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Landmark Case

FREEDOM OF EXPRESSION, WILFUL PROMOTION OF HATRED AND THE *CHARTER OF RIGHTS AND FREEDOMS*: *R.* v. *KEEGSTRA*

Prepared for the Ontario Justice Education Network by a Law Clerk of the Court of Appeal of Ontario

R. v. *Keegstra* (1990)

Facts

Mr. Keegstra started teaching high school in the early 1970s in the small town of Eckville, Alberta. He had been a teacher in the town for about 10 years when his teachings came under scrutiny. After reading her son's notes from Mr. Keegstra's social studies class, a parent complained to the local school board. Mr. Keegstra had been teaching his students racially prejudiced material targeting Jewish people. He taught his students that Jewish people seek to destroy Christianity and are responsible for depressions, anarchy, chaos, wars and revolution. He also told his students that Jewish people "created the Holocaust to gain sympathy". Mr. Keegstra expected his students to include these teachings in class and on exams. If they did, they received good marks. If they did not, their marks suffered. A few months after the complaint, Mr. Keegstra was dismissed.

Wilful Promotion of Hatred

In 1984, Mr. Keegstra was charged under section 319(2) of the *Criminal Code* with wilfully promoting hatred against an identifiable group by communicating anti-semitic statements to his students.

Criminal Code of Canada

319. (2) Every one who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of
- (*a*) an indictable offence and is liable to imprisonment for a term not exceeding two years; or
- (*b*) an offence punishable on summary conviction.

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

Sections 319(7) and 318(4) provide definitions of some of the terms used in the above quoted sections:

- Communicating is defined as communicating by telephone, broadcasting or other audible or visible means.
- Identifiable group is any section of the public distinguished by colour, race, religion, ethnic origin, or sexual orientation.
- Public place is any place to which the public have access as of right or by invitation, express or implied.
- Statements include words spoken or written or recorded electronically or electro-magnetically or otherwise, and gestures, signs or other visible representations.

Freedom of Expression

The *Canadian Charter of Rights and Freedoms, 1982* is part of the Constitution of Canada and protects everyone's rights and freedoms against actions of the government. One of the fundamental freedoms protected by s. 2(b) of the *Charter* is the "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication." Even prior to the enactment of the *Charter*, Canadian courts recognized that freedom of expression was of crucial importance in a free and democratic society.

The scope of freedom of expression is very wide. Canadian courts have stated that expression will be protected if it is focused on:

(i) seeking and attaining truth;
(ii) encouraging participation in social and political decision-making; and
(iii) cultivating diversity in forms of individual self-fulfillment and human flourishing.

Courts have developed a two-step analysis to determine whether section 2(b) has been infringed. In the first step, the court considers whether the activity falls within the protection of section 2(b). Generally, if the expression conveys a meaning through a non-violent form, it will fall within the scope of section 2(b). The content of the expression conveyed is irrelevant as section 2(b) protects all content of expression. In the second step, the court will determine whether the purpose of the challenged government action is to restrict freedom of expression. If the government's purpose is to restrict expression, s. 2(b) will automatically be infringed. If the government has another purpose but the effect of the action restricts expression, section 2(b) will not necessarily be infringed. The Court would then consider if the expression is related to the principles upon which freedom of expression is based.

Section 1 of the *Charter* provides that rights are not absolute and can be constrained by reasonable limits. In *R.* v *Oakes*, the Supreme Court formulated a test to determine whether an infringement is justified under s.1 of the *Charter*. After finding that a government action has infringed a *Charter* right, the court will do a s. 1 analysis.

The Trial Decision

At Mr. Keegstra's trial, his lawyer argued that s. 319(2) of the Criminal Code violated Mr. Keegstra's right to freedom of expression. The trial judge disagreed, noting that the *Charter* provides

individuals with equal protection and benefit of the law without discrimination on the basis of colour, race, religion, or ethnic origin. The wilful promotion of hatred against an identifiable group would violate that person's equality rights (s. 15 of the *Charter*). On this basis, the trial judge held that s. 319(2) did not infringe s. 2(b) of the *Charter* and the jury convicted Mr. Keegstra of wilful promotion of hatred.

Appeal to the Alberta Court of Appeal

Mr. Keegstra appealed his conviction. The Court of Appeal agreed with Mr. Keegstra. It found that statements which the speaker knows to be false are not protected by the *Charter*, however section 2(b) does protect "innocent and imprudent speech". Therefore, because section 319 could apply to false statements that the person might not know are false, the Court found that it violated the right to freedom of expression.

The Court went on to determine that the violation of s. 2(b) was not justified under s. 1 of the *Charter*.

Appeal to the Supreme Court of Canada

The Crown appealed the Court of Appeal's decision to the Supreme Court of Canada.

