Court File No. 21811

SUPREME COURT OF CANADA

(On Appeal from the Ontario Court of Appeal)

B E T W E E N:

ERNST ZUNDEL

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

FACTUM OF THE INTERVENER

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BETWEEN:

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FACTUM OF THE INTERVENER CANADIAN CIVIL LIBERTIES ASSOCIATION

PART 1 - THE FACTS

1. By order of the Honourable Madame Justice L'Heureux-Dube, the Canadian Civil Liberties Association was given leave to intervene in the within appeal. The Intervener takes no position on the facts and its factum is divorced from the facts of this particular case. The factum of the Intervener concerns one issue, whether section 181 (formerly section 177) of the Criminal Code is an unconstitutional infringement of the guarantee of expression in section 2(b) of the Canadian Charter of Rights and Freedoms and is accordingly of no force and effect.

PART II - POINTS IN ISSUE

2. The Canadian Civil Liberties Association takes the following positions:

a. Is Section 181 of the Criminal Code of Canada, R.S.C. 1985, c. C-46 an infringement of the freedom of expression as guaranteed under section 2(b) of the Charter of Rights and Freedoms? It is the position of the Canadian Civil Liberties Association that section 181 is an infringement of section 2(b).

b. If Section 181 of the Criminal Code is an infringement of section 2(b) of the
10 Charter of Rights and Freedoms, can it be upheld under section 1 of the Charter as a reasonable limit prescribed by law and demonstrably justified in a free and democratic society? It is the position of the Canadian Civil Liberties Association that section 181 cannot be upheld as a reasonable limit within the meaning of section 1 of the Charter.

PART III - ARGUMENT

DOES SECTION 181 OF THE CRIMINAL CODE OF CANADA CONSTITUTE AN INFRINGEMENT OF FREEDOM OF EXPRESSION AS GUARANTEED UNDER SECTION 2(b) OF THE CHARTER OF RIGHTS AND FREEDOMS?

10 **(a) Is the conduct proscribed by section 181 of the Criminal Code protected by the guarantee to freedom of expression?**

3. It is respectfully submitted that before deciding whether there has been a limitation placed on the guarantee of freedom of expression, it is first necessary to enquire as to whether the conduct falling within the proscription of the section falls within the protected sphere of section 2(b).

Attorney-General of Quebec v. Irwin Toy Ltd.; Moreau et al, Interveners, [1989] 1 S.C.R. 927
20 *Regina v. Keegstra et al*, [1990] 3 S.C.R. 697 at page 729

4. Freedom of expression was entrenched in the Charter of Rights and Freedoms so as to ensure that all persons have the opportunity to "manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind". More particularly, freedom of expression, by guaranteeing the freedom to comment on all issues of social and political import, keeps those in power and authority responsive to social and legal norms. It follows that the fundamental nature of the freedom of expression must be to ensure that "if the activity conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of the guarantee." As stated by Lamer J. (as he then was) in
30 *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code*, "Activities cannot be excluded from the scope of guaranteed freedom of expression on the basis of the content or meaning conveyed." The vice of a provision such as section 181 is that it is capable of chilling a wide variety of expression which there could be no doubt is worthy of constitutional protection. Such expression would never enter the arena for fear of the criminal sanction it might attract.

Attorney-General of Quebec v. Irwin Toy Ltd.; Moreau et al, Interveners, *supra*, at page 969
Regina v. Keegstra et al, supra, at page 729
40 *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123 at page 1180

5. It is respectfully submitted that publications of false statements or false news are, despite their untruthfulness, intended to convey a meaning by those who make them. Given that this Honourable Court has stressed that the type of meaning which is conveyed by the communication is irrelevant to the question of whether the guarantee of freedom of expression has been infringed, the fact that the content of the expression covered by s. 181 of the Criminal Code may be untrue, does not eliminate such expression from the protection of section 2(b) of the Charter.

Regina v. Keegstra et al, supra, at page 729-730

10 **(b) Was the purpose or effect of the government action to restrict freedom of expression?**

6. It is respectfully submitted that the prohibition in s. 181 of the Criminal Code aims directly at statements which are false. It is clear, therefore, that Parliament's aim in passing s. 181 was to constrain expression because of its content. This being so, the governmental purpose in passing the legislation may be viewed as (a) restricting a form of expression in order to control access by others to the meaning being conveyed or (b) controlling the ability of the person conveying the meaning to do so. In either case, the purpose of the legislation is an attempt by the government to limit freedom of expression. As such it can
20 be sustained only if it can be justified under section 1 of the Charter.

