Told Anti-Hate Bill Okayed By PM,” *Canadian Jewish News* (4 December 1964) 1.
118. “Lou Zablow at ceremony to honour authors of Anti-Hate Bill” (1964), Montreal, Montreal Holocaust Museum Archives (2011X.359.57). Klein is on the far left; Zablow is second from the right, shaking hands with Walker.

The Klein-Walker and Orlikow bills were drafted without Congress input.¹¹⁹ On 24 February 1964, Kayfetz wrote to Ottawa to request a copy of the bills, which, upon receipt, were sent to Laskin and the JPRC's Legal Committee for review.¹²⁰

Although Congress had been campaigning for hate-speech legislation for over a decade, it did not voice support for either bill. This was a confusing and disappointing response from the perspective of many of its constituents. Some speculated that the silence was attributable to jealousy. Bookman bemoaned the fact that the community finally had “a parliamentary measure which if adopted, would give teeth to the law to take action against...the distributors of anti-Semitic propaganda; and yet on this vital matter all we've had to date from Congress is a deafening silence.” Quoting “one individual” who accused the Jewish community of fighting over “who will get the credit for a measure to combat hate propaganda,” Bookman pleaded, “For heaven's sake let us forget this 'yichus' business and let Congress get behind any measure which would curb anti-Semitism.”¹²¹

But Congress's discomfort with the bills was more fundamental: It did not agree with them. Central to Congress proposals since at least 1953 had been a link to incitement of violence; as Laskin told the Special Committee, Congress did not think someone should face criminal charges for hurting the feelings of others.¹²² The Klein-Walker and Orlikow bills were something different: restrictions on speech untethered from risk of physical harm.

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

119. See “Why Congress Did Not Support Klein Bill,” *Canadian Jewish Chronicle* (28 August 1964) 1 [“Why Congress Did Not Support Klein Bill”].

120. See Letter from Ben Kayfetz to Queen's Printers (24 February 1964), Toronto, Ontario Jewish Archives (Fonds 17, Series 5-4-6, File 20); Letter from Ben Kayfetz to Bora Laskin (2 March 1964), Toronto, Ontario Jewish Archives (Fonds 17, Series 5-4-6, File 20).

121. Max Bookman, “Dateline Ottawa,” *Canadian Jewish Chronicle* (17 July 1964) 6. The Yiddish word *yichus* generally refers to family standing or lineage. Thus, in this context, Bookman is criticizing Congress for its alleged insistence that advocacy for the hate-speech bill must run through the CJC (with thanks to Nina Warnke for assistance with the Yiddish translation).

122. House of Commons, Bill No 93, *supra* note 38 at 62 (Bora Laskin).

and Wolfe Goodman and Donald Carr, founding partners of Goodman and Carr LLP.¹²³ A future Justice of the Court of Appeal for Ontario, Marvin Catzman, joined the committee a short time later (Catzman's father, Fred Catzman, was also a member and had previously headed the committee).¹²⁴ But the second feature is more pertinent to the present discussion: This group had a markedly civil-libertarian bent.¹²⁵ The Legal Committee included two of the CCLA's founding members (Laskin and Arthurs) and its intellectual driving force for over forty years (Borovoy). Harris would later author one of the most pro-freedom of expression and generally civil-libertarian judgments ever written in Canada.¹²⁶ Borovoy recalled that "[f]or the longest time" he and other members of the JPRC were in sync in their positions, which were increasingly out of sync with what most of the community wanted.¹²⁷

Congress leadership viewed the Klein-Walker and Orlikow bills as unjustified infringements on free expression. As Borovoy put it in an internal memo to the Legal Committee, "I have always opposed, as too great a risk to free speech, any legislation which would curtail the right to propagate race hatred, unless violence were intended or involved."¹²⁸ Laskin held the same view, writing in 1964 that while no "constitutional or other protection should be given to

123. Letter from Bora Laskin to Members of Legal Committee (4 March 1964), Toronto, Ontario Jewish Archives (Fonds 17, Series 5-4-6, File 20); Interview of Harry Arthurs (18 March 2020) [on file with author] [Arthurs Interview].

124. See Outline of Recommendations and Conclusions of Legal Committee Meeting (22 November 1966), Toronto, Ontario Jewish Archives (Fonds 17, Series 5-4-6, File 41).

125. Arthurs Interview, *supra* note 123.

126. See *R v Popert et al* (1981), 58 CCC (2d) 505 (Ont CA) [Popert]. The Popert case concerned a charge for mailing obscene material (then s 164, now s 168 of the *Criminal Code*) brought against publishers of *The Body Politic*, a newsmagazine aimed at the gay community. The impugned article, "Men Loving Boys Loving Men," described sexual relations of fictional men with young boys (*ibid* at 506-07). Justice Harris acquitted the accused, but a new trial was ordered by the County Court and upheld by the Court of Appeal for Ontario. For further explanation, see Interview of Sydney Harris by Osgoode Society for Canadian Legal History (9 March 1995, 14 March 1995) at 117-20 [on file with author]. In explaining why he did not deem the material obscene, Harris noted that he brought his "pre-judicial life into" the case: "I remember making some comparisons and talking about... you want obscenity, the concentration camps in the war, that was obscenity. This isn't obscenity" (*ibid* at 119).

127. Alan Borovoy, *At the Barricades: A Memoir* (Irwin Law, 2013) at 98-99.

128. Memorandum from Al Borovoy to Legal Committee of the Canadian Jewish Congress (1965), Toronto, Ontario Jewish Archives (Fonds 17, Series 5-4-6, File 34).

incitement to violence...I have stoutly maintained that it is unwise to go beyond incitement to violence.”¹²⁹

Although hesitant to criticize Klein, Walker, and Orlikow directly, Hayes conceded in an August 1964 interview—under pressure to explain Congress’s stance—that there were “people in Congress, at leadership level, who feel very strongly about civil liberties....These people weren’t going to...back something like the Klein bill.” However, Hayes also asserted, based on “inside information,” that the legislation had no chance of passing and that Congress did not think it prudent to expend its goodwill on a bill that was doomed to fail.¹³⁰

This reasoning did not go over well in the community. Bookman lamented that, “[a]s we see it, legislation will only be obtained over the dead bodies of the civil rightniks” who “make out a most beautiful case on behalf of freedom of opinion and speech and association; but let us remind ourselves that the first thing Hitler did after taking the fullest advantage of these freedoms was to deny them to everybody else.”¹³¹ The *Canadian Jewish News* was no less critical. An editorial published on 4 September 1964 called Jewish leadership “Januses” who with “one face proclaimed the necessity of adopting such a law, [while] the other condescendingly rejected it as impractical.”¹³² A letter to the editor on 18 September 1964 applauded the editorial: “My friends and I, all very active in the Jewish community here in Montreal, agree with you on the essence of [your] criticism.”¹³³

Bereft of Congress’s support, the Klein-Walker and Orlikow bills failed to gain much traction in Parliament. Both bills were referred to a House Standing Committee on External Affairs in October 1964. The committee held six meetings but dissolved without completing its study when the legislative session ended in April 1965.¹³⁴ Congress submitted written testimony to the committee that tracked its previous recommendations and did not endorse the Klein-Walker and

129. Laskin clarified that he was comfortable proposing an amendment to clarify the false news provision. See Melvin Fenson, “Group Defamation: Is the Cure Too Costly?” (1965) 1 *Man LJ* 255 at 273, n 67.

130. “Why Congress Did Not Support Klein Bill,” *supra* note 119.

131. Max Bookman, “Dateline Ottawa,” *Canadian Jewish Chronicle* (16 October 1964) 2.

132. “Canadian Jewry—New Year Balance,” Editorial, *Canadian Jewish News* (4 September 1964) 4.

133. L Goldstein, “The Issue: Representation,” Letter to the Editor, *Canadian Jewish News* (18 September 1964) 4.

134. See House of Commons, Standing Committee on External Affairs, *Minutes of Proceedings*, 26-2, vol 3, no 39 (24 March 1965) at 1885-86.

