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 INTERVENOR CANADIAN JEWISH CONGRESS

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PART I FACTS

1. The Intervenor Canadian Jewish Congress accepts the facts as set out in the Respondent's factum.

PART II ISSUES

2. It is submitted that the issues herein are whether s. 181 of the Criminal Code infringes ss. 2(b) and/or 7 of the Canadian Charter of Rights and Freedoms (the "Charter") and, if it does, whether it is saved by s. 1.

PART III LAW

A: FREEDOM OF EXPRESSION: SECTION 2(b)

(1) General

3. This Court has adopted a two-step approach in determining whether there has been an infringement of s. 2(b) of the Charter. The first is to determine whether the claimant's activity is within a sphere of protected conduct. If it is, the second is to determine whether the purpose or effect of government action is to restrict that conduct.

> Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927 at 967-977.

(2) The First Step: Expressive Activity

4. The appellant was charged with violating s. 181 of the Criminal Code, which reads as follows:

> Everyone who wilfully publishes a statement, tale or news 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 of not exceeding two years.
>
> Criminal Code, R.S.C. 1985 c. C-46, s. 181.

5. The Intervenors concede that the publication of even an obvious and deliberate falsehood is expressive activity.

R. v. Keegstra (1990), S.C.J. at 21, ([1990] 3 S.C.R. 697 at 729 (per Dickson C.J.)).

Irwin Toy v. Quebec (Attorney General), supra, at 969

(3) The Second Step: Purpose or Effect of Government Action

a) Purpose

6. It is submitted that government action directed at the consequences which flow from expression, as opposed to action directed at the expression itself, does not have as its purpose the limitation of s. 2(b) rights. This was addressed by this Court in Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Manitoba) (the "Prostitution Reference"). The provisions considered in the there made it an offence to communicate with any person in a public place "for the purposes of prostitution". Wilson J., for five members of the Court on this issue, said:

> I believe we see in this case a good example of government's attempt to deal with the consequences of expressive activity, not by dealing directly with those consequences, but by placing constraints on the meaning sought to be conveyed by the expressive activity. Rather than deal directly with the variety of harmful consequences which the Attorney General of Canada and others submit ultimately flow from the communicative act, s. 195.1(1)(c) prohibits the communicative act itself in the hope that this will put an end to such consequences.

...

> More precisely, s. 195.1(1)(c) does not require the Crown to show that the expressive act in a given case is in fact likely to lead to undesired consequences such as noise or traffic congestion. Instead, the provision prohibits all communicative acts for the purpose of engaging in prostitution or obtaining the sexual services of a prostitute that takes place in public regardless of whether a given communicative act gives rise to harmful consequences or not.
>
> Reference re ss. 193 and 195.1(1)(c) of the Criminal Code, [1990] 1 S.C.R. 1123 at 1205 to 1206 (emphasis added).

7. Thus, in that case, the purpose of the impugned section was to limit expressive activity. By contrast, s. 181 does not single out any particular meaning; rather, it focusses on the consequences of an expressive act as the gravamen of the offence, and requires the Crown to show that the expressive act is likely to lead to injury or mischief to a public interest. It is therefore submitted that the purpose of s. 181 is not to infringe the appellant's expressive activity.

> R. v. Kirby (1970), 1 C.C.C. (2d) 286 (Que. C.A.).
>
> R. v. Zundel (No. 1) (1987), 31 C.C.C. (3d) 97 (Ont. C.A.).

8. In R. v. Kirby, a publisher was charged under s. 177 of the Criminal Code, (the predecessor of s. 181) for publishing a lampoon of a daily newspaper. The Quebec Court of Appeal acquitted the defendant and provided the following analysis of the offence:

> While I agree that the appellant was responsible for the publication of this

> edition of Logos and that it contained news which he knew was false, the question we have to decide is whether it was such that causes or is likely to cause injury or mischief to a public interest. ...
>
> While I consider the page was stupid, pointless and in bad taste, I cannot agree that per se, it was reasonably sure to cause trouble and insecurity.
>
> R. v. Kirby, supra, at 289.

9. Similarly, in R. v. Zundel (No.1), the Ontario Court of Appeal held that a conviction under s. 181 requires that it be "proved that [the publication] was likely to cause such injury or mischief." In that case, the appellant was acquitted on another indictment relating to the pamphlet, "The West, War and Islam". The Court of Appeal noted that that pamphlet "was mailed in sealed envelopes to people in the Middle East". Accordingly, the Court concluded,

> We think in all the circumstances it was open to the jury to conclude that the pamphlet, "Did Six Million Really Die?" caused or was likely to cause mischief to the public interest specified in the indictment and that, "The West, War Islam" did not or was not likely to cause that mischief.
>
> R. v. Zundel (No. 1), supra, at 113 and 160-161.

