R. *v.* Zundel, [1992] 2 S.C.R. 731

Ernst Zundel *Appellant*

v.

Her Majesty The Queen *Respondent*

and

The Attorney General of Canada,
the Attorney General of Manitoba,
the Canadian Civil Liberties Association,
the League for Human Rights of B'Nai Brith
Canada and the Canadian Jewish Congress
Interveners

Indexed as: R. *v.* Zundel

File No.: 21811.

1991: December 10: 1992: August 27.

Present: La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin and Iacobucci JJ.

on appeal from the court of appeal for ontario

Constitutional law -- Charter of Rights -- Freedom of expression -- Spreading false news -- Criminal Code prohibiting wilful publication of false

statement or news that person knows is false and that is likely to cause injury or mischief to a public interest (s. 181) -- Whether s. 181 of Code infringes s. 2(b) of Canadian Charter of Rights and Freedoms -- If so, whether s. 181 justifiable under s. 1 of Charter -- Vagueness -- Canadian Charter of Rights and Freedoms, ss. 1, 2(b) -- Criminal Code, R.S.C., 1985, c. C-46, s. 181.

Criminal law -- Spreading false news -- Freedom of expression -- Criminal Code prohibiting wilful publication of false statement or news that person knows is false and that is likely to cause injury or mischief to a public interest (s. 181) -- Whether s. 181 of Code infringes the guarantee of freedom of expression in s. 2(b) of Canadian Charter of Rights and Freedoms -- If so, whether limit imposed by s. 181 upon s. 2(b) justifiable under s. 1 of Charter -- Canadian Charter of Rights and Freedoms, ss. 1, 2(b) -- Criminal Code, R.S.C., 1985, c. C-46, s. 181.

The accused was charged with spreading false news contrary to s. 181 of the *Criminal Code*, which provides that "[e]very one who wilfully publishes a statement, tale or news that he knows is false and causes or is likely to cause injury or mischief to a public interest is guilty of an indictable offence and liable to imprisonment . . .". The charge arose out of the accused's publication of a pamphlet entitled *Did Six Million Really Die?* The accused had added a preface and afterword to an original document, which had previously been published by others in the United States and England. The pamphlet, part of a genre of literature known as "revisionist history", suggests, *inter alia*, that it has not been established that six million Jews were killed before and during World War II and

that the Holocaust was a myth perpetrated by a worldwide Jewish conspiracy. The accused was convicted after a lengthy trial. On appeal, his conviction was upheld on constitutional grounds but struck down for errors in admitting evidence and in the charge to the jury. The matter was sent back for a new trial. The accused was again convicted and his conviction was affirmed by the Court of Appeal. This appeal is to determine whether s. 181 of the *Code* infringes the guarantee of freedom of expression in s. 2(*b*) of the *Canadian Charter of Rights and Freedoms* and, if so, whether s. 181 is justifiable under s. 1 of the *Charter*.

Held (Gonthier, Cory and Iacobucci JJ. dissenting): The appeal should be allowed. Section 181 of the *Criminal Code* is unconstitutional.

Per La Forest, L'Heureux-Dubé, Sopinka and McLachlin JJ.: Section 181 of the *Code* infringes the guarantee of freedom of expression. Section 2(*b*) of the *Charter* protects the right of a minority to express its view, however unpopular it may be. All communications which convey or attempt to convey meaning are protected by s. 2(*b*), unless the physical form by which the communication is made (for example, a violent act) excludes protection. The content of the communication is irrelevant. The purpose of the guarantee is to permit free expression to the end of promoting truth, political or social participation, and self-fulfilment. That purpose extends to the protection of minority beliefs which the majority regards as wrong or false. Section 181, which may subject a person to criminal conviction and potential imprisonment because of words he published, has undeniably the effect of restricting freedom of expression and, therefore, imposes a limit on s. 2(*b*).

Given the broad, purposive interpretation of the freedom of expression guaranteed by s. 2(*b*), those who deliberately publish falsehoods are not, for that reason alone, precluded from claiming the benefit of the constitutional guarantees of free speech. Before a person is denied the protection of s. 2(*b*), it must be certain that there can be no justification for offering protection. The criterion of falsity falls short of this certainty, given that false statements can sometimes have value and given the difficulty of conclusively determining total falsity.

Section 181 of the *Code*, unlike s. 319 at issue in *Keegstra*, is not justifiable under s. 1 of the *Charter*. In determining the objective of a legislative measure for the purposes of s. 1, the Court must look at the intention of Parliament when the section was enacted or amended. It cannot assign objectives, nor invent new ones according to the perceived current utility of the impugned provision. Although the application and interpretation of objectives may vary over time, new and altogether different purposes should not be devised. Here, while s. 181 may be capable of serving legitimate purposes, Parliament has identified no social problem, much less one of pressing concern, justifying it. The provision originally focused on the prevention of deliberate slanderous statements against the nobles of the realm to preserve political harmony in the state. To suggest now that its objective is to combat hate propaganda or racism is to go beyond its history and its wording and to adopt the "shifting purpose" analysis this Court has rejected. Such an objective, moreover, hardly seems capable of being described as a "nuisance", the rubric under which Parliament has placed s. 181, nor as the offence's target of mere "mischief" to a public interest. Furthermore, if the simple identification of the (content-free) goal of protecting

the public from harm could constitute a "pressing and substantial" objective, virtually any law would meet the first part of the onus imposed upon the Crown under s. 1. Justification under s. 1 requires more than the general goal of protection from harm common to all criminal legislation; it requires a specific purpose so pressing and substantial as to be capable of overriding the *Charter*'s guarantees. The lack of any ostensible purpose justifying s. 181 led the Law Reform Commission of Canada to recommend repeal of the section, labelling it as "anachronistic". It is also significant that the Crown could point to no other free and democratic country with criminal legislation of this type. The fact that s. 181 has been rarely used despite its long history supports the view that it is hardly essential to the maintenance of a free and democratic society. The retention of s. 181 is not necessary to fulfil any international obligation undertaken by Parliament. In the absence of an objective of sufficient importance to justify overriding the right of free expression, s. 181 cannot be upheld under s. 1 of the *Charter*. Other provisions, such as s. 319(2) of the *Code*, deal with hate propaganda more fairly and more effectively. Still other provisions seem to deal adequately with matters of sedition and state security.

Even if the Court were to attribute to s. 181 the objective of promoting racial and social tolerance and to conclude that such objective was so pressing and substantial as to be capable of overriding a fundamental freedom, s. 181 would still fail to meet the proportionality test which prevailed in *Keegstra*. First, assuming a rational link between s. 181 and the objective of social harmony, the section is too broad and more invasive than necessary to achieve that aim. The phrase "statement, tale or news", while it may not extend to the realm of true

opinion, obviously encompasses a broad range of historical and social speech, going well beyond what is patent or provable to the senses as a matter of "pure fact". What is an assertion of fact, as opposed to an expression of opinion, is a question of great difficulty and the question of falsity of a statement is often a matter of debate. But the greatest danger of s. 181 lies in the undefined phrase "injury or mischief to a public interest", which is capable of almost infinite extension. To equate the words "public interest" with the protection and preservation of certain *Charter* rights or values, such as those in ss. 15 and 27, is to engage in an impermissible reading in of content foreign to the enactment. The range of expression potentially caught by the vague and broad wording of s. 181 extends to virtually all controversial statements of apparent fact which might be argued to be false and likely to do some mischief to some public interest, regardless of whether they promote the values underlying s. 2(*b*). Not only is s. 181 broad in contextual reach; it is particularly invasive because it chooses the most draconian of sanctions to effect its ends -- prosecution for an indictable offence under the criminal law. There is thus a danger that s. 181 may have a chilling effect on minority groups or individuals, restraining them from saying what they would like for fear that they might be prosecuted. Second, when the objective of s. 181 is balanced against its potential invasive reach, the limitation of freedom of expression is disproportionate to the objective envisaged. The value of liberty of speech, one of the most fundamental freedoms protected by the *Charter*, needs no elaboration. By contrast, the objective of s. 181, in so far as an objective can be ascribed, falls short of constituting a countervailing interest of the most compelling nature. Further, s. 181 could support criminalization of

expression only on the basis that the sanction was closely confined to situations of serious concern.

Per Gonthier, Cory and Iacobucci JJ. (dissenting): The deliberate publication of statements known to be false, which convey meaning in a non-violent form, falls within the scope of s. 2(*b*) of the *Charter*. The sphere of expression protected by the section has been very broadly defined to encompass all content of expression irrespective of the particular meaning sought to be conveyed unless the expression is communicated in a physically violent form. Freedom of expression is so important to democracy in Canada that even those statements on the extreme periphery of the protected right must be brought within the protective ambit of s. 2(*b*). In enacting s. 181 of the *Code*, Parliament sought to restrict, not all lies, but only those that are wilfully published and that are likely to injure the public interest. Although the targeted expression is extremely limited, the provision does have as its purpose the restriction of free expression. Section 181, therefore, constitutes an infringement of s. 2(*b*).

Section 181 of the *Code* is sufficiently precise to constitute a limit prescribed by law under s. 1 of the *Charter*. The citizen knows that to be at risk under this section, he must wilfully publish a false statement knowing it to be false. Further, the publication of those statements must injure or be likely to injure the public interest. The fact that the term "public interest" is not defined by the legislation is of little significance. The courts play a significant role in the definition of words and phrases used in the *Code* and other enactments. The term "public interest", which is widely used in federal as well as provincial statutes,

must be interpreted in light of the legislative history of the particular provision in which it appears and the legislative and social context in which it is used. In the context of s. 181, the term "public interest" should be confined to those rights recognized in the *Charter* as being fundamental to Canadian democracy. It need not be extended beyond that. As an example, the rights enacted in ss. 7, 15 and 27 of the *Charter* should be considered in defining a public interest. A "public interest" likely to be harmed as a result of contravention of s. 181 is the public interest in a free and democratic society that is subject to the rule of law. A free society is one built upon reasoned debate in which all its members are entitled to participate. As a fundamental document setting out essential features of our vision of democracy, the *Charter* provides us with indications as to which values go to the very core of our political structure. A democratic society capable of giving effect to the *Charter*'s guarantees is one which strives toward creating a community committed to equality, liberty and human dignity. It is thus only if the deliberate false statements are likely to seriously injure the rights and freedoms set out in the *Charter* that s. 181 is infringed. This section, therefore, provides sufficient guidance as to the legal consequence of a given course of conduct and cannot be said to be too vague.

Section 181 of the *Code* is justifiable under s. 1 of the *Charter*. Parliament's objective of preventing the harm caused by the wilful publication of injurious lies is sufficiently pressing and substantial to justify a limited restriction on freedom of expression. The objective of s. 181 is evident from the clear wording of the provision which prohibits the publication of a statement that the accused knows is false and "that causes or is likely to cause injury". This specific

objective in turn promotes the public interest in furthering racial, religious and social tolerance. There is a pressing and substantial need to protect groups identifiable under s. 15 of the *Charter*, and therefore society as a whole, from the serious harm that can result from such "expression". The work of numerous study groups has shown that racism is a current and present evil in our country. It is a cancerous growth that is still alive. Section 181, which provides protection, by criminal sanction, to all vulnerable minority groups and individuals against the harms caused by deliberate and injurious lies, still plays a useful and important role in encouraging racial and social tolerance, which is so essential to the successful functioning of a democratic and multicultural society. The focus of s. 181 is on manipulative and injurious false statements of fact disguised as authentic research. The international instruments against national, racial or religious hatred signed by Canada, the various provisions similar to s. 181 found in other free and democratic countries, the tragedy of the Holocaust and Canada's commitment to the values of equality and multiculturalism in ss. 15 and 27 of the *Charter* emphasize the importance of s. 181's aim.

The purpose attributed to s. 181 is not new. The predecessors of s. 181 were always aimed at preventing the harm caused by false speech and thereby protecting the safety and security of the community. While initially the protection of the public interest from harm focused on the prevention of deliberate slanderous statements against the great nobles of the realm to preserve the security of the state, the purpose has evolved over the years to extend the protections from harm caused by false speech to vulnerable social groups and therefore to safeguard the public interest against social intolerance and public

alarm. Thus, rather than creating a new and different purpose, the aim of the section has been maintained. The wording of s. 181, however, includes a permissible shift in emphasis with its test which is based on injury to the public interest. Looking back to the inclusion of the offence in the *Code*, and the last amendment to the section, one can reasonably conclude that there has been a shift in the values that inform the public interest. Since this shift has been incorporated into the language of the section itself, it is therefore permissible. The test of defining "injury . . . to a public interest" takes into account the changing values of Canadian society. Those values encompass multiculturalism and equality, precepts specifically included in the *Charter*.

Section 181 of the *Code* is an acceptably proportional response to Parliament's objective. First, there is a rational connection between the suppression of the publication of deliberate and injurious lies and Parliament's objective of protecting society from the harms caused by calculated falsehoods and thereby promoting the security and safety of the community. Where racial and social intolerance is fomented through the deliberate manipulation of people of good faith by unscrupulous fabrications, a limitation on the expression of such speech is rationally connected to its eradication.

Second, s. 181 does not unduly infringe the right of freedom of expression. Under s. 181, the accused is not judged on the unpopularity of his beliefs. It is only where the deliberate publication of false facts is likely to seriously injure a public interest that the impugned section is invoked. Any uncertainty as to the nature of the speech inures to the benefit of the accused. The

infrequent use of s. 181 can be attributed to the extremely onerous burden on the Crown to prove each element of the offence. The fact that the section is seldom used, however, should not militate against its usefulness. Further, s. 181 is not overly broad. An application of the appropriate criteria makes it possible to draw a coherent distinction between statements of opinion and assertions of fact. When applied to the pamphlet at issue in this case, these criteria indicate that statements couched as "revisionist history" may be taken to be allegations of fact rather than submissions of opinion. The jury, as instructed by the trial judge, was clearly capable of drawing that distinction. While it is true that no theory of history can be proved or disproved, the accused has not been convicted for misinterpreting factual material but for entirely and deliberately misrepresenting its contents, manipulating and fabricating basic facts in order to support his theories. Courts deal with the question of truth and falsity of statements on a daily basis. With reference to reliable historical documents, "historical facts" can also be shown to be true or false in the context of s. 181 -- a section well suited to respond to the harm caused by vilification campaigns disguised as pseudo-science. Finally, the fact that Parliament has enacted hate propaganda legislation does not invalidate s. 181. The government may legitimately employ a variety of measures in order to achieve its objective. Human rights legislation may, in certain circumstances, be sufficient to deal with a particular problem in this area, but the strength of the criminal law is needed and reserved for the extreme cases, such as the case at hand, to send a clear message and to discourage and punish those who knowingly publish falsehoods that are likely to injure a public interest.

Third, the prohibition of the wilful publication of what are known to be deliberate lies is proportional to the importance of protecting the public interest in preventing the harms caused by false speech and thereby promoting racial and social tolerance in a multicultural democracy. Section 181, at best, limits only that expression which is peripheral to the core values protected by s. 2(*b*) of the *Charter*. The falsehoods of the type caught by s. 181 serve only to hinder and detract from democratic debate. The section is narrowly defined in order to minimally impair s. 2(*b*). It also provides maximum protection for the accused.

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By McLachlin J.

Distinguished: *R. v. Keegstra*, [1990] 3 S.C.R. 697; **applied**: *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *R. v. Oakes*, [1986] 1 S.C.R. 103; **referred to**: *R. v. Butler*, [1992] 1 S.C.R. 452; *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712; *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *Reference re Alberta Statutes*, [1938] S.C.R. 100; *Switzman v. Elbling*, [1957] S.C.R. 285; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326; *Hills v. Canada (Attorney General)*, [1988] 1 S.C.R. 513; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *R. v. Salituro*, [1991] 3 S.C.R. 654; *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154; *United States v. Schwimmer*, 279 U.S. 644 (1929); *R. v. Hoaglin* (1907), 12 C.C.C.

226; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123; *R. v. Carrier* (1951), 16 C.R. 18, 104 C.C.C. 75; *R. v. Kirby* (1970), 1 C.C.C. (2d) 286.

By Cory and Iacobucci JJ. (dissenting)

R. v. Keegstra, [1990] 3 S.C.R. 697; *R. v. Oakes*, [1986] 1 S.C.R. 103; *Pappajohn v. The Queen*, [1980] 2 S.C.R. 120; *R. v. Osborne* (1732), 2 Swans. 532, 36 E.R. 717; *R. v. De Berenger* (1814), 3 M. & S. 67, 105 E.R. 536; *Gathercole's Case* (1838), 2 Lewin 237, 168 E.R. 1140; *Scott's Case* (1778), 5 New Newgate Calendar 284; *R. v. Hoaglin* (1907), 12 C.C.C. 226; *R. v. Carrier* (1951), 16 C.R. 18, 104 C.C.C. 75; *R. v. Kirby* (1970), 1 C.C.C. (2d) 286; *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 000; *R. v. MacLean and MacLean (No. 2)* (1982), 1 C.C.C. (3d) 412; *R. v. Springer* (1975), 24 C.C.C. (2d) 56; *R. v. Butler*, [1992] 1 S.C.R. 452; *R. v. Olan*, [1978] 2 S.C.R. 1175; *Hills v. Canada (Attorney General)*, [1988] 1 S.C.R. 513; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *R. v. Salituro*, [1991] 3 S.C.R. 654; *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154; *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143; *R. v. Fringe Product Inc.* (1990), 53 C.C.C. (3d) 422; *Garrison v. Louisiana*, 379 U.S. 64 (1964); *Ollman v. Evans*, 750 F.2d 970 (1984), *certiorari* denied, 471 U.S. 1127 (1985); *Johnson v. The Queen*, [1975] 2 S.C.R. 160; *Kane v. Church of Jesus Christ Christian -- Aryan Nations*, [1992] A.W.L.D. No. 302; *R. v. Zundel*, Ont.

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Criminal Code, R.S.C. 1927, c. 36, s. 136.

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Criminal Code, R.S.C., 1985, c. C-46, ss. 140, 181, 361 to 363, 400, 686(1)(*b*)(iii).

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APPEAL from a judgment of the Ontario Court of Appeal (1990), 53 C.C.C. (3d) 161, 37 O.A.C. 354, dismissing the accused's appeal from his conviction on a charge of wilfully and knowingly publishing a false statement contrary to s. 181 of the *Criminal Code*. Appeal allowed, Gonthier, Cory and Iacobucci JJ. dissenting.

Douglas H. Christie, for the appellant.

W. J. Blacklock and *Jamie C. Klukach*, for the respondent.

Graham R. Garton and *James Hendry*, for the intervener the Attorney General of Canada.

Aaron L. Berg, for the intervener the Attorney General of Manitoba.

Marc Rosenberg and *Shayne Kert*, for the intervener the Canadian Civil Liberties Association.

Mark J. Sandler and *Marvin Kurz*, for the intervener the League for Human Rights of B'Nai Brith Canada.

Neil Finkelstein, for the intervener the Canadian Jewish Congress.