Orlikow bills.¹³⁵ Klein and Orlikow reintroduced their bills in the new legislative session, but the government did not refer them for further study and both bills died on the order paper.¹³⁶

D. "THE COMMITTEE...WAS SET UP TO SATISFY THEM": CONGRESS'S LEGISLATIVE CAMPAIGN AND THE FORMATION OF THE COHEN COMMITTEE, 1964

Even as Congress distanced itself from these legislative efforts, it simultaneously embarked on an aggressive campaign to obtain its preferred legislation. In early March 1964, the CJC organized a letter-writing campaign to lobby the government to enact legal protections against hate propaganda. Congress mailed letters to the representatives of hundreds of Jewish organizations urging them to have their members wire the Minister of Justice, Guy Favreau, requesting that he take action, and to write their MP asking that they do all in their power to combat hatemongers. Congress included different forms of draft language that could be sent to Favreau or individual MPs.¹³⁷ The JPRC files contain numerous

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

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

137. Letter from Meyer W Gasner (2 March 1964), Toronto, Ontario Jewish Archives (Fonds 17, Series 5-4-6, File 18).

letters subsequently sent by community members to Parliament, suggesting that many eagerly took up the CJC's request.¹³⁸

On 12 March 1964, a Congress delegation met with Favreau and other government officials. The delegation submitted a brief emphasizing the rise in neo-Nazism, calling attention to existing laws and regulations that might be used to restrict the flow of hate propaganda, and requesting the same amendments to the *Criminal Code* that it had previously advanced. Congress subsequently reported that the meeting had gone well and that the ministers had assured them they would investigate the matter. In fact, on 13 March 1964, Favreau stated in Parliament that "the Jewish congress of Canada ought to be commended for the very good presentation which they made," and "that the material submitted and the comments which [they] made...are already under study by my officials."¹³⁹ Additionally, Congress sent the brief to the premiers of all ten provinces¹⁴⁰ and to numerous MPs, including John Diefenbaker and Tommy Douglas, leaders of the federal Progressive Conservatives (PCs) and NDP, respectively. Both Diefenbaker and Douglas replied expressing support for government action while not committing themselves to a specific proposal.¹⁴¹

Congress's lobbying made an impact. On 26 April 1964, Prime Minister Lester B. Pearson spoke at a dinner organized by the Montreal Israel Bond Organization, telling a crowd of twelve hundred that it was the government's duty "to act against all those who advocate, incite or insinuate discrimination or disseminate 'hate' literature for that purpose."¹⁴² The next day, Secretary of External Affairs Paul Martin gave a speech at Beth Sholom Synagogue in Toronto in which he acknowledged the spread of neo-Nazism and told the congregation

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

139. *House of Commons Debates*, 26-2, vol 1 (13 March 1964) at 873 (Hon Guy Favreau).

140. See *e.g.* Memorandum from Ben Kayfetz to Sydney Harris (31 March 1964), Toronto, Ontario Jewish Archives (Fonds 17, Series 5-4-6, File 14) (indicating that various Premiers had acknowledged the material sent by the Congress).

141. Letter from John Diefenbaker to Ben Kayfetz (16 March 1964), Toronto, Ontario Jewish Archives (Fonds 17, Series 5-4-6, File 16); Letter from Tommy Douglas to Ben Kayfetz (16 March 1964), Toronto, Ontario Jewish Archives (Fonds 17, Series 5-4-6, File 16).

142. "Govt., Opposition for Immediate Action Against Canada neo-Nazis," *Canadian Jewish News* (1 May 1964) 1 ["Govt. Opposition"]; "No 'graded' citizenship in Canada—Pearson," *Toronto Daily Star* (27 April 1964) 1.

that the government may introduce legislation if it could not deal with the threat under existing laws.¹⁴³ In addition, at a speech in Montreal around the same time, Diefenbaker deemed hate literature poisonous, outrageous, and offensive.¹⁴⁴

To bolster the legitimacy of its legal position, Congress retained two of the most well-known lawyers in Canada, J.J. Robinette and Arthur Maloney, to separately provide opinions on the prospect of successfully prosecuting disseminators of hate literature under existing laws. In a memo to Harris on 1 May 1964, Robinette concluded that the present sections of the *Criminal Code* were inadequate and that a criminal prosecution would be unsuccessful.¹⁴⁵ Maloney likewise foresaw “grave difficulties” with a criminal prosecution under current laws.¹⁴⁶

Harris sent both memos to Diefenbaker and Favreau.¹⁴⁷ On 5 June 1964, in response to a question from Diefenbaker in Parliament, Favreau acknowledged that he had read Robinette’s opinion and stated that “the matter is still being actively pursued by my officers and myself, but a formula which will reconcile freedom of thought and expression...has not yet been evolved in a manner which is satisfactory to me.”¹⁴⁸

Congress’s campaign made a breakthrough in the fall of 1964. On 17 October 1964, Hayes and Congress President Michael Garber, along with recently-appointed Dean of McGill Faculty of Law Maxwell Cohen, met with

143. “Gov’t. Opposition,” *supra* note 142.

144. “Diefenbaker Calls for Action in Canada Against Anti-Jewish Tracts,” *Jewish Telegraphic Agency* (29 April 1964) 4.

145. See Letter from John J Robinette to SM Harris (1 May 1964), Toronto, Ontario Jewish Archives (Fonds 17, Series 5-4-6, File 20). This was not the first time Congress worked with Robinette. See *Noble et al v Alley*, [1951] SCR 64 [*Noble*]. The JPRC paid for Robinette’s services as lead counsel in *Noble* in which the Supreme Court struck down a restrictive covenant prohibiting the sale of property “to any person of the Jewish, Hebrew, Semitic, Negro or coloured race or blood” (*ibid* at 64). See George D Finlayson, *John J. Robinette, Peerless Mentor: An Appreciation* (Dundurn Press for the Osgoode Society for Canadian Legal History, 2003) at 44-47; Girard, *supra* note 39 at 257-58.

146. Letter from Arthur Maloney to Sydney Harris (28 May 1964), Toronto, Ontario Jewish Archives (Fonds 17, Series 5-4-6, File 20).

147. Letter from BG Kayfetz to John Diefenbaker (21 May 1964), Toronto, Ontario Jewish Archives (Fonds 17, Series 5-4-6, File 20); Letter from Saul Hayes to Guy Favreau (29 May 1964), Toronto, Ontario Jewish Archives (Fonds 17, Series 5-4-6, File 20); Letter from Sydney Harris to John Diefenbaker (8 June 1964), Toronto, Ontario Jewish Archives (Fonds 17, Series 5-4-6, File 20); Letter from Sydney Harris to Guy Favreau (8 June 1964), Toronto, Ontario Jewish Archives (Fonds 17, Series 5-4-6, File 20).

148. *House of Commons Debates*, 26-2, vol 4 (5 June 1964) at 3976-77 (Hon Guy Favreau).

Favreau.¹⁴⁹ Cohen—McGill’s first full-time Jewish law professor and Canada’s first Jewish law school dean—was active in Congress leadership.¹⁵⁰ He also had deep connections to the federal Liberals.¹⁵¹ Cohen served as a foreign policy consultant to the government and had assisted Pearson in his successful campaign for the party’s leadership.¹⁵² In addition, he was friends with then Minister of Justice Favreau.¹⁵³

The delegation of Hayes, Garber, and Cohen recommended that a “first-class team” be assembled to study the hate-speech issue.¹⁵⁴ The government accepted Congress’s proposal. On 10 November 1964, at an event at the Sheraton Mount Royal Hotel sponsored by Montreal B’nai Brith and flanked by Jewish dignitaries including Klein and Hayes, Favreau announced that the government would create a “small, informal committee of experts” to study possible measures against hate literature. To a standing ovation, Favreau promised the packed audience “that we do not intend to allow this challenge to our civilization to stand without answer.” Favreau named the first two members of the committee: Saul Hayes and Maxwell Cohen.¹⁵⁵

In January 1965, Favreau announced that Cohen would chair the committee and appointed the remaining members: Doctor James A. Corry, a constitutional law scholar and Principal of Queen’s University; Father Gérard Dion, Professor of Industrial Relations at Université Laval; Mark MacGuigan, Professor of Law at the University of Toronto; Shane MacKay, Executive Director of the *Winnipeg Free Press*; and Professor Pierre-Elliott Trudeau of the Faculty of Law of the Université de Montréal.¹⁵⁶ MacGuigan later recalled that the speed with which the government acted and the fact that Hayes was appointed led him “to believe that [the CJC] was the principal reason for the committee and that it was set up to satisfy them.”¹⁵⁷

149. Kaplan, *supra* note 4 at 247.

150. Sheldon Kirshner, “Cohen feels at home in academia, government,” *Canadian Jewish News* (12 March 1981) 5; Ronald St John MacDonald, “Maxwell Cohen at Eighty: International Lawyer, Educator, and Judge” (1989) 27 *Can YB Intl Law* 3 at 31.

