

Landmark Case

FREEDOM OF EXPRESSION, WILFUL PROMOTION OF HATRED AND THE *CHARTER OF RIGHTS AND FREEDOMS*: *R. v. KEEGSTRA*

Prepared for the Ontario Justice Education Network by a Law Clerk of the Court of Appeal of Ontario

R. v. Keegstra (1990)

Facts

Mr. Keegstra started teaching high school in the early 1970s in the small town of Eckville, Alberta. He had been a teacher in the town for about 10 years when his teachings came under scrutiny. After reading her son's notes from Mr. Keegstra's social studies class, a parent complained to the local school board. Mr. Keegstra had been teaching his students racially prejudiced material targeting Jewish people. He taught his students that Jewish people seek to destroy Christianity and are responsible for depressions, anarchy, chaos, wars and revolution. He also told his students that Jewish people "created the Holocaust to gain sympathy". Mr. Keegstra expected his students to include these teachings in class and on exams. If they did, they received good marks. If they did not, their marks suffered. A few months after the complaint, Mr. Keegstra was dismissed.

Wilful Promotion of Hatred

In 1984, Mr. Keegstra was charged under section 319(2) of the *Criminal Code* with wilfully promoting hatred against an identifiable group by communicating **anti-semitic** statements to his students.

Criminal Code of Canada

319. (2) Every one who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of

- (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or
- (b) an offence punishable on summary conviction.

319. (3) No person shall be convicted of an offence under subsection (2)

- (a) if he establishes that the statements communicated were true;
- (b) if, in good faith, the person expressed or attempted to establish by an argument an opinion on a religious subject or an opinion based on a belief in a religious text;
- (c) if the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true; or
- (d) if, in good faith, he intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred toward an identifiable group in Canada.

Sections 319(7) and 318(4) provide definitions of some of the terms used in the above quoted sections:

- Communicating is defined as communicating by telephone, broadcasting or other audible or visible means.
- Identifiable group is any section of the public distinguished by colour, race, religion, ethnic origin, or sexual orientation.
- Public place is any place to which the public have access as of right or by invitation, express or implied.
- Statements include words spoken or written or recorded electronically or electro-magnetically or otherwise, and gestures, signs or other visible representations.

Freedom of Expression

The *Canadian Charter of Rights and Freedoms, 1982* is part of the Constitution of Canada and protects everyone's rights and freedoms against actions of the government. One of the **fundamental freedoms** protected by s. 2(b) of the *Charter* is the "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication." Even prior to the enactment of the *Charter*, Canadian courts recognized that freedom of expression was of crucial importance in a free and democratic society.

The scope of freedom of expression is very wide. Canadian courts have stated that expression will be protected if it is focused on:

- (i) seeking and attaining truth;
- (ii) encouraging participation in social and political decision-making; and
- (iii) cultivating diversity in forms of individual self-fulfillment and human flourishing.

Courts have developed a two-step analysis to determine whether section 2(b) has been infringed. In the first step, the court considers whether the activity falls within the protection of section 2(b). Generally, if the expression conveys a meaning through a non-violent form, it will fall within the scope of section 2(b). The content of the expression conveyed is irrelevant as section 2(b) protects all content of expression. In the second step, the court will determine whether the purpose of the challenged government action is to restrict freedom of expression. If the government's purpose is to restrict expression, s. 2(b) will automatically be infringed. If the government has another purpose but the effect of the action restricts expression, section 2(b) will not necessarily be infringed. The Court would then consider if the expression is related to the principles upon which freedom of expression is based.

Section 1 of the *Charter* provides that rights are not absolute and can be constrained by reasonable limits. In *R. v. Oakes*, the Supreme Court formulated a test to determine whether an **infringement** is justified under s.1 of the *Charter*. After finding that a government action has infringed a *Charter* right, the court will do a s. 1 analysis.

The Trial Decision

At Mr. Keegstra's trial, his lawyer argued that s. 319(2) of the Criminal Code violated Mr. Keegstra's right to freedom of expression. The trial judge disagreed, noting that the *Charter* provides

individuals with equal protection and benefit of the law without discrimination on the basis of colour, race, religion, or ethnic origin. The **wilful promotion of hatred** against an identifiable group would violate that person's equality rights (s. 15 of the *Charter*). On this basis, the trial judge held that s. 319(2) did not infringe s. 2(b) of the *Charter* and the jury convicted Mr. Keegstra of wilful promotion of hatred.