//*McLcahlin J.*//

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

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

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

Neither the admittedly offensive beliefs of the appellant, Mr. Zundel, nor the specific publication with regard to which he was charged under s. 181 are directly engaged by these constitutional questions. This appeal is not about the dissemination of hate, which was the focus of this Court's decision in *R. v. Keegstra*, [1990] 3 S.C.R. 697, and the reasons of my colleagues Cory and Iacobucci JJ. here. In *Keegstra*, this Court ruled that the provisions of the *Criminal Code* which prohibit the dissemination of hate violated the guarantee of freedom of expression but were saved under s. 1 of the *Charter*. This case presents the Court with the question of whether a much broader and vaguer class of speech -- false statements deemed likely to injure or cause mischief to any public interest -- can be saved under s. 1 of the *Charter*. In my view, the answer to this question must be in the negative. To permit the imprisonment of people, or even the threat of imprisonment, on the ground that they have made a statement which 12 of their co-citizens deem to be false and mischievous to some undefined public interest, is to stifle a whole range of speech, some of which has long been regarded as legitimate and even beneficial to our society. I do not assert that Parliament cannot criminalize the dissemination of racial slurs and hate propaganda. I do assert, however, that such provisions must be drafted with sufficient particularity to offer assurance that they cannot be abused so as to stifle a broad range of legitimate and valuable speech.

The Background

The charge arises out of the publication by the appellant of a 32-page booklet seemingly entitled *Did Six Million Really Die?* which had previously been

published by others in the United States and England. The bulk of the booklet, excepting the foreword and postscript authored by the appellant, purports to review certain publications in a critical fashion. On the basis of this review, it suggests, *inter alia*, that it has not been established that six million Jewish people were killed before and during World War II and that the Holocaust is a myth perpetrated by a worldwide Jewish conspiracy.

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

The Issues

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

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

Analysis

1. *Section 181: Its History, Purpose and Ambit*

Section 181 dates from the Statute of Westminster in 1275, which introduced the offence *De Scandalis Magnatum* or *Scandalum Magnatum*. It provided "[t]hat from henceforth none be so hardy to tell or publish any false News or Tales, whereby discord, or occasion of discord or slander may grow between the King and his People, or the Great Men of the Realm". The criminal offence was enforced by the King's Council, and later by the Court of Star Chamber, until the 17th century when its enforcement was taken over by the common law courts. It had as its primary aim the prevention of "false statements which, in a society dominated by extremely powerful landowners, could threaten the security of the state": see *R. v. Keegstra*, *supra*, at p. 722, *per* Dickson C.J.; and F. R. Scott, "Publishing False News" (1952), 30 *Can. Bar Rev.* 37, at pp. 38-39. As Holdsworth recounts, "[t]his was no vain fear at a time when the offended great one was only too ready to resort to arms to redress a fancied injury": *A History of English Law* (5th ed. 1942), vol. III, at p. 409. Nonetheless, *De Scandalis Magnatum* is not thought to have been a very effective instrument. Holdsworth refers to a "thin stream of . . . cases" from the 16th century onwards; by the time of its repeal in 1887 (*Statute Law Revision Act*, 1887 (U.K.), 50 & 51 Vict., c. 59) it had long been obsolete.

Although the offence of spreading false news was abolished in England in 1887, and does not survive in the United States, it was enacted in Canada as part of the 1892 *Criminal Code*. The reason for the offence's retention in Canada is unknown. Scott suggests that it may have been no more than

oversight, with no one in Canada being aware that the English provision had been repealed four years previously: see Scott, *supra*, at p. 40. Certainly Burbridge, the drafter of the 1892 *Code*, was no enthusiast of the offence, commenting in his 1890 *Digest of the Criminal Law in Canada* that its "definition is very vague and the doctrine exceedingly doubtful": see Scott, *supra*, at p. 39. Be that as it may, the offence was retained, originally under the rubric of "Seditious Offences" (*Criminal Code, 1892*, S.C. 1892, c. 29, s. 126; R.S.C. 1927, c. 36, s. 136) and more latterly as a species of "Nuisance" (S.C. 1953-54, c. 51, s. 166). Until its revision in 1955, the *Criminal Code* provision read:

> **136.** Every one is guilty of an indictable offence and liable to one year's imprisonment who wilfully and knowingly publishes any false news or tale whereby injury or mischief is or is likely to be occasioned to any public interest.

The substantive elements of the offence remained the same after Parliament's 1955 transfer of the provision to the "nuisance" section of the *Code*, but the potential sentence was increased to two years. Neither documentary nor *viva voce* evidence has been proffered to explain why the section was retained in Canada when it had been dropped elsewhere or why it was moved from the offences dealing with "Sedition" to those dealing with "Nuisance". What is now s. 181 has been judicially considered only three times in Canada, excluding this case; the jurisprudence on it is virtually non-existent.

After considering the rather sparse history of the provision, Cory and Iacobucci JJ. conclude at p. 000 that:

> . . . a review of the historical development of the law's response to false news reflects its role in prohibiting the dissemination of false information which strikes at important interests of society as a whole. Section 181 perpetuates one of the central functions of *De Scandalis* in prohibiting public alarm and internecine hostilities between and among social groups.

With the greatest respect, I find no support in the history of the provision for such a conclusion. The only lesson to be gleaned from the history of s. 181 is that the offence was aimed at protecting the rule of law and the security of the state, in the guise of the head of power whether that be the monarchy or later the government: see Drouin J. in *R. v. Carrier* (1951), 16 C.R. 18, 104 C.C.C. 75 (Que. K.B. (Criminal Side)). The fact that provocative racial statements have been, on the odd occasion in the past two hundred years, prosecuted as other criminal offences such as "public mischief" and "criminal libel" sheds no light on the objective behind the enactment of the "false news" provision. Moreover, as discussed below, the very cases referred to by Cory and Iacobucci JJ. to support their conclusions actually reveal the overinclusiveness of the provision.

I turn from history to the wording of s. 181 and the ambit of the section upon whose constitutionality this Court is asked to pronounce. The construction of s. 181 is not at issue in these proceedings, leave to appeal on those issues having been denied. The analysis of the constitutionality of s. 181 must therefore be based on the section as it was interpreted by the courts below.

As interpreted by the trial judge and the Court of Appeal below, the *actus reus* of the offence is the publication of "a statement, tale or news" that is false and that "causes or is likely to cause injury or mischief to a public interest . .

.". The *mens rea* lies in the knowledge that the statement is false. Thus the Crown, to succeed, must establish beyond a reasonable doubt the following propositions:

1. That the accused published a false statement, tale or news;

2. That the accused knew the statement was false; and

3. That the statement causes or is likely to cause injury or mischief to a public interest.

Each of the three elements of the offence created by s. 181 is capable of giving rise to considerable difficulty of application in the context of a trial. The question of falsity of a statement is often a matter of debate, particularly where historical facts are at issue. (Historians have written extensively on the difficulty of ascertaining what actually occurred in the past, given the difficulty of verification and the selective and sometimes revisionist versions different witnesses and historians may accord to the same events; see, for example, the now famous treatise of E. H. Carr, *What is History?* (1961)). The element of the accused's knowledge of falsity compounds the problem, adding the need to draw a conclusion about the accused's subjective belief as to the truth or falsity of the statements. Finally, the issue of whether a statement causes or is likely to cause injury or mischief to the public interest requires the identification of a public interest and a determination of whether it has been or is likely to be injured. In the case of each of the three elements of the offence, the not inconsiderable

epistemological and factual problems are left for resolution by the jury under the rubric of "fact". Thus, both in its breadth and in the nature of the criteria it posits, s. 181 poses difficulties not usually associated with criminal prohibitions, which traditionally demand no more of a jury than common sense inferences from concrete findings on matters patent to the senses.

At pages 000-000, Cory and Iacobucci JJ. summarize and interpret in detail the s. 181 trial process in the case at bar, the goal being to show that s. 181 did not theoretically or practically preclude the accused Zundel from raising a reasonable doubt on each element of the offence -- a basic requirement of fundamental justice. The argument, as I understand it, would appear to be that if s. 181 occasioned no unfairness in this case, it never will. One doubts the validity of such an inference, given the acknowledgement that this was a clear, simple case on the facts. But that aside, I do not share my colleagues' view that as a practical matter the Court can be certain, even in this instance, that the defendant was accorded procedural justice. On the contrary, it is my view that the difficulties encountered in this case underline the inherent vices of s. 181.

Difficulties were encountered at trial with respect to all three elements of the offence -- with respect to what constitutes a "statement, tale or news", interpreted as constituting an assertion of fact as opposed to opinion; what constitutes injury or mischief to a public interest; and what constitutes proof of knowledge of falsity of the statement. The courts below resolved the difficult issue of the distinction between a statement and an opinion by treating it as a question of fact for the jury to resolve. While this is true in a technical legal

sense, in a practical sense the jury was told that the publication at issue was a false statement. By applying the doctrine of judicial notice and telling the jury that "[t]he mass murder and extermination of Jews in Europe by the Nazi regime" was an (historical) fact no "reasonable person" could dispute, the judge effectively settled the issue for them. Moreover, I am unable to agree with my colleagues (see p. 000) that the trial judge instructed the jury that the "onus of differentiating fact from opinion" lay with the Crown. Judge Thomas's direction that the Crown must prove "that the pamphlet, in essence, is a false statement of fact" does not impose upon the Crown the more difficult burden of first explaining to and then convincing a jury of the distinction between historical fact and historical opinion regarding events almost fifty years old. This might be forgiven, given the elusiveness of distinguishing historical fact from historical opinion. But it shows the danger in criminalizing "false statements". The contention is that expressions of opinion are not caught by s. 181. The reality is that when the matter is one on which the majority of the public has settled views, opinions may, for all practical purposes, be treated as an expression of a "false fact".

The question of knowledge of falsity was similarly left as a question of fact for the jury to decide. But this too was not a question of fact in the usual sense. The jury was instructed that it was entitled to infer from the judge's instruction that because the Holocaust must be regarded as proven, the accused must have known it to be proven and must be taken to have published his pamphlet deliberately for personal motives, knowing the falsity of his assertion to the contrary. Judge Thomas added, albeit as only one factor in this assessment,

the principle that the "more unreasonable the belief, the easier it is to draw the inference that the belief is not honestly held". In the context of a sexual assault trial such an instruction would be unlikely to mislead the jury, both because questions of consent and perceptions of consent are far more common place than questions of the sincerity of an accused's belief in esoteric or outlandish historical "facts", and because the jury is likely to have the assistance of the *viva voce* evidence of both the complainant and accused in determining whether the inference that the accused's unreasonable belief in the complainant's consent was not an honest one ought to be drawn. But in the context of a prosecution under s. 181 a jury is, in the face of such instructions, unlikely to be able to evaluate or accept the accused's assertion that he believed the truth of his publications. The logic is ineluctable: everyone knows this is false; therefore the defendant must have known it was false.

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

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

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

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

Section 2(*b*) of the *Charter* provides:

> **2.** Everyone has the following fundamental freedoms:
>
> . . .
>
> (*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

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

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

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

The purpose of the guarantee is to permit free expression to the end of promoting truth, political or social participation, and self-fulfilment. That purpose extends to the protection of minority beliefs which the majority regard as wrong or false: *Irwin Toy, supra*, at p. 968. Tests of free expression frequently involve a contest between the majoritarian view of what is true or right and an unpopular minority view. As Holmes J. stated over sixty years ago, the fact that the particular content of a person's speech might "excite popular prejudice" is no reason to deny it protection for "if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought -- not free thought for those who agree with us but freedom for the thought that we hate": *United States v. Schwimmer*, 279 U.S. 644 (1929), at pp. 654-55. Thus the guarantee of freedom of expression serves to protect the right of the minority to express its view, however unpopular it may be; adapted to this context, it serves to preclude the majority's perception of `truth' or `public interest' from smothering the minority's perception. The view of the majority has no need of constitutional protection; it is tolerated in any event. Viewed thus, a law which forbids expression of a minority or "false" view on pain of criminal prosecution and imprisonment, on its face, offends the purpose of the guarantee of free expression.

The jurisprudence supports this conclusion. This Court in *Keegstra* held that the hate propaganda there at issue was protected by s. 2(*b*) of the *Charter*. There is no ground for refusing the same protection to the communications at issue in this case. This Court has repeatedly affirmed that all communications which convey or attempt to convey meaning are protected by s.

2(*b*), unless the physical form by which the communication is made (for example, by a violent act) excludes protection: *Irwin Toy*, *supra*, at p. 970, *per* Dickson C.J. and Lamer and Wilson JJ. In determining whether a communication falls under s. 2(*b*), this Court has consistently refused to take into account the content of the communication, adhering to the precept that it is often the unpopular statement which is most in need of protection under the guarantee of free speech: see, e.g., *Keegstra*, *supra*, at p. 828, *per* McLachlin J.; *R. v. Butler*, [1992] 1 S.C.R. 452, at p. 488, *per* Sopinka J.

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

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

The second argument advanced is that the appellant's publication is not protected because it serves none of the values underlying s. 2(*b*). A deliberate

lie, it is said, does not promote truth, political or social participation, or self-fulfilment. Therefore, it is not deserving of protection.

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

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

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

Indeed, the very cases relied upon by Cory and Iacobucci JJ. to support their position reveal the potential of s. 181 for suppressing valuable political criticism or satire. In *R. v. Hoaglin* (1907), 12 C.C.C. 226 (N.W.T.S.C.), cited at p. 000 of their judgment, the "false" publication asserted "Americans not wanted in Canada". The injury to public interest was, in the words of Harvey J., that "if [Americans] investigate they will find conditions such as to prevent them investing and taking up homesteads" (*Hoaglin, supra*, at p. 228). Even if one accepts the finding that the statement was undoubtedly "false", it arguably represented a valuable contribution to political debate on Canadian immigration policy. Yet the accused was convicted for publication of such statements contrary to s. 136 (now s. 181). Similarly, in *R. v. Kirby* (1970), 1 C.C.C. (2d) 286 (Que. C.A.), a case involving prosecution for publication of political satire in the Montreal Gazette (cited at p. 000 of their judgment), Hyde J.A. accepted that the publication fell within the satirical tradition of Chaucer, Swift and Addison. In reversing the trial judge's conviction, he observed that the section may capture "pranks" and that the "prank" in question was "very close to the border" (p. 290).

The second difficulty lies in the assumption that we can identify the essence of the communication and determine that it is false with sufficient

accuracy to make falsity a fair criterion for denial of constitutional protection. In approaching this question, we must bear in mind that tests which involve interpretation and balancing of conflicting values and interests, while useful under s. 1 of the *Charter*, can be unfair if used to deny *prima facie* protection.

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

Even a publication as crude as that at issue in this case illustrates the difficulty of determining its meaning. On the respondent's view, the assertion that there was no Nazi Policy of the extermination of Jews in World War II communicates only one meaning -- that there was no policy, a meaning which, as my colleagues rightly point out, may be extremely hurtful to those who suffered or lost loved ones under it. Yet, other meanings may be derived from the expressive activity, e.g., that the public should not be quick to adopt `accepted' versions of history, truth, etc., or that one should rigorously analyze common

characterizations of past events. Even more esoterically, what is being communicated by the very fact that persons such as the appellant Mr. Zundel are able to publish and distribute materials, regardless of their deception, is that there is value inherent in the unimpeded communication or assertion of "facts" or "opinions".

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

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

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

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

In concluding that the publication here in issue is protected by s. 2(*b*) of the *Charter*, I rely in the final analysis upon the words of Dickson C.J. in *Keegstra*, *supra*, at pp. 765-66:

> . . . it must be emphasized that the protection of extreme statements, even where they attack those principles underlying the freedom of expression, is not completely divorced from the aims of s. 2(*b*) of the *Charter*. . . . [I]t is partly through clash with extreme and erroneous views that truth and the democratic vision remain vigorous and alive. . . . [C]ondoning a democracy's collective decision to protect itself from certain types of expression may lead to a slippery slope on which encroachments on expression central to s. 2(*b*) values are permitted. To guard against such a result, the protection of communications virulently unsupportive of free expression values may be necessary in order to ensure that expression more compatible with these values is never unjustifiably limited.

Having concluded that the publication here at issue is protected by s. 2(*b*) of the *Charter*, I come to the question of whether the purpose or effect of s. 181 of the *Criminal Code* is to restrict this sort of expression.

The respondent correctly concedes that the Government's purpose in and the effect of s. 181 is to restrict expressive activity. The argument of the intervener, the Canadian Jewish Congress, that the purpose and effect of s. 181 are not to restrict expression but rather to prevent the harmful consequences of publications such as the one at issue, misses the point. First, this Court has never focused upon a particular consequence of a proscribed act in assessing the legislation's purpose; the Court examines what might be called the `facial' purpose of the legislative technique adopted by Parliament to achieve its ends: see, for example, *Irwin Toy*, *supra*, at pp. 973-76. Second, a legislative provision may have many effects. One demonstrated effect of s. 181 in the case at bar is to

subject Mr. Zundel to criminal conviction and potential imprisonment because of words he published. In the face of this reality, it is undeniable that s. 181, whatever its purpose, has the effect of restricting freedom of expression.

I conclude that s. 181 violates s. 2(*b*) of the *Charter*.

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

Section 1 of the *Charter* provides:

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

The first question is whether s. 181 represents a "limit prescribed by law". It was argued that the difficulty of ascertaining what constitutes a "statement, tale or news" as opposed to an opinion, as well as the vagueness of the term "injury or mischief to a public interest", render s. 181 so vague that it cannot be considered a definable legal limit. Preferring as I do to deal with the matter on its merits, I assume without deciding that s. 181 passes this threshold test.

Section 1 requires us to weigh the intrusion of rights represented by the impugned legislation against the state's interest in maintaining the legislation. In this case that translates to weighing the state's interest in proscribing

expression which it deems `likely to cause injury or mischief to a [matter of] public interest' on pain of criminal sanction against the individual's constitutional right to express his or her views. Where a law restricts an express constitutional right, as in this case, the *Charter* permits the limitation to be maintained only if the Crown shows that the restriction is "demonstrably justified" in a "free and democratic society" -- that is, a society based on the recognition of fundamental rights, including tolerance of expression which does not conform to the views of the majority.

I turn first to the state's interest in prohibiting the expression here at issue -- the question of whether the Crown has established an overriding public objective, to use the language of *R. v. Oakes*, [1986] 1 S.C.R. 103. In determining the objective of a legislative measure for the purposes of s. 1, the Court must look at the intention of Parliament when the section was enacted or amended. It cannot assign objectives, nor invent new ones according to the perceived current utility of the impugned provision: see *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 334, in which this Court rejected the U.S. doctrine of shifting purposes. Although the application and interpretation of objectives may vary over time (see, e.g., *Butler*, *supra*, *per* Sopinka J., at pp. 494-96), new and altogether different purposes should not be invented. The case is quite different from the anti-obscenity legislation in *Butler* where the goal historically and to the present day is the same -- combatting the "detrimental impact" of obscene materials on individuals and society -- even though our understanding or conception of that detrimental impact (a "permissible shift in emphasis") may have evolved, as Sopinka J. noted. My colleagues say that it is a permissible shift in emphasis that

the false news provision was originally focused on the "prevention of deliberate slanderous statements against the great nobles of the realm" and is now said to be concerned with "attacks on religious, racial or ethnic minorities" (see p. 000). But this is no shift in emphasis with regard to the purpose of the legislation -- this is an outright redefinition not only of the purpose of the prohibition but also of the nature of the activity prohibited. To convert s. 181 into a provision directed at encouraging racial harmony is to go beyond any permissible shift in emphasis and effectively rewrite the section.

