Court file no. 21811

IN THE SUPREME COURT OF CANADA
(On Appeal from the Court of Appeal for Ontario)

B E T W E E N:

ERNST ZUNDEL

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

FACTUM OF THE INTERVENER LEAGUE FOR HUMAN RIGHTS OF B'NAI BRITH CANADA

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PART I.

STATEMENT OF FACTS

1. The Intervener adopts and relies upon the submissions contained in paragraphs 2 to 11 of the Respondent's Factum.

PART II.

POINTS IN ISSUE

2. The intervenor accepts the recitation of the points in issue contained in paragraph 12 of the Respondent's factum.

PART III.

ARGUMENT

A. SECTION 2(B) OF THE CHARTER: "EXPRESSIVE" CONTENT

3. (With reference to paragraphs 15 to 21 of the Appellant's Factum). The Appellant Zundel contends that section 181 contravenes freedom of expression. He relies upon the decision of this Honourable Court in Irwin Toy Ltd. v. Quebec (Attorney General), contending that any activity which conveys or attempts to convey a meaning has expressive content and prima facie falls within the scope of section 2(b).

4. Section 2(b) of the Charter, on its face, does not simply protect freedom of expression but, rather, freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication. It is submitted that "expression" must be interpreted in the context of the preceding words "thought, belief, opinion". In this context, expression is a manifestation of one's thoughts, beliefs and opinions, in much the same way as religion is a manifestation of one's conscience (and reflected as such under s. 2(a) of the Charter).

5. It is therefore submitted that section 2(b) only protects expression which manifests one's thoughts, beliefs or opinions.

Any person who publishes statements which he knows to be false is conveying what he does not think, what he disbelieves and that which is not his true opinion.

6. It is submitted that this Honourable Court in Irwin Toy Ltd. v. Quebec (Attorney General) only ruled that activity which conveys or attempts to convey a meaning has expressive content in the context of protecting true expressions of the heart and mind, however unpopular.

> --Irwin Toy Ltd. v. Quebec (A.G.) [1989] 1 S.C.R. 927 at pp. 968-969.

7. It is submitted that the undeniably inclusive articulation of "expression" by this Honourable Court contemplates and presupposes expression as a genuine manifestation of one's heart and mind. The deceitful publication caught by section 181 of the Criminal Code no more attracts section 2(b) scrutiny than other Criminal Code or legislative provisions, grounded upon misrepresentations known by their originator to be false. These include:

Criminal Code	Offence
S. 131	Perjury - with intent to mislead, making a false statement under oath, knowing it to be false.
S. 138	Known falsehoods relating to Affidavits.
S. 300	Publication of a defamatory libel, known to be false.
S. 361 and 362(1)	Obtaining credit by a false pretence (ie. a representation of a matter of fact either present or past, that is known by the person who makes it to be false...)

	Knowingly making a false statement in writing with intent that it should be relied upon....
S. 364	Fraudulently obtaining food...by knowingly making a false statement....
S. 366-368	Forgery and uttering a forged document
S. 372	With intent to injure...conveying information known to be false.
S. 400	Making, circulating or publishing a prospectus, statement or account that is known to be false.

8. It is therefore submitted that the deliberate dissemination of falsehoods is not expression, within the meaning of section 2(b) of the Charter. This conclusion may be grounded upon varied analyses:

a) conduct which misrepresents its originator's heart and mind does not convey "meaning" for the purposes of section 2(b) (as contended by the Respondent at paragraphs 41 to 42 of its Factum);

b) conduct which misrepresents its originator's heart and mind is not "activity" as contemplated by this Court in Irwin Toy Ltd., supra, though it may be said to convey a meaning;

c) because this conduct is activity which conveys a meaning, it prima facie falls within the scope of section 2(b). However, this presumptive protection is displaced by a purposive interpretation of the Charter in general and the values served by section 2(b) in particular.

All of these approaches recognize that the deliberate dissemination of falsehoods serves no societal interest and positively undermines other societal values deserving of constitutional protection. The

Intervener submits that the approach advocated in subparagraph c) above is the most consonant with the previous judgments of this Honourable Court.

> --But cf. Reference re Criminal Code, Ss. 193 & 195(1)(c) (1990) 77 C.R. (3d) 1 per Lamer J. (as he then was) at pp. 48 - 52

B. SECTION 2(b) OF THE CHARTER: "FREEDOM"

9. It is submitted that the same conclusion may be appropriately derived from consideration of the meaning of "freedom". Section 2(b) of the Charter does not protect "expression" per se but, rather, the fundamental freedom designated as freedom of expression.

