COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Whatcott, 2023 ONCA 536
DATE: 20230811
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Harvison Young, Sossin and Copeland JJ.A.

BETWEEN

His Majesty the King

Appellant

and

William Whatcott

Respondent

Jamie Klukach and Natalya Odorico, for the appellant

John Rosen and Mindy Caterina, for the respondent

John Sikkema, for the intervener The Association for Reformed Political Action Canada

Hatim Kheir and Marty Moore, for the intervener Free to Care Society of Canada

Heard: June 21, 2023

On appeal from the acquittal entered by Justice Robert F. Goldstein of the Superior Court of Justice on December 10, 2021, with reasons reported at 2021 ONSC 8077.

Sossin J.A.:

[1] In 2016, William Whatcott successfully applied under a fake name to march in the Toronto Pride Parade alongside a group he identified as the “Gay Zombies Cannabis Consumers Association”. In its application, the group identified sexual

health education as one of its goals. Unbeknownst to the organizers of Toronto Pride, the group distributed two-page flyers which warned of the dangers of the “homosexual lifestyle”. After a Pride Parade attendee reported the incident to the police, Mr. Whatcott was charged with one count of willfully promoting hatred against gay men.

[2] The trial judge acquitted the respondent, Mr. Whatcott, of charges of hate speech under s. 319(2) of the *Criminal Code*, R.S.C. 1985, c. C-56, arising from a flyer distributed by the respondent and others in a group which called itself the “Gay Zombie Cannabis Consumers Association” at the 2016 Toronto Pride Parade.

[3] The Crown appeals from that acquittal and seeks a new trial for the respondent. The Crown raises three grounds of appeal: (1) that the trial judge erred in concluding the challenged statements in the flyer did not constitute “hate speech” under s. 319(2) of the *Criminal Code*; (2) that the trial judge erred in excluding expert evidence on the hateful nature of the flyer; and (3) that the trial judge erred in excluding evidence of prior discreditable conduct by the respondent.

[4] For the reasons that follow, I would allow the appeal on the basis that the trial judge erred in excluding the expert evidence. In my view, in light of this error, a new trial is required.

BACKGROUND

[5] In the 2016 Toronto Pride Parade, the respondent was part of a group called the “Gay Zombie Cannabis Consumers Association” who misrepresented their intentions to gain permission to participate in the parade. Mr. Whatcott and five associates dressed in green bodysuits and masks, handing out “Zombie Safe Sex Packets” which included the flyer that gave rise to the prosecution.

[6] The flyer featured a photo of two men embracing with their shirts off, photoshopped to have zombie eyes and blood dripping from their mouths. Below this, the flyer headline stated, “Gay Zombies want you to practice safe sex!”. This headline sat on top of three photographs accompanied by text boxes. The first two photographs were of a male anus with anal warts and a dead body with multiple lesions. Next to the photo of the male anus, the flyer shared statistics about HPV infection rates among HIV-negative and HIV-positive gay men as well as a list of other infections that “homosexuals are at a high risk of acquiring”. Next to the second photo of the dead body with lesions which the flyer identified as an AIDS fatality, the text box claimed that “Many homosexuals falsely believe that sodomy is safe with the advancement of anti-retroviral therapy” but that “the truth is that an average of 15,000 people still succumb to AIDS annually in North America”. The text box goes on to list common side effects of “anti-AIDS medications”. The third and last photograph was a panel of three photographs of someone who the flyer claimed had transitioned to a woman and then back to a

man. The flyer advised: “If you are struggling with gender confusion don’t let homosexual activist therapist lie to you and tell you, you can be a gender other than your birth gender.”

[7] Also on the front page, there was a paragraph stating that “natural law is clear, homosexuality is incompatible with human nature”. The flyer stated:

> Disease, death and confusion are the sad and sordid realities of the homosexual lifestyle. The “Gay Zombies” are concerned about the spiritual, psychological and physical welfare of all potential homosexual pride attendees, so we want to give you this accurate information and encourage you to abstain from homosexuality.

[8] The second page of the flyer contained a photograph of Justin Trudeau beside a photograph of a man’s mouth purportedly containing genital warts. It stated, in part:

> Canada has embarked on a destructive journey towards sexual anarchy and homosexual inspired oppression. The fruit of sexual anarchy is the rejection of God’s plan of life long heterosexual matrimony and replacing the virtues of chastity, fidelity, unconditional love, and lifelong commitment to one’s spouse with promiscuity, polyamory, pornography, and homosexuality. The clear evidence contained in this package shows Canada’s new sexual ethic is contrary to natural law and no good will come from it.
>
> The rejection of true marriage is also in direct opposition to God’s law and it is our duty to warn you that those who choose to rebel against the God who created them, do so at their eternal peril.

[9] An attendee and recipient of the flyer complained to the police, who investigated and laid a charge against the respondent for willfully promoting hatred contrary to s. 319(2) of the *Criminal Code*.