It is argued that this interpretation represents a mere shift in emphasis because the thrust of s. 181 and its predecessors, like the obscenity provisions in *Butler*, disclosed a single goal: "the protection of the public interest from harm" or from that which would "threaten the integrity of the social fabric" (the reasons of Cory and Iacobucci JJ., at p. 000). Yet, all *Criminal Code* provisions -- as well as much statutory regulation in the public and private law spheres -- have as their basic purpose the protection of the public from harm and the maintenance of the integrity of the social fabric. Indeed, one might argue that such was the goal of the obscenity provisions under review in *Butler*, yet the Court did not adopt that as the legislation's objective. Instead, it relied upon a specific objective concerning the effect of pornographic materials on individuals and the resultant impact on society. If the simple identification of the (content-free) goal of protecting the public from harm constitutes a "pressing and substantial" objective, virtually any law will meet the first part of the onus imposed upon the Crown under s. 1. I cannot believe that the framers of the *Charter* intended s. 1 to be applied in such a manner. Justification under s. 1 requires more than the general

goal of protection from harm common to all criminal legislation; it requires a specific purpose so pressing and substantial as to be capable of overriding the *Charter*'s guarantees. To apply the language used by Sopinka J. in *Butler* (at p. 496); s. 181 cannot be said to be directed to avoidance of publications which "seriously offend the values fundamental to our society", nor is it directed to a "substantial concern which justifies restricting the otherwise full exercise of the freedom of expression".

It is impossible to say with any assurance what Parliament had in mind when it decided, contrary to what had happened in other democracies, to leave s. 181 as part of our criminal law. Five parties made written submissions on this issue; five different objectives were posited by them. Those supporting the legislation offer the following three theories as to the purpose of s. 181:

> 1. to protect matters that rise to a level of public interest from being jeopardized by false speech (respondent);
>
> 2. to further racial and social tolerance (Canadian Jewish Congress); and
>
> 3. to ensure that meaningful public discussion is not tainted by the deleterious effects of the wilful publication of falsehoods which cause, or are likely to cause, damage to public interests, to the detriment of public order (Attorney General for Canada).

The difficulty in assigning an objective to s. 181 lies in two factors: the absence of any documentation explaining why s. 181 was enacted and retained and the absence of any specific purpose disclosed on the face of the provision. We know that its original purpose in the 13th century was to preserve political harmony in the state by preventing people from making false allegations against the monarch and others in power. This ostensibly remained the purpose through to the 19th century. However, in the 20th century, Parliament removed the offence from the political "Sedition" section of the *Code* and placed it in the "Nuisance" section, suggesting that Parliament no longer saw it as serving a political purpose. It is to be further noted that it does not appear in that part of the *Criminal Code* dedicated to "Offences Against the Person and Reputation", in which both the hate propaganda and defamatory libel provisions appear. Beyond this all is speculation. No Parliamentary committees commented on the matter; no debates considered it. Nor do the vague, general words employed in the text of s. 181 offer insight into what purpose Parliament might have had in mind in enacting and retaining it.

All this stands in sharp contrast to the hate propaganda provision of the *Criminal Code* at issue in *Keegstra* -- s. 319(2). Both the text of that provision and its long and detailed Parliamentary history, involving Canada's international human rights obligations, the Cohen Committee Report (*Report of the Special Committee on Hate Propaganda in Canada* (1966)) and the Report of the Special Committee on the Participation of Visible Minorities in Canadian Society (*Equality Now!* (1984)), permitted ready identification of the objective Parliament had in mind. Section 319(2), under challenge in *Keegstra*, was part of

the amendments to the *Criminal Code* "essentially along the lines suggested by the [Cohen] Committee . . ." (*per* Dickson C.J. in *Keegstra*, *supra*, at p. 725). The evil addressed was hate-mongering, particularly in the racial context. The provision at issue on this appeal is quite different. Parliament has identified no social problem, much less one of pressing concern, justifying s. 181 of the *Criminal Code*. To suggest that the objective of s. 181 is to combat hate propaganda or racism is to go beyond its history and its wording and to adopt the "shifting purpose" analysis this Court has rejected. Such an objective, moreover, hardly seems capable of being described as a "nuisance", the rubric under which Parliament has placed s. 181, nor as the offence's target of mere "mischief" to a public interest.

The lack of any ostensible purpose for s. 181 led the Law Reform Commission in 1986 (Working Paper 50: *Hate Propaganda*) to recommend repeal of the section, labelling it as "anachronistic", a conclusion which flies in the face of the suggestion that s. 181 is directed to a pressing and substantial social concern. It is noteworthy that no suggestion has been made before this Court that Canada's obligations under the international human rights conventions to which it is a signatory require the enactment of any provision(s) other than that section which was under review in *Keegstra*: s. 319. The retention of s. 181 is not therefore necessary to fulfil any international obligation undertaken by Parliament.

Can it be said in these circumstances that the Crown has discharged the burden upon it of establishing that the objective of the legislation is pressing and substantial, in short, of sufficient importance to justify overriding the

constitutional guarantee of freedom of expression? I think not. It may be that s. 181 is capable of serving legitimate purposes. But no objective of pressing and substantial concern has been identified in support of its retention in our *Criminal Code*. Other provisions, such as s. 319(2) of the *Criminal Code*, deal with hate propaganda more fairly and more effectively. Still other provisions seem to deal adequately with matters of sedition and state security.

Parliament's enactment of s. 319 of the *Criminal Code*, a provision carefully tailored to combat the propagation of hate -- the evil at which my colleagues believe s. 181 now also to be directed, should not be overlooked. The "further[ance of] racial, religious and social tolerance" and the "safeguard[ing of] the public interest against social intolerance and public alarm", the goals ascribed to s. 181 by my colleagues, are the focus of the *Code*'s proscription of hate propaganda. Racial minorities, as "identifiable groups" within the meaning of s. 319, are not "stateless" persons like those referred to in the powerful remarks of Professor Mari Matsuda quoted in the reasons of Cory and Iacobucci JJ. Like my colleagues, I readily acknowledge the pernicious effects of the propagation of hate; such effects are indeed of relevance to a s. 1 analysis of s. 319, as was evident in this Court's decision in *Keegstra*, *supra*. I concur, as well, with the *dicta* in *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154, that the *Charter* should not be used "as a weapon to attack measures intended to protect the disadvantaged" (p. 233), but I find the principle's application in this context ironic. Section 2(*b*) of the *Charter* has as one of its fundamental purposes the protection of the freedom of expression of the minority or disadvantaged, a freedom essential to their full participation in a democracy and to the assurance that their basic rights are respected. The proscription of false news was originally

intended to protect the mighty and the powerful from discord or slander; there is nothing to suggest any legislative intention to transform s. 181 from a mechanism for the maintenance of the status quo into a device for the protection of "vulnerable social groups".

In the rational connection portion of their analysis (pp. 000-000), Cory and Iacobucci JJ. rely upon the *Report of the Special Committee on Hate Propaganda in Canada*, which impugned the "19th century belief" that man was a "rational creature" who could distinguish between truth and falsity. We are told that "[w]e cannot share this faith today in such a simple form" -- thus, a limitation of this type of speech is rationally connected to the goal of furthering racial tolerance. This lesson of history is paid heed to, but no credence appears to be given to the similar lesson (or warning) of history regarding the potential use by the state (or the powerful) of provisions, such as s. 181, to crush speech which it considers detrimental to its interests, interests frequently identified as equivalent to the "public interest". History has taught us that much of the speech potentially smothered, or at least `chilled', by state prosecution of the proscribed expression is likely to be the speech of minority or traditionally disadvantaged groups.

The fact that s. 181 has been so rarely used despite its long history supports the view that it is hardly essential to the maintenance of a free and democratic society. Moreover, it is significant that the Crown could point to no other free and democratic country which finds it necessary to have a law such as s. 181 on its criminal books. I would be remiss not to acknowledge here the provisions which my colleagues' research has discovered, under the heading

Legislative Responses in Other Jurisdictions (pp. 000-000). A review of these examples reveals their minimal relevance to this appeal. The Italian provision, although not reproduced for our inspection, has clearly been limited in its scope to the preservation of the rule of law or the legal order by the Italian constitutional court referred to by my colleagues; there is no indication that the provision extends to the promotion of racial harmony. Even less relevant are the Danish *Criminal Code* provisions to which Cory and Iacobucci JJ. refer. On a plain reading, s. 140 of the Danish *Code* is directed not to false statements of fact, but to insulting remarks about the religious practices of others; s. 266(b), on the other hand, is equally clearly a proscription of hate propaganda similar to s. 319 of our *Criminal Code*, upheld in *Keegstra*. Of the German offences mentioned, only that dealing specifically with Holocaust denial would appear to be directed to false statements of fact, a much more finely tailored provision to which different considerations might well apply. As indicated above, the forerunner of our s. 181 was repealed in England over a century ago, leaving no apparent lacunae in the criminal law of a country that has seen its share of social and political upheavals over the ensuing period. It is apparently not to be found in the United States. How can it be said in the face of facts such as these and in the absence of any defined evil at which the section is directed that the retention of the false news offence in this country is a matter of pressing and substantial concern justifying the overriding of freedom of expression? In *Butler*, this Court, *per* Sopinka J., at p. 497, relied on the fact that legislation of the type there at issue, pornography legislation, may be found in <u>most</u> free and democratic societies in justifying the restrictions it imposes on freedom of expression. The opposite is the case with s. 181 of the *Criminal Code*.

In the absence of an objective of sufficient importance to justify overriding the right of free expression, the state's interest in suppressing expression which may potentially affect a public interest cannot outweigh the individual's constitutional right of freedom of expression and s. 181 cannot be upheld under s. 1 of the *Charter*. But even if one were to attribute to s. 181 an objective of promoting social and racial tolerance in society and manage the further leap of concluding that objective was so pressing and substantial as to be capable of overriding entrenched rights, the Crown's case under s. 1 of the *Charter* would fail for want of proportionality between the potential reach of s. 181 on the one hand, and the "evil" to which it is said to be directed on the other.

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

The phrase "statement, tale or news", while it may not extend to the realm of true opinion (wherever the line is to be drawn, itself a question of great difficulty), obviously encompasses a broad range of historical and social speech,

going well beyond what is patent or provable to the senses as a matter of "pure fact". Indeed, one of the cases relied upon in support of the proposition that the section deals only with statements of fact and not with expressions of opinion, *R. v. Hoaglin*, *supra*, demonstrates just how slippery the distinction may be. If the expression in issue in that case, in which a disaffected American settler in Alberta had printed posters which stated "Americans not wanted in Canada; investigate before buying land or taking homesteads in this country" is an example of a "false statement of fact" falling within the prohibition, one shudders to consider what other comments might be so construed. Nor are the difficulties confined to determining what is a factual assertion as opposed to an expression of opinion. What is false may, as the case on appeal illustrates, be determined by reference to what is generally (or, as in *Hoaglin*, officially) accepted as true, with the result that the knowledge of falsity required for guilt may be inferred from the impugned expression's divergence from prevailing or officially accepted beliefs. This makes possible conviction for virtually any statement which does not accord with currently accepted "truths", and lends force to the argument that the section could be used (or abused) in a circular fashion essentially to permit the prosecution of unpopular ideas. Particularly with regard to the historical fact -- historical opinion dichotomy, we cannot be mindful enough both of the evolving concept of history and of its manipulation in the past to promote and perpetuate certain messages. The danger is not confined to totalitarian states like the Nazi regime in Germany or certain communist regimes of the past which blatantly rewrote history. We in Canada need look no further than the `not so noble savage' portrayal of Native Canadians in our children's history text books in the early part of this century. Similarly, in the United States, one finds the ongoing revision of

the historical representation of African Americans, whose contribution to aspects of the history of the United States, such as their contribution to the North's victory in the Civil War, is only now being recognized.

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

Cory and Iacobucci JJ. propose to overcome this difficulty by defining the phrase "public interest" in accordance with selected *Charter* values. Two observations are relied upon -- that courts regularly define phrases in legislation, and that the courts have not, thus far, adequately defined "public interest" -- as the justification to define anew "public interest" in the context of s. 181's purported application to Mr. Zundel. Although the section's "legislative history" and the "legislative and social context in which it is used" is said by my colleagues to govern the definitional process, their interpretation focuses upon a select range of *Charter* values, values which do not include freedom of expression. In support of this technique, reliance is placed upon the following authorities: *Hills v. Canada (Attorney General)*, [1988] 1 S.C.R. 513; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; and *R. v. Salituro*, [1991] 3 S.C.R. 654. These authorities confirm the following basic propositions: that the common law should develop in accordance with the values of the *Charter* (*Salituro, supra*, at p. 675), and that where a legislative provision, on a reasonable interpretation of its history and on the plain reading of its text, is subject to two equally persuasive interpretations, the Court should adopt that interpretation which accords with the *Charter* and the values to which it gives expression (*Hills* and *Slaight, supra*). None of these decisions stands for the proposition that an age-old provision whose aim and scope was created pre-*Charter* can, as of 1982, be redefined by reference to a present-day perception of utility.

The result of my colleagues' redefinition is the equation of "public interest" with "the protection and preservation of those rights and freedoms set out in the *Charter* as fundamental to Canadian society" (p. 000). Thus, for

example, whenever the Crown can establish that the publication of a false statement is likely seriously to injure the dignity and equality of those whom ss. 15 and 27 of the *Charter* are intended to protect, the offence is made out. In so doing my colleagues have arguably created a new offence, an offence hitherto unknown to the criminal law. The promotion of equality and multiculturalism is a laudable goal, but, with respect, I can see no basis in the history or language of s. 181 to suggest that it is the motivating goal behind its enactment or retention. To import it is to engage not in a valid process of statutory interpretation, but in impermissible reading in of content foreign to the enactment; *Salituro*, *Slaight* and *Hills* were never intended to be taken this far.

Section 181 can be used to inhibit statements which society considers should be inhibited, like those which denigrate vulnerable groups. Its danger, however, lies in the fact that by its broad reach it criminalizes a vast penumbra of other statements merely because they might be thought to constitute a mischief to some public interest, however successive prosecutors and courts may wish to define these terms. The danger is magnified because the prohibition affects not only those caught and prosecuted, but those who may refrain from saying what they would like to because of the fear that they will be caught. Thus worthy minority groups or individuals may be inhibited from saying what they desire to say for fear that they might be prosecuted. Should an activist be prevented from saying "the rainforest of British Columbia is being destroyed" because she fears criminal prosecution for spreading "false news" in the event that scientists conclude and a jury accepts that the statement is false and that it is likely to cause mischief to the British Columbia forest industry? Should a concerned citizen fear

prosecution for stating in the course of political debate that a nuclear power plant in her neighbourhood "is destroying the health of the children living nearby" for fear that scientific studies will later show that the injury was minimal? Should a medical professional be precluded from describing an outbreak of meningitis as an epidemic for fear that a government or private organization will conclude and a jury accept that his statement is a deliberate assertion of a false fact? Should a member of an ethnic minority whose brethren are being persecuted abroad be prevented from stating that the government has systematically ignored his compatriots' plight? These examples suggest there is merit in the submission of the Canadian Civil Liberties Association that the overbreadth of s. 181 poses greater danger to minority interest groups worthy of popular support than it offers protection.

These examples illustrate s. 181's fatal flaw -- its overbreadth. At pages 000-000, Cory and Iacobucci JJ. attempt to alleviate the fears associated with the problem of overbreadth by arguing that the Crown will always bear a heavy onus in proving all of the elements under s. 181. It is argued that any danger is limited by the phrase "public interest" because even those publishing known falsehoods will not be prosecuted where their lies have an "overall beneficial or neutral effect". In this way, Cory and Iacobucci JJ. claim that the examples proffered above raise no practical problem (see p. 000).

I, for one, find cold comfort in the assurance that a prosecutor's perception of "overall beneficial or neutral effect" affords adequate protection against undue impingement on the free expression of facts and opinions. The

whole purpose of enshrining rights in the *Charter* is to afford the individual protection against even the well-intentioned majority. To justify an invasion of a constitutional right on the ground that public authorities can be trusted not to violate it unduly is to undermine the very premise upon which the *Charter* is predicated.

Cory and Iacobucci JJ. make no mention of the reality that the decision to prosecute must, by necessity, be made by state agents and that the issue must be adjudicated upon by a judge and jury in a particular locale with a particular conception of a benefit to the public. All it takes is one judge and twelve jurors who believe that certain `falsehoods' compromise a particular "public" interest, and that such falsehoods `must have been' known to the accused, in order to convict. A jury in Port Alberni, B.C., may have a very different view of the overall beneficial impact of false statements of fact impugning the lumber industry than a jury in Toronto. Finally, Cory and Iacobucci JJ. fail to address the argument that the danger raised by these examples, the `chilling effect' of s. 181, outweighs its minimal benefit given the alternative means of prosecution of speech detrimental to racial tolerance under s. 319 of the *Criminal Code*.

Not only is s. 181 broad in contextual reach; it is particularly invasive because it chooses the most draconian of sanctions to effect its ends -- prosecution for an indictable offence under the criminal law. Our law is premised on the view that only serious misconduct deserves criminal sanction. Lesser wrongs are left to summary conviction and the civil law. Lies, for the most part, have historically been left to the civil law of libel and slander; it has been the law

of tort or delict that has assumed the main task of preserving harmony and justice between individuals and groups where words are concerned. This is not to say that words cannot properly be constrained by the force of the criminal law. But the harm addressed must be clear and pressing and the crime sufficiently circumscribed so as not to inhibit unduly expression which does not require that the ultimate sanction of the criminal law be brought to bear: see Dickson C.J. in *Keegstra*, *supra*, at p. 772. The *Criminal Code* provisions against hatemongering met that criterion, focusing as they did on statements intended to cause "hatred against any identifiable group". The broad, undefined term "mischief to a public interest", on the other hand, is capable of almost infinite extension.

It is argued that the expression here at issue is of little value and hence is less deserving of protection under s. 1 than expression which directly engages the "core" values associated with freedom of expression as identified in *Irwin Toy*. The short answer to this contention is that expression which a jury might find to be a deliberate lie likely to injure a public interest and which would therefore be inhibited by s. 181 may well relate to the "core" values protected by the guarantee, as the examples cited earlier in these reasons demonstrate. The provision at issue in *Keegstra*, s. 319(2) of the *Criminal Code*, was confined to hate propaganda, and hence restricted only speech of low or negative value. That cannot be said of s. 181, which may catch a broad spectrum of speech, much of which may be argued to have value. I add that what is at issue is the value of <u>all</u> speech potentially limited by the provision at issue. In assessing this, the Court must not be diverted by the offensive content of the particular speech giving rise to the *Charter* challenge of the legislative provision.

In summary, the broad range of expression caught by s. 181 -- extending to virtually all controversial statements of apparent fact which might be argued to be false and likely do some mischief to some public interest --, combined with the serious consequences of criminality and imprisonment, makes it impossible to say that s. 181 is appropriately measured and restrained having regard to the evil addressed -- that it effects a "minimal impairment" to use the language of *Oakes*. Section 181 is materially different, in this regard, from s. 319(2) -- the provision upheld under s. 1 by the majority of this Court in *Keegstra*.

The same considerations lead to the conclusion that the gravity of the restriction on the right of freedom of expression is not proportionate to s. 181's putative objective. In *Keegstra* (at pp. 762-63) the majority of this Court, *per* Dickson C.J., held that given the important and documented objectives of s. 319(2) and the minimal contribution to the values underlying the freedom made by the narrow range of expression caught by that provision, the restriction was proportional to the furtherance of the democratic values upon which s. 319(2) is based. In the case on appeal, the same test leads to the contrary result. 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 short, s. 181 fails the proportionality test applied in *Keegstra*.