(c) The argument based on violence or threats of violence

7. According to the decision of the majority of this Honourable Court in *Regina v. Keegstra,* "Stated at its highest, an exception [to the rule that all expression that conveys or attempts to convey meaning falls within the ambit of s. 2(b) of the Charter] has been suggested where meaning is communicated directly *via* physical violence, the extreme repugnance of this form to free expression values justifying such an extraordinary step." Further, the Court held that threats of violence are not excluded from the definition of
30 expression envisioned by s. 2(b). Any purely expressive activity, therefore, if it does not involve physical violence or harm, will be afforded the *prima facie* protection of s. 2(b) of the Charter.

Regina v. Keegstra et al, supra, at page 732

8. The Respondents argue that the expression proscribed by s. 181 of the Criminal Code, the "deliberate lie", is "akin to violence" and as such falls outside the protected

sphere of freedom of expression. The dissemination of false news or false statements does not involve actual physical violence and thus, it is necessary to consider why violence has been excluded as a protected form of expression in order to assess whether the exception should be widened to include the publication of false news.

9. The justification for excluding violence from the ambit of s. 2(b) of the Charter is not just that violence is harmful to the victim, but rather that "violence is inimical to the rule of law on which rights and freedoms depend. Threats of violence are similarly inimical. They are coercive, taking away free choice and undermining freedom of action. Most fundamentally, they undercut one of the essential justifications of free expression--the role of free expression in enhancing the freedom to choose between ideas (the argument based on truth) or between courses of conduct (the argument based on democracy)."

Regina v. Keegstra et al, supra, at page 830

10. Whatever one might say about lies *per se,* and accepting that some lies do inhibit choice [for example the false cry of fire], section 181 goes far beyond those lies and is capable of embracing a wide range of expression in no way akin to or analogous to violence or threats of violence. In her dissenting opinion in *Regina v. Keegstra et al.*, Madame Justice McLachlin recognized (in the context of the promotion of hatred against an identifiable group) that,

> "In the heat of political debate protagonists frequently make overstated attacks.....Opponents are called incompetent, or corrupt or unintelligent--or worse. Groups of opponents--for example, cabinet ministers or members of the opposing party--may be categorically vilified."

In certain kinds of political situations, s. 181 would be capable of chilling the kind of "overstated attack" to which Madame Justice McLachlin refers. In short, it could chill ordinary political discourse.

Regina v. Keegstra et al, supra, at page 831

11. In the absence of certain imminent harms, too much valuable speech is vulnerable to the allegation of falsehood. In times of great stress there is an even greater incentive on the part of the government to examine the content of speech and make the allegation of falsehood and thus to muzzle or limit debate. In a great many of our political controversies, for example, people tend to exaggerate their claims and minimize the claims of their adversaries. Such "overstated attacks", made in the heat of an argument and in the absence

of considered thought, could be stigmatized as the dissemination of false information if uttered in a public forum. This type of expression, however, rather than subverting the ends of democracy, promotes the process through the open and frank exchange of ideas and opinions. As stated by Madame Justice McLachlin, "It is impossible to imagine a vigorous political debate on a contentious issue in which the speakers did not seek to undermine the credibility of the ideas, conclusions and judgment of their opponents. Yet such debate is essential to the maintenance and functioning of our democratic institutions."
Regina v. Keegstra et al, supra, at page 832

10

CAN SECTION 181 BE SAVED BY RESORT TO SECTION 1 OF THE CHARTER OF RIGHTS AND FREEDOMS?

(a) General considerations

12. Freedom of expression has been described as a cornerstone of our way of life and thus it should be be impeded as little as possible. Further, the courts must be particularly vigilant in upholding this freedom and extremely cautious in restraining it. The importance of freedom of expression lies in the fact that it performs the strategic role in society as the
20 freedom upon which other freedoms depend. The ability to comment on social and political issues in an unfearful fashion keeps authority and power responsive to social and legal norms and subject to proper restraint.
Regina v. Andrews (1988), 43 C.C.C. (3d) 193 (Ont. C.A.) at page 210

(b) An objective relating to concerns which are pressing and substantial

13. It is respectfully submitted that in order to be upheld as constitutional under section 1 of the Charter, the impugned legislation must have as its objective one that is "of sufficient importance to warrant overriding a constitutionally protected right or freedom".
30 The standard must be high in order to ensure that objectives of a trivial nature do not gain section 1 protection and the objective must be of a pressing and substantial nature before it can be characterized as sufficiently important to override a Charter right.
Regina v. Oakes, [1986] 1 S.C.R. 103 at page 138
Regina v. Keegstra et al, supra, at page 846

