No. 21811

SUPREME COURT OF CANADA

(On Appeal from the Ontario Court of Appeal)

BETWEEN:

ERNST ZUNDEL

Appellant

AND:

HER MAJESTY THE QUEEN

Respondent

APPELLANT'S FACTUM

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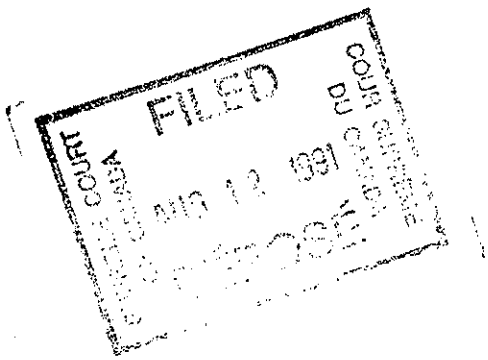

Table of Contents

Part I

The Facts

1. This is an appeal by the appellant Ernst Zundel from the decision of the Ontario Court of Appeal, dated February 5th, 1990, to uphold the conviction of the appellant by a jury presided over by Thomas J. of the District Court of Ontario, handed down on May 11th, 1988, for spreading false news. Leave to appeal to this honourable Court on the issue of the constitutionality of s. 181 was granted on November 15th, 1990.

R. v. Zundel (No. 2) (1990) 53 C.C.C. (3d) 161 (Ont. C.A.)

2. In his first trial, the appellant was convicted of the same charge on February 28th, 1985, and that conviction was set aside by the Ontario Court of Appeal on January 23rd, 1987.

R. v. Zundel (No. 1) (1987) 31 C.C.C. (3d) 97 (Ont. C.A.)

3. In the first trial, the first appeal to the Ontario Court of Appeal and the second appeal to the Ontario Court of Appeal, the argument was made that section 181 (then section 177) was invalid, inoperative and of no force or effect by virtue of section 2(b) of the *Charter of Rights and Freedoms*, and that the section, being vague and overbroad was not justified under section 1 of the *Charter of Rights and Freedoms*.

4. Section 181 [formerly s. 177] of the *Criminal Code* states:

> **Spreading False News** 181. [177] Every one who wilfully publishes a statement, tale or news that he knows is false and that causes or is likely to cause injury or mischief to a public interest is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

5. In the indictment, the Crown added the words "in racial and social tolerance" after the words "to **the** public interest."

6. The words of the section appear to allow, in fact invite, the addition of **any** public interest at the whim of the Crown, whether racial, social, religious, political, economic or otherwise, as is manifest in the indictment, in which the Crown alleged that the Appellant

> did in 1981 wilfully publish a false statement, tale or news that he knows is false and that caused or is likely to cause mischief **to the public interest in racial and social tolerance** contrary to section 177 of the Criminal Code.

The Indictment, Case on Appeal, page 1

7. The charge arose over a 32-page booklet entitled *Did Six Million Really Die?* which was initially published by other parties in the United States and England. The Appellant allegedly acquired the Canadian rights to the booklet and reprinted it for distribution in Canada. The publication was not written by the Appellant, but merely reprinted and distributed by him, except for a brief introduction and postscript written by the Appellant and signed by him with his name and address included.

Did Six Million Really Die?, Case on Appeal, pages 125-156

8. The booklet is in the nature of a review of earlier publications concerning the German policy toward the Jews before and during World War II. It therefore is best characterized as a statement of opinion based on and drawn from other, earlier writers' statements of opinion and fact. In particular, the conclusion of the booklet relies on the observations and statements of fact and opinion of the French historian, Professor Paul Rassinier.

Did Six Million Really Die?, Case on Appeal, pages 152-154

9. In the first trial, the Crown called some direct eye-witness testimony but in the second trial, chose not to do so, relying on judicial notice and the opinion of historians. The direct evidence of the alleged true facts was never called. The principles of **R. v. Abbey**, a decision of this court, were found by the Court of Appeal to have no

Part III

The Argument

of the *Criminal Code* **contravene s. 2(b) of the** *Canadian Charter of*

edoms?

Canadian Charter

: and liberal interpretation should be given to s. 2(b) of the *Charter.*

ıadian Charter of

Ford v. Quebec (A.G.) [1988] 2 S.C.R. 712 at 764-66 (S.C.C.)

Retail WDSU v. Dolphin Delivery Ltd. [1986] 2 S.C.R. 573 S.C.C.)

:e of the rights and
a reasonable
ee and

lom of expression was entrenched in the Constitution...to ensure
eryone can manifest their thoughts, opinions, beliefs, indeed all
sion of the heart and mind, however unpopular, distasteful or
ry to the mainstream. If the activity conveys or attempts to convey
ning, it has expressive content and *prima facie* falls within the scope
guarantee [of s. 2(b)]."

Irwin Toy Ltd. v. Quebec (A.G.) [1989] 1 S.C.R. 927 at 968-69 (S.C.C.)

Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.) [1990] 1 S.C.R. 1123 at 1180 (S.C.C.)

ever pernicious an idea may seem, we depend for its correction not
conscience of judges and juries but on the competition of other
"

Ollman v. Evans (1984) 750 V. (2d) 976 at 1016

Whitney v. Calif. 274 U.S. 357 at 376-77

18. Section 181 appears on its surface to be narrowly drawn so as to prohibit only knowingly false statements, tales or news (hence not constitutionally protected speech) but actually this begs the question since the determination of truth or falsity of a statement requires analysis of the content of the statement and therefore applies prohibition on the basis of content which offends against the fundamental freedom of expression which should only be limited under the strictest of circumstances. If the *Charter of Rights* had enshrined "freedom of truthful expression" in its hallowed phrases, everyone would have raised the question, "Who says, truthful?" The answer being, "The state says!" Freedom of expression would then be seen for what it was, a revocable license from the authorities. The freedom should not be reduced by interpretation to the status of a revocable license from the state.

19. Section 2(b) would only escape application if it had specifically been worded "freedom of truthful expression, belief, etc." which it does not, for obvious reasons, i.e. such a limitation would beg the question of what is truth.

20. The purpose of s. 181 is *prima facie* overtly to restrict freedom of expression. The guarantee of freedom of expression "will necessarily be infringed by government action having such a purpose." The test for constitutionality therefore shifts from s. 2(b), and the onus automatically shifts to the Crown to prove that s. 181 is a reasonable and justifiable limitation in a free and democratic society under s. 1. Clearly s. 181 is not a reasonable or justifiable limitation (see "C" below).

> **R. v. Keegstra** (1990) S.C.C. 21118 (unpublished) per Dickson C.J.C. at 22-23, 27-28.

21. Regarding s. 2(b) of the Charter, McLachlin J. stated in **Keegstra**:

> "Attempts to confine the guarantee of free expression only to content which is judged to possess redeeming value or to accord with the accepted values strike at the very essence of the value of the freedom, reducing the realm of protected discussion to that which is comfortable and compatible with current conceptions. If the guarantee of free expres-

sion is to be meaningful, it must protect expression which challenges even the very basic conceptions of our society. A true commitment to freedom of expression demands nothing less."

To challenge the basic conceptions of our society is achieved **only** by challenging what society says is true. The Court unanimously found that s. 319(2) violated s. 2(b).

Keegstra, supra, per McLachlin J. at 59

Braun, S., "Social and Racial Tolerance and Freedom of Expression" 11 Dal. L.J. 471 at 474-75, 479.

22. The publication in question, *Did Six Million Really Die?*, challenges the very basic conceptions of our society about "the holocaust" when it says on its cover, "The Truth at Last Exposed."

B: Does s. 181 of the *Criminal Code* contravene s. 7 of the *Canadian Charter of Rights and Freedoms*?

23. It was originally argued in the first Zundel appeal before the Ontario Court of Appeal (1) that the section was vague and over-broad as it does not define a public interest, nor does it define truth or falsity, and (2) it does not give the accused any reasonable certainty as to the form of the prohibited speech because opinion which is legal is indistinguishable in an historical thesis from statements of fact, based as it must inevitably be, on hearsay.

24. Section 181 is so vaguely worded that it can be used on any pretext to prosecute and persecute anyone in the publishing industry who dares to publish anything controversial, and in particular anything that does not have the stamp of officially-defined "truth." Since this is an indictable offence punishable by two years in prison, there is a substantial risk to liberty and security of the person.

Law Reform Commission of Canada, Hate Propaganda (Working Paper No. 50), at 29

25. A law that has the potential to convict a person who has not intended anything wrong offends the principles of fundamental justice and, if imprisonment is available as a penalty, violates a person's right to liberty under s. 7.

Reference re Section 94(2) of the M.V.A. (1985) 18 C.R.R. 30 at 55-57

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26. Section 181 is contrary to section 7 of the Charter because it does not require that there be proven any effect on a public interest, such as racial and social tolerance, only that such effect is "likely." All the more so because **it does not require any intent to cause such effect** and this is a crime which could result in prison. This is clear from the recharge to the jury in the second Zundel trial where the jury asked to be told how the effect need be proven and the judge directed them as he did.

Re-charge to jury, **Zundel** trial (No. 2), Case on Appeal, page 114

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27. The precursor to s. 181 was originally designed to muzzle the public and protect the interest of the King and powerful landowners in a feudal system. Section 181 is now outdated and outmoded, replaced by more precise legislation (ss. 59, 180, and 319). Use of outmoded legislation to muzzle the free expression of ideas on pain of a jail term is contrary to the principles of fundamental justice and s. 7.

30

Keegstra, supra, per Dickson CJC at 12-13.

Law Reform Commission, supra, at 12, 29

28. The case at bar demonstrates that section 181 does not require any proven actual effect, any intent to cause the effect, any actual distribution, any recipient of the publication or any emergency where falsehoods could not be answered by truth or invalid opinions could not be refuted (such as a war) or other incapacity to engage in rational discourse. Such a law in fundamentally unsound.

40

29. Mr. Justice Holmes wrote in the dissent in **Abrams**:

> Now nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man without more would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so.
>
> **Abrams et al v. The United States** 250 U.S. 616

This was in wartime, for a pamphlet which urged strikes in munitions factories because of America's intervention in the Bolshevik revolution, albeit it was designed to stop the intervention, not the war on Germany.

