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The Supreme Court of Canada in *Attis v. The Board of School Trustees District No 15* [1] has put a final stamp on the proposition that a schoolteacher's utterances inside or outside the school are subject to limitations as regards freedom of expression, because the constitutional freedom of expression does not allow a teacher to create a poisoned educational environment. In every society, teachers occupy positions of trust and confidence. They exert considerable influence over their students. As a consequence, their conduct directly impacts on the community's confidence in the school system. If a teacher, by engaging in hate propaganda—whether within or outside the school—creates a poisoned environment characterized by lack of equality and tolerance, his/her legitimate freedom of expression is not infringed when it clashes with other people's right of equality.

The Supreme Court of Canada in a previous case [2] had decided that the criminal law's provision which prohibits the wilful promotion of hatred, other than in a private conversation, towards any section of the public distinguished by colour, race, religion or ethnic origin does not infringe the constitutional guarantee of freedom of expression, and a teacher who was convicted under that section cannot have any grounds to grieve or complain.

While freedom of speech has become a hallmark of western democracies, the problem remains as to how wide this freedom is and where its limits

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1. 133 D.L.R. (4th) 1 (Can. 1996) The divided New Brunswick Court of Appeal's decision was overruled and overturned: Ross v. Moncton Board of School Trustees, District 15, (1991) 12 N.B.R. (2d) 361(CA); and (1993) 110 DLR (4th) 241 (CA). See also Attis v. Board of Education, Dist. No 15 (1991) 121 N.B.R. (2d) 304 (The appeal to the Supreme Court was a consolidated one). The Court of Appeal had allowed the appeal from the judgment of the Court of Queen's Bench ((1991) 121 N.B.R. (2d) 361), which had confirmed the decision of a Board of Inquiry, established under the provincial (state) human rights legislation, to suspend or even dismiss the teacher for his out-of-classroom virulent anti-Jewish views and denial of the Holocaust.

2. [1990] 3 SCR 697.

should be drawn. [3] Absolute or totally unabridged freedom would mean no laws or rights. [4] The jury is currently out on the question whether freedom of speech should always enjoy a preferential status over other rights and freedoms. One good example is that in Canada a conflict arises between the constitutionally protected guarantee of free speech and laws restraining the dissemination of hate propaganda. [5] However, Canadian society recognizes that the conflict can be resolved by a balancing act which prescribes reasonable limits on the freedom of expression, because (1) it has to be balanced against other peoples' freedom and (2) no freedom can be absolute. [6] This article examines these developments.

Public School Boards' Obligation to Provide Discrimination-free Educational Services

The Canadian Constitutional protection of equality under section 15 of the Canadian Charter of Rights and Freedoms—to be free from discrimination on the basis of, inter alia, race and sex [7]—can come in conflict, particularly in educational situations, with the freedom of expression stipulated in the same

3. See F. Schauer, FREE SPEECH: A PHILOSOPHICAL ENQUIRY (1992).

4. See W.S. Tarnopolsky, THE CANADIAN BILL OF RIGHTS (1966). See also A.R. Regel, *Hate propaganda: A Reason to Limit Freedom of Speech*, 40 Sask. LR 303 (1985); M. Cohen, chairman, REPORT OF THE SPECIAL COMMITTEE ON HATE PROPAGANDA IN CANADA (1966).

5. Some people maintain that although the dissemination of hate messages is undesirable, it cannot and should not be controlled by legislation, because, inter alia, prosecution of a hatemonger is likely to provide him/her with a golden opportunity to further propagate his/her perverted ideas. For example, see H.W. Arthurs, *Hate Propaganda—An Argument Against Attempts to Stop it by Legislation*, 18 Chitty's LJ (1976). However, see R. Pitman, *Incitement to Racial Hatred: The International Experience*, Australian Human Rights Com. (1982); Allison Reyes, *Freedom of Expression and Public School Teachers*, Dalhousie J. Leg. St. 35 (1995).

6. According to Irwin Cotler, "Canada has developed one of the most comprehensive legal regimes of criminal and civil anti-discrimination remedies to combat hate propaganda of any free and democratic society. Indeed, the Canadian experience has generated one of the more instructive and compelling sets of legal precedents and principles respecting this genre of litigation and the principle of freedom of expression in the world today" in G-A Beaudoin & E. Mendes, THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS (1996), p.20.5.