Appeal to the Alberta Court of Appeal

Mr. Keegstra appealed his conviction. The Court of Appeal agreed with Mr. Keegstra. It found that statements which the speaker knows to be false are not protected by the *Charter*, however section 2(b) does protect "innocent and imprudent speech". Therefore, because section 319 could apply to false statements that the person might not know are false, the Court found that it violated the right to freedom of expression.

The Court went on to determine that the violation of s. 2(b) was not justified under s. 1 of the *Charter*.

Appeal to the Supreme Court of Canada

The Crown **appealed** the Court of Appeal's decision to the Supreme Court of Canada.

The Majority Opinion of the Supreme Court of Canada

Four out of the seven judges disagreed with the decision of the Alberta Court of Appeal. Chief Justice Dickson wrote the majority decision.

Is Freedom of Expression Infringed?

To determine whether Mr. Keegstra's freedom of expression was infringed, the majority applied the two-step analysis for s. 2(b) cases. On the first step, the majority found that the expression conveyed meaning and was therefore protected by s. 2(b). The fact that the statements were offensive was irrelevant. On the second step, the majority determined that the very purpose of s. 319 of the *Criminal Code* was to restrict certain kinds of expression. Therefore, the majority found that s. 319(2) of the *Criminal Code* infringed section 2(b) of the *Charter*.

In coming to this conclusion, the majority rejected the argument that the wilful promotion of hatred is like a violent activity, and therefore should not be treated as an expression issue. Mr. Keegstra's expression consisted of words, while violence is expression communicated directly through physical harm. For this reason, even hate propaganda is expression within the meaning of s. 2(b).

The majority also rejected the argument that hate propaganda does not fall within the protection of s. 2(b) because it amounts to threats of violence. Threats of violence are expression and their suppression must be justified under s. 1 of the *Charter*.

Is the Violation of Freedom of Expression Justified under Section 1 of the *Charter*?

The majority applied the Oakes Test to determine if the violation of Mr. Keegstra's freedom of expression was justified under s. 1 of the *Charter*. It concluded that Parliament's objective in

preventing harm caused by **hate propaganda** was a pressing concern given the extent of the harm and given the importance of reducing racial, ethnic and religious tensions in Canada.

The majority then considered whether s. 319(2) of the *Criminal Code* was a **proportional response** to this objective. As part of that analysis, it first concluded that there was a **rational connection** between s. 319(2) and of protecting target group members and fostering harmonious social relations.

Next, the majority considered whether s. 319(2) **impairs** freedom of expression as little as possible. It concluded that s. 319(2) does not overly restrict freedom of expression. The provision is written to ensure that only expression which is openly hostile to target groups is affected.

Finally, the majority considered whether there was proportionality between the effects of s. 319(2) on freedom of expression and the objective. It found that hate propaganda contributes little to the aspirations of Canadians in the quest for truth, the promotion of individual self-development, or the protection and fostering of a vibrant democracy where the participation of all individuals is accepted and encouraged.

As a result, the majority concluded that the infringement of s. 2(b) of the *Charter* by s. 319(2) of the *Criminal Code* was justified under s. 1 of the *Charter*.

The Dissenting Opinion of the Supreme Court of Canada

Three judges of the Supreme Court of Canada disagreed with the majority's decision. Justice McLachlin (now Chief Justice McLachlin) wrote the **dissent**. Justice La Forest, in a short one-paragraph dissent, agreed with Justice McLachlin.

Is Freedom of Expression Infringed?

Justice McLachlin agreed with the majority decision that s. 319(2) of the *Criminal Code* violated the right to freedom of expression enshrined in the *Charter*.

Is the Violation of Freedom of Expression Justified under Section 1 of the *Charter*?

The dissenting judges disagreed that the infringement of freedom of expression was justifiable under s. 1 of the *Charter*.

The dissent agreed with the majority on the first step of the Oakes Test finding that s. 319 related to a pressing concern in a free and democratic society.

The minority then considered whether s. 319(2) of the *Criminal Code* was an acceptably proportional response to this objective. As part of that analysis it considered whether there was a rational connection between s. 319(2) and the objective. The minority recognized there was some evidence linking s. 319(2) to its objectives. However, it also noted that s. 319(2) could have a **chilling effect** on defensible expression. A chilling effect might occur if law-abiding citizens self-censor and avoid what may actually be lawful behaviour because the law does not clearly specify what is legal and what is not. Furthermore, s. 319(2) may actually promote the cause of hate-mongers, as prosecutions for racist expression generally attract extensive media coverage. The

minority therefore concluded that there was only a weak connection between the criminalization of hate propaganda and its actual prevention.