When one balances the importance of the objective of s. 181 against the potentially invasive reach of its provisions, one cannot but conclude that it "overshoots the mark". It fails the tests for minimal impairment and

proportionality by which this Court upheld the criminalization of hate propaganda under s. 319(2) of the *Criminal Code*. The value of liberty of speech, one of the most fundamental freedoms protected by the *Charter*, needs no elaboration. By contrast, the objective of s. 181, in so far as an objective can be ascribed, falls short of constituting a countervailing interest of the most compelling nature. In *Oakes*, *supra*, Dickson C.J. made it clear that the less important the provision's objective, the less tolerable is an adverse effect upon the fundamental freedom. Section 181 could support criminalization of expression only on the basis that the sanction was closely confined to situations of serious concern. In fact, s. 181 extends the sanction of the criminal law to virtually any statement adjudged to be falsely made which might be seen as causing mischief or likely to cause mischief to virtually any public interest. I cannot conclude that it has been shown to be "demonstrably justified" in "a free and democratic society".

To summarize, the restriction on expression effected by s. 181 of the *Criminal Code*, unlike that imposed by the hate propaganda provision at issue in *Keegstra*, cannot be justified under s. 1 of the *Charter* as a "reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society". At virtually every step of the *Oakes* test, one is struck with the substantial difference between s. 181 and the provision at issue in *Keegstra*, s. 319(2) of the *Code*. In contrast to the hate propaganda provision (*Keegstra*), the false news provision cannot be associated with any existing social problem or legislative objective, much less one of pressing concern. It is, as the Law Reform Commission concluded, "anachronistic". But even if the Court were to attribute to s. 181 the objective of promoting racial and social tolerance and conclude that

such objective was so pressing and substantial as to be capable of overriding a fundamental freedom, s. 181 would still fail to meet the criteria of proportionality which prevailed in *Keegstra*. In *Keegstra*, the majority of this Court found the objective of the legislation to be compelling and its effect to be appropriately circumscribed. The opposite is the case with s. 181 of the *Criminal Code*. Section 181 catches not only deliberate falsehoods which promote hatred, but sanctions all false assertions which the prosecutor believes `likely to cause injury or mischief to a public interest', regardless of whether they promote the values underlying s. 2(*b*). At the same time, s. 181's objective, in so far as an objective can be ascribed to the section, ranks much lower in importance than the legislative goal at stake in *Keegstra*. When the objective of s. 181 is balanced against its invasive reach, there can in my opinion be only one conclusion: the limitation of freedom of expression is disproportionate to the objective envisaged.

In their laudable effort to send a message condemning the `hate-mongering' of persons such as the appellant by upholding s. 181 as a reasonable limit, it is my respectful opinion that my colleagues Cory and Iacobucci JJ. make three fundamental errors. First, they effectively rewrite s. 181 to supply its text with a particularity which finds no support in the provision's history or in its rare application in the Canadian context. Second, they underrate the expansive breadth of s. 181 and its potential not only for improper prosecution and conviction but for `chilling' the speech of persons who may otherwise have exercised their freedom of expression. Finally, they go far beyond accepted principles of statutory and *Charter* interpretation in their application of s. 1 of the *Charter*. While I share the concerns of my colleagues, I fear that such

techniques, taken to their ultimate extreme, might render nugatory the free speech guarantee of the *Charter*.

Disposition

I conclude that s. 181 of the *Criminal Code* infringes the right of free expression guaranteed by s. 2(*b*) of the *Charter* and that the infringement is not saved by s. 1 of the *Charter*. I do not find it necessary to deal with the arguments under s. 7 of the *Charter*.

I would allow the appeal, enter an acquittal, and answer the first constitutional question in the affirmative and the second in the negative. In the result, I need not consider whether the terms of the appellant's bail infringed his rights under the *Charter*.

//*Cory and Iacobucci JJ.*//

The reasons of Gonthier, Cory and Iacobucci JJ. were delivered by

CORY and IACOBUCCI JJ. (dissenting) -- This appeal raises the issue of the constitutionality of s. 181 of the *Criminal Code*, R.S.C., 1985, c. C-46 (formerly s. 177), which states:

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

The appellant, Ernst Zundel, alleges that the provision violates s. 7 and s. 2(*b*) of the *Canadian Charter of Rights and Freedoms* and cannot be justified under s. 1 of the *Charter*.

This appeal concerns the wilful publication of deliberate, injurious lies and the legislation which seeks to combat the serious harm to society as a whole caused by these calculated and deceitful falsehoods. Our colleague, McLachlin J., has stated that s. 181 violates s. 2(*b*) of the *Charter* and is not saved under section 1. We agree with her conclusion, though not with her reasoning, that s. 181 violates s. 2(*b*) of the *Charter*. However, with respect, we do not agree that the section cannot be justified under s. 1.

I. Background: The Pamphlet in Question

In the 1970's and 1980's, the appellant published and distributed white supremacist literature, videos and paraphernalia through the auspices of his Toronto publishing house, Samisdat Publishers Ltd. He was charged with two counts of spreading false news in contravention of what is now s. 181 of the *Code* for publishing two pamphlets. He was acquitted at trial on the count relating to the publication of the pamphlet, *The West, War and Islam!*, but was convicted on the count relating to a pamphlet entitled, *Did Six Million Really Die?* It is this conviction which he appeals to this Court.

Because much of the reasoning in this case turns on whether the expression in question purports to be a statement of fact or of mere opinion, and

because it is difficult to comprehend fully the significance of harmful speech in the abstract, the pamphlet warrants more than a general reference in order to make clear the precise nature of the publication at issue.

The pamphlet is part of the genre of anti-Semitic literature known euphemistically as "revisionist history". The pamphlet indicates the author is "Richard Harwood . . . a writer and specialist in political and diplomatic aspects of the Second World War. At present he is with the University of London". However, the piece appears to have actually been produced in England by Richard Verral, editor of the neo-nazi British National Front newspaper in 1977. The appellant has added a preface and afterword to the original document, entitled *Historical Fact No. 1, Did Six Million Really Die? Truth at Last Exposed*.

The basic gist of the piece is that the Holocaust perpetrated by the German National Socialists against the Jews of Europe during the Second World War never occurred. According to the appellant, there was no concerted plan to exterminate European Jewry, along with assorted others of racial extraction, religious persuasion, national origin or sexual orientation of which the Nazis did not approve. By pointing to what he alleges to be new evidence, the appellant submits that some Jews died, as people will in war time, but that the "Final Solution to the Jewish Question" was never anything more than a plan to facilitate emigration to Madagascar. He states that the Holocaust is a myth fabricated by an immensely powerful Jewish-Zionist conspiracy to win lucrative war reparations from the Germans, to make them feel ashamed and a pariah in the

eyes of other nations, and to win political and economic support for the State of Israel.

While the appellant argues that his purpose in preparing and disseminating the publication was to provide a novel analysis of historical documents, Richard Verral makes clear the true import of the "revisionist" project. In the aftermath of the Holocaust, the international community has cast a jaundiced eye on all forms of racism and has bonded together to reject and obliterate it. The author alleges that "the Anglo-Saxon world" is falling into decline because of the presence of non-Aryans and that the lessons of the horrors of the Holocaust prevent "rational" debate about this trend. Under the heading "The Race Problem Suppressed", the pamphlet states:

> Thus the accusation of the Six Million is not only used to undermine the principle of nationhood and national pride, but it threatens the survival of the Race itself. . . . Many countries of the Anglo-Saxon world, notably Britain and America, are today facing the gravest danger in their history, the danger posed by the alien races in their midst. Unless something is done in Britain to halt the immigration and assimilation of Africans and Asians into our country, we are faced in the near future, quite apart from the bloodshed of racial conflict, with the biological alteration and destruction of the British people as they have existed here since the coming of the Saxons. In short, we are threatened with the irrecoverable loss of our European culture and racial heritage. But what happens if a man dares to speak of the race problem, of its biological and political implications? He is branded as that most heinous of creatures, a "racialist". And what is racialism, of course, but the very hallmark of the Nazi! They (so everyone is told, anyway) murdered Six Million Jews because of racialism, so it must be a very evil thing indeed.

Presumably in order to quell the abhorrence with which people of good will respond to racism, the premise of the pamphlet was that the brutal

realization in the Holocaust must be denied. To this end, the pamphlet makes numerous false allegations of fact. It will suffice to point to only a few.

The pamphlet alleges that:

> - the Nazi concentration camps were only work camps; that gas chambers were built by the Russians after the War; that the millions who disappeared through the chimneys of the crematoria at Auschwitz, Sobibor, Maidanek and elsewhere actually moved to the United States and changed their names;
>
> - *The Diary of Anne Frank* is a work of fiction;
>
> - the emaciated living and dead found by liberation forces died of starvation and typhus;
>
> - the films and photographs are clever forgeries;
>
> - there are no witnesses to or survivors of the slaughter and every perpetrator who later revealed his complicity was coerced.

The appellant was convicted after a lengthy trial of spreading false news contrary to s. 181. On appeal to the Ontario Court of Appeal, his conviction was upheld on constitutional grounds but struck down for errors in the admission of evidence and the charge to the jury. The matter was sent back for a new trial: (1987), 58 O.R. (2d) 128, 35 D.L.R. (4th) 338, 56 C.R. (3d) 1, 29 C.R.R. 349,

31 C.C.C. (3d) 97. The appellant was again convicted after a trial before Judge Thomas and a jury. His second appeal to the Ontario Court of Appeal was denied unanimously: (1990), 37 O.A.C. 354, 53 C.C.C. (3d) 161. He appeals to this court by leave on the constitutional issues alone, [1990] 2 S.C.R. xii.

II. Judgments below

A. *Trial*

(1) Judicial Notice

At trial, Judge Thomas took judicial notice of the fact that Jews were murdered by the Nazis but did not take judicial notice of the facts alleged in the appellant's pamphlet:

> The mass murder and extermination of Jews in Europe by the Nazi regime during the Second World War is so generally known and accepted that it could not reasonably be questioned by reasonable persons. I directed you then and I direct you now that you will accept that as a fact. The Crown was not required to prove it. It was in the light of that direction that you should examine the evidence in this case and the issues before you.

Accordingly, it was not open to the appellant to argue that no Jews died during the Second World War, and indeed, as noted above, this was not his thesis. In his final address to the jury, defence counsel analyzed the relationship between the judicial notice and the appellant's work:

> His Honour will tell you what he says is reasonable for reasonable men to contest. But it won't include the six million, it won't include the gas chambers and it won't include an official plan. That's basically what this book is all about.
>
> That is not to dispute the Jewish tragedy of mass murder of some Jews by some Nazis during World War II which His Honour will tell you is a fact. The Judicial ruling goes no further than that. And if two Jews were killed by some Nazis, that wouldn't be a mass murder. It would certainly be a tragedy. It would be wrong. But it wouldn't necessarily be what is portrayed as the Holocaust. [Emphasis added.]

The appellant was fully able to defend the specific allegations out of which he built his argument as to the motive, intention, mechanisms, scope, and impact of the slaughter. He was fully able to put forth his argument that "the Holocaust", writ large as an historical icon, was a fabrication. The court explicitly did not take away from the jury the possibility of accepting evidence in support of Zundel's fundamental premise that there was no systematic plan of genocide and thus that racism was not as dangerous as supposed. The trial judge also made it clear in his instruction to the jury that they were to find that some Jews died but must be satisfied beyond a reasonable doubt that these deaths amounted to the historical cataclysm known as the Holocaust. In his charge to the jury, Judge Thomas summarized the position of the defence:

> The publication considered in its essence puts forward the thesis six million Jews were not killed during the war, there was no official plan or policy by the National Socialist regime of Adolf Hitler to exterminate the Jews, and there were no homicidal gas chambers.

(2) Elements of the Offence

Judge Thomas defined the elements of the offence which the Crown had to prove as:

> (a) wilful publication
>
> (b) of a statement of fact rather than of opinion (the onus of differentiating fact from opinion lying with the Crown);
>
> (c) which the accused knew to be false when he published it; and
>
> (d) which falsehood is likely to cause mischief to the public interest (in this case, the interest in racial and social tolerance).

(i) *Wilful Publication*

While the appellant conceded publication, the Crown adduced the evidence of Sergeant Luby of the Metropolitan Toronto Police that, in the course of investigating the complaint against him, the appellant confirmed that he had written the preface and conclusion, had published the amended version of Richard Verral's work and had distributed it within and beyond Canadian borders. Indeed, the afterward of the pamphlet itself enumerates the appellant's distribution efforts in Canada. The jury was instructed that, if they accepted the evidence of the officer and admission by counsel for the appellant, they could find that he had wilfully published it. Judge Thomas noted that the date of publication was key in determining the most important issue of knowledge of falsity at publication date.

The Crown had alleged that the publication occurred in 1981. The trial judge summarized the evidence on this point as suggesting that it was produced at some point between early 1979 and Sgt. Luby's attendance at the appellant's home on May 29, 1984.

(ii) *Statement of Fact Rather than of Opinion*

The appellant argued that the pamphlet was only an expression of opinion and, in the alternative, that if found to be an assertion of fact, it was verifiable as truth. Judge Thomas held that the issue of whether the pamphlet conveyed an assertion of fact or mere opinion was to be determined by the jury. He pointed to the defence expert, Dr. Fann, who asserted that a factual claim may be distinguished from an expression of opinion by virtue of its capacity to be tested and verified, while expressions of opinion are merely subjective and thus cannot be proved or disproved. The defence expert Dr. Botting had testified that the pamphlet was two thirds fact and one third opinion but that he would characterize it as an expression of opinion. The trial judge left it to the jury to determine whether to accept this submission or to accept the Crown's argument, paraphrased as:

> Do you think his view was influenced by his contention that there is no such thing as a fact, that everything is opinion? The Crown asks, in the real world, don't we have to distinguish between fact and opinion on a daily basis?

The defence expert witness, Mr. Felderer, a publisher of Holocaust denial literature, also testified that the pamphlet was important because it contained allegations of fact. Judge Thomas instructed the jury:

> Although there are individual items or passages in the pamphlet which, considered separately might be characterized as opinions, I direct you that it is open to you to find that the pamphlet, considered as a whole, asserted as a fact that Jews were not exterminated as a result of government policy during the Nazi regime, that the Holocaust did not occur and it is an invention or a hoax to enable Israel and Jews to collect huge reparation payments from Germany.

It was left to the jury to consider whether the Crown had satisfied them beyond a reasonable doubt of the verifiable falsity of the factual assertions contained in the pamphlet and whether the cumulative effect of these errors rendered the pamphlet as a whole a false statement or tale.

(iii) *Falsity of the Factual Allegations*

The appellant's allegations of fact in the pamphlet were divided into 85 extracts and rebutted one by one. The trial judge summarized this material at length for the jury but it will suffice here to point only to some of the more egregious examples. The pamphlet alleged that a memorandum from Joseph Goebbels revealed that the Final Solution was never more than a plan to evacuate Jews to Madagascar. It was shown that there was no such memorandum but that the reference was to Goebbels' diary entry of March 7, 1942. This diary extract was adduced and shown to state nothing of the kind. The Crown went on to point

out that the entry for March 27, 1942 made clear that the Final Solution was, in fact, genocide:

> Not much will remain of the Jews. On the whole, it can be said that about 60 per cent of them will have to be liquidated whereas only about 40 per cent can be used for forced labor. . . .

The pamphlet alleges that no documentary evidence exists of the Nazi plan to exterminate the Jews. The Crown adduced speeches by Heinrich Himmler, head of the SS, made on October 4, 1943 to his troops in Posen in which he refers to the program of extermination of the Jews. Himmler stated:

> I also want to talk to you, quite frankly, on a very grave matter. Among ourselves it should be mentioned quite frankly, and yet we will never speak of it publicly. . . .
>
> I mean the clearing out of the Jews, the extermination of the Jewish race. . . .

The appellant argued that the term "exterminate" used in this passage really meant "deport". It was left to the jury to consider whether they accepted that this was a possible interpretation.

The Crown also adduced the December 9, 1942 entry in the diary of Hans Frank, SS officer in charge of Poland, describing the annihilation of 3.5 million Jews in the general government and numerous documents adduced at the Nuremberg trials, including the daily reports of the Einsatzgruppen (action groups) enumerating the death tolls of Jews in the USSR. In a report to Hitler of

December 20, 1942, Himmler indicates that the Einsatzgruppen had executed 363,211 Jews between August and November, 1942.

The pamphlet alleged, purportedly relying on a Red Cross report, that all concentration camps were really humane work camps. Mr. Biedermann, a delegate of the International Committee of the Red Cross, testified that the Red Cross Report pertained exclusively to prisoner of war camps as the Red Cross personnel had not been inside any camps in which civilians were detained. The Crown adduced evidence from Professor Hilberg that while some camps had labour facilities annexed to them, Belzec, Treblinka, Sobibor and Chelmno were exclusively "killing factories" and that gas chambers were in operation at Auschwitz-Birkenau and Maidanek. The numbers of Jews slaughtered was verifiable from railway records showing the payments per person made by the Gestapo for transport to the camps. These numbers were compared with those having left the camps or who were found there after liberation.

On and on, the Crown showed that the appellant misrepresented the work of historians, misquoted witnesses, fabricated evidence, and cited non-existent authorities.

(iv) *Appellant's Knowledge of Falsity*

The trial judge made it clear that this was the most important element of the offence and that the onus lay on the Crown to prove beyond a reasonable doubt that the appellant knew that these assertions of fact were false when he

published them. The Crown alleged publication in 1981. Evidence was heard from defence witnesses that the appellant was extremely familiar with the history of the Holocaust and that he was aware of the overwhelming evidence produced by orthodox Holocaust historians that the Holocaust did occur.

The Crown adduced evidence that the appellant was committed to white supremacist and anti-Semitic causes and was a fan of Adolf Hitler and of the Nazi regime. The Crown adduced a radio interview with the CBC and two pamphlets allegedly written and distributed by the appellant under his pen name, Christof Friedrich (his middle names), entitled *The Hitler We Loved & Why* and *UFO's: Nazi Secret Weapon*. It was open to the jury to find that evidence of motive drawn from these materials was relevant to knowledge of falsity. Judge Thomas stated:

> It is true that the accused man is not on trial for his beliefs, and he is not on trial for publishing Exhibits 2 and 3. However, it is open to you to find that if the accused believed in National Socialism, it is open to you to conclude that he knowingly would publish falsehoods to foster and protect those beliefs. In other words, that is the limited use that you can make of Exhibits 2, 3 and 5 combined.

Sgt. Luby testified that the appellant stated to him that he had been writing "those things" for 25 years. Defence witnesses who shared the appellant's views testified that, as far as back as 1969, the appellant had believed the Holocaust was a myth. Mr. Smith, a representative from the "revisionist history" group, the Institute for Historical Review, and Mr. Faurisson, a "revisionist historian" convicted on charges arising out of his Holocaust denial publications in France, testified that in 1979, the appellant attended a conference of the Institute

in which participants undertook to launch a campaign against the Holocaust. Mr. Walendy, another participant at the Conference, testified that he discussed the pamphlet with the appellant at that time and made him aware of objections and criticisms levelled against the publication elsewhere. It was left to the jury to conclude whether the appellant had no knowledge of the falsity of the materials or whether, despite the fact that he knew they were false, he was prepared to publish falsehoods in order to win converts to his cause.

Judge Thomas instructed the jury that while the unreasonableness of the appellant's belief was a relevant factor in determining whether he truly held such a belief, it was by no means conclusive of the matter. Consistent with the jurisprudence of this Court on the role of unreasonableness of beliefs in, for example, the defence of mistake of fact, in *Pappajohn v. The Queen*, [1980] 2 S.C.R. 120, at p. 156, Judge Thomas stated that:

> If you find that the accused honestly believed that the pamphlet was true, or you are left with a reasonable doubt on this point, you must acquit. Now, it is not necessary for that belief, held honestly, to be reasonable. The unreasonable nature of the belief is only one factor to be considered. In other words, it is only one item of the evidence to support an inference that the belief is not honestly held.