The Majority Opinion of the Supreme Court of Canada

Four out of the seven judges disagreed with the decision of the Alberta Court of Appeal. Chief Justice Dickson wrote the majority decision.

Is Freedom of Expression Infringed?

To determine whether Mr. Keegstra's freedom of expression was infringed, the majority applied the two-step analysis for s. 2(b) cases. On the first step, the majority found that the expression conveyed meaning and was therefore protected by s. 2(b). The fact that the statements were offensive was irrelevant. On the second step, the majority determined that the very purpose of s. 319 of the *Criminal Code* was to restrict certain kinds of expression. Therefore, the majority found that s. 319(2) of the *Criminal Code* infringed section 2(b) of the *Charter*.

In coming to this conclusion, the majority rejected the argument that the wilful promotion of hatred is like a violent activity, and therefore should not be treated as an expression issue. Mr. Keegstra's expression consisted of words, while violence is expression communicated directly through physical harm. For this reason, even hate propaganda is expression within the meaning of s. 2(b).

The majority also rejected the argument that hate propaganda does not fall within the protection of s. 2(b) because it amounts to threats of violence. Threats of violence are expression and their suppression must be justified under s. 1 of the *Charter*.

Is the Violation of Freedom of Expression Justified under Section 1 of the *Charter*?

The majority applied the Oakes Test to determine if the violation of Mr. Keegstra's freedom of expression was justified under s. 1 of the *Charter*. It concluded that Parliament's objective in

preventing harm caused by **hate propaganda** was a pressing concerm given the extent of the harm and given the importance of reducing racial, ethnic and religious tensions in Canada.

The majority then considered whether s. 319(2) of the *Criminal Code* was a **proportional response** to this objective. As part of that analysis, it first concluded that there was a **rational connection** between s. 319(2) and of protecting target group members and fostering harmonious social relations.

Next, the majority considered whether s. 319(2) **impairs** freedom of expression as little as possible. It concluded that s. 319(2) does not overly restrict freedom of expression. The provision is written to ensure that only expression which is openly hostile to target groups is affected.

Finally, the majority considered whether there was proportionality between the effects of s. 319(2) on freedom of expression and the objective. It found that hate propaganda contributes little to the aspirations of Canadians in the quest for truth, the promotion of individual self-development, or the protection and fostering of a vibrant democracy where the participation of all individuals is accepted and encouraged.

As a result, the majority concluded that the infringement of s. 2(b) of the *Charter* by s. 319(2) of the *Criminal Code* was justified under s. 1 of the *Charter*.

The Dissenting Opinion of the Supreme Court of Canada

Three judges of the Supreme Court of Canada disagreed with the majority's decision. Justice McLachlin (now Chief Justice McLachlin) wrote the **dissent**. Justice La Forest, in a short one-paragraph dissent, agreed with Justice McLachlin.

Is Freedom of Expression Infringed?

Justice McLachlin agreed with the majority decision that s. 319(2) of the *Criminal Code* violated the right to freedom of expression enshrined in the *Charter*.

Is the Violation of Freedom of Expression Justified under Section 1 of the *Charter*?

The dissenting judges disagreed that the infringement of freedom of expression was justifiable under s. 1 of the *Charter*.

The dissent agreed with the majority on the first step of the Oakes Test finding that s. 319 related to a pressing concern in a free and democratic society.

The minority then considered whether s. 319(2) of the *Criminal Code* was an acceptably proportional response to this objective. As part of that analysis it considered whether there was a rational connection between s. 319(2) and the objective. The minority recognized there was some evidence linking s. 319(2) to its objectives. However, it also noted that s. 319(2) could have a **chilling effect** on defensible expression. A chilling effect might occur if law-abiding citizens self-censor and avoid what may actually be lawful behaviour because the law does not clearly specify what is legal and what is not. Furthermore, s. 319(2) may actually promote the cause of hate-mongers, as prosecutions for racist expression generally attract extensive media coverage. The

minority therefore concluded that there was only a weak connection between the criminalization of hate propaganda and its actual prevention.

Next, the minority considered whether s. 319(2) impairs freedom of expression as little as possible. Despite the limitations found in s. 319(2), it is **overbroad** because the definition of offending speech may catch expression that should be protected by s. 2(b). For example, the term "hatred" in s. 319(2) is capable of denoting a wide range of diverse emotions and is highly subjective.

Finally, the dissenting judges considered whether there was proportionality between the effects of s. 319(2) on freedom of expression and the objective. They concluded that there was not. Any possible benefits of s. 319(2) were outweighed by the significant infringement on the guarantee to freedom of expression. Section 319(2) is capable of catching not only statements like those made by Mr. Keegstra, but also works of art and statements made in the heat of social controversy, which would not foster the goals of social harmony and individual dignity.

The Result

Section 319(2) of the *Criminal Code* was held to be constitutional and Mr. Keegstra's conviction was restored.