Next, the minority considered whether s. 319(2) impairs freedom of expression as little as possible. Despite the limitations found in s. 319(2), it is **overbroad** because the definition of offending speech may catch expression that should be protected by s. 2(b). For example, the term “hatred” in s. 319(2) is capable of denoting a wide range of diverse emotions and is highly subjective.

Finally, the dissenting judges considered whether there was proportionality between the effects of s. 319(2) on freedom of expression and the objective. They concluded that there was not. Any possible benefits of s. 319(2) were outweighed by the significant infringement on the guarantee to freedom of expression. Section 319(2) is capable of catching not only statements like those made by Mr. Keegstra, but also works of art and statements made in the heat of social controversy, which would not foster the goals of social harmony and individual dignity.

The Result

Section 319(2) of the *Criminal Code* was held to be constitutional and Mr. Keegstra’s conviction was restored.



Classroom Discussion Questions

1. Where did the trial begin? To which courts was it appealed?
2. What section of the *Criminal Code* was challenged in this case? What offence is that section related to?
3. What section of the *Charter* was used to challenge the section of the *Criminal Code* involved in this case? What right does that section protect?
4. What do you think about the three principles for supporting freedom of expression? Can you think of others that should be included?
5. The majority and the dissenting opinions in this case both refer to definitional and other limits in s. 319 of the *Criminal Code*. Take a look at this section. Can you give examples of the limits that are being referred to?
6. What do you think of the fact that a law that violates an individual's *Charter* right can be justified under section 1?
7. In your own words, can you explain why Chief Justice Dickson decided that hate propaganda was not the same as violence? Do you agree?
8. What is the chilling effect? Do you agree with the opinion of the dissent that s. 319(2) could have a chilling effect on free speech?
9. Between the majority and the dissenting opinion in this case, which did you find most convincing? Why?
10. Do you think that criminalizing hate speech suppresses (prevents) it?



R. v. Keegstra: Worksheet 1

Using your textbook, a dictionary, the *Criminal Code* or any other resources available, define the following terms.

Anti-semitic

**Fundamental
Freedoms**

Infringement

**Wilful Promotion
Of Hatred**

Appeal

**Hate
Propaganda**

**Proportional
Response**

Impair

Dissent

Oakes Test

**Chilling
Effect**

Overbroad



R. v. Keegstra: Worksheet 2

The courts undertake a two-step analysis to determine if a government action infringes the section 2(b) guarantee to freedom of expression.

In the first step, the court considers whether the activity falls within the protection of section 2(b). Expression that conveys a meaning through a non-violent form generally will fall within the scope of section 2(b) regardless of the content of the expression.

In the second step, the court will determine whether the purpose of the challenged government action is to restrict freedom of expression. If the government's purpose is to restrict expression, s. 2(b) will automatically be infringed. If the government has another purpose but the effect of the action restricts expression, section 2(b) will not necessarily be infringed. The Court would then consider if the expression is related to the principles upon which freedom of expression is based.

Activity

Research a real Supreme Court of Canada case dealing with freedom of expression and apply the same structures of reasoning to the real case.

Be sure to include the following:

1. A case description
2. A description and analysis of the legal issues (i.e. *Charter* sections, laws in question)
3. The two-step analysis of freedom of expression
4. If you determine that s. 2(b) has been infringed, consider if the laws would be justified under s. 1 of the *Charter*

Recommended Websites:

Supreme Court of Canada – This site provides information on the Supreme Court of Canada, the judges, court cases and judgements.

<http://scc.lexum.umontreal.ca/en/index.html>

Canadian Legal Information Institute (CanLII) – This site has links to courts, to journals, cases and legislation.

<http://www.canlii.org/>



R. v. Keegstra: Worksheet 3

Using the Court's two-part test to determine if a government action infringes the section 2(b) guarantee to freedom of expression, explain what you think the outcome would be for the following scenarios:

1. The provincial government has passed a law called, *The Clean Streets Act*, prohibiting anyone from distributing pamphlets in public without a pre-approved licence. This new law aims at preventing garbage or litter, in any form, from being thrown on the streets. In order to be able to distribute pamphlets in public, a person has to go to his or her local City Hall and apply for a licence. In addition to paying a clean-up fee to the city, an application form has to be completed. On the application form, the questions asked include, "explain why you want to distribute pamphlets" and "where will you be distributing pamphlets?" If a licence is not properly obtained, a person could face a fine of up to \$5,500.

Based on the above information about *The Clean Streets Act*, consider each of the following. Discuss your reasoning and whether or not you think a court would uphold this law.