(v) *Mischief to a Public Interest*

The public interest identified was racial and social tolerance. The Crown argued that an attack on one segment of society harmed all of society. The trial judge told the jury that they had to be satisfied beyond a reasonable doubt that the publication of *Did Six Million Really Die?* was a threat to this interest.

The Crown submitted that the pamphlet fostered hatred and contempt for Jews. It did so insidiously because it disguised itself as an academic work, relying upon appeals to authority. It did so in a particularly vicious manner because the objects of the fabrication are themselves characterized as diabolical liars such that their attempts to clarify and rebut the allegations would not be believed. Perhaps most importantly, the Crown alleged that the pamphlet makes tolerance for religious minorities "a dirty word" and the game of dupes.

The appellant submitted that no harm had been proved to have resulted from the publication and that public debate of provocative views enhanced social and racial tolerance. He submitted that it was an insult to Canadians to suggest that they were not capable of discerning truth from falsity. The trial judge instructed the jury that deliberate lies were not protected by s. 2(*b*) of the *Charter* but left the final issue of harm to the jury as well. They returned with a verdict of guilty.

B. *Ontario Court of Appeal #1* (1987), 31 C.C.C. (3d) 97

Although this is an appeal from the second trial, it is useful to note briefly the fate of the appellant on his first appearance before the Ontario Court of Appeal. In a decision rendered on behalf of the full court, the Ontario Court of Appeal affirmed the essential elements of the offence as they were described by the trial judge at the second trial and set out earlier.

The decision was rendered quite early in the development of *Charter* jurisprudence and the court noted that there was little precedent to guide them. They addressed themselves to the proper scope of the right under s. 2(*b*) and concluded that deliberate lies likely to produce racial and social intolerance did not fall within its embrace.

In doing this, they placed great reliance on the United States approach to defining a limit to freedom of expression which excludes obscene, libellous and knowingly false speech. After considering the various justifications provided in the American jurisprudence for limiting expression, they concluded (at pp. 123-24):

> Spreading falsehoods knowingly is the antithesis of seeking truth through the free exchange of ideas. It would appear to have no social or moral value which would merit constitutional protection. Nor would it aid the working of parliamentary democracy or further self-fulfilment. In our opinion an offence falling within the ambit of s. 177 [now s. 181] lies within the permissibly regulated area which is not constitutionally protected. It does not come within the residue which comprises freedom of expression guaranteed by s. 2(*b*) of the Charter.

After assuming for the sake of argument that they were wrong and the provision was a violation of s. 2(*b*), the Court of Appeal considered the presence in the *Criminal Code* of Canada and those of other commonwealth jurisdictions of the offence of defamatory libel in determining that the section was important and demonstrably justified in free and democratic societies. They thus found the provision to be justified under s. 1.

The court then considered the appellant's submission that the provision was unconstitutional because it violated s. 7 by being void for vagueness or overbreadth. The court considered that the only element of the offence in s. 177 (now s. 181) open to challenge was the category of "public interests" to which injury might accrue. They considered that criminal law is always aimed at preserving some public interest and found that the preservation of racial harmony was certainly such an interest. They therefore found no violation of s. 7.

However, the Court of Appeal went on to find that some of the appellant's objections to the conduct of the trial judge did have merit. They found these technical errors too numerous to justify the exercise of s. 613(1)(*b*)(iii) (now s. 686(1)(*b*)(iii)) and ordered the new trial which was referred to earlier.

C. *Ontario Court of Appeal #2* (1990), 53 C.C.C. (3d) 161

The appellant appealed this second conviction, raising 47 grounds of appeal, most of which were found to be utterly without merit and were not dealt with. The Court did consider the issues of judicial notice, various elements of the charge to the jury, admissibility of evidence read into the record, questioning of the appellant about his belief in Nazi policies, and production of his other anti-Semitic publications. The Court of Appeal considered at length allegations of actual and apparent bias in the trial judge and rejected them. The only finding which has relevance to the constitutional issue in this appeal is the court's

approval at p. 196 of the trial judge's characterization of the promotion of racism as a practice contrary to a public interest.

> [I]t is not in the public interest to have one segment of the community racially or religiously intolerant against another segment of the community. An attack on one segment of the community is, in reality, an attack on the whole community. If one segment is not protected from criminal defamation and libel, accusations of criminal wrong-doing, criminal fraud, the whole community is vulnerable because the next segment is fair game, and then the next segment is fair game, until you have destroyed the entire community.

III. Issues in this Appeal

By an order dated January 28, 1991, the Chief Justice stated the following constitutional questions:

1. Is s. 181 (formerly s. 177) of the *Criminal Code* of Canada contrary to fundamental freedom of thought, belief, opinion, and expression, including freedom of the press and other media of communication, set out in s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*?

2. If so, is s. 181 (formerly s. 177) of the *Criminal Code* of Canada a reasonable limit prescribed by law demonstrably justifiable in a free and democratic society as required by s. 1 of the *Canadian Charter of Rights and Freedoms*?

In a subsequent order on June 14, 1991 the Chief Justice added two further constitutional questions:

3. Is s. 181 (formerly s. 177) of the *Criminal Code* contrary to s. 7 of the *Canadian Charter of Rights and Freedoms* as being a vague and uncertain restriction upon the fundamental freedom of expression?

4. If so, is s. 181 (formerly s. 177) of the *Criminal Code* a reasonable limit prescribed by law demonstrably justifiable in a free and democratic society, pursuant to s. 1 of the *Canadian Charter of Rights and Freedoms*?

IV. Analysis

A. *History of Section 181*

The section has its origin in the offence of *De Scandalis Magnatum* enacted in 1275, 3 Edw. 1, *Stat. Westm. prim.* c. 34. It read:

> Forasmuch as there have been oftentimes found in the Country Devisors of Tales, whereby discord or occasion of discord, hath many times arisen between the King and his People, or Great Men of this Realm; for the Damage that hath and may thereof ensue; It is commanded, That from henceforth none be so hardy to tell or publish any false News or Tales, whereby discord, or occasion of discord or slander may grow between the King and his People, or the Great Men of the Realm; and he that doth so, shall be taken and kept in Prison, until he hath brought him into the Court, which was the first Author of the Tale.

The provision of peaceful means of redress for attacks on reputation seems to have originated with organized society. Early Germanic laws such as the *Lex Salica* and the *Norman Costumal* sought to prevent blood feuds which, by their persistent violence, tore societies apart. See V. V. Veeder, "The History and Theory of the Law of Defamation I" (1903), 3 *Colum. L. Rev.* 546, at p. 548, and "The History and Theory of the Law of Defamation II" (1904), 4 *Colum. L. Rev.* 33.

Professor Veeder places *De Scandalis* in historical context. While it was indeed aimed at the protection of the powerful, it was part of a system of remedies for defamation available to all subjects. The existence of separate fora was ascribed, in part, to the fact that attacks on nobility were viewed as having a political aspect, as a specie of sedition, while those against ordinary citizens were not. The section was repealed in the United Kingdom by the *Statute Law Revision Act,* 1887, 50 & 51 Vict., c. 59, but remains in force in Canada as enacted in the *Criminal Code*.

Like most of our laws, the function of prohibitions against spreading false news has changed dramatically over the last 700 years. In 2 Ric. 2, st. I c. 5 of 1378, the provision was re-enacted to expand the class of those whose reputation interests implicated the integrity of the state. By virtue of amendments in 12 Ric. 2, c. 11 of 1388, the statute also provided for the punishment for disseminators as well as devisers of false news. See: Law Commission of the United Kingdom's Working Paper No. 84 on *Criminal Libel,* at p. 10.

In the Working Paper No. 84, the development of an ever more specialized panoply of remedies for false news is characterized as revealing a common theme of preventing a loss of confidence in government. When the Star Chamber took over prosecutions in 1488 soon after the development of the printing press and the corresponding capacity for wide publication to the masses, the Chamber's focus was on protecting the Christian monarchy. See Working Paper No. 84, *supra*, at pp. 12-13. The Star Chamber was also concerned with the protection of private rights:

> . . . the Star Chamber was anxious to suppress duelling. To this end it would punish *defamatory* libels on private citizens who had suffered insult thereby, in the hope that this remedy would be more attractive to the person insulted than the issue of a challenge to fight. [Emphasis in original.]
>
> (J. R. Spencer, "Criminal Libel -- A Skeleton in the Cupboard", [1977] *Crim. L.R.* 383, at p. 383.)

After the abolition of the Star Chamber in 1641, its criminal jurisdiction passed to the Court of King's Bench. Since that time, the courts have alternately used the false news, criminal libel, and public mischief provisions in seeking to prohibit the dissemination of false news likely to harm a public interest. See F. R. Scott, "Publishing False News" (1952), 30 *Can. Bar Rev.* 37, at p. 40.

In 1732, a criminal charge was brought against one Osborne for printing a libel that members of the Portuguese Jewish community living in London had murdered a Jewish woman and her illegitimate child by a Christian lover. The court held that a libel conviction was not made out because the allegations were not aimed at an identifiable person, yet went on to convict the accused:

> Admitting an information for a libel may be improper, yet the publication of this paper is deservedly punishable in an information for a misdemeanour, and that of the highest kind; such sort of advertisements necessarily tending to raise tumults and disorders among the people, and inflame them with an universal spirit of barbarity against a whole body of men, as if guilty of crimes scarce practicable, and totally incredible.
>
> (*R. v. Osborne* (1732), 2 Swans. 532, 36 E.R. 717; and 2 Barn. K.B. 138 and 166, 94 E.R. 406 and 425; W. Kel. 230, 25 E.R. 584.)

In *Gathercole's Case* (1838), 2 Lewin 237, 168 E.R. 1140, at p. 1145, a charge of defamatory libel was made out against an Anglican cleric who had disseminated false, scandalous and malicious anti-Catholic slurs.

In *Starkie's Treatise on the Law of Slander and Libel* (3rd ed. 1869), the author suggests at p. 578 that criminal libel operated to punish not merely the blasphemous and seditious but:

> . . . also, for those reflecting upon sects, classes, companies, or bodies of men, though not mentioning any person in particular; if such libels tend to excite the hatred of the king's subjects against the members thereof generally, or to provoke them to a breach of the peace.

In *Scott's Case* (1778), 5 New Newgate Calendar 284, the accused was convicted of spreading false news for making and displaying posters which made the following declarations:

> `In pursuance of His Majesty's order in council to me directed, these are to give public notice that war with France will be proclaimed on Friday next, the 24th instant, at the palace royal, St. James', at one of the clock, of which all heralds and pursuivants at arms are to take notice, and give their attendance accordingly.

In *R. v. De Berenger* (1814), 3 M. & S. 67, 105 E.R. 536 (K.B.), the accused was found guilty of public mischief for spreading false rumours that the war with France was soon to end in order to drive up the value of government bonds and thereby profit from the public's misapprehension. Such conduct now gives rise to prosecutions under the false pretences sections at ss. 361-363 of the *Code* and the false prospectus section at s. 400, while the offence of public

mischief in s. 140 only applies to false allegations of criminal conduct which impairs police efficacy.

Prosecution of false news as a subset of public mischief continued in the U.K. until the passage of the *Public Order Act*, 1936 (U.K.), 1 Edw. 8 & 1 Geo. 6, c. 6. In 1936, Arnold Leese was convicted for publishing in his magazine, *The Fascist*, an article alleging that Jews were responsible for unsolved child murders. He was convicted of "publishing and printing divers scandalous and libellous statements regarding his Majesty's Jewish subjects with intent to create ill will between his Majesty's subjects of the Jewish faith and those not of the Jewish faith so as to create a public mischief". In convicting the accused, the trial judge stated:

> I am not in the least concerned with any controversy that might have arisen with regard to these matters. . . . I am satisfied that nothing can be more mischievous to the public weal than the circulation of statements of his [*sic*] kind. I can appreciate that behind what you have done there is possibly a belief amounting in its intensity almost to fanaticism with regard to the truth or otherwise of these statements. That the public well-being can be served by the publication of stuff of this kind -- and I call it "stuff" advisably [*sic*]-- I cannot imagine. Nothing can be more harmful to the public weal than that.
>
> (*London Times*, September 22, 1936, at p. 11, col. 4.)

More generally, the close of the 19th century saw a specialization of function among the various sections. The spreading false news provision appears in art. 95 of Stephen's *Digest of the Criminal Law* (1878), at p. 62, as:

> Every one commits a misdemeanor who cites or publishes any false news or tales whereby discord or occasion of discord or slander may grow between the Queen and her people, or the great men of the realm (or which may produce other mischiefs). [Emphasis added.]

Scott, *supra*, notes at p. 39 that it was upon this formulation of the offence that the Canadian *Criminal Code* provision was based. Enacted in 1892, s. 126 of the *Criminal Code*, S.C. 1892, c. 29, declared:

> **126.** Every one is guilty of an indictable offence and liable to one year's imprisonment who wilfully and knowingly publishes any false news or tale whereby injury or mischief is or is likely to be occasioned to any public interest. [Emphasis added.]

While *R. v. Keegstra*, [1990] 3 S.C.R. 697, dealt with s. 319, Dickson C.J. had occasion to comment in passing on the broad history of criminal libel offences (at p. 724):

> While the history of attempts to prosecute criminally the libel of groups is lengthy, the *Criminal Code* provisions discussed so far do not focus specifically upon expression propagated with the intent of causing hatred against racial, ethnic or religious groups.

However, a more thorough review of the history of the related provisions reveals a clear pattern of attention to attacks on vulnerable groups. Scott, *supra*, examined the relationship of s. 136 (now s. 181) to its historical antecedents (at pp. 40 and 42):

> The king's reputation and title were amply protected from attack by various statutes, and the peers and other "magnates" gradually abandoned their remedies under the ancient doctrine of *scandalum*

> *magnatum* because the developed law of libel and slander, and of contempt of court for justices, took care of all their needs. Hence the penalties for spreading "false news and tales" might have been absorbed into various specialised branches of the law, and there might be today no trace of a general crime of spreading false news in our law, had it not had an independent root in the idea of public mischief.
>
> . . .
>
> This notion of mischief in the common law has relevance to section 136 of the Canadian Code because the word "mischief" appears in the section. The recent English cases show the doctrine is not obsolete. Canadian law, based on statute, is more clearly formulated and goes farther than the actual holding in any English decision. Its roots are nevertheless to be found in what is an operative principle of the common law. It is wrong for anyone knowingly to cause a public mischief by publishing or telling lies. Lying itself does not constitute the crime. Injuring the public interest does.
>
> Allied in principle to these instances of public mischief are the case where by spreading false news a libel was occasioned to a group of persons. The rule here is close to the notion both of libel and of public mischief; or perhaps one might say it is another example of public mischief, of which libel upon individuals whether "magnates" or simple citizens, is one type.

The section has rarely been used in modern times. In *R. v. Hoaglin* (1907), 12 C.C.C. 226 (N.W.T.S.C.), the accused was an American immigrant who apparently had not fared well here. He placed a sign in his shop window to the effect that he was having a closing out sale and advising Americans to think twice before settling in Alberta because Americans were not welcome there. The trial judge convicted him on the basis that the Alberta government sought to foster American immigration. Harvey J. was careful to stress that the provision was aimed at false assertions of fact, not disagreeable expressions of opinion. He stated (at p. 228):

> The words themselves under certain circumstances, would not amount to an offence. If a newspaper in discussing the public policy of the country stated that it did not think it was in the interest of Canada that citizens of the United States should come in here, I do not think that would be a

> matter which would be properly dealt with under this section of the Code.

In *R. v. Carrier* (1951), 16 C.R. 18, 104 C.C.C. 75 (Que. K.B. (Criminal Side)), the accused was acquitted on a charge arising out of the dissemination of a pamphlet protesting the treatment of Jehovah's Witnesses entitled "The Burning Hate of Quebec for God, Christ and for Liberty is a subject of shame for all Canada" on the grounds of *autrefois acquit* on a charge of seditious libel. In interpreting the "public interest" harmed by false news, Drouin J. looked to the history of the provision and found that it was aimed at controlling seditious speech which threatened to undermine lawful authority. He equated the public interest with sedition and concluded that speech which fomented discord among citizens but did not issue in other violent conduct was not contrary to the public interest.

In 1955 (S.C. 1953-54, c. 51), the provision was removed from the "Sedition" section of the *Code* and re-enacted under the category of "Nuisance". In doing this, Parliament made it clear that while the import of s. 181 was not to punish sedition, it continued to have a role to play. Section 166 stated:

> **166.** 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 is liable to imprisonment for two years. [Emphasis added.]

The re-enacted section was dealt with in *R. v. Kirby* (1970), 1 C.C.C. (2d) 286 (Que. C.A.). The appellant was the publisher of an underground newspaper that had printed a facsimile of the front page from the Montreal Gazette on the back

cover of an issue of his paper, carrying the headline "Mayor Shot By Dope-crazed Hippie". The accompanying story stated that Mayor Drapeau had been attacked by a needle-wielding drug fiend but was recovering nicely. The papers had been distributed with the page folded inside, but someone had played a prank on the pranksters and folded them so that the "Gazette" page was outermost. Several calls were made by concerned citizens to Drapeau's office and some 50 calls to the Gazette's night editor. In overturning the conviction, the court found that there had been no intention to pass the satire off as news, let alone as false news, and thus no intent to commit the offence. The court concluded (at p. 289):

> I find it difficult to imagine that anyone could have been misled into believing that the story was genuine.
>
> . . .
>
> While I consider the page was stupid, pointless and in bad taste, I cannot agree that, *per se*, it was reasonably sure to cause trouble and insecurity. The inconvenience to which the night city editor of the Gazette was put does not in my view constitute "injury or mischief to a public interest" and the Mayor himself gave no indication of concern over the event. . . .

Thus, a review of the historical development of the law's response to false news reflects its role in prohibiting the dissemination of false information which strikes at important interests of society as a whole. Section 181 perpetuates one of the central functions of *De Scandalis* in prohibiting public alarm and internecine hostilities between and among social groups. The courts have quite properly determined that expressions aimed at dissenting political opinion are not caught by the section.

It remains to be determined whether s. 181 is invalid as a result of a contravention of s. 2(*b*) of the *Charter* which cannot be justified under s. 1 of the *Charter*.

B. *Section 2(b) of the Charter*

Section 2(*b*) of the *Charter* provides:

> **2.** Everyone has the following fundamental freedoms:
>
> . . .
>
> (*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

The fundamental importance of freedom of expression to a free and democratic society is beyond question. At issue is whether s. 181 contravenes that right.

The first step in the *Charter* analysis is to ascertain whether the activity of the litigant who alleges a s. 2(*b*) violation falls within the ambit of protected expression. The sphere of expression protected by the section has been very broadly defined to encompass all content of expression irrespective of the particular meaning sought to be conveyed unless the expression is communicated in a physically violent form (*R. v. Keegstra*, *supra*). The activity of Zundel involved the deliberate and wilful publication of lies which were extremely damaging to members of the Jewish community, misleading to all who read his words and antithetical to the core values of a multicultural democracy. The basis for determining whether this type of activity falls within the scope of protected expression was set out in *Keegstra, supra*. There

Dickson C.J. found that hate propaganda satisfied the first step of the s. 2(*b*) of the *Charter* inquiry. He wrote (at p. 730):

> Because *Irwin Toy* stresses that the type of meaning conveyed is irrelevant to the question of whether s. 2(*b*) is infringed, that the expression covered by s. 319(2) is invidious and obnoxious is beside the point. It is enough that those who publicly and wilfully promote hatred convey or attempt to convey a meaning . . . .

