

In *R. v. Keegstra*,⁴⁹ a majority of the Supreme Court of Canada answered yes. All members of the Court agreed that, despite its message, hate speech does convey a meaning and therefore constitutes expression within the ambit of the *Charter*. Following the course it had laid out in *Irwin Toy*, the Court refused to exclude hate speech from the protection of the *Charter* on definitional grounds. It held that, if this form of expression was to be limited, the law had to satisfy the reasonable-limits test of section 1. All members of the Court also accepted the argument that the objective of the anti-hate speech law was sufficiently compelling to justify limiting a *Charter* right. Such a law is intended to avoid tangible harm in the form of feelings of humiliation and degradation felt by those targeted. Furthermore, it is designed to enhance a social climate of mutual respect and tolerance. Anti-hate laws, said the Court, were not only consistent with certain international obligations assumed by Canada but also enhanced other important and competing *Charter* values of equality and multiculturalism.

The judges of the Supreme Court divided, however, on the question of minimal impairment. A purposive analysis led the majority to conclude that the minimal impairment test was to be applied less rigorously than in other contexts. While hate speech qualified as expression, in the majority's view, it had to be recognized that hate speech was inimical to the values underlying freedom of expression. It was clearly false, thereby not attracting support from the rationale of the marketplace of ideas. And, while democracy depends upon free and open debate, hate speech denies equal dignity and respect, a precondition for genuine debate. Hate speech also attacks the autonomy rights of those who are its targets. From this perspective, the majority concluded that the anti-hate law could be justified as a minimal impairment of freedom of expression. The law was, in the Court's view, drawn with sufficient precision to avoid posing a threat to honest or worthy expression. It does not prohibit private communications, and the prosecution has to prove as an essential ingredient of the offence that the speech represents the wilful promotion of hatred. The accused is afforded a number of defences, including truth; the good-faith expression of opinion on a religious subject; the reasonable belief in the truth of statements relevant to the public interest, the discussion of which is for the public benefit; and the conviction that the statement was intended in good faith to remove feelings of hatred. The majority found that the Parliament had carefully tailored the law to its

⁴⁹ *Keegstra*, above note 15.

legitimate objective and that it should be upheld on the ground that it minimally impaired freedom of expression.

The dissenting judges saw the effect of the anti-hate law quite differently. While not disputing Parliament's laudable goals, the minority did not agree that the law had a rational connection to those goals. The effect of an anti-hate-law prosecution is to afford the hatermonger an otherwise unattainable platform and level of publicity. Attempts at suppression might only serve to create martyrs. Historical evidence of vigorous anti-hate-law prosecution in pre-Nazi Germany was offered to suggest that such laws were at best ineffective and at worst counter-productive. The dissenting judges also disagreed that the law was sufficiently precise, pointing to instances where prosecutions had been brought or threatened against forms of expression plainly tolerable in a free society. Though such prosecutions might not succeed, the very threat of prosecution could well stifle expression on controversial matters.⁵⁰

In subsequent cases, the Supreme Court upheld the *Canadian Human Rights Act* provisions curtailing hate speech⁵¹ and a decision of a provincial human rights tribunal ordering a school board to remove from the classroom a teacher who had expressed racist views.⁵² However, in another case⁵³ the Supreme Court struck down the "false news" provision of the *Criminal Code*, which had been used in an attempt to silence a well-known purveyor of anti-Semitic and Holocaust-denial literature. The law in question prohibited the publication of statements, known by the speaker to be false, that causes or is likely to cause injury or mischief to a public interest. All members of the Court agreed that, although the law was aimed at deliberate lies, freedom of expression was involved. Even lies convey a meaning, and if that meaning was to be suppressed, the Court held that the law had to satisfy the section 1 reasonable-limits test. However, as in the hate-speech case, the Court was sharply divided on the application of the minimal-impairment test. This time the majority ruled that the law could not be justified. While the "false news" law was being used to combat a modern problem, its objective was shrouded in the mists of time.

50 The American courts have tended to strike down restrictions on racist speech: see *Collin v. Smith*, 578 F.2d 1197 (1978); *R.A.V. v. City of St. Paul*, 112 S.Ct. 2538 (1992).

51 *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892, 75 D.L.R. (4th) 577.

52 *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825, 133 D.L.R. (4th) 1.

53 *Zundel*, above note 16.