10. In R. v. Big M Drug Mart Ltd. [1985] 1 S.C.R. 295, Dickson C.J.C., delivering the judgment of this Honourable Court found that freedom of conscience and religion is a "fundamental" freedom under the Charter and further held, in part because:

> "The values that underlie our political and philosophic traditions demand that every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided inter alia only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own." (at p. 346)

11. It is submitted that these remarks, addressed to fundamental freedom of religion, are no less applicable to the fundamental freedom of expression. It is submitted that the said judgment underscores that, even if the deliberate dissemination of falsehoods could be said to be "expression", its regulation does not interfere with the disseminator's fundamental freedom to express, since (paraphrasing Big M Drug Mart) it does not prevent him from manifesting, through expression, whatever beliefs and opinions his conscience dictates and does not compel him to

manifest, through expression, beliefs or opinions his conscience rejects.

--R. v. Zundel (No. 1), Case on Appeal, page 177

--R. v. Kopyto (1987) 62 O.R. (2d) 449 (Ont. C.A.) per Cory J.A. (as he then was) at pp. 464 - 465

12. It is submitted that it would trivialize and undermine the values served by the Charter to conclude that s. 2(b) constitutionalizes a fundamental freedom to deceive, forge, knowingly libel, swear falsely, convey false alarms and, in relation to s. 181, publish knowing falsehoods.

C. SECTION 2(b): "UNPOPULAR IDEAS"

13. (With reference to paragraph 80 of the Appellant's Factum). The Appellant contends that, 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. In response, it is submitted that this Honourable Court has recognized the considerable abilities of a jury to receive and follow instructions and not be distracted by extraneous issues. Second, there is of course no onus upon the accused to discharge. Third, it is not without significance that the Appellant, who now pleads the inability of a jury to fairly assess the merits of this case, elected twice to be tried by a Court composed of a Judge and a jury and was acquitted on one count which he faced. Evidently, the jury was not swept away by the unpopularity of the Appellant's views such as to render a verdict based upon passion or prejudice. Most importantly, the comments of La Forest J. in Jones v. The Queen [1986] 2 S.C.R. 284 at page 295 underscore that the assertion of the fundamental freedom of conscience and religion imposes a duty upon the Court to evaluate the sincerity of the belief asserted, however unpopular or uncommon. These comments are equally apposite to the fundamental freedom of expression.

D. SECTION 2(b) OF THE CHARTER: "MARKETPLACE OF IDEAS"

14. (With reference to paragraphs 17, 29, 30, 32, 47, 55, 78 and 81 of the Appellant's Factum). The Appellant repeatedly contends, relying in large measure upon American jurisprudence, that falsehoods should not be prohibited but, rather, dealt with in "the marketplace of ideas". The Appellant's submission is framed in a variety of ways:

Paragraph 17: "However pernicious an idea may seem, we depend for its correction..on the competition of other ideas". (emphasis added by the Intervener)

Paragraph 32: Citing the dissent of Holmes J. in Abrams et al. v. U.S. 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...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..." (emphasis added by the Intervener)

Paragraph 47 In the context of section 1, the necessity to prohibit the communication of false views cannot be a pressing or substantial concern where there is opportunity in a free and democratic society to combat error or fallacious views with truths. (emphasis added by the Intervener)

Paragraph 55 It is irrational to suggest that majority opinion would be unable to rebut the opinions expressed in an obscure pamphlet. (emphasis added by the Intervener)

Paragraph 78 Citing the dissent of McLachlin J. in Keegstra, free and democratic society rests on the value of fostering a vibrant and creative society through the marketplace of ideas. New ideas need be tested in the arena of debate... (emphasis added by the Intervener)

Paragraph 81 — Citing Brandeis J. in Whitney v. California, "...it is hazardous to discourage thought, hope and imagination..if there be time to expose through the discussions, the falsehoods and fallacies..the remedy to be applied is more speech, not enforced silence". (emphasis added by the Intervener)

15. It is respectfully submitted that the Appellant's contention misconceives the distinction between deliberate and inadvertent falsehoods, which distinction underlines the jurisprudence relied upon.

16. The intentional lie is designed to mislead. Its author feels no constraint to even attempt accuracy. On the contrary, intentional lies may be crafted to appear accurate, well documented and verified. Often, a big lie is believed more than a small one. Human nature assumes that "a publisher would not print such daring accusations without some proof". Put another way, "brazenness begets its own credibility".

