No. 21811

IN THE SUPREME COURT OF CANADA

(On Appeal from the Ontario Court of Appeal)

BETWEEN:

ERNST ZUNDEL

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

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I. STATEMENT OF FACTS

1. The facts for the purposes of this appeal are stated in the factum of the Respondent.

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II. POINTS IN ISSUE

2. By order of the Chief Justice of Canada, the following constitutional questions were stated:

(1) Is Section 181 (formerly 177) of the *Criminal Code* contrary to section 7 of the *Charter of Rights and Freedoms* as being a vague and uncertain restriction upon the fundamental freedom of expression?

(2) If so, is Section 181 (formerly 177) of the *Criminal Code* a reasonable limit prescribed by law demonstrably justifiable in a free and democratic society, pursuant to Section 1 of the *Charter of Rights and Freedoms*?

(3) Is Section 181 (formerly s. 177) of the *Criminal Code* of Canada contrary to the fundamental freedom of thought, belief, opinion, and expression, including freedom of the press and other media of communication, set out in s. 2(b) of the *Canadian Charter of Rights and Freedoms*?

(4) If so, is section 181 (formerly s. 177) of the *Criminal Code* of Canada a reasonable limit prescribed by law demonstrably justifiable in a free and democratic society as required by s. 1 of the *Canadian Charter of Rights and Freedoms*?

3. The position of the Attorney General is that the questions should be answered as follows:

Question 1: No.

Question 2: If it is necessary to answer this question, the answer should be: No.

Question 3: No.

Question 4: If it is necessary to answer this question, the answer should be: Yes.

III. ARGUMENT

A. The Challenged Legislation

4. Section 181 of the *Criminal Code* makes it an offence to wilfully publish information that is false to the knowledge of the person who publishes it, and that causes or is likely to cause injury or mischief to a public interest. Thus, the proscribed conduct is narrowly limited to the act of

(1) deliberately

(2) publishing (i.e., making publicly and generally known)

(3) an assertion of fact which, to the knowledge of the publisher, is false, and which

(4) causes, or is likely to cause, injury to a public (not merely a private) interest.

5. As Professor Scott has observed,[1] the origins of section 181 go far back in English history. The nature of the offence has evolved somewhat over time. In the modern era, it has been seen as serving the public interest in the maintenance of racial and religious harmony, by protecting minorities against a particular "form of mischievous slander".[2]

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

2. *Ibid.*, at p. 47.

B. Section 2(b) of the Charter

6. The Appellant argues, in essence, that the application of this Court's "broad, inclusive approach to the protected sphere of free expression"[1] should result in a finding that s. 181 is *prima facie* inconsistent with the Constitution. On this view, statements which are false to the knowledge of their publisher nevertheless convey

"meaning", and the purpose of the challenged provision is to restrict expression of that "content". The underlying premise, then, is not limited to the assertion that there is "no such thing as a false idea"[2] under the *Charter*. Rather, the argument makes the additional assumption that there is positive constitutional value in false statements of fact.

1. *Irwin Toy Ltd. v. Quebec*, [1989] 1 S.C.R. 927, at p. 970.

2. *Gertz v. Robert Welch Inc.* (1974), 418 U.S. 322, at p. 339.

7. Clearly, this Court's section 2(b) jurisprudence fully supports the notion that all "thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream"[1] are within the ambit of the guarantee. But this Court has yet to suggest that false assertions of fact, knowingly made, possess any intrinsic value that is worthy of protection. Indeed, such deliberate falsehoods cannot be reconciled with the principles which have been said to underlie the constitutional guarantee of freedom of expression, which have been summarized as follows:

> "(1) seeking and attaining the truth is an inherently good activity; (2) participation in social and political decision-making is to be fostered and encouraged; and (3) the diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in an essentially tolerant, indeed welcoming environment not only for the sake of those who convey a meaning, but also for the sake of those to whom it is conveyed."[2]

1. *Irwin Toy Ltd. v. Quebec*, *supra*, para. 6, note 1, at p. 968.

2. *Ibid.*, at p. 976; *R. v. Keegstra*, [1990] 3 S.C.R. 697, per Dickson C.J.C. at p. 728.