Similarly, constitutional protection under s. 2(*b*) must therefore be extended to the deliberate publication of statements known to be false which convey meaning in a non-violent form. Freedom of expression is so important to democracy in Canada that even those statements on the extreme periphery of the protected right must be brought within the protective ambit of s. 2(*b*).

The second step of the test is to determine whether the purpose of the impugned legislation is to restrict freedom of expression. Here, the purpose of s. 181 is to restrict, not all lies, but only those that are wilfully published and that are likely to injure the public interest. Although the targeted expression is extremely limited, the provision does have as its purpose the restriction of free expression. Accordingly, it must be found that s. 181 constitutes an infringement of the freedom of expression guaranteed under s. 2(*b*) of the *Charter*.

Before turning to s. 1 of the *Charter,* it is important to recall what has been written concerning the weight to be attached to other *Charter* provisions and the consideration of contextual factors. In *Keegstra*, *supra,* Dickson C.J., wrote at p. 734:

> I believe, however, that s. 1 of the *Charter* is especially well suited to the task of balancing, and consider this Court's previous freedom of expression decisions to support this belief. It is, in my opinion, inappropriate to attenuate the s. 2(*b*) freedom on the grounds that a particular context requires such; the large and liberal interpretation given the freedom of expression in *Irwin Toy* indicates that the preferable course is to weigh the various contextual values and factors in s. 1. [Emphasis in original.]

C. *Section 1 Analysis*

In order to determine whether s. 181 can be justified under s. 1 of the *Charter* a careful balancing of a number of factors must be considered. In doing so we have followed the test set out in *R. v. Oakes*, [1986] 1 S.C.R. 103.

(1) Prescribed by Law

(i) *The General Rule*

There is a separate constitutional question posed which raises the issue of vagueness under s. 7 of the *Charter*. Indeed, if the vagueness of the impugned law is the sole issue raised, it is dealt with under s. 7. Nonetheless, the proper place to deal with this vagueness argument is under s. 1. See *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 000, at pp. 000-000.

The concept that a section of an enactment would be declared void for vagueness is based upon the sound rule that a person should know with reasonable certainty what the law is and what actions are in danger of breaking the law. There can be no doubt that a section of the *Criminal Code* enacting an offence must provide

sufficient guidance to predict the legal consequences of a given course of conduct but a statute or legal enactment can do no more than set boundaries which create an area of risk.

It is the guidance of conduct and not the absolute direction of conduct which is the appropriate objective of legislation. A provision will be too vague if it does not provide a basis for legal debate and discussion. If it does not sufficiently delineate an area of risk, it can provide neither notice to a person of conduct which is potentially criminal nor an appropriate limitation on the discretion of the authorities seeking to enforce the provision. Such a provision offers no basis for the judiciary to define limits of conduct. See *Nova Scotia Pharmaceutical*, *supra*, at pp. 000-000.

Section 181 cannot be said to be vague. It provides clear guidelines of conduct. The citizen knows that to be at risk under this section, he or she must wilfully publish a false statement knowing it to be false. Further, the publication of those statements must injure or be likely to injure the public interest.

(ii) *How Should the Term "Public Interest" be Defined as it is Used in Section 181*?

The appellant contends that the term, "public interest", is so vague that the section is invalid. It is submitted that the term could be used by an unscrupulous government to render criminal any conduct or opinion opposed by the government of the day.

The fact that the term is undefined by the legislation is of little significance. There are many phrases and words contained in the *Criminal Code* which have been interpreted by the courts. It is impossible for legislators to foresee and provide for every eventuality or to define every term that is used. Enactments must have some flexibility. Courts have in the past played a significant role in the definition of words and phrases used in the *Code* and other enactments. They should continue to do so in the future.

For our purposes, it is sufficient to refer to but a few of the judicial definitions of words and phrases found in the *Criminal Code*. In obscenity cases, courts have properly taken it as their role and duty to define such terms as "indecent", "immoral" or "scurrilous" found in various sections of the *Code* (see, for example, *R. v. MacLean and MacLean (No. 2)* (1982), 1 C.C.C. (3d) 412 (Ont. C.A.), and *R. v. Springer* (1975), 24 C.C.C. (2d) 56 (Sask. Dist. Ct.). In *R. v. Butler*, [1992] 1 S.C.R. 452, Sopinka J. considered the meaning that should be attached to the words "undue exploitation of sex", which also were not defined in the statute.

Similarly, courts have considered and interpreted, the words "deceit, falsehood or other fraudulent means". In *R. v. Olan*, [1978] 2 S.C.R. 1175, "other fraudulent means" was found to include means which were not in the nature of a falsehood or deceit. Rather the words were held to encompass all means which can properly be designated as dishonest. That same case further concluded that although there was no definition of "defraud" contained in the *Criminal Code*, dishonesty and deprivation were essential elements that must be considered as integral components of the word.

It is clear then that the courts can and should define terms and words used in the *Criminal Code*. A review of the cases that have thus far considered false news provisions reveals that they have not yet adequately defined the term "public interest". It is therefore necessary to consider further how the phrase "public interest" should be defined in the context of s. 181.

A survey of federal statutes alone reveals that the term "public interest" is mentioned 224 times in 84 federal statutes. The term appears in comparable numbers in provincial statutes. The term does not and cannot have a uniform meaning in each statute. It must be interpreted in light of the legislative history of the particular provision in which it appears and the legislative and social context in which it is used.

A "public interest" likely to be harmed as a result of contravention of s. 181 is the public interest in a free and democratic society that is subject to the rule of law. A free society is one built upon reasoned debate in which all its members are entitled to participate. Section 181, including its reference to "public interest", should, as this Court has emphasized, be interpreted in light of *Charter* values. See *Hills v. Canada (Attorney General)*, [1988] 1 S.C.R. 513, *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, and *R. v. Salituro*, [1991] 3 S.C.R. 654. As a fundamental document setting out essential features of our vision of democracy, the *Charter* provides us with indications as to which values go to the very core of our political structure. A democratic society capable of giving effect to the *Charter*'s guarantees is one which strives toward creating a community committed to equality,

liberty and human dignity. The public interest is, therefore, in preserving and promoting these goals.

The term, as it appears in s. 181, should be confined to those rights recognized in the *Charter* as being fundamental to Canadian democracy. It need not be extended beyond that. As an example, the rights enacted in ss. 7, 15 and 27 of the *Charter* should be considered in defining a public interest.

Section 15 of the *Charter* provides that every individual is equal before and under the law and is to be free of discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability. If the wilful publication of statements which are known to be false seriously injures a group identifiable under s. 15, such an act would tear at the very fabric of Canadian society. It follows that the wilful publication of such lies would be contrary to the public interest. If the Crown is able to establish beyond a reasonable doubt that those fundamental rights are likely to have been seriously damaged by the wilful publication of statements known to be false, it will have fulfilled this part of its obligations under the section.

Thus, the term "public interest" as it appears in s. 181 refers to the protection and preservation of those rights and freedoms set out in the *Charter* as fundamental to Canadian society. It is only if the deliberate false statements are likely to seriously injure the rights and freedoms contained in the *Charter* that s. 181 is infringed. This section, therefore, provides sufficient guidance as to the legal

consequence of a given course of conduct. It follows that the section cannot be said to be so vague that it is void.

(2) Objective

(i) *A Pressing and Substantial Aim*

The aim of s. 181 is to prevent the harm caused by the wilful publication of injurious lies. This is evident from the clear wording of the provision itself which prohibits the publication of a statement that the accused knows is false and "that causes or is likely to cause injury". This specific objective in turn promotes the public interest in furthering racial, religious and social tolerance. There can be no doubt that there is a pressing and substantial need to protect groups identifiable under s. 15 of the *Charter*, and therefore society as a whole, from the serious harm that can result from such "expression". The decision of this Court in *Keegstra* clearly recognized the invidious and severely harmful effects of hate propaganda upon target group members and upon society as a whole (see pp. 746-49). It was found that members of such groups, not unexpectedly, respond to the humiliation and degradation of such "expression" by being fearful and withdrawing from full participation in society. Society as a whole suffers because such "expression" has the effect of undermining the core values of freedom and democracy.

Professor Mari Matsuda has described the impact unchecked racist speech has on target group members in "Public Response to Racist Speech: Considering the Victim's Story" (1989), 87 *Mich. L. Rev.* 2320, at pp. 2338 and 2379:

> To be hated, despised, and alone is the ultimate fear of all human beings. However irrational racist speech may be, it hits right at the emotional place where we feel the most pain. The aloneness comes not only from the hate message itself, but also from the government response of tolerance. When . . . the courts refuse redress for racial insult, and when racist attacks are officially dismissed as pranks, the victim becomes a stateless person.
>
> . . .
>
> The government's denial of personhood by denying legal recourse may be even more painful than the initial act of hatred. One can dismiss the hate group as an organization of marginal people, but the state is the official embodiment of the society we live in.

Similarly, it would be impossible to deny the harm caused by the wilful publication of deliberate lies which are likely to injure the public interest. The evil is apparent in the deceptive nature of publications caught by s. 181. The focus of s. 181 is on manipulative and injurious false statements of fact disguised as authentic research. The publication of such lies makes the concept of multiculturalism in a true democracy impossible to attain. These materials do not merely operate to foment discord and hatred, but they do so in an extraordinarily duplicitous manner. By couching their propaganda as the banal product of disinterested research, the purveyors of these works seek to circumvent rather than appeal to the critical faculties of their audience. The harm wreaked by this genre of material can best be illustrated with reference to the sort of Holocaust denial literature at issue in this appeal.

Holocaust denial has pernicious effects upon Canadians who suffered, fought and died as a result of the Nazi's campaign of racial bigotry and upon Canadian society as a whole. For Holocaust survivors, it is a deep and grievous denial of the significance of the harm done to them and thus belittles their enormous

pain and loss. It deprives others of the opportunity to learn from the lessons of history. To deliberately lie about the indescribable suffering and death inflicted upon the Jews by Hitler is the foulest of falsehoods and the essence of cruelty. Throughout their tragic history, the circulation of malicious false reports about the Jewish people has resulted in attacks, killings, pogroms and expulsions. They have indeed suffered cruelly from the publication of falsehoods concerning their culture.

The Cohen committee demonstrated that racial intolerance was alive and functioning in Canada in the 1960's. In 1984, both the Special Committee Report on Participation of Visible Minorities in Canadian Society, *Equality Now!*, and the Canadian Bar Association's *Report of the Special Committee on Racial and Religious Hatred* found that racism and words inciting hatred were growing problems in Canada and urged that prohibitions against them be maintained and strengthened. The facts in the recent case of *Kane v. Church of Jesus Christ Christian--Aryan Nations*, Alta. Bd. Inq., February 28, 1992, [1992] A.W.L.D. No. 302, reveal with dreadful clarity that racism is a current and present evil in our country. It is a cancerous growth that is still alive, growing and thriving on ignorance, suspicion, fear and jealousy.

Section 181 provides protection, by criminal sanction, not only to Jewish Canadians but to all vulnerable minority groups and individuals. The salutary nature of this section should be emphasized. It can play a useful and important role in encouraging racial and social tolerance which is so essential to the successful functioning of a democratic and multicultural society. It achieves this goal by expressing the repugnance of Canadian society for the wilful publication of

statements known to be false that are likely to cause serious injury or mischief to the public interest which is defined in terms of *Charter* values. Indeed, it would be unfortunate if the *Charter* was used to strike down a provision that protects vulnerable groups and individuals.

In *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154, it was said of this important principle (at p. 233):

> This Court has on several occasions observed that the *Charter* is not an instrument to be used by the well positioned to roll back legislative protections enacted on behalf of the vulnerable.
>
> . . .
>
> The same principle has been repeated and emphasized in *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at p. 993, and in *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at p. 1051. This principle recognizes that much government regulation is designed to protect the vulnerable. It would be unfortunate indeed if the *Charter* were used as a weapon to attack measures intended to protect the disadvantaged and comparatively powerless members of society.

The aim of s. 181 has the effect of protecting the vulnerable in society and, as such, is a pressing and substantial concern. It is of particular importance since, under our constitution, multiculturalism and equality are to be enhanced.

(ii) *International Instruments*

In seeking to deny the Holocaust in order to facilitate the promotion of racism, the appellant has aimed with deadly accuracy. The Nazi attempt to commit genocide against the Jews and other "non-aryan" subjects within their control is part

of an all too long and frequently repeated history of persecutory atrocities committed by majorities against minorities. The Holocaust is undeniably a watershed marking the apogee of the brutal consequences which flow from unchecked racism. It was in response to the horrors of the Holocaust that Western nations undertook to seek to abolish racism. Dickson C.J. noted this trend in his dissenting reasons in *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, at p. 348:

> Since the close of the Second World War, the protection of the fundamental rights and freedoms for groups and individuals has become a matter of international concern. A body of treaties (or conventions) and customary norms now constitutes an international law of human rights under which the nations of the world have undertaken to adhere to the standards and principles necessary for ensuring freedom, dignity and social justice for their citizens. The *Charter* conforms to the spirit of this contemporary international human rights movement, and it incorporates many of the policies and prescriptions of the various international documents pertaining to human rights. The various sources of international human rights law -- declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, customary norms -- must, in my opinion, be relevant and persuasive sources for interpretation of the *Charter*'s provisions.

Canada is a signatory to two relevant international instruments. The United Nations *International Covenant on Civil and Political Rights* (in force for Canada August 19, 1976), 999 U.N.T.S. 172, Article 20(2), and the *International Convention on the Elimination of All Forms of Racial Discrimination* (in force for Canada November 13, 1970), 660 U.N.T.S. 212, preamble and Article 4. Both documents provide that advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law (see *Keegstra*, *supra*, at pp. 749 to 755). These instruments serve 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.

In this case the published statements which were known to be false referred to the Holocaust. As a result it has been necessary to refer to that most evil episode in history and to the Jewish people who were its victims. However, the reasoning equally applies to any identifiable minority group which has been seriously injured by the wilful publication of a statement known to be false.

(iii) *Legislative Responses in Other Jurisdictions*

Like Canada, many free and democratic societies have responded to their international obligations by enacting specific hate propaganda provisions equivalent to our s. 319 while retaining or adding sections addressed to specific related forms of malice. Some use spreading false news provisions. Article 656 of the Italian *Criminal Code* makes it an offence to publish and disseminate false, exaggerated or misleading news liable to disrupt the public order. The provision was upheld in the Constitutional Court in Decision No. 191/1962 on the basis that public order means "legal order on which social co-existence is based", i.e., that set of norms which ensures the effectiveness of the legal order. See Alessandro Pace, "Constitutional Protection of Freedom of Expression in Italy" (1990), 2 *European Review of Public Law* 71, at p. 84.

The Danish *Criminal Code* deals with attacks based on religion under s. 140, while prohibiting false speech against a variety of vulnerable social groups under s. 266(b). Section 140 of the Danish *Criminal Code* reads:

> 140. Any person who exposes to ridicule or insults the dogmas or worship of any lawfully existing religious community in this country

> shall be liable to simple detention, or in extenuating circumstances, to a fine.

Section 266(b) of the Danish *Criminal Code* makes it an offence for:

> . . . any person who, by circulating false rumors or accusations persecutes or incites hatred against any group of the Danish population because of its creed, race, or nationality shall be liable to simple detention, or in aggravating circumstances, imprisonment for any term not exceeding one year.
>
> (See, K. Lasson, "Racial Defamation As Free Speech: Abusing the First Amendment" (1985), 17 *Colum. Hum. Rts. L. Rev.* 11, at p. 51.)

As a result of the Federal Republic of Germany's direct experience with the horrors of unchecked racist speech, it has regulated it under three penal offences. Two of these cast a broad net which embraces all forms of hate speech while the third is specifically aimed at dealing with holocaust denial as a specie of insult. Article 130 of the West German *Criminal Code* prohibits attacks on human dignity by incitement to hate. Article 131 prohibits race-hatred writings. Article 185 creates the offence of insult. Article 194(1) provides for initiation of prosecutions by victims of persecution during World War II. See Professor Eric Stein, "History Against Free Speech: The New German Law Against the "Auschwitz" -- and other -- "Lies"" (1986), 85 *Mich. L. Rev.* 277. In the judgment at 75 BGHZ 160, 33 NJW 45 (1980), the court made it clear that the punishment of false allegations about the Holocaust was not about different interpretations of history but about disrespect:

> The very historical fact that humans were segregated according to their origin under the so-called Nuremberg laws, and were robbed of their individuality with a view to their extermination, gives the Jews living in the Federal Republic a special personal relationship with their fellow

> citizens; in this relationship the past is present even today. They are entitled, as a component of their personal self-image, to be viewed as a part of a group, singled out by fate, to which all others owe a particular moral responsibility, and that is an aspect of their honor. The respect of this self-image constitutes for every one of them one of the guarantees against a repetition of discrimination and a basis for their life in the Federal Republic. Whoever attempts to deny these events deprives each and every one of them of the personal worth to which they are entitled.
>
> (Cited and translated in Stein, *supra*, at p. 303.)

While the presence of overlapping provisions in other jurisdictions is by no means conclusive of the constitutional validity of the provision at issue in this appeal, the fact that legislation of this type is found in other free and democratic countries is relevant in considering whether the objective is of sufficient importance to justify this very limited infringement on freedom of expression.

(iv) *Other Charter Provisions*

(a) General: Section 15 of the *Charter*

It must be remembered that the s. 1 analysis takes place in the context of whether the limit is justifiable in a "free and democratic society" and therefore, the analysis of the limited s. 2(*b*) infringement must be conducted in light of Canada's commitment to the values set out in other sections of the *Charter*. The wording of s. 181 itself, through its reference to the "public interest", invokes the values of the *Charter*. Thus, the legislature has signalled the importance of the objective because it has defined the harm against which the provision protects in terms of the values that are closest to the foundations of our multicultural and democratic society.

False statements aimed at perpetuating the unequal participation and treatment of groups already disadvantaged along s. 15 enumerated or analogous grounds do not foster full participation in society but prevent it. Democratic pluralism assumes that members of society will not simply organize around single interests of race, class or gender but will explore and discern their commonalities, coming together around certain issues and diverging on others in constantly changing configurations. Deliberate lies which deny these commonalities divide groups which might otherwise organize around mutual interests, and instead forge loyalties based on artificial and reified racial identifications that do not permit society to perceive and pursue its various goals. Those in the target group lose the capacity to participate with others and are reduced to some single aspect of their identities. Those in the majority lose the opportunity for meaningful participation in a fully open society when access to the perspectives of minorities is lost. This will occur whenever the majority so demeans a minority that these perspectives can no longer be accorded the dignity and authority which their cogency might merit. Speech which, through the deliberate dissemination of falsehoods, has the effect of promoting or perpetuating discrimination and exclusion of a group subjected to historical disadvantage will be prohibited. By prohibiting calculated falsehoods which undermine the equality of target group members, s. 181 enhances the goals of s. 15 of the *Charter*.

In this connection, it is also important to recognize the significance of s. 27 of the *Charter* in assessing the importance of s. 181's objective.

(b) Section 27 of the *Charter*

Section 27 provides:

> **27.** This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

The importance of multiculturalism has also been recognized internationally. The model for s. 27 of the *Charter* was Article 27 of the 1966 *International Covenant on Civil and Political Rights*, ratified by Canada in 1976. That section provided:

> *Article 27.* In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

This Article, like s. 27 of the *Charter*, stresses the importance of tolerance and respect for the dignity of human beings. Recent events in Canada and throughout the world have demonstrated how quickly these ideals can be forgotten and how important it is to cherish them.

