C70189

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

HIS MAJESTY THE KING

Appellant

-and-

WILLIAM WHATCOTT

Respondent

FACTUM OF THE RESPONDENT

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PART I – RESPONDENT'S STATEMENT AS TO FACTS

A. OVERVIEW

1. On July 3, 2016, the Respondent and several associates marched in the Toronto Pride Parade disguised as the "Gay Zombies Cannabis Consumers Association." They passed out a printed flyer with the headline "Gay Zombies want you to practice safe sex!" ("the Flyer"). As the trial judge later found, the Flyer contained disturbing imagery and expressed distasteful views. The Respondent was charged with wilfully promoting hatred contrary to s. 319(2) of the *Criminal Code*. He was acquitted after a judge-alone trial before the Honourable Justice Goldstein in the Superior Court of Justice.

2. The Trial Crown[1] pursued a "medical" and "health" theory of the case, submitting that the Flyer promoted hatred because it dehumanized gay men as carriers of disease. The trial judge thoroughly reviewed the applicable law and evidence at trial, which included the evidence of a Crown expert in infectious diseases. He concluded that the Flyer, while offensive, distasteful, and obnoxious, was in the "grey zone" between legitimate expression and hate speech.

3. Disappointed with the trial judge's decision, the Appeal Crown challenges the Respondent's acquittal. Their primary argument is that the trial judge "erred in his conclusion" that the Flyer did not constitute hatred. At its height and on its face, the Appeal Crown argues that the trial judge incorrectly applied the "legal standard" for hatred. In substance, the Appeal Crown has not properly articulated any legal error in relation to its primary ground of appeal. Instead, the Appeal Crown makes new submissions in an attempt to retry this case.

[1] For clarity, Crown counsel are referred to as either the Trial Crown or the Appeal Crown as context requires.

4. The Appeal Crown's factum provides no concrete examples of *how* the trial judge supposedly erred in applying the wrong "legal standard" for hatred. Instead, their entire primary argument appears to be that the trial judge failed to recognize a list of five "hallmarks of hatred" which were not submitted for consideration by the Trial Crown. Only one of these new five factors for consideration aligns with the medical/health theory of the Trial Crown.

5. The Appeal Crown argues that the trial judge's conclusion that the Flyer did not comprise hatred was "unreasonable". However, deference is owed to trial judges who are permitted to "unreasonably" acquit defendants provided they do not err in so doing. Regardless, the trial judge in this case issued a reasonable decision after considering the relevant legal principles. There is no singular "legal standard" for hatred, a term which the *Criminal Code* does not define. Approaching the criminal charge of promoting hatred requires a trier of fact to apply the legal principles expressed in applicable case law. At trial, all parties agreed on the relevant legal principles. The Appeal Crown now cites those same legal principles, all of which were expressly applied by the trial judge.

6. The Appeal Crown's secondary argument is that the trial judge erred in dismissing the Trial Crown's pretrial application to admit expert evidence about the history of anti-gay discrimination. The trial judge correctly found that the evidence was unnecessary and risked distracting the then-anticipated jury. Like the primary argument of the Appeal Crown, this secondary argument also fails to articulate a legal error and, for the most part, amounts to new admissibility submissions. Furthermore, the Trial Crown never re-applied to admit this expert evidence after the risk of distracting a jury was removed because the matter converted to a judge-alone trial.

7. The Appeal Crown's tertiary argument is that the trial judge erred in dismissing the pretrial Crown application to admit prior discreditable conduct. The Appeal Crown argues that the trial judge "erred in his assessment" that the prejudicial effect of the proposed evidence outweighed its probative value, yet never explains *how* the trial judge supposedly erred in this assessment. In fact, the trial judge, in a carefully considered judgement, cited and correctly applied the prevailing case law in response to the Trial Crown's submissions. Regardless, any alleged error is immaterial to this appeal because the evidence of the alleged discreditable conduct is relevant only to the issue of intent, a moot issue given that the trial judge concluded the Flyer did not amount to hate speech.

8. There is no basis to interfere with the Respondent's acquittal. The trial judge grappled with the issues at trial as framed by the Trial Crown and defence counsel. He issued three well-reasoned judgments which responded to those issues. The trial judge was entitled to decide as he did, and deference is owed to his decisions which do not exhibit any material errors.

9. The Respondent's position regarding the Appeal Crown arguments is that:

1) The trial judge correctly found that the Flyer did not constitute hatred within the meaning of s. 319(2) of the *Criminal Code*;

2) The trial judge did not error in excluding expert evidence tendered by the Trial Crown, relevant to the history of anti-gay discrimination; and

3) The trial judge correctly found that proposed evidence of prior discreditable conduct was propensity evidence, its minimal probative value outweighed by prejudicial effect.

B. THE FACTS

10. The facts set out in the Appellant's factum are substantially correct. The Respondent relies upon the following facts to clarify and elaborate.

(1) History of the proceedings

11. The Trial Crown preferred a direct indictment in this matter such that it proceeded directly to Superior Court for a trial by judge and jury pursuant to s. 565(2) of the *Criminal Code*. After the trial judge issued his pre-trial rulings, the Trial Crown consented to the Respondent's re-election to a judge-alone trial.

(2) The Trial Crown's "health" theory

12. The Trial Crown focused on the theme of health – its theory being that the Flyer distorted medical fact and manipulated AIDS history in order to dehumanize gay men by portraying them as carriers of disease. The Trial Crown submitted that only selected parts of the Flyer constituted hate speech.

> Submissions of the Trial Crown, *Transcript Vol 7 (Oct 22, 2021)* at 12/0-30, 14/0-8, 17/10-30, 21/20-25/20, 35/8-15[2]

13. The Flyer consisted of two pages (a front and back). The first page was headlined "Gay Zombies want you to practice safe sex!". It contained three boxes of text each accompanied by images on the left side. The Trial Crown submitted that only the first two boxes comprised hate speech. These two boxes purported to provide information about various diseases and depicted photographs described as anal warts and an AIDS fatality. The Trial Crown submitted that reasonable doubt applied to the third box at the bottom of the page, which claimed to describe a specific person who had undergone a sex change operation.

> Submissions of the Trial Crown, *Transcript Vol 7 (Oct 22, 2021)* at 19/0-20/35
> "Gay Zombie Flyer", Exhibit 4 (Trial), *Appeal Book* at 1122-1123

[2] All references are to PDF page numbers in accordance with the *General Practice Direction Regarding all Proceedings in the Court of Appeal*.

14. The Flyer's second page was headlined "Gay Zombies believe in speaking the truth, even if it is unpopular!". The Trial Crown submitted that only the top portion of the second page, which referenced genital warts, comprised hate speech, and that the other portions referencing various politicians, did not.