Purpose of the law:	
Effect of the law:	
Does the law affect the ability to seek and attain truth? Explain:	
Does the law effect the encouragement of participation in social and political decision-making? Explain:	
Does the law effect the cultivation of diversity in forms of individual self-fulfillment and human flourishing? Explain:	
Do you think <i>The Clean Streets Act</i> will be upheld? Why or why not?	

2. The success of recent laws that limit tobacco companies from advertising their products to Canadians has encouraged the federal government to consider passing a similar law that would limit auto companies from advertising their cars to potential buyers. Though tobacco advertising was aimed at promoting a healthier lifestyle and reducing healthcare expenses from tobacco-related illnesses, this new law would be aimed at protecting the environment from harmful pollutants emitted by automobiles. The government thinks the this law would encourage Canadians to consider alternative means of transportation, such as biking, walking, or public transit. Critics of this proposed law think it unfairly prevents consumers from making educated decisions about what car, if any, they should buy. Automobile companies are also angry and add that the law unfairly targets their industry and infringes their freedom of expression. Before the government tries to formally pass this law, it has decided to test the law's constitutional validity. The Government has brought the law before the Supreme Court of Canada as a reference question. You are one of the Supreme Court judges. You have been asked to make a decision about whether this proposed law infringes automobile companies' s. 2 (b) *Charter* rights, and if so, whether the government can justify this infringement.

Based on the above information, consider each of the following. Discuss your reasoning and whether or not you think a court would uphold this law.

Purpose of the law:	
Effect of the law:	
Does the law affect the ability to seek and attain truth? Explain:	
Does the law effect the encouragement of participation in social and political decision-making? Explain:	
Does the law effect the cultivation of diversity in forms of individual self-fulfillment and human flourishing? Explain:	
Do you think this proposed law that limits automobile advertising will be upheld? Why or why not?	



R. v. Keegstra: Worksheet 3 Answer Key

Students will generate a range of responses, many of which will be correct and creative. *The goal is to generate discussion and issue-spotting. These are some possible answers to guide discussion:*

Scenario 1 - The Clean Streets Act Scenario:

Purpose of the law:	The purpose of this law is to prohibit garbage or litter created by the distribution of pamphlets in public places. The distribution of pamphlets is authorized only by licence.
Effect of the law:	The effect of this law is to limit freedom of expression because government has now made it more difficult for anyone to express his or her views, unless the criteria to obtain a licence are met.
Seeking and attaining truth:	To prohibit pamphlet distribution may affect a person's ability to express his or her views to members of the public. As a result, not only is the pamphleteer affected, but also members of the public will not be exposed to ideas or events that may allow them to seek or attain truth. Unless the pamphleteer has the ability to go to City Hall to obtain a licence, can afford the clean-up fee and is approved, he or she cannot distribute pamphlets. Note that the person applying for the licence has to answer why he or she wants to distribute pamphlets. Is this to ensure that hate speech or forms of inciting violence are not present? Or, is this a form of censorship?
Encouraging participation in social and political decision-making:	Not only is the pamphleteer prohibited from encouraging participation in social and political decision-making, potential recipients of the pamphlet are also prevented from having the opportunity to participate in social or political decision-making, regardless of whether they agree with the pamphleteer's views or not.
Cultivating diversity in forms of individual self-fulfillment and human flourishing:	The requirement that the potential pamphleteer completes an application form that asks the question, "why you want to distribute pamphlets" could be interpreted as a form of censorship.
Do you think <i>The Clean Streets Act</i> will be upheld? Why or why not?	It is likely that a court would hold that the Act infringes s.2 (b). A court would likely decide that the requirements of the Act, without further clarification, or a more focused application, affects the core values of expression (attainment of truth, etc.) The debate would then proceed to a s.1 <i>Charter</i> analysis and whether the infringement of government was justified.

Scenario 2 - The Proposed Law to limit advertising abilities by automobile companies:

