A Review of the *Keegstra* Case

SUPREME COURT UPHOLDS HATE PROPAGANDA LAW

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On the 11th of January, 1984, James Keegstra, a teacher at the Junior and Senior High School in Eckville, Alberta, was charged with wilfully promoting hatred against the Jewish people contrary to, what is now, section 319(2) of the *Criminal Code* of Canada. The charge related to statements made by Keegstra while teaching his Grades 9 and 12 Social Studies classes. The *Keegstra* prosecution heightened an already lively debate on whether the *Criminal Code* prohibition against the dissemination of hate propaganda was constitutionally valid. The debate raged on in the public forum and within our court system for almost seven years. Finally, on the 13th of December, 1990, the Supreme Court of Canada settled the matter, for the time being at least: the Justices, by a 4 to 3 majority, upheld the constitutional validity of section 319(2).[1]

SOME BACKGROUND:

In 1965, the Minister of Justice, the Honourable Guy Favreau, set up a special committee to study the problem of hate propaganda in Canada. The committee, chaired by Dean Maxwell Cohen of McGill Law School, concluded that the provisions of the *Criminal Code* were inadequate to deal with the problems of hate propaganda. Consequently, they recommended amendments to the *Criminal Code* which would put in place provisions to deal with the various aspects of hate propaganda. The Cohen Committee suggested that Parliament enact prohibitions against the "advocating of genocide" (now section 318), the "public incitement of hatred" (now section 319(1)), and the "wilful promotion of hatred" (now section 319(2)). Special search and seizure powers relating to hate propaganda (now section 320) were also recommended. These recommendations were adopted by Parliament and became law in 1970.

From the outset, the most controversial of these provisions was the prohibition against the "wilful incitement of hatred". The text of the provision is as follows:

> Everyone who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of
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> (a) an indictable offence and is liable to imprisonment for two years; or
>
> (b) an offence punishable on summary conviction.

Even in the years before *Canadian Charter of Rights and Freedoms* came into effect, critics complained that the provision was an infringement of freedom of expression. This criticism, quite naturally, intensified after the advent of the *Charter*. From the outset, the Cohen Committee had been sensitive to this criticism. In order to allay the fears of civil libertarians, the Committee made two suggestions: (1) that no prosecutions should be undertaken without the consent of the Attorney General, and (2) that a set of defences specifically designed to narrow the scope of the prohibition against the "wilful incitement of hatred" be included in the *Criminal Code*. These defences are found in section 319(3):

> No person shall be convicted of an offence under subsection (2)
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> (a) if he established that the statements communicated were true;
>
> (b) if, in good faith, he expressed or attempted to establish by argument an opinion on a religious subject;
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> (c) if the statements were relevant to any subject of public interest, discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true;
>
> (d) if, in good faith, he intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred towards an identifiable group in Canada.

Not only was this provision unsatisfactory to civil libertarians, it engendered a different type of criticism from those minority ethnic and religious groups who had lobbied so strenuously for the adoption of the Cohen Committee recommendations. Their criticism was straightforward: the provisions were unworkable. The combined effect of sections 319(2) and (3) would make it impossible to convict anyone of this offence. They pointed to the requirements for conviction:

- The Crown must prove that the accused's conscious purpose was to promote hatred. The accused may accidently, negligently, or even recklessly promote hatred. This is not a crime. It is only the wilful or *intentional* promotion of hatred which is prohibited.

- This wilful promotion of hatred must be directed towards an *identifiable group*. An identifiable group is one that is distinguishable by colour, race, religion, or ethnic origin.

- The statements which promote hatred must be *other than in private conversation.*

- The Crown must prove beyond a reasonable doubt that the accused was not making a good faith argument on a religious subject.

- Further, the Crown must disprove, also beyond a reasonable doubt, any reasonable mistaken belief defence.

- Finally, the Crown must prove beyond a reasonable doubt that the accused was not, in good faith, attempting to point out, for the purpose of removal, matters tending to produce feelings of hatred.

- The accused may still escape conviction if he proves that the statements he made were true.

It is little wonder that the leadership of the various ethnic and religious communities in Canada saw the provisions as unworkable. And the Attorneys-General of the province, whose task it was to prosecute under the law, agreed with them.

THE FACTS:

Keegstra had begun his teaching career as an industrial arts teacher. He had shown an "interest" in history and soon found himself teaching Social Studies 9 and 30 (Grades 9 and 12 history, respectively). The curriculum of Social Studies 30 was supposed to be an examination of world history since 1900. Keegstra, however, was not constrained by this "technicality".

He taught that all the major events of history were connected to one central theme: a Jewish conspiracy to take over the world and rule it through the mechanism of one world government. He taught that the Jews were responsible for the First and Second World Wars. He linked the Jewish people to the American, French and Russian Revolutions. He taught that Jews formed secret societies — the Jacobins, the Illuminatti, the Bolsheviks — to pursue their evil plan to rule the world. He taught that Jews controlled the government, the banks, the courts, and the media. And he taught that the Holocaust was a hoax. He taught that the Talmud was the "blueprint" for this one world government. For confirmation of his views, he pointed to the New Testament.