> Submissions of the Trial Crown, *Transcript Vol 7 (Oct 22, 2021)* at 19/0-20/35
> "Gay Zombie Flyer", Exhibit 4 (Trial), *Appeal Book* at 1122-1123

15. What made the Flyer hate speech, on the Trial Crown's theory, was the way it distorted medical information and threaded lies with truth. The Trial Crown submitted:

> What this comes down to is whether Mr. Whatcott's statements about gays being diseased, and the carriers of disease, is hatred, and it's the Crown's submission that this is not a simple warning as envisioned by the Christian tradition. The flyer dehumanizes gays as nothing more than the carrier of disease.
>
> Submissions of the Trial Crown, *Transcript Vol 8 (Oct 26, 2021)* at 84/20-85/5

16. The Trial Crown admitted that some of the Flyer's language was "a matter of semantics". In submissions, they speculated whether the Flyer would have even given rise to a criminal charge if it did not include some diseases and the AIDS fatality picture.

> Submissions of the Trial Crown, *Transcript Vol 7 (Oct 22, 2021)* at 32/4-35, 41/8-21

17. In response to the Trial Crown's theory, defence counsel submitted that the Flyer had to be looked at holistically in accordance with the governing law.[3] The first page of the Flyer corresponded with the message of disease (the first box), death (the second box) and confusion

[3] In their factum, the Appeal Crown asserts that defence counsel acknowledged that the Flyer "seems to conflate pedophilia with homosexuality" (Appeal Crown Factum, footnote 6 to para 41). In fact, trial counsel, in an exchange with the trial judge, was attempting to respond to the Trial Crown's "medical" theory of the case. Defence counsel explained that a box on page two of the Flyer about a politician (who allegedly had sex with a minor) related to the "political side" of the Flyer, whereas the Trial Crown was focused on the "medical side" of the Flyer, which had to be assessed holistically to be understood (see: Submissions of defence counsel, *Transcript Vol 8 (Oct 26, 2021)* at 61/10-62/30).

(the third box) – its broad message conveying the Christian belief that homosexuality is incompatible with human nature. Defence counsel submitted that, when the Flyer was assessed as a whole, it was not beyond the "borderline" area that is outside the ambit of criminal hate speech, according to the Supreme Court of Canada. Consequently, it could not meet the high bar of being hatred.

Submissions of defence counsel, *Transcript Vol 8 (Oct 26, 2021)* at 22/5-35, 61/10-62/30
"Gay Zombie Flyer", Exhibit 4 (Trial), *Appeal Book* at 1122-1123

(3) The Respondent's police statement

18. The Respondent turned himself in for arrest and provided a videotaped statement to the police. He brought his bible to the police station, and during breaks, he read from the Bible and prayed to God. The Respondent said that he was an outspoken Christian and that he viewed the world through the lens of a hardline Christian conservative – in his view, homosexual behaviour, like abortion, is a sin. He was upfront about wanting to discourage homosexual behaviour. However, he believed anyone, including homosexuals, could return to God.

"Transcript of statement of Mr. Whatcott", Exhibit 6a (Trial), *Appeal Book* at 1213

19. The Respondent considered it his Christian duty to reach out to sinners to try to influence them. He did not view the Flyer as hatred or as harmful. He acknowledged that people might find the Flyer offensive and explained that he thought it was reasonable political expression, especially when considering the context of the colourful political expression one finds at gay pride parades.

"Transcript of statement of Mr. Whatcott", Exhibit 6a (Trial), *Appeal Book* at 1139-1141, 1146, 1169-1170, 1181, 1190-1191, 1213, 1220-1223, 1233

20. The Respondent's beliefs were shaped, in part, by his early years as a "street kid" and heavy drug user. He explained that one time, prior to finding religion, he engaged in homosexual behaviour in exchange for drugs. He believed that sexual behavior is malleable and controllable. The Respondent told police that discouraging homosexual behaviour was not equivalent to denigrating the person engaging in the behaviour – as a Christian, he believed that unbridled sexuality is incompatible with human nature as God intended.

> "Transcript of statement of Mr. Whatcott", Exhibit 6a (Trial), *Appeal Book* at 1230-1231, 1236-1237

21. The Respondent's beliefs were also shaped by the decade he spent working as a nurse in Toronto's gay community during the nineties. He estimated he saw 600 gay men die of AIDS. He viewed the Flyer's statement that "disease, death, and confusion" were realities of the "homosexual lifestyle", as a reasonable comment validated by scientific research, which demonstrated a heightened risk of anal cancer, AIDS, and hepatitis, for males who engage in homosexual sex.

> "Transcript of statement of Mr. Whatcott", Exhibit 6a (Trial), *Appeal Book* at 1160-116, 1230

(4) Evidence of Dr. Mona Loutfy (Crown expert in infectious diseases)

22. The Crown called Dr. Mona Loutfy as an expert in infectious diseases and elicited evidence about the veracity of medical claims made in the Flyer. Her testimony revealed, as the Trial Judge found, that most medical claims made in the Flyer were not outright falsehoods, but rather were in "the ballpark of plausible or at worst an exaggeration".

> Evidence of Dr. M. Loutfy, *Transcript Vol 2 (Oct 8, 2021)* at 19/25-20/7
> Reasons for Judgment (2021 ONSC 8077) at para 51-52

23. For example, the Flyer stated that studies in San Francisco and Vancouver found that "nearly 100% of HIV positive homosexuals and 67% of HIV negative homosexuals are infected with HPV of the rectum". Upon canvassing peer-reviewed studies proximate to 2016 in cross-examination, Dr. Loutfy testified that the Flyer figures were "slightly higher" than reported in medical journals. The studies canvassed with her in cross-examination included findings that over 90% of HIV positive men who have sex with men had a least one type of anal HPV, and that men who have sex with men have a "high risk" of anal HPV infection.

> Evidence of Dr. M. Loutfy, *Transcript Vol 4 (Oct 18, 2021)* at 40/5-41/2
>
> "Risk factors for anal human papillomavirus infection type 16 among HIV-positive men who have sex with men: a systematic review and meta-analysis", Exhibit 25 (Trial), *Appeal Book* at 1732-1733
>
> "HPV genotyping and risk factors for anal high-risk HPV infection in men who have sex with men from Toronto, Canada", Exhibit 26 (Trial), *Appeal Book* at 1750-1751

24. Although Dr. Loutfy did not agree that men who have sex with men have a higher risk of acquiring parasitic diseases, she did agree that they had a higher risk of acquiring anal cancer, chlamydia, gonorrhea, and syphilis.

