CITATION: R. v. Whatcott, 2020 ONSC 5541
COURT FILE NO.: CR-19-70000064-0000
DATE: 20210816

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
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	)	
HER MAJESTY THE QUEEN	)	*Rebecca De Filippis and Scott Patterson,* for the Crown
	)	
	)	
– and –	)	
	)	
	)	
WILLIAM WHATCOTT	)	*Lindsay Daviau and John Rosen*, for Mr. Whatcott
	)	
	)	
	)	
	)	**HEARD:** June 9, 10, and July 14, 2021

R.F. GOLDSTEIN J.

REASONS FOR JUDGMENT ON EXPERT EVIDENCE APPLICATION

[1] On July 3, 2016 Mr. Whatcott attended the Toronto Pride Parade dressed as a "Gay Zombie". He and his friends distributed a flyer. The flyer warned of the dangers of "the homosexual lifestyle". The flyers condemned homosexual sex. The Crown alleges that the flyers constitute hate speech. Mr. Whatcott now faces a single charge of willful promotion of hatred contrary to s. 319(2) of the Criminal Code.

[2] The Crown applies to qualify Professor Nick Mulé as an expert witness. The Crown proposes that Professor Mulé give expert evidence in the area of anti-gay discrimination.

[3] In my view, the proposed expert evidence does not meet the test of necessity; further, it fails on a cost-benefit analysis. For the reasons that follow, the Crown's application is dismissed.

BACKGROUND:

[4] Mr. Whatcott is a Christian activist who strongly believes in spreading the Gospel of Jesus Christ. He is a public health nurse by profession. For many years he has waged a campaign against what he sees as the spiritual and physical dangers of the "homosexual lifestyle" and homosexual

sex. This campaign has occasionally landed him in legal hot water. See, for example, *Saskatchewan Human Rights Commission v. Whatcott*, 2013 SCC 11.

[5] In 2016 Mr. Whatcott and some of his supporters applied to march in the 2016 Toronto Pride Parade as the "Gay Zombies Cannabis Consumers Association". They wore green skin-tight "zombie" outfits and displayed Pride paraphernalia – in Mr. Whatcott's case, a rainbow-coloured ballet tutu. As Mr. Whatcott described a photograph of himself and his supporters on the way to the parade in a subsequent blog entry,

> Here is my Elite Top Secret Special Forces Crack Christian Commando Anti-Sodomite Counter Intelligence Unit leaving the Sherbourne Subway Station disguised as the 'Gay Zombies Cannabis Consumers Association' to infiltrate and strike the dark forces of the Toronto Homosexual Shame parade and bring about a glorious victory for the Gospel of Jesus Christ by delivering 3000 'Zombie Safe Sex' packages to the parade goers.

[6] Mr. Whatcott and his Christian Commandos marched in the Parade and handed out flyers indicating that "Gay Zombies Want You To Practice Safe Sex". The implication of the flyers is that that only heterosexual sex is safe. Factually, there is no doubt about what Mr. Whatcott did: he disseminated the flyer. The real issues in the trial will be whether the content of the flyers constitutes hate speech; and, if so, whether Mr. Whatcott intended to promote hatred.

[7] A more extensive description of Mr. Whatcott's activities and blog entries can be found in my decision on the Crown's discreditable conduct application: *R. v. Whatcott*, 2019 ONSC 1599.

THE PROPOSED EXPERT EVIDENCE:

[8] The Crown proposes to call Professor Nick Mulé. Professor Mulé is a fully tenured associate professor in the School of Social Work of the Faculty of Liberal Arts and Professional Studies at York University. He is cross appointed to the School of Gender, Sexuality, and Women's Studies, where he is coordinator of the sexual studies program.

[9] The purpose of the evidence is summarized in the Crown's written submissions:

> … If Dr. Mulé is qualified as an expert, the Crown proposes to elicit evidence about the history of anti-gay discrimination, including the forms if discrimination faced by gay individuals, the common stereotypes employed to perpetuate anti-gay discrimination, and the themes of anti-gay discrimination. The Crown seeks to have Dr. Mulé provide an opinion about whether the accused's flyer references themes of anti-gay discrimination or contains stereotypes historically used to discriminate against and denigrate the gay community, with a focus on the theme of health.

[10] The Crown proposes three questions to be put to Professor Mulé:

- First, what beliefs and stereotypes have historically been at the root of discrimination against the gay community?
- What types of discrimination has the gay community historically faced?
- Does the accused's flyer invoke the beliefs and stereotypes historically used to discriminate against and denigrate the gay community?

[11] Professor Mulé submitted a report to Crown counsel on December 15, 2019. The report was 15 pages, including 3 ½ pages of references. Professor Mulé also submitted an undated supplementary report to Crown counsel. The supplementary report was 6 pages, including 2 ½ pages of references. The supplementary report consisted of 10 questions posed by Crown counsel arising from the report, and Professor Mulé's answers.

[12] Professor Mulé began by defining his language. He indicated that he would be using the term LGBT2-SQI to capture "those whose gender identity and/or expression fall outside the rigid traditional binary of male and female and may not align their gender identity with the biological sex they were assigned at birth." He used that language classification because, as he put it, the case raised the question of willful hatred towards an identifiable group being the LGBT2-SQI communities. Professor Mulé defined LGBT2-SQI to mean lesbian, gay, bisexual, transsexual, transgender, 2-Spirit, queer, and intersex. He also indicated that he would also use the term "gender and sexually diverse".