10. By contrast to s. 181, the offences of speaking seditious words or seditious libels are completed simply by advocating "the use, without the authority of law, of force as a means of accomplishing a governmental change within Canada" with the intention of inciting acts of violence or

public disorder. There is no requirement to prove that these consequences will likely occur.

Criminal Code, R.S.C. 1985, c. C-46, ss. 59, 60.

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

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

11. In this way, s. 181 is also distinguishable from s. 319(2) of the Criminal Code which was considered by this Court in Keegstra. Section 319(2) created an indictable offence where someone,

> by communicating statements other than in private conversation, wilfully promotes hatred against an identifiable group ...

Section 319(2) thus directly aimed at the content of statements being communicated; actual proof of hatred, or the likelihood that it would follow, was not an element of the offence. As Chief Justice Dickson stated, s. 319(2) "aims directly at words". This direct aim rendered the purpose of s. 319(2) as being aimed at limiting freedom of expression. Dickson C.J. concluded the following in this regard:

> Moving to the second stage of the s. 2(b) inquiry one notes that the prohibition in s. 319(2) aims directly at words - in this appeal, Mr. Keegstra's teachings - that have as their content and objective the promotion of racial or religious hatred. The purpose

> of s. 319(2) can consequently be formulated as follows: to restrict the content of expression by singling out particular meanings that are not to be conveyed.
>
> Criminal Code, R.S.C. 1985, c. C-46, s. 319(2).
>
> R. v. Keegstra, supra, at 23 (S.C.R. at 730). See also S.C.R. 775-6.

12. In Taylor, this Court held that the purpose of s. 13(1) of the Canadian Human Rights Act was to constrain s.2(b) rights notwithstanding that it aimed only at expression which was "likely to expose" a person to hatred or contempt. Two points should be noted. First, the argument that the law was directed at consequences, not the expression itself, was not dealt with. It was therefore an unargued case on this point. Second, Taylor is distinguishable in any event.

> Canada (Human Rights Commission) v. Taylor, [1990] 3 S.C.R. 892 at 914
>
> Canadian Human Rights Act, S.C. 1976-77 c. 33, s. 13(1).

13. Section 13(1) of the Canadian Human Rights Act provides:

> It is a discriminatory practice for a person or groups of persons acting in concert to communicate telephonically, or to cause to be communicated, repeatedly, in whole or in part, by means of the facilities of a telecommuncation undertaking within the legislative authority of Parliament, any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or persons are

> identifiable on the basis of a prohibited ground of communication.
>
> Canadian Human Rights Act, supra, s.13(1)

14. The proscription considered in Taylor was thus based upon Parliament's authority to regulate a medium of communication, namely, a "telecommunication undertaking within the legislative authority of Parliament." Section 181 of the Criminal Code, on the other hand, is passed pursuant to Parliament's jurisdiction over criminal law. As such, its primary aim is at the effects of activity on public order. In Reference Validity of s. 5(a) of the Dairy Industry Act, Rand J. defined criminal law in the following terms:

> A crime is an act which the law, with appropriate penal sanctions, forbids; but as prohibitions are not enacted in a vacuum, we can properly look for some evil or injurious or undesirable effect upon the public against which the law is directed. That effect may be in relation to social, economic or political interests; and the legislature has had in mind to suppress the evil or to safeguard the interest threatened.
>
> .....
>
> Is the prohibition then enacted with a view to a public purpose which can support it as being in relation to criminal law? Public peace, order security, health; morality: these are the ordinary though not exclusive ends secured by that law ...
>
> Constitution Act, 1867, as amended, ss. 92(10)(a) and 91(27)
>
> Reference re: Validity of s. 5(a) of the Dairy Industry Act, [1949] S.C.R. 1 at 49-50.

15. It is therefore submitted that the purpose of s. 181 is not to single out a specific meaning being conveyed -

i.e., the deliberate publishing of falsehoods - but to explicitly control the consequences of the activity - i.e., the likely injury or mischief caused by the published falsehood.

b) Effect

16. The burden is thus on the appellant to show that the effect of the law is to limit him in the pursuit of truth, participation in the community, or individual self-fulfillment and human flourishing. Dickson C.J. put it as follows in Irwin Toy:

> The precise and complete articulation of what kinds of activity promote these principles is, of course, a matter for judicial appreciation to be developed on a case by case basis. But the plaintiff must at least identify the meaning being conveyed and how it relates to the pursuit of truth, participation in the community, or individual self-fulfillment and human flourishing.

Irwin Toy, supra, at 977.

