DISTINGUISHING *ZUNDEL* AND *KEEGSTRA*

Bruce P. Elman and Erin Nelson

INTRODUCTION

In 1984, Ernst Zundel, a commercial artist living in Toronto, was charged with two counts of spreading false news contrary to s. 181 (formerly s. 177) of the *Criminal Code*. Section 181 of the *Criminal Code* provides:

> 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.

The charges arose from the publication of two articles: *The West, War and Islam!* and *Did Six Million Really Die? The West, War and Islam!* was not distributed in Canada and Zundel was, consequently, acquitted of the charge pertaining to it.

Did Six Million Really Die? was a 32 page pamphlet which was ostensibly written by Richard Harwood of the University of London, although the actual author of the piece was Richard Verral, then editor of a British neo-Nazi newspaper. Zundel had added a foreword and an afterword to the document. This pamphlet asserted that the Holocaust did not occur, that there was never an official Nazi policy of extermination of the Jews and other non-aryan peoples, and that allegations regarding the Holocaust are not "merely ... exaggeration, but an invention of post-war propaganda."[1] The pamphlet goes on to characterize the Holocaust as "the most colossal piece of fiction and the most successful of deceptions...."[2]

Further, the pamphlet alleges that Nazi concentration camps were only work camps and that the Russians built the gas chambers following the end of the Second World War. Several other false allegations were made in the document, including the assertion that *The Diary of Anne Frank*[3] was a work of fiction. Zundel's defence at trial was that he had an honest belief in the truth of the work. This defence was not accepted by the jury and he was convicted and sentenced to 15 months imprisonment and three years probation. During the probation period, he was not to publish anything on the subject of the Holocaust.

The First Appeal:

The trial judgment was appealed, on numerous grounds, to the Ontario Court of Appeal. In the decision, released on January 23, 1987, the Court of Appeal overturned the verdict and ordered a new trial because of errors that had been made in the conduct of the trial. Only the Court's discussion of the constitutional issue has relevance here.

The constitutional issue considered by the Court was whether s. 181 violated s. 2(b) of the *Canadian Charter of Rights and Freedoms*: the guarantee of freedom of expression. The Court first examined the origin and history of the *Code* provision, dating back to *De Scandalis Magnatum* in 1275. This offence was primarily aimed at protecting "the peers and other great men against slanderous lies which might cause mischief to the public if the perpetrator were not punished."[4] These statutes were repealed in England in 1888, but, nonetheless, the offence found its way into the draft *Criminal Code* of 1892. Until the 1955 amendments of the *Code*, the offence was listed under "Part VII: Seditious Offences, Title II: Offences Against Public Order, Internal and External." In 1955, the section (then s. 166) was moved into "Part IV: Sexual Offences, Public Morals and Disorderly Conduct", under the sub-heading of "Nuisances."

The Ontario Court of Appeal held that the expression prohibited by s. 181 (wilful assertions of fact(s) which are false to the knowledge of the person who publishes them, and which cause or are likely to cause injury or mischief to the public interest) did not fall within the protected sphere of freedom of expression (s. 2(b)). The Court further held that even if their decision with regard to s. 2(b) was erroneous and s. 181 did violate the guarantee of freedom of expression, the section would still be valid as a reasonable limit "prescribed by law as can be demonstrably justified in a free and democratic society" (s. 1 of the *Charter*).

This ground of appeal thus failed and the section was held to be constitutionally valid. Nonetheless, because of the errors made by the trial judge, particularly with respect to jury selection and misdirection on elements of the offence, the conviction was quashed and a new trial ordered. The Supreme Court of Canada dismissed an application for leave to appeal from the Ontario Court of Appeal judgment.[5]

The Second Trial:

A new trial was held, and on May 13, 1988, a second jury delivered a guilty verdict. Ontario District Court Judge Thomas sentenced Zundel to 9 months imprisonment. Zundel did not give evidence at this trial, as he had in the first trial. Judge Thomas stated that the sentence was less severe than that given at the first trial because there was "no evidence that

the accused had actually been able to have any significant part of the community react to his beliefs."[6]

The Second Appeal:

Zundel also appealed the second trial verdict, both in regard to his conviction and his sentence. The appeal judgment was released on February 5, 1990 but no discussion of the constitutionality of s. 181 was included.

THE DECISION OF THE SUPREME COURT OF CANADA

On the 15th of November, 1990, the Supreme Court of Canada granted leave to appeal only with respect to the Charter issue: whether s. 181 of the *Criminal Code* was constitutionally valid. Although the constitutional questions involved challenges based upon both ss. 2(b) (freedom of expression) and 7 (fundamental justice) of the *Charter*, only the s. 2(b) issue was discussed in the majority opinion. Section 2(b) of the *Charter* states:

> Everyone has the following fundamental freedoms:
>
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

Charter litigation, usually, involves a two-step process: (i) Does the statutory provision violate a *Charter* right? and (ii) Is it a justifiable limitation under s. 1 of the *Charter*?

Violation of the Right:

Is s. 181 of the *Criminal Code* a violation of s. 2(b) of the *Charter*? This involves two inquiries as posed in *Irwin Toy*:[7]

> (i) Is the prohibited expression protected by s. 2(b)? Does it attempt to convey meaning? Is it violent in form?
> (ii) Is the purpose or effect of the government action in question (in this case s. 181) to restrict such expression?

