Hate Speech and Freedom of Expression: The Constitutionality of the Trudeau Government's Plans to Criminalize Holocaust Denial

The Trudeau government, as part of its 2022 Budget, set out its intention to amend the Canadian Criminal Code to "prohibit the communication of statements, other than in private conversation, that willfully promote antisemitism by condoning, denying or downplaying the Holocaust."[1] This raises several key constitutional questions. The first is whether this proposal infringes upon rights listed under Section 2(b) of the *Charter*, which guarantees individuals' "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication."[2] The second question is whether such an infringement, if it exists, can be justified under Section 1 of the *Charter*, which states that the rights and freedoms in the *Charter* can be limited if this "can be demonstrably justified in a free and democratic society."[3]

What Constitutes Free Expression? The Scope of Section 2(b)

In *R v Keegstra* (1990), a landmark case on the constitutionality of hate speech regulation, the Supreme Court stated that all activity that conveys or attempts to convey meaning is considered expressive and within the ambit of Section 2(b), regardless of how distasteful or unpopular it is.[4] To avoid any misunderstanding, the Court explicitly affirmed that hate speech is captured by section 2(b), and that the only form of expression that would not fall within section 2(b)'s ambit would be physical violence.[5] Similarly, in *R v Zundel* (1992), the Court held that the publication of false news — as an activity that evidently attempts to convey meaning — is also a form of expression guaranteed protection under section 2(b).[6]

Given this expansive reading of Section 2(b) of the *Charter*, it is clear that the promotion of antisemitism by condoning, denying, or downplaying the Holocaust would legally constitute a form of expression that is captured within Section 2(b). It is also clear that with this law the government intends to interfere with this expression, and thus there is an infringement of section 2(b) which must be tested under section 1 of the *Charter*.

Section 1 and the *Oakes* Test

The limitations clause in section 1 of the *Charter* was explicated in a 1986 case, *R v Oakes*, where the Court set out a 2-step test to determine whether a government infringement of a

Charter right can be justified:

1. The government must show that the law in question has a goal that is both "pressing and substantial."[7]

2. The court then conducts a proportionality analysis using three sub-tests:

a) The government must first establish that the impugned law is *rationally connected* to its purported purpose.

b) The law must only *minimally impair* the violated *Charter*

c) Even if the government can satisfy the above steps, the impact on *Charter* rights may be too high a price to pay for the benefit the provision would procure. In other words, there must be a balance between the law's *salutary and deleterious effects*.[8]

To shed light on how this test might apply to the government's proposed Holocaust denial law, it is useful to examine two seminal cases in which the criminalization of antisemitism was at issue. Those cases are the two that were mentioned above: *R v Keegstra* (1990) and *R v Zundel* (1992). At first glance, these cases appear to produce opposite conclusions, and we accordingly need to assess which is more relevant when considering the justifiability of the law under consideration here.

Case Study 1: *R v Keegstra*

Mr Keegstra, a high school teacher, was promoting antisemitism to his students by describing Jews as "treacherous," "subversive," and "sadistic."[9] As a result, he was charged with wilfully promoting hatred against an identifiable group under section 281(2) of the Criminal Code (now Section 319(2)). While the Supreme Court found that section 319(2) infringed upon the rights guaranteed under section 2(b), the majority also found that such an infringement was justified under the *Oakes* test.

In applying the *Oakes* test, the Court first noted the significant harm caused by hate propaganda, both to members of the targeted group and to society at large. The Court accordingly had no trouble concluding that the criminalization of hate speech via section 319(2) had a pressing and substantial objective: namely, addressing the significant harm caused by hate speech.

Moving on to the three-step proportionality stage of the *Oakes* test, the Court had little trouble concluding that the criminalization of hate speech was "rationally connected" to the state's pressing and substantial objective. Even if criminalizing hate speech didn't actually suppress hate speech, the Court said, it clearly addresses the harms of hate speech in at least one important sense: by reflecting "the severe reprobation with which society holds messages of hate directed towards racial and religious groups."[10]

Next, the Court considered the question of minimal impairment — the second prong of the proportionality analysis — by noting that the scope of section 319(2) is limited in several key

ways. Firstly, it does not capture private communications, or communications that were intended to be private but inadvertently became public.[11] Secondly, it requires the promotion of hatred to be wilful, i.e. *intentional*.[12] And thirdly, it requires that an individual intended to "promote *hatred*," not merely ridicule or disparagement. In combination, these factors mean that section 319(2) only captures those few individuals who "intend or foresee as substantially certain a direct and active stimulation of hatred."[13] This, for the Court, was a sufficiently narrow sphere of application to make the provision "minimally impairing" of *Charter* rights.

Finally, in assessing the overall proportionality of the provision, the Court noted that while the nature of regulated expression is not relevant in determining whether or not it falls within the ambit of section 2(b), it does become relevant in assessing whether or not the suppression of the expression can be justified under section 1.[14] Thus, because hate speech has no connection to (and in fact undermines) the values underlying section 2(b) — e.g. the promotion of democratic values — the Court concluded that the restrictions of section 319(2) were easier to justify.[15] The Supreme Court therefore upheld section 319(2) as a justifiable limit on free expression.

