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

RESPONDENT'S FACTUM

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RESPONDENT'S FACTUM

PART I

THE FACTS

1. This is an appeal launched by the Appellant from the decision of the Ontario Court of Appeal dismissing his appeal to that court from a conviction recorded by a court composed of His Honour Judge Thomas and a jury on May 11, 1988 on an indictment which charged that he:

> "in or about the year 1981 at the Municipality of Metropolitan Toronto in the Judicial District of York did publish a statement or tale, namely, "Did Six Million Really Die?" that he knows is false and that is likely to cause mischief to the public interest in social and racial tolerance, contrary to the Criminal Code".

Case on Appeal, pg. 237, l 20-25

2. The statement or tale alleged to be false in this case was a 30-page pamphlet entitled, "Did Six Million Really Die?". It purported to be written by Richard Harwood who was described as "a writer and specialist in political and diplomatic aspects of the Second World War. At present, he is with the University of London".

The evidence showed however that the author was, in fact, a person named Richard Verral. There was also evidence that indicated he was a member of the National Front movement in England. On the front cover, the pamphlet was inscribed, "Historical Fact No. 1". The phrase, "Truth At Last Exposed" was contained at the bottom of the cover.

Case on Appeal, pg. 88 l 1-10
pg. 125
pg. 238, l 10-20

3. The jury was instructed that in the context of this charge the Crown had to prove beyond a reasonable doubt:

1. that the Appellant wilfully published the pamphlet;
2. that the pamphlet was, in essence, a false statement of fact not an opinion;
3. that it was false to the knowledge of the Appellant at the time he published it; and,
4. that it was likely to cause mischief to the public interest in social and racial tolerance.

Case on Appeal,
Charge to Jury, pg. 29, l 30-111 l 30

Position of the Crown

4. It was the Crown's position at trial that "Did Six Million Really Die?" contained numerous false statements of fact and when considered as a whole the pamphlet falsely asserted as a fact that less than 300,000 Jews died in the custody of the Nazi regime during World War II; that the Holocaust was an imaginary slaughter and not the result of official Nazi policy; and that the Holocaust is a hoax or a fraud, invented by the Jews after World War II to enable Israel and Jews to collect huge reparation payments from Germany. The pamphlet was thus a big lie constructed on a number of little lies. It was the Crown's position that the pamphlet was published by the Appellant after it was decided at the 1979 Conference of the Institute for Historical Review, an organization with which a number of the defence witnesses were associated, to launch a campaign against the Holocaust. As an extremely well read student of World War II history, the Appellant knew the pamphlet was false when he published it. However, the Appellant is an admirer of Adolf Hitler and his racial theories. He wanted to rehabilitate National Socialism and promote animosity towards Jews by misleading the public into believing that Jews have dishonestly used the

Holocaust to fraudulently obtain financial compensation and to secure political advantage for the State of Israel.

Case on Appeal,
Charge to Jury, pg. 34, l 8-38 l 33
pg. 62, l 20-34
pg. 67, l 13-92 l 20
pg. 100, l 30-106 l 12

Position of the Defence at Trial

5. The position of the defence at trial was that the pamphlet "Did Six Million Really Die?" did not amount to a statement of fact but, rather, merely expressed an opinion. In the alternative, the defence asserted that the pamphlet was, in essence, true. In the further alternative, the defence's position was that the Appellant honestly believed the pamphlet to be true. It should be noted, however, that in his second trial, the Appellant chose not to testify. Defence counsel also took the position that the Crown had not proved that the pamphlet was likely to cause mischief to the public interest in social and racial tolerance. The jury's verdict can only be taken as a rejection beyond a reasonable doubt of the various defence positions advanced in the case at bar and a finding that the elements of the offence were made out.

Case on Appeal,
Charge to Jury, pg. 38, l 38-108 l 12

6. The only issue before this Honourable Court is the constitutional validity of the section itself. The admissibility of the Crown's evidence, the reasonableness of the verdict and the adequacy of the instructions given in this particular case are no longer issues in these proceedings. The constitutional questions to be addressed on the within appeal are set out in the Points in Issue section of this factum.

Case on Appeal, pp. 9, 12

7. The Appellant has made reference in his factum, in paragraphs 9-11, to some features of the case at trial. The following paragraphs are an effort to clarify certain matters in light of the comments of the Appellant.

8. It is true that there was no direct evidence that the pamphlet in question was ever received by anyone. There was evidence, however, that could support a finding it had been distributed by the Appellant. The pamphlet itself which Zündel admitted to Sgt. Luby having signed indicated it had been distributed to Attorneys General, members of

Parliament and the Legislature, all media representatives, clergymen and 8,000 Canadians in all walks of life. It should be noted that the trial judge re-charged the jury indicating that they had to be satisfied that the Appellant had made the pamphlet generally accessible or available to the public.

Case on Appeal, pg. 31, l 1- 34, l 5
pg. 114, l 20-115 l 23
pg. 155

9. Evidence was led by the Crown or elicited through defence witnesses going to prove a large number of statements in the pamphlet, used in an effort to support the central assertion, were false and misleading. The trial judge did not review in his charge these individual areas of falsity. A few examples, nonetheless, can be seen when the evidence reviewed in the charge is read with the pamphlet. One example reflected in the charge to the jury is the reference at page 30 of the pamphlet which alleged that:

> "In 1955 another neutral Swiss source 'Die Tat' of Zurich (January 19, 1955) in a survey of all Second World War casualties based on figures of the International Red Cross, put the loss of victims of persecutions because of politics, race or religion who died in prisons or concentration camps between 1939 and 1945 at 300,000 not all of whom were Jews and this figure seems the most accurate assessment."

The evidence showed that the International Committee of the Red Cross never created any such statistics. In addition, when the article in 'Die Tat' was examined it, in fact, referred to 300,000 persons dying in Germany as opposed to all Second World War casualties including those dying in the death camps outside of Germany.

A further example can be found in the quotes taken from the report of the Red Cross. The pamphlet takes quotes from this report and thereby suggests to the reader that a reliable source concluded that the conditions in all camps were good and there was no evidence of a planned extermination in any of the camps in Europe. In fact, the evidence indicated that the Red Cross delegates were not in the extermination camps and the Red Cross report was only describing conditions in certain camps.

A further example can be found when the pamphlet states:

> "In general what reliable statistics there are, especially those relating to emigration are sufficient to show that not a fraction of six million Jews could have been

exterminated".

Professor Browning in his evidence referred to three sets of contemporary German-prepared statistics which supported his evidence that between 5 and 6 million Jews died as a result of Nazi policy.

In addition, the pamphlet referred to an article indicating that Evangelical Bishop Dibelieus had denounced a Gerstein memorandum as "untrustworthy". Reference to the article however indicated the opposite was true, the Bishop in fact suggesting that Gerstein was "trustworthy".

A further example can be found when the pamphlet states:

> "It should be emphasized straightaway that there is not a single document in existence which proves that the Germans intended to or carried out the deliberate murder of Jews".

Professor Browning and Dr. Hilberg referred in their evidence to what they indicated were a number of such documents. These included the Hans Frank Diary, Himmler's Posen Speech, the Einsatzgruppen Reports, and Himmler's Report to Hitler in December of 1942 which indicated 363,211 Jews had been executed in four months in South Russia, the Ukraine and Bialystok. The report also showed that during that time, the S.S. had 174 casualties.