--Louis Nizer, "My Life in Court" c 1961 at p. 21

17. Against this background, it is submitted that intentional lies are not easily overcome, if at all, in the "marketplace of ideas". The marketplace remedy of "more speech" is met by new and enlarged intentional lies. In this sense, the exchange is grossly unequal. It is analogous to a contest between two litigants, one of whom answers opposing judicial precedents by manufacturing his own.

18. Apart from the inadequacy of the marketplace to overcome intentional lies, these lies debilitate their victim, in no less significant a way than hate promotion demoralizes its victims and negatively impacts upon the victims' own rights and freedoms.

19. It is submitted that the jurisprudence cited by the Appellant does not extend constitutional protection to intentional lies. The

passages cited in paragraph 17 above demonstrate that the unregulated "marketplace of ideas" is a remedy for falsehoods where pernicious ideas compete with other ideas, where the market determines the power of the thought to be accepted, where loathsome opinions are expressed, where error or fallacious views are communicated, where new ideas are tested in the arena of debate and where more speech prevents discouragement of thought, hope and imagination. The intentional lie is not an idea, opinion, error, view, thought or aspect of hope and imagination. Its originator's ideas, opinions, views, thoughts, hopes and imagination are concealed and misrepresented.

20. It is significant that Holmes J., whose dissent in Abrams et al. v. U.S. is relied upon by the appellant, finds that the views of the defendants were "honestly held".

--Abrams et al. v. U.S. 250 U.S. 616 (1919) at p. 22

21. It is equally significant that Brandeis J. in Whitney v. California 47 S.C. Reporter 641 (1927), again cited by the Appellant, speaks at page 648 of the view the American founding fathers that "the freedom to think as you will and speak as you think" as "indispensable to the discovery and spread of political truth".

22. By its verdict, the jury found (paraphrasing Holmes J.) that Zundel did not avow a creed of ignorance and immaturity, honestly held. By its verdict, the jury found (paraphrasing Brandeis J.) that Zundel did not speak as he thought. Section 181 required no less.

23. In R. v. Keegstra, Dickson C.J.C., speaking for a majority of the Court, refused to follow the line of argument that incursions placed upon free expression are only justified where there is a clear and present danger of imminent breach of peace. He departed from the view, reasonably prevalent in America at

present, that the suppression of hate propaganda is incompatible with the guarantee of free expression. However, as noted by Dickson C.J.C., the trend reflected in the American jurisprudence is 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. It is submitted that the departure from the American jurisprudence in favour of limited suppression of expression reinforces the view that, at the very least, intentional lies in Canada merit the same treatment as they are accorded in America.

--R. v. Keegstra (1990) S.C.C. 21118 per Dickson, C.J.C. at pp.33-36

24. It is further submitted that the analysis of the philosophical underpinnings of free expression in Canadian society undertaken by McLachlin J., in dissent, in Keegstra furthers the view that section 2(b) of the Charter does not extend constitutional protection to intentional lies. By way of example:

(1) "Many assert that free expression is an end in itself, a value essential to the sort of society we wish to preserve. This view holds that freedom of expression "derives from the widely accepted premise of Western thought that the proper end of man is the realization of his character and potentialities as a human being." It follows from this premise that all persons have the right to form their own beliefs and opinions, and to express them. (at pp.11-12) (emphasis added)

(2) "...freedom of expression guarantees the right to loose one's ideas on the world.." (at p. 46)

(3) "The right to fully and openly express one's views on social and political issues is fundamental to our democracy and hence to all the other rights and freedoms guaranteed by the Charter. (at p. 69) (emphasis added)

25. It is also significant that the Alberta Court of Appeal [per Kerans J.A., Stevenson (as he then was) and Irving JJ.A. concurring] concluded in R. v. Keegstra that knowingly false expression was not covered by s. 2(b) of the Charter. The basis of

the Court's judgment was that s. 319(2) extended beyond knowingly false communications, covering all falsehoods, including those innocently and negligently made. That Court regarded the relevant question under s. 2(b) of the Charter to be whether falsehoods unknowing made were protected by the Charter. Kerans J.A. decided in the affirmative, stating that "section 2(b) should be understood as protecting both innocent error and imprudent speech".

--R. v. Keegstra, supra per Dickson C.J.C. at p. 10)

E. "PURPORTED IMMUNITY OF HISTORY FROM JUDICIAL SCRUTINY"

26. (With reference to paragraphs 33, 43, 48, 89 to 100 of the Appellant's Factum). The Appellant repeatedly contends that history is uncertain and its interpretations are varied, non-static and debatable; hence, historical controversies cannot be the subject of criminal law.