In resolving this issue, Justice McLachlin reviewed the prior jurisprudence on freedom of expression. She noted that, in *Irwin Toy*, the Court held that s. 2(b) protected "minority beliefs which the majority regard as wrong or false," and that the *Keegstra*[8] case stood for the proposition that content is irrelevant in determining whether or not the expression is protected. All expressive activity is protected by s. 2(b) unless it is "violent in form." The Court refused to concede the Crown's argument that lies or false statements can never have any value and therefore should not be protected by s. 2(b). Justice McLachlin stated that what is "false" cannot be defined with enough precision "to make falsity a fair criterion for denial of constitutional protection."[9]

The Court held that the type of speech prohibited by s. 181 fell within the protected sphere of s. 2(b) and that the purpose and effect of s. 181 was to suppress such speech. Thus, the Court held that s. 181 was a violation of the constitutional guarantee of freedom of expression.

Section 1 Analysis:

Section 1 of the *Charter* provides:

> 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.

In dealing with the s. 1 inquiry, the Court followed the now familiar test as set out in *R.* v. *Oakes*:[10]

1. The provision must address a legislative objective which is sufficiently important to warrant overriding a constitutional right. The objective of the legislation must be pressing and substantial.
2. The means used to achieve the objective must be proportional:
   (i) the means must be rationally connected to the objective;
   (ii) the means must impair the *Charter* right or freedom as little as possible;
   (iii) the effect of the means must be proportional to the legislative objective.

Objective:

Justice McLachlin found that there was no real evidence available as to the purpose or objective underlying s. 181. The original purpose of the false news provision was the preservation of "political harmony." However, in removing the section from that part of the *Code* entitled "Sedition" and placing it in the part entitled "Nuisance," Parliament seemed to have departed from s. 181's original political purpose. Justice McLachlin rejected the suggestion that the purpose of s. 181 had become the preservation of "social harmony," as this was a "shifting purpose" which, in her opinion, was not permissible.

According to Justice McLachlin, the Court must look to the intent of the legislature at the time of enactment or amendment of the relevant section. She noted that the Court "cannot assign objectives, nor invent new ones according to the perceived current utility of the impugned provision...."[11]

Thus, she concluded that "Parliament (had) identified no social problem, much less one of pressing concern, justifying s. 181 of the Criminal Code."[12]

To bolster her argument that no pressing and substantial objective could be ascribed to s. 181, Justice McLachlin noted that, in 1986, the Law Reform Commission of Canada had recommended the repeal of s. 181, as it was "anachronistic." Furthermore, no other "free and democratic" countries had provisions similar to s. 181. As to some provisions alluded to by the dissent, the majority noted that these sections were all far more specific than s. 181 and, in fact, appeared to be more comparable to s. 319(2) of the *Code* (wilful promotion of hatred) than to s. 181.

Finally, the section has been used infrequently since 1955. This lent further support to the argument that no legislative objective important enough to warrant overriding a *Charter* right could be attributed to s. 181. Justice McLachlin stated that the "purpose" branch of the *Oakes* test had not been met by s. 181. She further stated that even if s. 181 did have a valid and important legislative objective (as had been argued by the dissent), it would still fail under s. 1 because it could not meet the proportionality test.

Rational Connection:

Although the majority found no articulated objective underlying s. 181, let alone one that was pressing and substantial, for the sake of the analysis, they assumed that the section was rationally connected to the objective of "promoting social harmony." The majority proceeded to undertake the rest of the proportionality test.

Minimal Impairment:

Justice McLachlin held that the section was not a minimal impairment of the guarantee of freedom of expression. According to Justice McLachlin, the "fatal flaw" of s. 181 was its overbreadth, particularly in relation to the "undefined and virtually unlimited reach of the phrase `injury or mischief to a public interest'."[13]

Justice McLachlin distinguished s. 181 from s. 319(2) by contrasting the term "hatred against any identifiable group" with "mischief to a public interest," which she asserted was "capable of almost infinite extension."[14] The two sections were further distinguished in that s. 319(2) was restricted to the prohibition of hate propaganda, while s. 181 was not limited in this manner and could, therefore, affect a "broad spectrum of speech, much of which may be argued to have value."[15] Justice McLachlin also mentioned that while the expression at issue in the case at bar was arguably of little or negative value, the issue before the court was the value of all expression which could potentially come within the reach of s. 181.

Although there was agreement among all members of the Court as to the potential harm which could result from the appellant's publications, in the result, the Supreme Court of Canada struck down s. 181 of the *Criminal Code* as a violation of s. 2(b) of the *Charter* which could not be upheld as a reasonable limit under s. 1, and entered an acquittal for Zundel.

DISSENTING JUDGMENT: *R.* v. *ZUNDEL*

Justices Cory and Iaccobucci delivered dissenting reasons with Justice Gonthier concurring. In the dissent's view, s. 181 of the *Criminal Code*, although a violation of the freedom of expression guarantee in s. 2(b) of the *Charter*, was justified as a reasonable limit under s. 1. The divergence between the majority and dissenting views turns, as it so often does, on the s. 1 analysis.

Section 1 Analysis:

Objective:

The dissent concluded that the aim of s. 181 was "to prevent the harm caused by the wilful publication of injurious lies" which "in turn promotes the public interest in furthering racial, religious and social tolerance."[16] To support the importance of this objective, other *Charter* provisions were used, as were international instruments and "legislative responses in other jurisdictions."