A further example can be found in the statement:

> "The Soviet charge that the Action Groups had wantonly exterminated a million Jews during their operations has been shown subsequently to be a massive falsification. In fact, there had never been the slightest statistical basis for the figure".

Dr. Browning referred to the reports prepared by the Einsatzgruppen which provide a statistical basis for the figure one million.

In addition, by way of further example the pamphlet endeavoured to attribute a statistic of 896,892 Jews killed to Raul Hilberg; Dr. Hilberg testified, however, he never gave any such statistic.

Case on Appeal, pg. 34, l 30-35 l 10
pg. 61, l 20 - l 31
pg. 69, l 1-71 l 13
pg. 72, l 7-76 l 5
pg. 78, l 9 - l 13
pg. 131, 133, 134, 154
pg. 203, l 20 - l 30
pg. 242, l 18-245 l 7

10. A synopsis of some of the evidence of Hilberg and Browning is contained at pp. 67-80 of the Case on Appeal. Their evidence indicated that, indeed, between 5 and 6 million Jews were killed as a matter of policy by the Nazi Regime during World War II.

Case on Appeal, pg. 67, l 1 - 80 l 30

11. The Crown does not accept as accurate that Browning's evidence was "history is opinion" as suggested by the Appellant.

Appellant's factum, paragraph 89

PART II

POINTS IN ISSUE

12. The points in issue are stated in the constitutional questions which read as follows:

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

2. If so, is section 181 (formerly section 177) of the Criminal Code of Canada a reasonable limited justified in a free and democratic society as required by section 1 of the Canadian Charter of Rights and Freedoms?

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

4. If so, is section 181 (formerly section 177) of the Criminal Code of Canada 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?

PART III

ARGUMENT

A) THE ELEMENTS OF SECTION 181

i) Wilful Publication

13. Under section 181 of the Code the publication of the statement must be wilful. Consequently, a heightened mens rea requirement is created. Negligence or recklessness is not sufficient. Vicarious liability is not available under section 181. The jury, in the case at bar, was instructed that "publication" means to make the document in question generally accessible or available to the public. Such an act would have to be done wilfully.

Regina v. Zündel (No. 1) (1987), 56 C.R. 1 at 17 (Ont.C.A.)

The Queen v. Keegstra [1990], 3 S.C.R. 697 at 772-5(S.C.C.)

ii) Statement, Tale or News

14. Publication of a statement, tale or news covers assertions as to both present and past occurrences. However, to be caught by the section, the statement must be false. Assertions of simple opinion cannot accurately be characterized as false. Thus, the Court of Appeal held that the false statement must be one of fact to be caught by the section.

Regina v. Zündel (No. 1), supra, pp. 18, 63

iii) Knows to be False

15. Section 181 makes it clear that to be guilty of this offence the Crown must prove beyond a reasonable doubt that the statement is false, to the knowledge of the accused at the time he publishes it. As the Court of Appeal for Ontario points out, to affirmatively know that something is false is more than an absence of an honest belief in its truth. The accused must know of the untruth of what he is conveying to others as true.

Regina v. Zündel (No. 1), supra, pg. 62-3

English Law Reform Commission Working Paper 84, pp. 130-131

Glanville Williams, Criminal Law, The General Part 2nd. ed., (1961), pg. 62

iv) Causes or is Likely to Cause Injury or Mischief to a Public Interest

16. In this case the Crown relied on the "is likely to cause injury or mischief" branch of section 181 and particularized "social and racial tolerance" as being the public interest likely to be injured.

17. The requirement that a statement or tale be of a nature that it is "likely to cause injury or mischief to a public interest", in effect, ensures that the publication in question objectively poses a significant danger of damage or harm to important social interests.

Black's Law Dictionary, 6th ed., "Injury"

Kirk v. Trerise et al. (1979), 14 B.C.L.R. 310 at 314 (B.C.C.A.)

Regina v. Kirby (1970), 1 C.C.C. (2d) 286 at 289 (Que.C.A.)

18. The term "public interest" is a concept known to our legal system. It is used as a legal tool to define rights and obligations in a variety of contexts. Indeed, it is a notion bound up in any analysis of limitations and the rights protected by the Charter itself. It appears in other places in the Criminal Code as well as in civil litigation. It is a term which the courts have been able to interpret.

Baia v. Baia et al. [1970], 3 O.R. 165 at 168-172 (Ont.S.C.)

Re Town of Summerside and Maritime Electric Co. [1983], 1 D.L.R. (4th) 551 at 554-555 (P.E.I.S.C.)

Re A.C.S. (1969), 7 C.R.N.S. 42 at 54-5 (Ont.S.C.)

Regina v. Sanchez-Pino (1973), 11 C.C.C. (2d) 52 at 59 (Ont.C.A.)

Powers v. The Queen (1973), 20 C.R.N.S. 23 at 36 (Ont.C.A.)

Criminal Code sections 308, 309, 311, 319(3)(c), 515(10)(b), 736(1)

19. It is respectfully submitted that, here, the phrase "a public interest" takes its meaning through a consideration of the context in which it appears. The constitutional principles underlying the scope of our criminal law, the historical background of this offence,

as well as other factors, inform us as to the meaning of the term as employed in section 181.

(a) The Constitutional Context

20. It is submitted that this Honourable Court has recognized certain matters as being the public purposes which underlie the criminal law as a matter of constitutional principle. Rand J., of this Honourable Court, indicated that public peace, order, security, health and morality are the ordinary ends served by the criminal law.

> Reference as to the Validity of section 5(a) of the Dairy Industry Act [1949] S.C.R. 1 at 50 (S.C.C.)

21. It is submitted that when one examines the history of the common law's efforts to control statements which were injurious or threatened important interests through the criminal law, one can conclude that much of this effort was directed toward preserving various features of what Rand J., identified as the core public purposes underlying the criminal law.

(b) Historical Background

22. The roots of the criminal law's efforts to control speech which threatened important interests can be traced back to the 1200s and very early attempts to control certain types of statements that it was felt could breed "occasion for social discord". In 1275, as part of the original Statute of Westminster, one of England's first Parliaments enacted the offence of De Scandalis Magnatum. The statute provided:

> ...that from henceforth none be so hardy to tell or publish any false views or tales, whereby discord, or occasion of discord, or slander, may grow between the King and his people or the great men of the realm (emphasis added).
>
> 3 Edw. I, c.34; See also 2 Ric. 2, St. 1, C.5; 12 Ric. 2, c.11.
>
> R. v. Keegstra, supra., at 722 (per Dickson C.J.C.).
>
> W. Holdsworth, III A History of English Law, 5th ed., (1942) at 409.

23. These early statutes were not simply concerned with protecting the reputation of the great and the powerful from unfounded attacks. These statutes reflected an overriding concern that such attacks posed a significant threat to the peace and harmony of the community. These offences were originally enforced by the King's Council, and were

not taken over by the common law courts until the 17th century. Individual reputations, whether belonging to the great and powerful or to ordinary citizens, were protected through private remedies, first by the ecclesiastical courts and later by the common law courts.

> W. Holdsworth III A History of English Law, supra., at 409
>
> Law Reform Commission Working Paper on Criminal Libel No. 84, pp. 10-16

24. It is submitted that the De Scandalis Magnatum statutes contributed to the development of various species of criminal libel as well as other bases of criminal liability for statements that injured the community. Underlying all these offences, it is submitted, was the concern that a peaceful, secure, and harmonious community be maintained. As Hawkins put it in his Pleas of the Crown, infra, in discussing defamatory libel:

> "...the Court will not grant this extraordinary remedy by information, nor should a grand jury find an indictment, unless the offence be of such single enormity that it may reasonably be construed to have a tendency to disturb the peace and harmony of the community".