7. Section 15 of the Canadian Charter provides: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

Charter. [8] Freedom of expression can also clash with the Human Rights legislation—all Canadian federal and provincial jurisdictions now contain anti-discrimination provisions in their Human Rights legislation. For example, the New Brunswick Human Rights Act provides:

> 5(1) No person, directly or indirectly, alone or with another, by himself or by the interposition of another, shall . . . (b) discriminate against any person or class of persons with respect to any accommodation, services or facilities available to the public . . . because of race, colour, religion, national origin, ancestry, place of origin, age, physical disability, mental disability, marital status, sexual orientation or sex.

Two significant questions the Supreme Court of Canada had to decide in *Attis v. Board of School Trustees, No. 15* [9] were (1) whether this section comes into conflict with the Canadian Charter of Right's constitutionally protected freedom of expression, and (2) can a teacher be disciplined for his or her views expressed outside the school, which are considered to be covered by the above discrimination provision. The Supreme Court's answer to the first question was "no"; thus it upheld the Criminal Code's provision, and decided that the answer to the second question is "yes." The unanimous Supreme Court said that a school is a communication centre for a whole range of values and aspirations of a society. It is an arena for the exchange of ideas. It has to be premised upon principles of tolerance and impartiality so that all persons within the school environment feel equally free to participate. A school board is under a legal duty to maintain a positive school environment. Therefore, a teacher's on-duty or off-duty conduct may impair his or her ability to be impartial and may impact upon the educational environment. The Supreme Court accepted the following passage in the British Columbia Court of Appeal's decision in *Abbotsford School District 34 Board of School Trustees v. Shewan*: [10]

> The reason why off-the-job conduct may amount to misconduct is that a teacher holds a position of trust, confidence and responsibility. If he or she acts in an improper way, on or off the job, there may be a loss of public confidence in the teacher involved, and other teachers generally, and there

8. See D. Givan, *The Ross Decision and Control in Professional Employment*, 41 U.N.B.L.J. 333 (1992); E.L. Herbert & M.A. Foster, *Freedom of Expression Outside the Classroom:* in W.F. Foster, EDUCATION AND LAW; A PLEA FOR PARTNERSHIP (1992); R.M. Gordon, "*Freedom of Expression and Values Inculcation in the public School Curriculum,* 13 J.L.& Educ. 523 (1984).

9. *Supra*, note 1.

10. [1987] 21 BCLR (2d) 93.

> may be controversy within the school and within the community which disrupts the proper carrying on of the educational system . . .

Allison Reyes' following exposition also was accepted by the Supreme Court of Canada:

> Teachers are a significant part of the unofficial curriculum because of their status as "medium." In a very significant way, the transmission of prescribed "messages" (values, beliefs, knowledge) depends on the fitness of the "medium" (the teachers) . . . The integrity of the education system also depends to a great extent upon the perceived integrity of teachers. It is to this extent that expression outside the classroom becomes relevant. While the activities of teachers outside the classroom do not seem to impact *directly* on their ability to teach, they may conflict with values which the education system perpetuates.

Freedom of Expression

The Canadian Charter of Rights and Freedoms provides for constitutionally protected fundamental freedom of "thought, belief, opinion and expression, including freedom of the press and other media of communication," [11] which is subject "only to such limits prescribed by law as can be demonstrably justified in a free and democratic society." [12] According to the Supreme Court of Canada, it is difficult to imagine any freedom more important to a democratic society than freedom of expression. [13] The Supreme Court has stated that the freedom of expression has to be given a broad, purposive interpretation and this freedom should only be restricted in the clearest of circumstances. [14] It also has said that the purpose of the guarantee is to permit free expression in order to promote truth, political and social participation, and self-fulfilment. [15] Furthermore, "[t]he scope of constitutional protection of expression is very broad. It is not restricted to views shared or accepted by the majority, not to truthful opinions. [16] Rather, freedom of expression serves to protect the right

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11. Section 2(b) of the Canadian Charter of Rights and Freedoms. See P. Petraglia, *Public Servants and Free Speech*, 2 Admin. L.J. 6 (1986); R. Moon, *The Supreme Court on the Structure of Freedom of Expression*, U. Toronto L.J. 419 (1995); B. McKenna, *Canada's Hate Propaganda Law: A Critique*, 26 Ottawa LR 159 (1994).