151. See MacDonald, *supra* note 150 at 42-43.

152. *Ibid* at 43.

153. *Ibid* at 39, n 150.

154. *Ibid*; Kaplan, *supra* note 4 at 247.

155. “Favreau To Appoint Committee To Study ‘Hate’ Legislation,” *Canadian Jewish Chronicle* (13 November 1964) 1; Kaplan, *supra* note 4 at 247-48.

156. *Ibid* at 247-48.

157. Bialystok, *supra* note 5 at 118.

Although the committee's personnel was finalized in January 1965, its report would not be released until April 1966.¹⁵⁸ In the meantime, tension in the Jewish community would rise to a boil.

E. "DON'T STICK YOUR NOSES IN IT": JEWISH VIGILANTISM, 1964–65

Despite Congress's hard work, anxiety continued to grow among Canadian Jews over the perceived onslaught of neo-Nazism and the lack of progress in suppressing anti-Semitism.

On 25 October 1964, on its public affairs show *This Hour Has Seven Days*, the CBC again broadcasted an interview with George Lincoln Rockwell, leader of the American Nazi Party. Sitting under a swastika flag, Rockwell declared that Hitler could not have destroyed six million Jews and proclaimed his intention to gas "queers and liberals" and send "Negroes back to Africa from whence they came."¹⁵⁹ Understandably, many in the Jewish community (as well as the broader Canadian public) were upset with CBC's decision to give Rockwell a platform.¹⁶⁰ The Association of Holocaust Survivors sent a memo to the Board of Broadcast Governors expressing outrage that "tens of thousands of Canadian citizens who suffered bodily and spiritually under the Nazi tyranny and who lost their closest relatives in Nazi extermination camps should be insulted, threatened again and their wounds reopened for the sake of cheap sensationalism."¹⁶¹

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

158. Kaplan, *supra* note 4 at 256.

159. *Ibid* at 253; Oscar Berson, "Reporters or Yokels?" *Canadian Jewish News* (30 October 1964) 1.

160. See e.g. "CBC showered with protests on Nazi show," *The Globe and Mail* (26 October 1964) 12; "800 protests flood CBC over Nazi," *Toronto Daily Star* (26 October 1964) 27; "Anger against CBC erupts in Commons," *The Globe and Mail* (27 October 1964) 11.

161. Memorandum presented to Board of Broadcast Governors by Association of Former Concentration Camp Inmates, Survivors of Nazi Oppression (17 November 1964), Toronto, Ontario Jewish Archives (Fonds 17, Series 5-4-6, File 30).

error...that guided the [JPRC] to hesitate when the Klein-Walker Anti-Hate Bill first was discussed.”¹⁶²

Frustrated with leadership, some took more direct measures. In early 1965, a group of Holocaust survivors and others created a vigilante organization to fight the neo-Nazis. They called themselves “N3,” referring to Newton’s third law of motion, that to each action there is an opposite and equal reaction.¹⁶³ The group felt it had to do something because Jewish leadership would not. Mike Berwald, one of N3’s founding members, recalled that he had previously met with Kayfetz, Harris, and J.S. Midanik (Chairman of the JPRC’s Central Region) but was told “not to stick our noses in it,” that “it was [the JPRC’s] job,” and that they were “doing everything possible.”¹⁶⁴ N3 bugged meetings held at John Beattie’s home and hired a private investigator to infiltrate Beattie’s organization.¹⁶⁵

N3 was not the only group taking matters into its own hands. Several high school students in Toronto formed the Canadian Organization for the Indictment of Nazism (COIN). COIN operated a “defence element” that gathered intelligence on neo-Nazis and managed to photograph Beattie’s files. Cyril Levitt—now a professor at McMaster University, who has written about Jewish history and racial incitement—was one of its founders. He recently recalled that looking back, “we thought of ourselves in a more grandiose way than I do today.”¹⁶⁶

In addition, Michael Englishman—a Holocaust survivor from the Netherlands—and a friend secretly attended meetings held by Beattie and Stanley. Shocked by what he was hearing, Englishman began to record the licence plate numbers of all attendees. He and his friend subsequently broke into

162. MJ Nurenberger, “Canadian Jewry—Crisis in Leadership,” *Canadian Jewish News* (6 November 1964) 1.

163. Memorandum from Ben Kayfetz to JS Midanik (1 February 1965), Toronto, Ontario Jewish Archives (Fonds 17, Series 5-4-6, File 34); Interview of Cyril Levitt (26 November 2020) [on file with author] [Levitt Interview].

164. Bialystok, *supra* note 5 at 126-28.

165. *Ibid.*

166. Levitt Interview, *supra* note 163; Bialystok, *supra* note 5 at 128. With respect to Professor Levitt’s work on Jewish history and racial incitement, see Louis Greenspan & Cyril Levitt, eds, *Under the Shadow of Weimar: Democracy, Law, and Racial Incitement in Six Countries* (Praeger, 1993); Cyril Levitt & William Shaffir, *The Riot at Christie Pits* (Lester & Orpen Dennys, 1987).

the neo-Nazis' headquarters and stole their membership files.¹⁶⁷ According to Englishman, his desire to take action arose from Congress's inaction:

I spoke with Ben Kayfetz and Myer Sharzer who both held positions within the executive of the Jewish Congress. They told me that the Jewish Congress knew all about it. I then asked what they were planning to do about it. Their answer was that the position of the Executive was to do "nothing."...I was flabbergasted at first. Then I said to them, "you people have not learned a thing from the Holocaust. Because what you are doing now is precisely what brought the Nazis to power in Germany!"¹⁶⁸

Congress did in fact know all about neo-Nazi activities, as they too were surveilling Stanley, Beattie, and their associates.¹⁶⁹ The JPRC hired several informants to attend neo-Nazi meetings and record conversations involving Stanley and Beattie.¹⁷⁰ It passed on this information to the police.¹⁷¹

While it was monitoring the Nazis, Congress was *also* spying on the Jewish vigilantes.¹⁷² The JPRC had at least two agents regularly attend N3's meetings and report back to Kayfetz, one of whom was accepted as a member of N3's executive. Kayfetz's agents provided details about N3's membership, plans, and its views of Congress.¹⁷³ Berwald claimed that Jewish leadership also bugged their meetings; when N3 bought a bugging device to infiltrate the neo-Nazis, it picked

167. Interview of Michael Englishman by Karyn Farber (17 August 1987), Los Angeles, USC Shoah Foundation Visual History Archive (Collection of the Sarah and Chaim Neuberger Holocaust Education Centre).

168. Michael Englishman, "Neo-Nazis in Toronto" (1996-97) 4-5 *Can Jewish Studies* 120 at 121-22. In the quoted passage, Englishman was referring to the announcement that Beattie planned a rally at Allan Gardens, discussed below.

169. See *e.g.* Announcement of Meeting at the Windsor Room, King Edward Hotel (1964), Toronto, Ontario Jewish Archives (Fonds 17, Series 5-4-6, File 17); Sydney Harris, Memorandum to file re campaign against hate literature (14 December 1964), Toronto, Ontario Jewish Archives (Fonds 17, Series 5-4-6, File 30).

170. See Memorandum from Ben Kayfetz to Sydney Harris (1 December 1964), Toronto, Ontario Jewish Archives (Fonds 17, Series 5-4-6, File 34); "Report re Mr. G." from MS to SMH, JSM, & BGK (18 February 1965), Toronto, Ontario Jewish Archives (Fonds 17, Series 5-4-6, File 34); Garrity, *supra* note 89 at 11.

171. Letter from Ben Kayfetz to L McIsaac (7 December 1964), Toronto, Ontario Jewish Archives (Fonds 17, Series 5-4-6, File 14).

172. Memorandum from Ben Kayfetz to file (25 January 1965), Toronto, Ontario Jewish Archives (Fonds 17, Series 5-4-6, File 34).

173. See *e.g.* Memorandum from Ben Kayfetz to JS Midanik re N-3 (5 February 1965), Toronto, Ontario Jewish Archives (Fonds 17, Series 5-4-6, File 34); Memorandum from Ben Kayfetz to JS Midanik re N-3 (9 February 1965), Toronto, Ontario Jewish Archives (Fonds 17, Series 5-4-6, File 34).

up the one Congress was using.¹⁷⁴ Needless to say, there was a breakdown of trust between leadership and the survivor community, which burst into the open in the summer of 1965.