The *International Convention on the Elimination of All Forms of Racial Discrimination*,[17] the *International Covenant on Civil and Political Rights*,[18] and similar instruments were cited by the dissent "to emphasize the important objective of s. 181 in preventing the harm caused by calculated falsehoods which are likely to injure the public interest in racial and social tolerance."[19]

Sections 15 (equal protection) and 27 (enhancement of multicultural heritage) of the *Charter* were also employed by the dissent in attempting to support the importance of s. 181's objective.

Proportionality:

The dissent concluded that s. 181 limited "only that expression which is peripheral to the core rights protected by s. 2(b)."[20] According to the dissent:[21]

> [A] careful examination of the philosophical underpinnings of our commitment to free speech reveals that prohibiting deliberate lies which foment

racism is mandated by a principled commitment to fostering free speech values.

The dissent further held that they were bound to follow the *Keegstra* decision and, thus, it was "appropriate to limit expression protected by s. 2(b) under s. 1 where such expression threatens the dignity of members of the target group and promotes discrimination ...."[22]

Rational Connection:

Once the dissent had identified the objective of s. 181 as the promotion of "social harmony," they had little difficulty in finding that s. 181 met the "rational connection" branch of the proportionality test.

Minimal Impairment:

In this component of the s. 1 analysis, the dissent began with an examination of the text of s. 181. The dissent argued that s. 181 was a "minimal intrusion" on freedom of expression because of the very heavy onus placed on the Crown in order to obtain a conviction. The Crown was required to prove: (i) the wilful publication of false factual statement(s) that the publisher knew were false and (ii) that the statement caused or was likely to cause injury to a public interest. All of these requirements were in an accused's favor, resulting in only á trivial encroachment on the s. 2(b) guarantee of freedom of expression.

In the majority decision, Justice McLachlin identified the main defect in s. 181 as being overbreadth. The dissent argued that s. 181 was not overly broad. In making this argument, the dissent must overcome the difficulty presented by the text and, in particular, by the phrase "cause or are likely to cause injury to a public interest." No restriction on the meaning of the phrase "injury or mischief to a public interest" is found in the section. Numerous interpretations of that phrase are available to a trier of fact and, thus, there is potential for abuse.

Finally, in spite of the existence of hate propaganda legislation (*Criminal Code* s. 319(2)) the dissent held that s. 181 "still fulfils an important role in a multicultural and democratic society ... (in emphasizing) the repugnance of Canadian society for the wilful publication of known falsehoods that cause injury to the public interest through their attacks upon groups identifiable under s. 15 of the *Charter* ...."[23]

Proportionality Between Effects and Objective:

The dissent held that, given the minimal worth of the expression caught by s. 181, and the narrow definition of the section, the effects of the section did not outweigh Parliament's objective. Once again, this analysis turns on the validity of the dissent's earlier decision that the promotion of "racial harmony" is a pressing and substantial objective underlying s. 181.

Although the reasons of the dissent are compelling, they are based on errors. The dissenting justices appear to have been motivated by grave concern with regard to the type of expression at issue in this particular case: Holocaust denial literature "disguised as authentic research."[24]

ZUNDEL AND *KEEGSTRA*: A COMPARISON

Zundel and the earlier case of *R.* v. *Keegstra*[25] both involved the dissemination of anti-semitic propaganda. As noted earlier, Ernst Zundel was originally convicted under s. 181 of the *Code* for publishing and distributing Holocaust denial literature. James Keegstra was an Alberta school teacher who was convicted of wilfully promoting hatred contrary to s. 319(2) of the *Criminal Code* for "systematically denigrating Jews and Judaism" in his classes. While s. 181 was struck down as an infringement of s. 2(b) of the *Charter* that could not be saved by s. 1, the Supreme Court of Canada upheld s. 319(2) as constitutionally valid. Both provisions were found to infringe freedom of expression; the difference in the results arises from the s. 1 analyses. Section 319(2) provides:

> 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 by summary conviction

Specific statutory defences are provided in s. 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, he expressed or attempted to establish by argument an opinion on a religious subject;
> (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.

The two provisions are located in different parts of the Code; s. 181 is found under the heading of "Nuisance," while s. 319(2) is found in the "Hate Propaganda" section. Other differences include:

i) Section 181 prohibits *wilfully publishing a false statement tale or news*; the content of a statement which may be prohibited is not specifically discussed in the provision. There is no indication as to whether Parliament's intention was to prohibit any particular type of statement, tale or news (for example, racist speech), but rather the section appears to have been designed to catch every false statement uttered.

ii) Further, the section speaks of *mischief or injury to the public interest*, but nowhere in the provision is this ambiguous phrase defined. The section is not clear on exactly what type of injury or mischief it seeks to prohibit or prevent; the public interest could be defined in innumerable ways.

iii) Section 319(2), on the other hand, explicitly deals with the *wilful promotion of hate against identifiable groups*. "Identifiable group" is defined as "any section of the public distinguished by colour, race, religion, or ethnic origin."[26] Thus, the section is directed at preventing the growth of hate against vulnerable minorities.

iv) Arguably, s. 181 can apply to the publication of a false statement to only one other person. The definition of "publish" used in defamation law is that a statement has been published if it has been communicated to one person other than the one to whom the statement refers. Section 319(2), on the other hand, specifically exempts *private conversation* from its scope.

v) Section 319(3) provides for *statutory defences*, further clarifying the narrow reach of the provision. Specific statutory defences are not found in s. 181.

vi) No prosecution under s. 319(2) can be commenced without consent of the attorney-general.[27] Under s. 181, anyone may commence a prosecution.

As noted earlier, the difference lay in the outcome of the s. 1 analysis. The textual differences of the provisions appears to have been a major factor in the contrasting determinations of their constitutional validity.

