R v. Ahenakew: Promotion of Hatred or Revolting Comment?

In 2002, David Ahenakew, a former Chief of the Assembly of First Nations, gave a speech and subsequent interview in which he made comments on various ethnic groups. These comments included blaming Jewish people for causing the Second World War, and indicating support for Hitler's actions in executing six million Jews, as they were a "disease."[1] Mr. Ahenakew had already been convicted of hate crimes in 2005, but successfully appealed that conviction a year later.[2] The speech in question was delivered at a conference by the First Nations of Saskatchewan, who at the time were very concerned about a parliamentary policy potentially requiring an Aboriginal person to sign a consent form when seeking medical care, which would be a violation of privacy and a barrier to medical care guaranteed in relevant First Nations' treaties.[3] After his speech, Ahenakew was met outside by Mr. Parker, a reporter from the Saskatoon Star Phoenix, who had some specific questions regarding disparaging comments made by the accused during the speech.

In *R v. Ahenakew*,[4] Mr. Ahenakew defended himself against the charge that he committed an offence contrary to section 319(2) of the *Criminal Code*.[5]This section reads:

> *Everyone who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of an indictable offence punishable on summary conviction.*

The seminal case of *R v. Keegstra*[6] is the most important case to deal with section 319(2) of the *Criminal Code*. This case dealt with the balancing of the "right of society to protect its citizens against destructive and humiliating public communications," against "the democratic right of freedom of expression."[7] In *Keegstra*, the Supreme Court of Canada had "emphasized that the offence is one of wilful promotion of hatred, not holding or expressing outrageous, offensive or unpopular opinions."[8] The majority of the Court found that section 319(2) did violate section 2(b) of the *Charter of Rights and Freedoms*,[9] but that this was a reasonable limit prescribed by law, "only if the section was strictly limited by a very narrow definition of intent."[10]

As with all other criminal cases, in *Ahenakew* the Crown has the onus to prove each element beyond a reasonable doubt. In this case, the Crown's duty was to establish that:

a. The accused communicated statements;[11]
b. The statements were not made in private conversation;[12]

c. The accused intended, in making those statements, to promote hatred, or
d. The accused had knowledge that making the statements created a substantial certainty that hatred would be promoted;
e. The hatred promoted was of the most severe and deeply-felt form of opprobrium;[13]
f. The hatred promoted was against an identifiable group, in this case, people of the Jewish faith.[14]

Justice Tucker did not believe Ahenakew intended to "promote hatred of Jewish people," so he did not meet the threshold for conviction.[15] Seven questions into the interview with Parker, Ahenakew made the following statement: "well, I'm not going to argue with you about the Jews," which strongly suggested Ahenakew had no intent to publicize his views against Jewish people and promote hatred.[16] Judge Tucker came to a similar conclusion when looking at the words uttered in the speech itself, finding that "the purpose of the accused was to influence the audience and First Nations leadership regarding the proper course of action to take on the consent form issue, and not to promote hatred against the Jewish people."[17] Nevertheless, Tucker had absolutely no sympathy for Akenakew, and went so far as to declare that the statements "he made about Jewish people were revolting, disgusting and untrue."[18]

The *Criminal Code* is not the only arbiter of legal speech in Canada: human rights commissions also deal with cases of this nature. Some will find comfort in knowing that not all opinions and comments can potentially result in a criminal charge, although if Ahenakew had published his views of Jewish people, rather than express them verbally, the Saskatchewan Human Rights Commission would have convicted him quickly.[19] Whether or not the public agrees with Justice Tucker's decision, Ahenakew's comments have already come at a personal cost to him: Ahenakew's award of the Order of Canada, the country's highest civilian honour, was revoked because of his comments.[20]

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[1] Revolting, but no Crime, *The Toronto Star* (25 February 2009).
[2] Reuters Canada, "Canada Native Leader Cleared in Second Hate Trial" (23 February 2009).
[3] *R. v. Ahenakew*, 2009 SKPC 10 at para. 7.
[4] *Ibid*.
[5] R.S.C. 1985, c. C-46.
[6] [1990] 3 S.C.R. 697.
[7] *Supra* note 3 at para. 6.

[8] *Ibid*.
[9] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the*Canada Act 1982* (U.K.), 1982, c. 11 .
[10] *Supra* note 3 at para. 17.
[11] It is obvious in this case that the accused was communicating statements (*Ibid*. at para. 21).
[12] The analysis here was divided into two parts: both the speech and the interview were found to be public conversations. There was a great deal of evidence in regards to whether the reporter Parker openly displayed his tape recorder, and the court found that he did (*Ibid*. at para. 22).
[13] The comments were quite emotional, and would result in a "feeling of antipathy amounting to hatred in at least some of the recipients" (*Ibid*. at para. 23).
[14] The court found that Jewish people are an identifiable group, that the Jewish faith is quite different from the Christian faith (*Ibid*. at paras. 24 and 19).
[15] *Supra* note 1.
[16] *Supra* note 3 at para. 28.
[17] *Ibid*. at para. 37.
[18] *Ibid*. at para. 43.
[19] Nigel Hannaford, Ahenakew Outrageous, Disgraceful, but not Illegal *The Calgary Herald* (24 February 2009).
[20] *Supra* note 1.