F. “BUT A DROP IN AN ALREADY FULL AND BITTER CUP”: THE CONGRESS PLENARY, THE RIOT AT ALLAN GARDENS, AND THE COMMUNITY ANTI-NAZI COMMITTEE, 1965

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

The fourteenth Congress plenary, held at the Queen Elizabeth Hotel in Montreal from 20 May 1965 to 24 May 1965, drew a record high of more than eight hundred delegates. At the insistence of the Association of Holocaust Survivors, a number of its members, in addition to Klein and Orlikow, were granted delegate status.¹⁷⁵

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

I have been extremely perturbed [with]...the civil libertarians, civil-libertyniks or the civil rightniks...being used...as a term of opprobrium [*sic*]. That to have a concern for civil rights and a concern for civil liberties is apparently something that Jews should not have when Jews are attacked. And I take the opportunity of this particular platform in not pleading with you, but pointing out to you that the Jewish community would have descended to an extremely sorry state if in fact the term civil libertarian and civil rightnik was an epithet and a term of opprobrium

174. Bialystok, *supra* note 5 at 127.

175. “Montreal Delegates Ask for Klein, Orlikow on Program,” *Canadian Jewish Chronicle* (7 May 1965) 1. Lou Zablow claimed that the Association of Holocaust Survivors and Klein were at first denied entry to the plenary but were allowed in when they threatened to demonstrate outside the Queen Elizabeth Hotel. See Bialystok, *supra* note 5 at 151-52.

rather than one that should be treated with the respect for the concern of others that it deserves. We should not forget ourselves and forget our own identity.¹⁷⁶

In his address the next morning, Harris argued that the community was best served by keeping in mind what the Canadian public would accept; asking for too much might undermine the entire endeavour. As he put it, “If our proposals cut down the freedom of Jehovah’s Witnesses or Orangemen, of Roman Catholics or of Separatists, then our proposals will not be accepted by Parliament – and no one should fool himself into wishfully thinking otherwise.”¹⁷⁷ Klein spoke in response, criticizing Congress’s leadership for its alleged diffidence and calling hate literature an abuse of free speech.¹⁷⁸

Harris proposed a resolution pursuant to which the delegation would endorse Congress’s prior proposals on hate-speech legislation. However, the Association of Holocaust Survivors moved from the floor for an amendment supporting the Klein-Walker and Orlikow bills. The amendment was put to a vote and carried by a huge majority, with only a handful of members, including Borovoy and Midanik, voting against it.¹⁷⁹ The survivors had finally succeeded in making support for group libel legislation official Congress policy. Lou Zablow later proudly recounted that the Association’s “resolution, although fought tooth and nail by...most influential members of the Establishment, passed with flying colours...terminating the era of the iron rule by so called civil libertarians who were willing to give the Nazis the right to spread their venom.”¹⁸⁰

The CJC’s reversal was received positively. In the *Canadian Jewish News*, Nurenberger applauded Congress leaders for changing their minds.¹⁸¹ However, any goodwill was nearly lost a short time later.

On 30 May 1965, John Beattie was scheduled to speak at a public rally at Allan Gardens in Toronto. The announcement that Beattie would be holding a rally reverberated throughout the Jewish community. N3 sent letters to Jewish

176. Speech by JS Midanik (22 May 1965), Montreal, Alex Dworkin Canadian Jewish Archives (Fonds CJC0001, ZA 1965-2-14A).

177. Speech by Sydney Harris (23 May 1965), Montreal, Alex Dworkin Canadian Jewish Archives (Fonds CJC0001, ZA 1965-2-14A).

178. Speech by Milton Klein (23 May 1965), Montreal, Alex Dworkin Canadian Jewish Archives (Fonds CJC0001, ZA 1965-2-14A).

179. “Big Crowds at CJC Sessions, Sparks Fly at Hate Legislation Debate,” *Canadian Jewish Chronicle* (28 May 1965) 1; MJ Nurenberger, “Commentary: Breakthrough,” *Canadian Jewish News* (28 May 1965) 1 [“Breakthrough”]; Borovoy, *supra* note 127 at 100.

180. Lou Zablow, “Comments,” *Voice of the Survivors* (1966), Montreal, Montreal Holocaust Museum Archives (2011X.41.91) at 3.

181. “Breakthrough,” *supra* note 179.

organizations and synagogues calling for mass attendance.¹⁸² An anonymous pamphlet informed “all Jewish youth” that they were “*required*, as a citizen of Toronto and as a Jew, to be there, no questions asked by parents,” as “your lives are at stake if these people become bolder.”¹⁸³

As it turned out, Beattie never obtained a permit to speak in the park; had he given a speech, he would have been arrested. He never got the opportunity to do so. By the time Beattie showed up, a crowd of between one thousand five hundred and five thousand people had gathered, including a large number of Holocaust survivors. Beattie, holding a swastika flag, was immediately detected and attacked. Another group of six youths wearing biker jackets—which turned out to be members of a motorcycle club happening to pass by—were also set upon. Police rescued the victims before any serious injury resulted. Eight Jews were arrested, in addition to Beattie. N3 provided bail for the Jewish arrestees.¹⁸⁴

Congress was very unhappy with this display of vigilantism, which threatened to undo decades of careful progress. On 8 June 1965, Congress sent a “communiqué” to approximately twenty thousand members of the Ontario Jewish community, admonishing the vigilantes “in our midst, who are determined to act on their own in dealing with the neo-Nazis with little regard for the consequences to the community.”¹⁸⁵ It continued:

The Canadian Jewish Congress accuses these persons and groups of irresponsibly creating a tense and inflamed situation which...was bound to erupt into violence and which unfortunately did so erupt; let us face it—the consequences of the riot could have been more ugly, even tragic!

[...]

There are some individuals—fortunately very few—of these self-appointed *shomrim* [guardians] who have mistaken noise for action and rabble-rousing for militancy and who have not hesitated to turn an unfortunate coincidence into the occasion for inflammatory allegations of anti-Semitic motivation.¹⁸⁶

182. Bialystok, *supra* note 5 at 131.

183. Anonymous Pamphlet to All Jewish Youth (1965), Toronto, Ontario Jewish Archives (Fonds 17, Series 5-4-6, File 11) [emphasis in original]. The pamphlet, though unsigned, stated that it had “Rabbi Monson’s endorsement,” presumably referring to Rabbi David Monson of Beth Sholom Synagogue in Toronto (*ibid*).

184. Bialystok, *supra* note 5 at 132; Englishman, *supra* note 168 at 122-23.

185. CJC Report on Neo-Nazism and Hate Literature (8 June 1965), Toronto, Ontario Jewish Archives (Fonds 17, Series 5-4-6, File 24).

186. *Ibid* [emphasis in original]; “Jewish Congress Blames Jews for Fomenting Mob Violence,” *The Globe and Mail* (9 June 1965) 1 [“Congress Blames Jews”].

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

It is disgusting and very much disappointment [*sic*] in reading this letter. You are acting in such a passive way as during the war when 6 million Jews were slaughtered and you were afraid to raise your voice because this might embarrass the government.¹⁸⁷

Congress received a flood of similar criticism. The Association of Holocaust Survivors called for the immediate resignation of those responsible for the “malicious and unjust” statement, blaming this “deplorable and foolish act” on “the rancor of the handful of opponents of the recent plenary session resolution,” who were looking to avenge their defeat on the question of group libel legislation.¹⁸⁸ Likewise, a resolution passed by the Conference of Jewish Folk Organizations and Survivors of Concentration Camps in Toronto called Congress’s statement “an insult to the feelings of thousands of Jewish people in our city” and demanded its withdrawal and the resignation of all responsible parties.¹⁸⁹

In response to the backlash, on 7 July 1965, the CJC held a community meeting at Holy Blossom Temple in Toronto, chaired by Rabbi W. Gunther Plaut.¹⁹⁰ The meeting was designed to alleviate tensions caused by the communiqué, which, in Rabbi Plaut’s words, had “set the already smouldering Jewish community fully ablaze.”¹⁹¹ Plaut recalled that the voices of protest had become so loud “that the very continuance of Congress, at least in Toronto,

187. Handwritten Note from Samuel Panik (11 June 1965), Toronto, Ontario Jewish Archives (Fonds 17, Series 5-4-6, File 24).

188. “Congress Statement On Toronto Riot—Concentration Camp Survivors Demand Resignations Of Responsible Parties,” *Canadian Jewish Chronicle* (18 June 1965) 1.

