

honest heretic
marketplace of ideas

LANDMARK HATE SPEECH CASE

2 14 years of teaching students that the Holocaust ^{er} happened and that there exists an evil Jewish conspiracy determined to control world

Keegstra - raises a dilemma for liberals who favour Freedom of expression

2 sincere but misguided teacher

2 classroom discussions of "theories" of the sort to which Keegstra subscribes must be limited

A CASE OF MISEDUCATION

2 The idea of open-minded education excludes the possibility of viewing Keegstra as an "honest heretic" championing unpopular ideas in a free market

2 possibility of critical student reflection? - open-mindedness and critical thinking

The Myth of the Sacred: The Charter, The Courts, And the Politics of the Constitution in Canada

2 challenging the "myth of the sacred" ... the popular belief held by most Canadians that the Charter is beyond politics

2 complete judicial neutrality and impartiality not unquestionably accepted b/c of such controversial decisions (Vriend) (M.v.H)

2 trend ... due to Charter and broad language ... led to judicial supremacy

2 KEEGSTRA < absolute freedom of speech
social equality & gov't regulation of hate speech

Media Awareness Network - Hate Activity and the Law [From Marches to Moderns: A Report on Organized Hate in Metro Toronto, 1997]

↳ challenge of defining "hate" - hate is an emotion rather than a concrete act

... rather the emotion of hate often results in specific acts being carried out

↳ Keegstra (1990) 3SCR 697 - leading def'n of "hate"

2 criminal sanction against the most extreme forms of hate propaganda - wilful promotion of hatred against an identifiable group

2 an emotion which can result in specific harmful or concrete acts (discrimination, violence)

2 def'n a continuum from hate propaganda discrimination physical violence genocide? ...

2 ** the law does not provide a solution to the problem of hate in our society **

** LAW A TOOL used to keep hate from moving our society away from democracy and freedom

2 and protection of minority groups

2 message of decency & tolerance

2 deterrent against hate activity

law criticised as a remedy is reactive not proactive ...

s. 319(2) - primary criminal provision to combat hate propaganda

↳ prohibits willful promotion of hatred against an identifiable group, by communicating statements other than in private conversation

↳ defences - est. the stmts were true
- made in good faith
- relevant to public interest and made for public benefit on reasonable grounds thought to be true
- stmts made to educate about racism/anti-racism

↳ Keegstra's 2(b) rights a justified violation - b/c of available defences/s2 safeguards to protect against abuse of the section (req't to obtain AG consent)

↳ Zundel - NEVER charged under 319(2) - rather 181 (false news law)

Z lack of enforcement/underused

Z Zundel (1992) 75 CCC (3rd) 449 (SCC)

Z unconstitutional b/c the limit to free speech too broad thus not justified

Australian Journal of HR - Criminalising Racial Hatred: L. McNamara

→ relationship between law, multiculturalism & achievement of social harmony

↳ balance betw protecting individual civil rights and the regulation of expressions of racial hatred

↳ Keegstra dismissed and charged under 319(2)

↳ 319(2) - weak connection to core of 2(b)

- appropriate & acceptable means for furthering the important objective of preventing

Dickson J. the dissemination of hate propaganda

- advantage of limitation outweighs any deleterious effects

- central concept of free & democratic society is dissipation of racism

↳ 319(2) - breadth, vagueness & subjectivity

McLachlin J. - the overbroad criminalization of virtually all expression which might be construed as

DISSENT promoting hatred is not proportionate and appropriate means of achieving the end

... of protecting our society against the evils of hate propaganda

- breadth of the category of speech it catches

- absolute nature of the prohibition to such speech

- draconian consequences

- other more preferable remedies

(Irwin Toy) (Keegstra) (Sharpe)

broad defn of expression

& convey meaning

limit

expand

McLachlin

* McLachlin - conception of freedom of expression as the "pivotal charter right" [along lines of American model]

Dickson - expression guarantee must be considered within the context of Charter's concern for indiv. dignity & equality

Purposive/contextual approach to Charter interp.

requires courts to consider a rich array of historical, philosophical, & comparative sources

one charter right cannot nullify another

↳ language of charter not rigid/fixed but organic

s. 1(b) expression - broad interp. - generous scope of exp.