[10] At a judge-alone trial, the trial judge considered the elements of the offence: first, that the respondent communicated statements, in this case the flyer; second, that the flyer was distributed publicly; third, that the flyer promoted hatred; fourth, that the promotion of hatred was against an identifiable group; and fifth, that if the flyer promoted hatred, the respondent did so wilfully. Only the third (promotion of hatred) and fifth elements (*mens rea* of wilfulness) of the offence were in dispute.

[11] The trial judge found that he had reasonable doubt about whether the flyer promoted hatred because the flyer had “few, if any, of the hallmarks of hate speech” identified in *Warman v. Kouba*, [2006] C.H.R.T. No. 5, and was “not sufficiently misleading as to be inflammatory”. He compared the contents of the flyer to the speech involved in other significant hate speech cases, and noted that while it may be offensive, the flyer did not contain hallmarks of hate comparable to those cases, as it did not call for violence against gay men, suggest that society segregate gay men because they are dangerous or a menace to others, suggest that gay men threaten society, or allege that there is “a secret cabal of gay men set on taking over Canadian society”.

[12] The trial judge relied on the expert evidence of a professor of theology, Professor Douglas Farrow, called by the defence, who explained the flyer's religious context and biblical references. For example, the trial judge referenced the Professor Farrow's testimony on the use of the term "sodomite", stating that "[t]he use of that term may or may not be insulting, depending on the context". Based on Professor Farrow's evidence, he interpreted a number of the statements on the flyer as being rooted in religion and scripture. While he noted that legitimate expressions of religious belief could not be used to shield a message that contains hate speech, he found that these references only condemned men having sex with men, but did not "suggest that gay men are subhuman or compare them to animals". The trial judge also observed that the passage in Leviticus 20:13, which prescribes the death penalty for men who have sex with men, was not quoted on the flyer.

[13] The trial judge also relied on the evidence of Dr. Mona Loufty, a medical expert called by the Crown, for interpreting the claims on the flyer. Based on this, he noted that the medical assertions in the flyer were "either in the ballpark of plausible or at worst an exaggeration". Accordingly, he found that the flyer clearly opposed the extension of legal rights to gay people, but that the respondent was within his rights to express this view in the way he did, as he did not do so in a way that promoted hatred against gay men.

[14] The trial judge excluded the evidence of one proposed Crown expert on anti-gay discrimination, Professor Nick Mulé, who proposed to testify about the common tropes of immorality, criminality, and sickness/disease seen in anti-gay discrimination. The trial judge excluded this evidence because he determined it was unnecessary and the cost-benefit analysis favoured exclusion of the expert evidence.

[15] After finding he had reasonable doubt about whether the respondent's flyer promoted hatred, the trial judge also found that he had a reasonable doubt that the respondent intended to promote hatred (though he noted he did not need to decide this, given his first finding warranted an acquittal). He found that the evidence did not persuade him beyond a reasonable doubt that the respondent intended to promote hatred against gay men.

[16] The trial judge also excluded evidence of prior discreditable conduct, including social media posts, blog posts and the circulation of similar material held by the Supreme Court of Canada to have exposed gay men to hatred under *The Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1: *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11, [2013] 1 S.C.R. 467 ("*Whatcott (SCC)*"). The trial judge concluded the prejudicial effect of this evidence outweighed its probative value.

[17] Based on the admissible evidence, the trial judge did not find a sufficient basis in the record of intent to promote hatred and noted that he found it "puzzling that if the respondent intended to promote hatred, he would have distributed the flyers to the very group he intended to promote hatred against". He found that while the respondent may have intended to create a controversy, uproar, or furor, this was insufficient to find that he intended to promote hatred.

[18] The trial judge concluded by stating that "[a]lthough I find Mr. Whatcott not guilty, he should not take this result as a vindication or as an endorsement of his views. I have found him not guilty because the flyer is in the grey zone between legitimate expression and hate speech".

ISSUES

[19] The appellant raises three grounds of appeal:

1) Did the trial judge err by concluding that the statements communicated by the respondent were not "hatred" within the meaning of s. 319(2)?
2) Did the trial judge err by excluding expert evidence relevant to establishing the hateful nature of the respondent's flyers?
3) Did the trial judge err by excluding evidence of the respondent's prior discreditable conduct?

[20] The standard of review was the subject of some dispute by the parties. The appellant argued the formulation and application of the objective test for hate

speech in light of the record before the trial judge constituted questions of law, reviewable on a standard of correctness, while the respondent argued deference should be owed to the findings of the trial judge that the flyer in question did not constitute hate speech.

[21] As I would allow the appeal on the second ground dealing with the expert evidence alone, it is not necessary to deal in detail with the other grounds. In particular, as I would find the record on which the trial judge based his findings to be incomplete, it is not necessary to examine the appellant's argument that key findings were in error, as those findings may have differed if the trial judge had the benefit of a full record.