14. It may well be that some prohibitions on false news may relate to concerns which are pressing and substantial, for example the prohibition on false fire alarms. However,

section 181 is so vague that it is capable of sweeping within its ambit any number of matters which far from being pressing or substantial may be trivial and of tenuous importance. The section is not limited to important public interests but covers any "public interest" and is not limited to real injury to such interests but any likelihood of injury or mischief. The fact that the section could be successfully invoked against a store owner for saying that Americans were not wanted in Canada demonstrates the vague and yet wide breadth of the prohibition. Whatever the original objective of the section of the Criminal Code dealing with the offence of "spreading false news", the section is simply so inherently vague that it cannot be said to meet the test of an objective which warrants overriding a constitutionally protected freedom.

Regina v. Hoaglin (1907), 12 C.C.C. 226 (N.W.T. S.C.)

15. The "spreading false news" offence contained in section 181 of the Criminal Code finds its origins in the ancient statutes dealing with *De Scandalis Magnatum* (1275), or libels upon peers and high officials, enacted in the reigns of Edward I and Richard II, and amended from time until their repeal in 1888. The original purpose of the statutes was to "preserve the public peace by the avoidance of rumours and tales 'whereby discord may arise between the king and his people or the great men of this realm.'" During the reign of Queen Elizabeth, the punishment for this offence was the loss of ears for the spoken word and the loss of one's right hand for the written word. The statutes were not frequently enforced and were "quite obsolete" at the time of their repeal in 1888. The statutes did survive long enough to be included under the heading of "spreading false news" in the 1892 Canadian Criminal Code. The inclusion of the offence may have been on an error, however, since "it is doubtful whether anyone in Canada was aware of the English repeal [of the statutes] , which was tucked away in the [English] Law Revision Act." The present wording of section 181 is, with only minor exceptions, the wording of the section enacted in the original Criminal Code.

Law Reform Commission of Canada, *Hate Propaganda*, Working Paper 50, 1986, Ottawa, at page 29
F.R. Scott, Publishing False News, (1952) 30 *Canadian Bar Review* 37 at pages 38-40

16. In 1965, in response to the representations of various groups, and after a reported upsurge in representations of neo-Nazi activity in Canada, the United States and Britain, the Canadian Minister of Justice set up a the Cohen Committee to study the problem of hate propaganda in Canada. The Committee reported in 1966 and recommended the addition of

new offences to the Criminal Code. Specifically, the committee stated that given the earlier court decisions in respect of the false news provision of the Criminal Code, "the applicability of section 166 [now section 181] to the dissemination of hate propaganda is therefore highly doubtful." In 1970, the recommendations of the Cohen Committee were acted upon and the Criminal Code was amended by the addition of the new offences of advocating genocide, public incitement of hatred likely to lead to a breach of the the peace, and wilful promotion of hatred. Unlike the hate literature provisions of the Criminal Code which were carefully drawn and narrowly targeted to a particular problem and a specific type of expression, the purpose of s. 181 is unclear, its target unfocused and the safeguards virtually non-existent.

Report of the Special Committee on Hate Propaganda in Canada, 1965, (Ottawa: Queen's Printer, 1966), at page 45-46
Regina v. Keegstra et al, supra, at page 824

17. In 1986, the Law Reform Commission of Canada produced a working paper in which the Commission assessed the role that the criminal law could play in regard to hate propaganda. In considering the offence of "publishing false news", the Commission found that certain threats to public interest ought to be criminalized but questioned whether section 181 (then s. 177) achieved this purpose. The Commission asked, "While there is a need for a crime to cover causing public alarm, is section 177 the right crime for the job?" and answered the question by stating, "In our view, no. Section 177 is flawed in two major ways--it is anachronistic and too broad." The Commission recommended that the offence of publishing false news in s. 181 should be abolished.

Law Reform Commission of Canada, *Hate Propaganda*, Working Paper 50, 1986, Ottawa, at page 29-30, 40

(c) Application of the proportionality test to section 181

18. It is respectfully submitted that section 181 of the Criminal Code cannot meet the proportionality test prescribed by section 1 of the Canadian Charter of Rights and Freedoms.

