# THE CASE OF IMRE FINTA

David Matas*

Imre Finta was accused of being a key official in the rounding up and deportation of Jews in Szeged, Hungary to Auschwitz, a Nazi death camp, and to Strasshof, a Nazi concentration camp.[1] The round up had six phases. First, the Jews were identified and required to wear a yellow star. Second, all their property was seized. Third, they were removed to ghettoes. Fourth, the Jews were moved to a large concentration centre where all valuables were taken from them. Fifth, they were taken to the transport trains, and finally they were transported, most commonly for extermination at Auschwitz.

Finta was accused of being in charge of bringing Jews from the ghettoes to the concentration centre in Szeged. He was allegedly in charge of the concentration centre and his responsibilities supposedly included making sure that the Jews were kept in the brickyard and could not escape. He also took charge of taking valuables from them and his trial counsel admitted that Finta made daily announcements demanding that the prisoners relinquish all valuables on pain of death. Finally, he allegedly supervised the loading of the prisoners onto boxcars which took the Jews to their deaths at Auschwitz or to forced labour in Strasshof.

The Finta prosecution has an unusual legal history. Sabina Citron, a Holocaust survivor, publicly accused Finta of committing war crimes. Finta denied her charges and called her a liar. She sued him for libel. When the case went to trial, Finta did not defend the action and he was ordered to pay Mrs. Citron $30,000 plus court costs.

CTV broadcast a report accusing Finta of being a war criminal and Finta sued the network for libel. CTV engaged in extensive preparation for the trial, including obtaining videotape commission evidence in Austria, Hungary and Israel. After CTV accumulated the evidence, Finta withdrew his libel suit. The Court ordered Finta to pay the court costs of CTV and when he did not pay, CTV seized and sold his house at auction.

The evidence against Finta is overwhelming and unanswered. Finta presented no evidence to answer the charges brought against him, either at his libel trials or at his criminal prosecution. When asked at his criminal trial if he wanted to call evidence on his own behalf, he declined. Yet, Finta was acquitted. How is it possible that Finta could win his case when he called no evidence on his own behalf and the evidence against him was overwhelming? The answer is that there was a stacked jury and an appeal to racial prejudice.

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*Barrister & Solicitor (Winnipeg); Chair of the war crimes committee of B'nai B'rith Canada.

[1] *R.* v. *Finta* (1992), 73 C.C.C. (3d) 65 (Ont. C.A.).

**Stacking the Jury**

Douglas Christie, counsel for Finta, asked potential jurors, "Are you a member or supporter of any organization which advocated or opposed the prosecution of war crimes or crimes against humanity, or advocated or opposed changes in the *Criminal Code* in that regard?"[2] This initial question was not proposed either by the Crown or by the defence. It was suggested by the trial judge, Mr. Justice Archie Campbell, to replace a series of questions advanced by Christie. The questions Christie had suggested were designed to exclude all Jews from the jury.

The problem with the judge's replacement question is that it had the same result as the questions proposed by Christie. All major Jewish organizations are in favour of the prosecution of war crimes and crimes against humanity without exception. Therefore, the overwhelming majority of Jews in the community would be excluded by virtue of the question.

It might be proper to ask potential jurors if they are opposed to the existence of a law they might be asked to apply because, if a juror is opposed, there might be some concern that the or she would not apply the law. However, the question Christie asked would be improper even if it had no ethnic or exclusionary effect. In ordinary murder trials potential jurors are not asked if they are members of an organization that favours the existence of a law against murder or if they are personally in favour of a law against murder.

How is it possibly relevant to the duty of a juror whether he or she is in favour of an existing law? It was relevant to Douglas Christie because he wanted a jury inclined to nullification. He wanted a jury which would not consider Finta's guilt or innocence, but would find him "not guilty" because they did not believe in the law. Douglas Christie wanted to remove from the jury those who believed that the law should be applied. Surely this was an improper purpose and the court should have had no part in it. By suggesting a question that played into Christie's strategy of obtaining such a jury the judge committed a serious error.

**Improper Statements**

There are three sets of improper statements that Douglas Christie made that the judge did not correct either adequately or at all. In one set of remarks, Douglas Christie asserted the moral equivalence of Jews and Nazis, and of Canada today and Nazi Germany. The nature of his argument was that it was mere circumstance that what Finta and the Nazis were charged with is illegal today.

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[2]*R.* v. *Finta* (10 November 1989) Court Transcript at 10-11 (Ont. C.A.). Note that there were two additional questions to be asked, as follow up, if the answer was yes.