> Evidence of Dr. M. Loutfy, *Transcript Vol 4 (Oct 18, 2021)* at 25/0-35, 28/0-31/35, 33/0-17, 36/10-41/2

25. Dr. Loutfy testified that the Flyer's photograph of a person described as an "AIDS fatality" was unlike any case she had ever seen. She explained, however, that it could be a case of Kaposi's sarcoma, a disease which AIDS patients had a higher risk of acquiring prior to the development of anti-retroviral therapy. Dr. Loutfy speculated that the picture was potentially a "worst case," similar to a medical textbook picture she was shown during cross-examination.

> Evidence of Dr. M. Loutfy, *Transcript Vol 2 (Oct 8, 2021)* at 50/15-52/10
> Evidence of Dr. M. Loutfy, *Transcript Vol 3 (Oct 15, 2021)* at 13/15-14/7
> "Photo of a Kaposi Sarcoma", Exhibit 15 (Trial), *Appeal Book* at 1643

(5) Evidence of Professor Douglas Farrow (defence theology expert)

26. Dr. Farrow, a theology professor called by the defence, testified that Christians believe God's plan is for men and women to engage in lifelong procreative monogamous marriage. He explained that Christianity regards anything contrary to this plan as contrary to natural law and that violating natural law is akin to pursuing evil instead of good. Dr. Farrow testified that, according to biblical teachings, death and disease could result from deviating from God's plan.

Evidence of Dr. D. Farrow, *Transcript Vol 5 (Oct 19, 2021)* at 29/0-34/27
Evidence of Dr. D. Farrow, *Transcript Vol 6 (Oct 20, 2021)* at 29/10-31/10

27. Dr. Farrow saw a level of religious coherence in the Flyer, which unified three key elements: the creation of order, warnings about the consequences of deviating from order, and the invitation to restoration. Dr. Farrow opined that the Flyer was broadly consistent with the Christian duty to warn – people may be lost, and may engage in "evil" behaviour, but everyone can be rescued and restored. He explained that the missionary nature of Christianity is such that warnings and offers of salvation work together – Christianity is invitational and promotes extending invitations to become a beneficiary of God's blessings.

Evidence of Dr. D. Farrow, *Transcript Vol 5 (Oct 19, 2021)* at 41/10-42/35, 48/5-10, 52/10-54/15
Evidence of Dr. D. Farrow, *Transcript Vol 6 (Oct 20, 2021)* at 31/10-33/25

28. In cross-examination, Dr. Farrow admitted that lying, is a sin, but explained that it is a "tremendously complex territory", which requires "tremendous nuancing". For example, whether it is a sin to lie for the purpose of helping someone escape an oppressive regime could be debated at great length. Dr. Farrow testified that the Christian tradition has wrestled with concepts such as "just war" and the kinds of conditions which justify violating its mandate to tell the truth.

Evidence of Dr. D. Farrow, *Transcript Vol 6 (Oct 20, 2021)* at 38/5-30, 49/0-50/25

29. The Trial Crown cross-examined Dr. Farrow about the word "sodomy" and whether it is pejorative. Dr. Farrow testified that the term is not inherently pejorative but is a literary way of referring to unnatural sexual relations. Like many words, it could be used in an insulting way or not.[4]

Evidence of Dr. D. Farrow, *Transcript Vol 6 (Oct 20, 2021)* at 40/20-44/10

(6) Proposed Crown evidence of Professor Nicholas Mulé (not admitted)

30. The Trial Crown applied to admit the evidence of Professor Nicholas Mulé, an expert in anti-gay discrimination. The Trial Crown submitted that the expert evidence was necessary for situating the Flyer in relevant historical and social contexts of anti-gay discrimination. In keeping with the Trial Crown's theory, which focused on the theme of health, the Trial Crown argued that evidence about the history of AIDS as "the gay plague", and evidence regarding the stereotype that gays are diseased, was necessary for the trier of fact to determine whether the Flyer constituted hatred.

"Crown submissions on admissibility of expert evidence", *Appeal Book* at 108, 119

31. After reviewing the three proposed tropes of Professor Mulé's evidence (religion, law, and health), the trial judge held that the evidence was unnecessary and that it failed on a cost-benefit analysis because it posed too high a risk for jury distraction.

Reasons for Judgment on Expert Evidence Application (2021 ONSC 5541), at para 2, 38-39, 85-89

32. The Trial Crown did not re-apply to admit the evidence when the trial converted from a jury trial to a judge-alone trial.

[4] The Merriam-Webster dictionary defines "sodomy" as: (1) anal or oral copulation with another person *especially*: anal or oral copulation with a member of the same sex, (2) copulation with an animal.

PART II – RESPONSE TO APPELLANT'S ISSUES

33. As indicated previously in paragraph 9, it is the Respondent's position that:

1) The trial judge correctly found that the Flyer did not constitute hatred within the meaning of s. 319(2) of the *Criminal Code*;

2) The trial judge did not error in excluding expert evidence tendered by the Crown, relevant to the history of anti-gay discrimination; and

3) The trial judge correctly found that proposed evidence of prior discreditable conduct was propensity evidence, its minimal probative value outweighed by prejudicial effect.

1) The trial judge correctly found that the Flyer did not constitute hatred

(a) Overview of the trial judge's approach

34. In accordance with the Trial Crown's submissions, the trial judge approached the issues in the following order:

(a) Did the flyer promote hatred?
The Trial Judge had a reasonable doubt that it did.

(b) Did the Respondent promote hatred wilfully?
The Trial Judge had a reasonable doubt that he did.

(c) Do any of the statutory defences apply?
Due to his first two findings, the Trial Judge did not consider this issue.

Submissions of the Trial Crown, *Transcript Vol 7 (Oct 22, 2021)* at 6/25-35

(b) No legal error has been articulated by the Appeal Crown

35. Without explaining *how*, the Appeal Crown argues that the trial judge misapplied the "legal standard" for hatred and came to the "unreasonable" conclusion that the Flyer did not comprise hatred. In fact, the trial judge conducted an extensive review of the very legal principles cited by the Appeal Crown in its factum. As the Supreme Court of Canada explained in *Chung*, it is not an error of law if the trial judge applied the correct legal test, considered all circumstances, and came

to an unreasonable conclusion. In this case, the trial judge's conclusion was well within the range of reasonableness. It is trite that the trial judge's decision to acquit, reasonable or not, is owed deference so long as it is not tainted by error.