12. Section 1 of the Canadian Charter of Rights and Freedoms.

13. Edmonton Journal v. Alberta (Attorney General) [1989] 2 SCR 1326.

14. Irwin Toy Ltd v. Quebec (Attorney General) [1989] 1 SCR 927.

15. R v. Zundel [1992] 2 SCR 731.

16. In a 1938 case, the Supreme Court of Canada had expressed its view on freedom of expression as follows:

of the minority to express its views, however unpopular such views may be." [17] But unlimited and unrestrained expression can repress the participation of some individuals in the democratic process. Furthermore, some extreme forms of expression can work to undermine society's commitment to democracy when it is used to propagate ideas anathemic to democratic values. [18]

The Supreme Court of Canada has evolved a two step approach to the enquiry to determine whether an individual's freedom of expression has been infringed: (1) the court should determine whether the individual's activity falls within the freedom of expression as it is protected by the Canadian Charter of Rights and Freedoms; and (2) whether the purpose or effect of the impugned limitation is to restrict that freedom. The two cases which have reached the Supreme Court of Canada, concerning teachers' hate propaganda, were viewed from this interpretive model. The Supreme Court decided that teachers owe certain responsibilities to their students, their employers and society generally, and their freedom of expression has to be weighed against the rights and freedoms of other people, especially the minorities.

Freedom of Speech may Clash with Criminal Code Provisions

While the Canadian Constitution in its Charter of Rights provides a liberal guarantee of freedom of expression, the Canadian Criminal Code, in a complicated and controversial section, provides that wilfully promoting hatred

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> The right of public discussion is, of course, subject to legal restrictions: those based upon considerations of decency and public order, and others conceived for the protection of various private and public interests with which, for example, the laws of defamation and sedition are concerned. In a word, freedom of discussion means, to quote the words of Lord Wright in James v. Commonwealth [1936], "freedom governed by law": Reference Alberta Statutes [1938] SCR 100.

17. Ottis, *supra*, note 1. Justice La Forest J speaking for the unanimous court reaffirmed the following view Madam Justice McLachlin expressed in Zundel, *supra*, note 11:

> The purpose of the guarantee is to permit free expression to the end of promoting truth, political or social participation, and self-fulfilment. That purpose extends to the protection of minority beliefs which the majority regard as wrong or false . . . Tests of free expression frequently involve a contest between the majoritarian view of what is true or right and an unpopular minority view. As Justice Holmes stated 60 years ago, the fact that the particular content of a person's speech might "excite popular prejudice" is no reason to deny it protection for "if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate. . . .

18. *Keegstra, supra,* note 2.

against any identifiable group is an offence. [19] These two apparently conflicting provisions have created a lot of soul-searching and litigation relating to teachers' freedom of expression. [20]

The question, fundamental to a free and democratic society, is whether hate propaganda by teachers is constitutionally protected; and if so whether it is protected only in the classroom. Another related and important question is whether a teacher can be disciplined or dismissed for hate propaganda, when there has been no criminal prosecution, especially when the propaganda takes place outside the classroom. [21] The Supreme Court of Canada has endeavoured to provide the answers. As seen above, it decided in 1990 [22] that legislation prohibiting the public, wilful promotion of group hatred is justified. However,

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19. Section 319 of the Criminal Code, 1985 provides:

(2) Everyone who, by communicating statements, other than . . . in private conversation, wilfully promotes hatred against any identifiable group is guilty of
(a) an indictable offence . . . , or
(b) an offence punishable on summary conviction.
(3) No person shall be convicted of an offence under subsection (2)
(a) if he established that the statements communicated were true;
(b) if, in good faith, he expressed or attempted to establish by argument an opinion upon a religious subject;
(c) if the statements were relevant to a subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true; or
(d) if, in good faith, he intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred towards an identifiable group in Canada.
(6) No proceedings for an offence under subsection (2) shall be created without the consent of the Attorney-General.
(7) In this section
"Communicating" includes communicating by telephone, broadcasting or other audible or visible means;
"identifiable group" means any section of the public distinguished by colour, race, religion or ethnic origin . . .
"public place" includes any place to which the public have access of right or by invitation, express or implied;
"statements" includes words spoken or written or recorded electronically or electro-magnetically or otherwise, and gestures, signs or other visible representations.