[22] For this reason, it is not necessary to address the standard of review on appeal of the findings of the trial judge in relation to the threshold for hate speech beyond observing that, where facts are not in dispute, the formulation and application of the hate speech standard could well constitute a question of law, but where the factual findings are made by a trial judge on a properly constituted record, they must be afforded deference.

ANALYSIS

A. The trial judge's findings on the expert evidence

[23] While the trial judge explained his conclusions on the flyer with reference to its specific parts (for example, considering each medical claim with reference to its

accuracy), the trial judge offered little by way of an assessment of the whole of the flyer in relation to the question of whether it promotes hatred against gay men. As I set out below, this missing aspect of his analysis may be related to the absence of expert evidence before him on the tropes and stereotypes that have been used to perpetuate discrimination against gay men.

[24] In reaching his conclusions, it is clear that the trial judge relied considerably on the evidence of the expert witnesses.

[25] With respect to Professor Farrow's evidence, the trial judge stated, in part:

> [43] Professor Farrow further testified that the idea that death is the reality of the homosexual lifestyle also has at least some grounding in scripture and in Christian thought. In Genesis, humans are told that they will suffer death if they deviate from God's plan. Paul, in his letters to the Romans, also says that the failure to conform to God's plan will result in consequences.
>
> [44] A duty to warn is also rooted in scripture. According to Professor Farrow, it is basic to Christian thought and has roots in Jewish thought. The prophet Ezekiel, for example, warns that failure to follow God's law will bring divine consequences. The invitation portion of the flyer is basic to the Christian mission, which is to bring the nations to God's love. The warning and the invitation must go hand in hand. Christians are sent out into the community to bring the good news that Jesus died for our sins. The refences to spiritual welfare and encouragement to "refrain from homosexual activities" is also grounded in Christian thought.
>
> …

> [47] The use of scripture to justify or encourage violence would undoubtedly be a hallmark of hate, but the flyer does not use scripture to justify violence. The scriptural passages obviously condemn men having sex with men but the flyer does not suggest that gay men are subhuman or compare them to animals. Leviticus 20 – which famously prescribes the death penalty for men who have sex with men – is not quoted. There is also no call that gay men should be segregated from the rest of the society. I cannot find that the flyer uses religious and scriptural language as a cover for hateful beliefs.

[26] With respect to the evidence of Dr. Loutfy, a specialist on infectious diseases, the trial judge highlighted examples where, on cross-examination, Dr. Loutfy conceded some of the medical claims in the flyer were not entirely false. For example, at para. 69:

> In my view, and in summary, the medical assertions in the flyer are hyperbole, and in some ways misleading. As a document prepared by a layman, however, the flyer's assertions are mostly in the ballpark of plausibility – or at least not the type of inflammatory lies that are the hallmarks of hate.

[27] Based in large part on the expert medical testimony of Dr. Loutfy, the trial judge concluded:

> Overall, I found the medical assertions in the flyer to be, at best scientifically debatable and at worst hyperbole (leaving aside the false assertions about the parasitic diseases). The real question, of course, is not whether each assertion was simply false (or validated) but whether the medical assertions promoted hatred against gay men. One of the hallmarks of hate is the use of "true stories, news reports, pictures and references from purportedly reputable sources to make negative generalizations about the targeted group." Does the flyer

> do this? I find myself left with a reasonable doubt on the point.

[28] Given the importance of the expert evidence in the trial judge's analysis, the trial judge's ruling to exclude the expert evidence on how tropes about religion and disease reflect and advance anti-gay discrimination becomes especially significant.

B. The trial judge erred in excluding the evidence of Professor Mulé

[29] The trial Crown proposed to elicit evidence about the history of anti-gay discrimination with a focus on the "theme of health". In a pre-trial application, the Crown argued that Professor Mulé's proposed expert evidence was necessary to understand how anti-gay discrimination has been perpetuated, especially in relation to the "health trope".

[30] The respondent opposed the admission of this expert evidence, arguing that anti-gay discrimination in Canadian society was well established and not in dispute.

[31] The trial judge found Professor Mulé had "knowledge and experience beyond that of an ordinary person in the area, broadly, of discrimination against LGBT2-SQI people." He was also satisfied that Professor Mulé would make a "good-faith effort to give unbiased evidence." Specifically, the trial judge found his testimony to be "candid and not argumentative." The trial judge further expressed no reservations over the relevance of this evidence. Nonetheless, the trial judge

ruled the evidence was inadmissible because it was unnecessary and because the cost-benefit analysis favoured exclusion of the evidence.

(1) The admission of expert evidence and standard of review

[32] Expert evidence is presumptively inadmissible. In *R. v. Mohan*, [1994] 2 S.C.R. 9, the Supreme Court established a basic structure for the admissibility of expert opinion evidence. That structure features two main components. The Court recognized four threshold requirements that the proponent of the evidence must establish in order for proposed expert opinion evidence to be admissible: (1) relevance; (2) necessity in assisting the trier of fact; (3) absence of an exclusionary rule; and (4) a properly qualified expert (*Mohan*, at pp. 20-25).