Tomorrow, what the Nazis did could be considered legal, and therefore what Finta was charged with doing could be legal as well. Specifically, what Douglas Christie said is, "You had better have moral certainty if you are to convict, because if somebody 45 years from now puts you on trial in another country for persecuting Imre Finta and that country might be as hostile to Jews as we are to Nazis, who would you be calling? Don't call me."[3] Elsewhere he said "You never know in this crazy world, what we do today is lawful and might be some kind of crime tomorrow."[4]

The equivalence of Jews and Nazis, of Canada and Nazi Germany, in Douglas Christie's jury address, invites the jury into the moral world of Nazism. It invites them to find that what the Nazis did was not wrong, but just circumstantially, at this time and place, illegal. The Crown and the Judge commented on these remarks a good deal because they amounted to an invitation to equate convicting Finta with persecuting him.

While there is no doubt that this aspect of the remarks raises a sound argument for a new trial, this is not all that is wrong with the remarks. Equating Jews to Nazis, Canada to Nazi Germany, and proclaiming the moral relativity of crimes against humanity is not on the same level as, for example, asserting relativity of the right to choice in an abortion case. It mischaracterizes the very nature of crimes against humanity. The laws on war crimes and crimes against humanity are peremptory norms of international law, *jus cogens*. These norms are accepted and recognized by the international community as a whole as norms from which no derogation is permitted. According to the *Vienna Convention on the Law of Treaties*, a treaty is void if it conflicts with any peremptory norm of international law.[5]

These norms of international law are few and far between. Ian Brownlie, in his treatise on international law, lists only six that are without significant controversy.[6] One of these six is crimes against humanity. As these norms of international law are basic to humanity, to say that tomorrow crimes against humanity may cease to be crimes, as Christie did, is to say that tomorrow humanity may cease to be human.

War crimes and crimes against humanity are *malum in se*, not *malum prohibitum*. Crimes *malum in se* are wrong in themselves, while crimes *malum prohibitum* are wrong only because they are prohibited. The Law Reform

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[3]*Supra*, note 2 at 10838, 10839.

[4]*Ibid.* at 10897.

[5](1969) 1155 U.N.T.S. 311, art. 53.

[6]*Principles of Public International Law*, 3d ed. (Toronto: Oxford Press, 1979) at 513.

Commission of Canada has written that crimes *malum in se* are "not only punishable by law, but also meriting punishment." They argue that such crimes "are not just forbidden, they are also wrong." To ignore these crimes is "to be less than human" and to do nothing about such crimes "is tantamount to condoning [them]." Therefore "to be fully human" means responding when such crimes are committed.[7]

The Law Reform Commission also noted that only a minority of criminal offences are *malum in se*. The majority of crimes are *malum prohibitum* and are not necessarily wrong in themselves, but are prohibited for expediency. The Commission objected to diluting the basic message of criminal law by jumbling together wrongful acts and acts prohibited for simple convenience. The Commission reasoned that if we do so we may end up thinking that real crimes are no more important than mere regulatory offences.[8] Yet, Douglas Christie did exactly that. He equated war crimes and crimes against humanity to mere regulatory offences which may be gone or different tomorrow. The trial judge said nothing to sort out the jumble Christie presented to the jury.

The laws against war crimes and crimes against humanity are human rights laws which punish gross and flagrant violations of the most basic human rights standards. In the words of Mr. Justice McIntyre, speaking for the Supreme Court of Canada about the Ontario Human Rights Code, "Legislation of this type is of a special nature, not quite constitutional but certainly more than the ordinary, and it is for courts to seek out its purpose and give it effect."[9] Douglas Christie's remarks gave the impression that the war crimes law was ordinary legislation and what the judge said did not contradict or correct that impression.

Furthermore, Mr. Justice Deschenes, in his report for the Commission of Inquiry on War Criminals,[10] went so far as to say that war crimes can form the basis of criminal prosecution, even if there is domestic law to the contrary, by virtue of the *Canadian Charter of Rights and Freedoms*.[11]

If a person is charged with driving on the wrong side of the street, it is no doubt improper to say in defence that tomorrow we may all be driving on the

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[7]Law Reform Commission of Canada, *Report: Our Criminal Laws* (Ottawa: Queen's Printer, 1976) at 5.

[8]*Ibid.* at 11.

[9]*Re O.H.R.C. et al. and Simpson Sears* (1986), 23 D.L.R. (4th) 321 at 329.

[10]*Commission of Inquiry on War Criminals Report, Part I: Public* (Ottawa: Canadian Government Publishing Centre, 30 December 1986) at 132.

[11]Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

opposite side of the road. However, to say that tomorrow Jews may be in the position Nazis are today, or that tomorrow Canada may be in the position Nazi Germany was during World War II, is not an equivalent error. It is an error that is much more serious. It is an invocation of Nazi immorality. It ignores the distinction between crimes *malum in se* and crimes *malum prohibitum*. It turns a blind eye to the peremptory nature of the Canadian norms of international law, and it ignores the quasi-constitutional status of the offences for which Finta was charged.