> *R v Chung*, 2020 SCC 8 at para 16
> *R v Chapman*, 2016 ONCA 310 at para 23-25, 34-39
> *R v George*, 2017 SCC 38 at para 16-17
> *R v R.E.M.*, 2008 SCC 51 at para 55

36. The Appeal Crown's assertion that the trial judge's finding was "unreasonable" is not a legitimate basis for a Crown appeal. In *Biniaris*, the Supreme Court of Canada explained that an "unreasonable" acquittal is incompatible with the presumption of innocence and proof beyond a reasonable doubt. Justice Arbour, for the Court, stated:

> [T]he Crown is barred from appealing an acquittal on the sole basis that it is unreasonable, without asserting any other error of law leading to it.
>
> There is no anomaly in this result. The powers of the court of appeal in the case of Crown appeals on a question of law are contained in s. 686(4) of the *Code*. There is no reference in that section to an unreasonable verdict. This is consistent with the limited rights of appeal conferred on the Crown by s. 676(1). **The absence of language granting a remedial power corresponding to s. 686(1)(*a*)(i), suggests that Parliament did not intend "unreasonable acquittals" to be appealable by the Crown at first instance. Further, and more importantly, as a matter of law, the concept of "unreasonable acquittal" is incompatible with the presumption of innocence and the burden which rests on the prosecution to prove its case beyond a reasonable doubt.** See *Lampard*, *supra*, at pp. 380-381; *Schuldt v. The Queen*, 1985 CanLII 20 (SCC), [1985 2 S.C.R. 592, at p. 610; *B. (G.)*, *supra*, at pp. 70-71. Since, different policy considerations apply in providing the Crown with a right of appeal against acquittals, it seems to me that there is no principle of parity of appellate access in the criminal process that must inform our interpretation of this issue.
>
> *R v Biniaris*, 2000 SCC 15 at para 32-33 [Emphasis added], cited with approval in *R v Barros*, 2011 SCC 51 at para 52 and in *R v J.M.H.*, 2011 SCC 45 at para 27 and in *R v Boudreault*, 2012 SCC 56 at para 7
>
> Appeal Crown Factum at para 32, 51
>
> See also: *R v Barros*, 2011 SCC 51 at para 76 and *R v J.M.H.*, 2011 SCC 45 at para 32

(c) The Appeal Crown is attempting to retry this case based on a new theory

37. The Trial Crown theory was that the Flyer was hatred because it distorted medical facts, dehumanizing gay men by portraying them as carriers of disease. Referencing the human rights tribunal case of *Warman v Kouba*[5], wherein the presiding Member provided a list of "hallmarks of hate" to aid hate speech analyses, the Trial Crown submitted:

> And I'd suggest to you that an extension of [the hallmarks of hate cited in *Warman v Kouba*] is really just preying upon stereotypes. If you employ those stereotypes that have caused hate in the past, that have caused enmity, that have caused ill-will in the past, you are employing a device, a well-known device in the promotion of hate. And the obvious enmity of ill will was extended toward gays in the past was the AIDS epidemic, what was terribly known as the gay plague.
>
> [. . .]
>
> So, to sum up why this is hate, he, Mr. Whatcott, employed the constellation of devices. He dehumanized gays as being carriers of disease, he used true lies in the veneer of truth to distort medical fact and create outright lies and he preyed upon the tragic history of gays in Canada.
>
> Submissions of the Trial Crown, *Transcript Vol 7 (Oct 22, 2021)* at 23/4-15, 35/9-15

38. In keeping with its medical/health theory of this case, the Trial Crown submitted:

(a) The Flyer image of the AIDS fatality conveyed the impression that "gays are dangerous because they carry this deadly virus that dehumanizes them".

Submissions of the Trial Crown, *Transcript Vol 7 (Oct 22, 2021)* at 25/30-28/30, 30/20-32/5

(b) The Flyer communicated that gay men are dangerous and warrant disgust and loathing because they have a deadly virus.

Submissions of the Trial Crown, *Transcript Vol 7 (Oct 22, 2021)* at 29/0-15

(c) The Flyer used "true stories" to make negative generalizations about gay men – one of the "hallmarks of hate" listed in the *Warman* case. The Trial Crown submitted that the Flyer gave medical misinformation the "veneer of legitimacy" by quoting it as medical fact. Another aspect of this was the Flyer's use of allegedly "medical" images of the AIDS fatality and genital warts.

Submissions of the Trial Crown, *Transcript Vol 7 (Oct 22, 2021)* at 29/25-35/10

[5] [2006] CHRD No 50.

39. The Appeal Crown argues that the trial judge "failed to recognize" the following five *new* "hallmarks of hate" – new in the sense that they were not part of the Trial Crown's submissions:

(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 targeted group is depicted as inferior, unnatural, and without value.

(iv) Purportedly reputable sources are relied on to support negative and inflammatory generalizations about the target group.

(v) The message communicated is that only the eradication of the target group will bring an end to the harms associated with the group.

Appeal Crown Factum at para 42-50

40. Only the fourth new hallmark cited by the Appeal Crown aligns with the Trial Crown's theory of the case. Setting aside the fourth new hallmark, which the trial judge specifically considered in his judgment, the remaining hallmarks amount to a new Crown theory of this case. The trial judge would have erred if he had convicted the Respondent based on a theory of liability that had not been before him.[6]

R v R.H., 2022 ONCA 69 at para 7, 18-24

41. Furthermore, the Appeal Crown cannot use its right of appeal to secure a retrial based on a theory or legal argument not advanced at trial. As Justice Doherty explained in *Varga*:

> The Crown's right of appeal on any ground that involves a question of law alone is none the less an appellate remedy and not a licence to refer legal questions to the Court of Appeal for its consideration and advice. As Freedman J.A. explained in *R. v. Hout*, [1969] 1 C.C.C. 256 at p. 259, 70 D.L.R. (2d) 703 (Man. C.A.):

[6] Remarkably, the first new hallmark, regarding political support, is not only a new submission, but it relates to a portion of the Flyer that the Trial Crown expressly rejected as comprising hatred (See Appeal Crown Factum at para 43, and see Submissions of the Trial Crown, *Transcript Vol 7 (Oct 22, 2021)* at 19/0-20/35.

> A question of law is certainly appealable to this Court. But it must be not a question of law submitted in the abstract and on which the views of the Court of Appeal are sought as a kind of consultative or advisory body, but rather a question of law directly and concretely related to the acquittal in question.
>
> **In addition, there are situations in which an appellate court should not address the merits of a ground of appeal advanced by the Crown even though that ground alleges an error in law that is germane to the acquittal. For example, the Crown cannot advance a new theory of liability on appeal [. . .] Nor can the Crown raise arguments on appeal that it chose not to advance at trial** [. . .]
>
> *R v Varga*, [1994] OJ No 1111 (Ont CA) at para 25 [Emphasis added]
>
> See also *R v Suarez-Noa*, 2017 ONCA 627 at para 32-35, and *R v Barton*, 2019 SCC 33 at para 47

(d) The trial judge correctly concluded that the Flyer did not constitute hate speech

i. The high bar for hatred in criminal law

42. Section 319(2) of the *Criminal Code* prohibits the wilful promotion of hatred in public. The Supreme Court of Canada upheld its constitutionality in the 1990 case of *R v Keegstra*, which was heard in conjunction with the appeals in *R v Andrews* and *Canada (Human Rights Commission) v Taylor*.

