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## **Civil Law Alternatives in the Fight Against Hate Speech: The Case Study of the Marcus Hyman Act**

## Abstract

*The difficult question of how to hold hatemongers legally accountable has lately taken on greater urgency as hate speech has risen to disturbing levels. In the fight against harmful speech, Canada is heavily reliant on the criminal law. An alternative legal remedy might be provided through civil actions for group defamation. Such lawsuits are currently permitted only in Manitoba. The Manitoba legislation was enacted in the 1930s through the efforts of Jewish MLA Marcus Hyman as a means for combating the fascist Canadian Nationalist Party headed by William Whittaker. This article provides a history of the Marcus Hyman Act. The Hyman Act has been discussed in several works but none of these sources offers a comprehensive analysis of the legislation's origins and history. This article fills this gap. While historians have suggested that the Hyman Act—and its subsequent invocation in a lawsuit against Whittaker brought by William Tobias—was inconsequential, in fact it represented an important victory against antisemitism in the 1930s. Although it has fallen into disuse, the legislation's history indicates that it could provide a useful mechanism for countering racism in the present day.*

## Résumé

*L'enjeu difficile concernant les moyens pour tenir les semeurs de haine légalement responsables a récemment pris une importance accrue, car les discours haineux ont atteint des niveaux inquiétants. Dans la lutte contre ces types de discours, le Canada s'appuie fortement sur le droit pénal. Un autre recours juridique pourrait être fourni par des actions civiles pour diffamation collective, de telles poursuites n'étant actuellement autorisées qu'au Manitoba. La législation manitobaine a été promulguée dans les années 1930 grâce aux efforts du député juif Marcus Hyman comme moyen de lutter contre le parti nationaliste canadien fasciste dirigé par William Whittaker. Cet article présente l'historique de la Loi Marcus Hyman. La loi Hyman a été abordée dans plusieurs ouvrages, mais aucune de ces sources ne propose une analyse complète des origines et de l'histoire de la législation. Cet article comble cette lacune. Alors que les historiens ont suggéré que la loi Hyman — et son invocation ultérieure dans un procès contre Whittaker intenté par William Tobias — était sans conséquence, elle a en fait représenté une victoire importante contre l'antisémitisme dans les années 1930. Bien qu'elle soit tombée en désuétude, l'histoire de cette législation indique qu'elle pourrait constituer un mécanisme utile pour contrer le racisme de nos jours.*

A perennial debate exists in the literature concerning the law's role in—and appropriate legal instruments for—combating harmful speech. The controversy concerning whether and how a legal system can hold hatemongers responsible has long divided and vexed legal scholars and political actors.<sup>2</sup>

This issue has lately taken on particular urgency. We live in a time of rising hate speech and xenophobia. This rise has had a deep impact on minority groups in Canada, including the Asian, Black, Indigenous, 2SLGBT+, and Muslim communities.<sup>3</sup> It has also significantly affected Canadian Jews. According to B'nai Brith Canada, antisemitic incidents reached a record high in 2020 for the fifth consecutive year.<sup>4</sup> False information spread online has blamed Jews for manufacturing the coronavirus and profiting from the COVID-19 pandemic.<sup>5</sup> Antisemitism spiked again during and after the May 2021 conflict between Israel and Hamas.<sup>6</sup>

There is a pressing need to examine potential solutions for addressing this disturbing increase in harmful speech. Canadians seeking legal redress currently have limited options aside from pursuing charges under the hate-speech sections of the *Criminal Code*.<sup>7</sup> But these provisions have proved difficult to use and convictions have been rare.<sup>8</sup>

An alternative legal remedy would be to bring a lawsuit for group defamation—a civil action directed against persons who made defamatory comments about an entire class of people, such as Jews. However, lawsuits for group defamation are generally prohibited under Canadian law.<sup>9</sup> Although someone defamed personally may bring a lawsuit, when an entire group of people is defamed, an individual member generally has no cause of action. To give an example, a statement declaring that “Jews fabricated the Holocaust” will typically provide insufficient foundation for a defamation suit, unlike a statement that falsely accused a specific Holocaust survivor of fabricating their story.

The only clear exception is Manitoba, which permits lawsuits to prevent libel against members of a race or religion.<sup>10</sup> This legislation was passed unanimously in April 1934 to combat growing fascism in the province, particularly the Canadian Nationalist Party headed by William Whittaker. The law was introduced by Marcus Hyman, a Jewish Member of the Legislative Assembly (“MLA”) from Winnipeg, and is commonly referred to as the “Marcus Hyman Act”<sup>11</sup>

This article presents a history of the Marcus Hyman Act. By turning to history, a goal of this research is to explore the efficacy of civil remedies for group defamation—an area of the law that has received relatively little consideration in the debate over legal countermeasures for hate speech.<sup>12</sup> The Hyman Act has received attention in several works, primarily from scholars of Manitoba Jewish history and antisemitism in Canada during the 1930s.<sup>13</sup> None of these sources offers a comprehensive analysis of the legislation’s origins and history. I fill this gap, relying primarily on archival research and media sources, including Winnipeg’s Yiddish press (*Dos Yiddishe Vort*).<sup>14</sup> These sources provide new insight into the origins and purposes of the Hyman Act and its role in opposing fascism and upholding the group dignity of Manitoba’s Jews in the 1930s.

I make two central claims. First, while historians have suggested that the Hyman Act was a hollow achievement, the legislation's enactment and its subsequent invocation by William Tobias were in fact important victories against antisemitism. Second, this law—which is now rarely used and largely forgotten—could provide a useful weapon in the modern-day fight against racism. These arguments are interconnected; the legislation's history evidences its historical significance and future potential.

This article proceeds in four parts. Part one provides a history of the lead-up to and enactment of the Hyman Act. Part two describes a lawsuit brought by William Tobias in October 1934 that resulted in a permanent injunction against William Whittaker. Part three sets out the aftermath of the Tobias suit, including the Act's subsequent history and the Canadian Jewish Congress' ("CJC") decision not to pursue similar legislation after the Second World War. Part four argues for the historical importance of the Hyman Act as an effective weapon against fascism in the 1930s and as a potentially useful tool in countering antisemitic speech today.<sup>15</sup> I then offer some concluding remarks.

## **I. Clouds in the Early Thirties: Fascism in Manitoba and the Marcus Hyman Act**

### **William Whittaker and the Canadian Nationalist Party**

The Jewish community of Manitoba, which had numbered a mere 1,500 persons at the turn of the century, grew to almost 20,000 by 1931 out of a total Canadian Jewish population of approximately 157,000.<sup>16</sup> About ninety percent of Manitoba's Jews resided in Winnipeg; ninety percent of these Jews, in turn, were concentrated in Winnipeg's North End.<sup>17</sup> Although still socio-economically marginalized, the Jewish community had developed strong institutional resources and grown active politically.<sup>18</sup>

Hitler's ascension to power in March 1933 caused deep concern among Manitoba's Jews. On April 2, 1933, a rally in support of German Jewry was organized by sixty Jewish groups at the Winnipeg Auditorium.<sup>19</sup> Speakers included Marcus Hyman and other leaders of Winnipeg's Jewish community.<sup>20</sup> Hyman, a member of the Independent Labor Party ("ILP")—an opposition party in Manitoba's parliament—was a Winnipeg MLA and the only Jewish representative in the Manitoba Legislature. Non-Jewish dignitaries also spoke at the rally, including John Queen, the ILP's leader.<sup>21</sup>

Fascism was soon to arrive closer to home. In early July 1933, the Canadian Nationalist Party was formed in Winnipeg, led by William Whittaker.<sup>22</sup> Whittaker was born in London, England in 1875 and immigrated to St. Catharines, Ontario in the early twentieth century following a stint with the British army in India.<sup>23</sup> He moved to Winnipeg in 1907, working a series of jobs, including as a member of the Canadian

Pacific Railway police force.<sup>24</sup> Whittaker later claimed that while working for the CPR he discovered that Jews were using freemasons as their tools to control politics in Canada.<sup>25</sup> Whittaker worked as an organizer for the Ku Klux Klan—which failed to gain much traction in Manitoba—several years before forming the Nationalist Party.<sup>26</sup>



William Whittaker<sup>27</sup>

The Nationalists began holding rallies in Winnipeg and other towns in Manitoba. Whittaker denounced Jews and blamed them for spreading communism.<sup>28</sup> Whittaker's group also posted antisemitic bulletins around Winnipeg.<sup>29</sup> Whittaker derived his support primarily from unemployed young men, including veterans of the First World War hard hit by the Great Depression, who bitterly resented their poverty.<sup>30</sup>

Beginning in November 1933, Whittaker started publishing a monthly newspaper called the *Canadian Nationalist*. The paper was wildly antisemitic, accusing Jews of controlling the press, promoting communism, and causing the Depression for economic gain.<sup>31</sup> Whittaker reproduced the *Protocols of the Elders of Zion* as conclusive proof of the Jewish plot for world domination.<sup>32</sup>

It is difficult to assess how many people subscribed to Whittaker's newspaper—he never made his circulation figures public<sup>33</sup>—but there is evidence that it was widely disseminated. The statement of claim later filed in the Tobias case said that Whittaker's newspaper had wide circulation in Winnipeg and throughout the province.<sup>34</sup>

Whittaker's men sold the *Canadian Nationalist* openly on the streets of downtown Winnipeg.<sup>35</sup> Shlomo Ben Adam, who grew up in the predominantly Mennonite village of Winkler, Manitoba, recalled that around this time almost every family in Winkler subscribed to Whittaker's hate sheet.<sup>36</sup> Whittaker also claimed in February 1934 that there were "quite a few" people in Toronto who received his paper.<sup>37</sup>

Manitoba's Jews worried that Whittaker's party was "gaining great strength" and had a large number of adherents in part on account of his "vile" newspaper.<sup>38</sup> Indeed, attendance at his rallies was increasing.<sup>39</sup> A committee of the Western Division of the newly-reconstituted CJC reported in early 1934 that it had "quite a serious problem on our hands" with respect to the Nationalists.<sup>40</sup> Alarmed by the increasingly antisemitic tone of the *Canadian Nationalist*, the CJC and the Anti-Defamation League of B'nai Brith formed a joint committee to combat "the Nationalist Paper and its menace to Jewry."<sup>41</sup>

Whittaker's publication also produced a reaction from the Manitoba government, which feared public disorder. On 13 December 1933, Attorney General WJ Major called Whittaker into his office to discuss the government's concerns. According to notes of the discussion, Whittaker effected a "distinct military bearing" and "was in a strongly hostile mood and attitude," at once launching "into a strongly worded attack on the Jews, their internationalist world-wide organizations, schemes etc."<sup>42</sup> Major diffused the situation by explaining that he had convened the meeting in "a friendly manner" to caution Whittaker that some of the passages contained in the December 1933 issue of the *Canadian Nationalist* might run afoul of the criminal law.<sup>43</sup> Showing Whittaker an annotated version of the *Criminal Code*, Major pointed out that the criminal offence of sedition had been defined by the courts to include the promotion of hostility between different groups of His Majesty's subjects.<sup>44</sup> Whittaker gradually softened over the course of the meeting, apparently concerned that he might be committing a criminal offence. He promised Major that he would "put on the soft pedal" as he had no desire to break the law.<sup>45</sup>

Any forbearance on Whittaker's part was temporary. In January 1934, he travelled to Europe with several colleagues, attending the first anniversary celebration of the founding of the Third Reich in Berlin. There he met Julius Streicher, among others.<sup>46</sup> The February 1934 edition of Streicher's noxious tabloid, *Der Stürmer*, featured a photograph of Whittaker and his colleagues.<sup>47</sup> Manitoba's Jews noticed Whittaker's appearance in *Der Stürmer* and it was picked up in the Yiddish press.<sup>48</sup> Whittaker was emboldened by his European sojourn; upon his return to Canada he attacked Jews and the government with vigour. At a rally on 2 February, he accused Jews of controlling Winnipeg's mainstream media and spreading communism.<sup>49</sup> He also criticized the Liberals, Conservatives, Co-operative Commonwealth Federation ("CCF"), and labour organizations, predicting that Canada would soon shine with glory with the Canadian Nationalists in power.<sup>50</sup>

The Jewish community remained vigilant. The CJC worked behind the scenes, successfully lobbying the ILP to condemn Whittaker in the Manitoba Legislature.<sup>51</sup> At the legislative session on 13 February 1934, John Queen called the Canadian Nationalist Party a menace to civilization and assailed Attorney General Major for not moving to suppress it. Waving a copy of the *Canadian Nationalist* for dramatic effect, Queen accused the Nationalists of seeking to overthrow the government.<sup>52</sup> Queen was cautious to note that Whittaker's antisemitic rantings had little appeal to "British minds," but nevertheless could influence "certain European minds in the population"<sup>53</sup> "The people of this country ought to know about this," Queen thundered, calling on Major to charge Whittaker with sedition.<sup>54</sup>