27. Section 181 of the Criminal Code requires proof beyond a reasonable doubt that the accused wilfully publishes assertions of fact which are false to the knowledge of the person who publishes them and which cause or are likely to cause injury or mischief to a public interest.

28. By its verdict, the jury found the Appellant Zundel to be a fraud; holocaust denial to be a deceit. The fortune teller who defrauds his victims by pretending to read the future surely cannot plead that the uncertain status of the future immunizes his conduct. Similarly, the fraud who practices his deceit by pretending to advance a historical thesis cannot immunize his conduct from judicial scrutiny by pleading the uncertainties of history.

29. The Appellant Zundel has, in this instance, chosen history as a vehicle for his obscene deceit. Intentional lies masquerade as "historical controversy" "a different account of the past" "a historical debate". Intentional lies could as easily be cloaked as

scientific or medical or sociological facts. (In fact, the Appellant also appealed to pseudo-scientific facts). The determination as to whether or not intentional lies enjoy constitutional protection is not predicated upon the particular discipline used as a pretext for those lies.

30. In any event, an assessment of historical facts, in the context of truth, is a function which can be performed by our Courts. History records past events. Our Courts necessarily concern themselves with the proof of past events. Rules of evidence, grounded in necessity and reliability, enable triers of fact to deal fairly with less contemporaneous events. Competing land claims, roots of title, treaty obligations, and war crimes impose a duty upon courts to consider and evaluate evidence of historical events. Section 181 may, in the circumstances of some cases, compel an examination of historical facts. This no more renders it unconstitutional or unworkable than examination of "a representation of a matter of fact either present or past" renders the offence of false pretences unconstitutional or unworkable. Similarly, section 319 of the Criminal Code was not rendered unconstitutional merely because, in some circumstances, a consideration of hate promotion compels an examination of historical facts, in the context of truth or a reasonable belief in truth.

31. It is further submitted that, in evaluating whether deliberate falsehoods which cause or are likely to cause injury or mischief to a public interest are deserving of constitutional protection, it is of assistance to this Honourable Court to be cognizant of the use of deliberate falsehoods to delegitimize vulnerable communities in general and the Jewish community in particular.

32. The publication "Did six million really die?" falsely asserts as a fact, inter alia, that the holocaust is an imaginary slaughter

and not the result of official Nazi policy; that the holocaust is a hoax or a fraud, invented by Jews after World War II to enable Israel and Jews to collect huge reparation payments from Germany.

33. Holocaust denial is but the latest in a series of deliberate lies which portray Jews as master conspirators who pretend to be victims for machiavellian reasons. Those lies, often officially sanctioned, have persisted for almost two millennia.

34. In the second to fourth centuries, Jews were falsely portrayed as habitual murderers and destroyers, people possessed by an evil spirit, potential progenitors and followers of the Anti-christ. At the time of the first Crusade, Jews were depicted as children of the devil and agents employed by Satan for the express purpose of combating Christianity and harming Christians. In 1096, the corpse of a Christian that had been buried for a month was dug up by either a Crusader or a citizen in Worms, Germany. The Jews were accused of murdering the individual, boiling the corpse and throwing the resulting concoction into various wells to poison the water supply. This led to rioting and the death of 800 Jews.

Cohn, N., Warrant for Genocide: The Myth of the Jewish World Conspiracy and the Protocols of the Elders of Zion (1981) Scholars Press, pp. 21 - 23

Parkes, J., The Jew in the Medieval Community (1976) Hermon Press, pp. 69-70.

35. The myths and prevarications that surrounded Jews in the middle ages tended to exclude them from the Christian society they inhabited. Jews were made into a people apart, dangerous enemies wholly without legal rights. Jews were restricted to the most sordid trades and frequently exposed to imprisonment, expulsion and mob rule. In the twelfth century, Jews became subject to the allegation that they ritually slaughtered Christian children for religious purposes. Talk began of a secret Jewish government which employed black sorcery in an underground war against Christians.

Cohn, N., Warrant for Genocide. pp.22 - 23

36. The first accusation in continental Europe of the Jewish ritual slaughter of a Christian child took place in Blois, France in 1171. The Jews of Blois were alleged to have crucified a Christian child during Passover and thrown the corpse into the Loire. Thirty one Jewish men and women were burnt alive as a result of this calumny. This incident follows a similar claim of the ritual slaughter of a child in Norwich, England in 1144. Accusations of devil worship, usury and defilement of sacred Christian objects was the justification for Philip Augustus' expulsion of all Jews from France in 1182.