Section 1 Analysis:

Objective:

The first step in the s. 1 inquiry is a determination of whether the provision is based upon a legislative objective which is sufficiently important to override a *Charter* right. In the *Zundel* case, as noted earlier, the majority of the Court (*per* Justice McLachlin) had considerable difficulty in attributing any purpose to s. 181, let alone a "pressing and substantial" one.

In *Keegstra*, on the other hand, Chief Justice Dickson was able to define the objective of s. 319(2) as the prevention of harm caused by expression which promotes hatred of identifiable groups. The finding that this was, in fact, the objective of the section was supported by the "close connection between the recommendations of the Cohen Report (Report of the Special Committee on Hate Propaganda in Canada) and the hate propaganda amendments to the Criminal Code."[28] Justice Dickson identified the two principal harmful effects of hate propaganda as (i) the response of humiliation and degradation engendered in members of the target group; and (ii) the influence such material has on the society as a whole by indirectly causing attitudinal changes.

The objective attributed to s. 319(2) was further supported by our obligations under international human rights instruments such as the *International Convention on the Elimination of All Forms of Racial Discrimination*[29] and the *International Covenant on Civil and Political Rights*,[30] as well as by other sections of the *Charter*.

In reviewing other *Charter* provisions, Justice Dickson focused on ss. 15 and 27, stating that these sections "represent a strong commitment to the values of equality and multiculturalism, and hence underline the great importance of Parliament's objective in prohibiting hate propaganda."[31] The conclusion reached by the Chief Justice with respect to the objective of s. 319(2) of the *Criminal Code* was that,[32]

> it would be impossible to deny that Parliament's objective in enacting s. 319(2) is of the utmost importance ... Parliament has recognized the substantial harm that can flow from hate propaganda, and in trying to prevent the pain suffered by target group members and to reduce racial, ethnic and religious tension in Canada, has decided to suppress the wilful promotion of hatred against identifiable groups.

Proportionality:

Rational Connection:

In *Zundel*, there is little reference to the "rational connection" branch of the s. 1 justification test. In the *Keegstra* decision, Justice Dickson first discussed the "relation of the expression at stake to free expression values." The free expression values alluded to by the Chief Justice were: (i) the search for truth; (ii) the attainment of self-fulfilment by expressing oneself freely; and (iii) freedom of expression and the ability to participate in the political process. He concluded that "expression intended to promote the hatred of identifiable groups is of limited importance when measured against free

expression values."[33] This finding allowed the Court to more easily justify s. 319(2) as a reasonable limit on freedom of expression.

In terms of whether s. 319(2) was rationally connected to Parliament's objective, the Chief Justice stated:[34]

> [I]t would be difficult to deny that the suppression of hate propaganda reduces the harm such expression does to individuals who belong to identifiable groups and to relations between various cultural and religious groups in Canadian society.

The Court did not accept the contention that the media coverage of a trial was likely to lead to an increased following for the hate-monger. Although media attention is often focused on the proceedings pursuant to charges under s. 319(2), the message sent by the publicity, as well as by the trial process, is "the severe public reprobation with which society holds messages of hate directed towards racial and religious groups."[35]

As to the contention that government suppression of expression would serve only to make that expression more attractive, Justice Dickson argued:[36]

> Government disapproval of hate propaganda does not invariably result in dignifying the suppressed ideology. Pornography is not dignified by its suppression, nor are defamatory statements against individuals seen as meritorious because the common law lends its support to their prohibition ... [i]n this context, no dignity will unwittingly be foisted upon the convicted hate-monger or his or her philosophy ...

Finally, as to the argument that the Weimar Republic[37] had laws similar to s. 319(2) "and yet these laws did nothing to stop the triumph of a racist philosophy under the Nazis,"[38] Justice Dickson responded that no claim had been made that s. 319(2) could by itself prevent a tragedy like the Holocaust. That is not, however, a compelling reason for the repeal or removal of such laws from the Canadian *Criminal Code*.

Minimal Impairment

In the *Zundel* case, the Court concluded that s. 181 of the *Code* did not constitute a minimal impairment of freedom of expression. In particular, the phrase "public interest" caused a serious problem of "overbreadth."

With respect to this branch of the *Oakes* test, s. 319(2) was also challenged as being overbroad and unjustifiably vague, thus creating "a real possibility of punishing expression that is not hate propaganda."[39] In order to dispose of this contention, Justice Dickson focused on the terms of s. 319(2), the defences to the charge (in s. 319(3)), and the alternative modes available to fulfil Parliament's objective.

a. Terms of section 319(2):

Justice Dickson first noted that s. 319(2) specifically exempts private conversation from its scope. He stated that this was an indication that Parliament was not encroaching on the privacy of individuals through the use of the section.

The Chief Justice then examined the word "wilful." The presence of this word had previously been held to indicate that the *mens rea* requirement of s. 319(2) is that of *intention* to promote hatred, or the *knowledge* that promotion of hatred is foreseeable or substantially certain to result from an act done in pursuit of another purpose.[40] This demanding mental element requirement was held by Justice Dickson to severely limit the reach of s. 319(2):[41]

> [T]his stringent standard of *mens rea* is an invaluable means of limiting the incursion of s. 319(2) into the realm of acceptable (though perhaps offensive and controversial) expression. It is clear that the word "wilfully" imports a difficult burden for the Crown to meet, and in so doing, serves to minimize the impairment of freedom of expression.