20. *See* Loraine Weinrib, *Hate Propaganda in a Free and Democratic Society,* 36 McGill L.J. 1416 (1991); R. Moon, *Drawing Lines in a Culture of Prejudice: R. v. Keegstra and the Restriction of Hate Propaganda,* 26 U.B.C.L.R. 99 (1992); K. Dubis, "Freedom to Hate," 54 Sask. L.R. 149 (1990); B.P. Ellman, *Combatting Racial Speech: The Canadian Experience,* 32 Alberta L.R. 623 (1994); Marie-France Major, *Sexual Orientation Hate Propaganda: Time to Group,* Can. J.L. & Society 221 (1996).

21. We do not discuss section 181 of the Criminal Code which made it a crime for a person to "wilfully publish a statement, tale or news that he/she knows is false and that causes or is likely to cause injury or mischief to a public interest." This provision was declared by the majority of the Supreme Court of Canada unconstitutional: see R v. Zundel, *supra,* note 15.

22. R. v. Keegstra, *supra,* note 2. This case was heard in conjunction with Canada (Human Rights Commission v. Taylor, [1990] 3 SCR 892 and R. v. Andrews and Smith, [1990] 3 SCR 870: both dealing with hate propaganda in different contexts.

Chief Justice Dickson, for the majority, came to that conclusion after saying that the prohibition is an infringement of freedom of speech, but it can be justified under section 1 of the Canadian Charter. Furthermore, Justice Cory's opinion is that "[w]hen expression does instill detestation it lays the foundation for the mistreatment of members of the victimized groups." He was, therefore, of the view that to promote group hatred is tantamount to practising discrimination.

As alluded to above, while freedom of speech has to be given fundamental importance, it is not easy to delineate its boundaries. For example, it was said by the European Court of Justice in *Handyside v. UK* [23] that:

> Freedom of expression . . . is applicable . . . to . . . "ideas" . . . that offend, shock or disturb the State or any sector of the population. Such are the demands of pluralism, tolerance and broad-mindedness without which there is no democratic society."

Similarly, according to the Alberta Court of Appeal:

> Respectable judicial and political opinion holds that a citizen in a democratic society must show a courage and stoicism in the face of abusive exercise of freedom of expression. [24]

However, when it comes to hate propaganda [25] or incitement to racial hatred, other considerations have to be taken into account. According to the Supreme Court of Canada, "it is through rejecting hate propaganda that the State can best encourage the protection of values central to freedom of expression, while

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23. (1976) 1 EHHR 737.

24. Kerans JA in *R v. Keegstra* (1988) 60 Alta LR 1.

25. It is mostly referred to in the US as "racist speech." *See* Wright, *Racist Speech and the First Amendment,* 9 Miss. C. L. Rev. 1 (1988); Tribe, AMERICAN CONSTITUTIONAL LAW 2nd Ed. (1987); Kretzmer, *Freedom of Speech and Racism,* 8 Cordozo L. Rev. 445; Downs, *Skokie Revisited: Hate Group Speech and the First Amendment,* 60 Notre Dame L. Rev. 629 (1985); Au, "Freedom From Fear (Freedom of Speech vs Freedom of Fear from Racism Activities)," 15 Lincoln L. Rev. 45 (1984). K. Lasson, *Racial Defamation as Free Speech: Abusing the First Amendment,* 17 Columb. L.R. 11 (1985); R.G. Wright, *Racist Speech and the First Amendment,* 9 Miss. C. L.R. 1 (1988); R. Post, *Free Speech and Religious, Racial and Sexual Harassment: Racist Speech, Democracy and the First Amendment* 32 Wm. & Mary L.R. 267 (1991); T. Massaro, *Equality and Freedom of Expression: The Hate Speech Dilemma,* 32 Wm. & Mary L.R. 211 (1991); K.L. Krast, *Citizenship, Race and Marginality,* 30 Wm. &. Mary L.R. 1 (1988); M.J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Stand,* 87 Mich. L.R. 2320 (1989) M. Becker, *Conservative Free Speech and the Uneasy Case for Judicial Review,* 64 U. Col. L.R. 974 (1993); N. Wolfson, *Free Speech Theory and Hateful Wounds,* 60 Cin. L.R. 1 (1991); P. Linzer, *White Liberal looks at Racist Speech, 65* St. John's L.R. 187 (1991); F. Abrams, *Hate Speech: The Present Implications of a Historical Perspective,* 37 Villanova L.R. 743 (1992).