Queen had personal reasons for going after the Nationalists. The left-wing ILP was an ideological predecessor of the CCF—the ILP merged with the CCF in Manitoba in 1936<sup>55</sup>—and as such was a frequent target of Whittaker's diatribes.<sup>56</sup> Queen himself was a hero of the labour movement and had been imprisoned for seditious conspiracy following the 1919 Winnipeg General Strike.<sup>57</sup> But Queen also had political reasons for leaping to the defence of the Jewish community. Following the 1932 Manitoba election, the ILP held only five seats in the legislature, placing it third behind Premier John Bracken's Liberal-Progressives (38 seats) and the Conservatives (10 seats).<sup>58</sup> The ILP drew its support almost entirely from urban centres, mainly Winnipeg, and was very popular with Winnipeg's Jews.<sup>59</sup> Queen, moreover, would run for mayor of Winnipeg in November 1934, winning a narrow victory thanks to considerable support from the North End.<sup>60</sup>

Major responded positively to Queen's censure. Perhaps unbeknownst to Queen, Major had already met with Whittaker in December and was undoubtedly displeased that his friendly warnings had gone unheeded. On 20 February 1934, Major criticized Whittaker and assured the public that law and order would be preserved.<sup>61</sup> Major accused the Canadian Nationalists of seeking the government's destruction and warned that they could face criminal charges for seditious conspiracy.<sup>62</sup> However, Major sounded unsure of whether such charges might apply, stating that "activities of this kind ... are dangerously close to if not an actual violation of the criminal law of Canada."<sup>63</sup>

The Jewish community was pleased with the government's response. *Dos Yiddishe Vort* commented that while Major's speech should have come sooner, it had reassured the community of the government's protection.<sup>64</sup> On 22 February 1934, Hyman rose in the legislature and congratulated Major for his speech "concerning the pseudo-Nationalist movement raising its ugly head in this province." Hyman stated that the "filthy and scurrilous" articles in the *Canadian Nationalist* had caused "considerable restlessness and fear of violence" among Manitoba's Jews and it was becoming increasingly difficult "to restrain some of our younger men from demonstrating

their enraged resentment of these foul libels on the Jewish people.”<sup>65</sup> Major’s speech, said Hyman, had provided the Jewish community with complete assurance of the government’s support.<sup>66</sup>

Major followed up his words with action. Upon learning of a planned Nationalist rally on the evening of February 21 in Winnipeg’s North End, Major contacted the building’s owners and persuaded them to cancel it. City police were sent to bar the doors and preserve order. Aside from his desire to back up his warning in the legislature, Major feared with good reason that a Nationalist meeting in the North End would result in violence. In fact, by 7:30 pm that evening, a crowd of one thousand had gathered outside of the hall.<sup>67</sup> Shortly before 8 pm, Whittaker arrived by automobile to a mixed reception, with some shouting “Here comes Hitler!”<sup>68</sup> Upon being informed that the meeting could not proceed, Whittaker and his followers left peaceably, ignoring a taunt of “speak out here, Hitler” from someone in the crowd.<sup>69</sup> In internal correspondence, the CJC took credit for lobbying Major to prevent the meeting.<sup>70</sup>

However, Nationalist Party meetings were allowed to resume, and Whittaker demonstrated that he would not back down. At a rally on 24 February 1934, Whittaker threatened Major with legal action.<sup>71</sup> Three days later, Whittaker again castigated the Attorney General, boldly predicting that Major would convert to Nationalism “within a short time.”<sup>72</sup> And on March 2, before a capacity crowd, Whittaker dared Major to show that the *Canadian Nationalist* was seditious, asserting that if the government had the power to stop it, it would have been suppressed a long time ago.<sup>73</sup> It certainly appeared that Whittaker had a point, as no sedition charges were forthcoming and his hate sheet continued to circulate.

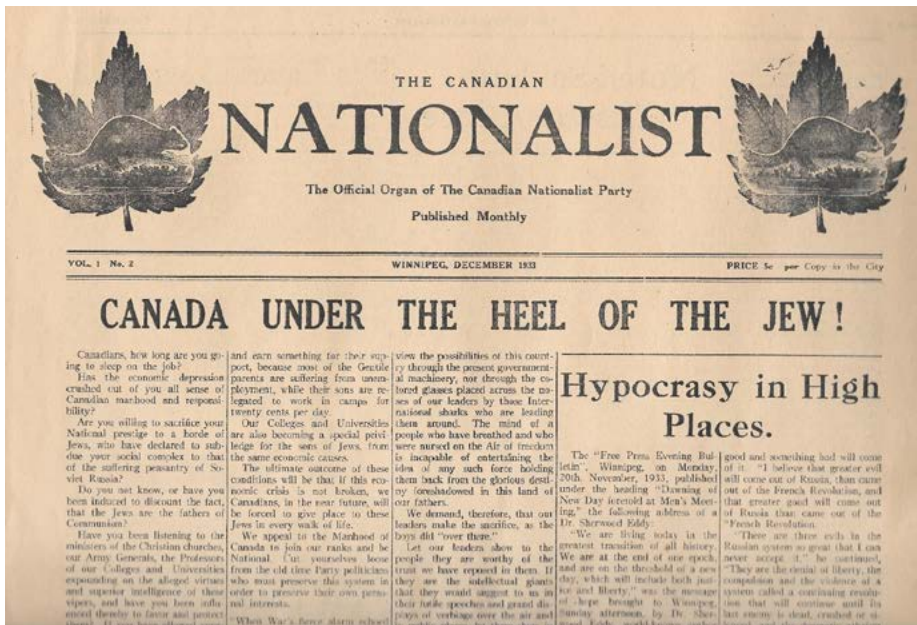
### **The Jewish community response: Anti-Fascism and the Marcus Hyman Act**

But even while Whittaker was seemingly gaining strength, the Jewish community was putting together an effective response.

The community’s reaction was in some quarters more visceral than the behind-the-scenes politicking preferred by the CJC. For example, in early January 1934, two young Jewish men, Isaac Kettner and Boris Weller, assaulted a man selling the December issue of the *Canadian Nationalist* on a Winnipeg street corner and took five copies of his newspaper. Kettner and Weller were charged with robbery. According to the accused, the man had told them that it was the object of the Nationalist Party to drive all Jews out of Canada—and that they would be driven out, too—at which point they became angry and grabbed the papers.<sup>74</sup>



Despite the arrest, this display of vigilantism worked to the benefit of the Jewish community. MJ Finkelstein, a prominent lawyer and president of the CJC Western Division, took up the defence. Finkelstein argued that Kettner and Weller should be acquitted because the stolen papers were defamatory.<sup>75</sup> Magistrate RB Graham agreed, commenting with surprising transparency that while the accused “were technically guilty of robbery, I am going to stretch the law to the extent of not convicting them.”<sup>76</sup> Better still, in dismissing the charges Graham went out of his way to express the “strong opinion” that the *Canadian Nationalist* was libellous and possibly seditious—insofar as it contained “references such as ‘Canada under the heel of the Jew’ and other scurrilous statements against the Jewish people”—and that any person selling the newspaper could face prosecution.<sup>77</sup> Finkelstein was elated that Graham had “expressed in no uncertain terms his views that newspapers containing such articles are seditious and libellous and contrary to law” and hoped that “such an open expression from so able a jurist as Graham will help formulate decent Canadian opinion on this point and will have a very salutary effect on the situation generally.”<sup>78</sup>



*Canadian Nationalist* (December 1933)<sup>79</sup>

Whether or not the acquittal had a salutary impact on the general situation, it certainly upset Whittaker. On 6 March 1934, Whittaker railed against Graham and threatened that if Whittaker had the money he would have sued both the magistrate and the Attorney General for defamation.<sup>80</sup> Whittaker vowed to continue publishing his newspaper.<sup>81</sup>

Jewish militancy against the Nationalists also took more organized forms. In early March 1934, an anti-fascist league was formed in Winnipeg.<sup>82</sup> Often referred to as the “Jewish Anti-Fascist League,” the organization included non-Jews and styled itself the “Anti Fascist League, Winnipeg” in English.<sup>83</sup> In fact, its initial leader, Jacob Penner, was a Mennonite.<sup>84</sup> The Anti-Fascist League’s roots were in the Communist Party, which enjoyed significant support among Winnipeg’s Jews, but it also incorporated more moderate Laborists.<sup>85</sup> The League organized a boycott of German goods and sought to coordinate the fight against fascism at home and abroad.<sup>86</sup> A more militant youth section was also created. Its members snuck into Nationalist meetings and reported their findings back to the community.<sup>87</sup> William Litvin served as the youth section’s secretary; in the Yiddish press, he explained that the disgusting allegations in Whittaker’s hate sheet had greatly antagonized younger Jews, particularly on account of the “current economic crisis,” which left Jewish youth “especially unsettled.”<sup>88</sup>

The Anti-Fascist League’s formation did not sit well with more conservative Jewish communal leaders, who preferred cautious diplomacy.<sup>89</sup> For instance, William Ross—who later served as the long-time leader of Manitoba’s Communist Party—recalled that at a meeting of Jewish youth a prominent Conservative rabbi implored the crowd not to get involved in anti-fascist activity and claimed that Mussolini was not antisemitic.<sup>90</sup>

Communal leaders were more supportive of an approach advanced in the legislature by Marcus Hyman. On 22 March 1934, Hyman introduced a bill to amend Manitoba’s *Libel Act* to permit lawsuits for group libel.<sup>91</sup> The bill had in fact been drafted by Ernest Brotman, a lawyer who previously worked for Hyman in private practice.<sup>92</sup> Hyman made clear that his law was directed squarely at Whittaker’s group and particularly the *Canadian Nationalist*.<sup>93</sup> Responding to the announcement of Hyman’s bill, Whittaker dared Hyman to bring out “his big guns,” questioning “how Marcus Hyman could be a member of the Independent Labor Party, for he did not think Mr. Hyman ever did any labor in his life.”<sup>94</sup>

Even though the ILP held only five seats in the 55-seat legislature, Hyman’s bill passed unanimously and received royal assent on 7 April 1934.<sup>95</sup> At the time of its enactment, the text of the legislation’s first section read as follows:

The publication of a libel against a race or creed likely to expose persons belonging to the race or professing the creed to hatred, contempt or ridicule, and tending to raise unrest or disorder among the people, shall entitle a person belonging to the race or professing the creed to sue for an injunction to prevent the continuation and circulation of the libel; and the Court of King’s Bench is empowered to entertain the action.<sup>96</sup>

Thus, the Hyman Act permitted a lawsuit against anyone who published a libellous statement against any “race or creed” likely to expose them to contempt or ridicule and that tended to raise unrest or disorder among the people. The additional requirement that the statement tend to raise unrest or disorder was added by the legislature to the original bill to alleviate concerns over freedom of speech.<sup>97</sup> The only remedy permitted by the law was an injunction against the persons responsible for the libel.<sup>98</sup> Hyman explained that in order to get his bill through he “felt it necessary to make quite clear that I was not out to obtain any monetary advantage.”<sup>99</sup> Hyman no doubt sought to preclude allegations that the Jewish community was attempting to profit off of the legislation.

What is remarkable about the Hyman bill is the ease with which it passed compared to similar efforts in Ontario and Quebec around the same time. The Hyman Act was in fact modelled after an earlier, unsuccessful attempt at a group libel law in the latter province.<sup>100</sup> In 1932, the two Jewish members of Quebec’s legislature, Peter Bercovitch and Joseph Cohen, introduced a bill permitting the issuance of an injunction to prohibit the libel of any race, religion, or nationality.<sup>101</sup> Bercovitch and Cohen were members of the ruling Liberal Party under Premier Louis-Alexandre Taschereau and the legislation initially had the cautious support of the Taschereau government.<sup>102</sup> However, the government swiftly retreated in the face of an overwhelmingly negative reaction from the press.<sup>103</sup> The failure of the Bercovitch–Cohen bill was treated as a personal victory by fascist leader Adrien Arcand and pushed antisemitism in Quebec to new heights.<sup>104</sup> In Ontario, attempts in 1935 and 1937 by Jewish Liberal Member of Provincial Parliament (“MPP”) JJ Glass to introduce legislation modelled on the Hyman Act also failed.<sup>105</sup>

There are several reasons for the happier fate of Hyman’s bill. First, Whittaker had, imprudently, attacked the government directly, daring Major to take action against him and bragging that the government had no power to stop the publication of his newspaper. This impelled the Bracken administration to support Hyman’s legislation.<sup>106</sup> Moreover, unlike in Quebec and Ontario, the Manitoba press greeted the bill positively or with indifference.<sup>107</sup> In general, Manitoba’s mainstream media was hostile to fascism. The *Winnipeg Free Press*, for one, took an early and consistent stance against Hitler and fascist activity in Canada.<sup>108</sup> A review of the Manitoba press reveals virtually no backlash to the Hyman Act. The *Brandon Sun* stands out as a rare exception, calling it “stupid legislation added to the statutes of Manitoba and the woes of Manitobans.”<sup>109</sup> But even the conservative *Winnipeg Tribune* signalled its approval for the law, commenting that Hyman’s bill was “in no sense a gag on debate” and that “[a]ppeals to race prejudice, always harmful and despicable, are particularly out of place in Canada.”<sup>110</sup>

Another reason was Hyman's well-earned reputation, both in Jewish and non-Jewish circles. Hyman was the son of a famous rabbi who moved from Vilna to London, England in 1885, when Marcus was two years' old.<sup>111</sup> Hyman earned law and master's degrees from Oxford, picking up several awards in the process.<sup>112</sup> Upon graduation, he spent several years in India before moving to Winnipeg in 1913.<sup>113</sup> From 1915–1921 he lectured at the Manitoba Law School, the first Jew to do so.<sup>114</sup> Following the 1919 General Strike Hyman acted as one of the strikers' defence counsels.<sup>115</sup> He became a prominent labour lawyer in the 1920s and was elected to the Winnipeg School Board in 1923.<sup>116</sup> After two unsuccessful bids for mayor of Winnipeg, Hyman won a seat in the legislative assembly in 1932 as a member of the ILP, with overwhelming support in the North End.<sup>117</sup> Hyman then became one of the most respected members of the House.<sup>118</sup> The *Winnipeg Tribune's* parliamentary reporter commented in early 1934 that Hyman was “the Labor party's intellectual” who “combines with a pleasant voice and cultured diction the laudable qualities of forcefulness and brevity” (although the reporter admitted to “sometimes finding difficulty in ascertaining just what Mr. Hyman is trying to convey”).<sup>119</sup> In sum, Hyman's esteemed reputation would have ensured that his legislative proposal was taken seriously.