The Alberta Court of Appeal (in the decision that formed the subject of the appeal to the Supreme Court) had held that "even a demanding *mens rea* component fails to give s. 319(2) a constitutionally acceptable breadth,"[42] largely because of the fact that the section does not require proof of actual hatred resulting from a communication. Justice Dickson held that to require proof of actual hatred "gives insufficient attention to the severe psychological trauma suffered by members of those identifiable groups targeted by hate propaganda."[43] He further stated that such a requirement would seriously weaken the section's effectiveness because a causative link between a statement and resulting hatred would be extremely difficult to prove.

The third aspect of s. 319(2) dealt with by Justice Dickson was the phrase "promotes hatred against any identifiable group;" in particular, the words "promotes" and "hatred" were examined. The Chief Justice found "promotes" to mean "active support or instigation,"[44] or "more than simple encouragement or advancement."[45] With respect to the word "hatred," Justice Dickson stated that it must be interpreted "according to the context in which it is found;" and that in the context of s. 319(2), the term "connotes emotion of an intense and extreme nature that is clearly associated with vilification and detestation."[46] In this sense, "hatred" is restricted to cover only the most "intense form of dislike."[47]

b. Defences to section 319(2):

The specific statutory defences provided in s. 319(3) were held to further limit the scope of the provision in that they are,[48]

> intended to aid in making the scope of the wilful promotion of hatred more explicit ... [t]o the extent that s. 319(3) provides justification for the accused who would otherwise fall within the parameters of the offence of wilfully promoting hatred, it reflects a commitment to the idea that an individual's freedom of expression will not be curtailed in borderline cases.

It was argued that the defence of truth (s. 319(3)(a)) was inadequate protection against an overly broad hate propaganda law. It would often be difficult to classify statements as being "true" or "false." This would result in a "chilling effect" on speech as persons who feared prosecution would exercise self-censorship. Justice Dickson, however, rejected this argument.

c. Alternative Modes of Furthering Parliament's Objective:

It was argued before the Court that criminal sanction was not necessary to meet the legislative objective in enacting s. 319(2); that in fact other methods would be more effective in combatting the harm resulting from hate propaganda. Among suggested alternatives were information, education and human rights legislation. The Court held that it is open to the government to employ several measures in order to fulfil its objective, and that "section 1 should not operate in every instance so as to force the government to rely upon only the mode of intervention least intrusive of a *Charter* right ...."[49]

Section 319(2) was held by the court not to "unduly impair the freedom of expression."[50]

Effects of the Limitation

Justice McLachlin, in the *Zundel* decision, held that weighing the effects of the legislation against its objective led to the finding that the effects of s. 181 were not proportional to its objective. She stated:[51]

> Any purpose which can validly be attached to s. 181 falls far short of the documented and important objective of s. 319(2). On the other side of the scale, the range of expression caught by s. 181 is much broader than the more specific proscription of s.319(2).

In summarizing the s. 1 analysis, Justice McLachlin stated that "at virtually every step of the *Oakes* test, one is struck with the substantial differences between s. 181 and the provision at issue in *Keegstra*."[52] She held that s. 181 could not be related to any "existing social problem or legislative objective," and that the provision was, as concluded by the Law Reform Commission, "anachronistic."

In the *Keegstra* decision, Justice Dickson held that because of the limited value of the expression prohibited by s. 319(2), and because of the great importance of the legislative objective underlying the section, the effects of the provision on freedom of expression did not outweigh Parliament's objective.

CONCLUDING COMMENTS

1. The majority decision in the *Keegstra* case was written by Chief Justice Dickson, with Justices Wilson, L'Heureux-Dubé, and Gonthier concurring. The dissent, led by Justice McLachlin, included Justices Sopinka and LaForest. In the interval between the *Keegstra* and *Zundel* decisions, both the Chief Justice and Justice Wilson retired. Justice Wilson was succeeded by Justice Iaccobucci and the Chief Justice was replaced by Justice Stevenson, who has since also retired. The majority in the *Zundel* case was composed of Justices McLachlin, Sopinka, LaForest and L'Heureux-Dubé, with Justices Cory, Iaccobucci and Gonthier dissenting. It may be argued that the *Zundel* decision was the product of a changed composition of the Court since the judgment in *Keegstra*.[53] Nonetheless, Justice McLachlin's use of the *Keegstra* decision (a decision in which she dissented) as a benchmark for evaluation of the false news provision, confirms the constitutionality of the hate propaganda provision and the validity of the analysis employed in *Keegstra* itself.

2. It is clear that the different results in these two cases turned, in large measure, on the originally articulated objective underlying each provision. In *Zundel* the original objective behind s. 181 — to ensure political harmony in the realm — had no currency and, thus, was not pressing and substantial. The concept of "shifting purpose" was rejected by the majority. The original purpose behind the hate propaganda provisions still has relevance today (perhaps even more so than when it was legislatively adopted). Consequently, the purpose was seen as pressing and substantial. Thus, recent legislation has a better chance of passing muster than does older legislation (recall that s. 181 was described as "anachronistic"). This will remain so as long as the concept of "shifting purpose" is rejected by the courts. Undoubtedly, this issue will be revisited in future cases.

3. The other salient observation arising from a comparison of the judgments is that s. 319(2) was upheld because of the narrow drafting of the section and the creation of special statutory defences in s. 319(3). Thus the text of s. 319(2), itself, is its most valuable feature from a constitutional perspective, but makes it quite difficult to employ from the

perspective of the criminal law. Maybe this is the answer; it is difficult to secure a conviction on s. 319(2) and so it should be.

