Supreme Court of Canada: 1992 Zündel Judgement

[1992] 2 SCR 731,

The judgment of McLachlin, La Forest, L'Heureux-Dube and Sopinka JJ. was delivered by

McLACHLIN J.:-- Four constitutional questions were stated by the Chief Justice on this appeal; the questions ask whether s. 181 (formerly s. 177), the "false news" provision of the Criminal Code, R.S.C., 1985, c. C-46, violates s. 2(b) or s. 7 of the Canadian Charter of Rights and Freedoms, and if it does, whether such violation is a reasonable limit upon these Charter rights within the meaning of s. 1. Section 181 reads:

181. Every one who wilfully publishes a statement, tale or news that he knows is false and that causes or is likely to cause injury or mischief to a public interest is
guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

Neither the admittedly offensive beliefs of the appellant, Mr. Zundel, nor the specific publication with regard to which he was charged under s. 181 are directly engaged by these constitutional questions. This appeal is not about the dissemination of hate, which was the focus of this Court's decision in R. v. Keegstra, [1990] 3 S.C.R. 697, and the reasons of my colleagues Cory and Iacobucci JJ. here. In Keegstra, this Court ruled that the provisions of the Criminal Code which prohibit the dissemination of hate violated the guarantee of freedom of expression but were saved under s. 1 of the Charter. This case presents the Court with the question of whether a much broader and vaguer class of speech -- false statements deemed likely to injure or cause mischief to any public interest -- can be saved under s. 1 of the Charter. In my view, the answer to this question must be in the negative. **To permit the imprisonment of people, or even the threat of imprisonment, on the ground that they have made a statement which twelve of their co-citizens deem to be false and mischievous to some undefined public interest, is to stifle a whole range of speech, some of which has long been regarded as legitimate and even beneficial to our society. I do not assert that Parliament cannot criminalize the dissemination of racial slurs and hate propaganda. I do assert, however, that such provisions must be drafted with sufficient particularity to offer assurance that they cannot be abused so as to stifle a broad range of legitimate and valuable speech.**

THE BACKGROUND

The charge arises out of the publication by the appellant of a 32-page booklet seemingly entitled Did Six Million Really Die? which had previously been published by others in the United States and England. The bulk of the booklet, excepting the foreword and postscript authored by the appellant, purports to review certain publications in a critical fashion. On the basis of this review, it suggests, inter alia, that it has not been established that six million Jewish people were killed before and during World War II and that the Holocaust is a myth perpetrated by a worldwide Jewish conspiracy.

The case comes to this Court after two trials, each of which resulted in a conviction. Although the first conviction was overturned, the Ontario Court of Appeal rejected the appellant's submission that s. 181 violated the Charter and sent the matter back for a new trial. This appeal is brought from the conviction on the second trial. Leave to appeal to this Court was granted on the general Charter issue only -- the constitutionality of s. 181 of the Criminal Code.

THE ISSUES

As stated, the issue is whether s. 181 of the Criminal Code violates the Charter. It is argued that it violates ss. 2(b) and 7, and that these infringements are not justifiable under s. 1 of the Charter.

In the event the conviction is upheld, a subsidiary issue arises of whether the terms of the appellant's bail are too broad.

ANALYSIS

1. Section 181: Its History, Purpose and Ambit

The question of falsity of a statement is often a matter of debate, particularly where historical facts are at issue. (Historians have written extensively on the difficulty of ascertaining what actually occurred in the past, given the difficulty of verification and the selective and sometimes revisionist versions different witnesses and historians may accord to the same events; see, for example, the now famous treatise of E.H. Carr, What is History? (1961)). The element of the accused's knowledge of falsity compounds the problem, adding the need to draw a conclusion about the accused's subjective belief as to the truth or falsity of the statements. Finally, the issue of whether a statement causes or is likely to cause injury or mischief to the public interest requires the

identification of a public interest and a determination of whether it has been or is likely to be injured. In the case of each of the three elements of the offence, the not inconsiderable epistemological and factual problems are left for resolution by the jury under the rubric of "fact". Thus, both in its breadth and in the nature of the criteria it posits, s. 181 poses difficulties not usually associated with criminal prohibitions, which traditionally demand no more of a jury than common sense inferences from concrete findings on matters patent to the senses.