189. Resolution of Conference of Jewish Folk Organizations and Survivors of Concentration Camps (22 June 1965), Toronto, Ontario Jewish Archives (Fonds 17, Series 5-4-6, File 49). Making matters worse, the communiqué was leaked to *The Globe and Mail* before it reached its recipients. See “Congress Blames Jews,” *supra* note 186; Bialystok, *supra* note 5 at 136. Many other newspapers picked up the story and ran similar headlines. See Letter from Ben Kayfetz to JS Midanik (22 June 1965), Toronto, Ontario Jewish Archives (Fonds 17, Series 5-4-6, File 11).

190. Rabbi Plaut would go on to serve as president of Congress and Vice-Chair of the Ontario Human Rights Commission. See Ron Csillag, “Scholar urged Jews to engage larger world,” *The Globe and Mail* (14 February 2012) S8.

191. Plaut, *supra* note 47 at 244.

was in jeopardy.”¹⁹² Approximately eight hundred people attended the meeting, which lasted five hours.¹⁹³

Plaut opened by declaring, “[T]he first thing that we must understand is that we are here tonight not to fight Jews but to fight Nazis.”¹⁹⁴ Nevertheless, tension was palpable between Holocaust survivors and community leadership. Cyril Levitt, who attended the meeting, recalled that the atmosphere was “pretty raucous,” and people were “really angry.”¹⁹⁵ Numerous attendees rose to excoriate Congress leadership and praise the vigilantes at Allan Gardens. One Holocaust survivor called the Congress communiqué “a tremendous offense to those who went through the hells and agony of Nazism.”¹⁹⁶ Sabina Citron—an honorary secretary of the Association of Holocaust Survivors, who would gain prominence over the ensuing years through her quest to have Ernst Zundel prosecuted—tied Congress’s insensitivity to its failure to support legislation on group libel.¹⁹⁷ Citron reminded the audience that it was the survivors who had lobbied for the Klein-Walker bill and that “Congress refused to have anything to do with it.” It was only “after a year and a half’s struggle and under the pressure of all but 4 delegates to the Plenary Session [that] the Klein-Walker bill was finally taken under the wings of Congress.” Thus, Citron noted, “[w]e should make it absolutely clear that the letter in itself was but a drop in an already full and bitter cup.”¹⁹⁸ Responding to Citron and others, Midanik defended both the communiqué and his position on the legislation:

I don’t retreat from my position at all on the question of group libel or on the question that came up at the Plenary Session. I have a right to a viewpoint and I have a right to a defence of civil liberties and I have a right to be convinced that I am right even though I am a group of four people.¹⁹⁹

192. *Ibid* at 244.

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

194. Transcript of community meeting at Holy Blossom Temple (7 July 1965), Toronto, Ontario Jewish Archives (Fonds 17, Series 5-4-6, File 32) [Meeting at Holy Blossom].

195. Levitt Interview, *supra* note 163.

196. Meeting at Holy Blossom, *supra* note 194.

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

198. Meeting at Holy Blossom, *supra* note 194.

199. *Ibid*.

However, a resolution passed at the 7 July 1965 meeting would further marginalize the civil libertarians. Under pressure to incorporate a broader perspective into Congress's response to neo-Nazism, it was resolved that a "democratic and widely representative" special committee be established to formulate the community's position.²⁰⁰ The composition of this group, which came to be known as the Community Anti-Nazi Committee (CANC), was decided at a subsequent meeting on 22 July 1964. Although operating under the aegis of Congress, only fourteen of its eighty members would come from the CJC and B'nai Brith. The remaining members were chosen by a cross-section of Jewish community organizations, including synagogue congregations of all stripes, labour groups, Zionists, women's organizations, youth groups, and *landsmanshaftn* (Jewish fraternal societies).²⁰¹

The CANC acted in an advisory capacity and its specific impact on Congress policy can be difficult to pinpoint.²⁰² Indeed, as set out below, the CANC's formation did not prevent disagreement in the years to come between Congress leadership and Holocaust survivors over the content of the hate-speech legislation. Rather, it further entrenched support for a group libel bill of some form. Congress had crossed the Rubicon and there would be no turning back. Levitt, who served as one of the committee's youth representatives, noted that the CANC's creation was a seminal event—"a kind of opening of the door—the bowing to the pressure to bring [the newcomers] into the inner circle."²⁰³

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

IV. 1965–1970: "FINALLY: ANTI-HATE BILL"²⁰⁴

A. OVERVIEW

The bulk of the Cohen Committee's findings were agreed on in July 1965 and the report was completed and sent to the government in November 1965. It was released in April 1966. In November 1966, the government tabled legislation

200. *Ibid.*

201. Memorandum from Myer Sharzer to BG Kayfetz re Special Steering Committee (3 August 1965), Toronto, Ontario Jewish Archives (Fonds 17, Series 5-4-6, File 32).

202. See Bialystok, *supra* note 5 at 142-43.

203. Levitt Interview, *supra* note 163.

204. See *Canadian Jewish News* (21 November 1969) 1.

in the Senate that was virtually identical to what the Cohen Committee had recommended.²⁰⁵

The Cohen Committee's recommendations and the government's proposed legislation tracked closer to the Klein-Walker bill than Congress's earlier proposals. The bill outlawed three things: first, advocacy or promotion of genocide (section 267A; now section 318); second, incitement of violence or hatred against an identifiable group through public communication, where such incitement was likely to lead to a breach of the peace (section 267B(1); now section 319(1)); third, a group libel provision, proscribing the wilful promotion of hatred or contempt against an identifiable group (section 267B(2); now section 319(2)). In addition, the legislation authorized *in rem* proceedings to seize hate propaganda (section 267C; now section 320).²⁰⁶

The offence of wilful promotion of hatred, which was punishable by up to two years' imprisonment, contained two defences. No person could be convicted if they established that: (a) the statements were true; or (b) the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and that on reasonable grounds they believed them to be true.²⁰⁷

Harvey Yarosky, then a young criminal lawyer and one of Maxwell Cohen's former students at McGill University, served on the committee as Cohen's executive assistant. He provided criminal law expertise and invaluable research on hate propaganda and legislation in other countries and assisted with drafting the report. According to Yarosky, the committee's members came to their task with no preconceived notions as to the necessity of hate-speech legislation. Indeed, many were concerned about the impact of such legislation on civil liberties and the question of whether criminalization of hate speech would prove an effective deterrent. However, after further study and review of racist material, the committee gradually came to a unanimous opinion on the need for a hate-speech bill. Yarosky remembered one committee member commenting that he had never realized how hurtful hate speech was for targeted groups.²⁰⁸

It was understood by the other committee members that Saul Hayes spoke for the Jewish community.²⁰⁹ Undoubtedly influenced by the shift in Congress policy, Hayes signed on to the Cohen Committee's opinion and would have

205. Kaplan, *supra* note 4 at 254-59, 272, n 61.

206. Bill S-49, *An Act to amend the Criminal Code*, 1st Sess, 27th Parl, 1966 (first reading 7 November 1966) at 1-2.

207. *Ibid* at 2.

208. Interview of Harvey Yarosky (30 November 2020) [on file with author] [Yarosky Interview].

See also Kaplan, *supra* note 4 at 255.

209. Yarosky Interview, *supra* note 208.

gone further; Hayes objected to the insertion of the defence of truth in section 267B(2). His dissent on this issue was noted in a footnote.²¹⁰ The report was otherwise unanimous.

Although the government introduced draft legislation in 1966, it was not passed until four years later, reflecting the considerable opposition to the bill—as Harris and others had warned. The legislation originally introduced in November 1966 was referred to a special joint committee of the Senate and House of Commons; however, the legislative session ended without the bill's consideration. The government reintroduced the legislation in May 1967 as Bill S-5, and in November 1967, the bill was referred to a Senate committee. That committee met three times but dissolved in 1968 in advance of the June election, which re-elected a Liberal government under its new leader, Pierre Elliott Trudeau. Due to a recent redrawing of its boundaries, Trudeau's Mount Royal riding became 38 per cent Jewish—making it Canada's most Jewish riding—further incentivizing him to ensure the legislation was enacted.²¹¹

The bill was introduced again in December 1968 as Bill S-21 and referred to another senate committee in February 1969. Bill S-21 passed the Senate in June 1969, only to die when Parliament was prorogued later that same month. The legislation was then introduced in the House of Commons in October 1969 and passed in April 1970.²¹² After further debate in the Senate—and a last-minute attempt by the legislation's opponents to refer the question of its constitutionality under the Bill of Rights to the Supreme Court of Canada—it received Royal Assent on 11 June 1970.²¹³

The legislation was amended along the way and weakened in several respects. Perhaps most importantly, a provision was inserted requiring the consent of the attorney general of a province to initiate a prosecution for wilful promotion of hatred or advocating genocide. Furthermore, private conversations were exempted from liability under section 267B(2). In addition, two defences were added to wilful promotion of hatred, protecting persons who, in good faith, expressed an opinion on a religious subject or an opinion based on a belief in a religious text

210. Cohen Committee Report, *supra* note 6 at 66, n 17 (“Mr. Hayes, while agreeing with these conclusions and recommendations, would have wished the recommendations to go further by excluding truth as a defence”).