4. Finally, the question remains: can s. 319(2) be used to successfully prosecute Holocaust deniers like Zundel? The issue of Holocaust denial did not play a major role in the *Keegstra* case, even though it was present. Although there is a strong argument to be made that those who deny the Holocaust (and publish pamphlets to that end) are wilfully promoting hatred against Jews, no precedents exist on whether the courts will accept Holocaust denial propaganda as statements promoting hatred. Nonetheless, it is sobering to recall that the *Zundel* prosecution was initially commenced under s. 181 by the Holocaust Remembrance Association because the Attorney General of Ontario refused to undertake to prosecute him under s. 319(2), fearing that a conviction could not be secured.

Bruce P. Elman, Faculty of Law, University of Alberta and **Erin Nelson**, Law Student, University of Alberta.

1. *Did Six Million Really Die?* at 4.
2. *Ibid.*
3. Anne Frank (1929-1945) was the teenage author of a diary composed while hiding from Nazis in Amsterdam. She died in Bergen Belsen concentration camp in 1945. The diary, discovered by non-Jewish friends after the family's arrest, was first published in 1947. (*Encyclopedia Judaica*)
4. *R.* v. *Zundel* (1987), 58 O.R. (2d) 129 (Ont. C.A.) at 144.
5. See 61 O.R. (2d) 588.
6. *R.* v. *Zundel (No.2)* (1988), 7 W.C.B. (2d) 26.
7. *Irwin Toy Ltd.* v. *Quebec (Attorney-General)*, [1989] 1 S.C.R. 927.
8. *R.* v. *Keegstra*, [1990] 3 S.C.R. 697.
9. *R.* v. *Zundel*, [1992] 2 S.C.R. 731.
10. *R.* v. *Oakes*, [1986] 1 S.C.R. 103.
11. *Supra*, note 9 at 764.
12. *Supra*, note 9 at 769.
13. *Supra*, note 9 at 774.
14. *Supra*, note 9 at 775.
15. *Ibid.*
16. *Ibid.*
17. As cited in *Zundel*, *supra*, note 9 at 811.
18. *Ibid.*
19. *Supra*, note 9 at 811.
20. *Supra*, note 9 at 828.
21. *Supra*, note 9 at 824.
22. *Supra*, note 9 at 826.
23. *Supra*, note 9 at 841.
24. *Supra*, note 9 at 808.
25. *Supra*, note 8.
26. Section 318(4) of the *Criminal Code*, R.S.C. 1985, c. C-46.
27. See s. 319(6) of the *Criminal Code*, R.S.C. 1985, c. C-46.
28. *Supra*, note 8, at 748-749.
29. As cited in *Keegstra, supra*, note 8 at 751.
30. *Ibid.*
31. *Supra*, note 8 at 756.
32. *Supra*, note 8 at 758.
33. *Supra*, note 8 at 762.
34. *Supra*, note 8 at 767.
35. *Supra*, note 8 at 769.
36. *Ibid.*
37. For a discussion of the laws of the Weimar Republic, see C. Levitt, "Racist Incitement and The Law: The Case of the Weimar Republic" in D. Schneiderman, *Freedom of Expression and the Charter* (Toronto: Carswell, 1991), and C. Levitt "Under the Shadow of Weimar: What are the Lessons for the Modern Democracies?" in L. Greenspan and C. Levitt, eds, *Under the Shadow of Weimar: Democracy, Law and Racial Incitement in Six Countries* (Westport, CT: Praeger, 1993).
38. *Supra*, note 8 at 768.
39. *Supra*, note 8 at 771.
40. *R.* v. *Buzzanga* (1979), 25 O.R. (2d) 705 (Ont. C.A.).
41. *Supra*, note 8 775.
42. *Supra*, note 8 at 776.
43. *Ibid.*
44. *Ibid.*
45. *Supra*, note 8 at 777.
46. *Supra*, note 8 at 777.
47. *Supra*, note 8 at 778.
48. *Supra*, note 8 at 779.
49. *Supra*, note 8 at 784.
50. *Supra*, note 8 at 786.
51. *Supra*, note 9 at 775-776.
52. *Supra*, note 9 at 776.
53. The issue of the changed composition of the Court and its potential effect on the *Zundel* decision was discussed in B. Elman, "Supreme Court Upholds Hate Propaganda Law" (1991) 2 *Constitutional Forum* 86-89. See also B. Elman, "*Her Majesty the Queen* v. *James Keegstra*: The Control of Racism in Canada" in L. Greenspan and C. Levitt, eds, *Under the Shadow of Weimar: Democracy, Law and Racial Incitement in Six Countries* (Westport, CT: Praeger, 1993).

UPDATE
CONSTITUTIONAL DEVELOPMENTS IN ISRAEL

INTRODUCTION

The State of Israel was born on the 14th of May 1948 (corresponding in the Jewish calendar to the 5th day of the month of Iyar 5708). From the earliest days of the new state's existence, attempts have been made to write a constitution. First a constituent assembly was elected to write a constitution. They met in February of 1949 but the task of drafting a constitution proved too daunting and they abandoned the idea. Instead, the assembly transformed itself into the first Knesset (Parliament) with full legislative authority in spite of the fact that no constitutional framework existed for the Knesset's actions.[1]

In 1951, the Harari Resolution solved this dilemma. Pursuant to this resolution, the constitution would be attacked in a "piecemeal fashion."[2] A series of "Basic Laws" have, since 1951, been enacted to cover all aspects of Israeli governmental institutions and functions — the Government, the Knesset, the Army, the Office of President, the Supreme Court, the State Comptroller, and so forth.