[33] In *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, [2015] 2 S.C.R. 182 ("*White Burgess*"), the Supreme Court further clarified that the admission of expert evidence involves a two-stage inquiry: at paras. 19, 22-24. The first stage requires the trial judge to consider the threshold requirements of admissibility laid out in *Mohan*. The second stage – the discretionary "gatekeeping" stage – requires the trial judge to balance the potential risks and benefits of admitting the evidence in order to determine whether the benefits justify the risks: *White Burgess*, at para. 24. Judges play the gatekeeper role to "screen out proposed evidence whose value does not justify the risk of confusion, time and expense that may result from its admission": *White Burgess*, at para. 16. In *White*

Burgess, relying extensively on *R. v. Abbey*, 2009 ONCA 624, 97 O.R. (3d) 330, leave to appeal refused, [2010] S.C.C.A. No. 125, the Supreme Court alerts judges to the risk of the trier of fact deciding "simply on the basis of an 'act of faith' in the expert's opinion" rather then using its own informed judgment: at para. 18.

[34] The standard of review of a trial judge's ruling on the admission of expert evidence is well established. Deference is owed to a trial judge's decision on admitting expert evidence, unless the trial judge commits an error of principle, materially misapprehends the evidence, or reaches an unreasonable conclusion: see e.g., *R. v. Oppong*, 2021 ONCA 352, 156 O.R. (3d) 401, at para. 34, leave to appeal refused, 2021 CanLII 133769 (S.C.C.); *R. v. Mills*, 2019 ONCA 940, 151 O.R. (3d) 138, at para. 47, leave to appeal refused, 2022 CanLII 700 (S.C.C.).

(2) Necessity

[35] In *Mohan*, the Supreme Court held that in order to meet the threshold of necessity, the expert evidence in question had to be more than merely helpful, yet this factor should not be judged by "too strict a standard". The Court held that the expert opinion would be necessary if "it provide[d] information, 'which is likely to be outside the experience and knowledge of a judge or jury'" and that … "the evidence must be necessary to enable the trier of fact to appreciate the matters in issue due to their technical nature": see p. 23.

[36] As the Court noted in *R. v. J.-L.J.*, 2000 SCC 51, [2000] 2 S.C.R. 600, at para. 56: “The purpose of expert evidence is thus to assist the trier of fact by providing special knowledge that the ordinary person would not know. Its purpose is not to substitute the expert for the trier of fact. What is asked of the trier of fact is an act of informed judgment, not an act of faith.”

[37] With respect to his analysis of necessity in the context of Professor Mulé’s proposed expert evidence, the trial judge stated that, “the expert evidence will not provide information that is likely to be outside the experience of the jury.”

[38] The trial judge’s analysis was premised on the trial occurring before a jury.[1] He elaborated on his conclusion that a properly instructed jury would be equipped to address the key issue in the case as to whether the flyer constituted hate speech without the need of an expert, at para. 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.

[39] He added, at para. 48:

> I agree with the Crown that the specific detailed linkages between the tropes of health and religion and anti-gay

[1] Subsequent to the pre-trial motions, the respondent re-elected trial by judge alone, with the consent of the Crown.

> 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.

[40] In my view, the trial judge failed to appreciate the importance of expert evidence on how discriminatory tropes against gay men are conveyed. The issue is not whether the 2SLGBTQI+ community faces discrimination, or the grounds on which they face such discrimination. The trial Crown applied to admit Professor Mulé's expert evidence in order to assist the jury in determining whether this flyer exploited such grounds so as to promote hate. These are connections that a jury – or a judge acting alone – might not be able to make on their own.

[41] While a jury or judge may be well equipped through common sense to understand or know that anti-gay discrimination exists, the trial Crown called Professor Mulé because he was qualified to provide evidence about how the flyer perpetuated long-held negative stereotypes about gay men and relied on these stereotypes and generalizations to promote hate.

[42] Just as the trial judge found it helpful to have expert evidence on religious tropes in order to understand, for example, a reference to "sodomites" in the flyer, so it would have been necessary, in my view, for the trial judge to have similar expert assistance in understanding how the text and images of disease, immorality

and danger associated with gay men lead to the promotion of hatred of this community in the eyes of the reasonable member of society.

[43] Professor Mulé testified about how the identifiable group would perceive the flyer. Professor Mulé explained how the tropes of anti-gay discrimination, present in the flyer, impact the community. The perspective of the target community is not only relevant *per se* in an analysis of hate speech, but it is critically important to an assessment of whether the challenged speech causes “emotional distress” to the members of that community: see *Ward v. Quebec (Commission des droits de la personne et des droits de la jeunesse)*, 2021 SCC 43, 463 D.L.R. (4th) 567, at paras. 62, 75, 83-84. The perspective of the gay male community as it relates to the tropes present in the flyer might strengthen (or diminish) the hatefulness of Mr. Whatcott’s communication.