211. Troper, *supra* note 12 at 210.

212. See *House of Commons Debates*, 28-2, vol 1 (17 November 1969) at 87 (Mr Turner); *House of Commons Debates*, 28-2, vol 6 (13 April 1970) at 5807 [*House of Commons Debates*, vol 6].

213. See *Senate Debates*, 28-2, vol 2 (16 April 1970) at 881-82 (Hon Muriel McQ Fergusson); Kaplan, *supra* note 4 at 259-64.

or intended to point out, for purposes of removal, matters producing or tending to produce feelings of hatred toward an identifiable group.²¹⁴

Debate over the bill was intense. Most controversial was the section on group libel.²¹⁵ Criticism centred on two points: first, that the bill was too great an infringement on freedom of speech;²¹⁶ second, that the legislation would prove ineffective as a tool for combating hatred. Two leading academics, F.R. Scott and Harry Arthurs, emphasized the latter argument. Scott contended that the bill provided “a false sense of security” but would not attack the root causes of racism; as he stated, “[W]e are making a gesture on the criminal law side and then everything else goes on as before.”²¹⁷ Arthurs, who had resigned from the JPRC’s Legal Committee in part over its shifting views on group libel,²¹⁸ became one of the legislation’s most convincing opponents. Among other things, he argued that the criminal law was a suboptimal instrument for countering hateful speech and that emphasis on criminal sanctions would discourage other, more useful measures, such as education.²¹⁹ Arthurs’s testimony had a powerful impact; it was cited several times by opponents of the bill in the bitter legislative debate that followed.²²⁰

The response of the legislation’s proponents to the first argument was that freedom of speech is not absolute and that the bill had been carefully tailored to

214. The bill went through other changes. “Religion” was added to the definition of “identifiable group”; the definition of “statements” was expanded to include electronic recordings; the word “means” was substituted for “includes” in the definition section of the genocide provision; the word “contempt” was deleted from the offence of wilful promotion of hatred; and communication facilities were exempted from *in rem* proceedings under s 267C.

215. Kaplan, *supra* note 4 at 263; Cohen, “Reflections on a Controversy,” *supra* note 8 at 112.

216. See *e.g.* *Senate Debates*, 28-1, vol 2 (17 June 1969) at 1615 (Daniel A Lang) [*Senate Debates* vol 2]; *House of Commons Debates*, vol 6, *supra* note 212 at 5532 (Eldon M Woolliams).

217. Senate, Standing Committee on Legal and Constitutional Affairs, *Evidence*, 28-1, vol 1, No 9 (29 April 1969) at 206-07 (Prof Scott).

218. Arthurs Interview, *supra* note 123.

219. *Ibid*; Senate, Standing Committee on Legal and Constitutional Affairs, *Evidence*, 28-1, vol 1, No 7 (22 April 1969) at 146-47 (Prof Arthurs). Part of Arthurs’s evidence was also published. See HW Arthurs, “Hate propaganda – an argument against attempts to stop it by legislation” (1970) 18 *Chitty’s LJ* 1.

220. See *e.g.* *House of Commons Debates* vol 6, *supra* note 212 at 5543 (Eldon M Woolliams); *House of Commons Debates*, 28-2, vol 6 (9 April 1970) at 5687 (Paul St Pierre); *Senate Debates*, 28-2, vol 2 (21 April 1970) at 895 (Hon Lionel Choquette).

restrict speech as little as possible.²²¹ The answer to the second was that the bill's effectiveness was to be found in its pedagogical and symbolic functions, not in its utility as a prosecutorial tool. To the legislation's supporters, the opponents had missed the point. As Cohen put it in an article he published shortly after the legislation was enacted, the provisions would serve a useful purpose simply through their enactment:

[T]he Committee took into account the important criticism aimed generally at any such controls, namely that such legislation cannot change the human heart and that fundamentally change must come from within and that the most formidable enemy of prejudice was education and not punitive criminal law. As a general proposition, the Committee accepted this broad concept of the basic role of the educational process, and of the social environment in general, as the more desirable framework within which to alter and control "patterns of prejudice." But it could not reject the double conclusion to which it came, namely that many of the community's most important self-educating values were enshrined in statements of criminal law and these in turn, once so enacted, had a continuing educational effect by their very formulation.²²²

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

The criminal law is not merely a sanction or control process. It is reflective and declaratory of the moral sense of a community and the total integrity of a community. It seeks not merely to proscribe, but to educate....I make no prediction as to how successful this legislation is going to be; I would be a fool to try to do it and so would any other member. [It] is a conscientious attempt on the part of the government... to outlaw as an articulation of the total integrity of the Canadian community the dissemination of hate in this country and throughout the world, proclaiming our commitment to humanity, humanism and to the rule of law.²²³

221. See *e.g.* Senate, Special Committee on the Criminal Code (Hate Propaganda), *Evidence*, 27-2, vol 1, No 2 (29 February 1968) at 43-44, 49-50 (Prof Maxwell Cohen) [Special Committee on the Criminal Code, vol 1, No 2]; *Senate Debates* vol 2, *supra* note 216 at 1610 (Mr Roebuck); Paul Martin, "Right to Live Without Fear," *Canadian Jewish Notes* (29 May 1970) 1.

222. Cohen, "Reflections on a Controversy," *supra* note 8 at 109.

223. *House of Commons Debates* vol 6, *supra* note 212 at 557-58 (Mr Turner).

B. “THERE IS A GOOD DEAL OF FEELING THAT THIS IS A JEWISH BILL”: CONGRESS EFFORTS TO SECURE PASSAGE OF THE LEGISLATION

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

CJC leadership sought to counter any impression that it was acting out of self-interest or that hate speech was only a matter of Jewish concern. Congress hired an Ottawa-based consultant, R. Alex Sim, to lobby MPs and report back inside information. Sim held himself out as the chairman of the “Committee on Citizen Rights,” likely to conceal his ties to the CJC when it was beneficial to do so.²²⁴ He attended parliamentary debates in Ottawa and travelled the country, attending public meetings on the legislation and talking to politicians and community groups.²²⁵ Sim was given other tasks, such as writing letters to the editor to major newspapers around the country—in his capacity as chairman of the Committee on Citizen Rights—expressing support for the bill and countering arguments against the legislation.²²⁶ In addition, he liaised with non-Jewish organizations, whom Congress wanted to get on board so as to provide the legislation with a broad base of support.²²⁷

224. Note, however, that it is not clear whether Sim created this organization for purposes of this campaign or whether it was already in existence.

225. See *e.g.* Letter from Ben Kayfetz to Saul Hayes re Report on planning committee meeting (15 January 1968), Toronto, Ontario Jewish Archives (Fonds 17, Series 5-4-6, File 52) [Report on planning committee]; Letter from Alex Sim to Ben Kayfetz (14 February 1968), Toronto, Ontario Jewish Archives (Fonds 17, Series 5-4-6, File 56); Letter from Alex Sim to Ben Kayfetz (29 April 1968), Toronto, Ontario Jewish Archives (Fonds 17, Series 5-4-6, File 52).

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

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

Congress worked hard to secure the backing of a wide assortment of minority and special interest groups. It forwarded relevant material to these organizations and offered to draft a brief for anyone who requested it.²²⁸ Several of the groups solicited by Congress testified in support of the bill. Indeed, most, if not all, of the groups who testified in favour of the legislation were affiliated with the Jewish community or had been approached by Congress.²²⁹ Other organizations issued public statements which Congress could cite in its own testimony—as “spontaneous” endorsements—to argue that “a groundswell of opinion across Canada” favoured the legislation.²³⁰

228. Report on planning committee, *supra* note 225; Letter from Louis Herman to Richard Jones (19 January 1968), Toronto, Ontario Jewish Archives (Fonds 17, Series 5-4-6, File 56).