[omitted]

On the final question of injury or mischief to a public interest, the trial judge told the jury that it was sufficient if there is a likelihood of injury or mischief to a particular public interest and directed the jury on the "cancerous effect of racial and religious defamation upon society's interest in the maintenance of racial and religious harmony in Canada." Judge Thomas further instructed the jury that "[t]here can be no doubt ... that the maintenance of racial and religious tolerance is certainly a matter of public interest in Canada". Once again, the jury's conclusion may have flowed inevitably from the trial judge's instruction.

One is thus driven to conclude that this was not a criminal trial in the usual sense. The verdict flowed inevitably from the indisputable fact of the publication of the pamphlet, its contents' divergence from the accepted history of the Holocaust, and the public interest in maintaining racial and religious tolerance. There was little practical possibility of showing that the publication was an expression of opinion, nor of showing that the accused did not know it to be false, nor of showing that it would not cause injury or mischief to a public interest. The fault lies not with the trial judge or the jury, who doubtless did their best responsibly to inform the vague words of s. 181 with meaningful content. The fault lies rather in concepts as vague as fact versus opinion or truth versus falsity in the context of history, and the likelihood of "mischief" to the "public interest".

Against this background, I turn to the question of whether the conviction and imprisonment of persons such as the appellant under s. 181 violate the rights which the Charter guarantees. The first question is whether the Charter's guarantee of free speech protects the impugned publication. If the answer to this question is in the affirmative, the second question arises of whether prohibition of the publication by criminal sanction can nevertheless be maintained as a measure

"demonstrably justified in a free and democratic society".

2. Does the Charter's guarantee of freedom of expression protect Mr. Zundel's right to publish the booklet Did Six Million Really Die?

Section 2(b) of the Charter provides:

2. Everyone has the following fundamental freedoms:

. . .

(b) freedom of thought, belief, opinion and expression,
including freedom of the press and other media of
communication;

The Court must first ask whether a publication such as that at issue is expression protected by s. 2(b) of the Charter. If so, the Court must ask the further question of whether the purpose or effect of s. 181 is to restrict such expression. If so, it will be found to violate s. 2(b) of the Charter: see Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927.

This Court has held that s. 2(b) is to be given a broad, purposive interpretation: Irwin Toy, supra. Even prior to the Charter, this Court recognized the fundamental importance of freedom of expression to the Canadian democracy; see Reference re Alberta Statutes, [1938] S.C.R. 100; Switzman v. Elbling, [1957] S.C.R. 285. I can do no better than to quote the words of my colleague Cory J., writing in Edmonton Journal v. Alberta (Attorney General), [1989] 2 S.C.R. 1326, at p. 1336:

It is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression. Indeed a democracy cannot exist without that freedom to express new ideas and to put forward opinions
about the functioning of public institutions. The concept
of free and uninhibited speech permeates all truly
democratic societies and institutions. The vital importance of the concept cannot be over-emphasized. No
doubt that was the reason why the framers of the Charter
set forth s. 2(b) in absolute terms which distinguishes
it, for example, from s. 8 of the Charter which guarantees
the qualified right to be secure from unreasonable search.

It seems that the rights enshrined in s. 2(b) should
therefore only be restricted in the clearest of circumstances.

The purpose of the guarantee is to permit free expression to the end of promoting truth, political or social participation, and self-fulfilment. That purpose extends to the protection of minority beliefs which the majority regard as wrong or false: Irwin Toy, supra, at p. 968. Tests of free expression frequently involve a contest between the majoritarian view of what is true or right and an unpopular minority view. **As Holmes J. stated over sixty years ago, the fact that the particular content of a person's speech might "excite popular prejudice" is no reason to deny it protection for "if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought -- not free thought for those who agree with us but freedom for the thought that we hate": United States v. Schwimmer, 279 U.S. 644 (1929)**, at p. 654. Thus the guarantee of freedom of expression serves to protect the right of the minority to express its view, however unpopular it may be; adapted to this context, it serves to preclude the majority's perception of 'truth' or 'public interest' from smothering the minority's perception. The view of the majority has no need of constitutional protection; it is tolerated in any event. Viewed thus, a law which forbids expression of a minority or "false" view on pain of criminal prosecution and imprisonment, on its face, offends the purpose of the guarantee of free expression.