[13] In fact, the indictment charges Mr. Whatcott with promoting hatred towards a narrower group, "to wit: gays…" I appreciate that the Pride Parade takes in different sexual minorities, and that hatred towards one group of sexual minorities might well involve hatred towards other sexual minorities. The indictment, however, contains the charge and in our law an accused person can only be found guilty of the crime as actually set out in the indictment.[1]

[14] Professor Mulé then set out the "Three (3) Major Tropes of LGBTQ Discrimination": religion (morality), law (criminality), and health (sickness). These tropes have discriminated against LGBT2-SQI people due to heterosexist and cisgendered perspectives.[2]

[15] Religious institutions have long condemned homosexuality. Professor Mulé noted that Mr. Whatcott has declared that his Christian faith informs his views and actions. Conservative Christians draw their views from the Old and New Testaments using a literal interpretation – which condemns homosexuality. Religious institutions have contributed the "immorality trope" by vilifying sexual minorities.

[16] Professor Mulé pointed out that homosexuality was a criminal offence until 1969 in Canada. Since then, he acknowledges, Canada has significantly reformed the law. For example,

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[1] I will use the term LGBT2-SQI throughout these reasons for the sake of consistency.

[2] The Oxford English Dictionary defines "trope" as "a word or phrase that is used in a way that is different from its usual meaning in order to create a particular mental image or effect."

sexual orientation is a protected ground in human rights legislation across the country. Same-sex marriage is lawful. In his testimony, Professor Mulé agreed that the law trope carries far less force than it previously did.

[17] The third trope is health, or sickness. Professor Mulé noted that homosexuality was a listed mental disorder in the Diagnostic and Statistical Manual of Mental Disorders by the American Psychiatric Association until 1973. It was replaced by "Sexual Orientation Disturbance" when it was finally removed in 1987. Professor Mulé also pointed to the HIV/AIDS epidemic that affected large numbers of gay and bisexual men. He noted in the report that with the development of new drugs the traffic effects of the epidemic have been significantly mitigated.

[18] Professor Mulé next examined to the "Three (3) Conceptual Implications of LGBT2-SQI Discrimination." These are: microaggressions, minority stress, and the social determinants of health. The Crown will not be relying on these three conceptual implications so I will describe them only briefly. A microaggression is a small indignity that communicates hostility or prejudice. Failure to address microaggressions contributes to stereotyping and marginalizing minority groups. Minority stress theorizes that members of marginalized groups are subject to prejudice, discrimination, lower socio-economic status, and reduced access to health care – which, in turn, leads to poor health outcomes. Negative social experiences also lead to stress, which also contributes to poor health outcomes. Social determinants of health theorize that health is affected by social factors, including inequality leading to negative structural outcomes.

[19] Professor Mulé then analyzed the flyer, with reference to the tropes and implications of LGBT2-SQI discrimination. He posited that "Gay Zombies" allude to gay people not having all their faculties.

[20] The flyer displays pictures of Prime Minister Justin Trudeau and an unknown man with genital warts on his lips. The flyer accuses the Prime Minister's party of promoting homosexuality and pedophilia. The flyer indicates that the man with the genital warts contracted them as a result of oral sex. Those comments are connected to the health trope.

[21] The flyer also featured photographs of former Defence Minister Bill Graham, former Ontario premier Kathleen Wynne, and former Ontario Deputy Education Minister Benjamin Levy. The flyer accused Mr. Graham of having sexual relations with an underage sex worker; identified Ms. Wynne as being a lesbian; and alleged that Mr. Levy is a child pornographer who used his position to introduce a "perverted sex education curriculum" into Ontario. Professor Mulé connects those to the criminality trope.

[22] Professor Mulé then analyzed two paragraphs of the flyer that draw on "right wing fundamental religious beliefs" that set up opposition to "left-wing, progressive, sexual and relationship values." Mr. Whatcott then suggests that if LGBT2-SQI people are "tired of your sin" then they may embrace Jesus Christ as their Savoir. Professor Mulé comments that the flyer accuses sexual minorities of being sinners, which is discriminatory and insensitive to religious members of the LGBT2-SQI communities, thus engaging the religion/morality trope.

[23] Professor Mulé described the back of the flyer. There are two young males embracing and engaged in a devious sex act given their "demon-like looks" as he describes it. Blood drips from their mouths. The flyer states "Gay Zombies want you to practice safe sex". The page also includes a photograph of anal warts. The flyer claims that gay people have high-risk sex that puts them at risk of sexually transmitted infections and provides health information and statistics. Professor Mulé has published research in the area of health as it affects LGBT2-SQI people. He points out in the report that the flyer contains inaccurate or inflated information and numbers. Professor Mulé links these paragraphs and photographs to the health trope.

[24] The back of the flyer also features the story and photograph of a person who changed his sex from male to female and back to male. The flyer points out that there was a happy ending to the story as this individual is a man (his God-given gender) who is now married to a woman. The flyer cautions people struggling with their sexual identity not to turn to therapists, who will "lie about the possibility of becoming a gender outside of one's birth gender." Professor Mulé states that this line is highly offensive to therapists who are trained and have ethical obligations to their patients.

[25] The final part of the flyer states disease and death are the result of the "homosexual lifestyle". Natural law deems homosexuality incompatible with human nature. Professor Mulé links this part of the flyer to the tropes of health and morality/religion.

[26] Professor Mulé finds that the contents of the flyers denigrate LGBT2-SQI communities. The text and the photographs are examples of the microaggressions – and outright aggressions – that sexual minorities confront on a regular basis. The actions taken by Mr. Whatcott and his cohort increase minority stress, which have negative implications for the social determinants of health. He concludes that "the actions Mr. Whatcott and his cohorts engaged in and the contents of the flyer were hateful and discriminatory towards LGBT2-SQI people."