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

Several of the nominally non-Jewish groups had ties to the Jewish community. For example, the United Nations Association was represented by Justice Harry Batshaw, who in 1950 became the first Jew appointed to a Superior Court in Canada and was active on Jewish community issues. See Canadian Jewish Heritage Network, “Batshaw, Justice Harry” (last visited 6 February 2022), online: <www.cjhn.ca/en/permalink/cjhn88127>. The Canadian Council of Christians and Jews was created with Congress assistance, which initially provided its entire funding. See Letter from Ben Kayfetz to Max Melamet (22 January 1959), Toronto, Ontario Jewish Archives (Fonds 17, Series 5-4-6, File 6). The delegation from the Manitoba Human Rights Association was led by Melvin Fenson, a Jewish lawyer from Winnipeg, Congress member, and formerly the long-time editor of Winnipeg’s *Jewish Post*. See Allan Levine, *Coming of Age: A History of the Jewish People of Manitoba* (Heartland Associates, 2009) at 216.

In addition, the CJC lobbied the Canadian Polish Congress to support the legislation and wrote a brief on their behalf. Although it is not clear whether the CJC also approached the United Black Front, internal correspondence from January 1968 indicates that its planning committee was reaching out to “Negro groups.” See Report on planning committee, *supra* note 225.

230. Special Committee on the Criminal Code, vol 1, No 2, *supra* note 221 at 34 (Mr Harris); Senate, Standing Committee on Legal and Constitutional Affairs, *Evidence*, 28-1, vol 1, No 2 (25 February 1969) at 41 (Mr Abbey) [Committee on Legal and Constitutional Affairs No 2].

The CJC's concern over not appearing self-interested was well-founded. James Harper Prowse, chairman of the Senate committee on Bill S-5, reported to Sim in February 1968 that there was "a good deal of feeling [in the Senate] that this is a Jewish bill"; Prowse was thus grateful when Sim brought him a list of non-Jewish organizations that Congress had been in touch with, which Prowse thought "would make a tremendous difference in the attitude of the committee members."²³¹ However, legislators continued to display anti-Semitic attitudes during the debates. Senator Lionel Choquette suggested that the Jewish community was trying to "shove this type of legislation down people's throats"²³² and that Jewish witnesses were prejudiced.²³³ Senator David Walker queried whether anyone supported the bill other than the Congress.²³⁴ Other legislators used language that invoked stereotypes of the "pathological Jew" who derived "pleasure in raising the alarm of imminent danger and in producing a perpetual and paranoid status of victimhood."²³⁵

Congress engaged in other lobbying efforts. It was in contact with Mark MacGuigan, who had served on the Cohen Committee as a law professor and was elected as a Liberal MP in 1968.²³⁶ Kayfetz asked MacGuigan to analyze the arguments being made against the bill, in exchange for which Kayfetz promised him "a suitable honorarium."²³⁷ MacGuigan published two academic articles and at least one editorial in support of the legislation, and testified before the Senate.²³⁸ In addition, the CJC sent letters to candidates in advance of the 1968 federal election requesting their support and had local representatives approach

231. Memorandum from Sim to Kayfetz on Bill S-5, *supra* note 227.

232. Special Committee on the Criminal Code, vol 1, No 2, *supra* note 221 at 24 (Senator Choquette).

233. Senate, Standing Committee on Legal and Constitutional Affairs, *Evidence*, 28-1, vol 1, No 5 (18 March 1969) at 94 (Senator Choquette).

234. Committee on Legal and Constitutional Affairs No 2, *supra* note 230 at 43 (Senator Walker).

235. Lunny, *supra* note 19 at 41, 58.

236. Cyril Levitt recalled that MacGuigan also came to speak to the CANC about the legislation and the Cohen Committee's work, although Levitt could not recall when exactly this took place. Levitt Interview, *supra* note 163.

237. Letter from Ben Kayfetz to Mark MacGuigan (21 March 1967), Toronto, Ontario Jewish Archive (Fonds 17, Series 5-4-6, File 42); Bialystok, *supra* note 5 at 165.

238. MacGuigan, "Hate Control," *supra* note 11; MacGuigan, "Bill S-5 and the Cohen Report," *supra* note 11.

candidates in person.²³⁹ As the legislative process dragged on, Congress lobbied MPs, influential senators, and high-ranking members of the Liberal government.²⁴⁰ In September and October 1969, Congress had a number of discussions with Trudeau and Turner and was able to secure a commitment that the government would introduce the anti-hate bill early in the upcoming legislative session and secure its passage—promises that the government kept.²⁴¹

C. “WE RESERVE THE RIGHT TO OPPOSE ANY LAW SO FULL OF LOOPHOLES AND ESCAPE CLAUSES”: SURVIVORS’ DISSATISFACTION WITH THE LEGISLATION

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

In its February 1968 testimony, echoing its prior legislative campaigns, Congress took a position that offered the greatest opportunity to ensure the bill’s enactment. Sydney Harris told the committee that Congress fully agreed with the defences to wilful promotion of hatred contained in the draft legislation; in fact, Harris emphasized, the CJC would go further and “*oppose* legislation that [did] not have these built-in safeguards to protect the full and free debate of social issues centering on the uninhibited discussion of controversial social issues.”²⁴² Notably, Congress did not adopt Hayes’s dissenting position in the Cohen Committee report opposing the defence of truth.²⁴³ Moreover, the Congress delegation encouraged the Senate to consider introducing an additional hurdle, that no prosecution be commenced without the attorney general’s consent—a suggestion

239. See *e.g.* Letter from Ben Kayfetz to Saul Hayes, *supra* note 226; Letter from Andrew Brewin to Sydney Harris (13 June 1968), Toronto, Ontario Jewish Archives (Fonds 17, Series 5-4-6, File 53); Letter from Ben Kayfetz to John Geller (14 June 1968), Toronto, Ontario Jewish Archives (Fonds 17, Series 5-4-6, File 52); Letter from Sydney Harris & Louis Herman (17-June 1968), Toronto, Ontario Jewish Archives (Fonds 17, Series 5-4-6, File 52); Letter from John Geller to members of Legislative Planning Committee (24 October 1969), Toronto, Ontario Jewish Archives (Fonds 17, Series 5-4-6, File 52).

240. See *e.g.* Letter from John Geller to members of Legislative Planning Committee, *supra* note 239; Letter from John Geller (26 November 1968), Toronto, Ontario Jewish Archives (Fonds 17, Series 5-4-6, File 52); Letter from Philip Givens to Ben Kayfetz (22 April 1970), Toronto, Ontario Jewish Archives (Fonds 17, Series 5-4-6, File 66).

241. Letter from John Geller to members of Legislative Planning Committee (9 October 1969), Toronto, Ontario Jewish Archives (Fonds 17, Series 5-4-6, File 53).

242. Special Committee on the Criminal Code, vol 1, No 2, *supra* note 221 at 32 (Mr Harris [emphasis added]).

243. See *ibid.* Congress explicitly approved of this defence.

the Senate ultimately gave effect to.²⁴⁴ Since requirement of the attorney general's consent has discouraged use of the legislation, it is surprising in hindsight that the CJC would go out of its way to propose this provision.²⁴⁵ The same is true of Congress's approval of the statute's generous defences.²⁴⁶

Congress's attitude can be explained by its goal of overcoming opposition to the bill and its optimism that the legislation would not need to be used. As Fred Catzman testified, "[I]f this legislation were enacted we would be bitterly disappointed if we found it necessary to have to resort to the courts to enforce it."²⁴⁷ Congress envisioned that the law would have a powerful symbolic and deterrent impact: "that the very enactment of such a law as a declaration of policy would have the salutary effect of making citizens aware that these are taboos they shouldn't engage in."²⁴⁸ As Kayfetz wrote after the legislation was enacted, Jewish leadership felt that the anti-hate bill would not "eliminate or even outlaw the bulk of antisemitic material that is circulated." Rather, "just as [with] the

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

The CJC's testimony regarding the attorney general's consent was somewhat equivocal, but it raised the issue on its own initiative and made clear that it endorsed such a requirement. In both its 1968 and 1969 testimony, Congress quoted passages from a speech by Chief Justice Dalton Wells of the Ontario High Court of Justice advocating to mandate the attorney general's consent out of concern for freedom of speech. In addition, in 1968 (but not 1969), the delegation added the following testimony: "It may well be that Chief Justice Wells' suggestion as to an Attorney General's fiat being a condition precedent to a prosecution is one which should be given effect to." See Special Committee on the Criminal Code, vol 1, No 2, *supra* note 221 at 33 (Mr Harris).