All that appeared to be missing was a Basic Law providing constitutional protection for individual rights and freedoms.

Two Basic Law dealing with human rights — *Basic Law: Freedom of Occupation* and *Basic Law: Human Dignity and Freedom* — were enacted in the last Knesset. A translation of these laws follows. A third Basic Law — *Basic Law: Fundamental Rights of the Person* — provides a more general law protecting individual human rights and is presently before the Knesset for consideration. An unofficial translation of this proposed Basic Law follows as well.

In the Spring of 1990, *Constitutional Forum constitutionnel* published an article by David Kretzmer on constitutional change in Israel.[3] The articles that follow by Justice Aharon Barak and Professor Lorraine Weinrib provide an update on the situation and some thoughts on the effect that the *Canadian Charter of Rights and Freedoms* has had as a model for the new Israeli Basic Laws. — ***B.P.E.***

1. L. Susser, "We the People" *Jerusalem Report* (5 November 1992).
2. D. Kretzmer, "The New Basic Laws on Human Rights: A Mini-Revolution in Israeli Constitutional Law?" (1992) 26 *Israel Law Review* 238-249.
3. D. Kretzmer, "The Constitutional Debate in Israel" (1990) 1:3 *Constitutional Forum constitutionnel* 13-14.

BASIC LAW: FREEDOM OF OCCUPATION[1]

Freedom of Occupation	1. Every citizen or resident of the State may engage in any occupation, profession or business; this right shall not be restricted except by statute, for a worthy purpose and for reasons of the public good.
Grounds for Licensing	2. If the engagement in an occupation is conditional upon receiving a license, the right to a license shall not be denied except according to statute and for reasons of state security, public policy, public order and health, safety, the environment, or safeguarding of public morals.
Application	3. All governmental authorities are obligated to respect the freedom of occupation of every citizen or resident.
Stability of the Law	4. Emergency regulations shall not have the power to change, temporarily suspend or place conditions on this Basic Law.
Entrenchment of the Law	5. This Basic Law shall not be changed except by a Basic Law enacted by a majority of Knesset members.
Temporary Provision	6. Legislative provisions that were in force prior to the coming into force of this Basic Law, and which contradict its provisions, shall remain in force for two years from the date on which this Basic Law comes into force; however, the aforesaid provisions shall be interpreted in the spirit of this Basic Law.

1 Enacted by the Knesset on 28th Adar A, 5752 (3 March 1992); the Bill and explanatory comments were published in *Hatza'ot Hok* 2096, 17th Tevet 5752 (24 December 1991), 102.

BASIC LAW: HUMAN DIGNITY AND FREEDOM[2]

Purpose

1. The purpose of this Basic Law is to safeguard human dignity and freedom, in order to entrench in a Basic Law the values of the State of Israel as a Jewish and democratic state.

Safeguarding of Life, Body and Dignity

2. The life, body or dignity of any person shall not be violated.

Protection of Property

3. A person's property shall not be infringed.

Protection of Life, Body and Dignity

4. Every person is entitled to protection of his life, body and dignity.

Personal Liberty

5. The liberty of a person shall not be deprived or restricted through imprisonment, detention, extradition, or in any other manner.

Exit from and Entry into Israel

6. (A) Every person is free to leave Israel.
(B) Every Israeli citizen outside Israel is entitled to enter Israel.

Privacy and Personal Confidentiality

7. (A) Every person is entitled to privacy and to the confidentiality of his life.
(B) A person's private domain shall not be entered without his consent.
(C) No search shall be carried out of a person's private domain, on his body, of his body, or of his personal effects.
(D) The confidentiality of a person's conversations, writings and records shall not be infringed.

Infringement of Rights

8. The rights according to this Basic Law shall not be infringed except by a statute that befits the values of the State of Israel and is directed towards a worthy purpose, and then only to an extent that does not exceed what is necessary.

Exception for Security Forces

9. The rights according to this Basic Law may not be restricted, qualified or waived for those serving in the Israel Defense Forces, the Israel Police, the Prison Service or in other security organizations of the State, except according to law and to an extent that does not exceed what is required by the nature and character of the service.

Conservation of Laws

10. Nothing in this Basic Law affects the validity of law that existed prior to the coming into force of this Basic Law.

Application

11. All governmental authorities are obligated to respect the rights under this Basic Law.

Stability of the Law

12. Emergency regulations shall not have the power to change this Basic Law, to suspend its force temporarily, or to set conditions upon it; however, when there exists a state of emergency in the State by virtue of a proclamation under s. 9 of the Law and Administration Ordinance, 5708-1948,[3] emergency regulations may be promulgated under the aforesaid section which deny or restrict rights according to this Basic Law, provided that the denial or the restriction are for a worthy purpose, and for a period and to an extent that shall not exceed what is necessary.

[2] Enacted by the Knesset on 12th Adar B, 5752 (17 March 1992); the Bill and explanatory comments were published in *Hatza'ot Hok* 2086, of 6th Kislev 5752 (13 November 1991), 60.

[3] *Official Gazette*, no. 2 5708, 1; *Sefer Ha-Chukkim* 5741, 306.