Douglas Christie did not just downgrade the war crimes law to the level of a regulatory offence. He argued it was positively evil. He referred to the law as diabolical, meaning it was the work of the devil.[12] The Crown referred to this remark in ground 9(b) of its Notice of Appeal to the Ontario Court of Appeal. The judge again under-reacted and merely said that, "[Christie] is entitled to his opinion." The judge also noted that it was not really relevant and that the law was constitutionally valid.[13] Saying it was constitutionally valid, and no more, placed it on the same level as all other laws. His statement ignored the standing a war crimes and crimes against humanity law has in the legal hierarchy. The judge's correction was indeed a misstatement of the law.

The third problem in the trial is the appeal to religious or ethnic prejudice in Douglas Christie's remarks. He introduced religion into the proceedings in a number of different ways. First, he quoted from the *New Testament* at length. The purpose of the quote appeared to be to appeal to the stereotype that the Jews killed Christ through bearing false witness in a Roman court.[14] Douglas Christie spoke of a conviction against Finta as vengeance against the accused.[15] However, Christie also spoke of a circle of vengeance in which he, by his own acknowledgement, was attempting to convey the idea of vengeance against the Jews leading to vengeance against Finta.[16] The notion of vengeance against the Jews only makes sense if the Jews did something which prompted vengeance, even though it may not have been justified. The something to which Douglas Christie referred was, again, the notion that the Jews killed Christ.

On several occasions, Douglas Christie distinguished between swearing an oath and making an affirmation. When he referred to Jewish witnesses, he habitually noted that these witnesses "affirmed". Indeed, he asserted that the Jewish

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[12]*Supra*, note 2 at 11865 (Crown refers to remark of Douglas Christie).

[13]*Ibid.* at 11485-11487.

[14]*Ibid.* at 10871-10874.

[15]The Crown noted this statement in ground 9(e) of its Grounds of Appeal to the Ontario Court of Appeal.

[16]*Supra*, note 2 at 11181-11182.

witnesses affirmed, even though in some cases they swore.[17] In his charge, the judge directed the jury that there is no distinction in law between swearing and affirming.[18] However, that direction failed to capture the true gravity of what Douglas Christie was doing. The continued reference to affirming can arguably be linked to his references that the Jews killed Christ through false witness. The reference to affirming was not just a devaluation of affirming, but was, as well, an appeal to religious prejudice.

A second anti-Jewish stereotype to which Douglas Christie appealed is the notion that Jews are mercenary or greedy. He implied that Jewish witnesses were in court to testify against Finta because the Crown was paying them to do so. He said that one witness only "came because for one thing it was a trip, I don't blame her, nice hotels, free lunch, great time."[19] About the witnesses in general he said that "there's only one person in this room who isn't paid to be here and it is not a witness."[20] The Judge did not comment on these remarks. These remarks not only misrepresent reality, but they are yet another appeal to religious or ethnic prejudice.

A third anti-Jewish stereotype to which Christie appealed is the notion that the Jews are vengeful. When Douglas Christie spoke of the prosecution of Finta as vengeance, he was referring to the vengefulness of the Jewish community, not of the Crown. For instance, when commenting on an unidentified man in the court audience who was improperly signalling to a witness, he said that "[i]t is the team work, a team effort. I don't blame Jews for feeling it is us against the world and the world persecutes us and we have to show how much we have been hurt."[21] He said as well that "much as Jews have suffered over the years, that is no justification for taking part in a trial to help fabricate evidence."[22] Douglas Christie directly referred to the Jewish witnesses as vengeful when he said, "These people who come here for [sic] malice towards Finta after 45 years were expressing vengeance against a man who represented to them a system they didn't like."[23]

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[17]See: letter from Kenneth Narvey to Hon. Kim Campbell (9 July 1990) Ottawa for a complete listing of these incidents.

[18]*Supra,* note 2 at 11571-11572.

[19]*Ibid.* at 11051.

[20]*Ibid.* at 11052.

[21]*Ibid.* at 2980.

[22]*Ibid.* at 11048, 11049.

[23]*Ibid.* at 11181.