[27] In the undated Supplemental Report, Crown counsel asks Professor Mulé 10 questions. These questions largely ask him to define terms ("gay", "discourse analysis", "old sex panic scenario") or to expand on concepts in the main report. Some of the areas that Professor Mulé expands upon include the history and significance of accusations of pedophilia as it relates to the gay community; the history and significance of the word "sodomy"; some of the health information and statistics that Professor Mulé refers to; HIV-related deaths and the use of anti-retroviral treatments; and the belittling and disenfranchisement of the LGBT2-SQI community through micro-aggressions.

[28] Crown does not intend to call evidence from Professor Mulé about microaggressions, minority stress, the social determinants of health, his opinions about Mr. Whatcott's conduct, or about the veracity of the claims in the flyer. As well, Crown counsel does not intend to ask Professor Mulé whether the flyer invokes hatred based on anti-gay discrimination – which is, of course, the ultimate issue for the jury

THE POSITIONS OF THE PARTIES:

[29] In her submissions, Ms. DeFilippis argues that Professor Mulé is qualified, that his evidence is necessary, and that the benefits of the evidence outweigh the costs. Ms. DeFilippis accepts that expert evidence is presumptively inadmissible. The Crown has the burden. She argues that Professor Mulé meets the test for expertise. He need not be the leading authority in an area, simply whether he has the training and experience to give him specialized knowledge. He has specialized knowledge through years of study of LGBT2-SQI issues and anti-discrimination advocacy. He is a professor with an expertise in gender and sexually diverse populations and has written several peer-reviewed articles. Ms. DeFilippis accepts that Professor Mulé has been an advocate in the past, but that there is no evidence that his personal beliefs will affect his opinion. The question is not whether he has personal biases or beliefs, but rather whether his biases or beliefs will prevent him from fulfilling his duty to the court. Professor Mulé was candid and not argumentative.

[30] Ms. DeFilippis finally argues that Professor Mulé's evidence meets the tests of necessity and relevance. In order to be necessary, the evidence must be more than merely helpful. Here, Professor Mulé's evidence will provide the historical and social context of the flyer. Professor Mulé will provide valuable information for the jury that links the flyer to historical tropes representing aspects of discrimination, such as the "gay plague" and that this evidence comes from his specialized knowledge. For example, the Crown intends to argue at trial that long-held tropes about disease expose gay people to hatred.

[31] Ms. Daviau, on behalf of Mr. Whatcott, argues that Professor Mulé should not be permitted to testify. She focusses three issues: first, whether the proposed evidence meets the test of necessity; second whether Professor Mulé is qualified to give expert evidence; and third, whether costs to the jury in terms of distraction and time outweigh the purported benefits of the evidence.

[32] On the question of expertise, Ms. Daviau argues that Professor Mulé does not have the background and training to give the evidence sought by the Crown. She argues that Professor Mulé is an advocate and that he is simply too biased to be objective. Finally, Ms. Daviau argues that the costs in terms of distraction and time do not outweigh the benefits of this proposed evidence.

ANALYSIS:

[33] As the Supreme Court of Canada stated in *R. v. Mohan*, [1994] 2 S.C.R. 9 at para. 17, admission of expert evidence depends on the application of the following criteria:

(a) relevance;

(b) necessity in assisting the trier of fact;

(c) the absence of any exclusionary rule;

(d) a properly qualified expert.

[34] A trial judge must apply the *Mohan* criteria. Additionally, the trial judge determining threshold admissibility must conduct a cost-benefit analysis of the evidence. Doherty J.A. referred to that analysis as the "gatekeeper" function of the trial judge: *R. v. Abbey*, 2009 ONCA 624 paras. 78-79.

[35] It is really the second and fourth of the *Mohan* criteria that are engaged here. As I will explain, this case also calls for a rigorous application of the gate-keeping function. There are four issues I must resolve:

- First, is the evidence necessary?
- Second, is Professor Mulé qualified to give expert evidence?
- Third, is Professor Mulé biased?
- Fourth, does the cost-benefit analysis favour admission or exclusion of the evidence?

(a) Is the evidence necessary?

[36] Ms. Daviau concedes that the proposed expert evidence is relevant, but she argues that it is not necessary. The jury does not require assistance. This is not highly technical case. This is a case about human behavior. Professor Mulé's proposed evidence is superfluous. The question is not whether LGBT2-SQI people have historically faced discrimination. It is also not whether discrimination still exists. As well, questions whether LGBT2-SQI people have made legal progress, or face health challenges, are not up for debate. The only question is whether the flyer constitutes hate speech, and Professor Mulé's evidence will not help the jury decide that.

[37] Crown counsel, Ms. DeFilippis, agrees that it is well-known that there has been anti-gay discrimination. The jury, however, needs to understand how anti-gay discrimination has been perpetuated. The Crown intends to concentrate on the health trope, and the flyer contains many statements about gay people and health. The jury needs to understand what the "gay plague" was, and how it is at the root of a system that equates sickness with immorality. The jury needs to understand the links between the stereotypes and tropes of anti-gay discrimination. The jury needs to understand the history and context of the accused's statements as the speech cannot be consider in a vacuum. The evidence is necessary for the jury to consider the issue of Mr. Whatcott's intent.

[38] I must respectfully disagree with the Crown in this instance. I do not believe that the evidence is necessary.

[39] As Charron J.A. (as she then was) put it in *R. v. K.(A).* (1999), 45 O.R. (3d) 641 (C.A.) at para. 90, "if the trier of fact can form his or her own conclusions on the facts without help, the opinion of an expert, even though relevant, is unnecessary and inadmissible." At para. 91, Charron J.A. noted that the test is set out in different ways in *Mohan*:

- The evidence must be necessary to enable the trier of fact to appreciate the matters in issue due to their technical nature.