Marcus, J.R., The Jew in the Medieval World A Source Book: 315-1791, (1981) Atheneum, pp. 24 - 27, 121 - 130

37. In the years 1348 - 1349 Europe was devastated by the plague known as the Black Death, leading to twenty five million deaths. By the fall of 1348, rumours began to spread that these deaths were due to an international Jewish conspiracy to poison Christians. This allegation led to a series of arrests, tortures, forced confessions, and false accusations. Ultimately thousands of Jews in at least 200 towns and hamlets were murdered. The resulting loss of numbers and wealth, combined with growing Christian enmity caused a catastrophic decline in the German Jewish community. German Jews would not play an important role in German life for over 200 years.

Marcus, J.R. The Jew in the Medieval World, pp. 43 - 48

38. In more modern times, anti-Jewish demonology began to concentrate on the lie of the Jewish world conspiracy. Beginning in the late eighteenth century, a series of fabrications and forgeries on this theme were published culminating in the infamous forgery entitled the Protocols of the Elders of Zion. The Protocols purport to be lectures or notes for lectures in which a

member of the secret Jewish government, the Elders of Zion, expounds on a plot to achieve world domination. They were first published in Russia, in 1903, and may have been forged by a member of the Czar's secret police. They were disseminated in an attempt to blame Jews for the ills of the Czarist regime. The Protocols and other anti-Jewish libels continued to be published in Russia throughout the Russian civil war, when over 100,000 Jews were slaughtered in race riots called pogroms.

Cohn, N., Warrant for Genocide, pp. 60 -65, 77 - 83, 128
Weinmann and Winn, Hate on Trial: The Zundel Affair, the Media, and Public Opinion in Canada (1986) Mosaic, p.21

39. Millions of copies of the Protocols were circulated throughout the world and relied upon by Nazi and fascist sympathizers. The first German edition of the Protocols were published in 1920 and quickly became a best seller. From their very first days, the Nazis exploited the Protocols and the myth of Jewish world supremacy to justify their terror and genocide. In Mein Kampf, Adolph Hitler spoke of the Protocols as a tool to vanquish the Jews, stating:

> "...once this book becomes familiar to a people, the Jewish menace can be regarded as already vanquished."

40. When the Nazi party gained power in Germany, the Protocols were presented as a basic textbook for German schools.

Cohn, N., Warrant for Genocide, p. 25, 194

Mein Kampf, 11th ed. Munich, 1942, p. 337, quoted in Cohn, p. 182

41. In Warrant for Genocide, historian Norman Cohn argues that the Protocols were instrumental in legitimizing the Holocaust. He feels that the fanaticism of those who were ideologically inclined to assist in the perpetuation of the Holocost was inspired by the Protocols. Further, in reviewing the work of the French antisemitic

mischief to the public interest, particularly as regards racial and social tolerance, is not deserving of constitutional protection and its suppression remains a pressing and substantial objective.

F. OPINION v. FACT

44. (With reference to paragraphs 23, 33, 34, 38 to 40, 48, 64 to 66 of the Appellant's Factum). The Appellant further contends that history is largely, if not exclusively, opinion. In any event, he contends that opinion and fact are so indistinguishable so as to make section 181 unconstitutionally vague. This contention also is said to fuel the Appellant,s position that section 181 is not a reasonable limit upon freedom of expression.

45. It is conceded that the distinction between "opinion" and "fact" is not always free from doubt. Nonetheless, the distinction is one which can meaningfully be made by our system of justice. The laws of libel and slander and the defence of "fair comment" are grounded in this distinction. The logical implication of the Appellant's contention is that the entire edifice of common law pertaining to libel and slander and the defence of "fair comment" has always been unmanageable. Surely, experience has shown that this is not so. More to the point, the burden rests upon the prosecution to establish beyond a reasonable doubt that the accused published a statement of fact, rather than an opinion. Any doubt in this regard is resolved in favour of the accused. In the result, only conduct which incontrovertibly can be characterized as a statement of fact will form the basis of criminal liability. Any conduct which cannot be so clearly characterized must be disregarded by the trier of fact. Further, the Court is obliged in law to remove from the jury's consideration any conduct which is incapable, in law, of characterization as a statement of fact.