It is perhaps an indication of the genius of Canada and Canadians that the supreme law of the land would recognize the existence of multiculturalism in our country and encourage its enhancement. Our country has benefited from and has been enriched by the efforts and accomplishments of Canadians of many different races, religions and nationalities. The recognition of multiculturalism in the *Charter* is an attempt to achieve the epitome of democratic societies.

The recognition of this principle in the *Charter* was not something new. Multiculturalism in our country has been acknowledged for many years by way of government policy and parliamentary enactment. For example, it was specifically recognized and cited by the members of the Royal Commission on Bilingualism and Biculturalism, some of whose policies were later implemented by the government. See the Report of the Royal Commission on Bilingualism and Biculturalism, Book IV, *The Cultural Contribution of the Other Ethnic Groups* (1970).

This Court has applied s. 27 in several cases beginning with *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295. In *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, Dickson C.J. again referred to s. 27 in connection with the definition of freedom of religion. There he wrote (at p. 758):

> . . . indirect coercion by the state is comprehended within the evils from which s. 2(*a*) may afford protection. . . . any more restrictive interpretation would, in my opinion, be inconsistent with the Court's obligation under s. 27 to preserve and enhance the multicultural heritage of Canadians.

In the same case, Wilson and La Forest JJ. used s. 27 to support their analysis under s. 1 of the *Charter* (see pp. 804-9).

In *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at p. 171, McIntyre J. applied s. 27 in the course of defining s. 15 equality rights. He referred to s. 27 to demonstrate that the goal of promoting equality is much greater than simply that of eliminating distinctions.

In *Keegstra, supra*, s. 27 was cited to support the reasonableness of the limits on freedom of expression provided by the hate literature sections of the *Code*. Dickson C.J. dealt with the meaning of s. 27 and wrote (at p. 757):

> . . . I expressly adopt the principle of non-discrimination and the need to prevent attacks on the individual's connection with his or her culture, and hence upon the process of self-development (see Magnet "Multiculturalism and Collective Rights: Approaches to Section 27", in Beaudoin and Ratushny, eds., op. cit., at p. 739).

The section provides constitutional reinforcement of Canada's long standing policy of recognizing multiculturalism. It recognizes that all ethnic groups are entitled to recognition and to equal protection. It supports the protection of the collective rights, the cultural integrity and the dignity of Canada's ethnic groups. In doing so it enhances the dignity and sense of self worth of every individual member of those groups and thereby enhances society as a whole.

Section 27 of the *Charter* is not merely the reflection of a fleetingly popular concept. Rather it is a magnificent recognition of the history of Canada and of an essential precept for the achievement of those elusive goals of justice and true equality. People must be able to take pride in their roots, their religion and their culture. It is only then that people of every race, colour, religion and nationality can feel secure in the knowledge that they are truly equal to all other Canadians. Thus secure in the recognition of their innate dignity, Canadians of every ethnic background can take pride in their original culture and a still greater pride in being Canadian. Section 27 strives to ensure that in this land there will be tolerance for all based on a realization of the need to respect the dignity of all.

Many authors have written of the importance of multiculturalism. Evelyn Kallen suggests that the cultural integrity and the collective dignity of ethnic communities are inextricably linked. Every ethnic group must be equally respected and afforded equal opportunity to freely practise and transmit over the generations its peoples' distinctive language, religion, and cultural design for living (see "Multiculturalism, Minorities, and Motherhood: A Social Scientific Critique of Section 27", in *Multiculturalism and the Charter: A Legal Perspective* (1987), 123, at p. 125).

Kallen argues compellingly that s. 27 should be interpreted in its broadest sense in order to protect the collective rights, cultural integrity and group dignity of Canada's many ethnic groups. She writes at p. 136:

> Section 27 recognizes and protects the "multicultural heritage" of Canadians. What is important to consider here is that the cultural heritage of *minority* Canadians almost invariably includes a history of human rights violations through collective discrimination. And, not infrequently, collective ethnic discrimination takes the form of group defamation. Violations of minority rights through racial and cultural persecution, sometimes to the point of policies of genocide, become a critical feature of an ethnic group's history and cultural heritage. Collective experiences of defamation, persecution, incarceration, and the like become part and parcel of an ethnic group's distinctiveness as a people and as a culture. Ceremonies are developed to commemorate collectively such tragic and traumatic events. These become sacred traditions, hallowed by time, which serve as indelible reminders to ethnic group members of the *collective price they have paid* for their commitment to the ethnic group and to its distinctive cultural design for living. [Emphasis in original.]

Viewed in light of Canada's history and the interrelationship of ss. 27 and 15 of the *Charter*, it can be seen that s. 181 has a very useful and important role to play in Canadian society. Section 181 encourages the goals of tolerance and equality

for all, as set out in the *Charter*, by expressing the repugnance of Canadian society for the wilful publications of false statements which seriously injure the public interest.

(v) *A Permissible Shift in Emphasis*

It has been argued that s. 181 is anachronistic and that to attribute to it the purpose of protecting racial and social tolerance is to trigger the invalid shifting purpose doctrine. Those concerns should now be addressed.

It is true the false news provision dates back to 1275. It was submitted that there is really no need at this stage in our history to protect the "Great Men of the Realm", which was the basis for the section when it was first enacted in the 13th century, and that the provision serves no other purpose. That position cannot be accepted. This section was specifically retained by Parliament in 1955. It has today a very real and pertinent role to play in Canada's multicultural and democratic society.

Over the years the purpose of the predecessors to s. 181 has evolved to extend the protections from harm caused by false speech to vulnerable social groups and therefore to safeguard the public interest against social intolerance and public alarm. It is true that *De Scandalis Magnatum* was enacted in a feudal society. That society depended for its existence upon the obedience and allegiance of the peasant class to the Sovereign and nobility. The protection of the public interest from harm focused, therefore, on the prevention of deliberate slanderous statements against the

great nobles of the realm. Such statements, it was thought, could lead to feuds among the nobility which would seriously threaten the security of the state and therefore harm the public interest. As the nature of the state changed, it was attacks on religious, racial or ethnic minorities that were seen to threaten the integrity of the social fabric. The centuries have passed and forms of government have changed but the enactment continues to have a salutary aim and effect.

The tragedy of the Holocaust and the enactment of the *Charter* have served to emphasize the laudable s. 181 aim of preventing the harmful effects of false speech and thereby promoting racial and social tolerance. In fact, it was in part the publication of the evil and invidious statements that were known to be false by those that made them regarding the Jewish people that lead the way to the inferno of the Holocaust. The realities of Canada's multicultural society emphasize the vital need to protect minorities and preserve Canada's mosaic of cultures.

Accordingly, there is a strong public interest in preventing the wilful publication of statements known to be false which seriously injure the basic dignity, and thus the security, and equality of others which ss. 7 and 15 of the *Charter* strive to provide. This interest is now subsumed within one of the original and continuing aims of s. 181 which is to prevent the harm caused by deliberate lies and to thereby promote racial and social tolerance. At the same time, there remains a public interest in the prevention of false statements of facts which are likely to jeopardize the security of the nation. Although it is not essential to these reasons, we should observe that s. 181 may, as well, apply to an individual who wilfully publishes statements known to be false which are not directed at a group, but do serious harm

to the public interest with regard to society as a whole. For example, to broadcast news that intercontinental missiles with nuclear warheads will be launched on Canada within the hour when that is known to be false would come within the purview of s. 181.

It is now clear that, in a multicultural society, the sowing of dissension through the publication of known falsehoods which attack basic human dignity and thus the security of its individuals cannot be tolerated. These lies poison and destroy the fundamental foundations of a free and democratic society.

The characterization of the purpose in s. 181 is readily distinguishable from the shifting purpose analysis which was criticised in *R. v. Big M Drug Mart Ltd.*, *supra*. First, the original purpose of the impugned legislation in *Big M* was undoubtedly religious and, therefore, in violation of s. 2(*a*) of the *Charter*. This Court observed that the aim of the impugned *Lord's Day Act*, in compelling sabbatical observance, had been long-established and consistently maintained by the courts of this country (at p. 331). By contrast, the original purpose of the predecessors of s. 181 clearly could not be considered unconstitutional. The provision was always aimed at preventing the harm caused by false speech and thereby protecting the safety and security of the community.

Second, the unsuccessful argument in *Big M* advocated a complete shift in purpose. Instead of the original aim of enforcing religious observance, it was argued that the new purpose was to implement a purely secular and universal day of rest from work. By comparison, the purpose in the present case has not shifted.

Rather than creating a new and different purpose as in *Big M*, the aim of the section has been maintained. The Canadian commitment to stemming intolerance and the dedication to multiculturalism and equality underline the importance and extent of the public interest in protecting against the harms of false speech and thereby maintaining racial and social tolerance.

Support for the proposition that a shift in emphasis is permissible also stems from the decision in *Butler, supra*. Centuries ago, obscenity laws were enacted to prevent the corruption of the morals of the King's subjects, and therefore to protect the peace of the King and government (see p. 473 of *Butler*). In *Butler*, however, Sopinka J. found that the objective of the obscenity laws is no longer moral disapprobation but rather the avoidance of harm to society. Sopinka J., at p. 495, quoted the words of Charron Dist. Ct. J. in *R. v. Fringe Product Inc.* (1990), 53 C.C.C. (3d) 422, at p. 443:

> Even though one can still find an emphasis on the enforcement of moral standards of decency in relation to expression in sexual matters in the jurisprudence subsequent to the enactment of s-s. (8), it is clear that, by the very words it has chosen, Parliament in 1959 moved beyond such narrow concern and expanded the scope of the legislation to include further concerns with respect to sex combined with crime, horror, cruelty and violence.
>
> It is the harm to society resulting from the undue exploitation of such matters which is aimed by the section. The "harm" conceived by Parliament in 1959 may not have been expressed in the same words as one would today. The court is not limited to a 1959 perspective in the determination of this matter. As noted in *Irwin Toy Ltd. v. Quebec (Attorney General)*, ([1989] 1 S.C.R. 927, at p. 984):
>
> > In showing that the legislation pursues a pressing and substantial objective, it is not open to the government to assert *post facto* a purpose which did not animate the legislation in the first place. . . However, in proving that the original objective remains pressing and substantial, the government surely can and should draw upon the

> best evidence currently available. The same is true as regards proof that the measure is proportional to its objective. . . It is equally possible that a purpose which was not demonstrably pressing and substantial at the time of the legislative enactment becomes demonstrably pressing and substantial with the passing of time and the changing of circumstances. [Emphasis added.]

Sopinka J. concluded by adding that a "permissible shift in emphasis was built into the legislation when, as interpreted by the courts, it adopted the community standards test" (p. 496). Similarly, in the present case, the wording of s. 181 includes a permissible shift in emphasis with its test which is based on injury to the public interest. Looking back to the inclusion of the offence in the *Criminal Code*, and the last amendment to the section in 1955, one can reasonably conclude that there has been a shift in the values that inform the public interest. As in *Butler*, this shift has been incorporated into the language of the section itself and is therefore permissible.

Just as the community standards test as applied to the obscenity law "must necessarily respond to changing mores" (*Butler*, *supra*, at p. 477), so too should the test to define "injury to a public interest" take into account the changing values of Canadian society. Those values encompass multiculturalism and equality, precepts specifically included in the provisions of the *Charter*.

Further support for the permissible shift in emphasis built into the legislation can be seen in the original wording of the provision in Burbridge's *Digest of Criminal Law of Canada* in 1890. As Professor Scott, as previously noted, *supra*, argues, the inclusion of the clause "or which may produce other mischiefs" in the original formulation is a "bridge" connecting the historical and prospective uses of the provision (at p. 40):

> The king's reputation and title were amply protected from attack by various statutes, and the peers and other "magnates" gradually abandoned their remedies under the ancient doctrine of *scandalum magnatum* because the developed law of libel and slander, and of contempt of court for justices, took care of all their needs. Hence the penalties for spreading "false news and tales" might have been absorbed into various specialised branches of the law, and there might be today no trace of a general crime of spreading false news in our law, had it not had an independent root in the idea of public mischief.

Based on the foregoing, we conclude that the objective of s. 181 is sufficiently pressing and substantial to justify this limited restriction on freedom of expression. The first test is therefore met.

(3) Proportionality

The next step in the s. 1 analysis is to determine whether the means chosen to further the objective are proportional to the ends.

(i) *Relation of the Expression at Stake to Free Expression Values*

It is at this stage that there must be an examination of the extent to which the expression at stake in a particular case promotes freedom of expression principles. Dickson C.J., in *Keegstra*, cautioned that (at p. 760):

> . . . it is equally destructive of free expression values, as well as the other values which underlie a free and democratic society, to treat all expression as equally crucial to those principles at the core of s. 2(*b*).

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. Liberal theory proposes that the state does not exist to designate and impose a single vision of the good life but to provide a forum in which opposing interests can engage in peaceful and reasoned struggle to articulate social and individual projects. We enshrine freedom of speech because it is an essential feature of humanity to reason and to choose and in order to allow our knowledge and our vision of the good to evolve. The risk of losing a kernel of truth which might lie buried in even the most apparently worthless and venal theory is believed to justify absolute freedom of expression. However, where there is no possibility that speech may be true because even its source has knowledge of its falsity, the arguments against state intervention weaken. When such false speech can be positively demonstrated to undermine democratic values, these arguments fade into oblivion.

Our colleague argues that truth may sometimes be in the eye of the beholder. In so far as she uses this assertion as a basis for including even pernicious speech within the ambit of protection afforded by s. 2(*b*) of the *Charter*, we agree. However, when it comes time to balance competing interests under s. 1, we must keep in mind that the various members of Canadian society behold deliberately false speech such as that at issue in this appeal from dramatically different perspectives.

A disinterested third party may indeed take from the appellant's work a healthy scepticism towards the production of bodies of knowledge. She may also

take from it support for feelings of contempt for Jews, Africans, Asians or for anyone who merely objects to "racialism".

Yet, there is another "beholder" of speech whose perspective is immensely relevant and yet does not figure in our colleague's account. We are warned quite properly that history has many lessons to teach. One is that the marketplace of ideas is an inadequate model; another is that minorities are vulnerable to censure as speakers. Indeed, by stressing the role s. 181 plays in permitting minorities to speak and to be heard, we recognize that grave caution must always be exercised to ensure that a provision aimed at alleviating oppression never becomes one for initiating or perpetuating it.

But history also teaches us that minorities have more often been the objects of speech than its subjects. To protect only the abstract right of minorities to speak without addressing the majoritarian background noise which makes it impossible for them to be heard is to engage in a partial analysis. This position ignores inequality among speakers and the inclination of listeners to believe messages which are already part of the dominant culture. It reflects the position put forth by the dissent but rejected by the majority in *Keegstra* that the right to freedom of expression entails only the freedom to "loose one's ideas on the world" and not to be respected, "listened to or believed".

With respect, we feel bound to follow the majority in *Keegstra* which held that it may be 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 which excludes them from full participation in society. Professor David Partlett explores this delicate balance in "From Red Lion Square to Skokie to the Fatal Shore: Racial Defamation and Freedom of Speech" (1989), 22 *Vand. J. Transnat'l L.* 431, at pp. 459 and 468-69:

> Furthermore, to view the government as villain is to ignore the capacity of the government as a speaker to moral matters. Government actions carry the imprimatur of authority. Silence and action carry social messages. This sits at the base of much anti-discrimination legislation. For government to speak provides not only a greater power to rectify wrongs but carries a moral message that discriminatory behavior does not have a place in that society.
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> . . .
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> Because government is a powerful, sometimes overwhelming, voice, great care should be taken to cabin its exercise.
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> But it is not sufficient simply to leave the argument here. Government -- in the defense of interests of tolerance, pluralism, and individual autonomy -- has a duty to speak on moral matters on behalf of those in the society who are inarticulate. Government is then acting as a facilitator for the expression of ideas, and it is difficult to attack the action from a free speech standpoint.

The type of "expression" targeted by s. 181 is only tenuously, if at all, connected to the values underlying freedom of expression. Dickson C.J., in *Keegstra*, referred to three rationales for protecting free expression (at p. 728):

> (1) seeking and attaining truth is an inherently good activity; (2) participation in social and political decision-making is to be fostered and encouraged; and (3) diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in a tolerant and welcoming environment for the sake of both those who convey a meaning and those to whom meaning is conveyed.

With respect to the search for the truth, the words of Dickson C.J. support the position that the publication of deliberate and injurious falsehoods does not contribute to the attainment of truth (at pp. 762-63):

> . . . the greater the degree of certainty that a statement is erroneous or mendacious, the less its value in the quest for truth. Indeed, expression can be used to the detriment of our search for truth; the state should not be the sole arbiter of truth, but neither should we overplay the view that rationality will overcome all falsehoods in the unregulated marketplace of ideas. There is very little chance that statements intended to promote hatred against an identifiable group are true, or that their vision of society will lead to a better world. To portray such statements as crucial to truth and the betterment of the political and social milieu is therefore misguided.

The publication of deliberate lies is obviously the antithesis of the truth. This publication deceives and misleads in a cruel and calculating manner those that seek the truth.

The values of self-fulfilment and human flourishing are also key to the principles underlying s. 2(*b*). Self-fulfilment and human flourishing can never be achieved by the publication of statements known to be false. Rather the damaging false statements that are prohibited under s. 181 serve only to impede, in a most despicable and demeaning manner, the enjoyment of these values by members of society who are the subject of these lies.

The third rationale underlying free speech deals with participation in social and political decision-making. As Dickson C.J., in *Keegstra*, stated (at p. 764):

> . . . expression can work to undermine our commitment to democracy where employed to propagate ideas anathemic to democratic values.

In our view, intentional and harmful falsehoods repudiate democratic values by denying respect and dignity to certain members of society, and therefore, to the public interest as a whole.

It is important to recognize that the American jurisprudence strongly supports the position that the state may restrict the publishing of deliberate and damaging lies. In *Garrison v. Louisiana*, 379 U.S. 64 (1964), Brennan J. stated (at p. 75):

> Calculated falsehood falls into that class of utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality . . ." *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 572. Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.

In sum, this analysis suggests that s. 181, at best, limits only that expression which is peripheral to the core rights protected by s. 2(*b*). Accordingly, deliberate and injurious falsehoods, like hate propaganda, "should not be accorded the greatest of weight in the s. 1 analysis" (Dickson C.J. in *Keegstra* at p. 765). It can therefore be concluded that restrictions on expression of this kind will be easier to justify than other infringements of s. 2(*b*).

(ii) *Rational Connection*

There can be no doubt that the suppression of the publication of deliberate and injurious lies is rationally connected to the aim of s. 181 in protecting society from the harms caused by calculated falsehoods and thereby promoting the safety and security of the community. The potentially destructive effects of speech were recognized in the 1966 *Report of the Special Committee on Hate Propaganda in Canada* (and adopted in *Keegstra*, *supra*, at p. 747) which reads in the opening paragraph of its preface and at p. 8:

> This Report is a study in the power of words to maim, and what it is that a civilized society can do about it. Not every abuse of human communication can or should be controlled by law or custom. But every society from time to time draws lines at the point where the intolerable and the impermissible coincide. In a free society such as our own, where the privilege of speech can induce ideas that may change the very order itself, there is a bias weighted heavily in favour of the maximum of rhetoric whatever the cost and consequences. But that bias stops this side of injury to the community itself and to individual members or identifiable groups innocently caught in verbal cross-fire that goes beyond legitimate debate.
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> . . .
>
> In the 18th and 19th centuries, there was a widespread belief that man was a rational creature, and that if his mind was trained and liberated from superstition by education, he would always distinguish truth from falsehood, good from evil. . . .
>
> We cannot share this faith today in such a simple form. While holding that over the long run, the human mind is repelled by blatant falsehood and seeks the good, it is too often true, in the short run, that emotion displaces reason and individuals perversely reject the demonstrations of truth put before them and forsake the good they know. The successes of modern advertising, the triumphs of impudent propaganda such as Hitler's, have qualified sharply our belief in the rationality of man. [Emphasis added.]