Blackstone in discussing criminal libel generally put it this way:

> But, in a criminal prosecution, the tendency which all libels have to create animosities and to disturb the public peace is the sole consideration of the law".
>
> Hawkins' Pleas of the Crown 8th ed., Vol. 1, (London: Sweet, Phenex, Maxwell, Stevens and Sons, 1824)
>
> Commentaries on the Laws of England, W. Blackstone, Vol. 4, pp. 149-153
>
> Law Reform Commission Working Paper on Criminal Libel 84, pp. 10-16
>
> Starkie's Treatise on the Law of Libel and Slander (3d), H.C. Folkard (1869), pp. 578-9
>
> Kenny's Outline of the Criminal Law J.W.C. Turner 19th ed., (1966) pp. 231-238

25. It should be observed that the tendency to create animosity or to disturb the peace and harmony of the community were not actual elements of the offence; rather they

were simple touchstones which could signal a level of gravity calling for the intervention of the criminal law.

Gleaves v. Deakin [1980], A.C. 457 at 487, 491, 495 (H. of L.)

Regina v. Wicks (1936), 25 Cr.App.R. 168 at 172-3 (Eng.C.A.)

26. Through the law of criminal libel (i.e. defamatory, seditious, blasphemous and obscene libel) this general public interest was protected by prohibiting statements injurious to individuals or the state. The common law however took the view that defamatory libel was not available unless the statement could, in effect, "descend to particulars and individuals".

The King v. Alme & Nutt (1699), 91 All E.R. 790, 1224 (K.B.)

Ex parte Genest v. Regina, (1933), 71 S.C. 5 (Que.S.C.)

27. There were, however, instances of statements which came before the common law courts that threatened the maintenance of a peaceful, secure, and harmonious community but which were not covered by the traditional notions of criminal libel. These cases often involved threats posed to the interests of various groups or sectors of the public. The common law courts struggled to determine the legal basis upon which these interests would be protected. Sometimes the courts afforded a remedy by expanding the notion of criminal libel, sometimes they considered the conduct as a public mischief, and sometimes it was tied to the notion of spreading false news. In spite of this doctrinal uncertainty, the common law courts remained committed to protecting public interests related to the maintenance of a peaceful, secure, and harmonious community when jeopardized by potentially injurious speech in this context.

King v. Osborne (1732), 94 E.R. 406, 425 (K.B.)
36 E.R. 717
25 E.R. 584

Gathercole's Case (1838), 168 E.R. 1140 (K.B.)

The King v. Jenour (1740), 87 E.R. 1318 (K.B.)

Russell on Crime J.W. Turner, 12th ed., Stevens & Sons, Vol. 2, pp. 1394-739

Starkie's Treatise on the Law of Libel and Slander, supra, H.C. Folkard, pp. 578-9, 654-5, 660-1

Rex v. De Berenger (1814), 105 E.R. 536 (K.B.)

Rex v. Scott 5 New Newdigate Cal. 284, cited in F.R. Scott, Publishing False News (1952), 30 Can.Bar R. 37 at 41

28. It is submitted that this doctrinally more amorphous branch of the common law was what Stephen was, in part, trying to capture when he drafted Article 95 of his Digest in the following terms:

> Every one commits a misdemeanour who cites or publishes any false news or tales whereby discord or occasion of discord or slander may grow between the Queen and her people or the great men of the realm (or which may produce other mischiefs).

This article inspired the original drafting of what today is section 181.

29. A review of the legislative history of the precursor of section 181 shows that the concern of De Scandalis Magnatum for great men was dropped and any private aspect to the notion of mischief which had appeared in the early drafts was later eliminated. The section thus read as follows when enacted in 1892:

> Every one is guilty of an indictable offence and liable to one year's imprisonment who wilfully and knowingly publishes any false news or tales whereby injury or mischief is or is likely to be occasioned to any public interest.

Martin's Criminal Code, J.W. Martin, Cartwright & Sons Ltd., Toronto (1955) pp. 297-9

30. In 1953-4, the Code was amended and some minor changes to the section were made. The section at that time read as follows:

> 166. Everyone 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 is liable to imprisonment for two years.

The section was, at this time, moved from the sedition section of the Code and placed in the nuisance section. This charge came closely on the heels of Rex v. Carrier, infra, and it

had, it is submitted, the effect of legislatively reversing that decision. This made it clear that a public interest as used in that section was not synonymous with sedition. That offence required no proof of known falsity and had been held not to extend to conduct that did no more than possess a tendency to generate ill-will or hostility amongst segments of the community.

Martin's Criminal Code (1955), pp. 297-299

Rex v. Carrier (1951), 104 C.C.C. 75 at 78-85 (Que.K.B.)

31. Some commentators indicate that the phrase "a public interest" draws meaning from the fact that the Code defines a common nuisance as an act which interferes with the lives, safety, health, property or comfort of the public and the commonly shared rights of all citizens. It is submitted that these interests can be seen as illustrations of a more fundamental concern with the maintenance of a peaceful, secure, and harmonious community.

Mewett and Manning, Criminal Law, 2nd. ed., Butterworths, Toronto, pp. 509-10

32. In light of the roots of this provision and its legislative history one can conclude that the term, " a public interest", within the meaning of section 181, is limited to those matters which are important to the maintenance of a peaceful, secure, and harmonious community.

33. Furthermore, in light of the evolution of the section it may also be concluded that the term, "a public interest", within the meaning of section 181, relates in particular to the interests of a group or sector of society. Moreover, the cases indicate that inconvenience to a few individuals is not enough. It is submitted that the matter must rise to the level of seriousness that it is a concern to the community, as a whole, although only part of the community may be directly affected.

Regina v. Kirby, supra., at 289

Russell on Crime, J.W. Turner, supra., pg. 1387

34. The preservation of social and racial tolerance is a matter that is important to the maintenance of a peaceful, secure, and harmonious community. It is directly related to the interests of groups within our community. In fact, it is a public interest sufficiently important to be reflected in a number of provisions of our constitution itself. It clearly qualifies as a public interest within the meaning of section 181.

Charter of Rights and Freedoms, ss. 15, 27

F. R. Scott, Publishing False News (1952), 30 C.B.R. 37, 47

B) THE CONSTITUTIONAL QUESTIONS

I) **Is section 181 (formerly 177) contrary to fundamental freedom of thought opinion and expression including freedom of the press and other media communication set out in section 2(b) of the Canadian Charter of Rights and Freedoms?**

It is the position of the Respondent that, as held by the Court of Appeal for Ontario, section 181 of the Criminal Code does not infringe section 2(b) of the Canadian Charter of Rights and Freedoms.

Does the Activity Come Within the Scope of the Guarantee?

35. The first step in this inquiry is to determine whether the activity in question is expressive and, thus, comes within the ambit of the guarantee. This Court has indicated that activity is expressive if it conveys or attempts to convey a meaning, however unpopular, distasteful or contrary to the mainstream. Activity which satisfies this requirement prima facie falls within the scope of the guarantee.

Irwin Toy Ltd. v. Quebec [1989], 1 S.C.R. 927 (S.C.C.)