The jurisprudence supports this conclusion. This Court in Keegstra held that the hate propaganda there at issue was protected by s. 2(b) of the Charter. There is no ground for refusing the same protection to the communications at issue in this case. This Court has repeatedly affirmed that all communications which convey or attempt to convey meaning are protected by s. 2(b), unless the physical form by which the communication is made (for example, by a violent act) excludes protection: Irwin Toy, supra, at p. 970, per Dickson C.J. and Lamer and Wilson JJ. In determining whether a communication falls under s. 2(b), this Court has consistently refused to take into account the content of the communication, adhering to the precept that it is often the unpopular statement which is most in need of protection under the guarantee of free speech: see, e.g., Keegstra, supra, at p. 828, per McLachlin J.; R. v. Butler, [1992] 1 S.C.R. 452, at p. 488, per Sopinka J.

The respondent argues that the falsity of the publication at issue takes it outside of the purview of s. 2(b) of the Charter. It is difficult to see how this distinguishes the case on appeal from Keegstra, where the statements at issue were for the most part statements of fact which almost all people would consider false. That aside, I proceed to the arguments advanced under the head of falsity.

Two arguments are advanced. The first is that a deliberate lie constitutes an illegitimate "form" of expression, which, like a violent act, is not protected. A similar argument was advanced and rejected with respect to hate literature in Keegstra on the ground that "form" in Irwin Toy refers to the physical form in which the message is communicated and does not extend to its content. The same point is determinative of the argument in this case.

The second argument advanced is that the appellant's publication is not protected because it serves none of the values underlying s. 2(b). A deliberate lie, it is said, does not promote truth, political or social participation, or selffulfilment.

Therefore, it is not deserving of protection.

Apart from the fact that acceptance of this argument would require this Court to depart from its view that the content of a statement should not determine whether it falls within s. 2(b), the submission presents two difficulties which are, in my view, insurmountable. The first stems from the difficulty of concluding categorically that all deliberate lies are entirely unrelated to the values underlying s. 2(b) of the Charter. The second lies in the difficulty of determining the meaning of a statement and whether it is false.

The first difficulty results from the premise that deliberate lies can never have value. Exaggeration -- even clear falsification -- may arguably serve useful social purposes linked to the values underlying freedom of expression. A person fighting cruelty against animals may knowingly cite false statistics in pursuit of his or her beliefs and with the purpose of communicating a more fundamental message, e.g., 'cruelty to animals is increasing and must be stopped'. A doctor, in order to persuade people to be inoculated against a burgeoning epidemic, may exaggerate the number or geographical location of persons potentially infected with the virus. An artist, for artistic purposes, may make a statement that a particular society considers both an assertion of fact and a

manifestly deliberate lie; consider the case of Salman Rushdie's Satanic Verses, viewed by many Muslim societies as perpetrating deliberate lies against the Prophet.

All of this expression arguably has intrinsic value in fostering political participation and individual self-fulfilment. To accept the proposition that deliberate lies can never fall under s. 2(b) would be to exclude statements such as the examples above from the possibility of constitutional protection. I cannot accept that such was the intention of the framers of the Constitution.

Indeed, the very cases relied upon by Cory and Iacobucci JJ. to support their position reveal the potential of s. 181 for suppressing valuable political criticism or satire. In R. v. Hoaglin (1907), 12 C.C.C. 226, cited at p. 28 of their judgement, the "false" publication asserted "Americans not wanted in Canada". The injury to public interest was, in the words of Harvey J., that "if [Americans] investigate they will find conditions such as to prevent them investing and taking up homesteads" (Hoaglin, supra, at p. 228). **Even if one accepts the finding that the statement was undoubtedly "false", it arguably represented a valuable contribution to political debate on Canadian immigration policy. Yet the accused was convicted for publication of such statements contrary to s. 136 (now s. 181).** Similarly, in R. v. Kirby (1970), 1 C.C.C. (2d) 286 (Que. C.A.), a case involving prosecution for publication of political satire in the Montreal Gazette, (cited at p. 30 of their judgement), Hyde J.A. accepted that the publication fell within the satirical tradition of Chaucer, Swift and Addison. In reversing the trial judge's conviction, he observed that the section may capture "pranks" and that the "prank" in question was "very close to the border" (p. 290).