[44] Emotional distress caused to individual members of the group is one of the pressing harms that anti-hate speech laws aim to address. The second, identified in *Keegstra*, *Taylor*, and *Whatcott (SCC)* is the social impact of hateful speech against a targeted group. “If a group of people can be considered inferior, subhuman, or lawless, it is easier to justify denying the group and its members equal rights or status”: *Whatcott (SCC)*, at para. 74. Professor Mulé’s evidence aimed to help the trier of fact situate Mr. Whatcott’s communication via the flyer in its social and historical context.

[45] In sum, the trial judge failed to address whether situating the flyer in its social and historical context was necessary for the trier of fact to determine whether the text, images, and the flyer as a whole, relied on stereotypes and tropes about gay men that expose them to feelings of detestation and vilification in the eyes of the reasonable member of society.

[46] The appellant also raises the concern of balance. Professor Mulé's evidence was responsive to Professor Farrow's evidence, which the trial judge admitted and relied upon. Without this evidence, according to the appellant, the trier was left with an unfairly imbalanced, one-sided perspective on the historic and cultural background which rooted the messages conveyed by the flyer.

[47] Further, Professor Mulé's opinion exposed the limits of Professor Farrow's evidence. Professor Mulé demonstrated that the respondent played on classic homophobic tropes such as that gay men are morally inferior, corrosive to Christian morals, dangerous to children, and therefore deserving of disease and suffering.

[48] According to the respondent, the argument that the admission of Professor Farrow's evidence required the admission of Professor Mulé's evidence to achieve some kind of balance is new on appeal. The trial Crown did not object to Professor Farrow's evidence in its pre-trial application, nor did the trial Crown revisit the issue of Professor Farrow's evidence after the exclusion of Professor Mulé's evidence.

[49] While I accept there were solid grounds to admit Professor Farrow's expert evidence, in my view, assessing Professor Farrow's testimony without the context that would have been provided by Professor Mulé resulted in an asymmetry in the analysis. The religious explanation and scriptural content of the flyers were fully before the court, and the trial judge relied on it in assessing whether the flyer met the definition of hate speech. However, on the other side, the full extent of the hateful meaning and subtext of the flyer was not presented, and the court did not receive a proper explanation, supported by expert analysis, of how exactly the flyer constituted hate speech against gay men, in the broader social and historical context of tropes in anti-gay discrimination. For example, in relying on Professor Farrow's evidence to conclude that "sodomite" is an insulting term only in some contexts, the trial judge provided a one-side analysis of the specific words used in the flyer without referencing the broader context of how these messages further anti-gay discrimination.

[50] The admissibility of expert evidence is a case-specific analysis, and precedent does not constrain the analysis of trial judges in each new case. However, it is worth noting that courts have recognized the utility of expert evidence of this nature to contextualize the meaning of text and images. For example, in *Abbey*, this court overturned the exclusion of expert evidence on the meaning of the accused's "teardrop tattoo within the urban street gang culture": at para. 4. In another example, in a trial about assaults that were alleged to have

been racially motivated, expert evidence on racism and hate crimes was admitted in order for the expert to provide assistance on the significance of song lyrics and visuals (such as tattoos) in determining whether the accused's actions were racially motivated: *R. v. Vrdoljak*, 2002 O.J. No. 1331 (O.C.J.).

[51] As set out above, an error in the application of a legal standard relating to the admission of expert evidence does not attract deference: see also *R. v. D. (R.)*, 2014 ONCA 302, 120 O.R. (3d) 260, at para. 52, citing *Abbey*, at paras. 97, 174. In this case, the trial judge committed a legal error in his application of the necessity criterion in the *Mohan* framework. Specifically, the trial judge's error in applying the necessity factor is apparent when he notes that Professor Mulé's "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." The trial judge misconstrued the nature of Professor Mulé's expert evidence and why the Crown proffered it to assist the trier of fact.

[52] The trial judge devoted most of his analysis to the flyer's medical claims. However, its contents extend well beyond that. The second page of the flyer included stereotypes about gay men engaging in oral sex at pride parades, stories and anecdotes that connected claims of sexual abuse and pedophilia to well-known political figures, and language about "homosexual inspired oppression". Referring to widespread knowledge of discrimination against gay men does not address the necessity of expert evidence with respect to the ways in which the

flyer may promote hatred of gay men through tropes of disease, immorality and danger.

[53] Just as a reference to “sodomite” required the assistance of an expert on biblical imagery, so understanding the implications of the references to HIV/AIDS, pedophilia and “gay zombies” in the flyer, among other references, required context.

[54] More importantly, expert evidence could have provided assistance to the trial judge in assessing the flyer and its impact as a *whole* as opposed to the analysis of particular images and claims which appeared to constitute the bulk of the trial judge’s analysis.