17. In this case, it is not the publishing of deliberate falsehoods at large which the appellant must justify. He must justify the publication of those falsehoods which are likely to harm a public interest, by showing that his statements further the pursuit of truth, participation in the community individual self-fulfillment or human flourishing. As Dickson C.J. stated in Taylor, "the more refined and searching analysis of the restricted expression" is to be carried out prior to the s. 1 analysis where "the effect (as opposed to

the purpose) of government regulation impinges upon the conveyance of meaning ..."

> Canada (Human Rights Commission) v. Taylor, supra, at 915.

10 18. It is submitted that none of the aims of expression as furthered by the publication of "Did Six Million Really Die?"

(i) Furtherance of Truth

19. The deliberate falsehoods published in "Did Six Million Really Die" do not further truth. In Keegstra, 20 Dickson C.J. held that the spreading of deliberate falsehoods causing social and racial intolerance does not contribute to the attainment of truth as a section 2(b) value. He stated:

> ... the greater the degree of certainty that a statement is erroneous or mendacious, the 30 less its value in the quest for truth. Indeed, expression can be used to the detriment of our search for truth; the state should not be the sole arbiter of truth, but neither should we overplay the view that rationality will overcome all falsehoods in the unregulated marketplace of ideas. There is very little chance that statements intended to promote hatred against an identifiable group are true, or that their 40 version of society will lead to a better world. To portray such statements as crucial to truth and the betterment of the political and social milieu is therefore misguided.
>
> R. v. Keegstra, supra, at 64 (S.C.R. at 762-763).

20. Similarly, in Beauharnais v. Illinois the Supreme Court of the United States considered the constitutionality of a criminal prohibition against any publication or exhibition which, inter alia, "is productive of breach of the peace..." The specific publication considered there were "anti-Negro leaflets". The Court concluded that the value of truth was not furthered by expressive activities which "inflict injury or tend to incite on immediate breach of the peace." The latter

> ... are no essential part of any exposition of ideas, and are of such slight social value as a step to the truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.
>
> Beauharnais v. Illinois, 343 U.S. 250 (1951) at 256-257

cf. Collin v. Smith, 578 F. 2d 1197 (7th Cir. 1978)

but see: R. v. Keegstra, supra at 36, (S.C.R. at 740).

(ii) Self Fulfillment and Human Flourishing

21. The value of individual self-fulfillment and human flourishing is founded upon "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". The conviction from which the appellant appeals includes a finding that the publication of "Did Six Million Really Die?" caused mischief "to the public interest in racial and social tolerance".

Irwin Toy v. Canada (Attorney General), supra, at 976

Indictment in R. v. Zundel, dated July 26, 1984: Case on Appeal, p. 1

22. It is submitted that expressive activity which harms the public interest in racial and social harmony is antithetical to the value of individual self-fulfillment and human flourishing in freedom of expression. As Chief Justice Dickson stated in Taylor, the contribution "to disharmonious relations among various social, cultural and religious groups ... result[s] [in] eroding the tolerance and open-mindedness that must flourish in a multicultural society which is committed to the idea of equality."

Canada (Human Rights Commission) v. Taylor, supra, at 919

(iii) Participation in Social and Political Decision-Making

23. The injury to social and racial tolerance caused by the publication of "Did Six Million Really Die?" has a similar effect on participation in community decision-making as does the spread of hate literate prohibited by s. 319(2) of the Criminal Code. The effect of such literature in this regard was addressed by Dickson C.J. in Keegstra as follows:

> The derision, hostility and abuse encouraged by hate propaganda therefore have a severely negative impact on the individual's sense of self-worth and acceptance. This impact may cause target group members to take drastic measures in reaction, perhaps avoiding activities which bring them into contact

> with non-group members or adopting attitudes and postures directed towards blending in with the majority. Such consequences bear heavily in a nation that prides itself on tolerance and the fostering of human dignity through, among other things, respect for the many racial, religious and cultural groups in our society.
>
> R. v. Keegstra, supra, at 43 (S.C.R. at 746).

24. For all of these reasons, it is submitted that the appellant's expressive activity is inimical to the values furthered by freedom of expression. Accordingly, government action which has the effect of limiting such activity does not violate s. 2(b) of the Charter.

B. THE PRINCIPLES OF FUNDAMENTAL JUSTICE: SECTION 7

25. With regard to s. 7 of the Charter, the Intervenor concedes that s. 181, as it is an indictable offence punishable by two years imprisonment, potentially deprives the appellant of his liberty. The Intervenors submit, however, that this deprivation is in accordance with the principles of fundamental justice.

> Reference re Section 94(2) of the Motor Vehicles Act (British Columbia), [1985] 2 S.C.R. 486 at 500.

26. The appellant appears to claim that s. 181 violates the principles of fundamental justice on two grounds: (i) the lack of a requirement that the Crown prove a specific intention to cause mischief makes the provision an absolute