30. In **Pierce et al v. United States**, Mr. Justice Pitney was dealing with a publication during wartime which attributed motives to the U.S. declaration of war.

> Four Albany socialists had been convicted for having circulated a pamphlet, entitled *The Price We Pay*, in the summer of 1917. Written by Irwin St. John Tucker, an Episcopal clergyman, the pamphlet condemned conscription, and asserted that despite the rhetoric about democratic war aims "this war began over commerical routes and ports and rights" and was being fought to "determine the question, whether the chambers of commerce of the allied nations or of the Central Empires have the superior right to exploit underdeveloped countries." The indictment charged, in part, that these were "false" statements. To Justice Pitney the charge seemed eminently well founded, for, he thought, "there was lawful evidence of the falsity of the statements."
>
> What kind of evidence? "**Common knowledge** (not to mention the President's Address to congress of April 2, 1917, and the Joint Resolution of April 6 declaring war, which were introduced in evidence) would have sufficed to show at least that the statements as to the causes that led to the entry of the United States into the war against Germany were grossly false; and **such common knowledge went to prove also that defendants knew they were untrue.**" Through this feat of judicial legerdemain, First Amendment safeguards vanished if speakers disagreed with official policy or with whatever Pitney considered "common knowledge." [emphasis added]
>
> **Pierce et al v. United States** 252 U.S. 239

Richard Pollenberg, *Fighting Faiths, The Abrams Case, The Supreme Court, and Free Speech*. (Viking, New York, 1987) at 203-204.

31. The ironic similarity to the judicial notice and common knowledge of historians evidence in **Zundel** could not be more striking, combined as it was with wartime Allied declarations like the Moscow Declaration and others referred to in the Crown's evidence to prove the holocaust, as defined by the Crown's theory, happened.

32. The dissent of Holmes in the **Abrams** case is the best answer to such findings of falsity:

> But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out...I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country...Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, "Congress shall make no law abridging the freedom of speech."

Abrams et al v. The United States, supra

Richard Pollenberg, *Fighting Faiths, The Abrams Case, The Supreme Court, and Free Speech*. (Viking, New York, 1987) at 240.

33. Section 181 also is contrary to fundamental justice because it introduces to the criminal law the issue of truth in history, which is an area which ought to be viewed as a matter of opinion beyond the scope of judicial intervention. To do otherwise is to intimidate historians and to bring the criminal law to bear upon "politically incor-

rect" thinkers. It really begs the question of Pontius Pilate, "What is truth?", especially historical truth.

Keegstra, supra, per. McLachlin J. at 83

Ollman v. Evans, supra, at 1016

34. There is a very real danger demonstrated by this case that unpopular opinions will be disliked by juries and judges and will therefore be categorized as statements of fact for the purpose of this section because there are no objective guidelines to distinguish between the two. This is so because according to the law and method of analysis in the United States which is expressed in **Ollman v. Evans**, this booklet, *Did Six Million Really Die?*, would have been classified as opinion as a matter of law and the jury would never have the opportunity to exercise their dislike.

35. Before an accused can be convicted of an offence, the trier of fact must be satisfied beyond a reasonable doubt of the existence of all the essential elements of the offence.

R. v. Vaillancourt (1987)32 C.R.R. 18 at 30-33

36. One of the elements of the offence to be proved beyond a reasonable doubt is that the publisher must have published a statement, tale, or news "that he knows is false." This process, especially when coupled with a process of judicial notice which declares that the underlying thesis of the mainstream opinion is "true", removes from the accused the right to be presumed innocent, and removes from effective consideration by the jury an essential element of the offence, in contravention of fundamental justice as established in **Vaillancourt**.

Vaillancourt, supra, at 32-33

Keegstra, supra, per McLachlin J. at 61.

Zundel (No. 1), supra

37. The Ontario Court of Appeal held in **Zundel (No. 1)** that the section only refers to statements of fact, not opinion. Interpretation of the events of history half a century old, with concomitant reliance on secondary sources from many countries in several languages, is necessarily a question of opinion, but the distinction between fact and opinion was never clarified. Legislation that is vague enough to allow prosecution for opinion is contrary to the principles of fundamental justice and offends section 7 of the *Charter*. This case was supported only by opinion evidence as to the falsity of the publication and nothing else. Does this not demonstrate that we are therefore dealing with a conflict of **opinion**?

Ollman v. Evans, supra, at 977-84, 1021-28

Keegstra, supra, per McLachlin J. at 87

R. v. Zundel (No. 1), supra, at 123, 126-28, 131-32, 158-59

38. The distinction between fact and opinion is one so difficult as to be regarded in the United States as a matter of law, although the Ontario Court of Appeal regarded the distinction as a matter of fact for the jury to decide. If the distinction is so obscure, the section must offend section 7.

Ollman v. Evans, supra, at 977-84, 1021-28

Zundel (No. 1), supra at 158-9

Zundel (No. 2), supra at 194

Braun, supra, at 476-77

39. The significance of **Ollman v. Evans** lies in the fact that in the United States, a free and democratic society with a long history, the civil tort of defamation is subject to constitutional First Amendment protection. If the statement is opinion, it cannot go to the jury. If the statement is one of fact, the judge lets the jury decide the rest of the issues. By this means, the law by judge's reasons creates knowable rules of inter-

pretation for the distinctions between fact and opinion which adds certainty and overcomes vagueness. No such clarification is provided by section 181 and hence its vagueness is evident.