- The opinion must be necessary in the sense that it provides information which is likely to be outside the experience and knowledge of a judge or jury.
- The subject-matter of the inquiry must be such that ordinary people are unlikely to form a correct judgment about it, if unassisted by persons with special knowledge.

[40] At para. 92 Charron J.A. suggested that the following alternative questions should be asked:

- Will the proposed expert opinion evidence enable the trier of fact to appreciate the technicalities of a matter in issue? or
- Will it provide information which is likely to be outside the experience of the trier of fact? or
- Is the trier of fact unlikely to form a correct judgment about a matter in issue if unassisted by the expert opinion evidence?

[41] Technical evidence – Charron J.A. gave the example of the engineering principles involved in the construction of a bridge – will ordinarily meet the criterion of necessity. Where the proposed opinion is about human behavior, it is more difficult to make the decision. There is no bright line that determines what is within the normal experience of the judge or jury and what is not.

[42] This is not a technical case. The first question is not an issue. Answering the second or third question is more challenging. In order to determine whether the expert evidence is necessary we must look at what the jury will be asked to decide. It will be asked to decide whether the flyer itself, the *actus reus* of the offence, constitutes hate speech. It will then be asked if Mr. Whatcott willfully promoted it.

[43] In my view, the expert evidence will not provide information that is likely to be outside the experience of the jury.

[44] Chief Justice Dickson, in *R. v. Keegstra*, [1990] 3 S.C.R. 697, described hatred at para. 121:

> Noting the purpose of s. 319(2), in my opinion the term "hatred" connotes emotion of an intense and extreme nature that is clearly associated with vilification and detestation. As Cory J.A. stated in *R. v. Andrews*, supra, at p. 211:
>
> > Hatred is not a word of casual connotation. To promote hatred is to instil detestation, enmity, ill-will and malevolence in another. Clearly an expression must go a long way before it qualifies within the definition in [s. 319(2)].
>
> Hatred is predicated on destruction, and hatred against identifiable groups therefore thrives on insensitivity, bigotry and destruction of both the target group and of the values of our society. Hatred in this sense is a most extreme emotion that belies

> reason; an emotion that, if exercised against members of an identifiable group, implies that those individuals are to be despised, scorned, denied respect and made subject to ill-treatment on the basis of group affiliation.

[45] In *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, [2005] 2 S.C.R. 100, the Court considered whether Mr. Mugesera, in giving a speech in Rwanda, was criminally inadmissible to Canada based on a violation of s. 319(2) of the *Criminal Code*, the same section that Mr. Whatcott is charged under. The Court stated at para. 103:

> In determining whether the communication expressed hatred, the court looks at the understanding of a reasonable person in the context: *Canadian Jewish Congress v. North Shore Free Press Ltd. (No. 7)* (1997), 30 C.H.R.R. D/5 (B.C.H.R.T.), at para. 247. Although the trier of fact engages in a subjective interpretation of the communicated message to determine whether "hatred" was indeed what the speaker intended to promote, it is not enough that the message be offensive or that the trier of fact dislike the statements: *Keegstra*, at p. 778. In order to determine whether the speech conveyed hatred, the analysis must focus on the speech's audience and on its social and historical context. An abstract analysis would fail to capture the speaker's real message.

[46] Thus, the jury will be asked to review whether the flyer constituted hate speech from the point of view of the reasonable person in the context. The jury will be instructed generally that "hatred" consists of an "emotion of an intense and extreme nature that is clearly associated with vilification and detestation'"… and "is a most extreme emotion that belies reason; an emotion that, if exercised against members of an identifiable group, implies that those individuals are to be despised, scorned, denied respect and made subject to ill-treatment on the basis of group affiliation". The jury will be instructed that it is to apply that definition from the understanding of a reasonable person. It is not clear to me why the jury needs expert evidence to do so. The jury's task is to look at the flyer and determine whether it generates feelings of vilification and detestation towards gay people. The jury will be instructed to take into account the nature of the target audience of the speech: *Mugesera*, at para. 111. The jury will be warned that it is not enough that the contents of the flyer are merely distasteful. The jury will also be instructed that it will be open to them to infer the necessary *mens rea* based upon the contents of the flyer and the surrounding circumstances: *Mugesera*, at para. 105; *Keegsra*, at para. 117.

[47] The jury is meant to represent the community, and, acting collectively, is by definition the reasonable person. The Toronto of 2021 is a community that is rich in cultural, ethnic, racial, and sexual diversity, and prides itself in being so. Who better than the representatives of this community to understand whether the flyer constitutes hate speech from the point of view of the reasonable person in the contemporary context of our city?

[48] I agree with the Crown that the specific detailed linkages between the tropes of health and religion and anti-gay discrimination as found in the academic literature are unlikely to be within the knowledge and experience of the trier of fact. That said, those detailed linkages do not need to be set out for the jury to understand them. There is a well-known history of discrimination against gay people based on religion, health, and law.

[49] In the bail context, Wagner J. (as he then was) in *R. v. St-Cloud*, 2015 SCC 27 described the reasonable member of the community this way at para. 74:

> In *R. v. Hall*, 2002 SCC 64 this Court explained that the "public" in question consists of reasonable members of the community who are properly informed about "the philosophy of the legislative provisions, Charter values and the actual circumstances of the case"…

[50] As a trial judge sitting in Toronto, I find that the reasonable member of this community in 2021 is a person who is aware of an issue and has some familiarity with it from media and other sources. The jury will be made up of such people. Members of the jury will be generally aware that there are some religious denominations that have opposed equality and legal rights for LGBT2-SQI people, as seen in the debate over same-sex marriage in this country. Likewise, the reasonable member of this community will be aware of the linkage between discrimination against the gay community and the HIV/AIDS epidemic.