This appeal to the stereotype of Jews as vengeful could not have been more blatant. The *Globe and Mail* published an article in which was written, "Anti-Semites say [the trial] is pushed by Jews seeking revenge."[24] Douglas Christie actually asked the Court to order a mistrial because of the article, arguing that it characterized the defence he intended to present as anti-Semitic. He said "[the Globe and Mail] took some deliberation to put together a prejudicial piece of character assassination which casts the defence, if they wish to suggest revenge, in the role of anti-Semites."[25]

To say that a particular witness is vengeful, when there is some evidence to suggest it, is perfectly proper. However, that was not Douglas Christie's position. To suggest that all Jews are vengeful, when there is no such evidence is unadulterated racial prejudice. That was Douglas Christie's stated position. Yet, he asked for a mistrial, in part, because his assertion was correctly called anti-Semitic. In other words, Christie wanted to conduct an anti-Semitic defence without anyone having the power to call it anti-Semitic. Anti-Semitism, as a label, has become disreputable. Douglas Christie wanted to present his anti-Semitism to the jury and convince them of it without the prejudicial label of anti-Semitism being applied to what he was doing.

The judge, again, was either oblivious to what Christie was doing or failed to appreciate its significance. The judge ruled that "the article associates the defence that Mr. Finta may well raise with respect to arguments on credibility, with anti-Semitism, and thereby associates a legitimate defence ... with anti-Semitism."[26] The judge assumed that Christie was planning to conduct a legitimate defence based on evidence that a witness or witnesses were vengeful. Instead, he conducted the illegitimate defence that all Jews are vengeful, without evidence, based on prejudice alone. Even if it was not apparent at that point in the trial what Douglas Christie was planning to do, it was certainly apparent at the end of the trial what he had done. Yet, at no time did the judge do anything to change his earlier ruling or to effectively counteract Christie's actions.

Douglas Christie was attempting to have the jury adopt a Nazi frame of reference. He conducted his defence so as to try to have the jury think as Nazis would have thought during World War II. His appeal to anti-Jewish stereotypes was not just an attempt to discredit the witnesses, it was an attempt to credit Nazism and to persuade the jury that the anti-Jewish stereotypes under which the Nazis operated were correct. For instance, he suggested to expert witness Randolph Braham that "[y]ou acknowledge, I trust, that Jews were very

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[24] *The Globe and Mail* (29 December 1989).

[25] *Supra*, note 2 at 2980.

[26] *Ibid.* at 2989.

sympathetic at that time to Communism, were they not?"[27] and asked if "[i]n fact, it's true, isn't it, that most of the post-war Communists were Jewish?"[28] The notion of Jews as Communists was, and is, a Nazi stereotype used to justify the Holocaust. Douglas Christie went to great lengths to equate Jews with Communists. On a number of different occasions he identified a particular Hungarian Communist and then asked the witness if the named Communist was Jewish. How is that relevant, even to Christie, to the guilt or innocence of Imre Finta? It is relevant because Christie is suggesting that Jews are Communists and therefore, the Nazis were justified in doing what they did to the Jews.

Finally, reinforcing these very specific anti-Jewish remarks, Christie added a number of more general references to religion. He said that "the judgment you give will be also the judgment that we get from God."[29] He also said that "God, who is referred to in the *Bible* you swore your oath on, judges all of us too and vengeance isn't justice."[30] These remarks, besides incorporating the themes of vengeance and affirmation, bring God into the trial. The Crown objected to these propositions as a threat to the jury. This is a legitimate and objectionable aspect of their nature. However, the repeated references to God by Christie were also an attempt to reinforce the anti-Jewish stereotypes he played upon and an implication that God was on his side, or at least on the side of the propositions he was putting forward.

The only thing that the judge said about Christie's references to God was that it was "not my department."[31] The judge also said that "[y]ou cannot let your decisions be affected by prejudice", but did not make reference to any religious or ethnic prejudice in particular.[32] In light of what Douglas Christie had been saying, the judge's response was an acute under-reaction. Once again, his actions did not confront the problems posed by Christie's address.

The cumulative effect of Douglas Christie's various appeals to religious and ethnic prejudice must be taken into account. Even if any one of those appeals in isolation may not seem significant, their effect taken as a whole is greater than each one separately. Courts cannot assume that jurors will be immune to the risks resulting from attempts to convey religious and ethnic prejudice. The fact is that an element of religious and ethnic bigotry exists in Canadian society and an appeal

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[27] *Ibid.* at 2325.

[28] *Ibid.* at 2330.

[29] *Ibid.* at 11487.

[30] *Ibid.* at 11487.

[31] *Ibid.* at 11488.

[32] *Ibid.* at 11499.

to religious or ethnic prejudice may be successful. The prosecution should not have to run the risk of the existence of prejudice. Once an appeal to prejudice is made there is the chance that it may affect the verdict and this danger should not be present.

Once an effort to exploit religious or ethnic prejudice reaches a certain level, a direction from a judge, no matter how specific, may not be able to cure the defect in the trial. The direction serves to focus greater attention on the discriminatory remarks and on the fact that the witnesses are part of the targeted group. In the alternative, if the judge in this case could have repaired the damage by a specific direction, he gave no such direction. However, this inability to correct an aggressively inflammatory appeal to prejudice does not justify saying nothing. The judge must try to correct the damage as best as she or he can. The level of appeal to religious and ethnic prejudice in this case was such that it damaged the fairness of the trial beyond repair.