(i) **The Notion of "Expressive Activity" and "Meaning" Under Section 2(b)**

36. As this Honourable Court has consistently pointed out, the proper approach to the definition of the rights and freedoms guaranteed by the Charter is a purposive one (i.e. they are to be understood in light of the interests they are meant to protect). In seeking to ascertain the purpose of the right or freedom in question, reference should be made to the character and larger objects of the Charter itself and to the historical origins of the concepts enshrined by it. As Dickson, C.J.C. cautioned in Regina v. Big M Drug Mart Ltd., it is also important to remember that the Charter "was not enacted in a vacuum" and, accordingly, should be viewed in its "proper linguistic, philosophic and historical contexts".

Hunter v. Southam Inc. [1984], 2 S.C.R. 145 (S.C.C.)

Regina v. Big M. Drug Mart Ltd. [1985], 1 S.C.R. 295 (S.C.C.)

Regina v. Oakes [1986], 1 S.C.R. 103 (S.C.C.)

Ford v. Quebec (Att. Gen.) [1988], 2 S.C.R. 712 (S.C.C.)

37. In a number of recent cases, this Court, in keeping with its purposive approach to Charter interpretation, has commented upon the values which inform the freedom of expression. In Keegstra v. The Queen, infra., Dickson, C.J.C. indicated expression was deserving of protection if "it serves individual and societal values in a free and democratic society." To date, when the Court has come to discuss these values in more concrete terms, the following matters have been recognized:

(1) Seeking and attaining the truth is an inherently good activity. Freedom of expression protects an open exchange of views and ideas, thereby creating a competitive marketplace of ideas which will enhance the search for truth;

(2) Participation in social and political decision-making is to be fostered and encouraged. Freedom of expression is essential to intelligent and democratic self-government; and

(3) The diversity in forms of individual self-fulfilment and human flourishing ought to be cultivated in an essentially tolerant environment for the sake of both those who convey a meaning and those to whom it is conveyed. Expression is valued for its own sake as an aspect of individual autonomy and is protected because it is essential to personal growth and self-realization.

Ford v. Quebec, supra.

Irwin Toy Ltd. v. Quebec, supra.

Regina v. Keegstra [1990], 3 S.C.R. 697

Regina v. Andrews [1990], 3 S.C.R. 870

Edmonton Journal v. Alberta (Att.Gen.) [1989], 2 S.C.R. 1326 (S.C.C.)

R.W.D.S.U. v. Dolphin Delivery Ltd. [1986], 2 S.C.R. 573 (S.C.C.)

Devine v. Quebec (Attorney General) [1988], 2 S.C.R. 790 (S.C.C.)

Rocket v. Royal College of Dental Surgeons of Ontario [1990], 2 S.C.R. 232 (S.C.C.)

38. It is respectfully submitted that an assessment of whether or not a particular

activity is "expressive" so as to warrant constitutional protection, must be made in light of the values and principles underlying that freedom. Expressive activity which conveys or attempts to convey a meaning is constitutionally protected; but the terms "expressive activity" and "meaning", as they relate to s.2(b), are not without a context or definitional limits.

39. It is submitted that this Court's adoption of a "broad inclusive approach to the protected sphere of free expression", in Irwin Toy, does not reflect an abandonment of a purposive approach to the rights and freedoms guaranteed in the Charter. It is submitted that a generous interpretation of the scope of s.2(b) means that expressive activities which are but marginally connected to its underlying principles will, nonetheless, be protected, subject only to their justifiable limitation under s.1. It does not mean, however, that those underlying principles are completely irrelevant to a pre-section one determination of whether or not the freedom is engaged by the activity in question.

Ford v. Quebec, supra., at pp.765-6

(ii) Does s.181 Proscribe Expressive Activity?

40. Central to the guarantee of free expression is the notion that an individual should be free to act in accordance with her conscience and beliefs. Indeed, the freedom of individual conscience is at the core of what are described as the "fundamental freedoms" contained in section 2 of the Charter. In Regina v. Big M Drug Mart Ltd., Dickson, C.J.C. commented upon the primacy of this value in the following manner:

> ... It is because of the centrality of the rights associated with freedom of individual conscience both to basic beliefs about human worth and dignity and to a free and democratic political system that American jurisprudence has emphasized the primacy or "firstness" of the First Amendment. It is this same centrality that in my view underlies their designation in the Canadian Charter of Rights and Freedoms as "fundamental". They are the sine qua non of the political tradition underlying the Charter.
>
> Viewed in this context, the purpose of freedom of conscience and religion becomes clear. 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 ...

These sentiments were echoed in Irwin Toy, in the context of freedom of expression, when the Court stated:

> Freedom of expression was entrenched in our Constitution and is guaranteed in the Quebec Charter so as to ensure that everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream.
>
> Regina v. Big M Drug Mart Ltd., supra.
>
> Irwin Toy Ltd. v. Quebec, supra.
>
> Jones v. The Queen [1986], 2 S.C.R. 284, at 295 (S.C.C.)
>
> Regina v. Andrews (1988), 43 C.C.C. (3d) 193 (Ont.C.A.), per Cory, J.A. at p.210

41. It is respectfully submitted that the value attached to individual expressions of thought, opinion, conscience and belief is premised on the sincerity of those expressions. It is the benefit to individuals, derived of their ability to openly and honestly express their thoughts and opinions, which the freedom seeks to protect. To that end, the guarantee embraces all conduct that is a sincere effort to express one's thoughts or opinions, regardless of the meaning being conveyed. It is submitted, however, that conduct which does not express but, rather, misrepresents the speaker's heart and mind is not meaningful for the purposes of 2(b).

42. It is, therefore, respectfully submitted that since a statement known to be false is not truly reflective of an individual's conscience, it can not be said to be an expression of his heart and mind and cannot be said to be meaningful in the requisite sense. As such, it is submitted that the activity proscribed by s.181 is not expressive activity, within the contemplation of s.2(b). This conclusion is supported by a consideration of how the deliberate falsehood relates to the values underlying s.2(b).

(iii) The Relationship Between Deliberate Lying and s.2(b) Values

43. It is submitted that deliberate lying, which involves a complete absence of sincerity, fails to contribute to the process of self-realization and fulfilment that is contemplated by s.2(b). The known lie is conceptually polarized from the true expression of the heart and mind. Rather than promoting the dignity of the individual, it can actually be seen as cheapening the individual's worth.

44. It is respectfully submitted that the activity proscribed under s.181 does not even minimally further the values underlying s.2(b) and, in fact, undermines those values.

45. False statements, far from contributing to the ability of others to make free and informed decisions, distract from that ability, impede the democratic process, and pose as obstacles to the ascertainment of truth. Notably, this effect remains constant, regardless of whether or not the statement is known by the declarant to be false. However, it is submitted that where the declarant honestly but mistakenly believes in the truth of her statement, her conduct is entitled to the benefit of constitutional protection even though it undermines certain 2(b) values. In such an instance, some of the values underlying s.2(b) are still being served in that the individual's sincere expression contributes to her quest for self-fulfilment. Without the freedom to express that which she honestly believes to be true, an individual's participation in public discourse would be inhibited. It should be observed that known falsehoods are not considered as protected speech in the United States.

New York Times v. Sullivan 84 S.Ct. 710 (1964) (U.S.S.C.)

Gertz v. Robert Welch Inc. 94 S.Ct. 2997 (1974) (U.S.S.C.)

Garrison v. Louisiana 85 S.Ct. 209 (1964) (U.S.S.C.)