Furthermore, Hyman leveraged his reputation by proceeding cautiously to build up a broad base of support in the provincial legislature. HM Caiserman, General Secretary of the CJC, explained that “Mr. Hyman made it his business to secure a few people who would second his motion. They then canvassed every member of the Legislature individually and acquainted them with the contents of the Bill and the draft and invariably secured their approval.” Caiserman attributed the bill's unanimous support to this careful preparation.<sup>120</sup>



Marcus Hyman<sup>121</sup>

## **“Knives flashed in the fast waning sunlight”: The Market Square Riot**

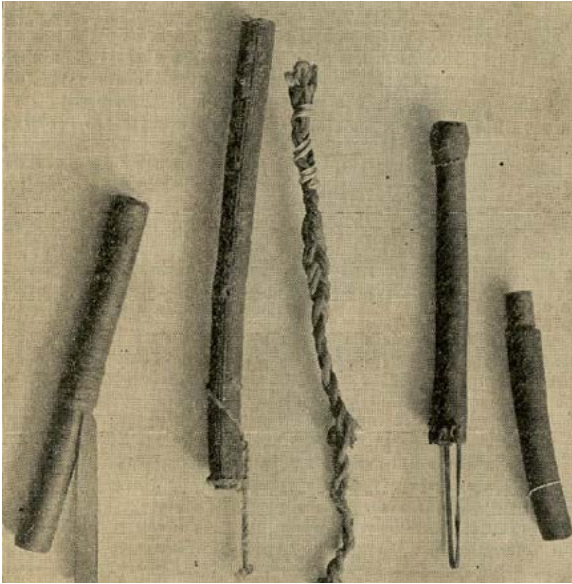
The Jewish community was optimistic following passage of the Hyman Act. *Dos Yiddishe Vort* predicted that the “wild anti-Semitic agitation in the local Nazi publication *The Nationalist* and the dissemination of the bogus *Protocols of Elders of Zion* will probably be stopped thanks to the bill by Marcus Hyman.”<sup>122</sup>

Such optimism was, however, premature. Whittaker was growing bolder in his attacks on the Jews. For example, at a rally in late March, Whittaker threatened that “[w]e will have to destroy the [Jews] or they will destroy us,” predicting that “we will soon be able to give our enemy, the Jews, the same welcome that Hitler gave them in Germany.”<sup>123</sup> Indeed, Whittaker was apparently undeterred by Hyman’s bill, as he maintained his onslaught following the law’s introduction<sup>124</sup> and passage in the legislature<sup>125</sup>, and he continued to publish and circulate the *Canadian Nationalist*.<sup>126</sup>

The situation reached a boiling point when Whittaker announced that he planned to hold a rally on 5 June 1934, in Market Square, located just outside Winnipeg’s City Hall. Market Square was a popular meeting place for communists and other left-wing groups.<sup>127</sup> Accordingly, the announcement was viewed by local communists—and surely was intended by Whittaker—as a deliberate provocation.<sup>128</sup> Around 8 pm on June 5, Whittaker marched into Market Square with about seventy-five of his followers, only to be met by several hundred communists and members of the Anti-Fascist League.<sup>129</sup> Fighting between the two sides apparently broke out when the fascists began to arm themselves with blackjacks.<sup>130</sup> The Yiddish media reported that “the opponents of the Fascists were so furious when they saw the Black Jacks that they attacked the Nazis with their greatest determination.”<sup>131</sup> The *Winnipeg Free Press* described the ensuing battle in dramatic terms:

Hopelessly outnumbered ... the mere handful of Nationalists ... [were] beaten unmercifully. ... Knives flashed in the fast waning sunlight, heavy clubs crashed against cap-protected skulls, and huge slabs of wood were torn from the stalls of market gardeners and used as battering rams against the tightly-pressing wall of snarling humanity.<sup>132</sup>

The “blood speckled” fascists eventually escaped under police protection.<sup>133</sup> Seven Nationalists and two communists were arrested.<sup>134</sup> Despite the Anti-Fascists’ apparent victory, William Litvin accused the Nationalists of “wild beastly brutality,” which “must have convinced everyone of the necessity to attract more people and strengthen and broaden the fight against fascism.”<sup>135</sup>



Weapons captured from the Nationalists at Market Square<sup>136</sup>

Whittaker promised to keep going, calling the Market Square battle the opening salvo in the cause of Gentile economic freedom.<sup>137</sup> The *Canadian Nationalist* subsequently reported the “real” story of the encounter, claiming that a thousand “frothing, foaming alcoholised beasts called Communists”, driven into battle by their “Jew masters”, had attacked a mere thirty of Whittaker’s men.<sup>138</sup> A defiant Whittaker pledged to soon hold another rally in Market Square.<sup>139</sup> He also continued to publish the *Canadian Nationalist*.<sup>140</sup> The stage was set for another clash between fascist and anti-fascist forces, only this one would take place in court.

## II. “The foundations of the British Empire will not be shaken if we stop this sort of thing”:

### Tobias v. Neufeld, et al.

As Whittaker’s hate sheet continued to circulate, the Jewish community took steps to implement its new legal weapon. On 24 October 1934, immediately after another edition of the *Canadian Nationalist*—“reeking with Anti-Semitic venom”—appeared on the streets of Winnipeg, the CJC and B’nai Brith held an urgent meeting at which they decided to initiate a lawsuit for group defamation against Whittaker.<sup>141</sup>

William Tobias was chosen as plaintiff.<sup>142</sup> Tobias, like Hyman, was held in high regard by Jews and non-Jews alike. Tobias had served in the First World War as a lieutenant in the Canadian Expeditionary Force and was awarded the Military Cross.<sup>143</sup> Upon his return to Canada, Tobias graduated from Manitoba Law School and established a successful law practice in Winnipeg.<sup>144</sup> In 1927, he was elected to the Manitoba legis-

lature as a member of the Conservative Party. His victory came as a surprise—many Jewish ILP supporters shunned him—but was explained by the fact that he was “the darling of all the young people, particularly the ladies.”<sup>145</sup> Tobias lost his re-election bid in 1932 but remained a prominent member of the community, serving as the first president of the General Monash Branch for Jewish members of the Canadian Legion and on the executive of several Winnipeg sports leagues.<sup>146</sup> Tobias also had personal reasons for leading the legal battle against antisemitism: In May 1933, the graves of Tobias’ parents in Winnipeg’s Jewish cemetery were vandalized along with numerous others.<sup>147</sup>



William Tobias<sup>148</sup>

As with its plaintiff, the Jewish community chose its legal counsel with care. A group of prominent Jewish lawyers assisted with legal materials and strategy behind the scenes; however, as law firm of record they selected Andrews, Andrews, Burbidge & Bell.<sup>149</sup> Jewish communal leaders felt it prudent to use a non-Jewish firm as their public face.<sup>150</sup> Andrews, Andrews, Burbidge & Bell had deep roots in Winnipeg’s conservative legal establishment and members of its firm played leading roles in opposing the 1919 General Strike, including serving as Crown prosecutors (opposite Hyman, among other defence counsel).<sup>151</sup> It may also have been selected because William Tobias articulated there.<sup>152</sup>

Tobias' statement of claim was filed in the Manitoba Court of King's Bench on 30 October 1934.<sup>153</sup> Shortly before its filing, the CJC uncovered that the printer of the most recent issue of the *Canadian Nationalist* was Randschau Publishing Company, owned by Herman and Anna Neufeld, who were added as defendants.<sup>154</sup> The statement of claim alleged that the defendants had libelled the Jewish people through two articles that appeared in volume 2, number 6 of the *Canadian Nationalist*, both of which accused Jews of practising ritual murder.<sup>155</sup> Immediately after filing the claim, Tobias' lawyers obtained an interim injunction against the *Canadian Nationalist* from Chief Justice Daniel MacDonald, who "expressed extreme disgust at the stupid accusations" contained in Whittaker's publication.<sup>156</sup>

On November 7, 1934, a court hearing was held before the Chief Justice to determine whether the interim injunction would continue until the trial. The Neufelds were dropped from the suit prior to argument on the injunction. Their lawyer claimed that his clients had not known what was contained in Whittaker's paper until after its publication and that upon learning of its contents told Whittaker they would do no more printing for him.<sup>157</sup> Tobias accepted this explanation and agreed to discontinue the action against them with a promise that the Neufelds would write a letter of apology and retraction.<sup>158</sup> The Neufelds subsequently wrote to Tobias emphasizing their deep remorse over the content of the *Canadian Nationalist*, which they said ran contrary to the teachings of their Mennonite church, and undertaking not to print any further libels against the Jews.<sup>159</sup>

Whittaker thus proceeded to challenge the injunction alone. His counsel argued that freedom of the press was at stake, that group defamation was permitted under the law, and that the Hyman Act was contrary to all precedents in the British Empire.<sup>160</sup> Chief Justice MacDonald gave these arguments short shrift. He held in no uncertain terms that the *Canadian Nationalist* "can be stopped and it ought to be stopped," commenting that the "foundations of the British Empire will not be shaken if we stop this sort of thing."<sup>161</sup> The interim injunction remained in place.

On 22 November 1934, Whittaker filed his statement of defence. He denied publishing the *Canadian Nationalist*, denied writing the impugned articles, and even denied that Tobias was Jewish.<sup>162</sup> Although Whittaker disclaimed the articles, he nevertheless simultaneously asserted that they were privileged, of great public interest, and true.<sup>163</sup> Following issuance of the statement of defence, *Dos Yiddishe Vort* concluded that Whittaker was determined to prove his libel and that the case would result in a sensational trial.<sup>164</sup> In fact, this was the high point of Whittaker's defence.

On 28 December 1934, Whittaker sat for an examination for discovery, pursuant to which he was questioned under oath by Tobias' lawyers. Whittaker refused to answer most questions on the advice of his counsel.<sup>165</sup> He denied having ever seen the *Ca-*



*nadian Nationalist* and refused to admit that he had anything to do with the articles in question.<sup>166</sup>

Tobias subsequently obtained a court order compelling Whittaker to answer the numerous questions he had tried to avoid.<sup>167</sup> A further date to continue the examination was scheduled for 18 January 1935. Whittaker, however, failed to show up on that day.<sup>168</sup> He and his counsel thereafter stopped participating in the lawsuit.