Racism tears asunder the bonds which hold a democracy together. Parliament strives to ensure that its commitment to social equality is not merely a

slogan but a manifest reality. Where any vulnerable group in society is subject to threat because of their position as a group historically subjected to oppression we are all the poorer for it. A society is to be measured and judged by the protections it offers to the vulnerable in its midst. Where racial and social intolerance is fomented through the deliberate manipulation of people of good faith by unscrupulous fabrications, a limitation on the expression of such speech is rationally connected to its eradication.

(iii) *Minimal Impairment*

Even if rationally connected, the means must impair the freedom as little as possible. The appellant argues that s. 181 is too broad and could potentially capture expression that does not relate to Parliament's objective. It is argued that this provision could potentially limit works of fiction based on fact, "historical novels", some interpretive journalism and unpopular or unconventional academic writing. These are concerns with respect to a possible chilling effect on expression.

(a) Terms of Section 181

The most cursory perusal of s. 181 will reveal that the Crown will never have an easy task obtaining a conviction under the section. It must be established that the accused

(1) <u>wilfully</u> published a false statement of fact presented as truth

(2) that he knew was false, and

(3) that the false statement causes or is likely to cause injury or mischief to a public interest.

It might be thought that it would be difficult enough for the Crown to establish that the impugned statement wilfully published by the accused was false and that the accused knew of the falsity of that statement. However the section goes on to require the Crown to establish that the statement is likely to cause injury to a public interest.

In this case the Crown presented clear, powerful and overwhelming evidence to establish every element of the offence. That evidence, set out earlier, certainly provided a sound basis upon which the jury could very properly conclude that Zundel was guilty. At this point, it is important to note that, as was done in this case, the trial judge must instruct the jury that the accused is not to be judged on the unpopularity of his or her beliefs.

To be acquitted under s. 181, there need only be a reasonable doubt with regard to the wilful publication of the statements presented as truth, or the falsity of the statements, or to the knowledge of the falsity or with regard to the likelihood of injury to the public interest. Any uncertainty as to the nature of the speech must inure to the benefit of the accused. Indeed, where the speech at issue lacks a factual base or is so vague that it makes no clear allegation capable of verification or falsification, it will not be caught by this section. These factors clearly weigh

heavily in the favour of the accused. The Crown in its factum accurately summarized the aspects of s. 181 which ensure that free expression is minimally impaired:

> The section does not purport to prohibit the expression of any idea or simple opinion, although they may pose a serious threat to a public interest. It only captures statements of fact which the Crown can prove to be false beyond a reasonable doubt. In cases in which the Crown cannot discharge this burden the public interest is left unprotected. It does not capture all false statements of fact but only those false to the knowledge of the accused. It does not capture all statements of fact false to the knowledge of the accused but only such statements as the accused deliberately chooses to make generally available to the public. It does not capture all statements of fact false to the knowledge of the accused which cause injury or pose a threat of injury. Injury even serious injury to an *individual* through falsehood is irrelevant under section 181. The possibility of some injury to even a *public* interest equally falls outside the scope of the section as the section requires the harm to such an interest to rise to the level of likelihood or to, in fact, occur. [Emphasis in original.]

It is clear that the Crown bears a very heavy onus in proving all the elements of the offence in order to convict an accused under s. 181.

Basically, the thrust of the appellant's argument is that s. 181 is an unjustifiable limit on freedom of expression. Such an argument, in this context, is more accurately characterized as an argument in support of the appellant's freedom to lie. Under s. 181, the appellant is free to tell all the lies that he wants to in private. He is free, under this section, to publish lies that have an overall beneficial or neutral effect. It is only where the deliberate publication of false facts is likely to seriously injure a public interest that the impugned section is invoked. This minimal intrusion on the freedom to lie fits into the broad category of *Criminal Code* offences which

punish lying. These offences include, *inter alia*, the provisions dealing with fraud, forgery, false prospectuses, perjury and defamatory libel.

The possibility of illegal police harassment really has little or no bearing on the proportionality of legislation which prohibits deliberate and injurious lies to legitimate Parliamentary objectives. It follows that the argument based on hypothetical potential harassment can be rejected, as it was in *Keegstra*. Although the appellant and the Canadian Civil Liberties Association argue that s. 181 is too broad, it is important to note that there have only been three other prosecutions under this "broad" offence and only one of these (*Hoaglin*, *supra*) has been successful. The infrequent use of this section can undoubtedly be attributed to the extremely onerous burden on the Crown to prove the offence. However, the fact that it is seldom used should hardly militate against its usefulness.

(b) Fact vs. Opinion

It has been argued that it is not possible to draw a coherent distinction between statements of opinion and assertions of fact and therefore, that s. 181 is overbroad. A statement, tale or news is an expression which, taken as a whole and understood in context, conveys an assertion of fact or facts and not merely the expression of opinion. As noted earlier, the trial judge suggested to the jury that the key element of the distinction is falsifiability. Expression which makes a statement susceptible to proof and disproof is an assertion of fact; expression which merely offers an interpretation of fact which may be embraced or rejected depending on its cogency or normative appeal, is opinion.

This analysis is supported by the distinctions employed in the Canadian and United States laws of defamation (see R. E. Brown, *The Law of Defamation in Canada* (1987), vol. 1, at p. 678, and *Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984) (*en banc*), *certiorari* denied, 471 U.S. 1127 (1985)). Four helpful criteria have been identified in order to distinguish fact from opinion: specificity of the terms used, verifiability, linguistic context and social context. All criteria are unified by the theme of exploring the response of a reasonable reader.

The statement must have a sufficiently definite meaning to convey facts. An allegation that X is corrupt is not an assertion of fact because it makes no specific allegation and uses language that lacks a definite meaning. However, an allegation that X is corrupt because he embezzles from his employer bespeaks sufficiently certain facts to permit its characterization as a factual claim.

The statement must be verifiable through empirical proof or disproof. An allegation that X is a KGB agent is empirically verifiable and therefore factual; an allegation that her temperament would suit her for such work is not verifiable and therefore an expression of opinion. A statement that the hot dogs one makes are 100 percent beef is a verifiable factual claim; a statement that they are delicious is an expression of opinion.

The statement must be made in a linguistic context in which it will be understood as fact rather than opinion. Allegations appearing in the context of a satirical article are not likely to be taken to be facts even when expressed in factual form. Sometimes the context itself, such as the irreverent underground newspaper

in *Kirby, supra*, will provide clues to the reader that they are not to accept the contents as literally true. However, allegations prefaced by cautions that they are only opinion may also be found to be factual claims if they are so "factually laden" that the caution is found to be a colourable attempt only to escape responsibility for allegations of fact.

Finally, the statement must be considered in its broader social context. Some forms of expression, such as academic periodicals, are accorded more authority and have traditions of authenticity that influence their interpretation, while others, such as political signs or lampoons, have traditions of hyperbolic rhetoric. Statements, such as the pamphlet at issue in this appeal, which are disguised as the reasoned product of scholarly investigation will be accorded greater seriousness by the reasonable reader.

It was argued that s. 181 is overbroad because it does not require the trial judge to instruct the jury on the distinction between fact and opinion as a matter of law, but leaves it to be determined as a matter of fact. The appellant submits that had the rules in *Ollman* (i.e., the four criteria set out earlier) been applied to the material in the case at bar, it would never have gone to the jury. It is difficult to see how this case helps the appellant. On the contrary, it seems to make clear that statements couched as "revisionist history" may be taken to be allegations of fact rather than submissions of opinion, despite protestations to the contrary. *Did Six Million Really Die?* makes specific claims about discrete historical incidents and the contents of publicly accessible historical documents. These statements are susceptible of being verified through examination of these documents. The pamphlet purports to be a

serious scholarly endeavour. The work of serious historians who allege that they have arrived at reasoned conclusions after thorough examination of primary sources is a form of expression accorded great authority. An application of the *Ollman* criteria confirms that the jury was clearly capable of drawing the distinction between fact and opinion as instructed by the trial judge.

The appellant argues that history is all interpretation. It is submitted that there is no objective historical truth because we do not understand facts in any unmeditated fashion, but through the lens of a theoretical perspective. Thus, the appellant contends, to assert that we can come to some conclusions as to what really happened at some point in history is to make an impossible epistemological claim or to give unwarranted authority to a single theoretical perspective. It is indeed true that no theory of history can be proved or disproved, although it may be shown to be more or less compelling or comprehensive. However, the appellant seeks to draw complex epistemological theory to the defence of what is really only, at best, the shoddiest of "scholarship" and, at worst pure charlatanism. The appellant has not been convicted for misinterpreting factual material but for entirely and deliberately misrepresenting its contents. When he points to the Goebbels' diaries and says they say X when in fact they say Y, he is not offering an alternative interpretation of the material but a fabrication proven to be false by the very materials to which he has referred.

Courts deal with the question of truth and falsity of statements on a daily basis. In every case in which the charge is fraud or the making of a false prospectus the court must determine whether false statements have been made. So too can

historical "facts" be shown to be true or false in the context of s. 181. Can it be said that France was not occupied by German forces in 1940; or that the Dunkirk evacuation never took place; that the Battle of Britain is nothing but wishful thinking; that London was never bombed; that German cities were never attacked by the allied air forces; that the Normandy landing in June of 1944 is no more than the stuff of dreams. The falsity of these statements can be proven beyond a reasonable doubt by reference to reliable historical documents, such as those in evidence at the appellant's trial. What can be proven as false statements, such as those published by Zundel which were known by him to be false, can and should come within the purview of s. 181.

In *The Holocaust Denial: Antisemitism, Racism & the New Right* (1986), at p. 105, Professor Gill Seidel points out the lacuna in the theoretical perspective of those who uncritically defend the type of "revisionist history" at issue here. She notes that those who would uncritically defend the free expression rights of purveyors of this form of speech do not necessarily act out of bad faith. However, their analysis misses a crucial point:

> [I]n encouraging a thousand versions of history to bloom, while refusing an acceptable label to any one, [Thion] replaces a state view of history (which he is surely right to reject) with a range of undifferentiated, equally weighted accounts. The difficulty is that such a range ignores power relations. It is a kind of free-market version of history.
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> . . .
>
> [But this orientation] does not allow him to see, even less accept, that Faurisson and others are bent on replacing the present anti-Nazi climate with a Nazi consensus, and that, in order to do so, they are playing intellectual games using academic, anti-authoritarian language. [Emphasis added.]

As distinguished from works which seek to retell traditional stories from the perspective of minorities and other groups heretofore unheard, the appellant has not adopted a novel perspective, unearthed non-traditional sources or re-interpreted traditional materials. He has lied. The deep-rooted criticism of "revisionism" is not directed, against its views of history but against its manipulation and fabrication of basic facts. This criticism was expressed by 34 French historians in a letter to *Le Monde* (February 21, 1979) dealing with the controversy over the work of the French historian, Faurisson:

> Everyone is free to interpret a phenomenon like the Hitlerite genocide according to his own philosophy. Everyone is free to compare it with other enterprises of murder committed earlier, at the same time, later. Everyone is free to offer such or such kind of explanation; everyone is free, to the limit, to imagine or to dream that these monstrous deeds did not take place. Unfortunately, they did take place and no one can deny their existence without committing an outrage on the truth.
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> (Cited and translated in Professor Lucy S. Dawidowicz, "Lies About the Holocaust" (1980), 70:6 *Commentary* 31, at p. 37.)

The appellant submits that he is a modern-day Galileo being sacrificed on the altar of received opinion. Indeed, a Galileo could not be caught under s. 181. Galileo pointed to the apparent movement of the planets and argued, contrary to accepted dogma of church and state, that the earth was not the centre of the heavens but revolved around the sun. His argument was not a deliberate falsification of the facts. Rather, he argued that his <u>theory</u> for explaining the significance <u>of the facts</u> was clearer and more comprehensive.

In contrast, the appellant posits a spurious problem, which cannot be solved by reconciling conflicting interpretations of the same evidence precisely

because it is not, in fact, based on the evidence but on misrepresentation or pure fabrication. The conflict between the assertions made by the appellant and those made by orthodox Holocaust historians cannot be resolved through reasoned debate. Orthodox historians point to sources which support their theories; the appellant and other "revisionist" historians point to documents which do not exist or which do not say what they claim they do. The pamphlet *Did Six Million Really Die?* does not fit with received views of reality because it is not part of reality. In the name of the integrity of knowledge, the appellant demands the right to throw a monkey-wrench into the mechanisms of knowledge.

We must re-iterate that the focus of s. 181 is not on the opinions of the appellant. While they might be caught under s. 319 , the hate propaganda provision, his acquittal on one charge at trial relating to *The West, War and Islam!* and the withdrawal of a subsequent charge against him for expressing these same opinions (*R. v. Zundel*, Ont. Prov. Ct., September 18, 1987, Babe Prov. Ct. J., unreported) make it clear that this section is not and has not been used against those who express unpopular, counter-intuitive or socially undesirable points of view. What is being prohibited is an attempt to win converts to this point of view and to inflict harm against disadvantaged members of society by the most unscrupulous manipulation.

The section will not catch an anthropologist proposing controversial theories which point to arguably true facts but draw erroneous assumptions with racist implications. However objectionable the content, inference or motive, this material would not be caught under s. 181 in the absence of evidence beyond a reasonable doubt of the falsity, and of the accused's knowledge of the falsity, of the

basic facts upon which such a theory was based. The theorist who argues, for example, that objective differences in cranial capacity translate into the intellectual superiority of men over women would be met on the field of reasoned debate by rival theorists who point to more credible interpretations which do not employ unspoken prejudice as their hidden premise. On the other hand, situations such as the case at bar in which the accused deliberately fabricates basic facts in order to support his theories render reasoned debate impossible.

Nor could s. 181 be invoked in the examples cited by our colleague. McLachlin J. referred to the doctor who exaggerates the number of persons infected with a virus in order to persuade people to be inoculated against a burgeoning epidemic and to the person who knowingly cites false statistics in order to prevent cruelty to animals. Both examples of expression not only fail to raise the possibility of injury to a public interest but, indeed, they would have an overall beneficial or neutral effect on society. In contrast, an accused would only be convicted under s. 181 if there were no reasonable doubt regarding a very serious injury to the public interest.

The appellant's arguments are not new. Deliberate lies which foment racism are an unsavoury relic of our collective history. However, racism with footnotes and chapter headings is still fundamentally racism and should be treated as such. Section 181 serves to prevent the harm caused by deliberate and injurious lies. It is therefore well-suited to respond to the harm caused by vilification campaigns disguised as pseudo-science.

(c) Alternative Modes of Furthering Parliament's Objectives

Finally, the presence of existing hate propaganda legislation should not weigh against either the need for or the validity of s. 181. It was argued that s. 181 was a mere duplication of the hate provisions of the *Criminal Code* and thus was invalid. Such an argument should not be accepted. There are numerous provisions of the *Criminal Code* which overlap to some extent but which are nonetheless valid. For example, *Johnson v. The Queen*, [1975] 2 S.C.R. 160, dealt with a charge under then s. 163(2) of the *Code* prohibiting the taking part in an "immoral, indecent or obscene" performance. This Court found that it was irrelevant that Parliament had enacted a separate offence of being nude in a public place. Nudity, it was noted, was not the sole factor in determining whether the performance was immoral.

Similarly, the fact that Parliament has enacted hate propaganda legislation does not invalidate s. 181. The section seeks to discourage the public dissemination of injurious falsehoods. These statements of fact, it should be remembered, are known by the accused to be lies. There is a pervasive and pernicious air of evil that surrounds their conscious aim to manipulate people. The deceptive nature of the deliberate publication of false statements of fact may, in certain circumstances, be even more invidious than the publication of hateful opinions which at least expresses the beliefs of the publisher. Thus s. 181 still fulfils an important role in a multicultural and democratic society. It emphasizes 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* and therefore on society as a whole.

As Dickson C.J. stressed in *Keegstra,* the government may legitimately employ a variety of measures in order to achieve its objective. On a general level, the promotion of racial and social tolerance and the prevention of harm caused by injurious and calculated falsehoods is best achieved through information and education. Human rights legislation may, in certain circumstances, be sufficient to deal with a particular problem in this area. Nevertheless, the strength of the criminal law must be reserved for the extreme cases, such as the case at hand. In a case such as this, with its potential to cause serious injury to the public interest, it is necessary to send a clear message by repudiating the harm caused by the appellant.

For example, it is true that driver education and the penalties provided by the *Highway Traffic Acts* may suffice to regulate most drivers. Nonetheless, the criminal law is used to demonstrate society's repugnance for the drunken driver who is likely to injure others. So too the criminal law has an important role to play in discouraging and punishing those who knowingly publish falsehoods that are likely to injure a public interest.

Overall, it would be hard to imagine a measure that would constitute a lesser impairment of a type of expression that is on the extreme periphery of the protected right. We therefore conclude that s. 181 does not unduly infringe the right to freedom of expression.

(iv) *Proportionality Between Effects and Objective*

At this stage in the s. 1 analysis, there must be an assessment of the importance of the state objective balanced against the effect of limits imposed upon the freedom. As previously noted, the "expression" at stake in the present case is inimical to the values underlying freedom of expression. The type of falsehoods caught by this section serves only to hinder and detract from democratic debate. The impugned provision, s. 181, is narrowly defined in order to minimally impair s. 2(*b*). In sum, the prohibition of the wilful publication of what are known to be deliberate lies is proportional to the importance of protecting the public interest in preventing the harms caused by false speech and thereby promoting racial and social tolerance in a multicultural democracy.

(4) Summary of the Section 1 Balancing and Conclusion

At the end of this detailed analysis it is worthwhile to step back and consider what it is that is being placed on the balance.

On one side is s. 181. It infringes to a minimal extent the s. 2(*b*) right to freedom of expression. In reality, it cannot be said that the prohibition of the wilful publication of false statements that are known to be false is an infringement of the core values of s. 2(*b*). Rather the infringement is on the extreme periphery of those values. In addition, the section can play an important role in fostering multiculturalism and racial and religious tolerance by demonstrating Canadian society's abhorrence of spreading what are known to be lies that injure and denigrate vulnerable minority groups and individuals.

On the other side, s. 181 provides maximum protection of the accused. It requires the Crown to establish beyond a reasonable doubt that the accused wilfully published false statements of fact presented as truth and that their publication caused or was likely to cause injury to the public interest. Any uncertainty as to the nature of the speech must inure to the benefit of the accused. If ever s. 1 balancing is to be used to demonstrate that a section of the *Criminal Code* is justifiable in a free and democratic society, this is such a case.

Legislation such as this which is aimed at the protection of society from deceit and aggression, yet provides the widest protection for the accused, should be fostered. Applying the *Charter* to strike s. 181 would be in direct contradiction to the principles established by this Court. The section is justifiable in our free and democratic Canadian society.

V. Disposition

In the result the appeal is dismissed. We would answer the constitutional questions as follows:

1. Yes.

2. Yes.

3. It is not necessary to answer this question.

4. It is not necessary to answer this question.

Appeal allowed, GONTHIER,CORY *and* IACOBUCCI JJ. *dissenting*.

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