There is a good deal of legal authority to the effect that a counsel's appeal to religious prejudice, or even to religion, is inflammatory and improper.[33] In the United States, where jury trials for civil cases are more common, the issue of appeals to religious prejudice has arisen in several cases. In a recent case involving a medical malpractice suit against a Jewish doctor, the Anti-Defamation League of B'nai B'rith filed an *amicus* brief arguing that improper references to religion by plaintiff's counsel denied the defendant due process and prevented a fair trial.[34]

Another problem with Finta's trial are the repeated statements of Holocaust denial by Douglas Christie. Holocaust denial was more a tactic Christie used in cross-examining witnesses than an element of his charge to the jury. One of the Crown's grounds of appeal (ground 30) confronted this problem of Holocaust denial. It stated that the trial judge erred in law in allowing defence counsel to cross-examine at length on the policy of extermination and gas chambers. However, it is not clear from that ground of appeal whether the Crown objected only because of the irrelevancy of these questions to the trial, or whether the Crown was concerned with the introduction of Holocaust denial into the trial.

Holocaust denial is not just a denial of fact. For neo-Nazis, it is a modern version of both self-exoneration and anti-Semitism. Denials of the Holocaust go hand in hand with assertions that Jews fabricate the claim of the Holocaust for self-serving purposes. For instance, this neo-Nazi approach was evident in questions Christie asked witness Randolph Braham. He asked, "You yourself are

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[33]See *R.* v. *Richard* (1957), 43 M.P.R. 229; *R.* v. *Logiacco* (1983), 2 O.A.C. 177; *R.* v. *House* (1921), 16 Cr. App. R. 149; and *R.* v. *Boucher*, [1955] S.C.R. 16.

[34]*Miller* v. *Schaefer* (1989), 317 Md. 609. The case was decided on another point.

Jewish and you have a bias, right?"[35] Objectively, it is hard to imagine what bias Braham would have because he is Jewish. The bias to which Christie was referring was the bias that the Holocaust existed. Christie was positing that the existence of the Holocaust was a matter of controversy, rather than an acknowledged fact. Braham, he was suggesting, had a bias in this supposed controversy because he was Jewish.

Douglas Christie made the purport of these remarks quite clear later in the trial. He asked, "It is very difficult for a Jewish person to be unbiased about the subject of the Holocaust?" and "You [Randolph] advance the Jewish understanding of history?"[36] This Holocaust denial-oriented questioning of Braham was prolonged and elaborate.

Christie's questioning of the witness Wolfgang Scheffler was similar. In one exchange, Christie tied together his themes of Holocaust denial and Jews as greedy people. He suggested that Jews deny the Holocaust in order to make money through reparations. Douglas Christie asked, "Dr. Scheffler, the Holocaust is big business, isn't it?"[37] The Crown objected and Christie replied, "It is my intention to suggest that there is a motive on the part of many people who are Zionists to exaggerate these things [the Holocaust] to inflate their claims [for reparations]." The ruling of the judge was to "go ahead."[38]

After Douglas Christie went on in this vein for quite some time, the judge finally stopped him, not on the basis that what Christie was doing was an appeal to ethnic prejudice, but solely on the basis that the issue of reparations was outside the area of expertise of the witness.[39] Even that ruling was made after the jury was out of the courtroom. The judge said nothing at all to the jury to correct or counter what Christie had just done.

Christie's Holocaust denial, through the questioning of witnesses, was not stopped or corrected by the judge. It was another very particular form of appeal to ethnic prejudice. The closest the judge came to dealing with the improprieties in Christie's questioning was a statement in his jury address that what counsel suggests to the witnesses is not evidence.[40] However, that statement is woefully inadequate to deal with the problem Christie's persistent denial of the Holocaust

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[35] *Supra*, note 2 at 1972.

[36] *Ibid.* at 2004.

[37] *Ibid.* at 3075.

[38] *Ibid.* at 3076.

[39] *Ibid.* at 3083-3085.

[40] *Ibid.* at 11493.

posed to the jury. Once Christie opened up the issue through his questioning, the Crown wanted to contradict this denial by submitting evidence of the Holocaust. However, the judge refused to allow the Crown to do so.

Douglas Christie's statements were outrageous. Equating Jews and Nazis or Canada and Nazi Germany, calling the law diabolical, appealing to religious and ethnic prejudice, and denying the Holocaust, are outlandish assertions one does not expect to hear from defence counsel under any circumstances. When Christie suggested that a conviction might be seen forty-five years from now as persecution, Judge Campbell replied that he did "not propose to dignify that kind of suggestion by spending such time on it."[41] The judge may have spent little or no time on Christie's most outrageous statements for that very reason.