40. If the judge-made rules of interpretation from **Ollman v. Evans** were applied to the facts of this case, it probably would not go to the jury. The booklet in question would be considered opinion. But the Court of Appeal of Ontario held that the distinction between fact and opinion was for the jury. (See **Zundel (No. 2)**, supra) That judgement was affirmed by this court in the denial of leave to appeal on that ground. This creates the effect of a law which gives no clear guidelines of what is opinion as opposed to fact, hence of the boundaries of circumscribed conduct. This renders the law vague in a way that should not be tolerated as proportional to the risk engendered by possibly untruthful statements in a free society where there is no immediate danger, but ample opportunity for discussion and debate upon the truth or otherwise, of the thesis. After all, the statements may be opinions.

41. The essence of a free and democratic society should be the trust placed in ordinary people to decipher truth or falsity for themselves. Where is there any reason to believe twelve jurors in court , under constraining rules of evidence with the wealth of the state on the one side, could find the truth in history, when society as a whole could not be trusted to do so. If society can be so trusted, why do we need section 181 to protect us?

42. In the case at bar, s. 181 has been used by the Crown to achieve the same ends as s. 319, thereby avoiding the statutory defences and protections of s. 319 in contravention of the principles of fundamental justice.

> "Using [s. 181] for this purpose is inappropriate for two reasons. First denials of the Holocaust should be dealt with for what they are — a form of hate propaganda. Second, on principle, if Parliament intends that promoting hatred be dealt with in a certain way and creates safeguards such as the requirement of the Attorney General's consent to avoid an

abusive application of the criminal law, a private prosecutor should not be able to avoid these safeguards by offence shopping elsewhere."

Law Reform Commission, supra, at 30.

The Law Reform Commission ignores nthe other safeguards of Section 319(2), i.e. truth, religious views, public benefit and the removal of hatred of another group.

43. Section 181 is contrary to fundamental justice because it enables self-interest groups to seek judicial notice or judicial imposition of an officially-sanctioned view of matters of history, a power which should not be within the purview of the courts in a free and democratic society in which academic freedom is valued.

Keegstra, supra, per McLachlin J. at 60-62

Braun, supra, at 475, 478-82

Whitney, supra, at 377

C: If s. 181 of the *Criminal Code* does contravene the guarantee of the rights and freedoms set out in s. 2(b) or s. 7 of the *Charter*, does s. 181 constitute a reasonable limit to those rights and freedoms that is demonstrably justified in a free and democratic society, pursuant to s. 1 of the *Charter*?

44. Section 1 of the *Charter* states:

> 1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

45. Before it can be determined that a limit on a right or freedom is demonstrably justified in a free and democratic society, it must first be established that the impugned legislation "has an objective of pressing and substantial concern in a free and

democratic society. Only such an objective is of sufficient stature to warrant overriding a constitutionally protected right or freedom."

Keegstra, supra, per Dickson, C.J. at 28

R. v. Oakes [1986] 1 S.C.R. 103 at 138 (S.C.C.)

46. Unlike s. 319(2), s. 181 has no such identifiable objective of "pressing and substantial concern." The law has been used only four times in the past century.

Law Reform Commission, supra, at 13

R. v. Kirby (1970) 1 C.C.C. (2d) 286, 13 Crim. L.Q. 128 (Que. C.A.)

R. v. Carrier (1951) 104 C.C.C. 75 (Que. K.B.)

R. v. Hoaglin (1907) 12 C.C.C. 226 (Alta.)

47. The necessity to prohibit the communication of false views could only be a pressing or substantial concern if there were no opportunity to combat error or fallacious views with truth, which is not the case in a free and democratic society. Furthermore, if it is the duty of government or the courts to decide absolute "truth" in history, then censorship is justified and a valid method because it will eliminate the possibility of error. The individual however, will need no judgment or capacity to discern truth from falsehood in society. They need only be indoctrinated in the official truth. Is this what is meant by "democratic society"?

48. The **Hoaglin** case and the **Zundel** case demonstrate how this section can be abused for political purposes to attack not only statements of fact but opinions about governments or history which because they are unpopular, triers chose to regard as facts. Hoaglin's view was that the government of Canada wasn't interested in American settlers because of the treatment he received. The Canadian government disagreed with his opinion and he went to jail. Such would offend most civil libertarians today, although putting Zundel in jail they might accept.

49. Sometimes it is alleged the existence of Nazi Germany is the reason for believing that one cannot trust the people in any society. This argument ignores the fact that the Weimar Republic had laws similar to section 181, and they were extensively used with no apparent effect if National Socialism is false, because it came to power anyway. The belief in state-sanctioned laws against false speech however is more dangerous because these laws will be equally effective against unpopular truth and totally ineffective against popular lies. They are merely an instrument of thought-control which can be unscrupulously avoided.

50.

> "The offence of spreading false news was moved from the Part dealing with Sedition to the Part dealing with Nuisance in the 1955 revision, reflecting, no doubt, a less serious view of the gravity of such an offence." The objective of the legislation is therefore not "pressing and substantial."
>
> Mewett and Manning, Criminal Law, 2nd Edition, (Toronto: Butterworths, 1985) at 510n.