Tobias' victory was now virtually ensured. His lawyers promptly obtained a court order striking out Whittaker's defence.<sup>169</sup> On 13 February 1935, Tobias secured a permanent injunction, ending the case. The language of the injunction was very broad, perpetually enjoining Whittaker and his servants and agents from publishing not only the libels alleged in volume 2, number 6 of the *Canadian Nationalist*, but also "any similar libels injuriously affecting those belonging to the Jewish race or professing the Jewish creed."<sup>170</sup> Justice PJ Montague commented that he had ordered the permanent injunction unhesitatingly and hoped it would have a salutary effect.<sup>171</sup> The Court also awarded \$334.82 in legal costs—a significant sum in 1935—although it is unclear whether Whittaker ever paid up.<sup>172</sup>

The Jewish community celebrated the result. MJ Finkelstein expressed disappointment that Whittaker took the "cowardly course" in refusing to defend the lawsuit, but nevertheless felt "quite certain that the outcome of this trial, and above all Whittaker's avoidance of the issue, is the final blow to his organization."<sup>173</sup> According to Finkelstein, the CJC had "practically destroyed [Whittaker's] movement" and the Nationalists had reached a "vanishing point" in Winnipeg, although they still carried on in some rural areas with diminishing effect.<sup>174</sup> It was thus "quite clear that our policy and tactics we used in fighting him and his group have been amply justified by the results."<sup>175</sup> The Yiddish media likewise deemed the trial of great significance. Whittaker had lost his courage and thereby admitted his lies about the Jewish people.<sup>176</sup> Accordingly, the verdict was "very important for the Jewish population of Manitoba."<sup>177</sup>

### III. Aftermath of the Tobias Case

#### Whittaker and the Canadian Nationalist

Whittaker kept a low-profile following Tobias' suit. Manitoba's newspapers went quiet on Whittaker after the Tobias case, suggesting that he ceased holding rallies, that his public meetings were poorly attended, or that the media did not find them newsworthy.<sup>178</sup> Whittaker's low profile is further indicated by the fact that in March 1935 the CJC wrote to Whittaker—using intermediaries in Saskatchewan posing as supporters—to find out what he was up to.<sup>179</sup> Whittaker complained that the "power

of Jewry which rules this country” had muzzled him in Manitoba, although this did not prevent him from mailing the *Canadian Nationalist* out of province.<sup>180</sup> He lamented that the Nationalists had become “the most hated party in the whole of Canada.”<sup>181</sup> Whittaker spoke of financial troubles; the Nationalists were a “small group of common working men,” mostly unemployed, in search of funds.<sup>182</sup> Whittaker commented that he wanted to leave Winnipeg but that his financial troubles kept him there.<sup>183</sup> He offered to sell a copy of the *Protocols of the Elders of Zion* for forty cents.<sup>184</sup>

Whittaker ceased publishing the *Canadian Nationalist* for a full year, from October 1934 to October 1935.<sup>185</sup> When it resumed publication, Whittaker’s hate sheet was produced in mimeographed format. He continued to mail the newspaper outside of Manitoba and appears to have eventually recommenced circulating it within Manitoba.<sup>186</sup> However, Whittaker’s general impecuniousness and the fact that he now required a mimeograph machine to disseminate his publication—in addition to its amateurish quality and increasingly bitter antisemitism—strongly suggests that it did not enjoy wide readership.<sup>187</sup>



*Canadian Nationalist* (December 1935)<sup>188</sup>

But Whittaker soldiered on. In the fall of 1936, he resurfaced and held several rallies in Winnipeg, reinvigorated by the arrival of the notorious British antisemitic journalist Henry Hamilton Beamish.<sup>189</sup> At the Winnipeg Auditorium on October 23, Whittaker spoke after Beamish, resuming his familiar attacks on the Jewish community. He was interrupted by shouts of “liar” from the crowd—among them a group of about twenty-five Jews—and fights broke out.<sup>190</sup>

The Jewish community was understandably concerned by Whittaker's re-emergence. The Anti-Fascist League urged renewed emphasis on the fight against fascism.<sup>191</sup> However, Whittaker and his party soon receded from view, and Whittaker fell seriously ill.<sup>192</sup>

Whittaker once again garnered headlines in March 1938 through his announcement that he had joined with Adrien Arcand and Ontario fascist leader Joseph Carr to form the National Unity Party.<sup>193</sup> The *Winnipeg Free Press* was not concerned; in an interview with Whittaker published the day after the announcement, the *Free Press* mocked him without mercy.<sup>194</sup> Nor was *Dos Yiddishe Vort*, which concluded that there was "no need to take seriously the new-founded Nazi party and her 'Leaders.'"<sup>195</sup> And the National Unity Party's formation did not improve Whittaker's fortunes. He soon expressed dissatisfaction with Arcand's leadership, suffered a stroke, and, in the words of historian Martin Robin, carried on in failing health "with a mimeograph machine, stackfuls of hate literature, and a few stray youthful adherents."<sup>196</sup> Whittaker died in poverty in October 1938.<sup>197</sup> His fascist movement died with him.<sup>198</sup>

### Deaths of Hyman and Tobias

Hyman was re-elected to the Manitoba legislature in July 1936.<sup>199</sup> Sadly, he did not complete his term, passing away on December 31, 1938.<sup>200</sup> Responses to Hyman's death highlighted his excellent reputation. Premier Bracken, Attorney General Major, and Mayor Queen served among the honorary pallbearers at his funeral.<sup>201</sup> The *Winnipeg Free Press* called Hyman a leading figure in Winnipeg, who "could not suffer fools gladly" and wore his Judaism with pride.<sup>202</sup> The *Winnipeg Tribune* was equally effusive, commenting that Hyman's "death removes one of Winnipeg's most individual, colorful and esteemed figures."<sup>203</sup> This sentiment was not confined to Winnipeg; the *Gladstone Age Press* called Hyman "a great Canadian" who would be missed in the legislature, and opined that the "many expressions of personal loss and many eloquent tributes to his sterling worth ... should serve as a sterling rebuke to those engaged in villification [sic] and inhuman persecution of Jews as a race."<sup>204</sup>

Tobias died in October 1941.<sup>205</sup> As with Hyman, Tobias' death brought an outpouring of grief and adulation. For example, the *Free Press* recalled "[h]is warm spirit, his sound judgment and his gaiety of spirit" and noted that in "a score of activities he was always on the job and always ready to do more."<sup>206</sup>

### Subsequent (dis)use of the Marcus Hyman Act

There is no record of the Jewish community pursuing any other lawsuits under the Hyman Act. As a general matter, the Act has been very rarely invoked since the Tobias suit. A review of the jurisprudence reveals only two other reported cases in the legislation's entire history.<sup>207</sup>

After Whittaker resurfaced, Manitoba's Jews considered bringing another action against him. The CJC and B'nai Brith—which formally joined forces in 1938 in the fight against antisemitism through the Joint Public Relations Committee<sup>208</sup>—discussed the issue many times, eventually deciding that another lawsuit would do more harm than good, likely on account of Whittaker's vastly reduced influence.<sup>209</sup>

Despite the Hyman Act's successful use against Whittaker in the 1930s, the Jewish community subsequently turned away from civil lawsuits for group defamation. While the precise reasons for this are uncertain, a few explanations can be suggested. First, the JPRC's dominant approach to antisemitism in the early post-War period was a "quarantine" policy, under which it was felt the best way to deal with hate-mongers was to ignore them. This approach was no doubt inspired by the insignificance of far-right movements in Canada after the War. Just as the Manitoba Jewish community concluded with respect to Whittaker in the late-1930s, Jewish leadership felt that the harms of providing hatemongers with a platform would outweigh any benefits from a legal proceeding.<sup>210</sup>

Second, when the JPRC decided to abandon the quarantine approach in the 1960s on account of rising neo-Nazism, it chose to focus its efforts on the criminal law.<sup>211</sup> Jewish leaders came to believe that a federal approach would be preferable to a provincial one, and that the criminal law possessed a symbolic power unmatched by civil legislation.<sup>212</sup> Notably, in 1964 the Ontario JPRC wrote to Jewish leaders in Winnipeg to ask for a recommendation as to whether they should lobby for provincial legislation in Ontario similar to the Hyman Act.<sup>213</sup> The Manitobans recommended against doing so.<sup>214</sup> In their view, it was better to focus on federal legislation, such as the *Criminal Code*, because an injunction under the Hyman Act could be circumvented by distributing hate propaganda outside of the province.<sup>215</sup> Ernest Brotman—author of the Hyman bill—offered a dissenting view, arguing that his legislation was an effective tool against antisemitism.<sup>216</sup> In 1965, primarily due to Jewish lobbying, the federal government struck a committee under the chairmanship of Maxwell Cohen—then Dean of McGill Law School, and Canada's first full-time Jewish law professor and law school dean—to examine legal remedies for hate speech.<sup>217</sup> The Cohen Committee's subsequent report acknowledged that the Hyman Act might be useful, but recommended an amendment to the *Criminal Code* because, in its view, "[n]o civil statute can create a moral standard equivalent to that of criminal law."<sup>218</sup> Criminal hate-speech legislation along the lines drafted by the Cohen Committee was enacted in 1970.<sup>219</sup>

Even as the criminal legislation proved difficult to use in the ensuing years, Jewish leaders continued to favour criminal law approaches and discount civil remedies for group defamation. In the early 1980s, the Ontario government considered amending the *Libel and Slander Act*<sup>220</sup> to permit group defamation lawsuits, out of concern that

the *Criminal Code* was, in the words of Ontario Attorney General Roy McMurtry, “useless in fighting hate literature.”<sup>221</sup> The CJC was cold on the idea—preferring to concentrate its attention on (unsuccessful) efforts to strengthen the criminal law provisions—and the government decided not to pursue it.<sup>222</sup> Les Scheininger, Chairman of CJC Central Region from 1983 to 1986 and later CJC president, recalled recently that “[w]e looked at a variety of alternatives with Mr. McMurtry at that time” and “the point of view that was expressed is that the best way of dealing with unacceptable behaviour would be pursuant to the *Criminal Code*.”<sup>223</sup>

A third, and related, explanation is that Jewish leaders felt that expanding civil remedies might discourage the government from enforcing existing criminal and human rights legislation—in other words, that the government would leave this to individual communities to take up on their own. When, in the 1990s, Ontario Progressive Conservative MPP Charles Harnick introduced a private member’s bill to create a cause of action for group defamation, he was forced to withdraw it in the face of opposition from the CJC. The CJC was concerned that a group defamation provision would “shift the onus in regard to dealing with hate crime from the State to individuals and community groups.”<sup>224</sup> Manitoba thus remains the only province with this type of legislation.<sup>225</sup>

#### IV. The Marcus Hyman Act’s Historical and Contemporary Significance

Historians have suggested that the Marcus Hyman Act and its subsequent invocation in the Tobias case were inconsequential because they failed to destroy Whittaker or the *Canadian Nationalist*. Allan Levine, likely the preeminent living scholar of Manitoba’s Jews, deems it a purely symbolic victory.<sup>226</sup> Harry and Mildred Gutkin also view any benefit arising from the legislation and the Tobias case as fleeting.<sup>227</sup> In a similar vein, Ira Robinson asserts that the Hyman Act and the Tobias lawsuit “did not seem to relieve the gloomy atmosphere within [Manitoba’s] Jewish community.”<sup>228</sup>

I disagree with these assessments. The historical record set out above establishes that the Hyman Act was a significant victory against antisemitism in the 1930s.

Hyman’s legislation clearly weakened Whittaker and his movement. Following initiation of Tobias’ legal action, the *Canadian Nationalist*—whose regular publication and distribution on the streets of Winnipeg during 1933–1934 had inflamed the Jewish community—went out of circulation for an entire year. Even when it resumed publication, Whittaker was forced at least initially to distribute his paper only out of province. The injunction therefore continued to provide relief for the Jews of Manitoba. In fact, Whittaker stated in March 1935 that he would have liked to leave Winnipeg but did not have the money to do so. Moreover, Whittaker lost his printer

and had to produce his paper in mimeograph, suggesting that he never regained a broad readership. Indeed, later issues of the *Canadian Nationalist* contain desperate pleas for money and Whittaker died in abject poverty.<sup>229</sup>

It is, then, likely that Whittaker continued to disseminate his hate sheet in a feeble attempt to remain relevant and because it was a primary source of his (minimal) income. Whittaker's decline after the Tobias case is further supported by the fact that in its aftermath he kept a much lower profile. As noted, MJ Finkelstein described the Nationalists in 1935 as having reached a vanishing point in Winnipeg and carrying on with diminishing effect in rural areas. This was a far cry from the front-page headlines and capacity crowds Whittaker had previously garnered. Whittaker remained out of public view until around September 1936, and, following a brief resurfacing, receded into irrelevance and ill-health thereafter. Even Whittaker's teaming up with Arcand and Carr in 1938 failed to revive his flagging enterprise. In sum, while the Tobias lawsuit may not have knocked Whittaker out, it was a powerful blow from which he never fully recovered.<sup>230</sup>

Significantly, the Jewish community viewed the introduction of the Hyman Act and its use against the Nationalists as important victories. The Yiddish media lauded the legislation's enactment and Tobias' defeat of Whittaker, deeming them of great significance for Manitoba's Jews. The CJC, for its part, saw the Tobias case as conclusive evidence that its strategy had been successful. As such, the Hyman Act served to bolster the group dignity of Manitoba's Jews and affirm their sense of inclusiveness and belonging.<sup>231</sup>