(3) Prejudice

[55] As the trial judge found this expert evidence unnecessary, he did not need to consider whether its probative value was overborne by its prejudicial effect. Nevertheless, the trial judge went on to conclude that even if the evidence were necessary, its prejudicial impact would outweigh its probative value and he would have excluded it on this basis.

[56] On this point, he explained, at para. 85:

> If l 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.

[57] The appellant submits that the trial judge erred in coming to this conclusion. The appellant emphasized that Professor Mulé never opined on whether the respondent's religious or political views were valid. He never expressed a personal opinion on the respondent's belief system. To the contrary, Professor Mulé's evidence was objective and drew from a large body of academic research and his own extensive experience studying, working with, and advocating on behalf of gender and sexually diverse communities.

[58] I agree. Professor Mulé's evidence does not invite the trier to debate whether Christianity or right-wing conservatism, generally speaking, promote hatred. Professor Mulé's proposal to contextualize the elements of the flyer in broader social and historical context in order to provide his expert evidence on the existence and use of the trope of health in anti-gay discrimination is not an attack on Mr. Whatcott's belief system. Any risk of impermissible reasoning could have been effectively addressed by instructions focusing the jury on the substantial legitimate relevance of this evidence, the inferences which could be drawn from it, and cautioning against its misuse.

[59] The trial judge's alternative ground for excluding the evidence of Professor Mulé again reveals an error in the application of the legal standard relating to the admission of expert evidence.

(4) The significance of the trial judge's error

[60] The impact of the failure to admit the expert evidence was significant in light of the substantive test for what constitutes hate speech.

[61] This test is not in dispute. In *R. v. Keegstra*, [1990] 3 S.C.R. 697, at pp. 777-78, the Supreme Court of Canada considered its meaning in the context of s. 319(2) of the *Criminal Code* found within the subsection of "Hate Propaganda". Dickson C.J., writing for the majority, explained that the term "hate propaganda" denotes "expression intended or likely to create or circulate extreme feelings of opprobrium and enmity against a racial or religious group." He further defined the meaning of "hatred" in s. 319(2), at p. 777:

> 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. 179: "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.

[62] This determination should be made *objectively*, the question being whether a reasonable person, aware of the context and circumstances surrounding the expression, would view it as exposing or tending to expose the target group to hatred: see *Whatcott (SCC)*, at para. 35, citing *Owens v. Saskatchewan (Human Rights Commission)*, 2006 SKCA 41, 267 D.L.R. (4th) 733, at para. 60.

[63] The Crown is not required to prove that actual harm resulted from the communication in question, so long as the communication amounted to the promotion of hate against an identifiable group.

[64] The case law on s. 319(2) of the *Criminal Code* and other cases on hate speech in the human rights context gives rise to additional propositions.

[65] First, the Supreme Court's decision in *Whatcott (SCC)* instructs to analyze the expression at issue in parts and as a whole in determining whether it amounts to hate speech. While a detailed approach is necessary to identify and analyze parts of the expression, so is analyzing the expression as a whole and in context. The Supreme Court noted that "[i]n most cases, the overall context of the expression will affect the presentation, tone, or meaning of particular phrases or excerpts": at para. 174.

[66] Second, in *Whatcott (SCC)*, the Supreme Court was clear that “Mr. Whatcott and others are free to preach against same-sex activities, to urge its censorship from the public school curriculum and to seek to convert others to their point of view”, meaning that this type of speech does not amount to hate speech: at para. 163.

[67] While I would not offer any conclusions as to whether the trial judge erred in his interpretation of s. 319(2) of the *Criminal Code*, the definition of hate speech, or its application to this case, it may be helpful to address the proper approach to analyzing whether a communication constitutes hate speech, as this question highlights the significance of the trier of fact having the benefit of a complete record. Additionally, this issue formed the bulk of the parties’ and interveners’ submissions. Indeed, the interveners Free to Care Society of Canada (“Free to Care”) and the Association for Reformed Political Action (“ARPA”) Canada were granted leave to make submissions on the threshold for hate speech, and in particular, on the issue of speech that condemns conduct, such as sexual behaviour, that is strongly tied with the identity of the group.

[68] In concluding that the flyer did not promote hatred, the trial judge reviewed the ten hallmarks of hate listed in *Warman v. Kouba*, 2006 C.H.R.T. 50, which the trial Crown highlighted in their submissions. The trial judge stated that the flyer did not contain various listed hallmarks such as calls to violence, suggestions that gay men are subhuman or animals, and calls for the segregation of gay men from

society. The trial judge also considered the flyer's assertions that homosexuality is contrary to human nature and that its realities include "disease, death and confusion". The trial judge concluded that these were expressions of "disdain" but that they did not amount to vilification or "the most intense form of dislike" as defined in *Keegstra*.