The offence *De Scandalus Magnatum* was abolished in England where it originated in the 1890's, but not before it was incorporated into the Canadian *Criminal Code*.

51. This Court has found that "Section 181 does not on its face address the problem of "hate literature"." Precise legislation has been passed by Parliament to cope with related matters (ss. 59, 180, 319). Given the existence of valid legislation specifically tailored to cope with such material, the objective of the more general provision of s. 181 cannot be said to be "pressing and substantial".

Keegstra, supra, per Dickson C.J.C. at 13, 105.

Law Reform Commission, supra, at 29-30.

52. Even if the objective of s. 181 were to be pressing and substantial, the Section does not meet the proportionality test in **Oakes**, which requires the Court to decide whether the law 1) is rationally connected to the objective, 2) minimally impairs *Charter* rights, and 3) does not produce effect so severe as to make impairment unjustifiable.

Oakes, supra, at 337

Keegstra, supra, per Dickson C.J.C. at 69 and per McLachlin J. at 65.

53. The first step to determine proportionality in **Oakes** is that "the measures adopted must be **carefully designed** to achieve the objective in question. They must **not** be **arbitrary, unfair or based on irrational considerations.** In short, they must be rationally connected to the objective. "

Oakes, supra, at 337

Carefully designed, not arbitrary, unfair or based on irrational considerations, and rationally connected to their objective

54. The measures adopted in s. 181 are not carefully designed to achieve any specific objective, but rather have evolved from *De Scandalis Magnatum*, abolished in England in 1887, the aim of which "was to prevent false statements which, in a society dominated by extremely powerful landowners, could threaten the security of the state."

Keegstra, supra, per Dickson C.J.C. at 12-13 and per McLachlin J. at 25.

F.R. Scott. "Publishing False News" (1952) 30 Can. Bar Rev. 37 at 39.

Law Reform Commission, supra, at 12, 29

55. There are no powerful landowners in Canada likely to take up arms against the government for any false rumours. All the more irrational is the suggestion that majority opinion would be unable to rebut the opinions expressed in an obscure pamphlet, if they are false to the extent necessary to be subject to judicial notice. By definition, judicial notice only exists when it is irrefutable by rational people. Are Canadians considered rational by these courts?

56. Falsity of a statement is not rationally connected by prosecution to the objective of truth in society because courts are not suited to resolving historical controversy due to evidentiary problems and inherent bias in every individual which only prolonged consideration can alter. Trials do not give opportunity either for prolonged consideration or extensive debate and discourse of an intellectual nature; courts are not debating societies.

57. The provisions of s. 181 are too vague and ambiguous to be characterized as carefully designed. Key elements are undefined, and cast too broad a net, including, potentially, works of fiction based on fact, "historical novels", most interpretative reporting, and any academic writing that enters new fields of enquiry on matters of public interest. Furthermore, "news" is by definition a recent, "new" occurrence which in the case at bar is used glaringly out of context to refer to events that happened 50 years ago. In short, the section invites arbitrary application and arbitrary judgments.

Law Reform Commission, supra, at 29-30

58. The idea of prohibiting false news was the objective of the Alberta government in the **Alberta Press** case.

Reference Re Alberta Statutes [1938] S.C.R. 100

59. Section 181 is vague because although it has been limited in its application by the Ontario Court of Appeal to statements of fact, it is not clear in law or in fact what is

a statement of fact as opposed to a statement of opinion. These measures then cannot be said to be carefully designed. They are quite capable of arbitrary application by prosecutors who if they feel like it can say it is merely an opinion, leave him alone. If not, they say it is a statement of fact and he must be prosecuted. This occurred in the case at bar. Zundel expressed the same views in a radio interview and the prosecutor went on record saying they were opinions.

Ollman v. Evans, supra, at 974-85

60. Actually,

> No area of modern libel law can be murkier than the cavernous depths of this [fact-opinion] inquiry.
>
> Sanford, *Libel and Privacy: The Prevention and Defense of Litigation* (1985). p. 107

61. The jury in the case at bar was left with the direction:

> Although there are individual items or passages in the pamphlet which considered separately might be characterized as opinions, I direct you that it is open to you to find that the pamphlet, considered as a whole, asserted as a fact that Jews were not exterminated as a result of government policy during the Nazi regime, that the Holocaust did not occur, and it is an invention or a hoax to enable Israel and Jews to collect huge reparation payments from Germany.

62. This demonstrates the confusing nature of any fact/opinion dichotomy. The court in **Ollman v. Evans** correctly stated:

> Lacking a clear method of verification with which to evaluage a statement...the trier of fact may improperly tend to render a decision based upon approval or disapproval of the contents of the statement, its author, or its subject.
>
> **Ollman v. Evans**, supra, at 981

63. The Court of Appeal in **Zundel (No. 2)** at 194 left the distinction between statement of fact and statement of opinion for the jury to decide as a matter of fact, thus circumventing the clear need to set down clear guidelines for the discernment between statements of fact and opinion. It is respectfully submitted (as it was argued before the Court of Appeal) that the distinction between fact and opinion should be a matter of law for the judge to determine at the outset of the case, as is done in the United States. Thus and only thus can publishers know with certainty where the prohibited line is drawn. If the line is that difficult to draw, and no certainty possible, it is manifestly unfair to impose criminal sanctions for crossing that line. American laws do not criminalize merely false statements with likely effects. In Canada this law has allowed the jury to decide in its opinion if it's a statement of fact or opinion. How do they do this?