46. For the reasons earlier noted, the distinction between "fact" and "opinion" is not altered by a historical context. On the contrary, if the Appellant is correct in his assertion that the

distinction is more difficult to make in a historical context, a more difficult onus would thereby be placed upon the prosecution to demonstrate that the conduct complained of has been proven beyond a reasonable doubt to be a statement of fact, rather than opinion.

47. (With reference to paragraphs 38 to 40 of the Appellant's factum.) The Appellant further contends that it is significant that the categorization of the opinion in American jurisprudence is made by the trial Judge, as a matter of law, and not by the jury. Assuming this to be so, the delineation of the relative functions of Judge and jury has absolutely no constitutional significance. The American and Canadian experiences are widely divergent in this regard. For example, this Honourable Court rejected the American model as to the co-conspirator's exception to the hearsay rule, wherein the trial Judge, not the jury, determines whether the preconditions exist to admit co-conspirators' statements in furtherance of a conspiracy against the accused.

48. (With reference to paragraph 37 of the Appellant's Factum). The Appellant contends in a related argument that history must be opinion since its proof, in this case, was accomplished by means of opinion evidence. This contention confuses method of proof with the matter to be proven. Insanity is not an opinion because its proof is accomplished through opinion evidence. The identity of an accused as the perpetrator is not opinion because its method of proof is accomplished through opinion evidence as to the source of bloodstains or fingerprints.

G. AVAILABILITY OF SECTION 319 OF THE CODE

49. (With reference to paragraphs 27, 42, 46 and 51 of the Appellant's Factum). The Appellant contends that section 181 is outdated and furthers no pressing and substantial objective, because section 319 is valid legislation which regulates the same field. It is contended that resort to section 181 avoids the statutory defences and protections of sections 319. Finally, the

Appellant contends that section 181 has only been used four times this century, demonstrating the absence of pressing and substantial concerns.

50. The Respondent has correctly submitted that "overlapping" statutory provisions do not, per se, render such provisions constitutionally invalid. The Intervener further submits that section 181 appropriately extends to conduct which is not captured by section 319 of the Criminal Code. For example, it is submitted that the wilful publication of statements of fact, known to be false, which are directed against women, the handicapped or the homosexual community are deserving of criminal sanction but remain unprotected under section 319 of the Criminal Code.[1] It is further submitted that section 319 confers no additional protection upon an accused than that conferred by section 181. On the contrary, unlike s. 319, an accused under section 181 is not criminally liable where a reasonable doubt exists as to whether or not the statements communicated were true. An accused under section 181 is not criminally liable where a reasonable doubt exists as to whether or not the accused believed his assertions of fact to be true. Further, an accused under section 181 is not criminally liable even where his belief is not based upon reasonable grounds. A reasonable doubt on any of these issues compels acquittal in the context of section 181 of the Criminal Code. Further, apart from the burden of proof, each of the s. 319(3) defences requires proof of "good faith", truth, or belief, on reasonable grounds, that the

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[1] In this sense, s. 181 is broader than s. 319 of the Code. Its extension beyond the definition of "identifiable group" defined in s. 318(4) of the Code does not render "injury or mischief to a public interest" vague or overbroad bearing in mind that they are only used in relation to a statement known by the accused to be false. Put another way, the definition of "identifiable group" in s. 318(4) does not exhaust the undeniable public interest in "racial and social tolerance". It is significant that the Cohen Committee urged a more inclusive definition of "identifiable group" in its report.

communicated statements were true. Accordingly, they could have no application to an accused who knowingly lies.

51. It is true that section 181 has been used infrequently. It is submitted that the number of individuals who wilfully publish statements, likely to injure the public interest, knowing them to be false bears little or no relationship to the pressing and substantial character of the concerns which underpin the legislation. Such an argument would conclude that the more successful legislation is in deterring conduct, the less justifiable the legislation becomes. In any event, the persistence of the wilful publication of known falsehoods in present day Canada underlines the continuing concerns addressed by the legislation. As well, it is submitted that the legislation not only serves to promote an important public interest (such as the interest in racial and social tolerance) but creates a normative standard of conduct in Canadian society.

> See Maxwell Cohen, "The Hate Propaganda Amendments: Reflections on a Controversy" [1970] Alta. L.R. 103 at pp. 109, 112 and 113

H. LEGITIMIZING FALSEHOODS

52. It has been contended that the prosecution of the Appellant may serve to legitimize his conduct and promote his cause. In the context of section 1 of the Charter it is contended that section 181 may not provide an effective way of curbing the intentional liar. In R. v. Keegstra, McLachlin J. noted the controversy surrounding the application of section 181 to the Appellant's conduct and cited his claim that his court battle had given him "a million dollars worth of publicity". Nonetheless, it is submitted that the comments of Dickson, C.J.C. at p.p. 70-72 in Keegstra lead to the conclusion that the severe public reprobation that arises out of the prosecution of individuals such as the appellant more than outweighs the free publicity afforded to such an individual.