8. Intentional lies of course serve only to obscure the truth and to inhibit its attainment. More fundamentally, such lies constitute a form of verbal abuse that can be

analogized with physical violence, since behaviour of this nature is the direct cause of harm which cannot be corrected by other forces in "the marketplace of ideas":

> "The marketplace remedy is inadequate for victims of group-based epithets because the assaultive aspects of epithets cannot be redressed by more speech. Following the line of reasoning in *Cox v. Louisiana* [(1965), 379 U.S. 536], an effective assault accomplished through the intimidating effect of words -- buttressed by their relationship to a history of present and past mistreatment -- should not be immune from legal sanction merely because words are the weapons of choice. Indeed, it may be dangerous for a targeted hearer to attempt to use a 'marketplace' remedy of more speech because that may only provoke the accosting speaker into more violence."[1]

1. S.M. SeLegue, "Campus Anti-Slur Regulations: Speakers, Victims, and the First Amendment" (1991), 79 Cal. L. Rev. 919, at p. 928. See also: Mari Matsuda, "Public Response to Racist Speech: Considering the Victim's Story" (1989), 87 Mich. L. Rev. 2320, at pp. 2334-48; Charles R. Lawrence III, "If He Hollers Let Him Go: Regulating Racist Speech on Campus", [1990] Duke L.J. 431, at pp. 468-72.

9. Further, deliberate falsehoods contribute nothing to the search for broad social consensus. They tend to "...divide, rather than to unite... Indeed, by demoralizing their victim they may actually reduce speech, dialogue, and participation in political life."[1] Nor do they provide any means for individual self-fulfillment. On the contrary, "... social science writers hold that making racist remarks impairs, rather than promotes, the growth of the person who makes them, by encouraging rigid, dichotomous thinking and impeding moral development."[2]

1. Richard Delgado, "Campus Antiracism Rules: Constitutional Narratives in Collision" (1991), 85 Northwestern U. L. Rev. 343, at p. 379.

2. *Ibid.*

10. The absence of any nexus between intentional lies and the values identified by this Court which underlie section 2(b) of the *Charter* underscores, it is submitted, the correctness of the conclusion reached by the court below on this issue:

> " It is difficult to see how such conduct would fall within any of the previously expressed rationales for guaranteeing freedom of expression. Spreading falsehoods knowingly is the antithesis of seeking truth through the free exchange of ideas. It would appear to have no social or moral value which would merit constitutional protection. Nor would it aid the working of parliamentary democracy or further self-fulfilment."[1]

1. (1987), 58 O.R.(2d) 129 (Ont. C.A.), at p. 155; leave to appeal refused, [1987] 1 S.C.R. xii.

C. Section 1 of the Charter

11. This Court has held that the proper judicial perspective under section 1 must be derived from the "synergetic relation" between the values underlying the *Charter* and the context or circumstances of the particular case.[1]

1. *R. v. Keegstra*, *supra*, para. 7, note 2, per Dickson C.J.C. at p. 737.

12. The majority of this Court in *Keegstra* summarized the trend in American law under the First Amendment to the Constitution as being "to protect offensive, public invective as long as the speaker has not knowingly lied and there exists no clear and present danger of violence or insurrection."[1](emphasis added).

1. *Supra*, para. 7, note 2, per Dickson C.J.C. at p. 729.

(1) Reasonable Limits Demonstrably Justified

(a) Objective of Sufficient Importance

13. The objective of section 181 is to ensure that meaningful public discussion is not tainted by the deleterious effects of the wilful publication of falsehoods which cause, or are likely to cause, damage to public interests, to the detriment of public order.

14. The importance of this objective is demonstrated by the long history of the offence in our criminal law and the importance of the protection of meaningful public debate. Though, of course, the length of time a law has been in force does not serve to excuse a breach of a freedom guaranteed by the *Charter*, it may be indicative of a fundamental harmony between the principle in question and the principles that underlie our criminal law.[1]

1. *R. v. Beare*, [1988] 2 S.C.R. 387, per La Forest J. at p. 406.