simultaneously demonstrating dislike for the vision forwarded by hate mongers." [26] Alan Regel maintains that hate propaganda must be controlled because of its perniciousness:

> The distribution of hate literature is very carefully planned. It proceeds step by step. First, propagator convinces the subject that they share a common plight—often economic despair. Next, an association is made between the target group and the common plight. Then it is suggested that the propagator and the subject must unite to defeat the target group. The propagandist does not lay its cards on the table and argue that the target group is the cause of the shared disaster—if it did the subject would almost certainly recognize the irrationality of the position. Rather, the propagator plays on the emotions of the subject, letting it believe that it is blaming the target group, of its own accord, for its plight. If the message is not picked up at the conscious level, the subject group will likely be affected by the subliminal messages. In such a case there is no opportunity rationally to reconsider the issue, and so there may be an infringement on the subject group's freedom of thought: a freedom which is surely necessary in a democracy.

According to Kathleen Mahoney, hate propaganda should be viewed

> as harassment on the basis of group membership. The courts in both Canada and the United States have accepted that harassment is a practice of inequality resulting in legally recognized harm and loss, even when it consists solely of words. It is a form of discrimination, even if the action is in words. When legislatures regulate harassment, they do not regulate the content of expression, although the expression has content. The Courts treat harassment as a practice of inequality [*Jazen et al v. Platy Enterprises Ltd* [27]]. Hate propaganda, which is a particularly virulent form of harassment, should be treated similarly. [28]

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26. *Keegstra, supra*, note 2. See I. Cotler, *Racist Incitement: Giving Free Speech A Bad Name*, in D. Schneiderman (ed.), FREEDOM OF EXPRESSION AND THE CHARTER (1991); S. Medjuk, *Rethinking Canadian Justice: Hate Must not Define Democracy*, 41 UNBLJ 285 (1992).

27. [1989] 1 SCR 1252. See also Robichaud v. Canada, [1987] 2 SCR 84.

28. K. Mahoney, *The Canadian Constitutional Approach to Freedom of Expression in Hate Propaganda and Pornography*, 55 Law & Contemporary Problems 77 (1992).

Proscribing Hate Propaganda in Canadian Schools is Constitutional

Two provincial Courts of Appeal came to different conclusions as to whether section 319(2) of the Canadian Criminal Code, illegalizing hate propaganda, was, in view of the guarantee of freedom of expression, constitutional or not. The Alberta Court of Appeal, in a public school teacher's case, [29] unanimously decided that it was too broad. It decided that while the Criminal Code anti-hate legislation is understandable, section 319(2) was too wide because it allowed an accused to be convicted even if nobody listened to, or was influenced by, his or her views. But the majority of the Ontario Court of Appeal decided that because wilful promotion of hatred against an identifiable group is harmful, it should be banned and therefore its control is not unconstitutional, and that section 319(2) of the Criminal Code does not infringe section 2(b) of the Canadian Charter, providing for the guarantee of freedom of expression, because the limitation on the freedom of speech in this case is reasonable and justified. [30]

In *Keegstra*, [31] the Supreme Court of Canada by a majority agreed with the Ontario Court of Appeal and disagreed with the Alberta Court of Appeal. Chief Justice Dickson, after warning against unqualified application of the

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29. *R v. Keegstra* (1988) 43 CCC (3d) 150. The Court of Appeal's unanimous decision was surprising, because of the virulent language the school teacher was using in his teachings. He imposed his obnoxious anti-Semitic views on his pupils. The Supreme Court gave examples of his teaching as follows:

> Mr. Keegstra's teaching attributed various evil qualities to Jews. He thus described Jews to his pupils as 'treacherous,' 'subversive,' 'sadistic,' 'money-loving,' 'power-hungry' and 'child-like.' He taught his classes that Jewish people seem to destroy Christianity and are responsible for depression, anarchy, chaos, wars and revolutions. According to Mr. Keegstra, Jews 'created the holocaust to gain sympathy' and in contrast to the open and honest Christians, were said to be deceptive, secretive and inherently evil. Mr. Keegstra expected his students to produce his teachings in class and on exams. If they failed to do so, their marks suffered.