Keegstra taught his students by lecturing. He would speak and they would write down his words. Sometimes he would write a phrase on the blackboard for emphasis and the students knew that this was important (i.e. that it should be used on an exam or in an essay) and they would copy it down in their notebooks. Students were evaluated on essays, tests, and exams. The students were to rely on their notes to complete these assignments. Other, more "mainstream", material was not to be used. History books, encyclopedias, and the like were "censored history" and their use was discouraged.

CASE HISTORY:

Keegstra was charged in January of 1984. The preliminary hearing took place in June of 1984. The accused was bound over for trial. In October of 1984 — prior to the trial — a hearing to examine the constitutionality of the *Criminal Code* provision was held. A decision upholding the validity of the provision was delivered in the next month. The trial began in April of 1985 and lasted three and one-half months. *Keegstra* was on the stand one of those months, during which he quoted extensively from, among other things, biblical scripture. The jury found Keegstra guilty and he was ordered to pay a fine of $5,000.00. Keegstra appealed. On the 6th of June 1988, the Alberta Court of Appeal overturned his conviction on the basis that section 319(2) was unconstitutional. The Crown appealed to the Supreme Court of Canada and the argument was heard in December of 1989. One year later, the Supreme Court of Canada granted the Crown appeal, declaring section 319(2) to be constitutionally valid. For the time being, Keegstra's conviction was reinstated, but the Court returned the matter to the Alberta Court of Appeal for reargument on questions involving the conduct of the trial. On the 15th of March, 1991, the Alberta Court of Appeal ordered a new trial. The Court was of the view that the method of jury selection was defective. The Attorney General of Alberta must now decide whether to pursue a new trial. It has been seven years since the original information was laid and the case is, so to speak, just beginning. More about this aspect of the case later.

THE SUPREME COURT DECISION:

In their analysis, both the majority and the dissent followed the now-standard two-stage approach to *Charter* adjudication. First, each examined whether section 319(2) of the *Criminal Code* violated section 2(b) of the *Charter*. The majority opinion asserted the proposition that expression which "wilfully promotes hatred" does not fall outside the protection of section 2(b) of the *Charter*. Any activity which attempts to convey meaning through a non-violent form of expression has expressive content and falls within the scope of section 2(b).[2] Further, they held that hate propaganda was *not* analagous to violence and, consequently, no exception for hate propaganda could be carved out of the protection afforded by section 2(b) of the *Charter*.

The assertion that section 2(b) had to be interpreted in light of sections 15 (equal protection) and 27 (preservation of multiculturalism) of the *Charter* as well as our International instruments and agreements was rejected. Sections of the *Charter*, other than 2(b), and International instruments and agreements could not be used to attenuate the scope of the protection afforded by freedom of expression under the *Charter*. These contextual values and factors should be used in the second phase of the inquiry.

The dissent was in general agreement with the majority on this stage in the analysis.

In the second phase, the so-called section 1 test, the Court examined whether section 319(2) was a reasonable limit which was demonstrably justified in a free and democratic society. The divergence of views between majority and dissenting factions of the Court rests, as it often does, on the result of the stage two analysis: the majority finds section 319(2) a reasonable and justifiable limitation, the dissent does not.

The majority began by noting that the objective — preventing pain to the target group and reducing racial, ethnic, and religious tension and, perhaps, violence — was of sufficient importance to warrant overriding a guaranteed right. Canada's International obligations and *Charter* sections 15 and 27 emphasize the importance of this objective. Furthermore, in the majority's opinion, section 319(2) is a reasonable and proportional response to secure that objective: the *Code* provision is rationally connected to the objective and does not unduly impair freedom of expression. On this latter point, the majority noted that section 319(2) was not vague nor was it overly broad. Indeed, in the majority's view, the *Code* section was narrowly drawn. They pointed to many of the requirements for a successful prosecution noted above. Other methods, non-criminal in nature, may exist for combatting racist incitement but Parliament is not limited to only one of these methods. Occasionally, the majority noted, condemnation through the force of the criminal law will be necessary.

Finally, the majority held that the advantages of the prohibition against racist incitement outweigh any resulting harmful effects. Once again, the majority referred to the importance of the protection of equality, the preservation and enhancement of multiculturalism, and Canada's International obligations. They contrasted this with the fact that hate propaganda is only tenuously related to the values underlying freedom of expression: the search for truth, individual self-fulfillment, and the maintainence of a vibrant democracy. Thus, the majority upheld the constitutional validity of section 319(2) of the *Criminal Code* and reinstated Keegstra's conviction until the Alberta Court of Appeal could adjudicate on other issues involving the conduct of the trial.