Case Study 2: *R v Zundel*

Mr Zundel published a pamphlet that downplayed the Holocaust, suggesting that it was a myth promoted as part of a global Jewish conspiracy. Consequently, he was charged with spreading false news under section 181 of the Criminal Code.[16]

In response to Mr Zundel's claim that this unjustifiably infringed his expressive freedom, the Supreme Court found that the dissemination of false information was distinct from the dissemination of hate, even where it can be said that the false information might be injurious to the public wellbeing.[17] Affirming the parameters set out in *Keegstra*, the Court found that publication of false information is protected by section 2(b) of the *Charter*, regardless of how false or misleading it is.[18] Furthermore, the Court found that the consequence of section 181 was to restrict expression, and thus there was an infringement on the rights guaranteed under section 2(b).[19]

Having found a section 2(b) infringement, the Court then turned to assessing whether the infringement could be justified through the *Oakes* test. This is where we find the decisive part of the Court's analysis. To quote the Court: "in determining the objective of a legislative measure for the purposes of s[ection] 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."[20] In essence, this means that to pass the *Oakes* test, the benefit the law provides must have been the one intended by Parliament at the time of enactment. Furthermore, in searching for the objective of the impugned law, the Court will require something more specific than just a general protection from harm.[21] Given these self-imposed restrictions, the Court could not find a pressing and substantial objective behind section 181, and it was accordingly deemed unjustified and unconstitutional.[22]

Having found that section 181 lacked a pressing and substantial objective, the rest of the *Oakes* test was unnecessary to deem the law to be invalid. Nonetheless, the Court noted that even if such an objective had been found, a ban on publishing false information that is likely to cause public mischief is simply too broad to be justified under section 1.[23]

Putting it All Together: Is Criminalizing Holocaust Denial Constitutional?

When looking at the government's proposed Holocaust denial law, we must begin by acknowledging the problem of antisemitism in Canada. In 2021, Canada saw record levels of antisemitic incidents, including violence, and an overall increase of seven percent compared to the year prior.[24] The fact that the government has described the law in question as "[p]rohibiting the promotion of Antisemitism" suggests that it clearly considers Holocaust denial to be part of a larger problem of antisemitism as opposed to just being a case of revisionist history or false information untethered from hate speech. As such, there is evidently a pressing and substantial objective that the proposed law seeks to achieve: namely, suppressing antisemitism in Canada. The presence of this pressing and substantial objective — which is closely related to the objective that was identified and validated in *Keegstra* — seems to distinguish the proposed law from the provision that was invalidated in *Zundel*. In other words, the law seems to be narrower and more specific in scope than the *Zundel* law (indeed, it is even narrower than the law that was upheld in *Keegstra*).

Going on to the second part of the *Oakes* test, we see that the government was careful to tie together the promotion of antisemitism and the denial, downplaying, or condoning of the Holocaust. In this regard, the law does not simply criminalize denial, downplaying, or condoning of the Holocaust, but rather does so only when this expression is used to *wilfully* promote antisemitism. Once again, the specificity of this wording shows the government's efforts to ensure that the law is narrow enough to survive a challenge under section 2(b) of the *Charter*. Moreover, the law takes direct cues from the Supreme Court's analysis in *Keegstra* by replicating much of the wording deemed there to be indicative of minimal impairment. For example, like section 319(2) — the provision that was upheld in *Keegstra* — the proposed law won't apply to private communications, and only applies where the promotion of antisemitism is "wilful," as opposed to ignorant or inadvertent.

In sum, then, given the pressing and substantial problem of antisemitism, and the similarity in the wording of the proposed law to section 319(2), it seems likely that the new prohibition (if it passes) would survive a *Charter* challenge under section 2(b). While freedom of expression is an important *Charter* right, the Supreme Court's rulings on laws regulating hate speech make it clear that socially harmful expression is far from unassailable, and will receive less protection than expression that aligns with the deeper values of the *Charter* and the Constitution.

[1] See here: <https://budget.gc.ca/2022/report-rapport/anx3-en.html#wb-cont>.

[2] *Canadian Charter of Rights and Freedoms*, s 2, part I of the *Constitution Act, 1982* [*Charter*].

[3] *Ibid*, s 1.

[4] *R v Keegstra*, [1990] 3 SCR 697 at 729 [*Keegstra*].

[5] *Ibid* at 732.

[6] *R v Zundel*, [1992] 2 SCR 731 at 753-755 [*Zundel*].

[7] *R v Oakes*, [1986] 1 SCR 103 at para 69 [*Oakes*].

[8] *Ibid* at para 71.

[9] *Keegstra*, *supra* note 4 at 714.

[10] *Ibid* at 769.

[11] *Ibid* at 773.

[12] *Ibid* at 773.

[13] *Ibid* at 777.

[14] *Ibid* at 760.

[15] *Ibid* at 761-762, 766.

[16] *Zundel*, *supra* note 6 at 732.

[17] *Ibid* at 743.

[18] *Ibid* at 753-755.

[19] *Ibid* at 750.

[20] *Ibid* at 761.

[21] *Ibid* at 762.

[22] *Ibid* at 767.

[23] *Ibid* at 768.

[24] "Antisemitism in Canada at record levels in 2021 with surge in violence, audit finds", *CBC News* (April 25 2022), online: <https://www.cbc.ca/news/canada/canada-antisemitism-violence-report-1.6430495>.