The Jewish community outside of Manitoba also saw these events as highly consequential. Jewish politicians sought to transplant Manitoba's legislation elsewhere. In the words of the Montreal-based *Canadian Jewish Chronicle*, Manitoba had led "the way in creating legislative machinery for enjoining racketeers from carrying on their work."<sup>232</sup> As we have seen, J.J. Glass, inspired by the Tobias lawsuit, attempted without success to introduce similar legislation in Ontario. In addition, AA Heaps, the Jewish Member of Parliament from Winnipeg North, lobbied the federal government unsuccessfully that because the Hyman bill had proved effective at the provincial level it should be copied at the federal level. Meeting with Minister of Justice Ernest Lapointe in 1937, Heaps argued in vain "that the Hyman Bill in Manitoba has proven an effective instrument in that Province and there is no reason why it should not be effective on a Dominion-wide basis."<sup>233</sup> Furthermore, commentators in the United States noticed and praised Manitoba's accomplishments.<sup>234</sup>

The historical import of the Hyman Act speaks to its contemporary relevance. In the modern-day struggle against racist speech, Canada is largely reliant on the hate-speech provisions in the *Criminal Code*. But hate-speech prosecutions require the

consent of the attorney general of the province and are seldom invoked, and, when used, convictions have been difficult to obtain.<sup>235</sup> Civil claims for group defamation have several advantages over the criminal law. First, civil proceedings have a lower burden of proof; the plaintiff need only make their case on a balance of probabilities, rather than beyond a reasonable doubt. Second, civil trials may offer less opportunity for grandstanding by the accused; criminal trials present excellent platforms for hatemongers to portray themselves as martyrs—a notorious example being the prosecution of Ernst Zundel in the 1980s—which may be greatly attenuated in a civil proceeding.<sup>236</sup> Third, civil trials place their focus on the issue of damage to the victimized group, rather than on the complicated question of the speaker's intention—who may argue in a criminal prosecution that they had no desire to promote racial hatred but were simply expressing a sincerely-held view.<sup>237</sup> Fourth, a civil court may have greater flexibility to craft a remedy that addresses the harm to the victimized community—such as through monetary compensation and/or an injunction to prevent repetition of the defamatory claims—instead of a narrow emphasis on punishing the offender.<sup>238</sup>

On the topic of remedies, it is arguable that Hyman was wise to limit the available award to an injunction. As seen through the Tobias case, history shows that injunctions can be very powerful tools for minority communities in the fight against discrimination.<sup>239</sup> In addition, the hatemonger can be prosecuted if they violate the injunction, thus offering an easier path to the criminal law—with subsequent emphasis on breach of the court order rather than on the speech in question.<sup>240</sup> Removing the availability of monetary damages also circumvents complicated questions regarding how to quantify the damage award and how to apportion it among a potentially large and ill-defined class of persons (assuming that one can even collect damages). Furthermore, as Hyman recognized, this approach pre-empts claims that the minority group is merely seeking to profit from the libel, an allegation the Jewish community might be particularly sensitive to.

It bears mention that Canadian law already has human rights provisions that provide a civil law supplement to the criminal law. However, only three provinces—British Columbia, Alberta, and Saskatchewan—possess human rights legislation directly aimed at hate propaganda; as such, this avenue is unavailable in Manitoba.<sup>241</sup> In any event, human rights proceedings, like criminal trials, have been criticized for being overly time consuming, expensive, and politicized, as well as for covering only very narrow forms of extreme speech.<sup>242</sup> Accordingly, their efficacy in fighting discrimination has been questioned.<sup>243</sup>

This is not to say that civil litigation is free of impediments. For one, funding of a civil action falls on the plaintiff, unlike criminal and human rights proceedings which are financed by the state (although, as in the Tobias lawsuit, it is possible to obtain

an award of costs from the losing party). There is also the related concern expressed above by the CJC: that permitting group defamation actions might disincentivize the government from taking initiative to protect minority groups, leaving this to the communities themselves. Another issue is the particularly vexed question of standing. The Jewish community's litigation under the Hyman Act in the 1930s succeeded in large part because of a significant degree of unity around the case. But as the legislation permits any member of an aggrieved community to bring an action, there might be little "community" control over perceived "rogue" elements who litigate more problematic cases—that is, cases for which there is less unity over the benefits of turning to the law. The Ernst Zundel criminal case—initiated by Sabina Citron and the Canadian Holocaust Remembrance Association in the face of opposition from some other segments of Canadian Jewry—arguably provides such an example.

These arguments and counterarguments concerning civil remedies for group defamation—including a comparison of the benefits and drawbacks of civil remedies as compared to human rights and criminal legislation—are deserving of greater consideration than can be offered here and I intend to take them up elsewhere. The essential point, however, is that a civil claim for group defamation may provide a useful mechanism to work alongside other remedies in the fight against racism. The Marcus Hyman Act teaches us that.

## V. Conclusion

This article has presented a history of the Marcus Hyman Act. Alarmed by the rise of fascism in the early 1930s, Manitoba's Jewish community responded with legal and extralegal measures. Its primary antagonist was William Whittaker and his Canadian Nationalist Party, which held rallies in and around Winnipeg and published the violently antisemitic newspaper the *Canadian Nationalist*. With thanks to Jewish MLA Marcus Hyman—in addition to a supportive government and mainstream press—the community succeeded in obtaining legislation permitting civil claims for group libel. A lawsuit subsequently launched by William Tobias, a war hero and former MLA, won a perpetual injunction against Whittaker and his hate sheet. Although Whittaker carried on with diminishing effect and eventually resumed publication of his newspaper, the Tobias suit led to his irreversible decline and Whittaker died a broken man in 1938. The Hyman Act thus deserves recognition as an important victory against antisemitism.

Despite this success, following the Second World War Jewish leaders shifted their focus toward criminal law remedies for group defamation. With the benefit of hindsight, we should ask whether they made a mistake. A half century of experience with our hate-speech provisions in the *Criminal Code* shows them to be largely ineffective. Indeed, the problem of antisemitic speech has grown significantly in that time.



It is therefore vital that we explore legal remedies to complement existing criminal and human rights legislation. In Manitoba the solution may be hiding in plain sight.

**1**

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**2**

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**4**

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**5**

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**6**

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**7**

*Criminal Code of Canada*, R.S.C. 1985, c. C-46 (hereafter "*Criminal Code*"). The *Criminal*

Code hate speech provisions are discussed in further detail below.

**8**

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**9**

See *Bou Malhab v. Diffusion Métromédia CMR inc.*, 2011 SCC 9. See also Joshua MacFayden, “‘Nip the Noxious Growth in the Bud’: Ortenberg v. Plamondon and the Roots of Canadian Anti-Hate Activism,” *Canadian Jewish Studies* 12 (2004): 73-96.

**10**

*The Defamation Act*, C.C.S.M. c. D20, s. 19. The word “defamation” encompasses both libel (written defamation) and slander (oral defamation). The Manitoba statute prohibits only libel. I refer to Manitoba as the only “clear” exception to the general prohibition against civil lawsuits for group defamation because British Columbia might allow for a similar cause of action through the *Civil Rights Protection Act*, R.S.B.C. 1996, c. 49 [“CRPA”]. This legislation, enacted in 1981, creates “a tort actionable without proof of damage” prohibiting “any conduct or communication ... that has as its purpose interference with the civil rights of a person or class of persons by promoting (a) hatred or contempt of a person or class of persons, or (b) the superiority or inferiority of a person or class of persons in comparison with another or others, on the basis of colour, race, religion, ethnic origin or place of origin.” Although the wording of the statute may thus be construed to permit a group defamation lawsuit (or at least something akin to such a suit), it has apparently never been used for this purpose and the legislation, as interpreted, contains important distinctions from the tort of defamation. For example—unlike in a defamation suit, where the intent of the speaker is presumed—the CRPA has been interpreted to require evidence that the defendant “intended to promote hatred, contempt, inferiority or superiority on a prohibited ground and intended to interfere thereby with the civil rights of the person or class of persons against whom the promotion of hatred, contempt or inferiority was directed.” *Maughan v. University of British*

*Columbia*, 2008 B.C.S.C. 14 at para. 347. See also *Canadian Jewish Congress v. North Shore News and Collins*, 1997 B.C.H.R.T. 35 at para. 208. In general, this legislation has been used infrequently and its utility as a tool for community actions against racism is deserving of additional study. See Benjamin Berger, “Using Statutory Measures to Redress Racism,” *Advocates’ Quarterly* 24, no. 4 (September 2001): 449-466.

**11**

The official name of the legislation was *An Act to Amend “The Libel Act”*, 1934 S.M., c. 23, s. 1.

**12**

Except where otherwise indicated, I use the term civil remedies here and below to exclude both criminal and human rights legislation.

**13**

See Henry Trachtenberg, “The Winnipeg Jewish Community and Politics: The Inter-War Years, 1919-1939,” *Manitoba Historical Society Transactions* 35, series 3 (1978-9), <http://mhs.mb.ca/docs/transactions/33/jewishpolitics.shtml>; Allan Levine, *Coming of Age: A History of the Jewish People of Manitoba* (Winnipeg: Heartland Associates, 2009), 256-59; Harry Gutkin, *Journey Into Our Heritage: The Story of the Jewish People in the Canadian West* (Toronto: Lester & Orpen Dennys, 1980), 208-12; David Rome, *Clouds in the Thirties: On Antisemitism in Canada, 1929-1939, Section 2* (Montreal: Canadian Jewish Congress (hereafter “CJC”) National Archives, 1977), 86-98; Lita-Rose Betcherman, *The Swastika and the Maple Leaf: Fascist Movements in Canada in the Thirties* (Pickering, Ont.: Fitzhenry & Whiteside, 1975), 65-75. Scholars of Canadian legal history have given the legislation little attention. For a rare exception, see David Fraser, “The Blood Libel in North America: Jews, Law, and Citizenship in the Early 20<sup>th</sup> Century,” *Law & Literature* 28, no. 1 (January 2016): 33-85.

**14**

Remarkably, given that Winnipeg’s Jewish population never exceeded 20,000, it operated three weekly newspapers for over six decades from the 1920s through the 1980s. Two newspapers—the *Jewish Post* and *Western Jewish News*—were in English; the other was *Das Yiddische Vort* (hereafter, “DYV”), known in English as the *Israelite Press*. See Lewis Levendel, *A Century of the Canadian Jewish Press: 1880s-1980s* (Ottawa: Borealis, 1989), 22-30, 175-202. In the early 1930s almost all Mani-

toba Jews spoke Yiddish—Louis Rosenberg reports that 99.92% of the Jewish population was Yiddish-speaking as of 1931—making the Yiddish media accessible to virtually the entire population. See Louis Rosenberg, *Canada's Jews: A Social and Economic Study of Jews in Canada in the 1930s*, ed. Morton Weinfeld (Montreal & Kingston: McGill-Queen's University Press, 1993), 399.

**15**

Although I argue in favour of the Marcus Hyman Act as a useful tool in opposing contemporary racist speech, my primary purpose in this article is to provide an account of the genesis and history of the Marcus Hyman Act. As I note below, the broader topic of civil remedies for group defamation is one that warrants further inquiry and which I intend to delve into more deeply in subsequent research.

**16**

Rosenberg, *Canada's Jews*, 20.

**17**

Henry Trachtenberg, "The Jewish Community of Winnipeg and the Federal Election of 1935 in Winnipeg North," *Manitoba History* 61 (Fall 2009): 2.

**18**

Ibid., 3.

**19**

Levine, *Coming of Age*, 256.

**20**

Ibid.

**21**

"To Speak at Protest Meeting," *Winnipeg Free Press* (hereafter, "WFP"), April 1, 1933, 15.

**22**

"Form Nationalist Party at Meeting Held in Winnipeg," *WFP*, July 8, 1933, 4. Several sources claim that the Canadian Nationalist Party was formed slightly later, around September 1933 (see e.g. Betcherman, *Swastika and Maple Leaf*, 65; Gutkin, *Journey Into Our Heritage*, 210; Martin Robin, *Shades of Right: Nativist and Fascist Politics in Canada, 1920-1940* (Toronto: University of Toronto Press, 1992), 200; Doug Smith, *Joe Zuken: Citizen and Socialist* (Toronto: James Lorimer & Co., 1990), 72). I have used the earlier date reported in the *WFP*.

**23**

"W. Whittaker Dies, Aged 63," *Winnipeg Tribune* (hereafter, "WT"), October 26, 1938, 21.

**24**

Ibid.

**25**

"What, No Neckties!" *WFP*, March 4, 1938, 1.

**26**

See Trachtenberg, "The Inter-War Years"; M.J. Finkelstein, letter to H.M. Caiserman, February 20, 1934, qtd. in Rome, *Clouds in the Thirties*, 88; Allan Bartley, *The Ku Klux Klan in Canada: A Century of Promoting Racism and Hate in the Peaceable Kingdom* (Halifax: Formac, 2020), 181-2. According to Bartley, "Whittaker was likely responsible for letters signed by the Ku Klux Klan that were delivered to Jewish residents of Winnipeg during the 1926 federal election campaign." Whittaker formed the Canadian Nationalist Party with Arthur F. Hart Parker, another notorious antisemite who served as the party's secretary. Parker broke off from the Nationalist Party in the spring of 1934 and formed his own party—the Fascist Party of Canada—whereupon he disavowed his antisemitic views and denounced Whittaker. See Robin, *Shades of Right*, 200, 204-05.