Ollman v. Evans, supra at 978

64. If the courts have great difficulty distinguishing between fact and opinion, the average person, whether juror or aspiring publisher, will have even greater difficulty. A statute that attaches criminal sanctions against the performance of an act the illegality of which is indiscernible to the average person (e.g. knowingly publishing a false statement of *fact* as opposed to *opinion*) is *prima facie* too vague to be definable, desirable, or demonstrably justified in a free and democratic society. With increased activity in desktop publishing, the problem of criminal liability for publishing someone else's ideas and opinions based on facts could become epidemic.

65. If the rational objective of the law is a society which is truthful, there is no demonstrated rational connection to prosecuting those facts or opinions regarded as false. This can only result in an official history.

66. Section 181 begs the question as to what is a statement of fact. This is so especially where the study of history in its various forms is usually regarded as a matter of opinion. It is common to present an opinion, theory or thesis of science or history as

if it were fact. (Cases in point: the theory or evolution or the theory of creation.) Is publication of all such opinions, theories or theses to be regarded as criminal acts, or only those unpopular enough to offend juries? Two historians, Dr. Christopher Browning for the Crown, and David Irving for the defence, testifying at the second Zundel trial confirmed what E.J. Carr maintains in the classic standard textbook *What is History?*, that history is essentially opinion.

E.J. Carr, *What is History?* pp. 1-23

Thomas Khun, *The Structure of Scientific Revolutions* (Chicago: University of Chicago Press) 1-9.

Proportionality

67. Section 181 is too vague and broad, since it "lacks a definition proportionate to its aim which would give those governed by it and those who administer it a reasonable opportunity to know what is covered by it, and to act accordingly."

Re Information Retailers Association of Metro Toronto Inc. and Metro Toronto, [1985] 52 O.R. (2d) 449 at 472, per Robins J.A. (Ont. C.A.)

68. With respect to the vagueness of s. 181, Mewett and Manning write in Criminal Law (2nd Ed.):

> What exactly an injury or mischief to the public interest is, has yet to be determined. If, indeed, the offence is related to sedition then some such harm would seem to be contemplated as for that offence.... If, on the other hand, it is no more than a nuisance, perhaps injury or mischief has a similar meaning to that contemplated by s.[180].

Mewett and Manning, supra, at 510n.

This is still no clearer following **Zundel (No. 1)** and **Zundel (No. 2)** in the Ontario Court of Appeal.

69. Section 181 invites arbitrary interpretation and is likely to be interpreted following irrational considerations. In the case at bar, the Crown was compelled to add to the indictment the words "in racial and social tolerance" in an attempt to define "a public interest". "A statement, tale or news" is similarly arbitrarily, unfairly and irrationally defined to suit the popular cause of the day. In short, if any identifiable objective exists, the measures adopted under s. 181 are not rationally connected to it. The section invites arbitrary additions of words defining "public interest". If racial and social tolerance is a public interest, why not political stability and respect for political parties or religious harmony and then published expression of views unpopular to the vast majority of people on political or religious topics could be prosecuted as false statements, tales or news. If one, why not the other, under this law. It just depends on the government of the day and the arbitrary whim of the prosecutor.

The indictment, Case on Appeal, page 1

Braun, supra, at 472-75

70. The second consideration in determining proportionality by applying the **Oakes** test is that "**the means...should impair "as little as possible" the right or freedom in question.**" S. 181 cannot be characterized as impairing the freedom of expression "as little as possible", since its sweep is all-encompassing.

Oakes, supra, at 337.

71. The effect of s. 181 is to limit the publication of a statement, tale or news creating a real possibility or punishing expression that is not false, or that is deliberately fictitious but those purporting to be based on historical fact, or that is satire, or that explores new ideas hitherto considered untenable and therefore "false." Judges are likely to find false views that are not generally held, especially upon religion, politics or history. The reason they are not generally held is that most people don't hold them; juries reflect the opinions of most people on history, religion and related

topics. Thus such trials are premised upon an inherent bias by definition. Galileo would have probably been convicted under section 181.

72. A real danger exists that, because the distinction between fact and opinion is so obscure, juries faced with unpopular opinions will hold them to be claims of fact. Furthermore individuals who are unpopular or infamous because they have published unpopular ideas may be tried by the media or the court on the strength of their unpopular ideas or beliefs and may be punished for the wrong reasons. In the case at bar much cross-examination of the political beliefs of the defence witnesses was conducted with that effect.

Zundel (No. 1), supra at 158-59.

Whitney, supra, at 376-77

73. A conviction under this section is possible for such a wide variety of statements, tales or news that it would have a disproportionately chilling effect on writers, publishers and academics in the form of self-censorship, especially in controversial historical or ethnic issues, as in the case at bar, where a vocal group which feels slighted by the position taken by the writer is able to precipitate prosecution of the writer, publisher or printer. It is desirable to allow publishers maximum freedom to publish a wide range of ideas, even those ideas which publishers disagree with or disbelieve or that the vast majority believes to be false. This section could have effectively been used in the time of Galileo or Copernicus to the same effect.