--R. v. Keegstra, supra per McLachlin J. at pp. 73-74 and Dickson C.J.C. at pp. 71-72

53. In fact, the evidence available suggests that the Appellant,s first trial did not promote holocaust denial as feared but, rather, engendered more sympathy towards the targeted community, especially among those who were aware of the trial. These findings are summarized in Weinmann and Winn, "Hate on trial: The Zundel Affair, The Media, and Public Opinion in Canada" at p. 80.

It is noteworthy that the Appellant Zundel did not testify in his own defence at his second trial. One can only infer that his concerns as to criminal liability outweighed the purported desirability of another million dollars of free publicity.

PART IV: NATURE OF ORDER SOUGHT

54. The Intervener, League for Human Rights B'nai Brith Canada adopts the position of the Respondent.

All of which is respectfully submitted.

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MARK J. SANDLER

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Counsel for the Intervener

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STATUTES

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

PERJURY—Idem—Application.

131. (1) Subject to subsection (3), every one commits perjury who, with intent to mislead, makes before a person who is authorized by law to permit it to be made before him a false statement under oath or solemn affirmation, by affidavit, solemn declaration or deposition or orally, knowing that the statement is false.

(2) Subsection (1) applies whether or not a statement referred to in that subsection is made in a judicial proceeding.

(3) Subsection (1) does not apply to a statement referred to in that subsection that is made by a person who is not specially permitted, authorized or required by law to make that statement. R.S., c. C-34, s. 120; R.S.C. 1985, c. 27 (1st Supp.), s. 17.

OFFENCES RELATING TO AFFIDAVITS.

138. Every one who

(a) signs a writing that purports to be an affidavit or statutory declaration and to have been sworn or declared before him when the writing was not so sworn or declared or when he knows that he has no authority to administer the oath or declaration,

(b) uses or offers for use any writing purporting to be an affidavit or statutory declaration that he knows was not sworn or declared, as the case may be, by the affiant or declarant or before a person authorized in that behalf, or

(c) signs as affiant or declarant a writing that purports to be an affidavit or statutory declaration and to have been sworn or declared by him, as the case may be, when the writing was not so sworn or declared,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years. R.S., c. C-34, s. 126.

PUNISHMENT OF LIBEL KNOWN TO BE FALSE.

300. Every one who publishes a defamatory libel that he knows is false is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years. R.S., c. C-34, s. 264.

FALSE PRETENCE—Exaggeration—Question of fact.

361. (1) A false pretence is a representation of a matter of fact either present or past, made by words or otherwise, that is known by the person

who makes it to be false and that is made with a fraudulent intent to induce the person to whom it is made to act on it.

(2) Exaggerated commendation or depreciation of the quality of anything is not a false pretence unless it is carried to such an extent that it amounts to a fraudulent misrepresentation of fact.

(3) For the purposes of subsection (2) it is a question of fact whether commendation or depreciation amounts to a fraudulent misrepresentation of fact. R.S., c. C-34, s. 319.

FALSE PRETENCE OR FALSE STATEMENT—Punishment—Idem—Presumption from cheque issued without funds—Definition of "cheque".

362. (1) Every one commits an offence who

(a) by a false pretence, whether directly or through the medium of a contract obtained by a false pretence, obtains anything in respect of which the offence of theft may be committed or causes it to be delivered to another person;

(b) obtains credit by a false pretence or by fraud;

(c) knowingly makes or causes to be made, directly or indirectly, a false statement in writing with intent that it should be relied on, with respect to the financial condition or means or ability to pay of himself or any person, firm or corporation that he is interested in or that he acts for, for the purpose of procuring, in any form whatever, whether for his benefit or the benefit of that person, firm or corporation,

(i) the delivery of personal property,

(ii) the payment of money,

(iii) the making of a loan,

(iv) the grant or extension of credit,

(v) the discount of an account receivable, or

(vi) the making, accepting, discounting or endorsing of a bill of exchange, cheque, draft, or promissory note; or

(d) knowing that a false statement in writing has been made with respect to the financial condition or means or ability to pay of himself or another person, firm or corporation that he is interested in or that he acts for, procures on the faith of that statement, whether for his benefit or for the benefit of that person, firm or corporation, anything mentioned in subparagraphs (*c*)(i) to (vi).

