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Freedom of expression or the right to lie?

William Akel reports on some aspects of the freedom of speech debate

An Englishman, David Irving, has been in the news recently causing public outcry, not only in Australia and New Zealand but also throughout other parts of the world. Irving alleges certain aspects of the World War II Nazi Holocaust against the Jews are exaggerated and after 30 years of research, has found no evidence that Hitler had knowledge of the atrocities which were being committed.

A threat to civil liberties

Irving's comments have incensed many, and there would probably be very few Australians and New Zealanders who would accept what he says. He has been banned from entering Australia. However, Queensland Civil Liberties Council president Terry O'Gorman says such a ban was a threat to freedom of speech and could lead to wider censorship in Australia. "While I find Irving a pompous white supremacist who revels in the unwholesome notoriety he attracts to himself by his distorted revisionist theories of the Holocaust, it is necessary that his views be heard by allowing him a visitor's permit", he said recently.

O'Gorman's point is that it is important that even people with views that are totally repugnant still get heard. People should be able to speak out, even at the risk of offending others.

In New Zealand, the right to freedom of expression is recognised in section 14 of the New Zealand *Bill of Rights Act* 1990:

"Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form."

Did six million people really die?

The furore over David Irving's beliefs is not a new phenomenon. A very similar situation recently rocked Canada, ending up in the Supreme Court of Canada. The case was *Zundel v The Queen*. Zundel had published a 32-page booklet entitled "Did Six Million Really Die?". The bulk of the booklet critically reviewed a number of publications and suggested 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. Zundel's assertions were extremely offensive to many.

The case arrived at the Supreme Court after Zundel had already been through two trials, each resulting in his conviction under section 181 of Canada's criminal code:

"Everyone 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 issue in the Supreme Court was whether section 181 violated sections 2(b) and 7 of the Canadian Charter of Rights and Freedoms (akin to, but constitutionally wider than the provisions in New Zealand's Bill of Rights in that the rights and freedoms expressed are guaranteed).

Section 2(b), similar to New Zealand's section 14, says:

"Everyone has the following fundamental freedoms: freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication."

The Supreme Court judgments are fascinating examples of legal jurisprudence on fundamental rights in today's society. The judges were split 4-3. The judgments represent the classic arguments for and against freedom of "expression" in circumstances where the expression is the very antithesis, and strikes at the heart, of a democratic society.

The right to freedom of expression

The majority of the judges found that section 181 violated section 2(b) of the Charter. Zundel's pamphlet was protected by section 2(b) and his convictions were overturned. In a powerful decision delivered by Madame Justice McLachlin these judges stressed that the purpose of section 2(b) is to permit freedom of expression to allow promotion of truth, political or social participation, and self-fulfilment.

The court said that often minorities will have views that totally fly in the face of what the majority of society believes, but they should still have the right to put their views, "unless the physical form by which the communication is made (for example, by a violent act) excludes protection". The court said it adheres to the precept: "It is often the unpopular statement which is most in need of protection under the guarantee of free speech."

The prosecution argued that what Zundel had written were deliberate lies and because of this they had no value, and were unlawful. But this did not persuade the majority of the court. McLachlin J said: "Exaggeration – even clear falsification – may arguably serve useful social purposes linked to the values underlying freedom of

expression ... 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 Muslim societies as perpetrating deliberate lies against the prophet."

In saying this the court stressed it was not condoning Zundel's assertions. However, the court held that if his comments were outside the protection of section 2(b), so would comments like those made by Rushdie be outside section 2(b) and so would, for example a doctor's comments who exaggerates the number of geographical locations of people potentially affected with a virus, in order to persuade people to be inoculated against a burgeoning epidemic.

McLachlin J quoted from Cory J (significantly one of the minority judges) in another case:

"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 uninhabited speech permeates all truly democratic societies and institutions. The vital importance of the concept cannot be over-emphasized."

The judge continued with reference to United States jurisprudence:

"As Holmes J stated over 60 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 we hate'."

The court eloquently summed up its reasons for giving the pamphlet the protection of section 2(b) by using a quote from another leading 1990 Canadian case, *R v Keegstra:*

"... it must be emphasised 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 section 2(b) of the Charter ... [I]t is partly through clash with extreme and erroneous views that truth and democratic vision remain vigorous and alive .."

A charter for liars?

The views of the three judges in the minority were expressed in an equally powerful joint decision delivered by Cory and Iacobucci JJ. To them the fundamental importance of freedom of expression to a free and democratic society was beyond question. At issue was whether section 181 contravened that right. The minority judges characterised Zundel's activity as involving:

"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 multi-cultural democracy ...".

They added:

"The publication of such lies makes the concept of multi-culturalism in a true democracy impossible to attain. These materials do not merely operate to ferment discord and hatred, but they do so in an extraordinarily duplicitous manner."

The judges in the minority analysed the Canadian Charter of Rights and Freedoms as a fundamental document setting out essential features of Canada's vision of democracy. The Charter provided indications of which values go to the very core of the Canadian political structure:

"A democratic society capable of giving effect to the Charter's guarantees is one which strives towards creating a community committed to quality, liberty and human dignity. The public interest is, therefore, in preserving and promoting these goals."

The minority looked at other provisions of the Charter and in particular section 15 which provides that every individual is equal before and under the law and should be free of discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability (similar to section 19 of New Zealand's *Bill of Rights Act*).

Cory and Iacobucci JJ noted:

"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."

The minority judges said that the focus of section 181 of the Criminal Code was on manipulative and injurious false statements of fact disguised as authentic research. They concluded:

"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 characterised 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. Those offences include, inter alia, the provisions dealing with fraud, forgery, false prospectuses, perjury and defamatory libel."

Abrogation of free speech

In justifying its abrogation of freedom of expression the minority expressed its concerns that:

"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 fermented 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."

Significantly, the majority judgment specifically said it did not assert that Parliament cannot criminalise the dissemination of racial slurs and hate propaganda. Instead, the issue was whether section 181 could be used in the way the prosecution contended. The majority's concern was that any such provision must be drafted with sufficient particularity to offer assurances that it could not be abused so as to stifle a broad range of legitimate and valuable speech. The importance of freedom of expression was beyond question.

William Akel is a partner in the Auckland office of the New Zealand national law firm Simpson Grierson Butler White.