15. The objective of protecting meaningful public debate from those who would add injurious falsehoods to it brings this legislation within the "class of cases in which the governmental objective is that of protection of a particularly vulnerable group, or members thereof".[1] In *Slaight Communications*, this included employees whose ability to seek new employment was being protected against the release of false information by their previous employers. In *Irwin Toy*,[2] the class was comprised of children who were being protected against the influence of commercial advertising. In *Keegstra*,[3] the class included members of ethnic and religious minorities who were being protected from vicious hate propaganda. In *Wholesale Travel*,[4] the class consisted of consumers who were protected from false or misleading advertising. It is submitted that if these groups are deserving of protection in the circumstances of those cases, the case is equally strong for the protection of democratic debate against the wilful dissemination of false information, which causes or is likely to cause harm to public interests.

1. *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, per Dickson C.J.C. at p. 1051.

2. *Supra*, para. 6, note 1.

3. *Supra*, para. 7, note 2.

4. *R. v. Wholesale Travel Group Inc.*, unreported, S.C.C. nos. 21779 and 21786, October 24, 1991, per Cory J. at pp. 31-32.

16. One of the harmful effects of such falsehoods which are injected into free debate is the potential influence upon society at large. The Special Committee on Hate Propaganda in Canada (the "Cohen Committee") wrote "...that individuals can be persuaded to believe 'almost anything' if information or ideas are communicated using the right technique and in the proper circumstances".[1]

1. *R. v. Keegstra*, *supra*, para. 7, note 2, per Dickson C.J.C. at p. 747.

17. The objectives of section 181 of the *Criminal Code* not only are consistent with, but also strive to reinforce and to give effect to, meaningful public debate, free at least from the harmful hinderance caused by the wilful publication of falsehoods, which cause or are likely to cause public damage.

18. Accordingly, it is submitted that the concern underlying the enactment of section 181 of the *Criminal Code* as a control on the dissemination of false information that causes or is likely to cause injury to a public interest is pressing and substantial, and that the objective of section 181 is of sufficient importance to justify its minimal and meaningful limitation of freedom of expression.

(b) **Proportionality**

19. This Court has stated that it will take into account, as part of the context of the limitation imposed on freedom of expression in question, the nature of the expression

prohibited: "Not all expression is equally worthy of protection. Nor are all infringements of free expression equally serious".[1]

1. *Rocket v. Royal College of Dental Surgeons of Ontario et al.*, [1990] 2 S.C.R. 232, per McLachlin J. at p. 274.

20. In the context of this appeal, the question to be asked is "whether, and to what extent, the expressive activity prohibited by [section 181] promotes the values underlying the freedom of expression".[1]

1. *R. v. Keegstra*, *supra*, para. 7, note 2, per Dickson C.J.C. at p. 762.

21. As submitted above, the falsehoods published by the Appellant do not aid in the search for truth because statements that are false to the knowledge of the person who published them are simply not the substance from which the truth can be distilled; in fact, they are the antithesis of it. This Court has recognized that there is a fundamental contradiction in the assertion that *all* expression is worthy of protection because it is impossible to know with absolute certainty whether a factual statement is true: "The problem with this extreme position, however, is that the greater the degree of certainty that a statement is erroneous or mendacious, the less its value in the quest for truth. Indeed, expression can be used to the detriment of our search for truth...".[1]

1. *R. v. Keegstra*, *supra*, para. 7, note 2, per Dickson C.J.C. at p. 763.

22. The Appellant bases his position on the theory that what he has been convicted of is the publication of a legitimate historical theory, comparing it to the work of an unpopular historian. He also forwards the view that because there can be philosophical debate about whether historical facts exist, it is impossible for a jury to distinguish fact from opinion.

23. It is submitted that these theories mistake the nature of the offence of which the Appellant has been convicted. He has not been convicted of adding a useful but

unpopular historical opinion to an historical debate, nor of adding his dissenting opinion to such a debate. Further, he has not been convicted of wilfully publishing false statements *simpliciter*, or of wilfully publishing false statements which he himself does not believe or hold to be true. His conviction *was* based on a finding of fact by the jury that his falsehoods caused, or were likely to cause, injury to the public interest in racial and religious harmony, considered by this Court in *Keegstra* to be a matter of great importance in this country.