30. *See* Gordon, *Freedom of Expression and Values Inculcation in the Public School Curriculum,* (1984) 13 J. L.& Educ 523; D. Bottos, *Keegstra and Andrews: A Commentary on Hate Propaganda and the Freedom of Expression* (1989) 27 Alberta L.R. 461; L. Weinrib, *Hate Promotion in a Free and Democratic Society* (1991) McGill L.J. 1416; M. Valois, *Hate Propaganda: A Constitutional Dilemma,* (1992) 26 Revue Juridique Themes 375; B. R. Moon, *Drawing Lines in a Culture of Prejudice: R. v. Keegstra and the Restriction of Hate Propaganda,* (1992) UBCLRE 99. Dubick, *Freedom to Hate: Do the Criminal Code Proscriptions against Hate Propaganda Infringe the Charter,* (1990) 54 Saskatchewan L.R. 149; E.L. Herbert & M.A. Dynna, *Freedom of Expression Outside the Classroom,* in W.F. Foster, EDUCATION AND LAW; A PLEA FOR PARTNERSHIP (1992); J.A. Ellis, *Public Teachers' Right to Free Speech: "A Matter of Public Concern,"* (1986) 12 So. U.L. Rev. 217; R.M. J.L. Reynolds, *Free Speech Rights of Public School Teachers: A proposed Balancing Test,* (1982) 30 Cleveland St. L.R. 673; M.E. Manley-Casimir & S.M. Piddocke, *Teachers in a Goldfish Bowl: A Case of "Misconduct,"* (1990) 3 Educ L.J. (Canada) 115; D. Schneiderman (ed), *Freedom of Expression and the Charter* (1991).

31. *Supra,* note 2.

American constitutional jurisprudence, said that there are important structural differences between the U.S. Bill of Rights and the Canadian Charter, particularly because of the limitation clause (section 1) of the Charter. Therefore, he cautioned against the untrammelled application of the American free speech doctrine. While the Court decided that section 319(2) of the Canadian Criminal Code infringes freedom of expression, it said that the limitation was protected under section 1 of the Canadian Charter. [32] The Court relied on the Cohen Report [33] which had concluded that the situation of hate propaganda in Canada was critical enough and could cause sufficient harm to justify legislative action. [34] According to the Chief Justice's definition, hate propaganda is "an expression intended or likely to create or circulate extreme feelings of opprobrium and enmity against a racial or religious group." He—after citing the International Convention on the Elimination of All Forms of Racial Discrimination, International Convention on Civil and Political Rights, and the European Convention for the Protection of Human Rights and Fundamental Freedoms—relied upon the equality and multi-culturalism provisions of the Canadian Charter to conclude that Parliament's objective in enacting section 319(2) of the Canadian Criminal Code was pressing and substantial. The Chief Justice decided that the provision of the Criminal Code was rationally connected to Parliament's objective, and it constituted a minimal impairment of freedom of expression—as previously decided by the Supreme Court. [35] He gave many reasons for coming to this conclusion. He gave as an example, that the section excludes private conversation. The prosecution has to prove that the alleged hate propagandist did it "wilfully." The word used in the section is

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32. Section 1 of the Charter provides that it "guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

33. The Cohen Committee concluded that its research has shown the power of words to maim and what a civilized society can do about it. Its opinion was, that:

> Not every abuse of human communication can be controlled by law or custom. But every society from time to time draws lines at the point where the intolerable and the impermissible coincide. In a free society such as ours, where the privilege of speech can induce ideas that may change the very order itself, there is the bias weighted heavily in favour of the maximum of rhetoric whatever the cost and consequences. But that bias stops this side of injury to the community itself and to individual members or identifiable groups innocently caught in verbal cross-fire that goes beyond legitimate debate. (This was cited by the Supreme Court in *Keegstra, supra,* note 2.)

34. See REPORT OF THE MINISTER OF JUSTICE OF THE SPECIAL COMMITTEE ON HATE PROPAGANDA IN CANADA (1966). See also Law Reform Commission, HATE PROPAGANDA WORKING PAPER No. 50 (1986); Law Reform Commission, REPORT: RE-CODIFYING OUR CRIMINAL LAW; REPORT NO. 31 (1987).

