MALCOLM ROSS AND FREE SPEECH

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"Holocaust," a sacrifice entirely consumed by fire, has been appropriately accepted as descriptive of the cold-blooded undertaking by the German government, elaborately planned and ruthlessly and efficiently carried out as long as it was possible, to exterminate the Jews and members of some smaller groups, including Gypsies, in Germany and the territories that German and allied armies occupied during World War II. Before they were overrun by the armies of the USSR and the western allies, their officers and agents, who were not all Germans, had slaughtered approximately six million Jews and smaller numbers of other groups. The facts of this massive campaign of extermination have been irrefutably proved by the evidence of intended victims whose time for death had not arrived when they were rescued, by soldiers and others who liberated the death camps, by evidence given by organizers and participants in the program before the international Nuremberg Tribunal, and by masses of documents in which the plans and progress of the scheme were carefully recorded by officials of the German government. I cannot understand the mental processes, if that is the correct phrase, by which individuals profess to have persuaded themselves that this monstrous program of extermination did not take place. However, there are some, of whom Malcolm Ross appears to be one, who present every outward appearance of holding that belief.

According to the findings of the Board of Inquiry that investigated a complaint against Ross under the New Brunswick *Human Rights Act*,[1] he has publicly asserted his belief in printed books, in contributions to the press, in a television interview, and perhaps in other ways. By these means he has publicly disseminated for several years his denial of the occurrence of the Holocaust, along with derogatory comments about Jews and Judaism.

He "continuously alleges," in the Board's words, that his "Christian" faith and way of life are under attack by an international conspiracy in which the leaders of Jewry are prominent. He speaks of society in the context of Jewish controlled mass media, of Jewish controlled international finance, and of "Jewish-dominated christianity, where every evangelist who appears on television spews out the same old line." He says, "The Jews, are (said to be) God's chosen people, so we must support them in everything they do."

He believes that many of the evils in our time stem from the fact that "we have ... allowed those who hate the Lord to rule over us." He refers to a great Satanic movement which is trying to destroy Christian faiths, and identifies the

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[1]R.S.N.B. 1973, c. H-11.

Jews as the "synagogue of Satan." He encourages others to condemn the Jews and throw off the "yoke of Jewish Domination." "These same themes," reports the adjudicator, "are constantly repeated in his writings which attack the Jewish religion."[2] The Board finds that Ross' writings and comments cannot be categorized within the scope of scholarly discussion. Ross' primary purpose is found to be an attack on the truthfulness, integrity, dignity and motives of Jewish persons rather than the presentation of scholarly research.

Here I must interject that freedom of expression cannot be confined to the product of scholarly research. Nevertheless the Board's finding is important. Ross' publications appear not to bear even a slight resemblance to the result of scholarly research, although they are apparently deceitfully presented under that guise. They resemble those of Ernst Zundel and Jim Keegstra, both of whom have been tried on criminal charges. As reported, they seem not to be as virulent as Keegstra's teaching, but if not protected by s. 2(b) of the *Canadian Charter of Rights and Freedoms*[3] they might be considered as wilfully promoting hatred against an identifiable group, under s. 319(2) of the *Criminal Code*.[4]

Section 2(b) of the *Charter* asserts that everyone constitutionally enjoys freedom of thought, belief, opinion and expression, including freedom of the press and other means of communication. Section 1 subjects this freedom to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Clearly, Ross is entitled to hold the beliefs he professes. Two juries found that Zundel did not believe in the truth of closely similar statements he published, but individuals have believed even more untenable doctrines. It is at least possible that Ross believes what he says. Any discussion of his case must proceed on the assumption that he does. On that assumption, should he be free to publish these beliefs?

As an abstract proposition, such a question would seem *prima facie* to require an affirmative answer. Nothing requires that opinions entitled to *Charter* protection must be true or reasonable or even plausible or sensible. However, in this case the question is not simply whether Ross should be free to deny the occurrence of Holocaust. This denial cannot be maintained without a vicious attack on the honour and integrity of not only the survivors of death camps but

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[2]*Attis* v. *Board of Education of District 15* (1991), 121 N.B.R. (2d) 1, (*sub nom. Attis* v. *New Brunswick School District No. 15*) 15 C.H.R.R. D/339 (Human Rights Board of Inquiry).

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

[4]R.S.C. 1985, c. C-46.

also of world Jewry, by Ross' assertion of a world-wide Jewish conspiracy.

Are there reasonable limits prescribed by law that are demonstrably justifiable in our "free and democratic" society that would deny Ross the freedom to publish his doctrine? There are three criminal offenses that might be applicable.

One, of which Zundel has been convicted, of publishing statements he knew to be false that were likely to cause social or racial intolerance, under what is now s. 181 of the *Criminal Code*, is not available here unless it can be asserted that Ross knows his statements to be false. As I have said, I must assume that he believes them to be true. In any event, I would not be surprised if the offence in question fails to stand up under a pending *Charter* challenge.

In certain circumstances, an accused can be convicted for wilfully promoting hatred against Jews under s. 319(2) of the *Criminal Code* for publishing statements one believes to be true. However, the offence is narrowly defined. Since the Attorney-General of New Brunswick has refused to authorize a prosecution for this offence, we can only speculate by analysis on whether it applies here.

Hatred is a strong word. It imports active and malevolent detestation and enmity, a violent and venomous emotion. Ross' utterances could be capable of arousing that emotion. Promoting is a purposeful activity. The word "wilfully" emphasizes absence of accident, mistake or ignorance of consequences. The word in this context has been judicially interpreted to mean intentionally or at least with knowledge that hatred is a certain consequence. Here the evidence of common knowledge in the community and of hateful behaviour by a small group of students against Jewish girls, shows that Ross could not have been ignorant of actual incitement of hatred, while he persisted in publishing his doctrine. The language of his attacks seems to provide evidence of actual intention to promote hatred.