Keegstra, supra, per McLachlin J. at 30, 82-84.

Ollman v. Evans, supra, at 1020.

Thomas Khun. *The Nature of Scientific Revolutions,* supra, 166-67, 191 ff.

Braun, supra, at 478.

74. The test for minimal impairment established by Dickson C.J.C. in **Keegstra** is whether the section in question creates "a narrowly confined offence which suffers from neither overbreadth nor vagueness." It is submitted that s. 181, unlike s. 319(2), is not narrowly confined and does suffer from both overbreadth and vagueness.

Keegstra, supra, per Dickson C.J.C. at 92-93; per McLachlin J. at 81-86

Braun, supra at 476-77.

75. According to the third branch of the **Oakes** proportionality test, "there must be a proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of "sufficient importance"."

Oakes, supra, at 337.

76. If the objective is truthful ideas about history, how can the effects of trying that issue be proportional? How can twelve people be trusted to find the truth in history if society at large in an open debate could not be trusted to make that judgment? If society could be so trusted, where is the proportionality of this law, and why is it necessary? It is not necessary to prosecute false ideas if society on its own can discern between truth and falsity. If society cannot do so, neither can juries under the constraints of time and evidentiary rules that criminal trials impose. There is no effect of this law which achieves its objective. Juries of 12 persons under the pressures of a trial and media publicity are less likely to find the truth about history than society at large over time.

77. In applying this portion of the **Oakes** test, once again the narrowness or broadness of the terms of the section is a factor to be weighed. Whereas s. 319(2) (for example) affects "a special category" of expression, with specific defences provided, the same cannot be said of s. 181, which is broadly drawn and very general in its ap-

plication, referring as it does to any allegedly "false" statement, news or tale, statement news or tale are never defined.

Keegstra, supra, per Dickson C.J.C. at 94.

Braun, supra, at 495, fn. 67.

78. The limitation on freedom of expression created by s. 181 invokes all the values upon which a free and democratic society rests: "the value of fostering a vibrant and creative society through the marketplace of ideas; the value of the vigorous and open debate essential to democratic government and preservation of our rights and freedoms; and the value of a society which fosters the self-actualization and freedom of its members." Essentially new ideas need to be tested in the arena of debate where they may be rejected rather than in courts where proof may be impossible. This law discounts all three of the above values.

Keegstra, supra, per McLachlin J. at 87.

79. Absolutely no warning is given as to what statements, tales or news are liable to result in prosecution. The falsity cannot be known in advance if it is opinion. Whether it is fact or opinion cannot be clearly known in advance. These considerations establish an infringement of the guarantee of freedom or expression of a most serious nature. The law may mean publishing an opinion a jury simply does not like. That is how it is capable of being interpreted by juries with the type of instructions they received in the case at bar.

Keegstra, supra, per McLachlin J. at 87-89

80. The truth of an unpopular idea, by definition, can never be proven to the satisfaction of a majority of persons. Hence by definition unpopular ideas will always be found by juries to be "known falsehoods" unless they believe the accused insane. The onus on any accused is impossible to discharge if his ideas are extremely unpopular.

81. Brandeis J. of the U.S. Supreme Court said in **Whitney**:

> [The Founding Fathers knew] that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government...; that the fitting remedy for evil counsels is good ones. Believing in the power of reason...they eschewed silence coerced by law — the argument of force in its worse forms...
>
> No danger flowing from speech can be deemed clear and present unless the evidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the **falsehoods** and fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence. [emphasis added]

Whitney, supra, at 376-77

82. Section 181 does not have a pressing and substantial objective. Furthermore, it fails to satisfy any one of the three components of the proportionality inquiry established in Oakes. Therefore the section is not a reasonable limit prescribed by law in a free and democratic society.

Keegstra, supra, per McLachlin J. at 89.

83. The freedom to express oneself openly and fully is of crucial importance in a free and democratic society, deserving of constitutional protection.

Keegstra, supra, per Dickson C.J.C. at 18, and per McLachlin J. at 89.

84.

> "In a free, pluralistic and democratic society we prize a diversity of ideas and opinions for their inherent value both to the community and to the individual."

Irwin Toy, supra, at 228, 233.

85. The principles of freedom of expression and fundamental justice in the context of a free and democratic society were thoroughly canvassed 40 years ago by the Supreme Court of Canada in a series of cases involving Jehovah's Witnesses charged with sedition and related offences for spreading an anti-Catholic, anti-Quebec tract called *Quebec's Burning Hate*, which clearly included statements of both unsubstantiated fact and opinion. The judgments of Rand and Locke JJ. are to this day considered classic decisions that help epitomize and define Canada as a free and democratic society. It behoves the Court to follow these early and important precedents.

Boucher v. The King, [1951] S.C.R. 265 (S.C.C.)

Saumur v. A.G. Quebec, [1953] 2 S.C.R. 299 (S.C.C.)

Chaput v. Romain, [1955] S.C.R. 834 (S.C.C.)