**27**

CJC0001, PC 01-03-077F, CJC organizational records, Alex Dworkin Canadian Jewish Archives, Montreal (hereafter, "CJA").

**28**

Betcherman, *Swastika and Maple Leaf*, 66; Gutkin, *Journey Into Our Heritage*, 210; Harry Gutkin & Mildred Gutkin, *The Worst of Times, the Best of Times: Growing Up in Winnipeg's North End* (Markham, Ont.: Fitzhenry & Whiteside, 1987), 174-75.

**29**

Levine, *Coming of Age*, 257.

**30**

Gutkin, *Journey Into Our Heritage*, 210; W. Whittaker, letter to unnamed individual in Shaunavon, Saskatchewan, March 19, 1935, CJC0001, ZA 1935-1-10, CJC organizational records, CJA.

**31**

See articles appearing in *Canadian Nationalist* 1, no. 1 (November 1933): 4-5 ("Jewish Con-

trol of the Press”) and 6 (“No Depression for the Jews in Canada”; “Inoculation of Diseases is a Jewish Weapon against the Gentiles”; and “The Jew spiritually an Alien”).

**32**

See e.g. “Jewish Control of the Press”, *Canadian Nationalist* 1, no. 2 (November 1933): 4-5.

**33**

Joan Sadler, “The Fascists in Manitoba,” *Trib Magazine*, May 24, 1980, 17.

**34**

Statement of Claim, *Tobias v. Neufeld et al.*, Man. K.B. 535/34 (hereafter, “*Tobias v. Neufeld*”), October 30, 1934, ATG 0012, GR0276, Winnipeg civil files, Provincial Archives of Manitoba, Winnipeg (hereafter, “PAM”).

**35**

See W. Litvin, “Strengthen the Fight Against Fascism,” *DYV*, June 15, 1934, 4.

**36**

Gutkin and Gutkin, *Worst of Times, Best of Times*, 174-75. German-speaking Mennonites in western Canada were particularly susceptible to fascism and strong pro-Nazi sentiments were expressed in the thirties in the Mennonite press; however, Mennonite fascist support was certainly not uniform and was mainly concentrated among those who had emigrated to Canada after the First World War. See Betcherman, *Swastika and Maple Leaf*, 64-65.

**37**

W. Whittaker, letter to L. Russell, February 20, 1934, Fonds 17, Series 5-3, File 35, CJC Ontario Region fonds, Ontario Jewish Archives, Toronto (hereafter, “OJA”).

**38**

Rome, *Clouds in the Thirties*, 88.

**39**

Betcherman, *Swastika and Maple Leaf*, 66.

**40**

Rome, *Clouds in the Thirties*, 88. The CJC was first constituted in 1919 only to become defunct shortly thereafter; it was officially re-established in January 1934 amid rising antisemitism. See Gerald Tulchinsky, *Branching Out: The Transformation of the Canadian Jewish Community* (Toronto: Stoddart, 1998), 33, 145.

**41**

Minutes of meeting of Canadian Jewish Congress and the Anti-defamation League of B’nai Brith, December 8, 1933, JHC 250, File 4, Jewish Heritage Centre of Western Canada Archives, Winnipeg (hereafter, “JHCWCA”); Minutes of meeting of National Executive of Western Division CJC, December 9, 1933, JHC 250, File 4, JHCWCA.

**42**

Memorandum of conference in office of Honourable Mr. Major in afternoon of December 13, 1933, ATG 0132, GR0542, J-13-2-7, Attorney General Central Registry operations and program files, PAM.

**43**

Ibid.

**44**

Ibid. This was in fact the commonly accepted definition of seditious intent until narrowed by the Supreme Court of Canada in *Boucher v The King*, [1951] S.C.R. 265.

**45**

Memorandum of conference in office of Honourable Mr. Major.

**46**

Robin, *Shades of Right*, 201-02.

**47**

Ibid.

**48**

“Jews Attacked Again by Winnipeg Nazis,” *DYV*, February 2, 1934, 1.

**49**

Ibid.

**50**

Ibid.

**51**

Rome, *Clouds in the Thirties*, 88.

**52**

“Fascist Movement in Winnipeg is Scored by Queen in House,” *WFP*, February 13, 1934, 1.

**53**

Ibid.; “Queen Attacks Nazis,” *DYV*, February 13, 1934, 1.

**54**

"Mr. Speaker," *WT*, February 13, 1934, 5.

**55**

Lloyd Stinson, "The Making of the Manitoba CCF," *WFP*, February 15, 1973, 18.

**56**

See e.g. "Fascist Leaders Arraign Present Political Groups".

**57**

Stefan Epp-Koop, *We're Going to Run this City: Winnipeg's Political Left after the General Strike* (Winnipeg: University of Manitoba Press, 2015), 29.

**58**

"Voters Study Party Angles of Election," *WFP*, June 15, 1936, 5.

**59**

Stinson, "Making of the Manitoba CCF"; Trachtenberg, "Inter-War Years".

**60**

Epp-Koop, *Run this City*, 118.

**61**

"Agitators Are Told By Major in House to Give Province a Wide Berth," *WFP*, February 21, 1934, 1; "Mr. Speaker," *WT*, February 21, 1934, 1.

**62**

Ibid.

**63**

Ibid.

**64**

"Mr. Major's Warning," *DYV*, February 27, 1934, 2.

**65**

"Major Praised for Averting Bad Situation," *WT*, February 23, 1934, 5.

**66**

Ibid.

**67**

"Police Prevent 'Brown Shirts' Holding Meet," *WT*, February 22, 1934, 3.

**68**

"Nationalist Meeting is Banned," *WFP*, February 22, 1934, 1.

**69**

"Police Prevent 'Brown Shirts' Holding Meet".

**70**

M.J. Finkelstein, letter to L. Rosenberg, March 2, 1934, qtd. in Rome, *Clouds in the Thirties*, 89.

**71**

"Legal Action is Likely to Face Hon. W.J. Major," *WFP*, February 26, 1934, 11.

**72**

"Nationalist Body Seeks to Convert Hon. W.J. Major," *WFP*, February 27, 1934, 3.

**73**

"Whittaker Dares Major to Show Paper Seditious," *WFP*, March 3, 1934, 3.

**74**

"Papers Attack on Jews Libel, Court Believes," *WT*, March 2, 1934, 1.

**75**

Ibid.

**76**

Ibid. See also "Verdict by Judge Graham Concerning the Nazi Suit of Great Significance," *DYV*, March 9, 1934, 2.

**77**

Ibid.

**78**

As qtd. in Rome, *Clouds in the Thirties*, 88.

**79**

Private collection of Connie Wawruck-Hemmett.

**80**

"Whittaker Makes Sharp Reply to City Magistrate," *WFP*, March 7, 1934, 4.

**81**

Ibid.

**82**

See "League Against Fascism Formed; Plan Convention," *WFP*, March 2, 1934; "Penner Elected Leader of League Against Fascism," *WFP*, March 24, 1934, 3.

**83**

Levine, *Coming of Age*, 149; Gutkin, *Journey Into Our Heritage*, 193; Jewish Anti-Fascist League, Yiddish pamphlet entitled "In the Fight

Against Fascism and Antisemitism," March 1937, JHC 25, File 1, JHCWCA. The history of the Jewish Anti-Fascist League warrants further study. The League was later headed by prominent community leader J.A. Cherniack, incorporated many Jewish organizations under its umbrella, went through at least one name change—it later called itself the "League Against Fascism and Antisemitism"—and fought with the Canadian Jewish Congress over leadership in the fight against antisemitism in Manitoba. See e.g. "Second Meeting of Anti-Fascist League," *DYV*, March 13, 1936; J.A. Cherniack, "The Congress and The League," *DYV*, February 25, 1938; M. Averbach, "Congress and League in Light of The Treaties," *DYV*, March 4, 1938; "Answer to Statement of the League Against Fascism and Anti-Semitism," *DYV*, April 8, 1938. The CJC's leaders were uncomfortable associating too closely with the Anti-Fascist League because of the League's ties to the Communist Party. See H.M. Caiserman, letter to S. Frank, December 6, 1936, CJC0001, ZA 1936-3-39, CJC organizational records, CJA; S. Frank, letter to H.M. Caiserman, December 10, 1936, CJC0001, ZA 1936-3-39, CJC organizational records, CJA; J.A. Cherniack, letter to W.L. MacKenzie King, February 1, 1937, CJC0001, ZA 1937-2-23, CJC organizational records, CJA.

**84**

"Penner Elected Leader". Penner was a Winnipeg alderman and founder of the Communist Party of Canada. His wife was Jewish and he was involved in a variety of Jewish communal endeavors. He is also the father of former Manitoba Attorney General Roland Penner. Levine, *Coming of Age*, 146-47; Trachtenberg, "The Inter-War Years".

**85**

Trachtenberg, "The Inter-War Years"; Gutkin, *Journey Into Our Heritage*, 193; Levine, *Coming of Age*, 258-59; Smith, *Joe Zuken*, 73.

**86**

Anti-Fascist League, "In the Fight Against Fascism and Antisemitism".

**87**

Sam Korman, "At a Fascist Meeting in Winnipeg," *DYV*, March 20, 1934, 2.

**88**

W. Litvin, "Winnipeg Jewish Youth in Fight Against Fascism," *DYV*, April 2, 1934, 4.

**89**

Gutkin, *Journey Into Our Heritage*, 193; Levine, *Coming of Age* 149, 259.

**90**

William Ross, interview by Doug Smith, Tape 1, May 20, 1986, 1986-217, Doug Smith fonds, PAM, [https://pam.minisisinc.com/scripts/mwimain.dll/144/LISTINGS\\_IMAGES/LISTINGS\\_DET\\_IMAGES/SISN%20293169?sessionsearch#av\\_files](https://pam.minisisinc.com/scripts/mwimain.dll/144/LISTINGS_IMAGES/LISTINGS_DET_IMAGES/SISN%20293169?sessionsearch#av_files).

**91**

At the same time, Hyman introduced a proposed amendment to the *Newspapers Act* to force publishers of pamphlets, leaflets, and handbills to disclose their names; this bill was also passed during the same legislative session. See "Stiffer Law for Libel, Objective of Marcus Hyman," *WFP*, March 21, 1934, 18.

**92**

H. Frank, letter to B.G. Kayfetz, March 2, 1964, Fonds 17, Series 5-4-6, File 20, CJC Ontario Region fonds, OJA. According to the *Winnipeg Tribune*, Brotman—who would later serve as a Winnipeg city councillor—was well-suited to lawmaking, as he was known "for worrying a point with pedantic insistence." See "Upsetter of By-Laws," *WT*, November 18, 1948, 6.

**93**

"Amendment to Libel Act is Given Approval," *WT*, April 4, 1934, 1.

**94**

"Leader of Brown Shirts Attacks Hyman Measure," *WFP*, March 21, 1934, 6.

**95**

"Manitoba House Is Adjourned Saturday To Convene In June," *WFP*, April 9, 1934, 2.

**96**

S.M. 1934 c. 23, s. 13(A)(1). The law contained two other subsections, which clarified that an "action may be taken against the person responsible for the authorship, publication, or circulation of the libel" (s. 13(A)(2)) and that "[t]he word 'publication' used in this section shall be interpreted to mean any words legibly marked upon any substance or any object signifying the matter otherwise than by words, exhibited in public or caused to be seen or shewn or circulated or delivered with a view to its being seen by any person" (s. 13(A)(3)).

**97**

"Wheat Instead of Money Can Be Used in Settling Farm Debts Under New Act," *WFP*, April 11, 1934, 5.

**98**

Ibid.

**99**

M. Hyman, letter to H.M. Caiserman, May 4, 1934, qtd. in Rome, *Clouds in the Thirties*, 90.

**100**

Ibid.

**101**

The original bill also covered libel against any creed, class, or denomination; this language was dropped (and the bill narrowed in other respects) in an unsuccessful attempt to satisfy the law's critics. Betcherman, *Swastika and Maple Leaf*, 13-14.

**102**

Ibid., 14.

**103**

Ibid., 14-18.

**104**

Ibid., 18-21.

**105**

Ibid., 105-06.

**106**

Ibid., 70.

**107**

Robin, *Shades of Right*, 204.