> *R v Keegstra*, [1990] 3 SCR 697
> *R v Andrews*, [1990] 3 SCR 870
> *Canada (Human Rights Commission) v Taylor*, [1990] 3 SCR 892

43. "Hatred" is not defined in the *Criminal Code*. In *Keegstra*, the Supreme Court of Canada considered its meaning in the context of s. 319(2). Chief Justice Dickson, for the majority, explained:

> **The meaning of "hatred" remains to be elucidated. Just as "wilfully" must be interpreted in the setting of s. 319(2), so must the word "hatred" be defined according to the context in which it is found.**
>
> [. . .]
>
> 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.**
>
> [. . .]
>
> **. . .the sense in which "hatred" is used in s. 319(2) does not denote a wide range of diverse emotions, but is circumscribed so as to cover only the most intense form of dislike.**
>
> *R v Keegstra*, [1990] 3 SCR 697 at para 116-117 [Emphasis added]

44. The meaning of "hatred" continues to be elucidated by the body of case law which builds on the *Keegstra* trilogy. This body of case law includes cases that address criminal hate speech and cases that address discriminatory hate speech pursuant to various pieces of human rights legislation. Although criminal cases often consider human rights cases and *vice versa*, there are significant distinctions between them.

45. For example, in *Saskatchewan (Human Rights Commission) v Whatcott*, the Supreme Court of Canada considered whether s. 14 of the *Saskatchewan Human Rights Code* (which prohibited exposing persons to hatred based on their sexual orientation) was constitutional, and whether four flyers distributed by the Respondent contravened the section. Section 14 prohibited the publication of representations that ***exposed or tended to expose*** identifiable groups to hatred. To assess "hatred", the Court explained:

> In light of these three principles, where the term "hatred" is used **in the context of a prohibition of expression in human rights legislation**, it should be applied objectively to determine whether a reasonable person, aware of the context and circumstances, would view the expression **as likely to expose** a person or persons to detestation and vilification on the basis of a prohibited ground of discrimination.
>
> *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11 at para 52 [Emphasis added]

This underscores the lower standard used in human rights cases from the higher standard required to establish hate speech in the criminal law context. As Chief Justice Dickson stated in *Keegstra*:

> The hate-monger must intend or foresee as **substantially certain a direct and active stimulation of hatred** against an identifiable group.
>
> *R v Keegstra*, [1990] 3 SCR 697 at para 115 [Emphasis added]

46. There is good reason for the higher bar in criminal cases where liberty is at stake in addition to freedom of expression. In *Keegstra*, the Supreme Court of Canada majority explained that the constitutionality of s. 319(2) of the *Criminal Code* was linked with its **restrictive ambit** – the reason the section passed constitutional muster was that the definition of hatred was circumscribed to cover ***only* the most "intense" form of dislike**.

> *R v Keegstra*, [1990] 3 SCR 697 at para 115-116, 119-125

47. The ambit of the section was further circumscribed by the defences listed in s. 319(3) which are available even when someone *intends* to promote hatred. As Chief Justice Dickson explained:

> To the extent that s. 319(3) provides justification for the accused who would otherwise fall within the parameters of the offence of wilfully promoting hatred, it reflects a commitment to the idea that an individual's freedom of expression **will not be curtailed in borderline cases**. The line between the rough and tumble of public debate and brutal, negative, and damaging attacks upon identifiable groups is hence adjusted in order to **give some leeway to freedom of expression**.
>
> *R v Keegstra*, [1990] 3 SCR 697 at para 120 [Emphasis added]

48. This restrictive approach to the criminal offence ensures that the need to prevent hatred does not unduly infringe the freedom of expression so crucial to a free and functioning democracy.

> *R v Keegstra*, [1990] 3 SCR 697 at para 27, 87-89

ii. The trial judge applied the correct legal principles

49. The Trial Crown and defence counsel agreed on the legal principles which applied to the definition of hatred and the necessary *mens rea*. In his decision, the trial judge reviewed and applied the "hatred" body of case law discussed during trial submissions. This included the governing case law cited by the Appeal Crown in its factum, all of which the trial judge expressly considered in his reasons for judgment. To the extent that a "legal standard" for hatred can be gleaned from relevant jurisprudence, the trial judge employed it.

> Submissions of the Trial Crown, *Transcript Vol 8 (Oct 26, 2021)* at 73/15-20
> Appeal Crown Factum at para 35-40
> Reasons for Judgment (2021 ONSC 8077) at para 27-37

iii. Even when considering the new Appeal Crown theory, the trial judge's decision remains reasonable

50. The new Appeal Crown theory posits that the trial judge's decision ought to be overturned because he "failed to consider" the five new hallmarks of hate referenced above. Setting aside the impropriety of considering a new Crown theory on appeal, the trial judge's decision remains reasonable even when considering the Appeal Crown's submissions.

51. For example, unlike the Trial Crown, the Appeal Crown now argues that the Flyer called for the "eradication of sexual conduct which is essential to the sexual orientation and identity" of gay men – presumably because the Flyer encouraged gay men to "abstain from the homosexuality". The fifth new hallmark of hate proffered by the Appeal Crown goes further, asserting that the Flyer's reference to abstention from homosexuality amounts to a call for the eradication of gay men. The Appeal Crown argues that the Flyer "implicitly" asserts gay men can choose not to be gay which is a powerful expression of hatred.

Appeal Crown Factum at para 2, 47-49

52. In support of this argument, the Appeal Crown cites equality jurisprudence which recognizes that homosexuality is an immutable characteristic analogous to the prohibited grounds of discrimination listed under s. 15 of the Charter, the section guaranteeing equality.

Egan v Canada, [1995] 2 SCR 513 at para 5
Halpern v Canada (Attorney General), [2003] OJ No 2268 (Ont CA) at para 7

53. The Appeal Crown submits that these equality cases establish that any suggestion that gay men can choose not to be gay is hate speech. This submission stretches the analyses of the cases too far. While it is correct that homosexuality is considered a deeply personal immutable characteristic for the purpose of assessing whether a law infringes equality, it is not correct that any suggestion to the contrary amounts to hate speech. As explained in the preceding sections of this factum, whether something amounts to hate speech depends on a contextual analysis of the speech in issue, and the application of the legal principles developed in relevant case law.

54. In concluding that the Flyer did not promote hatred, the trial judge engaged in the analysis called for by governing authorities. For example, in his reasons for judgment, the trial judge reviewed the ten hallmarks of hate listed in *Warman v Kouba*, which the Trial Crown highlighted in their submissions. He considered 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" – he found that these were expressions of disdain but that they did not amount to vilification or "the most intense form of dislike".