[69] The trial judge saw this as the kind of "borderline case" identified by Dickson C.J. in *Keegstra*. He explained that there was reasonable doubt about whether the flyer promotes hatred for two reasons: first, the flyer had "few, if any of the hallmarks of hate speech"; and second, the flyer was "not sufficiently misleading so as to be inflammatory".

[70] The appellant argues the trial judge erred in finding that the flyer did not constitute hate speech because he failed to consider additional "hallmarks of hate" apparent in the flyer, including: (i) political support for the targeted group is described as "sordid" and leading to great harm; (ii) acceptance of the targeted group is depicted as destructive of social values and institutions; (iii) the depiction of the targeted group as inferior, unnatural, and without value; (iv) purportedly reputable sources are relied on to support negative and inflammatory generalizations about the target group; and (v) the message communicated is that only the eradication of the target group will bring an end to the harms associated with the group. According to the appellant, the flyer portrays gay life as a life of danger, disease and debauchery, without any redeeming value, as it calls for gay

male sexual practices to stop in order to avoid the “sordid realities of the homosexual lifestyle”.[2]

[71] The respondent submits that the trial judge committed no error in his findings that the flyer did not constitute hate speech and that these findings are entitled to deference. The respondent further argues that some of the additional “hallmarks of hate” alleged by the appellant are new arguments on appeal and amount to a new theory of liability, which is not open to the Crown as appellant to pursue: *R. v. Varga*, 18 O.R. (3d) 784 (C.A.), at para. 25.

[72] Free to Care argues that the appellant equates advocacy against a practice central to an identifiable group’s identity with advocacy for the eradication of that group. In this case, Free to Care argues that advocating sexual abstinence for gay men is not equivalent to arguing that gay men should not exist. Additionally, Free to Care argued that the appellant’s argument improperly expands the scope of impermissible speech caught by s. 319(2) beyond the Supreme Court’s findings in *Keegstra* and *Canada (Human Rights Commission) v. Taylor,* [1990] 3 S.C.R. 892. Free to Care also submits that the appellant’s interpretation runs afoul of several *Charter* rights as well as the principles of a free democratic society that values open dialogue.

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[2] This is an excerpt from Mr. Whatcott’s flyer, not the appellant’s factum.

[73] ARPA similarly argues that "[t]he Crown's submissions wrongly conflate moral criticism of personal conduct that is tied to the identity of a protected group with promoting the destruction of the group so identified." ARPA argues that the Crown's interpretation would expand the scope of s. 139(2) by automatically qualifying criticisms of gay male sexual practices to promoting hatred. Instead, the ARPA argues that the Supreme Court in *Whatcott (SCC)* decided that the behaviour-identity distinction cannot shield speech that is framed in such a way as to objectively promote hatred against an identifiable group, i.e., gay men.

[74] Despite the interveners' claims that they disagree with the appellant on the above issue, in my view, the parties are largely in agreement with the Supreme Court pronouncement on the distinction between sexual orientation and sexual behaviour in *Whatcott (SCC)*, at paras. 121-124. Writing in the context of human rights legislation, the Supreme Court noted, at para. 124:

> Courts have thus recognized that there is a strong connection between sexual orientation and sexual conduct. Where the conduct that is the target of speech is a crucial aspect of the identity of the vulnerable group, attacks on this conduct stand as a proxy for attacks on the group itself. <u>If expression targeting certain sexual behaviour is framed in such a way as to expose persons of an identifiable sexual orientation to what is objectively viewed as detestation and vilification, it cannot be said that such speech only targets the behaviour</u>. It quite clearly targets the vulnerable group. Therefore, a prohibition is not overbroad for capturing expression of this nature. [Emphasis added.]

[75] As I have concluded the record before the trial judge was incomplete, I would leave a fuller analysis of the record in light of this analytic approach for the trial judge who will hear the matter anew. However, I would note that even in cases where the speech targets conduct, the analysis – as in all instances of hate speech – ultimately focuses on whether it objectively exposes the group to hatred, read as a whole, with a view to the context and circumstances surrounding the expression, in line with the propositions of law laid out by the Supreme Court in *Keegstra*, *Taylor*, *Whatcott (SCC)*, and other relevant jurisprudence.

[76] As mentioned above, the trial judge's analysis focused on the words and images in the flyer, considered in isolation, but did not engage in any analysis about the subtext and message of the flyer *as a whole* – which was precisely what Professor Mulé proposed to testify about.