46. Those who would pollute the marketplace of ideas with deliberate lies, rather than furthering the process of democracy, strike at its heart by deliberately placing material which is misleading before citizens, affecting their democratic choices. The persuasive impact of information put forth as a statement of fact is extremely strong. A statement of "fact" purports to be objectively true. As a result, it is submitted that recipients of such information are hindered in their ability to make informed decisions and form meaningful opinions. Accordingly, their ability to contribute to social and political decision making is seriously compromised. It is further submitted that statements which are established to be false are of no value in the quest for truth. Although false statements might be overcome in the search for truth, this possibility is not tantamount to a contribution to that endeavour.

Schauer, F., Free Speech: A Philosophical Inquiry (1982: New York), pp. 15-33, 167-177

"Group Vilification Reconsidered", 89 Yale Law Journal 309 (1979)

47. It is therefore, respectfully submitted that the nature of the known falsehood is such that it does not in any manner further section 2(b) values. In fact, it is destructive of those values. The Court of Appeal thus correctly observed in this case:

> 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. In our opinion, an offence falling within the ambit of s.177 lies within the permissibly regulated area which is not constitutionally protected.
>
> Regina v. Zündel (No. 1), supra.
>
> Authorities referred to in paras. 45 & 46, above

48. It is submitted that this realization confirms the first branch of the analysis herein presented, that to be expressive and to have meaning in the requisite sense, the statement must be a sincere reflection of the individual's conscience; not a misrepresentation of it.

(iv) The Significance of "Form" Under Section 2(b)

49. Alternatively, it is submitted that the deliberate lie ought to be seen as a form of expression which is not constitutionally protected by s.2(b).

50. While restrictions tied to content violate section 2(b), the guarantee does not protect all forms or acts of expression that may be used to convey a meaning. This Court has commented that:

> [t]he content of expression is conveyed through an infinite variety of forms including the written or spoken word, the arts and physical gestures or acts. While the guarantee of free expression protects all content, all forms are not, however, similarly protected.
>
> Reference Re: ss.193 & 195.1(1)(c) of the Criminal Code [1990], 1 S.C.R. 1123

(v) Deliberate Lying as a Form of Activity

51. Although known falsehoods are not expressions of the heart or mind, they may nevertheless be uttered in an effort to convince others of their truth for motives personal

to the speaker. It might be contended in this situation that this desire to deceive for personal motives is an expression of the heart or mind and is, therefore, meaningful.

52. For example, known falsehoods about the Holocaust may be told because the speaker wants to injure the reputation of Jews or because the speaker has a desire to resurrect the racial policies of National Socialism. If the motive for telling a lie is viewed as its meaning for constitutional purposes, then the meaning of known falsehoods about the Holocaust could be said to reflect an animosity for Jews, or admiration for the Nazi regime and its racial policies. From that point of view, a lie could be treated as a form of expression by means of which one's desires are surreptitiously accomplished.

53. It is submitted, however, that while such a motive may be a product of the heart or mind, it is one that is deliberately not expressed. The false statement of fact that is actually being expressed does not represent the heart or mind. It is submitted, therefore, that if knowingly false statements of fact are used in this way, as devices to communicate messages without expressing them openly, then they ought, if treated as expression at all, to be treated as an unprotected form of expression.

54. This Court has not exhaustively delineated precisely when and on what basis a form of expression chosen to convey a meaning falls outside the sphere of the guarantee. It has been suggested that violence, as a form of expression, is constitutionally impermissible. In Keegstra, Dickson, C.J.C. commented upon this exception, as follows:

> ... Stated at its highest, an exception 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.

55. It is respectfully submitted that deliberate lying is akin to violence as a form of expression in that its "extreme repugnance to free expression values" arises from its significantly damaging effect upon the freedoms and rights of other individuals. The concept of "freedom" in a free and democratic society contemplates not just the interests of the individual, but the freedoms and interests of all members of society. This Court has held that the freedom of an individual to express herself in a violent form is circumscribed by the rights of others to have their physical integrity and security protected and maintained. Violence subverts the act of communication and turns it into the imposition of ideas by force: a totalitarian action that is incompatible with the very idea of free expression in a democratic society.

56. Similarly, it is submitted that the use of known falsehoods as a form in which to convey an unstated or surreptitious message is equally antithetical to freedom of expression values. Deliberate lying, as a form of expression has an extremely deleterious effect upon the interest of others in enjoying the freedom afforded to them by s.2(b). Deliberate liars disguise from their audience the real message they intend to convey. Subterfuge enables speakers to influence thought through indoctrination, without opportunity for consideration, reflection, or debate -- all central aspects of free expression in a democratic society. The effect of false statements of fact is to frustrate the efforts of those exposed to them in their quests for self-fulfilment, in their desire to arrive upon the truth and in their ability to contribute to social decision making. It is submitted that it is no more consistent with freedom of expression to influence the minds of others through stealth than it is to do so through force.

Committee for the Commonwealth of Canada v. Canada, [1991], 77 D.L.R. (4th) 385 (S.C.C.)

Regina v. Keegstra, supra.

Regina v. Jones, supra.

D.F.B. Tucker, The Law, Liberalism and Free Speech, (New Jersey: Rowman and Allenheld, 1985), pp.34-37

57. Because known falsehoods contradict the principles on which freedom of expression is founded, it is submitted that they should receive no protection under s.2(b) of the Charter. To deny protection to this mode of expression would impose no real costs on freedom of expression. Speakers who openly expressed their honesty held sentiments would be functioning within a constitutionally protected sphere (subject to section one) no matter how repugnant those sentiments might be.

(iv) "Freedom" of Expression

58. Finally, in the further alternative, it is submitted that quite apart from considerations as to content and form, a limitation on the activity of deliberate lying is justified under s.2(b) on the basis of its deleterious effect upon the free expression interests of others.

59. It is submitted that s.2(b) does not protect the bare notion of "expression" but, rather, affords constitutional protection to the freedom to express. Inherent to the concept

of "freedom" in a free and democratic society is regard for the interests of all members of society as well as individual interests. Section 2(b) cannot be interpreted so as to consider exclusively the interests of the person wishing to express himself. As was stated by this Court in Irwin Toy:

> Such protection is, in the words of both the Canadian and Quebec Charters, "fundamental" because in a free, pluralistic and democratic society, we prize a diversity of ideas and opinions for their inherent value both to the community and to the individual. [emphasis added]

Consequently, it is submitted that it is appropriate to consider, within the context of s.2(b), the impact of an individual's activity on the free expression interests of others.

> Committee for the Commonwealth of Canada v. Canada, supra.
>
> Irwin Toy, supra.

60. It is submitted that if the activity of deliberate lying serves the free expression interests of the individual at all, it does so but minimally. On the other hand, as previously submitted, its effect on the free expression interests of others is very negative. It is submitted that this negative effect far outweighs any benefit to the individual and, in an overall sense, the relationship of deliberate lying to the values that s.2(b) seeks to protect is a highly discordant one. It is further submitted that this balancing of 2(b) values and interests within the context of s.2(b) itself is distinct from justifying a limitation on the basis of a pressing government objective under s.1.

Is the purpose or effect of the government action to restrict freedom of expression?

61. If this Honourable Court is of the view that the activity in question does fall within the protected sphere of conduct, then the next step of the analysis involves consideration of whether the purpose or effect of the impugned legislation was to control attempts to convey meaning through the proscribed activity.