(i) Carefully designed or rationally connected to the objective

19. It is respectfully submitted that section 181 is not carefully designed to achieve the stated objective of the protection of a "public interest" from the dissemination of false information. The section makes it an offence to publish false news or statements which are

likely to cause "injury or mischief" to a "public interest". Nowhere in the section, however, is there included a definition of the words "public interest" and the words themselves are inherently vague. This presents the difficulty that the use of the words "public interest" does not assist in sending a clear and precise indication to members of society as to what the limits of the expression impugned by the section are. As stated by the Law Reform Commission of Canada, section 181 "is too wide because it is too vague. It is too vague because it catches any statement which the publisher knows is false, if likely to cause 'mischief to a public interest'. But what is 'mischief to a public interest?' While this phrase may appear to catch only harmful conduct, the appearance is deceptive." Proof
10 of this sentiment lies in the fact that the reported prosecutions under section 181 include a conviction of an angry store owner for saying that Americans were not wanted in Canada and an attempt to prosecute a member of the Jehovah's Witnesses for circulating a pamphlet after the same pamphlet had been found not to constitute a seditious libel.

Res v. Carrier (1951), 104 C.C.C. 75 (Que.K.B.)
Regina v. Hoaglin , supra
Law Reform Commission of Canada, *Hate Propaganda*, Working Paper 50, 1986, Ottawa, at page 29

20 20. The prohibited zone outlined by s. 181 is the deliberate falsehood which is likely to injure the public interest. In the absence of a definition of "public interest", however, how are persons to know when their inevitable exaggerations and minimizations encroach on the proscribed area of expression? In the absence of clear and precise legislation, they cannot know and the best way for such persons to protect themselves is to confine their speech to non-controversial matters that steer as far as possible from issues of public interest.

(ii) Impair as little as possible

21. It is respectfully submitted that in determining whether the limit on freedom of
30 expression imposed by section 181 of the Criminal Code is a reasonable one, a court must remain acutely aware of the potential impairment of free expression posed by such a restriction, as opposed to the societal gain that may be had by restricting individual's or group's freedom of expression in this manner. Section 181 fails to zero in on the kind of public interest that is in need of protection. Thus it is necessarily overbroad and therefore cannot impair "as little as possible".

(a) The "chilling effect"

22. The cost of limiting any right or freedom to any degree is the possibility that such a limit will necessarily have a "chilling effect". Where a right or freedom is limited to any extent by legislation, particularly legislation in the criminal law domain, there exists the possibility that persons in the community with legitimate claims, points of view or beliefs, who might otherwise choose to exercise their freedom of expression, might be deterred from so doing. It chills because so much speech in the political arena is susceptible to the accusation of falsehood. The attempt to ban the "deliberate lie", therefore, could endanger normal discussion and expression.

10

23. The danger to freedom of expression stems not only from the ultimate fact of conviction, but also from the initial fear of prosecution. As was noted by Laurence Tribe: That judges will ultimately rescue those whose conduct in retrospect is held protected is not enough, 'for the value of the sword of Damocles is that it hangs--not that it drops'. Yet if individuals who exaggerate their own positions or who minimize the claims of an adversary cannot engage in, for example, political debate without the fear of facing a criminal prosecution, such persons cannot be said to be enjoying the full ambit of their freedom of expression. To whatever extent the existence of certain legislation makes citizens look over their shoulders as a result of their engaging in the ordinary discourses of a democracy, the

20 freedom of expression will be commensurately chilled.

Tribe, L., *American Constitutional Law*, (1978) The Foundation Press, New York, at page 711, quoting from the dissenting judgment of Mr. Justice Marshall in *Arnett v. Kennedy*, 416 U.S. 134, 231 (1974)

24. A democracy will function less viably if the participants in public debate have to fear criminal prosecutions for their exaggerations or for fear of allegations of lies. The people most likely to experience this "chilling effect" will be those with unpopular or unconventional ideas; they are the persons most apt to exercise self-censorship for fear of

30 over-stepping the bounds of accepting social truth, thereby "inviting onerous prosecution and financially ruinous litigation."

Braun, Stefan, "Social and Racial Tolerance and Freedom of Expression in a Democratic Society: Friends or Foes?", 11 *Dalhousie Law Journal* 471 at page 478

25. As events fade from memory and the evidentiary burden of proof of truth becomes more difficult to meet, the greater the danger that a false news provision cast in such wide

terms will chill legitimate discussion. In a different political climate than we now enjoy a provision such as s. 181 can become a weapon in the hands of those who wish to stifle expression of minority viewpoints or stories of events which the majority would sooner commit to the dustbin of history. While today the section is used against a person who falsely denies the Holocaust, at a different time and in a different climate it could be used to restrain the speech of Holocaust survivors who speak truthfully of their experiences, yet who would be unable to produce the kind of evidence in court in order to support their own individual stories.