[77] Even if one sentence in the flyer was found to amount hate speech, the flyer would be in contravention of s. 319(2). However, the flyer must also be viewed holistically, "to determine the overall impact and effect of the publication": *Whatcott (SCC)*, at para. 174. Although the trial judge notes this, at para. 71 of his reasons, I would find that he does not engage in a holistic analysis. The trial judge wrote:

> The flyer may be broken down into discrete parts for analysis as I have done, but it must be viewed in totality to determine whether it promotes hatred. The flyer is, no doubt, distasteful and obnoxious to many people. I understand that many may believe that the flyer contains “dog whistles”. “Dog whistles” can and often do communicate hate speech; indeed, that is often the purpose of a dog whistle. Respectfully, however, I do not agree that the flyer contains “dog whistles” that are hallmarks of hate speech; at best, it is debatable. The fact that there can be a debate about it means that is in the “grey zone” between legitimate expression and hate.…

[78] While explicitly noting the need for a holistic analysis, the trial judge goes on in this paragraph to find that it is debatable whether the flyer contains dog whistles that communicate hate speech. Professor Mulé’s evidence would have been of great assistance to the trial judge in recognizing and analyzing the contents and impact of the “dog whistles”. Despite acknowledging that dog whistles can and do often communicate hate speech, the trial judge does not analyze what dog whistles are present in the flyer or what they could be in the context of gay men. The trial judge also failed to engage with most of the content on the second page of the flyer, which included allegations of sexual abuse and pedophilia in relation to public figures, in particular those connected to the Liberal Parties of Canada and Ontario.

[79] When read with an understanding of common anti-gay stereotypes and tropes used to support discrimination, the text and images of the flyer take on more significance than particular statements or claims on their own – an analysis which the trial judge did not engage in. For example, when assessing the medical claims

in the flyer, the trial judge relies heavily on his interpretation of the veracity of the medical claims based on Dr. Loufty's evidence, finding the claims to be an exaggeration at worst – and finding there is some truth ("a kernel of accuracy") to the claims about the correlation between gay men and disease and death.

[80] Because of this focus on the truth of the medical claims, the trial judge failed to engage in any broader analysis about the stereotyping of gay men as diseased and dangerous, and the ways this might resemble some of the hallmarks of hatred he concluded the flyer was lacking, including presenting gay men as a danger to society. The same is true of the flyer's allegations of pedophilia and child sexual abuse. The flyer highlights stories of men who are public figures and have been accused of these crimes. It will be open to the trier of fact to determine whether these stories, when read in context with the rest of the flyer, paint gay men as criminals and predators, suggesting they are a threat to society. While the trial judge mentions this generalization as a possible marker of hatred, he does not connect it to the express allegations of child sexual abuse and pedophilia made on the flyer.

[81] To obtain a new trial, the appellant must demonstrate with a reasonable degree of certainty that the verdict would not necessarily have been the same if the legal error had not been made. Although the onus on the appellant is a heavy one, it need not prove the verdict would necessarily have been different. The appellate court must be satisfied that the trial judge's error might reasonably, in the

concrete reality of the case, have had a material bearing on the acquittal: see *R. v. George*, 2017 SCC 38, [2017] 1 S.C.R. 1021, at para. 27, citing *R. v. Graveline*, 2006 SCC 16, [2006] 1 SCR 609, at paras. 14-15; and *R. v. Morin*, [1988] 2 S.C.R. 345, at p. 374).

[82] In my view, the trial judge's exclusion of Professor Mulé's evidence constituted a legal error which affected the record on which he based his acquittal. Given the contextual dynamics of the test for hate speech, with the assistance of that expert evidence, the verdict could well have been different. On this basis, a new trial on a complete record is required.

C. The prior discreditable conduct evidence

[83] The appellant tendered some of the respondent's other publications including social media blogs from 2018 and 2019 and printed flyers distributed by him in Saskatchewan in 2001. According to the appellant, it was open to a trier to find that the statements communicated by the respondent in these materials evinced his strong and enduring homophobic views and feelings of animus toward gay men.

[84] The appellant contended that the respondent's intensely negative attitude toward gay men was evidence of motive, furthering the inference that he intended to promote hatred against them.

[85] The defence opposed the admission of this evidence and the trial judge agreed, holding that its prejudicial effect outweighed its probative value.

[86] The trial judge excluded the prior discreditable conduct evidence for four reasons: first, he held that admitting the proposed motive evidence risked the possibility that the respondent could be convicted for holding unpopular views rather than committing a criminal offence. Second, the trial judge concluded that the prior discreditable conduct evidence risked shifting the burden of proof by requiring the respondent, in effect, to defend his political and religious views. Third, the trial judge reasoned that admitting the proposed evidence would come "dangerously close" to criminalizing distasteful speech. Fourth and finally, the trial judge concluded that the proposed evidence would be "highly distracting" to a jury, which may be led to debate the respondent's political and religious views, rather than focus on whether the Crown had proven its case.

[87] As I would dispose of this case based on the second ground of appeal, I would neither condone this reasoning nor comment on whether it constituted an error. The balancing of probative value and prejudicial impact of this evidence will be for the trial judge in the new trial to determine, if the appellant once again seeks to have it admitted.

DISPOSITION

[88] For the reasons set out above, I would allow the appeal, and order a new trial for the respondent.

Released: August 11, 2023 “A.H.Y.”

“L. Sossin J.A.”
“I agree. A. Harvison Young J.A.”
“I agree. Copeland J.A.”