62. At this point in the analysis, it will already have been found that the activity of knowingly disseminating falsehoods is expressive activity which attempts to convey a meaning, so as to bring it within the ambit of s.2(b). It is respectfully submitted that, in light of that finding, it is not disputed that at least part of the government's purpose under s.181 is to limit that expressive activity in circumstances where it gives rise to a particular harmful consequence. Therefore, should it be found that the activity in issue falls within the

scope of the guarantee, then the Respondent concedes that it would be necessary to proceed to section 1 of the Charter.

II. If section 181 (formerly 177) is contrary to the guarantee of freedom of expression contained in 2(b) is it a reasonable limit justified in a free and democratic society?

i) Introduction

63. This Honourable Court in Regina v. Oakes indicated that under section one, two balancing criteria must be satisfied. First, the objective must be sufficiently important to override a constitutionally protected right or freedom. Second, the means chosen to achieve the objective must be reasonable and justified. This is said to involve a form of proportionality test.

Regina v. Oakes, supra., at pg. 139 (S.C.C.)

64. In subsequent cases, this Honourable Court has highlighted the need to avoid a rigid approach to section one. A contextual approach is to be preferred wherein the Court can truly weigh the actual competing interests in the case. As Wilson J., stated in Edmonton Journal v. A.G. Alberta, infra:

> "The contextual approach attempts to bring into sharp relief the aspect of the right or freedom which is truly at stake in the case as well as the relevant aspects of any values in competition with it. It is my view that a right or freedom may have different meanings in different contexts...It seems entirely probable that the value to be attached to it for the purpose of balancing under section one and may also be different".

This court has subsequently adopted this approach under section one. As Dickson C.J.C., said in Reference Re Section 193 and 195.1(1)(c) of the Criminal Code:

> When a Charter freedom has been infringed by state action that takes the form of criminalization, the Crown bears the heavy burden of justifying that infringement. Yet, the expressive activity, as with any infringed Charter right, should also be analyzed in the particular context of the case. Here, the activity to which the impugned legislation is directed is expression with an economic purpose. It can hardly be said that communications regarding an economic transaction of sex for money lie at, or even near, the core of the guarantee of freedom of expression.

Edmonton Journal v. A.G. Alberta, supra., at 1355-6

Regina v. Keegstra, supra., per Dickson C.J.C., pp. 734-738, 759-767, per McLachlin J., pp. 844-848 (S.C.C.)

Reference Re section 193 and 195.1(1)(c) of the Criminal Code, supra., at 1136

Rocket v. Royal College of Dental Surgeons of Ontario, supra., at 246-249

Schwartz v. The Queen, [1988] 2 S.C.R. 443 at 486-493

Chaulk and Morrissette v. The Queen, [1990] 3 S.C.R. 1303 at 1342-3

65. It is respectfully submitted that the context of this case involves the publication of deliberate lies. Assuming the court finds that this activity falls within the scope of the freedom of expression as contained in section 2(b), such "expression" is not at the core of the values underlying section 2(b). This realization significantly informs the section one analysis. As indicated earlier, deliberately lying does nothing to further the growth of the individual, the pursuit of the truth, or the democratic process.

Edmonton Journal v. A.G. Alberta, supra.

Regina v. Keegstra, supra., pp. 763-767

Regina v. Zündel, supra., pp. 28-29

Objective

66. It is submitted that Parliament's objective in enacting section 181 was to protect matters that rose to a level of a public interest from being jeopardized by false speech. In aiming at this object, Parliament was of necessity balancing the interests of those wishing to express themselves against the interests of those who were most directly affected or threatened by the expression in question. Parliament reflected its concern for free expression values in a number of ways in section 181, primarily by limiting the immediate object of that section to the deliberate spreading of falsehoods known by the publisher to be false. It is submitted that the protection of matters significant enough to be features of the public interest is an important enough concern to warrant overriding any constitutionally protected right that exists for knowingly false speech.

67. It is submitted that there is a basis to conclude that the publication of

falsehoods can be injurious to or pose significant danger to important public interests. Indeed, the majority of this Honourable Court in Keegstra, supra., recognized that we should not overplay the view that rationality will overcome the impact of all falsehoods in the unregulated marketplace of ideas:

Regina v. Keegstra, supra., pp. 747, 759-763

Report to the Minister of Justice of the Special Committee on Hate Propaganda (1966), in particular pp. 8, 26-32, 59-67

68. It is submitted that there are contexts in which "more speech" is unlikely to avoid harm to matters of public interest. This is just such a case. The average reader would not have the knowledge to be aware of the manner in which the pamphlet twists and fabricates its sources. The seeds of prejudice can be difficult to overcome once sown. History has taught us that these seeds can blossom fully into hate and violence under the right conditions. Moreover, publications like the one in the case at bar tend to reduce the target group's ability to respond through more speech. This is particularly true when they are labelled "fraudsmen".

Regina v. Keegstra, supra., pp. 720-5, 738-754

K. Lasson, Racial Defamation As Free Speech Abusing the First Amendment, Columbia Human Rights Law Review, Vol. 17, pg. 11 at 39-55

Democracy and Defamation Control of Group Libel, D. Reisman (1942), Col. L.R. 727-731

Democracy and Defamation Fair Game and Fair Comment, D. Reisman (1942), Col. L.R. 1085 at 1088-1097

Mari Matsuda, Public Response to Racist Speech: Considering the Victim's Story (1989), Mich. L.R. 2321 at 2334-2348

Group Vilification Re-Considered (1979), Yale Law Journal, 308 at 309-314

Freedom of Speech and Racism, David Kretzner (1987), 8 Cardozo Law Review, pp. 445, 455-467

69. It is submitted, for the reasons advanced at the outset of the factum, that the

term "a public interest" as used in section 181 is limited to matters which are important to the maintenance of a peaceful, secure, and harmonious community. The notion of a public interest is tied in particular to the interests of groups or sectors of the community. Such interests are of significant public importance. They are analogous to some of the items expressly recognized as sufficiently important to limit freedom of expression under certain international instruments which provide guarantees in relation to freedom of expression. For example, the European Convention for the Protection of Human Rights recognizes that freedom of expression can be limited for the purpose of public safety as well as to preserve the rights and reputations of others:

> European Convention for the Protection of Human Rights, Articles 10(1), 10(2)
>
> X v. The Federal Republic of Germany (Application No. 9235/81), (1982), 29 E.H.R.R., 194
>
> Felderer v. Sweden (1984), 8 E.H.R.R. 91
>
> Glimmerveen v. Netherlands (1979), 4 E.H.R.R. 260
>
> Convention on the Elimination of all Forms of Racial Discrimination 1970), Can.T.S., No. 28, Article 4
>
> Regina v. Keegstra, supra., 749-754

70. It is submitted that section 181 is aimed at more than the preservation of group reputation, however, even when used in that context it can fill a useful supplemental role to section 319. Section 181 of the Code goes some distance to prevent the ground work for the hate-mongers from being laid through the wilful publication of known falsehoods which promote social and racial intolerance.

> Regina v. Keegstra, supra., pp. 745-749
>
> Equality Now, Report of the Special Committee on Visible Minorities, March 1984, pp. 1-6, 65-74

71. It is therefore submitted that the protection of areas of the public interest which are important to the maintenance of a peaceful, secure, and harmonious community against the wilful publication of falsehoods is a matter of sufficient importance to override a constitutionally protected right.

ii) Rational Connection

72. It is submitted that the prohibition through the criminal law of the wilful publication of material known by the author to be false and which either is causally linked to harm to a public interest or which can be said to be likely to cause such harm is rationally connected to the objective of preventing false speech that endangers such interests.