Reasons for Judgment (2021 ONSC 8077) at para 33, 38-40

55. The trial judge spent a considerable portion of his judgment addressing the Trial Crown's main argument that the Flyer purposely included medical misinformation alongside true information to make negative generalizations about gay men. As required, the trial judge reviewed the medical assertions in the context of the entire Flyer and concluded that while some assertions were incorrect, any misinformation did not amount to the type of inflammatory lies suggestive of hatred. He grappled with the issues posed by this case and delivered a thorough and well-reasoned decision, which must be accorded deference. The Appeal Crown's new submissions do not establish that the trial judge's conclusion was tainted by error.

Reasons for Judgment (2021 ONSC 8077) at para 55-71

(2) The trial judge correctly excluded unnecessary expert evidence

(a) Overview

56. In a pre-trial motion, when this matter was still set as a jury trial, the Trial Crown applied to introduce the evidence of Professor Nicholas Mulé, an expert in anti-gay discrimination. The Trial Crown proposed to elicit evidence about the history of anti-gay discrimination with a focus on the "theme of health" ("the Proposed Expert Evidence"). The Trial Crown argued that the Proposed Expert Evidence was necessary to understand how anti-gay discrimination has been perpetuated, especially in relation to the "health trope".

"Crown submissions on admissibility of expert evidence", *Appeal Book* at 108
Reasons for Judgment on Expert Evidence Application (2021 ONSC 5541), at para 37

57. By 2021, when this matter was before the trial judge, the history of discrimination against gay people had been renowned for decades. For example, in the two equality cases cited in the

Appeal Crown's factum, which date back to 2003 and 1995, the Supreme Court of Canada and the Ontario Court of Appeal observed that the historic disadvantage suffered by homosexuals was widely recognized and documented.

> *Egan v Canada*, [1995] 2 SCR 513 at para 173
> *Halpern v Canada (Attorney General)*, [2003] OJ No 2268 (Ont CA) at para 83

58. In concluding that the Proposed Expert Evidence was unnecessary, the trial judge correctly applied the *Mohan* criteria and the governing appellate authorities. He considered that the jury would be asked to determine if the Flyer promoted hatred from the point of view of a reasonable person aware of the relevant context. The trial judge determined that expert evidence was not necessary for this task given the well-known history of discrimination against gay people based on religion, health, and law, and given that the Flyer itself and the circumstances surrounding its distribution provided the necessary factual foundation for the jury's decision.

> Reasons for Judgment on Expert Evidence Application (2021 ONSC 5541), at para 3, 33-34, 39-43, 46, 57

59. The trial judge further held that, even if the Proposed Expert Evidence was necessary, it failed on a cost-benefit analysis. He was concerned that the jury, tasked with determining whether the Trial Crown had proven the offence, would become distracted by a debate about the Respondent's religious and political beliefs.

> Reasons for Judgment on Expert Evidence Application (2021 ONSC 5541), at para 82-89

(b) The Appeal Crown has not articulated any legal error regarding necessity

60. The Appeal Crown makes four submissions in support of its argument that the trial judge "wrongly decided" that the Proposed Expert Evidence was unnecessary. These submissions,

which amount to a rehashing of arguments made by the Trial Crown in combination with new arguments that were never put to the trial judge, fail to reveal any error in the trial judge's decision.

61. ***First***, the Appeal Crown submits that the Proposed Expert Evidence was necessary to situate the Flyer in a social and historical context. This submission was expressly considered by the trial judge who thoroughly explained why he considered the Proposed Expert Evidence to be unnecessary given the well-known nature of the social and historical context of anti-gay discrimination. The Appeal Crown has not articulated any error in this aspect of the trial judge's analysis, beyond disagreeing with the trial judge's conclusion.

> Appeal Crown Factum at para 57-58
> Reasons for Judgment on Expert Evidence Application (2021 ONSC 5541) at para 30, 37-57

62. ***Second***, the Appeal Crown submits that the Proposed Expert Evidence was "responsive" to Professor Farrow's evidence. On this argument, its exclusion left the trial judge with an "unfairly imbalanced" perspective because the evidence of Professor Farrow was admitted, and the Proposed Expert Evidence was not. This is a new argument which was not before the trial judge. It conflicts with the Trial Crown's position that the evidence of Professor Farrow, whom the Trial Crown considered an "excellent" witness", was relevant, necessary, and admissible. The Trial Crown neither expressed any concern that admitting Professor Farrow's evidence would create an "unfair imbalance," nor did the Trial Crown apply for a re-consideration of the admissibility of the Proposed Expert Evidence after Professor Farrow's evidence was admitted.

> Appeal Crown Factum at para 59
> Submissions of the Trial Crown, *Transcript Vol 5 (Oct 19, 2021)* at 9/5-10/5
> Submissions of the Trial Crown, *Transcript Vol 7 (Oct 22, 2021)* at 4/27-6/7

63. ***Third***, the Appeal Crown submits that the Proposed Expert Evidence was necessary because without it, the trial judge was unable to approach this case "unclouded by unconscious bias". This is another new argument never put to the trial judge.

Appeal Crown Factum at para 62

64. In Canadian jurisprudence, the consideration of "unconscious bias", as it relates to triers of fact, has generally been confined to juries.[7] In *Barton*, the Supreme Court of Canada, while confirming the strong presumption of juror impartiality, accepted that there is always a risk that "unconscious bias will seep into a juror's analysis". The majority explained, however, that such a risk can be addressed by careful limiting instructions.

R v Barton, 2019 SCC 33 at para 84, 162, 175-177

65. With respect to judges, the presumption of integrity and impartiality is higher than with respect to juries. The presumption of judicial impartiality can only be rebutted when an informed person, viewing the matter realistically and practically, would think it more likely than not that the trial judge, either consciously or unconsciously, decided unfairly. Only in rare cases, when this "extremely high" threshold is established with cogent evidence, will a party be granted a bias application for the removal of a trial judge from hearing a matter, or for the setting aside of a trial judgment.

Wewaykum Indian Band v Canada, 2003 SCC 45 at para 57-76
R v S. (R.D.), [1997] 3 SCR 484 at para 31
Cojocaru v British Columbia Women's Hospital and Health Centre, 2013 SCC 30 at para 14-27
Lloyd v Bush, 2012 ONCA 349 at para 23

[7] Canadian courts have also reviewed "unconscious bias" in relation to the assessment of police officer testimony. See i.e. *R v Sitladeen*, 2021 ONCA 303.