Purpose of the law:	The purpose of the law is to protect the environment by limiting the amount of cars on the road. The less cars, the less pollutants.
Effect of the law:	The effect of the law limits the ability of consumers to access information and directly affects automobile companies from being able to advertise. Freedom of expression is directly impacted. *Note, the Supreme Court of Canada has said that freedom of expression includes commercial expression, wherein both advertisers and consumers have an interest in the product. Discussion might focus on whether students think some forms of expression are more important than others – e.g. political versus commercial.
Does the law affect the ability to seek and attain truth? Explain:	It is arguable that the law affects the ability to seek truth (consumers cannot access information about cars as easily because they are not allowed to be exposed to it) and the ability to attain truth is affected in a similar fashion (the ability to make educated choices about potential purchases is affected). However, discussion could also include other ways people could access information about cars – would it make a difference if the law only prohibited billboard advertising instead of television or radio advertising? What about the internet? Discussions about ways to access information and whether government could or should control any one of those forums may arise.
Does the law effect the encouragement of participation in social and political decision-making? Explain:	A prohibition on advertising about an important consumer item would affect people's ability to participate in social decision-making: do they want to make such a significant purchase? How will a car affect their budget? Etc. If consumers have choice and knowledge of choice, consumers can influence what types of cars are manufactured: e.g. hybrid cars versus diesel cars.
Does the law effect the cultivation of diversity in forms of individual self-fulfillment and human flourishing? Explain:	It is possible to argue that the ability to exercise options about owning (or not owning) a car, specifically, a car of one's choosing, relates to self-fulfillment. Economic decisions relate to issues of self-fulfillment and autonomy. Discussion can include the difference between making decisions and having decisions made for you – with or without your input.
Do you think this proposed law that limits automobile advertising will be upheld? Why or why not?	It is likely that this proposed law would be declared unconstitutional. Though the protection of the environment is an important goal, government would likely have a difficult time justifying its infringement of auto companies' s. 2(b) rights. The freedom to advertise, even though commercial in nature, affects the core values of freedom of expression.



R. v. Keegstra: Worksheet 4

A Closer Look at the Law

Most people agree that free speech is essential to a thriving democracy. However, freedom of expression becomes a topic of debate in reference to particular types of speech, such as speech that promotes hatred or violence towards others. Some people believe that laws prohibiting hate propaganda enhance equality in society and uphold the democratic values of respect and tolerance for others. Other people believe that criminalizing hate speech causes censorship without reducing hate speech.

This case involved legislation from two different branches of the law.

- **Criminal** - The *Criminal Code* of Canada;
- **Constitutional** – The *Canadian Charter of Rights and Freedoms*

The Criminal Code of Canada:

Wilful Promotion of Hatred

319. (2) Every one who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of

- (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or
- (b) an offence punishable on summary conviction.

Defences

319. (3) No person shall be convicted of an offence under subsection (2)

- (a) if he establishes that the statements communicated were true;
- (b) if, in good faith, the person expressed or attempted to establish by an argument an opinion on a religious subject or an opinion based on a belief in a religious text;
- (c) if the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true; or
- (d) if, in good faith, he intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred toward an identifiable group in Canada.

The Canadian Charter of Rights and Freedoms:

2. Everyone has the following fundamental freedoms:

- a) freedom of conscience and religion;
- b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
- c) freedom of peaceful assembly; and
- d) freedom of association.

Questions:

1. Do you think that hate propaganda should be protected by the *Charter*?
2. Do you think that the courts should regulate speech at all? If so, what kinds of speech?
3. What are some reasons for prohibiting hateful speech? What are some reasons for allowing it?
4. Do you think a two-year sentence is appropriate for Wilful Promotion of Hatred? If not, what do you think is a fitting sentence?
5. If you were a judge, what decision would you make in the Keegstra case? What sentence, if any, do you think he should get?
6. Does it make a difference if Mr. Keegstra believed what he said was true?
7. Does it make a difference that Mr. Keegstra was teaching his views to students?
8. What is the impact of violating a person's freedom of speech?
9. Do you think that people should always abide by the written law, or should there be room for extenuating circumstances?
10. Do you think that publicizing cases like Keegstra's incites more hate speech or gives more attention to organizations promoting hate? Why or why not?
11. Do you think that laws like s. 319(2) cause societies to be more tolerant with greater social harmony?



R. v. Keegstra: Worksheet 5

The Supreme Court of Canada is the highest court of appeal in the country. It only hears cases that are of national significance, often relating to constitutional issues. The judges do not always vote the same way and in the case of Keegstra, three of the seven judges decided against the majority decision. Even though the decision of the majority is what becomes law, the dissenting (or minority) opinion can be very important in analyzing the rationale for applying legal principles in a particular case. When preparing for cases, lawyers often read the dissenting opinions of related cases to help them formulate arguments.

Activities

A) Write a one-page **dissent** that disagrees with the following statements.

1. Laws that prohibit hate speech have a chilling effect on free speech. They cause people to self-censor and not say what they really think.
2. Prohibiting hate speech promotes tolerance, prevents unequal power relations, and protects the equality of all citizens in a democratic society.

B) Choose one of the above statements and to be the focus of a classroom debate. Have students prepare arguments for and against prior to the debate.