The dissent, while agreeing that the objective was an important one, disagreed on whether section 319(2) was a reasonable and proportional means of securing the objective. They were of the view the *Code* section was not rationally connected to the objective: there was no evidence that criminalizing the dissemination of hate propaganda would, in fact, suppress it. Indeed, the dissent noted that criminalizing racist incitement might have the reverse effect of promoting racism by providing greater publicity and exposure for the racist propaganda. Further, the dissent held that section 319(2) was overly broad in that it could potentially catch more expression than was justifiable. In any event, the provision has a chilling effect on legitimate public discourse. They noted that alternative methods, less intrusive than prohibiting racist incitement, are available to Parliament. Given the serious potential damage to freedom of expression and the dubious benefit to be gained from prohibiting the dissemination of hate propaganda, the dissent held that section 319(2) was not a justifiable limit on freedom of expression and was of no force or effect.

SOME OBSERVATIONS:

1. Majority support for the constitutional validity of section 319(2) may no longer exist.

Two of the four Supreme Court Justices who voted to reinstate Keegstra's conviction have already retired from the Court. One, Chief Justice Dickson, was replaced by Justice Stevenson who, as a member of the Alberta Court of Appeal, voted to strike down the hate propaganda law. A second, Justice Wilson, has been replaced by Justice Iacabucci whose views on this subject are not known. On the other hand, Justice Cory took no part in the decision. While a member of the Ontario Court of Appeal, Justice Cory wrote a stirring judgement in support of the constitutionality of section 319(2) of the *Code*[3] Thus, we can be safe in asserting that he would have sided with the majority. Chief Justice Lamer also took no part in the decision. Although he has often sided with Justices Dickson and Wilson, his precise views on this subject are unknown.

It is unlikely that this change in Court personnel will cause the overturning of the *Keegstra* decision itself. The Supreme Court of Canada rarely changes its mind that quickly. But it may tell us something about the likely result in the *Zundel* appeal which will be heard shortly by the Court. It is very likely that section 193 of the *Code* (publishing false news), which formed the basis of Zundel's conviction, will be declared unconstitutional.

2. In spite of the decision of the Supreme Court, the Keegstra case is not over. It may be with us for some time to come.

Although the Supreme Court reinstated Keegstra's conviction, the Alberta Court of Appeal has overturned the conviction on the method of jury selection. The Attorney General of Alberta must now decide whether to seek leave to appeal to the Supreme Court on this issue, to pursue the re-trial, or to drop the whole matter. It has been seven years since this matter began.

3. Using the criminal process to deter racism is fraught with problems.

There is important symbolic value in having a law prohibiting the dissemination of hate propaganda. Our society must make a clear statement as to the values which we deem of central importance. If we believe that equality, the protection of minorities, and the preservation of multiculturalism are important to Canadian society, we must be prepared to support these values with criminal sanctions if necessary. Indeed, although no causal connection likely exists, there was an alarming increase in overt acts of racism and anti-semitism in Alberta following the Alberta

Court of Appeal's decision to strike down the hate propaganda law in 1988. (Witness the pins protesting the use of turbans by Sikh members of the R.C.M.P., the skinhead attack on former broadcaster Keith Rutherford for having exposed a Nazi war criminal a number of years ago, and the cross-burning at Provost, Alberta accompanied by chants of "Death to the Jews".)

Nonetheless, the criminal process is long, expensive, and, most importantly, unpredictable. It should not be casually invoked. Alternative legal means — perhaps human rights legislation — should be studied to determine if they might be effective in combatting racism. The case of *Malcolm Ross* may point up new ways of deterring racist incitement.[4] It may turn out, however, that minority religious and ethnic groups will be forced to develop extra-judicial strategies to combat racist incitement or remain at the mercy of the hate propagandist.

4. We see an interesting dichotomy of philosophical perspectives disclosed in the Keegstra decision.

We often see *Charter* decisions as being either "conservative" or "liberal". Indeed, a decision to uphold a law which limited freedom of speech would generally be labelled "conservative" while a decision to strike down a government prohibition on speech would be recognized as classically "liberal". The *Keegstra* decision shows us that these labels may no longer be very useful, if they ever were. The dissent's opinion might be classed as more "libertarian" than "liberal". The majority, on the other hand, seems to be concerned with a particular subspecies of "communitarianism" namely "minoritarian" values: the right of the individual to engage in speech which is intended to promote hatred must yield to the greater community interest in the protection of minorities and the ensuring of racial, ethnic, and religious tolerance for all Canadians.

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1. *R. v. Keegstra*, [1991] 2 W.W.R. 1 (S.C.C.).
2. Even threats of violence, according to the majority, would fall within s.2(b). See *ibid.* at 31-32.
3. See *Andrews and Smith* v. *The Queen* (1988), 65 O.R. (2d) 161 (Ont. C.A.).
4. See the N.B.C.A. ruling which restored the human rights commission hearing into Ross in *N.B. Dist. No. 15 v. N.B. Human Rights Board of Inquiry* (1989), 10 C.H.R.R. D/6426.