The second difficulty lies in the assumption that we can identify the essence of the communication and determine that it is false with sufficient accuracy to make falsity a fair criterion for denial of constitutional protection. In approaching this question, we must bear in mind that tests which involve interpretation and balancing of conflicting values and interests, while useful under s. 1 of the Charter, can be unfair if used to deny prima facie protection.

One problem lies in determining the meaning which is to be judged to be true or false. A given expression may offer many meanings, some which seem false, others, of a metaphorical or allegorical nature, which may

possess some validity. Moreover, meaning is not a datum so much as an interactive process, depending on the listener as well as the speaker. Different people may draw from the same statement different meanings at different times. The guarantee of freedom of expression seeks to protect not only the meaning intended to be communicated by the publisher but also the meaning or meanings understood by the reader: Ford v. Quebec (Attorney General), [1988] 2 S.C.R. 712, at p. 767, and Irwin Toy, supra, at p. 976. The result is that a statement that is true on one level or for one person may be false on another level for a different person.

Even a publication as crude as that at issue in this case illustrates the difficulty of determining its meaning. **On the respondent's view, the assertion that there was no Nazi Policy of the extermination of Jews in World War II communicates only one meaning -- that there was no policy, a meaning which, as my colleagues rightly point out, may be extremely hurtful to those who suffered or lost loved ones under it. Yet, other meanings may be derived from the expressive activity, e.g., that the public should not be quick to adopt 'accepted' versions of history, truth, etc. or that one should rigorously analyze common characterizations of past events.** Even more esoterically, what is being communicated by the very fact that persons such as the appellant Mr. Zundel are able to publish and distribute materials, regardless of their deception, is that there is value inherent in the unimpeded communication or assertion of "facts" or "opinions".

A second problem arises in determining whether the particular meaning assigned to the statement is true or false. This may be easy in many cases; it may even be easy in this case. But in others, particularly where complex social and historical facts are involved, it may prove exceedingly difficult.

While there are Criminal Code offences under which a person may be prosecuted for libel -- defamatory, blasphemous and seditious (all of which appear to be rarely if ever used and the constitutionality of which may be open to question) -- it is the civil action for defamation which constitutes the only other significant branch of the law in which a jury is asked to determine the truth or falsity of a statement. But the difficulties posed by this demand are arguably much less daunting in defamation than under s. 181 of the Criminal Code. **At issue in defamation is a statement made about a specific living individual. Direct evidence is usually available as to its truth or falsity. Complex social and historical facts are not at stake. And most**

importantly the consequences of failure to prove truth are civil damages, not the rigorous sanction of criminal conviction and imprisonment.

Before we put a person beyond the pale of the Constitution, before we deny a person the protection which the most fundamental law of this land on its face accords to the person, we should, in my belief, be entirely certain that there can be no justification for offering protection. The criterion of falsity falls short of this certainty, given that false statements can sometimes have value and given the difficulty of conclusively determining total falsity. Applying the broad, purposive interpretation of the freedom of expression guaranteed by s. 2(b) hitherto adhered to by this Court, I cannot accede to the argument that those who deliberately publish falsehoods are for that reason alone precluded from claiming the benefit of the constitutional guarantees of free speech. I would rather hold that such speech is protected by s. 2(b), leaving arguments relating to its value in relation to its prejudicial effect to be dealt with under s. 1.

Such an approach is supported by the language of the Charter and the relationship it establishes between s. 1 and the enumerated rights. We start from the proposition that legislation limiting the enumerated rights may be unconstitutional. (There is no presumption of constitutionality: Manitoba (Attorney General) v. Metropolitan Stores Ltd., [1987] 1 S.C.R. 110, at p. 122, per Beetz J.). If a limitation on rights is established, the onus shifts to the Crown to show that the legislation is justified under s. 1, where the benefits and prejudice associated with the measure are weighed. The respondent's s. 2(b) arguments would require evaluation of the worth of the expression which is limited at the first stage. This is an approach which this Court has hitherto rejected and one which I would not embrace.