This reticence was an error and, in itself, prevented the trial from being fair. When egregious statements of the kind made by Douglas Christie are presented to a court, there is a dignified and undignified way of responding to them. However, it is wrong in principle to say that responding to them at all is an indignity. It is undignified to respond to a suggestion that the Holocaust did not exist by going into great detail to show that the Holocaust did exist. It would treat the notion that the Holocaust did not exist as if it were worthy of serious consideration. It would even suggest that a person concerned with the truth might seriously believe that the Holocaust did not take place and such a response is unworthy of a court.

However, it is not undignified to point out what is happening, what the intentions are, and what the intended effect is when someone says the Holocaust did not occur. It is not undignified to point out that Holocaust denial is a form of neo-Nazi hate propaganda or to explain why neo-Nazis deny the Holocaust and the purpose it serves them in promoting Nazism. It is not inappropriate to outline as fact that hate propaganda is a criminal offence in Canada and that there has already been a criminal conviction for Holocaust denial.[42] Moreover, it is not undignified to take judicial notice of the Holocaust.

One can say that there is a dignified way of approaching all the outrageous statements made by Christie. Simply to ignore them because of their outrageous and extreme nature ignores the harm they cause to the trial. The cumulative effect of these errors was to make the trial unfair. In light of the verdict, and the nature of the defence, there is every likelihood that the jury did not address their minds to the guilt or innocence of Imre Finta. It is likely that their verdict was an exercise in jury nullification and that they decided that the law should not be

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[41] *Ibid.* at 11486.

[42] *R.* v. *Keegstra* (1990), 1 C.R. (4th) 129 (S.C.C.).

applied, whether Finta was guilty or not. Justice requires a new trial because this likelihood was created by the defence and not effectively counteracted by the judge.

However, Finta did not just win at trial. He also won at the Court of Appeal. How is it possible that he got away with jury stacking and anti-Semitism before the Ontario Court of Appeal? One reason is that on appeal the Crown did not challenge Finta on these points. The Crown agreed at trial to the question that was put to potential jurors. Once the Crown filed its notice of appeal, B'nai B'rith wrote to the Crown asking that the grounds of appeal be amended to include the issue of jury stacking.[43] The Crown refused.

In response to the anti-Semitic avalanche of Christie at the trial, the Crown said nothing. Nor, at the time of the appeal, did the Crown initially propose that Christie's attempts to arouse racial, religious, or ethnic prejudice be a ground for appeal. B'nai B'rith also proposed that the grounds of appeal be amended to include Christie's attempts to arouse racial, religious and ethnic prejudice against Jews. The Crown acceded to this request, but only partially. The Crown challenged, on appeal, the anti-Semitic remarks Christie made at the time of his address to the jury. However, the Crown did not challenge the unending stream of anti-Semitic remarks Christie made when he was questioning witnesses.

Regarding Christie's charge to the jury, Mr. Justice Dubin of the Ontario Court of Appeal wrote in his judgment:

> In my opinion, the inflammatory address tainted the trial, and the trial judge's comments about it in his charge to the jury fell far short of instructing the jury that they could not approach their duties in the manner that defence counsel invited them to do. This resulted in prejudice to the Crown's right to a fair trial, and which prejudice was not cured by the trial judge's instructions.

Mr. Justice Tarnopolsky agreed with Mr. Justice Dubin, but they were in the minority. The majority, while not approving of Christie's address to the jury, thought that what the judge said about it was sufficient to overcome the prejudice to the Crown's case. The Crown said nothing on appeal about the inflammatory anti-Semitic questioning of witnesses. As a result, neither did the judges in their reasons. For the Court of Appeal, it was as if it never happened.

The Crown appealed to the Supreme Court of Canada. It had an appeal as of right on the grounds of dissent in the Ontario Court of Appeal. The Crown also applied for leave to add other grounds. The grounds for leave did not include jury stacking or appeals to religious prejudice during the questioning of witnesses. Since the Crown had not raised those grounds at the level of the Ontario Court

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[43]Letter from B'nai B'rith to the Crown (16 October 1990) Ottawa.

of Appeal, it was perhaps not surprising that they also were not raised before the Supreme Court of Canada.