During the 1968 Senate hearing, in response to a question from Senator Arthur Roebuck—expressing concern about the practicality of requiring the attorney general's consent—the Congress delegation clarified that it "felt obliged to point out to the committee that Chief Justice Wells made this suggestion [but it did] not feel in any way the bill would be defective unless [the] suggestion were given effect to." See Special Committee on the Criminal Code, vol 1, No 2, *supra* note 221 at 42 (Mr Geller). Nevertheless, as noted, Congress quoted the same passage from Chief Justice Wells when it appeared before the Senate one year later. See Committee on Legal and Constitutional Affairs No 2, *supra* note 230 at 39 (Mr Abbey).

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

246. MacMillan, Claridge & McKenna, *supra* note 245 at 443 (statutory defences under s 319(2) have made investigation and prosecution of hate speech more challenging).

247. Special Committee on the Criminal Code, vol 1, No 2, *supra* note 221 at 40 (Mr Fred M Catzman).

248. *Ibid.*

anti-discrimination laws on the provincial level,” it was hoped that the law would improve “the climate of opinion.”²⁴⁹

The Association of Holocaust Survivors was unhappy with Congress’s position. It was concerned that the legislation was too weak and would prove ineffective. Among other things, the survivors wanted the defences to wilful promotion of hatred eliminated. Paul Goldstein, the Association’s president, accused Congress of displaying “a flagrant disregard for the Community’s feelings and interest.”²⁵⁰ In Goldstein’s view, the CJC was hijacking the bill and prioritizing the rights of Nazis over their victims:

It is clear that the same civil liberty advocated in the Jewish leadership who were so instrumental in muzzling the demands of the Jewish Community for effective group libel legislation in the past, are back in business again.

Let us not forget that the only reason the Congress is fighting for a group libel bill is because of the demands of the Jewish Community, spearheaded by the Association of Survivors and won by an overwhelming majority at the last plenary session in 1965.

These leaders didn’t want the bill in the first place! And now they are fighting in a manner which would make the proposed legislation permanently ineffective!²⁵¹

Congress did not back down. Hayes called Goldstein way out of line and accused him of not understanding the proposed legislation.²⁵² In an internal memo, Geller deemed Goldstein’s criticism “a completely dishonest attack not only on the intelligence of those of us engaged in the promotion of Bill S5 (which is fair) but on our honesty.”²⁵³ As Geller explained, the CJC position was carefully considered in order to “establish the bona fides of the Jewish community on the question of freedom of speech” so as to appeal to the legislation’s opponents.²⁵⁴ He added in a subsequent correspondence, “We might be able to deal with our enemies but God protect us from our friends.”²⁵⁵

249. Kayfetz, “The story behind,” *supra* note 11 at 8.

250. Paul Goldstein, “Bill to curb hate mongers has too many loopholes,” *Canadian Jewish Chronicle* (29 March 1968) 5.

251. *Ibid.*

252. *Ibid.*

253. Letter from John Geller to Saul Hayes (2 April 1968), Toronto, Ontario Jewish Archives (Fonds 17, Series 5-4-6, File 52).

254. *Ibid.*

255. Letter from John Geller to Saul Hayes (3 April 1968), Toronto, Ontario Jewish Archives (Fonds 17, Series 5-4-6, File 52).

When it testified again one year later, Congress presented a virtually identical brief.²⁵⁶ This time, the Association of Holocaust Survivors also testified. The Association repeated its critiques—that the legislation had too many loopholes and that the defences should be deleted.²⁵⁷ The survivors were not well-received. Much of the criticism directed against them came from David Croll, the only Jewish senator and himself a member of Congress. As he remarked in frustration:

The government has presented this bill. The Government wants a bill. You have got ten or a dozen lawyers and other people here who know more than lawyers. This is not an exercise for us. The intention is to get a bill that works. So...you [can] give us that much credit.²⁵⁸

Faced with a hostile reception, Goldstein conceded that the Association did not wish to jeopardize the legislation's passage, and "would be quite satisfied to see Bill S-21 adopted in its present form and to let its efficacy be tested by the courts."²⁵⁹

V. CONCLUSION

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

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

Second, Congress's failure to endorse the Klein-Walker and Orlikow bills may have squandered its best opportunity to secure a stronger law. In 1964,

256. See Committee on Legal and Constitutional Affairs No 2, *supra* note 230 at 31-42 (Mr Abbey).

257. Senate, Standing Committee on Legal and Constitutional Affairs, *Evidence*, 28-1, vol 1, No 6 (25 March 1969) at 129 (Mr Goldstein).

258. *Ibid* at 129 (Mr Croll).

259. *Ibid* at 129 (Mr Goldstein).

when these bills were introduced, neo-Nazism was ascendant and appeared well-coordinated. All major parties were on record as supporting some form of anti-hate legislation.²⁶⁰ In the House of Commons, Diefenbaker repeatedly pressed the government to take steps to stem the flow of hate literature.²⁶¹ According to the *Canadian Jewish Chronicle*, even the Social Credit Party and the Creditistes had promised to “vote for a law with teeth to curb hate propaganda.”²⁶² However, by the time Congress got on board with the legislation and the Liberal bill slowly worked its way through Parliament, neo-Nazism had subsided, handing its opponents a powerful argument against the legislation. In addition, Diefenbaker was replaced by Robert Stanfield in 1967, and the PCs ultimately opposed the bill.²⁶³

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

It also bears emphasizing that Congress’s careful approach ensured the legislation was eventually determined to be constitutional. In deeming section 319(2) of the *Criminal Code* a reasonable limit on freedom of expression pursuant

260. See e.g. “NDP Head Hopes for Legislation that Will Stop Hate Propaganda,” *Canadian Jewish Chronicle* (5 March 1965) 1; “Diefenbaker Says Conservatives Will Support Law Against Hate,” *Canadian Jewish Chronicle* (12 March 1965) 1.

261. See *House of Commons Debates*, 26-2, vol 1 (10 March 1964) at 732 (Right Hon JG Diefenbaker).

262. Max Bookman, “Dateline Ottawa,” *Canadian Jewish Chronicle* (7 May 1965) 6.

263. See *House of Commons Debates* vol 6, *supra* note 212 at 5530-33 (Mr Eldon M Woolliams). The Progressive Conservatives supported the genocide provision but opposed the rest of the bill. Despite the party’s official position, several Conservative MPs voted for the legislation.

to section 1 of the *Charter*, a one-vote majority of the Supreme Court of Canada in *Keegstra* cited the wide defences afforded to those accused of wilful promotion of hatred, which “significantly reduced” the “danger...that s. 319(2) is overbroad or unduly vague.”²⁶⁴ The majority was also impressed with the “particularly strong” Cohen Committee.²⁶⁵ Although Congress could not have predicted the language of the *Charter*, it deserves credit for indirectly anticipating how much of an inroad into freedom of speech the Court would ultimately accept. Furthermore, the closely-divided panel and the reasoning of the Court in *Keegstra* signals that a stronger bill—one absent the broad defences that the survivors found objectionable—would almost certainly have been struck down.

On account of the rise in hate speech over the last half-decade and the limited use of the legislation since its enactment, it is tempting to interpret the story of the criminalization of hate speech as a cautionary tale of the symbolic use of the criminal law. Arthurs, for example, calls the hate-speech legislation “an empty symbol” on account of its seldom invocation and apparently minimal deterrent effect.²⁶⁶

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

Arthurs’s view of the legislation as a hollow symbol echoes the opinion of those who argue the law has failed because of the low number of prosecutions and convictions. But the rich symbolism of the legislation suggests that we need to broaden our measure of the legislation’s effectiveness to accord with the actual goals of the bill. Irrespective of the number of prosecutions, the hate-speech legislation arguably does stand as an important symbol that we live in a cultural mosaic where hate speech and neo-Nazism are considered deviant and contrary

264. *Keegstra*, *supra* note 10 at 779.

265. *Ibid* at 724-25.

266. Arthurs Interview, *supra* note 123.

to Canadian values. Moreover, although manifestly difficult to quantify, it is certainly possible that the legislation has had an educative and deterrent impact through its very formulation, as envisioned by Turner, Cohen, and others. And, as Turner argued in Parliament, to view the criminal law as merely a penal sanction is to take an overly restrictive view of the objectives of criminal justice.²⁶⁷

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

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