3. Is the Limitation which Section 181 of the Criminal Code Imposes on the Right of Free Expression Justified under Section 1 of the Charter?

Section 1 of the Charter provides:

1. The Canadian Charter of Rights and Freedoms guarantees
the rights and freedoms set out in it subject only to such
reasonable limits prescribed by law as can be demonstrably
justified in a free and democratic society.

[omitted]

Moreover, it is significant that the Crown could point to no other free and democratic country which finds it necessary to have a law such as s. 181 on its criminal books. I would be remiss not to acknowledge here the provisions which my colleagues' research has discovered, under the heading "Legislative Responses in Other Jurisdictions" (pp. 45-48 of their reasons). A review of these examples reveals their minimal relevance to this appeal. The Italian provision, although not reproduced for our inspection, has clearly been limited in its scope to the preservation of the rule of law or the legal order by the Italian constitutional court referred to by my colleagues; there is no indication that the provision extends to the promotion of racial harmony. Even less relevant are the Danish Criminal Code provisions to which Cory and Iacobucci JJ. refer. On a plain reading, s. 140 of the Danish Code is directed not to false statements of fact, but to insulting remarks about the religious practices of others; s. 266(b), on the other hand, is equally clearly a proscription of hate propaganda similar to s. 319 of our Criminal Code, upheld in Keegstra. Of the German offences mentioned, only that dealing specifically with Holocaust denial would appear to be directed to false statements of fact, a much more finely tailored provision to which different considerations might well apply. As indicated above, the forerunner of our s. 181 was repealed in England over a century ago, leaving no apparent lacunae in the criminal law of a country that has seen its share of social and political upheavals over the ensuing period. It is apparently not to be found in the United States. How can it be said in the face of facts such as these and in the absence of any defined evil at which the section is directed that the retention of the false news offence in this country is a matter of pressing and substantial concern justifying the overriding of freedom of expression? In Butler, this Court, per Sopinka J., at p. 497, relied on the fact that legislation of the type there at issue, pornography legislation, may be found in most free and democratic societies in justifying the restrictions it imposes on freedom of expression. The opposite is the case with s. 181 of the Criminal Code.

In the absence of an objective of sufficient importance to justify overriding the right of free expression, the state's interest in suppressing expression which may potentially affect a public interest cannot outweigh the individual's constitutional right of freedom of expression and s. 181 cannot be upheld under

s. 1 of the Charter. But even if one were to attribute to s. 181 an objective of promoting social and racial tolerance in society and manage the further leap of concluding that objective was so pressing and substantial as to be capable of overriding entrenched rights, the Crown's case under s. 1 of the Charter would fail for want of proportionality between the potential reach of s. 181 on the one hand, and the "evil" to which it is said to be directed on the other.

Assuming a rational link between the objective of social harmony and s. 181 of the Criminal Code, the breadth of the section is such that it goes much further than necessary to achieve that aim. Accepting that the legislative solution need not be "perfect", it nevertheless must be "appropriately and carefully tailored in the context of the infringed right": Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.), [1990] 1 S.C.R. 1123, at p. 1138. The effect of s. 181 is to inhibit the expression or publication of any statements which may be found by a jury to be factual, false and likely to cause injury or mischief to a public interest. The territory covered by this prohibition can only be described as vast, as revealed by a brief look at the key phrases on which guilt or innocence turns.

. . .