10 26. It is respectfully submitted that not all conceivable false news legislation would necessarily create such a threat to legitimate discourse. There could be no reasonable objection, for example, to a law which prohibited the spreading of false news in situations where there was imminent peril to life or limb. By way of illustration, legal sanctions might be appropriate against a radio station for falsely broadcasting that missiles were on their way to strike at Canadian cities. Similar "public alarm" legislation already exists in section 437 of the Criminal Code which prohibits raising a false alarm of fire. The false news section of the Criminal Code, however, is neither so narrow nor so specific that it catches within its ambit only expression which poses a threat to security. The section makes unlawful the spreading of <u>any</u> false news that is likely to injure <u>any</u> public interest
20 and nowhere are the words "public interest" defined.

(iii) Proportionality between the importance of the right and the benefit conferred

27. The final aspect of the proportionality test requires that there 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'". It is self-evident, therefore, that the less important the objective, the less tolerable is an adverse effect on the protected right or freedom.

Regina v. Oakes, supra, at page 139

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28. It is respectfully submitted that the infringement of the guarantee of freedom of expression which is mandated by section 181 of the Criminal Code is a serious one. The section does not merely regulate the form or tone of the expression, but rather, it strikes directly at the content of the expression. Moreover, the legislation strikes at expression that may arise in "widely diverse domains, whether artistic, social or political." The prohibition

outlined by section 181 is capable of catching within its net the intemperate statement made in the heat of social controversy. Further, while few may actually be prosecuted to the point of conviction under section 181, many persons are capable of falling within the "shadow of its broad prohibition", and will thus restrict their expression for fear of running afoul of a vague law. An infringement of this nature, therefore, can only be justified by a countervailing State interest of the most compelling nature.

Regina v. Keegstra et al, supra, at page 863

29. It is highly speculative that s. 181 relates to "an objective of pressing and substantial concern in a free and democratic society." Further, it is questionable whether the stated objective of ensuring that only the "truth" is disseminated to the general public is served by prosecutions which may arise pursuant to the current legislation. According to Stefan Braun,

> "It is not at all self-evident that the purposes of freedom of social, political or socio-political expression such as self-development, attainment of social or political truth and effective parliamentary democracy are better achieved by a political process that censors social falsehoods for fear of its effects."

Society, for the most part, assumes that when persons are prosecuted, their actions or communications are being treated with seriousness by the state. The very exercise of prosecution in some cases contraves common sense. Where the falsehood in issue, such as the one in this case, is a malevolent obscenity, prosecution incurs the risk of legitimizing it. In the first trial of the Appellant, for example, this resulted in solemn debates over the outrageous claim that Auschwitz was a Jewish country club rather than a Nazi death camp. As well, Mr. John Burnett, Vice-President of the Royal Bank of Canada, was called as a Crown witness to deny that he was part of a Jewish conspiracy directing international Communism. Merely asking the question is an affront and the fact that the Crown felt compelled to do so is simply a consequence of this kind of prosecution.

Braun, Stefan, "Social and Racial Tolerance and Freedom of Expression in a Democratic Society: Friends or Foes?", *supra*, at page 473

30. In considering how well the false news offence serves the aim of keeping the deliberate falsehood out of the public domain, it is also necessary to be cognizant of what a criminal prosecution can do for hitherto unknown publishers. It is not so much that we need be concerned about inflating the following of such persons but that the effect of the

prosecution is to inflict a gratuitous obscenity upon the public. It is an indignity that this "news" must be dealt with as if it were worthy of serious debate.

PART IV
ORDER SOUGHT

31. It is respectfully submitted that section 181 of the Criminal Code should be found to be of no force and effect and thus that the constitutional questions should be answered as follows:

Questions 1 and 2: The Intervener takes no position on the application of section 7 of the *Canadian Charter of Rights and Freedoms*.

10 Question 3: Section 181 of the *Criminal Code* of Canada is contrary to the fundamental freedom of expression set out in section 2(b) of the *Canadian Charter of Rights and Freedoms*.

Question 4: Section 181 of the Criminal Code of Canada is not 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*.

20 ALL OF WHICH IS RESPECTFULLY SUBMITTED

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PART V

AUTHORITIES

PART VI

STATUTES

Criminal Code, R.S.C. 1985, c. C-46

S. 181

181. 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. R.S., c. C-34, s. 177.

Canadian Charter of Rights and Freedoms

S. 1

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.

S. 2

2. Everyone has the following fundamental freedoms:
(*a*) freedom of conscience and religion;
(*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
(*c*) freedom of peaceful assembly; and
(*d*) freedom of association.