66. In this case, the Trial Crown never raised an issue regarding the trial judge's unconscious bias. The Trial Crown never made an application, based on unconscious bias, for the trial judge to remove himself from the matter, or for the trial judgment to be set aside. Additionally, the Trial Crown never requested a self-instruction related to unconscious bias.

67. Furthermore, this new argument suggests that any time a trial judge approaches an issue regarding gay men, expert evidence is required to counter the risk of unconscious bias. This is not the law, which requires trial judges to determine if expert evidence is admissible pursuant to the *Mohan* criteria. In this case, the trial judge correctly applied *Mohan* criteria to the Proposed Expert Evidence. There is no basis to now find that the trial judge was "clouded by unconscious bias".

68. ***Fourth***, the Appeal Crown submits that the admissibility of the Proposed Expert Evidence is "supported by precedent" – because other courts have admitted similar expert evidence, the trial judge was wrong to consider the Proposed Expert Evidence unnecessary. However, precedent is not a basis for admissibility. As noted above, the trial judge was obliged to, and did apply the *Mohan* criteria contextually to this case as it was presented to him. The Appeal Crown has not articulated any error regarding how he did so.

(c) The trial judge did not "overemphasize" the potential for jury distraction

69. The Appeal Crown also argues that the trial judge erred because he "overemphasized the potential danger" of the Proposed Expert Evidence being left for the jury's consideration. This argument wrongly posits that the trial judge erred in finding that the core function of the jury was to determine if the offence was proven, rather than to debate the Respondent's political and religious beliefs.

Appeal Crown Factum at para 64-66

70. The Appeal Crown incorrectly submits that, in this case, the jury's function was to "debate the degree to which Mr. Whatcott's beliefs are hateful". Such a debate would have been, as the trial judge feared, a distraction from the jury's task, which was to determine whether, on the facts, the offence had been proven. The jury had to determine whether the Flyer promoted hatred, and if so, whether the Respondent knew that promoting hatred was a substantially certain outcome of distributing the Flyer. A debate about the "degree" of hatefulness of the Respondent's personal beliefs would not have assisted this deliberation.

> *R v Gunning*, 2005 SCC 27 at para 5, 27-28
> Reasons for Judgment on Expert Evidence Application (2021 ONSC 5541) at para 46, 48
> *R v Keegstra*, [1990] 3 SCR 697 at para 118, 139

71. Regardless of whether the Appeal Crown has correctly articulated the jury's function, this Court should not conclude that the trial judge committed reversible error either by "overemphasiz[ing] the potential danger" of the Proposed Expert Evidence being left for the jury's consideration, or by "risk[ing] the trier of fact relying on unconscious biases". Had the Trial Crown been concerned about either or both of the alleged errors now raised on appeal, trial remedies were available: the Trial Crown could have re-applied to admit the Proposed Expert Evidence once the risk of jury distraction disappeared; the Trial Crown could have requested a self-instruction on unconscious bias; and, if the Trial Crown was concerned that the trial judge could not render an unbiased judgment, the Trial Crown could have applied for the trial judge to recuse himself. The Trial Crown took none of these steps. Significantly, the trial judge was never asked to consider whether the calculus of the cost-benefit analysis in admitting the Proposed Expert Evidence changed after the matter converted to a judge alone trial.

(3) The trial judge correctly excluded evidence of other prior discreditable conduct

(a) Overview

72. The Appeal Crown takes issue with the trial judge's decision to exclude *prima facie* inadmissible propensity evidence in the form of "other discreditable conduct", namely:

(i) various social media blog posts written by the Respondent which dated from 2018-2019 (the "Blog Posts"); and

(ii) printed flyers the Respondent distributed in Saskatchewan in 2001 which the Supreme Court of Canada held were hatred pursuant to the *Saskatchewan Human Rights Code* (the "Saskatchewan Flyers").

Reasons for Judgment (Prior Discreditable Conduct) (2020 ONSC 1599) at para 6, 16-17
Addendum to Reasons for Judgment (Prior Discreditable Conduct) (2020 ONSC 5427) at para 2, 6

73. The Trial Crown agreed that these materials were *prima facie* inadmissible, and that the onus was on them to demonstrate that the evidence was relevant to an issue, namely motive, and that its probative value outweighed its prejudicial effect. The Trial Crown argued that the materials were evidence of the Respondent's deep-seated hatred of gay people, which was his motive for wilfully promoting hatred by distributing the Flyer.

Submissions of the Trial Crown, *Transcript dated Jan 14, 2020,* at 28/10-25, 31/20-32/35, 36/13-25, 40/10-42/25, 46/10-26, 50/30-52/35, 58/15-59/5, 60/30-61/12, 66/10-67/1, 70/0-10, 74/10-76/30, 78/3-31, 81/5-10

"Crown application record re prior discreditable conduct", Exhibit 2 (motion), *Appeal Book* at 401, 405, 412

Reasons for Judgment (Prior Discreditable Conduct) (2020 ONSC 1599) at para 22

74. The trial judge held that the Blog Posts generally had no probative value because they did not support the inference that the Respondent has an *animus* towards gay people; and to the extent that they showed he did, the probative value of the evidence was outweighed by its prejudicial effect.

Reasons for Judgment (Prior Discreditable Conduct) (2020 ONSC 1599) at para 7, 16, 31, 33, 57, 103

75. Regarding the Saskatchewan Flyers, the trial judge concluded that, although the evidence could prove that the Respondent had an *animus* towards gay people as framed by the Trial Crown, its prejudicial effect precluded its admission into evidence. The trial judge was especially concerned with the potential for this "highly distracting" evidence to derail jury deliberations into a debate on the Respondent's political and religious views.

> Addendum to Reasons for Judgment (Prior Discreditable Conduct) (2020 ONSC 5427) at para 8
> Reasons for Judgment (Prior Discreditable Conduct) (2020 ONSC 1599) at para 7, 43-46, 58, 68, 79, 84-85, 89, 97, 99, 102
> Comments of the trial judge, *Transcript dated Jan 14, 2020* at 53/3-35, 64/20-69/5

(b) The trial judge did not err by conflating "*animus*" with "hatred"

76. The Appeal Crown argues that the trial judge erred by conflating the meaning of "*animus*" with "hatred." To support this argument, the Appeal Crown cites two cases, *Griffin* and *Pasqualino*, neither of which stand for the proposition that it is an error to equate *animus* with hatred. In *Griffin*, the Supreme Court held that, if a deceased and accused had an acrimonious relationship in the period leading up to a murder, it is highly relevant to motive because it is evidence of *animus*. In *Pasqualino*, this Court held that recent threatening or abusive behaviour of an accused towards a murder victim was relevant to motive and intent.