B'nai B'rith wrote to the Minister of Justice, Kim Campbell, and asked her to add jury stacking and appeals to religious prejudice during questioning of witnesses to the grounds for leave to appeal to the Supreme Court of Canada.[44] She wrote back by letter stating that:

> I share your concern with defence counsel's improper questioning of witnesses; however, my officials are of the view that, in light of the wide discretion enjoyed by a trial judge in regard to the manner of questioning witnesses and the difficulty in proving that this affected the ultimate outcome of the trial, an appeal on that ground is not viable. In addition, they do not share your view that the jury was improperly selected.[45]

The Supreme Court of Canada affirmed the decision of the Court of Appeal on 24 March 1994. Mr. Justice Cory observed that Christie's statements were "unprofessional and prejudicial."[46] However, he held that the directions of the trial judge remedied the prejudice.[47] Lamer C.J. and Gonthier and Major JJ. concurred. The dissenting judgment of La Forest J., with which McLachlin and L'Heureux-Dubé JJ. concurred, did not consider this issue.

It is time to draw some lessons from this experience. One lesson is that the best case in the world can go awry when the jury is stacked and defence counsel is allowed to appeal to religious prejudice without hindrance. The Crown in *Finta* was hard-working, highly motivated, learned, and well prepared. Yet, they were still blind sided. The Minister of Justice, Kim Campbell, wrote in her letter that the, "Crown counsel did in fact object on many occasions to the improper questioning of witnesses by defence counsel at trial."[48] It is true that Crown counsel did object, but the objections were on the ground of relevancy, not on the ground of appeal to religious prejudice. It was not even clear that Crown counsel was aware of the stereotypes that Christie was trying to invoke. In another context, that sort of ignorance might be admirable. In the context of what was happening in *Finta*, this ignorance was fatal to the Crown's case.

In future cases, the Crown should be prepared for the sort of defence that Christie used in the *Finta* case, and not just because Christie or one of his acolytes may end up defending those accused of war crimes in the future. A war crimes

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[44]Letter from B'nai B'rith to Hon. Kim Campbell (11 June 1992) Ottawa.

[45]Letter from Hon. Kim Campbell to B'nai B'rith (28 August 1992) Ottawa.

[46]*R.* v. *Finta*, [1994] S.C.J. No. 26, 23023/23047 at 80.

[47]*Ibid.* at 81.

[48]*Supra*, note 45.

prosecution is like a hate propaganda prosecution, except it is worse. At least in hate propaganda cases there is the possibility that the accused does not believe what he is saying and that it is all just a fraud. This possibility was accepted by juries in the two false news prosecutions against Ernst Zundel.[49] However, in war crimes cases there is little doubt that the guilty have come to believe hate propaganda.

There is no rational explanation for mass murder. The only explanation is the irrational one, that the perpetrators have fallen under the sway of hate propaganda. Perpetrators really believe the lies, the hatred, the stereotypes. If they did not believe from the very beginning, they come to believe as they kill or after they kill, simply to rationalize their behaviour in their own minds. It is this self-delusion that leads perpetrators to participate in the crimes for which they are charged. The first victims of hate propaganda are its believers. They have to destroy themselves spiritually before they can destroy others physically.

Christie was parading anti-Semitic stereotypes in court, not just to inflame the jury, but because, in a sense, he was presenting what he saw as Finta's true defence. According to Christie, Finta acted as he did because he really believed that Jews were Communists, that Jews were out for money, and that vengeance against them was justified.

The War Crimes units in the Department of Justice and the Royal Canadian Mounted Police (R.C.M.P.) engage in historical research for the preparation of cases. However, the historical research component does not include research into the history of the ideology of hatred. It is a trite aphorism that those who do not learn from history are condemned to repeat it. In a microcosm, that proverb was being played out at Finta's trial. The courtroom became a theatre for the re-enactment of the anti-Jewish prejudices and stereotypes of World War II. Since the Crown had not learned and prepared itself from the history of hatred that led to the Holocaust, it ended up reliving that hatred in the courtroom. The Crown and the Court were bewildered in the face of such an onslaught.

In spite of the fact that the Crown was blind sided in the *Finta* case, it is reasonable to expect an appeal to racial prejudice in every war crimes case involving mass murder, no matter where or when the war crime occurred. The mere fact that this sort of defence is not a defence in law should not, especially after Finta's trial, delude the Crown into thinking that it will not be raised.

Once a defence based on an appeal to racial prejudice is raised, the Crown must be prepared to combat it frontally, not just tangentially. It is not enough to say that such a defence is irrelevant. It must be labelled for what it is, an appeal

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[49] *R.* v. *Zundel* (1987), 31 C.C.C. (3d) 97, and (1990), 53 C.C.C. (3d) 161.

to racial, religious, or ethnic prejudice. From the moment that the defence launches a racial invective in court, whether through questioning of witnesses or in any other way, both the Crown and the Court must do everything in their power to counteract, and condemn it. Passing it over as irrelevant is simply not enough.

