C70189

COURT OF APPEAL FOR ONTARIO

BETWEEN:

HIS MAJESTY THE KING

Appellant

– and –

WILLIAM WHATCOTT

Respondent

APPELLANT'S FACTUM

Ministry of the Attorney General
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PART I: STATEMENT OF THE CASE

(A) Procedural background

[1] The respondent was charged with one count of wilful hate promotion, contrary to section 319(2) of the *Criminal Code*. He was tried in the Superior Court of Justice at Toronto before Goldstein J who acquitted the respondent on December 10, 2021. By Notice of Appeal dated January 5, 2021 the Crown appeals his acquittal.

Indictment, Appeal Book, Tab 2
Notice of Appeal, Appeal Book, Tab 1

(B) Overview of the issues raised on appeal

[2] Under the pretense of offering "safe sex" advice, a printed pamphlet distributed publicly by the respondent, William Whatcott, tells the reader that members of the male, gay community are immoral, promiscuous, diseased, unnatural, sinful, prone to child sexual abuse, corruptive and destructive of laudable societal values based on "God's law." The material unequivocally suggests that the only way to bring an end to the debauchery and degeneracy of the "gay lifestyle" is for gay men to stop having sex with men. In effect, it calls for the eradication of sexual conduct that is essential to the sexual orientation and identity of this vulnerable group.

[3] Remarkably, the trial judge found this material does not amount to hatred, within the meaning of s. 319(2) of the *Criminal Code*.

[4] The trial judge also entertained reasonable doubt about whether the respondent intended or foresaw the promotion of hatred against gay men as a consequence of his messaging. He recognized, however, that if the material *was* hatred, the calculus would be altered because the common sense inference of intent would apply.

[5] The trial judge excluded expert evidence tendered by the Crown to provide background and context for the impugned statements. The proposed evidence shed light on the history and

cultural manifestations of homophobia, enhancing a lay trier's appreciation of the broader dimensions of meaning conveyed by the statements in the flyer.

[6] The trial judge also excluded evidence of prior discreditable conduct tendered by the Crown as relevant to the respondent's state of mind. In particular, similar material distributed by the respondent in the past was the subject of human rights litigation. Applying the definition of "hatred" adopted in *Keegstra*, the Supreme Court of Canada found that the messages conveyed by the respondent were hatred.

[7] It is the appellant's position that the trial judge's reasons for acquitting were tainted with these legal errors:

1. **The trial judge erred in his conclusion that the subject material does not constitute hatred. A reasonable person, aware of the context and circumstances surrounding the expression, would view it as exposing gay men to hatred.**

[8] This error alone warrants a new trial. As acknowledged by the trial judge, his reasonable doubt on the issue of intent would need to be reconsidered if statements in the flyer promoted hatred because a strong common sense inference of intent would be available.

[9] The trial judge committed two further errors:

2. **The trial judge erred by excluding expert evidence, tendered by the Crown, relevant to establishing the hateful nature of the messages disseminated by the respondent. This error compiles the trial judge's error in finding that the flyer did not promote hatred.**

3. **The trial judge erred by excluding evidence of prior discreditable conduct, relevant to the respondent's state of mind and the issue of intent. This evidence supported the common sense inference of intent.**

PART II: APPELLANT'S SUMMARY OF THE FACTS

(A) Overview of the case at trial

[10] On July 3, 2016, the respondent and five associates marched in the Toronto Pride Parade dressed in green body suits and masks that covered their faces. Calling themselves the "gay zombies", they passed out packets resembling condom packages but containing copies of a double-sided, printed flyer. The messages expressed in the flyer led to the respondent being charged with wilful hate promotion against gay men.

Ex.4: "Gay Zombie" flyer, Appeal Book, Tab 40[1]

[11] When he applied to participate in the parade, the respondent concealed his true identity, using the name "Robert Clinton". There was notoriety associated with his real name, particularly in the gay community in the aftermath of earlier human rights litigation relating to the respondent's dissemination of hateful, homophobic publications. The application required pre-approval of any printed material for distribution at the parade but the respondent did not disclose the flyer.

Ex.2: Pride application, Appeal Book, Tab 38
Ex.3: ROPE (Rules of Parade Entry) Pride 2016, Appeal Book, Tab 39

[12] The day after the parade, the respondent posted on his website, "FreeNorthAmerica.ca", an article entitled, "Whatcott Christian Commandos Infiltrate Toronto Shame Parade", referencing their activities the day before. The post included photographs of the respondent and some of his companions dressed in costume at the parade.

Ex.5: FreeNorthAmerica post, Appeal Book, Tab 41

[13] An agreed statement of fact set out these background facts. In addition, the Crown filed the respondent's statement to police, made at the time of his arrest on June 22, 2018 and called one witness, infectious disease expert Dr. Mona Loutfy. The Defence also called a single witness,

[1] Appendix A to this factum at **Tab 1**

Professor Douglas Farrow, expert in Judeo-Christian theology. The respondent did not testify.