35. See R. v. Oakes [1986] 1 SCR 103.

"Promotion" which includes "active support or instigation" but excludes "the simple encouragement or advancement."

Reasonable Limits on Freedom of Expression

In *Attis*, [36] the facts were that a resource teacher, inter alia, argued in his published writings and in public appearances that Christian civilization was being undermined and destroyed by an international Jewish conspiracy. When complaints were filed against the teacher on the basis of the provincial (state) human rights legislation's provision proscribing discrimination on the grounds of religion and ancestry, a Board of Inquiry—appointed under the provincial legislation—found that there was no evidence of any direct classroom activity by the teacher on which to base a complaint; however, his out of school comments were found to denigrate the faith and belief of Jews. The Board of Inquiry found that the school authorities [37] were responsible for the teachers out of school utterances, and therefore they discriminated against the Jewish children and their parents, and that the school authorities had failed to discipline the teacher which had resulted in a poisoned educational environment. The Board of Inquiry stated that educational services provided in a school are meant to be:

> for the general purpose of educating students. Education of students must be viewed in the broad context of including not only the formal curriculum but the more informal aspects of education that come through interchange and participation in the whole school environment. This would be in keeping with the broad purposive approach taken to the interpretation of human rights legislation. . . . In the present case it is claimed that the complainant and his children, on the basis of their religion or ancestry, are provided with an inferior or less secure learning environment than is available to parents and children of other religions and ancestries. This less secure environment, the complainant argues, has created apprehension, fears, anger, isolation, and in a broader context has attacked the dignity and self-worth of the complainant and his children. It has been claimed

36. *Supra,* note 1. See C.P. Chotalia, *Are Academic Freedom and Free Speech Defences to Poisoned Environment—What can Ross tell about Sexual Harassment,* 33 Alberta L.R. 573 (1995).

37. The School Board, the employer of the teacher, itself characterized a television interview by the teacher as follows:

> the climate created by this aggressive approach creates hostility that permeates and interferes with the desired tolerance required by the school system to show respect for the rights of all students and their families to practice their religious faith.

> that the School Board and Malcolm Ross have created a 'poisoned environment' in School District 15 for the complainant and his children. [The Board of Inquiry accepts these claims]. [38]

The Supreme Court of Canada, overturning the Court of Appeal's (majority) [39] rejection of the Board of Inquiry's findings, [40] found that the evidence disclosed a poisoned educational environment in which Jewish children perceived the potential for misconduct and were likely to feel isolated and suffer a loss of self-esteem on the basis of their Judaism. Justice La Forest, for the unanimous Supreme Court, said:

> It is on the basis of the position of trust and influence that we hold the teacher to high standards both on and off duty, and it is an erosion of these standards that may lead to a loss of community of confidence in the public school system. I do not wish to be understood as advocating an approach that subjects the entire lives of teachers to inordinate scrutiny on the basis

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38. The Board of Inquiry stated that

> In such situations it is not sufficient for a school board to take a passive role. A school board has a duty to maintain a positive school environment for all persons served by it and it must be ever vigilant of anything that might interfere with this duty. [It is an obligation of the school board] to work towards the creation of an environment in which students of all backgrounds will feel welcome and equal.

39. For the majority, Chief Justice Hoyt (New Brunswick) put the issue in the following way:

> The issue is whether an individual's freedom of expression can prevail against the fear that there will be a public perception that [the teacher's] discriminatory remarks directed against a religious or ethnic minority are being condoned. The discrimination here is aggravated because the minority is one that has been historically targeted for discrimination and because the author of the discrimination is a teacher, who might be considered a role model to students.

However, the majority, while saying that a teacher may be disciplined for off-duty activities, decided that the out of school activities of the teacher in this case were his own affair.