> *R v Griffin*, 2009 SCC 28 at para 63
> *R v Pasqualino*, 2008 ONCA 554 at para 29-31
> Appeal Crown Factum at para 73

77. These cases demonstrate that the scope of evidence which may prove *animus* depends on the context of the case. In this case, the scope was framed by the Trial Crown, who repeatedly

submitted that the Blog Posts were evidence of the Respondent's deep-seated hatred of gay people, which was his motive for distributing the Flyer. For example, the Trial Crown submitted:

> **"It's the Crown that takes the position that he intended to promote hate because he, in fact, hates homosexual people, and so that's where – where I focused my submissions for your Honour, which is the strength of that inference[.]"**
>
> "But, in my submission, Mr. Whatcott, when it comes to the hatred of homosexual people, has an intense and permanent hatred of them or of the community."
>
> "This was, at a minimum, a very distasteful message for anybody to receive. So, was that his intention? I don't know, maybe a trier of fact could have a doubt about that [. . .] but I don't think that diminishes from the fact that **when there's evidence available to the trier of fact from which they can conclude that he, in fact, hates homosexuals or the homosexual community, that that evidence should not go to the trier of fact if the probative value exceeds the prejudicial effect**."
>
> Submissions of the Trial Crown, *Transcript dated Jan 14, 2020*, at 28/15-20, 32/20-25 [Emphasis added]

78. The Trial Crown submitted that the political commentary contained in the Blog Posts was a manifestation of the Respondent's motive, that he hated gay people. Relying on *Salah*, the Trial Crown argued that the Blog Posts demonstrated that the Respondent's motive was "intense or permanent" such that it enhanced the probability he acted in accordance with it when distributing the Flyer.

> Submissions of the Trial Crown, *Transcript dated Jan 14, 2020*, at 51/5-10, 58/30-59/5, 61/5-62/10, 70/5-15
>
> *R v Salah*, 2015 ONCA 23 at para 64-66

79. The Appeal Crown now argues that four sentences parsed from the trial judge's reasons evince the "error" of "conflating" *animus* with hatred. In fact, the impugned portion of the trial judge's reasons respond to the Trial Crown's repeated and confirmed submission that the Blog Posts evidenced the Respondent's hatred of gay people (*i.e.*, his motive). The trial judge's reasons reveal no error.

> Appeal Crown Factum at para 72

80. Even assuming the trial judge committed a legal error regarding the Blog Posts, which the Respondent does not concede, such an error could not have materially affected the acquittal given that the trial judge concluded the Flyer was not hatred. The same applies to the Saskatchewan Flyers. The only potential relevance of the propensity evidence related to whether the Respondent *wilfully* promoted hatred, not to whether the Flyer itself promoted hatred.

R v George, 2017 SCC 38 at para 27

(c) The trial judge did not err in concluding that any probative value was outweighed by prejudicial effect; regardless any such error is immaterial

81. The trial judge made no errors in ruling that any potential probative value of the Blog Posts and the Saskatchewan Flyers was outweighed by their prejudicial effect. The trial judge correctly found that the prejudicial effect of all the proposed propensity evidence resulted from four factors:

(i) The risk that the Respondent would be convicted for holding unpopular views;

(ii) The risk that the burden of proof would be shifted as the trial became an exercise in forcing the Respondent to defend his political and religious views;

(iii) The risk that admitting the evidence would come "dangerously close" to criminalizing distasteful speech that was not alleged to be criminal speech;

(iv) The evidence would be "highly distracting" to a jury which could end up debating the Respondent's views rather than confine their task to determining whether the Crown had proven its case. The trial judge considered this the "most important" factor and repeated it throughout his judgment.

Reasons for Judgment (Prior Discreditable Conduct) (2020 ONSC 1599) at para 43-47

82. The Appeal Crown argues that the trial judge erred in his analysis of the prejudicial potential of the evidence. With respect to the Blog Posts, the Appeal Crown submits that the trial judge's "conflation" of *animus* and hatred infected his weighing of potential prejudice, as discussed above. With respect to the Saskatchewan Flyers, the Appeal Crown does not articulate

any legal error beyond alleging that the "trial judge erred in his assessment". As submitted above, the Respondent disagrees.

83. In any event, setting aside the issue of whether the Appeal Crown has properly demonstrated an error with regard to the Blog Posts, or articulated a legal error regarding the Saskatchewan Flyers, this Court should not find that the trial judge committed reversible error in his assessment of the risk of potential prejudice when the risk that most concerned him – the risk of jury distraction – never materialized. Again, the Trial Crown never pursued a remedy available at trial, namely, to renew their application to admit the evidence when the risk to jury deliberations, which most concerned the trial judge, was removed after the Respondent re-elected trial by judge alone.

PART III – ADDITIONAL ISSUES

84. The Respondent raises no additional issues.

PART IV – ORDER REQUESTED

85. The Respondent respectfully requests that this appeal be dismissed.

ALL OF WHICH is respectfully submitted this 16th day of May, 2023 by:

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Mindy Caterina
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SCHEDULE A – AUTHORITIES CITED

1. *Canada (Human Rights Commission) v Taylor*, [1990] 3 SCR 892
2. *Cojocaru v British Columbia Women's Hospital and Health Centre*, 2013 SCC 30*Egan v Canada*, [1995] 2 SCR 513
3. *Halpern v Canada (Attorney General)*, [2003] OJ No 2268
4. *Lloyd v Bush*, 2012 ONCA 349
5. *R v Andrews*, [1990] 3 SCR 870
6. *R v Barros*, 2011 SCC 51
7. *R v Barton*, 2019 SCC 33
8. *R v Biniaris*, 2000 SCC 15
9. *R v Boudreault*, 2012 SCC 56
10. *R v Chapman*, 2016 ONCA 310
11. *R v Chung*, 2020 SCC 8
12. *R v George*, 2017 SCC 38
13. *R v Griffin*, 2009 SCC 28
14. *R v Gunning*, 2005 SCC 27
15. *R v J.M.H.*, 2011 SCC 45
16. *R v Keegstra*, [1990] 3 SCR 697
17. *R v Pasqualino*, 2008 ONCA 554
18. *R v R.E.M.*, 2008 SCC 51
19. *R v R.H.*, 2022 ONCA 69
20. *R v S. (R.D.)*, [1997] 3 SCR 484
21. *R v Salah*, 2015 ONCA 23
22. *R v Suarez-Noa*, 2017 ONCA 627
23. *R v Varga*, [1994] OJ No 1111 (Ont CA)

24. *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11

25. *Warman v Kouba*, 2006 CHRT 50

26. *Wewaykum Indian Band v Canada*, 2003 SCC 45

SCHEDULE B – LEGISLATION CITED

None outside of the *Criminal Code of Canada*.

COURT OF APPEAL FOR ONTARIO

Proceedings commenced at Toronto

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