Prosecution of a crime is not just for the victims. It is for society as a whole. It is a statement of what society stands for, what it believes, what it accepts and what it will not tolerate. Victims are, of course, very interested in the prosecution of crimes committed against them. It is particularly troubling for the surviving victims of mass murder to observe the prosecution of someone who is accused of such crimes and to see the prosecution used as a continuing attack on the memories of those who were murdered and on those who survived. It is even more difficult to watch the Crown and the Court do virtually nothing in response.

A prosecution is supposed to be a search for a redress and a remedy for the crimes that were committed. It is not supposed to be a continuation of the victimization. Yet, that is what it becomes when the defence uses the trial as a platform for promoting the stereotypes and lies that led to the crimes in the first place. A passive prosecution in the face of racially prejudicial defence invective not only creates the difficulty of acquittal of a guilty accused, it also causes the trial to become a further attack on the victims and the survivors.

The Crown in *Finta* came prepared to fight one battle – to present the evidence and law necessary to get a conviction. As it turned out, there was a second battle to be fought for which the Crown was totally unprepared. This was the battle to use the courtroom as a forum for anti-Semitic hate propaganda. In future war crimes trials, the Crown must never again be unprepared for this sort of assault.

As important as this lesson is, there is a much larger lesson to be learned from the *Finta* case and this is one that involves not just the Crown but the government as a whole. The problems in the *Finta* case of jury stacking and appeals to religious prejudice were two separate problems that synergized. However, either one on its own would have been a problem. Given the jury that was picked, the verdict may well have been the same no matter what Christie said or did not say and no matter how the defence was conducted after jury selection.

The fact that it is possible to pick such a jury in a war crimes trial tells us first of all that we must be alert to this danger. This is a problem virtually unique to the war crimes field. When the state prosecutes for murder, it is not necessary to canvass the jury to be sure that they believe that the crime of murder should be prosecuted. It can be taken for granted that any jury will accept that murder must be prosecuted. However, surprising as it may seem, when the state prosecutes for participation in mass murder, it is necessary to canvass the jury to be sure that

they believe that the crime should be prosecuted. The *Finta* case illustrates this point. Jury trials are trials of the accused by his or her peers. Jurors represent society at large. While legally and morally genocide is a crime, the reality is that many people may see it as a crime that should not be prosecuted in Canada.

Old age is no defence to murder, nor should it be. Yet, on a practical level many people have sympathy for an elderly accused. There is no statute of limitations for murder, but many people are willing to forgive even mass murder when it happened a long time ago. People will clamour for the prosecution of a neighbour's murderer. However, when the murderer is the neighbour and the victim is a foreigner, killed far away in a foreign land, the clamour for prosecution fades. More importantly, as evidenced in the *Finta* case, when all these factors are combined: when the accused is old, when he has been a quiet friendly neighbour for decades, when the crime was committed a long time ago and far away in another country, and when the victim is a stranger and a foreigner, there are many people in Canada who have little or no interest in a prosecution.

The government of Canada should be commended for introducing legislation in Parliament to provide for prosecution of war crimes, for steering it through Parliament, for setting up the War Crimes units in Justice and the R.C.M.P., and for bringing cases to court in the face of this hostile sentiment. However, for the government, the Crown and the courts to believe that sentiment has ceased to exist just because Parliament has legislated is naive. Parliament does not and cannot legislate the beliefs of individuals. As the *Finta* case has shown, these beliefs still remain in a segment of the Canadian population, even if only in a minority segment. The Crown and the court must be aware that they may well be faced with potential jurors who harbour these beliefs. These jurors should not be serving on war crimes juries.

What happened in the *Finta* case was perverse. Instead of potential jurors being excused from jury duty because they did not believe in the law, they were in effect, excused from jury duty when they did believe in the law and when they were members of an organization that promoted its adoption. However, even if that had not happened, it would not have been enough to prevent the jury nullification that appears to have occurred. The Crown and the court must take the initiative to assure, in every future case, that there is a jury that is prepared to enter a conviction, provided the facts justify such a verdict.

If a trial has such a jury, that cannot be the end of the matter. The Crown must be prepared to argue the value of the law. Why bring Nazi war criminals to justice? Why here? Why now? The reality is that jurors may well be asking themselves those questions. The Crown, in every case, must be prepared to answer them in order to do its job properly. The Crown has brought, and no doubt will continue to bring to court, the factual and legal case for prosecution.

For Nazi war crimes trials, it must also be prepared to bring to court the moral case for prosecution.

Even if there is no jury stacking and even if there is no defence based on an appeal to religious prejudice, the Crown may well be faced with a jury hesitant to apply the law for reasons that have nothing to do with either the facts or the law. Unless the Crown can communicate its own belief in the need for the law, in the need for enforcement of the law, even the best case in the world may fail.