

## Supreme Court Judgments

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

#### Section 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.
- (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 towards an identifiable group in Canada.

#### I. Facts

Mr. James Keegstra was a high school teacher in Eckville, Alberta from the early 1970s until his dismissal in 1982. In 1984 Mr. Keegstra was charged under s. 319(2) (then s. 281.2(2)) of the Criminal Code with unlawfully promoting hatred against an identifiable group by communicating anti-semitic statements to his students. He was convicted by a jury in a trial before McKenzie J. of the Alberta Court of Queen's Bench.

Mr. Keegstra's teachings attributed various evil qualities to Jews. He thus described Jews to his pupils as "treacherous", "subversive", "sadistic", "money-loving", "power hungry" and "child killers". He taught his classes that Jewish people seek to destroy Christianity and are responsible for depressions, anarchy, chaos, wars and revolution. According to Mr. Keegstra, Jews "created the Holocaust to gain sympathy" and, in contrast to the open and honest Christians, were said to be deceptive, secretive and inherently evil. Mr. Keegstra expected his students to reproduce his teachings in class and on exams. If they failed to do so, their marks suffered.

Prior to his trial, Mr. Keegstra applied to the Court of Queen's Bench in Alberta for an order quashing the charge on a number of grounds, the primary one being that s. 319(2) of the Criminal Code unjustifiably infringed his freedom of expression as guaranteed by s. 2(b) of the Charter. Among the other grounds of appeal was the allegation that the defence of truth found in s. 319(3)(a) of the Code violates the Charter's presumption of innocence. The application was dismissed by Quigley J., and Mr. Keegstra was thereafter tried and convicted. He then appealed his conviction to the Alberta Court of Appeal, raising the same Charter issues. **The Court of Appeal unanimously accepted his argument, and it is from this judgment that the Crown appeals.**

The Attorneys General of Canada, Quebec, Ontario, Manitoba and New Brunswick, the Canadian Jewish Congress, Interamicus, the League for Human Rights of B'nai Brith, Canada, and the Women's Legal Education and Action Fund (L.E.A.F.) have intervened in this appeal in support of the Crown. The Canadian Civil Liberties Association has intervened in support of striking down the impugned legislation.

**Her Majesty The Queen** *Appellant*

v.

**James Keegstra** *Respondent*

and

**The Attorney General of Canada,  
the Attorney General for Ontario,  
the Attorney General of Quebec,  
the Attorney General for New Brunswick,  
the Attorney General of Manitoba,  
the Canadian Jewish Congress,  
the League for Human Rights of B'nai Brith,  
Canada, Interamicus, the Women's Legal  
Education and Action Fund, and the  
Canadian Civil Liberties Association**

*Interveners*

File No.: 21118.

1989: December 5, 6; 1990: December 13.

Present: Dickson C.J.\* and Wilson, La Forest, L'Heureux-Dubé, Sopinka, Gonthier and McLachlin JJ.

*Constitutional law -- Charter of Rights -- Freedom of expression -- Hate propaganda -- Criminal Code prohibiting wilful promotion of hatred against identifiable groups (s. 319(2)) -- Defence of truth to be established by accused on balance of probabilities (s. 319(3)(a)) -- Whether s. 319(2) of Criminal Code infringes s. 2(b) of Canadian Charter of Rights and Freedoms -- If so, whether infringement justifiable under s. 1 of Charter.*

*Constitutional law -- Charter of Rights -- Presumption of innocence -- Reverse onus provision -- Criminal Code prohibiting wilful promotion of hatred against identifiable groups (s. 319(2)) -- Defence of truth to be established by accused on balance of probabilities (s. 319(3)(a)) -- Whether s. 319(3)(a) of Criminal Code infringes s. 11(d) of Canadian Charter of Rights and Freedoms -- If so, whether infringement justifiable under s. 1 of Charter.*

*Constitutional law -- Charter of Rights -- Reasonable limits -- General approach to s. 1 of Canadian Charter of Rights and Freedoms.*

The accused, an Alberta high school teacher, was charged under s. 319(2) of the *Criminal Code* with wilfully promoting hatred against an identifiable group by communicating anti-semitic statements to his students. Prior to his trial, the accused applied to the Court of Queen's Bench for an order quashing the charge. The court dismissed the application on the ground that s. 319(2) of the *Code* did not violate freedom of expression as guaranteed by s. 2(b) of the *Canadian Charter of Rights and Freedoms*. The court, for want of proper notice to the Crown, did not entertain the accused's argument that s. 319(3)(a) of the *Code* violated the presumption of innocence protected by s. 11(d) of the *Charter*. Section 319(3)(a) affords a defence of "truth" to the wilful promotion of hatred but only where the accused proves the truth of the communicated statements on a balance of probabilities. The accused was thereafter tried and convicted. On appeal the accused's *Charter* arguments were accepted, the Court of Appeal holding that ss. 319(2) and 319(3)(a) infringed ss. 2(b) and 11(d) of the *Charter* respectively, and that the infringements were not justifiable under s. 1 of the *Charter*.