**108**

See e.g. "Germany of This New Day," *WFP*, July 13, 1933, 11; "The Methods of Fascism," *WFP*, July 9, 1934, 13; "What, No Neckties!"; "What's the Cheering For?" *WFP*, September 30, 1938, 15; Gutkin, *Journey Into Our Heritage*, 210; G.V. Ferguson, "Poison Pens at Work," *WFP*, February 17, 1937, 11. The question of why the Manitoba press was more hostile to fascism than elsewhere in Canada is deserving of further inquiry, but two reasons might be suggested here. First, according to Lita-Rose Betcherman, western-Canadian Jews met less discrimination because "Anglo-Saxon nativism was diluted by the vast number of immigrants from central and eastern Europe. In 1931 half the population

of the prairies was of non-British and non-French origin." See Betcherman, *Swastika and Maple Leaf*, 61. The heightened presence of immigrant groups may have led the Manitoba media to be more attune to the dangers of fascism. Second, the editor-in-chief of the large and influential *Winnipeg Free Press*, John W. Dafoe, deserves much credit for taking the lead in opposing Nazism, apparently out of his personal antipathy toward fascism. See Andrew Wall, dir. *The Paper Nazis: Winnipeg Nazi and Fascist Movements of the 1930's*, Winnipeg, Fairpoint Films, 2011, 02:10ff.

**109**

"Laws and Legislators," *Brandon Sun*, April 18, 1934, 7.

**110**

"Libelling a Race," *WT*, February 14, 1935, 11.

**111**

Rome, *Clouds in the Thirties*, 89.

**112**

Marcus Hyman lawyer member file, M-92-7-17, File 9, Legal Judicial History collection, PAM; Rome, *Clouds in the Thirties*, 89.

**113**

Rome, *Clouds in the Thirties*, 89.

**114**

Marcus Hyman lawyer member file; Levine, *Coming of Age*, 209.

**115**

Marcus Hyman lawyer member file.

**116**

Trachtenberg, "The Inter-War Years".

**117**

Ibid. From 1920 to 1955, Winnipeg's MLAs were elected through a single transferable ballot, a form of ranked-choice voting. Winnipeg voters ranked a list of candidates and the top ten were elected. See Cameron MacLean, "How Manitoba broke ground with a decades-long proportional representation experiment now 'faded from memory'," *CBC News*, September 14, 2019, <https://www.cbc.ca/news/canada/manitoba/manitoba-single-transferable-vote-1.5271771>.

**118**

Stinson, "Making of the Manitoba CCF".

**119**

"Mr. Speaker," *WT*, February 15, 1934.

**120**

H.M. Caiserman, letter to The Secretary, South African Jewish Board of Deputies, May 5, 1937, CJC0001, CJC ZA 1937-2-23, CJC organizational records, CJA.

**121**

JM 450, JHCWCA.

**122**

"Law Adopted to Protect Against Libel," *DYV*, April 6, 1934, 1.

**123**

Korman, "At a Fascist Meeting in Winnipeg".

**124**

"Sharp Exchanges Features Meeting of Brown Shirts," *WFP*, March 30, 1934, 8.

**125**

"Whittaker Raps Internationalism as Canada's Foe," *WT*, May 24, 1934, 2.

**126**

Litvin, "Strengthen the Fight"; Sadler, "The Fascists in Manitoba".

**127**

Epp-Koop, *Run this City*, 96.

**128**

Smith, *Joe Zuken*, 73.

**129**

"Nazis Suffer Great Defeat in Battle on Market Square," *DYV*, June 8, 1934, 1.

**130**

Ibid.

**131**

Ibid.

**132**

"Brown Shirts and Communists Battle on Market Square," *WFP*, June 6, 1934, 2.

**133**

Ibid.

**134**

"Nazis Suffer Great Defeat".

**135**

Litvin, "Strengthen the Fight".

**136**

Anti-Fascist League, "In the Fight Against Fascism and Antisemitism".

**137**

"Brown Shirts to Meet on Square, Says Whittaker," *WFP*, June 13, 1934, 4.

**138**

Sadler, "The Fascists in Manitoba".

**139**

"Arrest of Penner and Others Asked by Nationalists," *WFP*, June 9, 1934, 4; "Brown Shirts to Meet on Square".

**140**

See *Canadian Nationalist* 2, no. 5 (undated) and no. 6 (undated). See also J.A. Cherniack, "We Rejoiced Too Soon," *DYV*, November 16, 1934, 4.

**141**

"Supreme Court Prohibits Dissemination of *Nationalist*," *DYV*, October 30, 1934, 1.

**142**

Ibid.

**143**

"W.V. Tobias, Sportsman and Lawyer, Dies," *WFP*, October 17, 1941, 7.

**144**

Ibid.

**145**

Levine, *Coming of Age*, 167.

**146**

"W.V. Tobias, Sportsman and Lawyer, Dies"; "Last Honors Are Paid to Capt. Tobias," *WT*, October 20, 1941, 3.

**147**

"Vandals desecrate Jewish cemetery," *WT*, May 8, 1933, 1.

**148**

JM 1755, JHS 3220, JHCWCA.

**149**

"Supreme Court Prohibits Dissemination of *Nationalist*"; Statement of Claim, *Tobias v. Neufeld*.



**150**

"Supreme Court Prohibits Dissemination of *Nationalist*".

**151**

See generally Reinhold Kramer and Tom Mitchell, *When the State Trembled: How A.J. Andrews and the Citizens' Committee Broke the Winnipeg General Strike* (Toronto: University of Toronto Press, 2010). The firm was previously known as Andrews, Andrews, Burbidge & Bastedo.

**152**

William Verner Tobias lawyer member file, M-94-2-5, File 12. Tobias' articling principal was initially S.L. Goldstine; when Goldstine left the firm Tobias completed his articles under F.S. Andrews.

**153**

Statement of Claim, *Tobias v. Neufeld*.

**154**

"Supreme Court Prohibits Dissemination of *Nationalist*".

**155**

Statement of Claim, *Tobias v. Neufeld*. The first article was entitled "The Murdering Jews. Jewish Ritual Murder"; the second was entitled "The Night of Murder. The Secret of the Jewish Purim Festival is Revealed".

**156**

"Chief Justice Forbids Spread of Nationalism".

**157**

M.J. Finkelstein, letter to H.M. Caiserman, February 15, 1935, CJC0001, ZA 1935-3-29, CJC organizational records, CJA.

**158**

Ibid.

**159**

H. Neufeld, letter to W. Tobias, November 19, 1934, CJC0001, ZA 1934-2-8, CJC organizational records, CJA. Anna Neufeld subsequently wrote a similar apology letter to Tobias on November 30, 1934. See Fraser, "The Blood Libel," 72. One should view these apologies with skepticism, given that Herman Neufeld later printed the *Deutsche Zeitung für Canada*, a Nazi-run and Nazi-financed newspaper in Winnipeg. See Betcherman, *Swastika and Maple Leaf*, 73; Jonathan Wagner, "The Deutsche Zeitung für Canada: A Nazi Newspaper in

Winnipeg", *MHS Transactions* 3, no. 33 (1976-77), [www.mhs.mb.ca/docs/transactions/3/deutschezeitung.shtml](http://www.mhs.mb.ca/docs/transactions/3/deutschezeitung.shtml).

**160**

M.J. Finkelstein letter to H.M. Caiserman, February 15, 1935.

**161**

Ibid.

**162**

Statement of Defence, *Tobias v. Neufeld*, November 22, 1934, ATG 0012, GR0276, Winnipeg civil files, PAM.

**163**

Ibid.

**164**

"Whittaker Wants to Prove Blood Libel," *DYV*, November 22, 1934, 1.

**165**

Transcript of Examination of William Whittaker, *Tobias v. Neufeld*, December 28, 1934, ATG 0012A, GR0276, PAM.

**166**

Ibid.

**167**

Order, *Tobias v. Neufeld*, January 11, 1935, ATG 0012A, GR0276, PAM.

**168**

Affidavit of F.M. Burbidge, *Tobias v. Neufeld*, January 19, 1935, ATG 0012A, GR0276, PAM.

**169**

Order, *Tobias v. Neufeld*, January 31, 1935, ATG 0012A, GR0276, PAM.

**170**

Minutes of Judgment, *Tobias v. Neufeld*, February 13, 1934, ATG 0012A, GR0276, PAM.

**171**

M.J. Finkelstein letter to H.M. Caiserman, February 15, 1935.

**172**

Certificate of Taxing Officer, *Tobias v. Neufeld*, ATG 0012A, GR0276, PAM.

**173**

M.J. Finkelstein letter to H.M. Caiserman, February 15, 1935.

**174**

Ibid.

**175**

Ibid.

**176**

"The Outcome of the Libel Suit," *DYV*, February 19, 1935, 2.

**177**

Ibid.

**178**

Whittaker's low profile following the Tobias lawsuit is further indicated by comments made in media and other sources when he re-emerged. See e.g. "Nationalist Chief Here Strikes At Internationalism," *WFP*, September 25, 1936, 17 (commenting that Whittaker had surfaced "[a]fter months of silent work"); "Warning For Communists," *CZAS (Polish Times)*, October 20, 1936, 3 (reporting that Whittaker had held his first public meeting "in a long time"); Anti-Fascist League, "In the Fight Against Fascism and Antisemitism" (noting in March 1937 that Whittaker had gone quiet for a long time but had recently resurfaced). See also Sadler, "The Fascists in Manitoba" (reporting that the Nationalists continued to hold meetings during this period but had ceased holding them publicly).

**179**

L. Nadler, letter to CJC, April 2, 1935 and H.M. Caiserman, letter to M.J. Finkelstein, April 15, 1935, both contained in CJC0001, ZA 1935-1-10, CJC organizational records, CJA.

**180**

W. Whittaker letter to Shaunavon, Saskatchewan, March 19, 1935.

**181**

W. Whittaker, letter to unnamed individual in Shaunavon, Saskatchewan, March 27, 1935, CJC0001, ZA 1935-1-10, CJC organizational records, CJA.

**182**

W. Whittaker, letter to E.A. MacKenzie, March 28, 1935, CJC0001, ZA 1935-1-10, CJC organizational records, CJA.

**183**

W. Whittaker letter to Shaunavon, Saskatchewan, March 19, 1935.

**184**

Ibid.

**185**

Wall, *Paper Nazis*, 14:00ff.

**186**

Rome, *Clouds in the Thirties*, 98; Gutkin and Gutkin, *Worst of Times, Best of Times*, 26; Anti-Fascist League, "In the Fight Against Fascism and Antisemitism"; S. Cass, letter to H.M. Caiserman, January 14, 1937, CJC0001, ZA 1937-2-23, CJC organizational records, CJA (Rabbi Samuel Cass of Vancouver reported to Caiserman that Cass had "received this morning copies of the October and November issue of the 'Canadian National', scurrilous mimeographed sheet.")

**187**

Note however that the January 1938 edition of the *Canadian Nationalist* and at least one following issue (April-May 1938)—in contrast to previous issues—appear to have been printed, suggesting an influx of funds (or at least access to a printer) perhaps on account of Whittaker's union with Arcand (discussed below). Indeed, the April-May 1938 edition contains an advertisement for Arcand's antisemitic newspaper, *Le Fasciste Canadien*.

**188**

Private collection of Connie Wawruck-Hemmett.

**189**

Trachtenberg, "The Inter-War Years". See also Betcherman, *Swastika and Maple Leaf*, 97 (calling Beamish "a kind of roving ambassador for world fascism"); "Nationalist Chief Here Strikes At Internationalism"; "Warns Communists of City Could Arm 5,000 in 48 Hours," *WFP*, October 10, 1936, 3; "Warning For Communists"; "Says Party Is Not Aligned With Fascists," *WFP*, October 3, 1936, 3. Beamish was a founder of The Britons, a "patriotic" society formed in 1919 for the express purpose of disseminating antisemitic propaganda. According to Sharman Kadish, "The Britons' brand of antisemitism was all-embracing, including religious, economic, political and racial elements." See Sharman Kadish, *Bolsheviks and British Jews: The Anglo-Jewish Community, Britain and the Russian Revolution* (London: Frank Cass, 1992), 38.

**190**

Trachtenberg, "The Inter-War Years"; "Beamish

Address Arouses Protests Among Listeners," *WFP*, October 23, 1936, 6. The *Jewish Post* was upset at this display of vigilantism and scolded the participants, commenting that "[a]ny mob hysteria ... that has been shown is premature and unwarranted. Our wisest course is to have faith in our government and in our leaders. ... One thing we must remember [is] we cannot hope to fight fire with fire." See "Loose Thinking", *Jewish Post*, October 29, 1936, 4.

**191**

Anti-Fascist League, "In the Fight Against Fascism and Antisemitism".

**192**

"To our members and subscribers to the Canadian Nationalist", *Canadian Nationalist* 1, no. 8 (August 1937): 13. See also "Nazi Leader in Winkler Denies Ties with Nazi-Germany," *DYV*, September 21, 1937 (reporting that while "[a] year ago, the party distributed flyers with propaganda ... against Jews in Winkler and the district ... since then, the group, of 25 individuals did not display further activity. Last winter it only carried out a series of enquiry meetings when funding was debated.")

**193**

"Fascism; Blueshirt Groups In Canada United," *WFP*, March 3, 1938, 1; "National Party Is Created By Fascists' Union," *WT*, March 3, 1938. See also Betcherman, *Swastika and Maple Leaf*, 119.