Canada (Canadian Human Rights Commission) v. Taylor [1990], 3 S.C.R. 892 at 925 (S.C.C.)

Keegstra v. The Queen, supra., pp. 767-771

Vaillancourt v. The Queen, [1987], 2 S.C.R. 636 at pg. 659-60 (S.C.C.)

iii) Minimal Intrusion

73. In considering whether or not this legislation is minimally intrusive, it must be recalled that we are dealing with a form of speech which does little or nothing to further the values of the freedom of expression. In fact, it is submitted that the dissemination of known falsehood undermines those values. In addition, Parliament, in enacting section 181 was attempting to balance the interests of those wishing to express themselves against the rights and interests of those members of the public most directly affected by the expression in question.

74. It is respectfully submitted that, given Parliament's objective, this legislation is minimally intrusive. In light of the elements of the offence created, it is well-tailored to achieve the identified objective .

75. The section does not purport to prohibit the expression of any idea or simple opinion, although they may pose a serious threat to a public interest. It only captures statements of fact which the Crown can prove to be false beyond a reasonable doubt. In cases in which the Crown cannot discharge this burden the public interest is left unprotected. It does not capture all false statements of fact but only those false to the knowledge of the accused. It does not capture all statements of fact false to the knowledge of the accused but only such statements as the accused deliberately chooses to make generally available to the public. It does not capture all statements of fact false to the knowledge of the accused which cause injury or pose a threat of injury. Injury even serious injury to an individual through falsehood is irrelevant under section 181. The possibility of

some injury to even a public interest equally falls outside the scope of the section as the section requires the harm to such an interest to rise to the level of likelihood or to, in fact, occur.

76. It is submitted that each one of the various ways in which the scope of section 181 is narrowed are concessions to the value Parliament places on the rights of those who wish to express themselves, and at each stage, the interest of members of the public who may be injured or threatened by such expression is compromised.

Keegstra v. The Queen, supra., pp. 771-786

Chaulk and Morrissette v. The Queen, supra.

Free Speech A Philosophical Inquiry, supra., F. Schauer, pg. 170

77. It is argued that the distinction drawn between opinion and fact renders the section unduly intrusive. These matters are conceptually distinct and Canadians distinguish between them as a matter of common sense. To the extent that any further legal definition of these matters is appropriate it should be observed that they are terms which the courts have been able to give meaning to so as to provide a standard in other contexts. Indeed, our law of defamation contains a similar issue and the American courts have also spoken on the distinction between fact and opinion in a constitutional context.

Burnett v. C.B.C. No. 1 (1988), 48 N.S.R. (2d) 1 at pp. 6-7, 19-23 (N.S.S.C.)

Vander Zalm v. Times Publishers (1980), 18 B.C.L.R. 210 at 213 (B.C.C.A.)

Gatley On Libel and Slander 8th ed. (1981), pp. 290-299

F. R. Scott Publishing False News, supra., pg. 44

Mikovich v. Lorain Journal Co. 110 S.Ct. 2695 (1990), (U.S.S.C.)

Benjamin v. Cowles Publishing Co. 684 P. (2d) 739 at 743 (1984), (Wash.C.A.)

Janklow v. Newsweek Inc. 788 Fed. 1300 at 1302-3 (1986), (U.S.C.A. 8th circ.)

78. It is submitted that it should also be observed that in cases in which there is no basis to view the document in question as asserting false fact, a motion for a directed verdict could be left open to the accused. Furthermore, the constitutionality of legislation ought not to be tested on the basis that judges or juries will ignore their duty to try the case in accordance with oaths according to the evidence and law.

Keegstra v. The Queen, supra., pg. 782-3

79. It is submitted that the use of the standard "a public interest" does not make the legislation unduly intrusive in the context of this expression (i.e. deliberate lies) which furthers free expression values in such a limited fashion. The term "a public interest" is amenable to judicial interpretation and creates a standard for the reasons advanced at the outset of the factum. Given that the offender must know the statement to be false and must choose to publish it and given the guidelines available to aid in the understanding of a public interest, persons expressing themselves have a reasonable basis upon which to govern their activity.

80. Furthermore, again protection is available through the judiciary in preventing prosecution in relation to matters that do not in law amount to a public interest within the meaning of the section. A motion to quash an indictment which did not allege a public interest within the meaning of section 181 would be available.

Proportionality

81. In light of the fact that this expression does so little to further the values underlying freedom of expression and in light of the significance of interests that are important to the maintenance of a peaceful, secure, and harmonious community, the deleterious effects on freedom of expression do not outweigh the importance of section 181.

II. Section 7

Is section 181 (formerly section 177) of the Criminal Code contrary to section 7 of the Charter of Rights as being a vague and uncertain limit on freedom of expression?

82. It is submitted that it is difficult to see how this question arises if section 181 survives scrutiny under section 2(b) and/or section 1 in relation to the first two constitutional questions stated. Assuming the court is prepared to treat the question as raising a facial vagueness challenge to section 181 the Respondent's submissions are set out below.

Reference Re Criminal Code section 193 and 195.1(1)(c), supra.

A. Introduction

83. Section 181 does not permit, as the Appellant submits, the prosecution of "anyone in the publication industry who dares to publish anything controversial". This provision instead merely captures those persons who publish material which has been proven beyond a reasonable doubt to be false to the knowledge of the accused and which causes or which is objectively likely to cause injury or mischief to a public interest within the meaning of section 181.

B. Principles of "The Doctrine of Void for Vagueness"

84. This Honourable Court has recently recognized that a law which is "impermissibly" vague offends principles of fundamental justice. The doctrine concerns the conceptual content of the elements of the offence. The "vagueness" of the law in this sense, however, is not tested by reference to the words of statute alone. Rather the test for vagueness, in the constitutional sense, is to be applied to the provisions in question in light of judicial interpretation. Absolute certainty of interpretation is a standard no law can meet. The fact that a term may be open to various interpretations is not fatal to the validity of a statute and flexibility is not to be equated with the measure of vagueness that is constitutionally offensive. The central question when confronted by a vagueness challenge under section 7 is, can the statute in question be given a sensible meaning. In effect, in this setting, the Appellant must show the legislation is impermissibly vague in all its applications. If legislation can be said to have a sensible meaning or a core, it is for the judiciary to apply it even in difficult cases. In such a situation it cannot be said that prosecutors are free to merely pursue their personal predilections. Nor can it be said citizens will be merely left to guess at the meaning of the legislation. Finally, as observed by Lamer J. (as he then was), the fact that a statue may be "broad and far reaching" does not mean it is "impermissibly vague" and offensive to section 7.

Reference Re Criminal Code section 193 and 195.1(1)(c), supra.

Regina v. Mortgentaler (1985), 22 C.C.C. (3d) 353 at 387-8 (Ont.C.A.), reversed on other grounds [1988], 1 S.C.R. 30

Regina v. Red Hot Video (1985), 18 C.C.C. (3d) 1 (B.C.C.A.)

85. The Appellant's complaints on the question of vagueness appear to relate to the distinction between fact and opinion and to the element of "a public interest". It is the Respondent's position that neither of these matters render the prohibition so vague as to be constitutionally offensive.

Statement of Fact

86. On the question of whether or not the distinction between fact and opinion renders section 181 unconstitutionally vague, the Respondent submits that it does not for the reasons advanced in paragraph 77 herein.

