

lin's observations with regard to the shifting of the onus, as mentioned in section 267B(3). I have in front of me the sections of the Criminal Code on defamatory libel and I notice that the onus is on the Crown to prove that a statement is made knowing it to be false. I was wondering why, under these circumstances, it would be felt necessary to shift the onus on to the accused to make his defence under that section.

Mr. Scollin: Could I refer, first of all, to page 66 of the Cohen Report and tell you what their observations were. In the subparagraph on that page, they observed, in particular:

For there can be little truth in abuse as such. We are strengthened in this opinion by the example of the Post Office Boards of Review (and they are referring to the National States Rights Party) which entertained the defence of truth raised at their hearings and had no difficulty in finding that the claim to truth was entirely spurious. Indeed the first Board wrote of the statements there in question that "their abusive quality is heightened by the knowledge that they are, in the face of obvious facts and repeated demonstrations of their falsity, represented as the 'truth.'" or these reasons also and so as not to severely encumber the prosecution with the necessity of adducing evidence against palpable falsehoods, we have decided to recommend that the burden of proving the truth of abusive statements should be placed upon the persons charged rather than resting upon the prosecution to disprove. For the accused was first an accuser and his accusations must be for him to prove.

To take, for example, the case of Dachau, the net result in practice would be, if the allegation made is that Dachau never happened, that this is a Jewish conspiracy to misrepresent the truth of history, of twenty-five years ago, and if part of the Crown's case then, part of the case of the Crown prosecutor in, say, Hamilton or Winnipeg or Vancouver, would be to prove, to have to prove, to undertake the burden of proving that what happened in Dachau did in fact happen—would this mean calling the survivors of Dachau, calling German guards, doing, redoing, the Nuremberg trials? This in fact is a practical matter. Look what it would mean if the burden of proof in this case were not put upon the accuser in the same way as an accusation against an individual, in a case under

section 261, where the accused has got to prove that the publication of the matter and the manner in which it was published was for the public benefit at the time it was published, and that the matter itself was true—where, on the face of the material, there is apparent abuse and excess. For the type of reason given in the Cohen Report, the object of the legislation is to say that, where you make allegations of this nature, it will be up to you to prove—rather than for the Crown to disprove, to undertake this enormous burden of, as I say, in this particular example, again redoing and reproving before a Canadian jury the findings of Nuremberg.

Senator Laird: The Crown has a lot more resources than the private individual to do things like that.

Mr. Scollin: Taking again this particular example, which is perhaps as useful as any, the individual, before alleging the untruth, the non existence of the facts of Dachau, has a mass of written material from reputable sources which if he has got goodwill, he can analyze, look at, to decide before he controverts what has apparently been established again and again. He has the mass of material available on which to make up his mind before making public statements.

There has to be largely a practical approach to this, that, if the legislation is going to function at all in the case of serious and, on the face of it, patent abuse, patent controverting of truth, it must be placed on the person who is the accuser rather than require the Crown to disprove it by witnesses. There are no shortcuts. The Crown cannot prove it by documents or by a transcript of the Nuremberg trials. It must be proved by trial. There must be witnesses. This is the reason for the reversal of onus.

Senator Lang: In crimes, generally, the Crown has a severe onus. This becomes a crime, if this bill becomes law. I really cannot see why this sort of crime should be any different from any other crime, if it is warranted being called a crime at all. The onus on the Crown is present in all capital charges right through to the least charge. Why should this case, which I would consider somewhat lesser than murder or rape or anything of that nature, carry with it a heavier burden on the accused than is normal in other crimes.

I am getting at this point: your example of Nuremberg is, I think, rather extreme. I can conceive of other statements where the ele-