24. Statements that are false to the knowledge of the publisher do not assist the democratic process. The connection between freedom of expression and the political process "...is perhaps, the lynch-pin of the s. 2(b) guarantee...".[1] It is submitted that wilful, damaging lies are of no value whatsoever to the democratic process, hence any perceived infringement of freedom of expression in this case is, at best, "peripheral to the core rights protected"[2] by section 2(b).

1. *R. v. Keegstra*, *supra*, para. 7, note 2, per Dickson C.J.C. at p. 763.

2. *United States v. Cotroni*, [1989] 1 S.C.R. 1469, per La Forest J. at p. 1492.

25. If section 2(b) of the *Charter* protects the wilful publication of statements which are false to the knowledge of the person who published them, it is submitted that this Court should consider the low value of the wilful publication of such falsehoods in the balancing process under section 1. The argument that individuals should be constitutionally entitled to publish statements which they know to be false and which cause or likely will cause injury to a public interest, would create a constitutional right to lie without regard to public consequences. Such a result would not further, but would rather defeat, the purposes of section 2(b) of the *Charter*.

(i) **Rational Connection**

26. It is submitted that the relationship between section 181 and the objectives of the law is clear. Section 181 is drawn to limit only the wilful spreading of falsehoods,

reflecting the serious concern about the effects of such activities on the public interests targeted.

27. As criminal legislation, section 181 operates to punish those who engage in harmful behaviour, and to deter the promotion of false and misleading hindrances to public debate.

(ii) **Minimal Impairment of the Section 2(b) Freedom**

28. Section 181 is a measured response to the damage that can be done to meaningful public debate by the wilful publication of falsehoods. This is demonstrated by several aspects of the law that narrow its scope. It is addressed, firstly, to the *wilful* publication of falsehoods. The Crown must meet the burden of showing that the accused wilfully promoted hatred.

29. Secondly, and more importantly, the Crown must prove that the statements published were false to the knowledge of the person who published them. In this way, a jury must be convinced that there is no possibility that the statements might add something beyond a hinderance to the democratic debate through the interjection of lies. In speaking of Parliament's deference to truth in the context of the hate propaganda provisions of the *Criminal Code*, the majority of this Court said "[w]hen the statement contains no truth, however, this flicker of justification for the intentional promotion of hatred is extinguished, and the harmful malice of the disseminator stands alone."[1] It is submitted that section 181 is evidence of Parliament's high respect for the value of truth, particularly in light of the "heavy burden" it has imposed on the Crown.[2]

1. *R. v. Keegstra*, *supra*, para. 7, note 2, per Dickson C.J.C. at p. 781.

2. Report of the Special Committee on Hate Propaganda in Canada (1966), at p. 45.

30. Thirdly, section 181 provides that no one shall be convicted of publishing statements that are false to the knowledge of the person who published them, unless they were to cause or likely to cause injury to a public interest. Thus, the offense does not catch the wilful spreader of lies that cause damage to private interests alone.

31. The majority in *Keegstra* stated that "[w]here the likelihood of truth or benefit from an idea diminishes to the point of vanishing, and the statement in question has harmful consequences inimical to the most central values of a free and democratic society, it is not excessively problematic to make a judgment that involves limiting of expression."[1] It is submitted that this is the case with the expression covered by section 181. Further, section 181 is not even as restrictive as the provisions of the *Criminal Code* at issue in *Keegstra*, because it does not proscribe information which may, in some cases, be true. Consequently, no concern as to potential "chilling effects" can arise here, and this no doubt explains the absence of any evidence as to the existence of such effects.[2]

1. *R. v. Keegstra*, *supra*, para. 7, note 2, per Dickson C.J.C. at p. 782.

2. *Moysa v. Alberta (Labour Relations Board)*, [1989] 1 S.C.R. 1572, per Sopinka J. at p. 1581.

32. The public interest in the prohibition of these types of falsehoods outweighs the peripheral, minimal intrusion on the freedom of expression in this case. The expression prohibited by section 181 is merely the publication of falsehoods, false even to the person who wishes to express them, in such a way as to cause, or to be likely to cause, injury to a public interest. As submitted above, there can be little or no value in such statements. Balanced with this is the more valuable interest of the public in sustaining meaningful debate.