FRAUDULENTLY OBTAINING FOOD AND LODGING—Presumption—Definition of "cheque".

364. (1) Every one who fraudulently obtains food, lodging or other accommodation at a hotel or an inn or at a lodging, boarding or eating house is guilty of an offence punishable on summary conviction.

(2) In proceedings under this section, evidence that an accused obtained food, lodging or other accommodation at a hotel or an inn or at a lodging, boarding or eating house, and did not pay for it and

(a) made a false or fictitious show or pretence of having baggage,

(b) had any false or pretended baggage,

(c) surreptitiously removed or attempted to remove his baggage or any material part of it,

(d) absconded or surreptitiously left the premises,

(e) knowingly made a false statement to obtain credit or time for payment, or

(f) offered a worthless cheque, draft or security in payment for his food, lodging or other accommodation,

is, in the absence of any evidence to the contrary, proof of fraud.

(3) In this section, "cheque" includes, in addition to its ordinary meaning, a bill of exchange drawn on any institution that makes it a business practice to honour bills of exchange or any particular kind thereof drawn on it by depositors. R.S., c. C-34, s. 322.

FORGERY—Making false document—When forgery complete—Forgery complete though document incomplete.

366. (1) Every one commits forgery who makes a false document, knowing it to be false, with intent

(a) that it should in any way be used or acted on as genuine, to the prejudice of any one whether within Canada or not; or

(b) that a person should be induced, by the belief that it is genuine, to do or to refrain from doing anything, whether within Canada or not.

(2) Making a false document includes

(a) altering a genuine document in any material part;

(b) making a material addition to a genuine document or adding to it a false date, attestation, seal or other thing that is material; or

(c) making a material alteration in a genuine document by erasure, obliteration, removal or in any other way.

(3) Forgery is complete as soon as a document is made with the knowledge and intent referred to in subsection (1), notwithstanding that the person who makes it does not intend that any particular person should use or act on it as genuine or be induced, by the belief that it is genuine, to do or refrain from doing anything.

(4) Forgery is complete notwithstanding that the false document is incomplete or does not purport to be a document that is binding in law, if it is such as to indicate that it was intended to be acted on as genuine. R.S., c. C-34, s. 324.

PUNISHMENT FOR FORGERY—Corroboration.

367. (1) Every one who commits forgery is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

(2) No person shall be convicted of an offence under this section on the evidence of only one witness unless the evidence of that witness is corroborated in a material particular by evidence that implicates the accused. R.S., c. C-34, s. 325.

UTTERING FORGED DOCUMENT—Wherever forged.

368. (1) Every one who, knowing that a document is forged,

(a) uses, deals with or acts on it, or

(b) causes or attempts to cause any person to use, deal with, or act on it,

as if the document were genuine, is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

(2) For the purposes of proceedings under this section, the place where a document was forged is not material. R.S., c. C-34, s. 326.

TELEGRAM, ETC., IN FALSE NAME.

371. Every one who, with intent to defraud, causes or procures a telegram, cablegram or radio message to be sent or delivered as being sent by the authority of another person, knowing that it is not sent by his authority and with intent that the message should be acted on as being sent by his authority, is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years. R.S., c. C-34, s. 329.

FALSE MESSAGES—Indecent telephone calls—Harassing telephone calls.

372. (1) Every one who, with intent to injure or alarm any person, conveys or causes or procures to be conveyed by letter, telegram, telephone, cable, radio, or otherwise information that he knows is false is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

(2) Every one who, with intent to alarm or annoy any person, makes any indecent telephone call to that person is guilty of an offence punishable on summary conviction.

(3) Every one who, without lawful excuse and with intent to harass any person, makes or causes to be made repeated telephone calls to that person is guilty of an offence punishable on summary conviction. R.S., c. C-34, s. 330.

FALSE PROSPECTUS, ETC.—Definition of "company".

400. (1) Every one who makes, circulates or publishes a prospectus, a statement or an account, whether written or oral, that he knows is false in a material particular, with intent

(a) to induce persons, whether ascertained or not, to become shareholders or partners in a company,

(b) to deceive or defraud the members, shareholders or creditors, whether ascertained or not, of a company,

(c) to induce any person to entrust or advance anything to a company, or

(d) to enter into any security for the benefit of a company,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

(2) In this section, "company" means a syndicate, body corporate or company, whether existing or proposed to be created. R.S., c. C-34, s. 358.