[51] The Crown argues that simply because the history of discrimination against gay people is well-known it does not mean that the evidence is unnecessary. The jury is unlikely to be well-versed in the tropes set out in the evidence and report of Professor Mulé and will be unable to make the linkage. The Crown relies on a decision of the British Columbia Human Rights Tribunal to illustrate the proposition. In *Canadian Jewish Congress v. North Shore Free Press Ltd. (c.o.b. North Shore News)*, 1997 B.C.H.R.T.D. No. 23 the respondents to a complaint wrote an article entitled “Hollywood Propaganda in 1994. The complainants argued that the article was likely to expose Jewish persons to hatred or contempt on the basis of race, religion, or ancestry contrary to the B.C. Human Rights Code. The respondents argued that the article was not antisemitic and that the relevant legislation breached s. 2(b) of the *Canadian Charter of Rights and Freedoms.* The Tribunal acknowledged the reality of antisemitism in Canadian society, but also permitted the introduction of expert evidence on the history of antisemitism, the key elements of antisemitic thought, and Holocaust denial.

[52] I find that the *North Shore Press* case is distinguishable from this one, notwithstanding the highly detailed and thorough reasons of Board Member Iyer (then a professor of law at the University of British Columbia and now a judge of the Supreme Court of British Columbia). The most obvious difference is that a human rights tribunal is not a criminal court sitting with a jury. The Tribunal does not appear to have determined threshold admissibility. The was no consideration of the necessity aspect of the *Mohan* criteria. The Tribunal was not required to conduct a cost-benefit analysis of the admission of the evidence, something that is basic to a criminal jury trial. Like most administrative tribunals, the enabling statute permits the tribunal to accept evidence considered necessary and appropriate, whether the evidence would be admissible in a court of law. It is true that the Tribunal relied on the expert evidence to evaluate whether the publication was antisemitic, but another purpose of the expert evidence was to consider whether the legislation met a pressing and substantial objective under a s. 1 *Charter* analysis.

[53] I am aware that *North Shore Press* was favourably commented on and adopted by the Supreme Court of Canada in *Mugesera*. *Mugesera*, however, did not deal with the *Mohan* criteria

or the threshold for the admission of expert evidence. Like *North Shore Press*, *Mugesera* involved an administrative tribunal rather than a criminal jury trial.

[54] I found the decision of Blouin J. of the Ontario Court of Justice in *R. v. Sears*, 2019 ONCJ 104 to be helpful. Sears and St. Germaine were charged with willful promotion of hatred against Jews and women. They published Your Ward News, a community newspaper. Several issues of the newspaper were entered as exhibits. The Crown called two expert witnesses, a history professor and a law professor. The defence conceded the qualifications of the two experts. Justice Blouin stated at para. 4:

> … I think it is important to deal with the evidence of both experts at this point. I will first say that both were extremely impressive. They both provided the Court with a historical background to many issues written about in YWN. They both communicated their opinions regarding anti-Semitism and misogyny succinctly and authoritatively. More impressively, they both enhanced the strength of their opinions by responding thoughtfully to questions and challenges in cross-examination. I had no trouble accepting either expert's evidence. As helpful and impressive as they turned out to be, in my view, they were not necessary. The agreed statement of facts (Exhibit 1), Mr. St. Germaine's police statement (Exhibit 18), and Exhibit 2 (the 22 issues of YWN) provide a complete factual foundation for my analysis.

[55] In his oral reasons convicting Sears and St. Germaine, Blouin J. stated:

> Okay. I agree with your counsel in this matter that it's important to read all of the issues of Your Ward News, and not just pick out certain quotes in certain parts, passages, that are in the newspaper.
>
> When one does that, and I have done that, there is an overarching and unrelenting message of hate. The breadth and depth of this message made it clear to me, beyond any doubt, that you both fully intended to promote hate.
>
> While both experts in this trial were excellent, and they assisted this Court in understanding a wider historical context regarding both anti-Semitism and misogyny, the 22 issues of this newspaper provided all the evidence necessary to conclude that you both wilfully promoted hate.
>
> If this material does not rise above distasteful expression to qualify as hate, then I can't imagine what will. I find you both guilty on both counts.[3]

[56] On summary conviction appeal to this Court the accused argued that the verdict was unreasonable because Blouin J. did, in fact, refer to the evidence of one of the experts in his

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[3] Reproduced at para. 25 of the summary conviction appeal judgment: *R. v. Sears* (cited in the next paragraph).

reasons. That argument was rejected by Kavanaugh J. of this Court: *R. v. Sears*, 2021 ONSC 4272 at para. 26. Brown J.A. dismissed an application for leave to appeal: *R. v. Sears*, 2021 ONCA 522.

[57] I find that the proposed expert evidence does not meet the test of necessity for the same reason – the flyer and circumstances surrounding the distribution of the flyer will provide the factual foundation for the jury's decision. Just as in the *Sears* case, the jury will be able to make a finding from the face of the flyer itself.

(b) Is Professor Mulé qualified to give expert evidence?

[58] Ms. DeFilippis argues that Professor Mulé is a social scientist. He is familiar with research methods and analysis. He has specialized knowledge that the jury cannot be expected to have. He does not need to be the leading authority in the field. His years of specialized study in LGBT2-SQI issues gives him the education and experience to assist the jury.