*Held* (La Forest, Sopinka and McLachlin JJ. dissenting): The appeal should be allowed. Sections 319(2) and 319(3)(a) of the *Code* are constitutional.

#### (1) *Freedom of Expression*

*Per* Dickson C.J. and Wilson, L'Heureux-Dubé and Gonthier JJ.: Communications which wilfully promote hatred against an identifiable group are protected by s. 2(b) of the *Charter*. When an activity conveys or attempts to convey a meaning, through a non-violent form of expression, it has expressive content and thus falls within the scope of the word "expression" as found in the guarantee. The type of meaning conveyed is irrelevant. Section 2(b) protects all content of

expression. In enacting s. 319(2) of the *Code*, Parliament sought to prohibit communications which convey meaning. Section 319(2), therefore, represents an infringement of s. 2(b).

Communications which are intended to promote hatred against identifiable groups do not fall within the ambit of a possible s. 2(b) exception concerning expression manifested in a violent form. This exception refers only to expression communicated directly through physical harm. Hate propaganda is not analogous to violence. It conveys a meaning that is repugnant, but the repugnance stems from the content of the message and not from its form. As for threats of violence, they are not excluded from the definition of expression envisioned by s. 2(b).

Sections 15 and 27 of the *Charter*, which deal with equality and multiculturalism, and the international agreements signed by Canada on the prohibition of racist statements, should not be used to interpret the scope of s. 2(b). It is inappropriate to attenuate the s. 2(b) freedom on the grounds that a particular context so requires. The large and liberal interpretation given to freedom of expression indicates that the preferable course is to weigh the various contextual values and factors in s. 1 of the *Charter*. This section both guarantees and limits *Charter* rights and freedoms by reference to principles fundamental in a free and democratic society.

Section 319(2) of the *Code* constitutes a reasonable limit upon freedom of expression. Parliament's objective of preventing the harm caused by hate propaganda is of sufficient importance to warrant overriding a constitutional freedom. 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 and perhaps even violence in Canada, has decided to suppress the wilful promotion of hatred against identifiable groups. Parliament's objective is supported not only by the work of numerous study groups, but also by our collective historical knowledge of the potentially catastrophic effects of the promotion of hatred. Additionally, the international commitment to eradicate hate propaganda and Canada's commitment to the values of equality and multiculturalism in ss. 15 and 27 of the *Charter* strongly buttress the importance of this objective.

Section 319(2) of the *Code* is an acceptably proportional response to Parliament's valid objective. There is obviously a rational connection between the criminal prohibition of hate propaganda and the objective of protecting target group members and of fostering harmonious social relations in a community dedicated to equality and multiculturalism. Section 319(2) serves to illustrate to the public the severe reprobation with which society holds messages of hate directed towards racial and religious groups. It makes that kind of expression less attractive and hence decreases acceptance of its content. Section 319(2) is also a means by which the values beneficial to a free and democratic society in particular, the value of equality and the worth and dignity of each human person can be publicized.

Section 319(2) of the *Code* does not unduly impair freedom of expression. This section does not suffer from overbreadth or vagueness; rather, the terms of the offence indicate that s. 319(2) possesses definitional limits which act as safeguards to ensure that it will capture only expressive activity which is openly hostile to Parliament's objective, and will thus attack only the harm at which the prohibition is targeted. The word "wilfully" imports into the offence a stringent standard of *mens rea* which significantly restricts the reach of s. 319(2) by necessitating the proof of either an intent to promote hatred or knowledge of the substantial certainty of such a consequence. The word "hatred" further reduces the scope of the prohibition. This word, in the context of s. 319(2), must be construed as encompassing only the most severe and deeply felt form of opprobrium. Further, the exclusion of private communications from the scope of s. 319(2), the need for the promotion of hatred to focus upon an identifiable group and the presence of the s. 319(3) defences, which clarify

the scope of s. 319(2), all support the view that the impugned section creates a narrowly confined offence. Section 319(2) is not an excessive impairment of freedom of expression merely because the defence of truth in s. 319(3)(a) does not cover negligent or innocent error as to the truthfulness of a statement. Whether or not a statement is susceptible to classification as true or false, such error should not excuse an accused who has wilfully used a statement in order to promote hatred against an identifiable group. Finally, while other non-criminal modes of combatting hate propaganda exist, it is eminently reasonable to utilize more than one type of legislative tool in working to prevent the spread of racist expression and its resultant harm. To send out a strong message of condemnation, both reinforcing the values underlying s. 319(2) and deterring the few individuals who would harm target group members and the larger community by communicating hate propaganda, will occasionally require use of the criminal law.

The effects of s. 319(2) are not of such a deleterious nature as to outweigh any advantage gleaned from the limitation of s. 2(b). The expressive activity at which s. 319(2) is aimed constitutes a special category, a category only tenuously connected with the values underlying the guarantee of freedom of expression. Hate propaganda contributes little to the aspirations of Canadians or Canada in either 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. Moreover, the narrowly drawn terms of s. 319(2) and its defences prevent the prohibition of expression lying outside of this narrow category. Consequently, the suppression of hate propaganda represents an impairment of the individual's freedom of expression which is not of a most serious nature.

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