40. Justice Ryan, in his dissent (later vindicated by the Supreme Court of Canada), agreed with the Board of Inquiry and said that both values, i.e., freedom of expression of the teacher, and freedom from discrimination of the students and their parents, have to be valued. In his opinion, a teacher's out-of-school activities can make him/her liable for disciplinary action. In his view, to affirm a teacher's unrestrained freedom of expression and of religion would be to trample upon the underlying values and principles of a free and democratic society such as the inherent dignity of the human being, commitment to social justice and equality and respect for cultural and group identity. The teacher was known as such whether within or outside the classroom. In this age of pervasive mass communication, the effect on young people of a teacher's utterance outside the class cannot be underestimated. He added:

> A teacher teaches. He is a role model. He also teaches by example. Children learn from example. [The teacher] teaches by example. He is a role model who publishes and promotes prejudice. This is wrong. In any event, the Board of Inquiry acted within its mandate and determined, in the balancing of conflicting interests, to protect and improve the conditions and interests of the disadvantaged and dis-empowered.

of more onerous moral standards of behaviour. This could lead to a substantial invasion of the privacy rights and fundamental freedoms of teachers. However, where a "poisoned" environment within the school system is traceable to the off-duty conduct of a teacher that is likely to produce a corresponding loss of confidence in the teacher and the system as a whole, then the off-duty conduct of the teacher is relevant. [41]

Conclusions

Freedom of expression is not an end itself, but a means to an end. This freedom has to be weighed against other freedoms. The majority of the Supreme Court of Canada [42] upheld the constitutionality of the hate propaganda provision of the Criminal Code. It said that the constitutional right to cultural diversity may be undermined by hate propaganda if the victim seeks to become culturally invisible. It upheld the conviction of a teacher who, within his teaching, was propagating anti-Jewish sentiments. Now the Supreme Court has decided that a teacher's off-duty activities, which propagate extreme or virulent views against a religious or ethnic group, are actionable. The teacher can be disciplined, or even be dismissed if he/she persists with his/her activities. In agreement it is submitted that in a multi-cultural and pluralistic society, colour- or race-based bigotry and religious intolerance cannot be allowed to flourish, particularly in our educational institutions. Canada has had a history of intolerance and racism, [43] and is now trying to right the balance, especially by the imposition of legal sanctions to be a racism-free and an egalitarian society. While bigotry and prejudice cannot be eliminated by the law, hate propaganda and discrimination can be minimized, if not completely controlled. Public

41. La Forest J, for the Supreme Court stated:

> By their conduct, teachers as "mediums" must be perceived to uphold the values, beliefs and knowledge sought to be transmitted by the school system. The conduct of a teacher is evaluated on the basis of his or her position, rather than whether the conduct occurs within the classroom or beyond. Teachers are seen by the community to the medium for the educational message and because of the community position they occupy, they are not able to "choose which hat they will wear on what occasion" (see Re Cromer and British Columbia Teachers' Federation (1986) 24 C.R.R. 271 Ar. P. 290 (B.C. C.A.)); teachers do not necessarily check their teaching hats at the school-yard gate and may be perceived to be wearing their teaching hats even off-duty.

42. In Keegstra, *supra,* note 2.

43. "... while Canadians understandably may view their country as one of the more egalitarian and reasonable polities in existence today, they often ignore a less sanguine aspect of Canadian social history and contemporary reality, both of which are replete with disturbing moments and movements of explicit discrimination and hatred"; Irwin Cotler, *Supra,* note 6. See also W.S. Tornopolsky & W.F. Pentney, *Discrimination and the Law* (1994); E. Mendes, *Racial Discrimination: Law and Practice* (1995).

teachers bear many social responsibilities, and are expected to instil acceptance of different faiths and beliefs in their students' minds. They should be disseminating and encouraging tolerance, rather than engaging in hate propaganda. They have every right to disagree with other beliefs, but those who live in glass houses normally refrain from throwing stones at others, because every belief, to a non-believer, can look defective or illogical, even silly. These days of mass communication, racist utterance out of school can attract as much as, if not more, attention than utterances in the school itself. Teachers therefore have to be careful that they do not engage in hate propaganda, or attract undue attention by making bigoted or racist statements, while aspiring to remain as teachers, and therefore role-models. Their actions, utterances and activities can easily attract undue attention as has been pointed out:

> Public teachers, especially in a small town or rural community, are rather like goldfish in a goldfish bowl: their behaviour is always open to public inspection and censure. School authorities, public authorities, the parents of the teachers' students, and members of the surrounding community scrutinize the teachers' acts and are ready to pass judgment on them. [44]

44. M.E. Manley-Casimir & S.M. Piddocke, "Teachers in a Goldfish Bowl: A Case of 'Misconduct,'" 3 Educ. L.J. 115 (1990).