But perhaps the greatest danger of s. 181 lies in the undefined and virtually unlimited reach of the phrase "injury or mischief to a public interest". Neither the respondent nor its supporting interveners has proffered any case law in which this phrase has been applied to a given factual circumstance in a clear and consistent manner. My colleagues refer to the "serious harm" and "serious injury" caused by deliberate falsehoods, but this begs the question of what sort or degree of harm is necessary in order to bring the section into play. Indeed, the limited jurisprudence on s. 181 evidences conflicting opinions on what constitutes a threatened or injured "public interest" justifying criminal sanction. It is difficult to see how a broad, undefined phrase such as "public interest" can on its face constitute a restrained, appropriately limited measure which impairs the right infringed to the minimum degree consistent with securing the legislation's objectives. Any deliberate lie (potentially defined as that which does not accord with accepted truth), which causes or is likely to cause "injury" or "mischief" to any "public interest" is within the potential reach of the section. The interpretation given to "public interest" in this case may not have been objectionable. But that is not the issue in determining whether a legislative restriction

of rights is overbroad. The issue is whether the provision permits the state to restrict constitutional rights in circumstances and ways that may not be justifiable. The vague and broad wording of s. 181 leaves open that possibility.

[omitted]

Section 181 can be used to inhibit statements which society considers should be inhibited, like those which denigrate vulnerable groups. Its danger, however, lies in the fact that by its broad reach it criminalizes a vast penumbra of other statements merely because they might be thought to constitute a mischief to some public interest, however successive prosecutors and courts may wish to define these terms. The danger is magnified because the prohibition affects not only those caught and prosecuted, but those who may refrain from saying what they would like to because of the fear that they will be caught. Thus worthy minority groups or individuals may be inhibited from saying what they desire to say for fear that they might be prosecuted. **Should an activist be prevented from saying "the rainforest of British Columbia is being destroyed" because she fears criminal prosecution for spreading "false news" in the event that scientists conclude and a jury accepts that the statement is false and that it is likely to cause mischief to the British Columbia forest industry? Should a concerned citizen fear prosecution for stating in the course of political debate that a nuclear power plant in her neighbourhood "is destroying the health of the children living nearby" for fear that scientific studies will later show that the injury was minimal? Should a medical professional be precluded from describing an outbreak of meningitis as an epidemic for fear that a government or private organization will conclude and a jury accept that his statement is a deliberate assertion of a false fact? Should a member of an ethnic minority whose brethren are being persecuted abroad be prevented from stating that the government has systematically ignored his compatriots' plight?** These examples suggest there is merit in the submission of the Canadian Civil Liberties Association that the overbreadth of s. 181 poses greater danger to minority interest groups worthy of popular support than it offers protection.

These examples illustrate s. 181's fatal flaw -- its overbreadth. At pp. 70-73 of their reasons, Cory and Iacobucci JJ. attempt to alleviate the fears associated with the problem of overbreadth by arguing that the Crown will always bear a heavy onus in proving all of the

elements under s. 181. It is argued that any danger is limited by the phrase "public interest" because even those publishing known falsehoods will not be prosecuted where their lies have an "overall beneficial or neutral effect". In this way, Cory and Iacobucci JJ. claim that the examples proffered above raise no practical problem (see p. 81 of their reasons).

I, for one, find cold comfort in the assurance that a prosecutor's perception of "overall beneficial or neutral effect" affords adequate protection against undue impingement on the free expression of facts and opinions. The whole purpose of enshrining rights in the Charter is to afford the individual protection against even the well-intentioned majority. To justify an invasion of a constitutional right on the ground that public authorities can be trusted not to violate it unduly is to undermine the very premise upon which the Charter is predicated.

[omitted]

Not only is s. 181 broad in contextual reach; it is particularly invasive because it chooses the most draconian of sanctions to effect its ends -- prosecution for an indictable offence under the criminal law. Our law is premised on the view that only serious misconduct deserves criminal sanction. Lesser wrongs are left to summary conviction and the civil law. Lies, for the most part, have historically been left to the civil law of libel and slander; it has been the law of tort or delict that has assumed the main task of preserving harmony and justice between individuals and groups where words are concerned. This is not to say that words cannot properly be constrained by the force of the criminal law. But the harm addressed must be clear and pressing and the crime sufficiently circumscribed so as not to inhibit unduly expression which does not require that the ultimate sanction of the criminal law be brought to bear: see Dickson C.J. in Keegstra, supra, at p. 772. The Criminal Code provisions against hatemongering met that criterion, focusing as they did on statements intended to cause "hatred against any identifiable group". The broad, undefined term "mischief to a public interest", on the other hand, is capable of almost infinite extension.

[omitted]