**194**

"What, No Neckties!".

**195**

"The Canadian Nazi Party," *DYV*, July 8, 1938, 3.

**196**

"W. Whittaker Dies, Aged 63"; Robin, *Shades of Right*, 205-6.

**197**

"W. Whittaker Dies, Aged 63"; Wall, *Paper Nazis*, 15:45ff.

**198**

Wall, *Paper Nazis*, 17:17ff.

**199**

See "Awaiting the Count," *WT*, July 30, 1936, 5.

**200**

"Marcus Hyman Dies," *WFP*, December 31, 1938, 1.

**201**

"Final Tributes Paid to Hyman," *WFP*, January 3, 1939, 2.

**202**

G.V. Ferguson, "Marcus Hyman," *WFP*, January 4, 1939.

**203**

"Marcus Hyman," *WT*, December 31, 1938, 17.

**204**

"A Critic's Column," *Gladstone Age Press*, April 20, 1939, 2.

**205**

"W.V. Tobias, Sportsman and Lawyer, Dies".

**206**

"Capt. W.V. Tobias," *WFP*, October 21, 1941, 11. See also "Last Honors Are Paid To Capt. Tobias," *WT*, October 20, 1941, 3; "William Tobias, Leader of Local Jewish Veterans, Dead at Age 49," *DYV*, October 17, 1941, 1.

**207**

*Courchene v. Marlborough Hotel Co.*, (1971) 20 D.L.R. (3d) 109 (Man. Q.B.), aff'd [1972] 1 W.W.R. 149 (Man. C.A.) (dismissing group defamation claim because defamatory statement against Indigenous persons had been withdrawn before initiation of lawsuit, and accordingly there was nothing to enjoin); *Romana v. CBC et al.*, 2017 M.B.Q.B. 163 (denying request for interlocutory injunction because it was not clear whether plaintiff's group defamation claim would succeed at trial). Note that in *Courchene*, the Chief Justice of the Manitoba Queen's Bench opined that the legislation may be unconstitutional as an infringement on the federal government's exclusive jurisdiction to legislate on criminal matters, on account of the phrase "tending to raise unrest or disorder among the people": (1971) 20 D.L.R. (3d) 109 at 115). However, this opinion is non-binding, as it had no bearing on the instant case, and the Court of Appeal declined to express an opinion on the issue: [1972] 1 W.W.R. 149 at 152. The provision has thus never been declared unconstitutional. Similar concerns were expressed in legal memoranda prepared for the CJC in the 1960's: J.J. Robinette, letter to S.M. Harris, May 1, 1964, Fonds 17, Series 5-4-6, File 20, CJC, Ontario Region fonds, OJA; Arthur Maloney, letter to S.M. Harris, May 28, 1964, Fonds 17, Series 5-4-6, File 20, CJC, Ontario Region fonds, OJA. This question of the constitutionality of the legislation is complicated and outside

the scope of this article, but two points are worth mentioning here. First, this concern would disappear if the phrase “tending to raise unrest or disorder among the people” was deleted or read out of the provision. Second, as noted below, in 2002 the Manitoba legislature amended the law to make clear that it should not be interpreted to extend to any conduct prohibited by the *Criminal Code* (and thus coming within federal jurisdiction).

**208**

Regarding the JPRC’s history, see Michael Friesen, “The Joint Public Relations Committee Series at the Ontario Jewish Archives: Some New Questions,” *Canadian Jewish Studies* 28 (2019): 126. Note that formal cooperation between the CJC and B’nai Brith in Manitoba in the field of anti-defamation took place earlier than in the rest of Canada and preceded the JPRC’s creation in 1938. See e.g. S. Frank, letter to H.M. Caiserman, December 8, 1936, CJC0001, ZA 1936-3-39, CJC organizational records, CJA.

**209**

W. Keller, letter to H.M. Caiserman, March 22, 1938, CJC0001, ZA 1938-2-22, CJC organizational records, CJA; H.M. Caiserman, letter to M. Averbach, June 13, 1938, CJC0001, ZA 1938-2-22.

**210**

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

**211**

Melvin Fenson, “Group Defamation: Is the Cure Too Costly?” *Manitoba Law School Journal* 1 (1962-1965): 260. On the JPRC’s decision to abandon the quarantine policy, see e.g. Plaut, *Unfinished Business*, 243; Sydney Harris, “And Now The Facts,” April 9, 1964, Fonds 17, Series 5-4-6, File 14, CJC Ontario Region fonds, OJA.

**212**

As noted above, under the Constitution of Canada, criminal law falls under federal jurisdiction, unlike the law of (civil) defamation which is governed by the common law as supplemented by provincial statutes.

**213**

H. Frank letter to B.G. Kayfetz, March 2, 1964.

**214**

Ibid.

**215**

Ibid.

**216**

Ibid.

**217**

William Kaplan, “Maxwell Cohen and the Report of the Special Committee on Hate Propaganda” in *Law, Policy, and International Justice: Essays in Honour of Maxwell Cohen*, ed. William Kaplan and Donald McRae (Montreal and Kingston: McGill-Queen’s University Press, 1993), 247-48. Regarding Cohen’s background, see Ronald St. John MacDonald, “Maxwell Cohen at Eighty: International Lawyer, Educator, and Judge,” *Canadian Yearbook of International Law* 27 (1989): 3-56.

**218**

Maxwell Cohen et al., *Report of the Special Committee on Hate Propaganda in Canada* (Ottawa: Queen’s Printer, 1966), 64.

**219**

Kaplan, “Maxwell Cohen and the Report of the Special Committee,” 259, 263-4.

**220**

R.S.O. 1990, c. L 12 (version currently in force).

**221**

Tammy Karol, “Ontario may use civil suits to eradicate hate literature,” *Canadian Jewish News*, October 20, 1983, 1. See also Patrick Lawlor, *Group Defamation: Submissions to the Attorney General of Ontario* (Toronto: Ministry of the Attorney General, 1984).

**222**

Manuel Prutschi, “Prelude to Trial – Zundel, the Jewish Community, Government and the Law” (unpublished manuscript), typescript, 54-55; Paul Lungen, “CJC, McMurtry discuss ways to fight hate literature,” *Canadian Jewish News*, August 9, 1984, 21.

**223**

Les Scheininger, interview by the author, February 9, 2021.

**224**

Minutes of the meeting of the Joint Community Relations Committee, Ontario Region, held

on March 1, 1994, CJC0001, DA21-19-15, CJC organizational records, CJA.

### 225

The legislation has been subject to minor amendments. In 1946, a subsection was added to prevent more than one action in respect of the same libel (S.M. 1946, c. 11, s. 20) and in 2002 the law was amended to add sexual orientation as a prohibited ground of discrimination and to clarify that the terms “religious creed” and “sexual orientation” should not be interpreted to extend to any conduct prohibited by the *Criminal Code* (S.M. 2002, c. 24, s. 17).

### 226

*Paper Nazis*, 13:38ff (interviewing Levine). See also Levine, *Coming of Age*, 258.

### 227

Gutkin and Gutkin, *Worst of Times, Best of Times*, 26.

### 228

Ira Robinson, *A History of Antisemitism in Canada* (Waterloo, Ont.: Wilfred Laurier University Press, 2015), 100. For similar assessments of the Hyman Act, see Betcherman, *Swastika and Maple Leaf*, 127; Rome, *Clouds in the Thirties*, 97; Rosenberg, *Canada's Jews*, 303.

### 229

“On the Road to Nationalism,” *Canadian Nationalist* 2, no. 1 (January 1938): 5.

### 230

Two further points bear mention. First, the Market Square battle also played a role in weakening Whittaker; however, it is notable that Whittaker continued to hold rallies and publish the *Canadian Nationalist* even after Market Square but did not do so in the aftermath of the Tobias suit. Second, the Canadian Nationalists were not the only fascist group operating in Manitoba at this time. But other fascist organizations failed to gain traction, leaving “Winnipeg’s native Fascist field – such as it was ... mainly to Whittaker.” Robin, *Shades of Right*, 204-05. Nor did Nazi-directed propaganda through the *Deutscher Bund Canada* gain a significant following. See Jonathan Wagner, “The Deutscher Bund Canada,” *Canadian Historical Review* 58, no. 2 (June 1977): 189, 199; Sadler, “The Fascists in Manitoba”.

### 231

Jeremy Waldron, *The Harm in Hate Speech* (Cambridge, Mass.: Harvard University Press,

2012), 4-5 (identifying undermining of public good of inclusiveness and group dignity of minority groups as primary harms of hate speech).

### 232

*Canadian Jewish Chronicle*, April 20, 1934, qtd. in Rome, *Clouds in the Thirties*, 93.

### 233

Confidential memorandum of A.A. Heaps, September 17, 1937, CJC0001, CJC ZA-2-23A, CJC organizational records, CJA.

### 234

Mark Vishniak, *An International Convention Against Antisemitism* (New York: Research Institute of the Jewish Labor Committee, 1946), 68 (attaching “great significance” to the Hyman Act); David Riesman, “Democracy and Defamation: Control of Group Libel,” *Columbia Law Review* 42, no. 5 (May 1942): 773-779 (deeming the Manitoba legislation the optimal legal means for combating group libel).

### 235

See Craig S. MacMillan, Myron G. Claridge, and Rick McKenna, “Criminal Proceedings as a Response to Hate: The British Columbia Experience,” *Criminal Law Quarterly* 45, no. 4 (October 2002): 446; Kaplan, “Maxwell Cohen and the Report of the Special Committee,” 267. The hate-speech provisions are contained in s. 318(1), s. 319(1), and s. 319(2) of the *Criminal Code* (in addition, s. 320 and s. 320.1 authorize *in rem* proceedings against hate propaganda). According to Statistics Canada’s Integrated Criminal Court Survey, between the 2009/2010 and 2017/2018 fiscal years there were 53 completed cases in adult and youth court where the most serious charge was classified as a hate-crime offence. Of these 53 cases, 23 ended in a finding of guilt (43%). To give a sense of proportion, during the same period approximately 3.74 million total cases reached a decision in adult and youth court. Thus, the percentage of hate-crime cases out of all completed cases was approximately 0.0014%. The rate of conviction for hate-crime offences was even smaller—approximately 0.0001% of all findings of guilt—reflecting the fact that findings of guilt in hate-crime cases are less frequent than the average rate across all offences. See Greg Moreau, “Police-reported hate crime in Canada, 2018,” *Statistics Canada*, February 26, 2020, <https://www150.statcan.gc.ca/n1/pub/85-002-x/2020001/article/00003-eng.htm>; “Adult criminal courts,

number of cases and charges by type of decision," *Statistics Canada*, last modified July 15, 2021, <https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3510002701>; "Youth courts, number of cases and charges by type of decision," last modified July 15, 2021, <https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3510003801>.

**236**

H.R.S. Ryan, "Annotation to *R v. Zundel*," 1992 CarswellOnt 109; Riesman, *Democracy and Defamation*, 755-56, 777.

**237**

Richard Moon, "Drawing Lines in a Culture of Prejudice: *R. v. Keegstra* and the Restriction of Hate Propaganda," *University of British Columbia Law Review* 26, no. 1 (1992): 139.

**238**

Ibid.

**239**

See also Owen Fiss, *The Law as it could be* (New York: NYU Press, 2013), 135ff (noting that in the 1960s United States "[i]t was the injunction, not the criminal law, which became the primary tool for the extension and vindication of human rights").

**240**

A good example is John Ross Taylor, who was successfully prosecuted after violating an order from the Canadian Human Rights Tribunal that he take down his antisemitic telephone message service: *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892.

**241**

*Alberta Human Rights Act*, R.S.A. 2002, c. A-25.5, s. 3; *The Saskatchewan Human Rights Code, 2018*, S.S. 2018, c. S-24.2, s. 14; *Human Rights Code*, R.S.B.C. 1996, c. 210, s. 7. The Northwest Territories also has a similar provision: *Consolidation of Human Rights Act*, R.S.N.W.T., 2002, c. 18, s. 13. In 2013, the federal Conservative government repealed s. 13 of the *Canadian Human Rights Act*, which had prohibited the dissemination of hate speech telephonically and over the internet. In June 2021, the Liberals introduced a bill to bring back this provision in a slightly modified form. See Bill C-36, *An Act to amend the Criminal Code and the Canadian Human Rights Act and to make related amendments to another Act (hate propaganda, hate crimes and hate speech)*, 2<sup>nd</sup> Sess., 43<sup>rd</sup> Parl., 2021. However,

Parliament was subsequently dissolved and, as of this writing, the legislation has not been reintroduced following the September 2021 election.

**242**

Richard Moon, "Report to the Canadian Human Rights Commission Concerning Section 13 of the Canadian Human Rights Act and the Regulation of Hate Speech on the Internet" (October 2008), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1865282](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1865282). See also Berger, "Using Statutory Measures," 458-60.

**243**

Ibid.