Of the four statutory defences provided by s. 319, three are clearly unavailable to Ross. His statements are patently not true. He has clearly not been attempting to remove matters likely to produce hatred against Jews. He cannot claim that his motivation has been a discussion for the public benefit. However, he may succeed in establishing that he has been attempting in good faith to establish by argument an opinion on a religious subject.

Not everything that is said or done in the name of religion is protected by s. 2(b) of the *Charter*. In *Salvation Army Canada East* v. *Ontario (Attorney-General)*[5], Henry J. of the Ontario High Court of Justice reviewed authorities on this subject. He refused to find that provisions of the *Pension Benefits Act* of

[5]Action No. RE 1115/89 (21 January 1992).

Ontario[6] that impose mandatory obligations on the Army and interfere with the Army's principle that its officers serve God voluntarily, not as employees and not under contract, without any right to remuneration or pension, are a forbidden infringement on the Army's freedom of religion. Senior officers of the Army asserted that the principle of voluntary service is essential to the faith of its officers. Henry J. disagreed. The decisions he considered and found to impose limits on the chartered freedom and his own decision are not related to the religious elements in Ross' public statements. Ross' seem to be, in a perverted way, essential elements of what he mistakenly believes to be the Christian religion. Even if they were shared with nobody else, they would seem to be an integral part of his personal religious belief. If he were prosecuted for this offence, an acquittal would not surprise me.

There is also the offence of seditious libel, under ss. 59 to 61 of the *Criminal Code*. On the facts as reported, there seems to be no evidence of a clear and present danger of a disturbance of the political or social order or an intention to invite such a disturbance necessary to support a conviction for that offence, notwithstanding the threatening acts of a small group of students.

We seem to be left with probably no criminally-based limitations on Ross' freedom of expression. In civil law, actions of defamation are not available to members of a large group who are not individually identified by the defamatory publication. This is unfortunate, for although in present circumstances I believe that the offence of wilfully promoting hatred is necessary, I also believe that the criminal process and criminal sanctions are not really appropriate for dealing with this type of behaviour. The *Defamation Act* of Manitoba[7] offers a suggestion of a possible civil remedy. Under it, the publication of a libel against a race or religious creed likely to expose persons belonging to the race, or professing the religious creed to hatred, contempt or ridicule, and tending to raise unrest or disorder among the people, entitles a person belonging to the race, or professing the religious creed, to sue for an injunction to prevent the continuation and circulation of the libel. The reference to contempt or ridicule and the requirement of a tendency to raise unrest and disorder could be dropped. The classes of persons entitled to protection could be extended. Some screening of the right to sue might be added. This process would avoid difficulties inherent in criminalization of the publication. This remedy would have to be provided by provincial legislation.

As it is, we are left with the question of the appropriateness of the proceedings under the New Brunswick *Human Rights Act*. On that issue, I can do no better

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[6]R.S.O. 1990, c. P.8.

[7]R.S.M. 1987, c. D20, s. 19(1).

than approve of the reasons for judgment of the Board of Inquiry. Teaching involves a relationship between school authorities and their employees with pupils in which freedom of expression enjoyed in general society must be curtailed. Hateful propaganda such as Ross' cannot be tolerated in that environment. Even though Ross did not directly teach his anti-Semitic doctrine to his classes, I am convinced that his obsessive, strongly held and violent beliefs must have coloured his teaching of almost any subject. Moreover, his publications and interview made his beliefs common knowledge in the community of the school district and had disturbing effects.

Some non-Jewish students were stimulated to engage in anti-Semitic acts and words. Two Jewish students who gave evidence felt threatened. Ross not only did not afford a good role model in the community – he actively afforded a bad role model. Even Alan Borovoy, General Counsel to the Canadian Civil Liberties Association, who strongly argues against the existence of the criminal offence of promoting hatred, agrees that Ross should not be employed as a teacher while propagating his offensive doctrine.[8]

If I had been a member of the Board of Inquiry, I would have proposed that Ross should be dismissed by the School Board on the ground that his continued employment in any capacity suggests that his publications enjoy a measure of support by members of the School Board. However, I can accept the actual order.

I will not comment in detail on the reasons for judgment or the order. Ross was represented by an able, assiduous and aggressive counsel. I am sure that nothing that could have been done or said on Ross' behalf was omitted. Justice Creaghan reviewed the proceedings and judgment and upheld them, with the exception of the addition of the order against the provincial Department of Education and the provision that Ross should be dismissed if he continued his anti-Semitic publications.[9] It seems to me that the single member of the Board of Inquiry has dealt admirably with the issues.

With great respect, I am unable to follow the reasoning that led Justice Creaghan to strike out the condition requiring Ross to be dismissed if he continued publication. The evidence established, in my opinion, that Ross' continuation in the employ of the Board while publishing his doctrine, and not his presence in class, was in itself disturbing and threatening. The Board was publicly and widely seen as, if not countenancing, at least tolerating his campaign, particularly in revoking its prohibition of publication. The provincial policy statement and the Board's response seem to have been greatly inadequate for

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[8]A. Borovoy, "Teacher's Conduct Outside Class Can Affect Job" *The Globe and Mail* (17 September 1991).

[9]*Attis* v. *Board of Education of District 15* (1991), 121 N.B.R. 361 (Q.B.).

dealing with Ross' conduct. His public appearance on television after the restraint was revoked suggests that nothing less than actual prohibition, strictly enforced will prevent him from continuing his publications. If he does so, I think he should enjoy his freedom of expression in other employment.