↳ commercial advertising (Irwin Toy), hate propaganda (Keegstra) and pornography (Sharpe) are expression but subject to limitations justifiable under s. 1 ~ deliberate falsehoods (Zundel) quality as exp.

↳ only violence has been held to be excluded from the defn of expression

↳ a claimant can demonstrate that a right has been infringed either by looking at ① gov't purpose OR ② the effects of the gov't actions

↳ problems of competing rights under s. 1 - arises in context of expression

claims

principles underlying f. of ex. - pol. debate, marketplace of ideas, autonomy/self-fulfillment

- f. of exp. broad interp. to incl. competing rights → (Keegstra) s. 15 equality rights may be at stake and constitute gov't objectives imp't. enough to justify f. of e. restrictions

multiculturalism } Charter

① int'l law to assist in the interp. of rights - information taken into consideration, but not definitive/determinative

- reference to norms of int'l law ---

(Keegstra) Conv. on the Elimination of Racial Discrimination

anti-hate laws consistent w/ int'l obligations →

↳ why? Charter rights and freedoms are specific versions (emanations) of internationally recognized HR.

④ PROPORTIONALITY - on balance the effects on the right disproportionate

↳ (Keegstra) court upheld hate propaganda offence

↳ protection of vulnerable groups via gov't law - hate propaganda law designed to protect ethnic minorities

- avoid feelings of humiliation/degradation

- targeting

- designed to promote social climate of mutual respect & tolerance

→ end? pg. 137

STEP 1 This case applies to the Charter analysis because the law in issue is s. 319(2) of the Criminal Code of Canada ("hate propaganda" law).

STEP 2 WHAT - the section of the Charter that applies is s. 2(b) freedom of thought, belief, opinion and expression.
 JJW (not) - the right holder in this case is Keegstra and everyone who enjoys s. 2(b) freedoms.
 of HOW? s. 319(2) of the CCC takes away from Keegstra's 2(b) rights because Keegstra cannot express/promote his beliefs about the Holocaust to his class.
 - s. 319(2) is too broad in its application

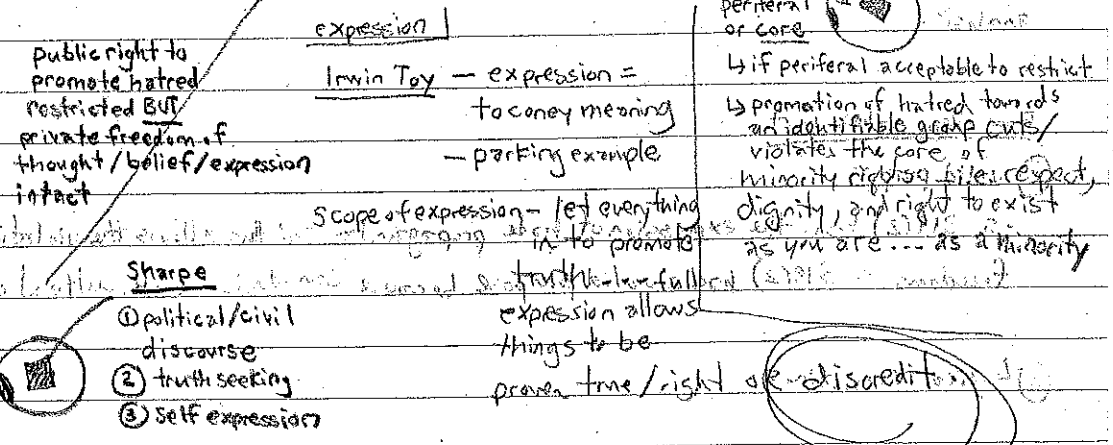
publicly promoting inciting hatred threat to a minority groups existence

Therefore, Keegstra's 2(b) rights have been violated and so we must move to a s. 1 "reasonable limits" / Oakes Test analysis to determine whether or not the violation is justified.

STEP 3
 (1) valid purpose - valid means to end - interests of public minority rights - explaining why the law is a valid way to achieve the purpose.
 (2) logical connection - connect law to purpose - limitation on expression to protect minority rights - effectiveness - any person able to use law as a tool to stop public promotion of hatred

(3) minimal impairment - reasonable b/c law does not violate CORE of expression rights
 (4) proper balance of competing rights

privacy possession private expression thought/belief



HR - respect and dignity

R. v. Zundel v. friend
 enumerated analogous equal before/under law