Public Interest

87. It is further submitted the term "a public interest" is not so vague as to be meaningless. This term may create a measure of flexibility in the section but this is not to be equated with a constitutionally offensive level of vagueness. As pointed out earlier in this factum courts have interpreted the term "public interest" in the past. This can be done in relation to section 181 in light of its context. To some extent this has already been done by the cases and authorities. Prosecutors are not here left free to pursue what are no more than their own personal predilections. In light of the fact that a public interest is capable of being given a sensible meaning and in light of the fact that the section only attaches to those who wilfully publish material they know to be false, there is no breach of section 7 vagueness principles. It is submitted that matters important to the maintenance of a peaceful, secure, and harmonious community are clearly matters of public interest, as is their manifestation in this case, i.e. the interest in social and racial tolerance.

D. Other Matters Raised by the Appellant

88. It is submitted that the principles of fundamental justice relating to the vagueness of offences, as indicated in paragraph 84 herein, are concerned with the conceptual content of the elements which make up their definition. The prohibition against vagueness does not require that crimes be confined to offences in which injury is in fact caused or which involved a subjective intent to cause injury. Many offences in the Code are based on a mere causal connection to consequences (e.g. assault causing bodily harm, impaired driving causing death, etc.) Others prohibit conduct because objectively it poses a danger to significant interests (e.g. driving over .08 mg., impaired care and control,

dangerous driving, causing an explosion that is likely to cause harm, etc.). In these cases there is no obligation on the Crown to prove that the accused adverted to the dangers involved in his conduct or subjectively intended the consequence.

Vaillancourt v. The Queen, supra., at 751-4

McCannell v. The Queen (1980), 54 C.C.C. (2d) 188 at 192-3 (Ont.C.A.)

The Queen v. Keegstra, supra., at 776

Regina v. Andrews, supra.

Regina v. Brooks (1988), 41 C.C.C. (3d) 157 (B.C.C.A.)

Rex v. Brailsford [1905], 2 K.B. 730 at 745 (K.B.)

89. Moreover, a person who wilfully disseminates material to the public which he knows to be false and which can be said objectively to be likely to damage or harm an important social interest can be characterized as being criminally blameworthy. Such conduct is dishonest and objectively poses a significant threat to the community.

Criminal Law 2nd ed., Mewett and Manning, pp. 509-10

Russell on Crime 12th ed., J.W. Turner, Vol. 2, 1387-1393

Bernard v. The Queen [1988], 2 S.C.R. 833 at 880, 889

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Hamling v. U.S. (1974), 418 U.S. 87 at 120-4, 94 S.Ct. 2887 at 2909-2911

Federal Commissioner of Taxation v. Turner (1984), 73 F.L.R. 24 at 26 (West Aust.S.C.)

90. In any event, it is submitted that once the theories of the defence presented at trial were negatived beyond a reasonable doubt and the jury found that the Appellant knew this pamphlet was, in essence, false the only reasonable inference, given the nature of this pamphlet, would be that the Appellant published it being aware that it was likely to

cause injury to the public interest in social and racial tolerance. Thus, in this case, any mens rea constitutionality required in the section was clearly present.

91. Section 181 is not "outmoded" or "outdated", but even assuming it to be so, there is no basis to conclude that it has become a vague and uncertain limit on freedom of expression. Furthermore, as this Honourable Court has made clear, the principles of fundamental justice are not to be found in the realm of what may be argued to be desirable policy, but in the basic tenets of our legal system.

Re B.C. Motor Vehicle Act [1985], 2 S.C.R. 486 at 495-504

Thompson Newspapers Ltd. v. Canada [1990], 1 S.C.R. 425 at 536-540

92. Under our legal system, items of history are not matters which courts have simply declared themselves impotent to grapple with. When historical facts become an issue in legal proceedings our system has developed rules of evidence as to how such matters may be proved. Indeed, with such rules, it would be impossible for courts to deal with claims of aboriginal right defences, aboriginal land claims, and defences of truth when history is used as a tool to sow hate.

Regina v. Zündel, supra., pp. 43-54

Calder v. A.G. of British Columbia [1973], S.C.R. 313 (S.C.C.)

Read v. Bishop of Lincoln (1892), A.C. 644 at 652-4 (P.C.)

Wigmore on Evidence, Chadburn Revision (1974), Vol. 5, pp. 561-567

Attorney General for Ontario v. Bear Island Foundation et al. (1984), 49 O.R. (2d) 353 at 368-386 (Ont.S.C.)

Regina v. Bartleman (1984), 13 C.C.C. (3d) 488 at 491-499 per Lambert J., (B.C.C.A.)

Moreover, this was not a case in which the Crown's experts merely relied on reputation or community opinion but their evidence was based on contemporaneous documents, many of which were translated and filed.

Case on Appeal, pp. 67-76, 200-203

93. This Honourable Court refused leave on the question of whether or not the taking of judicial notice in this particular case was appropriate. The Court of Appeal found that the judicial notice ruling in the circumstances of this case did not determine any element of the offence. Finally, the taking of judicial notice in this particular case can hardly render section 181 itself unconstitutional.

Regina v. Zündel (No. 2) (1990), 53 C.C.C. (3d) 161 at 167-171

94. The fact that in some cases the same facts may be prosecuted under more than one section of the Criminal Code in no way renders all provisions which overlap in such a sense inoperative on the basis of violating vagueness principles found in section 7 of the Charter. The Code contains numerous overlapping provisions governing thefts, forgery, obtaining by false pretences and fraud. Equally the same conduct may frequently be prosecuted under more than one section in relation to the Code's sexual offences. It is submitted that the principles enunciated by this Honourable Court in Kienapple v. The Queen, infra, prevent the registering of a multiplicity of convictions arising out of the same delict. While section 181 and 319 may overlap in some cases, their elements remain different. Under 181 the Crown bears the burden of proving that the Appellant knew the publication to be false and that the falsehood has caused injury or is likely to do so a matter of public interest. If this burden can be discharged it is difficult to see how any of the special defences provided in section 319 could be applicable to a charge under section 319(2).

Criminal Code, s.319

Kienapple v. The Queen [1975], 1 S.C.R. 729 (S.C.C.)

B. If section 181 (formerly section 177) of the Criminal Code of Canada violates section 7 as being a vague and uncertain limit on freedom of expression is it a reasonable limit justified in a free and democratic society?

It is conceded that if section 181 creates an offence that is so vague as to breach principles entrenched under section 7 it is not one of those circumstances in which such a breach can be justified.

PART IV

NATURE OF ORDER REQUESTED

95. It is respectfully submitted that the constitutional questions should be answered as follows and the appeal should be dismissed:

Q. 1. Is section 181 (formerly section 177) of the Criminal Code of Canada contrary to fundamental freedom of thought, belief, opinion and expression, including freedom of the press and other media communication set out in section 2(b) of the Canadian Charter of Rights and Freedoms?

A. No.

Q. 2. If so, is section 181 (formerly section 177) of the Criminal Code of Canada a reasonable limited justified in a free and democratic society as required by section 1 of the Canadian Charter of Rights and Freedoms?

A. Yes.

Q. 3. Is section 181 (formerly section 177) of the Criminal Code of Canada contrary to section 7 of the Charter of Rights and Freedoms as being a vague and uncertain restriction upon the fundamental freedom of expression?

A. No.

Q. 4. If so, is section 181 (formerly section 177) of the Criminal Code of Canada 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?

A. No.

ALL OF WHICH IS RESPECTFULLY SUBMITTED BY

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