(iii) Proportionality Between Effects and Objective

33. The nature and extent of the limitation on freedom of expression must be measured in the present circumstances by the form of expression which has been constrained. Section 181 of the *Criminal Code* is aimed at conduct which is far removed from the core of values sought to be protected by section 2(b) of the *Charter*. These kinds of falsehoods are not merely meaningless; rather, they hinder or detract from the development of democratic debate. When balanced against the harm caused to individuals and groups and the community as a whole by the wilful publication of lies, it is submitted that section 181 is a well-tailored provision which does not disproportionately limit the freedom of expression.

D. Section 7 of the *Charter*

34. The Appellant's section 7 argument reprises his theme that "truth" is unknowable, everything is a matter of opinion, and that therefore section 181 is impermissibly vague because it permits juries to deem unpopular opinions to be assertions of "fact" and to impose criminal liability on that basis. The Attorney General of Canada agrees with the Respondent that it is difficult to see how there could be any issue left for consideration under section 7 of the *Charter* in this regard once the Court has accepted or rejected the Appellant's thesis in relation to sections 2(b) and 1.

35. In any event, the principles to be applied in order to determine whether a challenged provision should be found to be "void for vagueness" were authoritatively stated by this Court in the *Prostitution Reference*.[1] The central consideration is whether the statute can be given sensible meaning by the courts. The language of section 181 is neither obscure nor does it employ terms of art. It has been applied in the past without any apparent difficulty.[2]

1. *Re Sections 193 and 195.1(1)(c) Criminal Code*, [1990] 1 S.C.R. 1123, per Lamer J. at pp. 1155-61.

2. *R. v. Kirby* (1970), 1 C.C.C. (2d) 286 (Que. C.A.)

36. The term "a public interest", far from broadening the scope of section 181, was obviously intended to have a narrowing effect. Deliberate falsehoods which only harm private interests are clearly beyond the ambit of the proscription. Further, the distinction between falsehoods that are "...merely improper or immoral and those which tend to produce a public mischief has long been recognised."[1]

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1. *R. v. Brailsford*, [1905] 2 K.B. 731, at p. 745.

37. The Appellant's section 7 argument extends beyond considerations of "vagueness" and asserts that section 181 of the *Code* is one of those "very few" crimes for which the principles of fundamental justice require a *mens rea* reflecting the particular nature of the crime.[1] But the maximum penalty does not rank as one of the more severe sentences authorized by the *Code*. Additionally, it is not apparent that any "special" stigma attaches to a conviction, unless it be concluded that all offences involving some element of dishonesty -- which are unlikely to be few in number -- are, by definition, "special".

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1. *R. v. Vaillancourt*, [1987] 2 S.C.R. 636, per Lamer J. at p. 653.

38. An accused who is convicted under section 181 is stigmatized by being branded a "liar", not a "damager of the public interest". The stigma flows only from proof beyond a reasonable doubt that the accused *wilfully* published statements which he *knew* to be false, not from the additional fact that he thereby caused harm to a public interest. Thus, even if the stigma is a "special" one, it is based on proof that the accused subjectively intended to do the very acts which give rise to the label placed upon him. The fact that the final element of the offence -- the harm to a public interest -- depends upon proof of objective foresight is not, in this context, constitutionally significant, given

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the absence of a connection between this element and the stigma created by a conviction.

E. Section 1 of the Charter

39. The Attorney General of Canada agrees with the Respondent that if section 181 creates an offence that is so vague as to be *fundamentally* unjust, the breach of section 7 of the *Charter* cannot be justified under section 1.

IV. ORDER SOUGHT

40. The Attorney General of Canada submits that the appeal should be dismissed and that the constitutional questions should be answered as follows:

(a) Question 1 should be answered in the negative;

(b) If it is necessary to answer Question 2, it should be answered in the negative;

(c) Question 3 should be answered in the negative;

(d) If it is necessary to answer Question 4, it should be answered in the affirmative.

ALL OF WHICH is respectfully submitted.

Graham R. Garton

James Hendry

Counsel for the Attorney General of Canada

V. AUTHORITIES