[59] Ms. Daviau conceded that Professor Mulé is well-versed in government policies that impact on LGBT2-SQI people. His main area of research and publishing focusses on those policies and on advocating changes to better serve sexual minorities. He has, however, never studied the history of discrimination against gay people. He is a social worker by training and teaches in the faculty of social work. He has written about pedagogy in the social work field. The defence referred to his faculty profile (which he agreed that he authored) to illustrate his actual areas of research:

> Dr. Nick Mulé's research interests are in the areas of advocacy, social inclusion/exclusion of gender and sexually diverse populations (lesbian, gay, bisexual, transsexual, transgender, two-spirit, genderqueer, intersex, queer, questioning – LGBTQ) in social policy and service provision and the degree of recognition of these populations as distinct communities in cultural, systemic and structural contexts. He also engages in critical analysis of the LGBTQ movement and the development of queer liberation theory.

[60] The defence position is that Professor Mulé does not research, study, or teach the identification and interpretation of negative beliefs, stereotypes, or tropes used to discriminate against gay people. He is not a theologian, a health expert, or a lawyer and so has no expertise to discuss those tropes. Broadly, Ms. Daviau argues that he relies on the research and writings of others, rather than his own original research.

[61] With great respect to the defence position, I disagree. Professor Mulé is well versed in the areas that the Crown seeks to qualify him.

[62] An expert is a witness who is "shown to have acquired special or peculiar knowledge through study or experience in respect of the matters on which he or she undertakes to testify": *R. v. Mohan* at para. 27.

[63] An expert is not disqualified because others are more versed in the subject area. Deficiencies go to weight rather than the threshold admissibility of the evidence: *R. v. Peng*, 2009

ONCA 921 at para. 20, where Moldaver J.A. (as he then was) adopted the reasons of Benotto J. (as she then was) at trial.

[64] In *R. v. Marquard*, [1993] 4 S.C.R. 223 three doctors had given expert evidence outside their areas of expertise. One doctor was the emergency room physician who first treated the victim; the second was an expert in child abuse and pediatrics. They both gave evidence about burns, even though neither was qualified as a burn expert. The third doctor, a burn expert, also gave evidence about child abuse. The first two doctors obviously possessed knowledge, as physicians, well beyond the knowledge of an ordinary person. The burn doctor had long experience of working with children who had been abused. That gave him an expertise in abuse not possessed by a lay person although he was not qualified in the area. McLachlin J., for the court, did not approve of the procedure of asking questions, but she was satisfied that there it was not an error to admit the evidence. She stated at para. 35:

> The only requirement for the admission of expert opinion is that the "expert witness possesses special knowledge and experience going beyond that of the trier of fact": *R. v. Béland*, [1987] 2 S.C.R. 398, at p. 415. Deficiencies in the expertise go to weight, not admissibility. As stated by Sopinka, Lederman and Bryant, The Law of Evidence in Canada (1992), at pp. 536-37:
>
> > The admissibility of such [expert] evidence does not depend upon the means by which that skill was acquired. As long as the court is satisfied that the witness is sufficiently experienced in the subject-matter at issue, the court will not be concerned with whether his or her skill was derived from specific studies or by practical training, although that may affect the weight to be given to the evidence.

[65] While the discrete issue in *Marquard* was different from discrete issue here – reception of evidence outside the scope of the court's qualification versus whether the initial qualification is even possible – I think there is a lesson. *Marquard* was an example of the principle that an expert need only have knowledge and experience that is beyond that of the ordinary person. That knowledge must be capable of being used to assist the jury in making sense of the evidence.

[66] I am satisfied in this case that Professor Mulé has knowledge and experience beyond that of an ordinary person in the area, broadly, of discrimination against LGBT2-SQI people. "Discrimination" as such may not have been his main topic of research and publishing, but there is no doubt that themes of discrimination figure prominently in his work. As a university professor he has undoubtedly taught courses and supervised student papers in areas that deal extensively with discrimination. As well, I see nothing wrong with him reviewing the literature to shore up his knowledge: *R. v. Russell* (1994), 95 C.C.C. (3d) 190 (C.A.) at para. 5.

[67] Finally, and very respectfully, it is not realistic to object to Professor Mulé's testimony about the three tropes on the basis that he is not a theologian, a lawyer, or a health-care professional. It is too much to require that that an expert witness possess expertise in all the subsets of knowledge that touch upon the main area. For example, an expert in ballistics giving an opinion that a particular bullet was fired from a particular weapon need not be an expert in the metallurgical

properties of the gun barrel or the chemical composition of the gunpowder in the cartridge (although if those were issues, separate experts might be required in a particular case). There is no requirement that a police officer expert in the methods of commercial drug traffickers possess medical expertise in the addictive properties of each drug. The expert must have some familiarity, of course, but if that were the requirement then no expert could ever testify about anything. To take the most obvious example, Professor Mulé does not need to be a theologian to understand that themes in the flyer are linked to religion – he needs to be an expert as to how those themes relate to historic discrimination against gay people.

[68] My duty is to decide the threshold question of Professor Mulé's qualifications. If the evidence had met the test of necessity, it would have been up to the jury whether to accept or reject some or all of his evidence. Once the expert evidence meets the threshold test, any deficiencies go to the weight of the evidence. I certainly would have permitted defence counsel to cross-examine Professor Mulé before the jury on this question.

(c) Is Professor Mulé biased?