Lamb v. Benoit, [1959] S.C.R. 321 (S.C.C.)

Roncarelli v. Duplessis, [1959] S.C.R. 121 (S.C.C.)

86. The courts have recognized a link between these cases and the offence of "spreading false news", which was then regarded as a branch of "sedition."

Carrier, supra, at 81

87. In **Boucher**, Rand J. stated:

> Freedom in thought and speech and disagreement in ideas and beliefs, on every conceivable subject, are of the essence of our life. The clash of critical discussion on political, social and religious subjects has too deeply become the stuff of daily experience to suggest that mere ill-will as a product of controversy can strike down the latter with illegality...
>
> Controversial fury is aroused constantly by differences in abstract conceptions; heresy in some fields is again a mortal sin; there can be fanatical puritanism in ideas as well as in morals; but our compact of free society

accepts and absorbs these differences and they are exercised at large with the framework of freedom and order on broader and deeper uniformities as bases of social stability. Similarly in discontent, disaffection and hostility: as subjective incidents of controversy, they and the ideas which arouse them are part of our living which ultimately serve us in stimulation, in the clarification of thought and, as we believe, in the search for the constitution and truth of things generally.

Boucher, supra, at 288.

88. In **Saumar**, Rand J. remarked:

> So it is with freedom of speech. The *Confederation Act* recites the desire of the three provinces to be federally united into one Dominion "with a constitution similar in principle to that of the United Kingdom." Under that constitution, government is by parliamentary institutions...: government resting ultimately on public opinion reached by discussion and the interplay of ideas. If that discussion is placed under license, its basic condition is destroyed: the government, as licensor, becomes disjoined from the citizenry. The only security is steadily advancing enlightenment, for which the widest range of controversy is a sine qua non.

Saumar, supra, at 330.

General Comments

89. Section 181 is available, and in the case at bar, was used to attack an unpopular viewpoint about history. However, the Crown's expert historian, throughout his evidence in the case at bar, maintained that his evidence was an **opinion** about history, and that history is opinion.

90. He maintained that

> "History is probably the most inexact of all social sciences."

Dr. Christopher Browning, **Zundel (No. 2)** Trial, Transcript, p. 3794, l. 20

91. History was defined as follows in an American case:

> History consists largely, if not wholly, of the records, narratives, and statements of others, purely hearsay.
>
> **Atchison v. Madden, Sykes & Co.** 103 S.W. 1193 at 1195

92. The appellant submits that the following statement about history demonstrates the essential unfairness of trying historical theses in the context of the criminal law, to sancify one side of an historical dispute:

> At the core of the modern idea of history is the axiom that historical praxis and interpretation are neither static nor consensual. There are constant changes in concept, method, technique, and evidence which along with changing times keep stimulating new as well as critical questions, hypotheses, and reappraisals. Whereas the voice of memory is univocal and uncontested, that of history is polyphonic and open to debate. Memory tends to rigidify over time, while history calls for revision.
>
> Arno Mayer, *Why Did the Heavens Not Darken?* (Pantheon, New York, 1988) at 17

93. The appellant submits that the definition of the word "democratic" included in section 1 of the *Charter* implies the right of each individual to decide major issues of public policy, and this includes the right to know and evaluate different accounts of the past to determine the best course for the future. This responsibility cannot be taken over by the state or by juries in individual criminal trials, having implications that create a State or Official History.

94. Historical controversy should be free from state interference as the role of the state in such matters should be neutral, not to create a vast chilling effect upon citizens.

95. There are many other institutions in place already in a free and democratic society through which historical controversy can be dealt with, i.e the media, universities, schools, partisan societies, etc.

96. Such an offence raises the dangers of one group using the criminal law to harass other groups with opposing political viewpoints, or of the state harassing historical dissidents.

97. The only other countries wherein the state determines the history are totalitarian countries, eg. the Soviet Union. The state itself has too many interests in the past to be entrusted with the power to control it. The state at any given time is represented by political interests in power. Such interests could silence opposition by the use of this section against statements they said were false.

98. There is an inherent impossibility of a fair trial on matters of historical controversy where the state throws its weight behind one particular viewpoint.

99. Not one shred of evidence of the Crown in the second trial of the case at bar escaped the category of opinion as it touched the issue of truth or falsity of *Did Six Million Really Die?*, except for judicial notice.

100. The attempt to criminalize an historical thesis, as in the case at bar, and thereby enshrine the converse as some sort of official state-sanctioned historical truth is contrary to the fundamental principles of a democracy. To sanctify some matters of historical opinion as indisputable historical fact sets a precedent which will inevitably eventually bring the administration of justice into disrepute as the writing of history continues to develop.

101. "Section [181], the crime of publishing false news, should be abolished."

Law Reform Commission, supra, at 30, 40.

Part IV

The Order Requested

102. It is respectfully submitted that the appeal should be allowed, that s. 181 be declared contrary to the *Canadian Charter of Rights and Freedoms* and hence inoperative and of no force or effect under s. 52 of the *Constitution Act*, 1982, and that the conviction be set aside and an acquittal be entered.

103. Costs to the appellant throughout.

Part V

List of Authorities

All of which is respectfully submitted,

Douglas H. Christie
Counsel for the Appellant