BASIC LAW: FUNDAMENTAL RIGHTS OF THE PERSON

Chapter 1: Fundamental Principles

Fundamental Principles

1. Fundamental human rights in Israel are founded on the recognition of the value of the human being, the sanctity of his or her life and being free; and these rights will be honoured in the spirit of the principles that are in the Declaration of the Establishment of the State of Israel

Derogation or Limitation of the Fundamental Rights - How

2. Fundamental human rights may be derogated from or limited only by means of a statute or explicit agreement in a statute which are consistent with a democratic state, which have a proper purpose and do not go beyond what is required.

Chapter 2: Fundamental Rights

Equality Before the Law and Prohibition of Discrimination

3. Everyone is equal before the law: There shall be no discrimination between persons for reasons of sex, religion, nationality, race, community, country of origin or any other reason. This holds only when the reason is not relevant to the matter.

Physical Integrity and Human Dignity

4. (A person's life, body, and human dignity may not be violated.)
Every person has the right to life, physical integrity, and human dignity. [handwritten]

Personal Liberty

5. A person's liberty may not be taken away or violated by imprisonment, detention, extradition, or in any other way.

Freedom of Movement

6. a. Every person lawfully present in Israel is free to move throughout the country as he wishes.
   b. Every citizen or resident of the State has the freedom to chose his or her place of residence in Israel.
   c. Every person is free to leave Israel.
   d. Every Israeli citizen who is outside of Israel has the right to enter Israel.

Freedom of Religious Belief

7. Every person has freedom of religious belief and also the freedom to fulfil the ([principles of] his or her belief and) the commandments of his or her religion.

Freedom of Opinion and Expression

8. Every person has freedom of opinion and expression and also the freedom to publicly express opinions and information in any manner.

Artistic Freedom and Freedom of Scientific Research

9. Every person has artistic freedom and freedom of scientific research.

Personal Privacy and Privacy of One's Life

10. a. Every person has the right to privacy and to the privacy of his or her life.
    b. The entry onto private property without permission is prohibited, as is the carrying out of a search on a person's private property, on a person's body, inside a person's body or clothing.
    c. The privacy of a person's conversations, writings and records shall not be violated.

Legal Personality

11. Every person has the capacity for obligations, rights, and undertaking legal actions.

Right to Property

12. A person's property may not be interfered with.

Freedom of Occupation

13. Every citizen or resident of the State has the freedom to engage in any occupation, trade or business.

Freedom of Assembly

14. Every citizen or resident of the State has the right to have assemblies, marches and demonstrations.

Freedom to Unionize

15. Every citizen or resident of the State has the freedom to join a union.

Right to Apply to Judicial Authorities

16. Every person has the right to apply to the judicial authorities.

Presumption of Innocence

17. Every person is presumed innocent until found guilty in a judicial proceeding.

Not to Punish without a Caution

18. A person is not criminally guilty for an act or omission that was not a crime according to a statute at the time of action or omission, and a person may not receive a more severe punishment that was applicable by law at the time of the commission of the crime; but the fixing of the amounts of fines is not to be considered an increase in severity of punishment.

Fair Judicial Proceeding

18a. Every person accused of a criminal offence has the right to a fair trial.

Chapter 3: Miscellaneous

Application

19. Every governmental organ or person acting on its behalf is obligated to honour fundamental human rights.

Obligation of Governmental Bodies

Possibility 1

19a. Every governmental body or person acting on its behalf is obligated to act fairly and justly.

Possibility 2

19a. Legal authorities affecting human rights may operate only in a fair proceeding, without bias or irrelevant considerations.

Possibility 3

Add to the end of section 19: ... to act fairly and to come to a just verdict.

Restriction relating to the Defence Forces

[-]

Non-application to Marriage and Divorce Laws

21. The Basic Law does not apply to laws prohibiting and permitting marriages and divorces.

Exercise of Fundamental Rights for a Bad Purpose

22. No fundamental human right may be exercised in a way that will damage the existence of the State or its democratic government or in order to suppress the human rights.

Stability of the Law

23. Emergency decrees do not have the force to alter this Basic Law, to suspend it temporarily or to add conditions to it. Nevertheless, when there exists in the State a state of emergency by force of a declaration pursuant to section 9 of the Proclamation of the Governmental and Judicial Authorities, 1948, it is permissible to make emergency decrees pursuant to the above cited section which have the power to derogate from or to limit the fundamental rights according to sections 5, 6(a)-(c), 8, 10, and 12-15, as long as the derogations or limitations do not exceed the time or extent required.

Force of Law

24. There is nothing in this Basic Law that affects the force of a law that existed prior to the adoption of the Basic Law; however, the law shall be interpreted in the spirit of this Basic Law.

Inflexibility of the [Basic] Law

25. This Basic Law may only be altered explicitly, directed or by a Basic Law which states that it has force despite what is stated in this Basic Law, and that is approved in a plenary sitting of the Knesset by a two thirds majority of the Members on first, second, and third readings.

There are proposed amendments concerning the rights of soldiers, police, prisoners and public servants. Each states that their fundamental rights may be denied or limited to the extent necessitated by the nature and character of their service.

Ministry of the Attorney General
Proposed Basic Law: Fundamental Human Rights / Proposal on Social Rights (6.12.92)

Social Rights

18b. Every resident has the right to live in human dignity, and included in this is the right to work and to fair working conditions and salary, the right to elementary education and the right to enjoy an appropriate level of health and material well-being. The rights in this section will be realized according to law and subject to reasonable limitations determined by the financial capacity of the State.

Right of Workers to Unionize

15a. Workers have the right to join unions for the purpose of defending their rights and for the purpose of adhering to collective agreements.

Right to Strike

15b. Workers have the right to strike.