[69] Ms. Daviau argues that Professor Mulé's personal belief system, as well as his body of work, go well beyond advocacy. His main ideas are that heterosexual norms discriminate against the LGBT2-SQI population; and that equality for sexual minorities is not sufficient for members of that community to lead full lives. He believes that here must be changes in the law to accommodate the queer lifestyle (captured under the heading "queer liberation theory"). The defence position is summarized in the factum:

> Dr. Mulé is certainly entitled to his beliefs, and to speak freely about them. He is entitled to debate whether the social norms of the general population are indeed discriminatory of LGBTQ persons and whether that justifies the creation of social norms applicable only to that community that will allow queer people to live a lifestyle free from criticism and legal restraints. But qualifying him as an expert in this case, notwithstanding his recognition of his duty to the Court to be impartial, injects into the trial a person with an inherent bias that may colour his opinion and therefore mislead the jury.

[70] Ms. DeFilippis, not surprisingly, takes a different view. She argues that merely holding beliefs outside the mainstream is not disqualifying. There must be a linkage between the beliefs held, and some sort of prejudice linked to the expert opinion. Here, there are none. As well, the Court can limit the scope of the expert's evidence in order to minimize the danger of a biased opinion.

[71] After very anxious consideration, I am satisfied that were Professor Mulé to testify he could give unbiased opinion evidence.

[72] An expert owes a duty to give "fair, objective, and non-partisan opinion evidence." The duty is owed to the court, and not to any party: *White Burgess Langille Inman v. Abbot and Haliburton Co.*, 2015 SCC 23, [2015] 2 S.C.R. 182 at paras. 10, 26-32. The application of this

principle to the threshold admissibility of expert evidence is complicated. As Cromwell J. put it in *White Burgess* at paras. 33-34:

> As we have seen, there is a broad consensus about the nature of an expert's duty to the court. There is no such consensus, however, about how that duty relates to the admissibility of an expert's evidence. There are two main questions: Should the elements of this duty go to admissibility of the evidence rather than simply to weight? And, if so, is there a threshold admissibility requirement in relation to independence and impartiality?
>
> In this section, I will explain my view that the answer to both questions is yes: a proposed expert's independence and impartiality go to admissibility and not simply to weight and there is a threshold admissibility requirement in relation to this duty. Once that threshold is met, remaining concerns about the expert's compliance with his or her duty should be considered as part of the overall cost-benefit analysis which the judge conducts to carry out his or her gatekeeping role.

[73] Once the expert testifies or attests that they understand their duties, the burden is on the opposing party to establish that the expert is unwilling or unable to comply with that duty: *White Burgess* at para. 48. In this case, the defence agrees that Professor Mulé understands his duties, but is unable to comply with that duty. That burden is a high one, as Cromwell J. explained at para. 49:

> This threshold requirement is not particularly onerous and it will likely be quite rare that a proposed expert's evidence would be ruled inadmissible for failing to meet it. The trial judge must determine, having regard to both the particular circumstances of the proposed expert and the substance of the proposed evidence, whether the expert is able and willing to carry out his or her primary duty to the court… Similarly, an expert who, in his or her proposed evidence or otherwise, assumes the role of an advocate for a party is clearly unwilling and/or unable to carry out the primary duty to the court. I emphasize that exclusion at the threshold stage of the analysis should occur only in very clear cases in which the proposed expert is unable or unwilling to provide the court with fair, objective and non-partisan evidence. Anything less than clear unwillingness or inability to do so should not lead to exclusion, but be taken into account in the overall weighing of costs and benefits of receiving the evidence.

[74] There is no question that Professor Mulé is an advocate. There is also no question that an advocate can be an expert witness: *R. v. Shafia*, 2016 ONCA 812 at para. 253; *R. v. Sadiqi*, 2013 ONCA 250 at paras. 10-15. I would not exclude his evidence for that reason alone. I also would not exclude his evidence for mere bias. An expert can be biased. The question is whether he can overcome that bias in giving an opinion. There are some portions of Professor Mulé's report that speak to a bias and a tone of the report is problematic.

[75] I will point to one problematic example in the report. At p. 7 Professor Mulé states:

> The next two (2) paragraphs are heavily premised on right-wing fundamental religious beliefs that accuse the powers that be of moving onto a path of "sexual anarchy". They set up oppositional right-wing, traditional sexual relationship values against left-wing, progressive, sexual and relationship values cautioning the latter to "eternal peril" should they not follow "natural law." These views are clearly contrary to the values of people who fall outside of the traditional, cis, heterosexual perspective, which is where LGBT2-SQI are positioned. The language and tone used indicate a denigration of the latter communities. Of note, in the line in which Mr. Whatcott provides contact information he suggests "if you are tired of your sin and want to come to your Lord and Saviour Jesus Christ…" he is accusing LGBT2-SQI people of either being sinners or engaging in sin and placing them in an oppositional stance to the Lord. This is both discriminatory and insensitive to the many religious members of the LGBT2-SQI communities.
>
> The last part of the face-page of the flyer features a bolded quote from 1 Peter 2: 21-24, that ironically Mr. Whatcott appears to not be abiding by in his 'reviling' of the LGBT2-SQI populations.

[76] Regrettably I detect a language and a tone in these paragraphs that indicate a denigration of Mr. Whatcott's religious beliefs. Professor Mulé's comment on the irony of using a quotation from the First Epistle of Peter is a judgment about what he sees as Mr. Whatcott's failure to abide by his own Biblical injunctions. There is also an assumption that "left wing, progressive" beliefs are superior to "right-wing fundamental religious beliefs."

[77] Professor Mulé would be less than human if he did not some kind of an actual bias against Mr. Whatcott, or at least against Mr. Whatcott's views. After all, Mr. Whatcott takes issue not just with the kinds of views expressed by Professor Mulé, but with much of what he stands for professionally and personally. The test is not whether Professor Mulé is biased but whether his views will colour his evidence, and whether he can overcome his bias.

[78] I turn to Professor Mulé's ideas. Many might see these ideas as radical or controversial – accepting of course, that yesterday's unthinkably radical ideas are sometimes today's conventional wisdom (same-sex marriage being an obvious contemporary example) – including:

- The notion that the majority of the population holds heterosexist views that, by definition, discriminate against LGBT2-SQI people;
- Queer Liberation Theory itself, which posits that LGBT2-SQI people need their own space to express their authentic selves, even if that requires exemptions from laws that ordinarily apply to all Canadians;
- LGBT2-SQI people should be permitted to use otherwise illegal drugs to enhance sexual experiences;
- Decriminalization of the failure to inform a sexual partner of one's HIV status if the viral load is below transmissible levels.

[79] Many of those ideas are seen as outside the mainstream. There is, of course, no doubt that Professor Mulé is free to express his views, pursue them as academic interests, and debate them.

The sole question is whether mere possession of these ideas contribute to bias on Professor Mulé's part. The Court has no position, obviously.

[80] I believe Professor Mulé would have a good-faith effort to give unbiased evidence. I am not troubled by the mere fact of his advocacy. Professor Mulé was candid with the court about his ideas and positions. He did not back away from those views or temporize in order to hide actual or perceived bias. I believe his candour speaks of a genuine effort to give unbiased evidence. I did not detect the same tone in his *viva voce* evidence that I detected in the report. He presented in an unbiased way and answered counsel's questions in a professional, non-argumentative manner. Moreover, as with questions of qualification, defence counsel would have been free to cross-examine Professor Mulé before the jury.

[81] As Cromwell J. pointed out, it will be a rare case where bias will make expert evidence inadmissible. This is not one of those rare cases.

(d) Does the cost-benefit analysis favour admission or exclusion of the evidence?

[82] A trial judge has a gatekeeper function when considering the admission of expert evidence. It is my responsibility to identify and weigh the competing considerations. The cost-benefit analysis encompasses but is wider than the analysis of probative value and prejudicial effect. It is not a bright-line test because the answer is often not straightforward. As Doherty J.A. pointed out, the analysis is case-specific: *Abbey*, at paras. 79, 86-96.

[83] The costs of expert evidence can include the additional time and resources taken to hear it; the possibility that the jury will abdicate its fact-finder role to an impressively credentialed expert; and the prospect that the evidence may unduly complicate the proceeding.

[84] The proposed expert evidence in this case is not necessary. It therefore has no benefit: *Abbey*, at para. 93. Although I need not go further in the cost-benefit analysis, I will explain what I think would have the significant costs of the proposed expert evidence.

[85] If I had found the evidence to be necessary, I would have to weigh the benefit against the potential for distraction and complication. The proposed expert evidence is likely to be highly distracting and may well focus the jury on pointless debates that have little to do with the main question: whether the Crown has proven each element of the offence beyond a reasonable doubt. I remain concerned that this will become a case about Mr. Whatcott's religious and political beliefs rather than a case about whether the Crown has proved each element of the offence beyond a reasonable doubt. This danger is the same one that I pointed to in my decision on discreditable conduct evidence.

[86] The sincerity or otherwise of Mr. Whatcott's religious beliefs may be touched upon in the evidence. But that is not the same as debating the merits of his beliefs, and I believe that the expert evidence raises that prospect. Professor Mulé stated at page 7 of his report:

> Of note, in the line in which Mr. Whatcott provides contact information he suggests "if you are tired of your sin and want to come to your Lord and Saviour Jesus Christ…" he is accusing LGBT2-SQI people of either being sinners or engaging in

> sin and placing them in an oppositional stance to the Lord. This is both discriminatory and insensitive to the many religious members of the LGBT2-SQI communities.

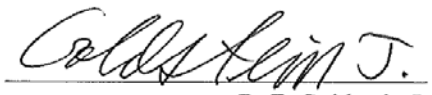
[87] Professor Mulé is, of course, correct that Mr. Whatcott's religious beliefs accuse LGBT2-SQI people of being sinners. Professor Mulé is of the opinion that Mr. Whatcott's religious beliefs are, in fact, a form of discrimination against LGBT2-SQI people. It is an integral part of his textual analysis of the flyer. Mr. Whatcott also appears to believe that LGBT2-SQI people will be better off – physically and spiritually – if they accept Jesus Christ as their Saviour. No doubt Mr. Whatcott would argue that he distributed the flyer as an act of Christian love, not as an act of discrimination and insensitivity. As I have mentioned, I cannot help but think that instead of debating whether the Crown has proven the elements of the offence, the jury will be led into a debate the degree to which Mr. Whatcott's religious beliefs are hateful. That is surely a dangerous and distracting debate for the jury. The jury may also find itself debating Mr. Whatcott's right to freedom of expression – a worthy subject of debate but not in the jury room in this case.

[88] Finally, as I have also mentioned, Professor Mulé's evidence may also set up a debate about "left-wing progressive values" versus "right wing fundamentalist religious values."

[89] An instruction to the jury that they are not to engage in these debates and focus on whether the Crown has proven the elements of the offence will likely be necessary even without the expert evidence. With the expert evidence, however, the potential is extremely high for distraction and undue complication. The jury may well focus on the wrong thing – or debate the wrong issues – which may lead to an incorrect decision.

DISPOSITION:

[90] The application is dismissed.



R. F. Goldstein J.

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ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

HER MAJESTY THE QUEEN

– and –

WILLIAM WHATCOTT

REASONS FOR JUDGMENT ON EXPERT EVIDENCE APPLICATION

R.F. Goldstein J.