Ex.1: Agreed statement of fact, Appeal Book, Tab 37[2]

(B) <u>The respondent's police statement</u>

[14] In his statement to the police on June 22, 2018, the respondent:

- described himself as a Christian activist and executive director of the "Christian Truth Activists", a group started by him;
- related his experience as a nurse in Toronto, working with hundreds of gay men dying of HIV;
- described the flyer as conveying a "political message";
- explained how he became a Christian;
- described himself as a "prosecuted Christian" who was "going to jail for speaking out against the homosexual agenda";
- stated that he ran for mayor in Saskatchewan in 2001 or 2002 and 2007;
- talked about his "FreeNorthAmerica" website and his outstanding civil law suit;
- estimated that he had delivered half a million flyers to mailboxes across Canada, advancing his views about homosexuality and abortion;
- explained that he "would love to influence especially young people to abstain from same sex practices";
- responded, "no" when asked whether there was anything positive to be said about people in same-sex relationships;
- stated there is "increasing censorship in Canada on these types of issues and I think the message itself could very well be punished by a judge that does not believe in free speech anymore."

Ex. 6a: Transcript of statement of Mr. Whatcott, June 22, 2018, Appeal Book, Tab 43

[2] Appendix B to this factum at **Tab 2**

(C) Evidence of Dr. Mona Loufty

[15] Dr. Mona Loufty was qualified as an expert in the area of infectious diseases. She was called by the Crown to testify about medical claims and information in the flyer. Dr. Loutfy prepared a report and a supplementary report in advance of the trial.[3] Based on these reports, it was anticipated that Dr. Loutfy would testify some of the information was true, some of it was false and some of it could be interpreted as misleading. The Crown submitted her evidence was relevant to three issues: (1) intent; (2) whether the flyer promoted hatred; and (3) whether the defence of truth under s. 319(3)(a) applied. The Defence conceded the admissibility of Dr. Loufty's evidence.

M. Loufty, Vol. II, pp. 2-18
Ex. 7: CV of Dr. Mona Loutfy, Appeal Book, Tab 44

[16] The Defence argued that Dr. Loutfy showed a bias. The trial judge found that she "did act as something of an advocate" but stressed that "this is hardly the worst case of advocacy by an expert." The trial judge concluded that "her bias detracted somewhat from her evidence."

Reasons for Judgment, Appeal Book, Tab 3 at para. 51

[17] The trial judge further found that "in cross-examination it became clear that many of the flyer's medical assertions were either in the ballpark of plausible or, at worst, an exaggeration. Some of course, were untrue." Although he ultimately concluded that Dr. Loufty's evidence did not assist in determining whether the flyer promoted hatred, the trial judge did accept that there were several inaccuracies in the medical assertions; specifically he found:

1) The assertion that men who have sex with men are at high risk of acquiring parasitic diseases (cryptosporidium, cystoisopora belli and microsporidia) is false;
2) The assertion that "death" is one of "the sad and sordid realities of the homosexual lifestyle" is "simply wrong for the 85-90% of gay men in Ontario who are HIV negative" and

[3] *Ex. A: First Report of Dr. Mona Loutfy, March 24, 2020*, Appeal Book, Tab 67
Ex. B: Second Report of Dr. Mona Loutfy, May 1, 2020, Appeal Book, Tab 68

"an exaggeration for the 10-15% of gay men in Ontario who are HIV positive".

3) The photograph of a deceased patient on what appears to be an autopsy table – taken from the website "cutedeadguys.net" – described as an "AIDS fatality" was unlike any case Dr. Loutfy had ever seen. The trial judge remarked that "the photograph is clearly designed to inspire fear of the consequences of AIDS infection." In his view, it was a "close call" as to whether this photograph promoted hatred.

Reasons for Judgment, Appeal Book, Tab 3, paras. 52-63

(D) Evidence of Professor Douglas Farrow

[18] On consent, the defence called religious expert, Professor Farrow, a professor of theology and ethics, to review the flyer and the respondent's blogs. He was asked to identify elements in these pieces that were consistent with the Judeo-Christian tradition.

D. Farrow, Vol. V, pp. 3-7
D. Farrow, Vol. VI, pp. 6-8

[19] Professor Farrow testified that the flyer adheres to the Christian tradition. In his opinion, it contains the following religious elements:

- The flyer refers to God's "divine plan" for human sexuality and familial relations -- a monogamous and long-lasting marriage between a man and woman that results in children -- and the consequence of not governing oneself according to the plan. The flyer is focused on sexual deviation as a particular form of behaviour that is not oriented to God's plan. Non-monogamous and non-procreative sex is "immoral"; a "sin against nature as well as a sin against God". In Professor Farrow's opinion, the sentence, "disease, death and confusion are the sad and sordid realities of the homosexual lifestyle", fits into these teachings.
- The flyer juxtaposes the virtues that Christians believe lead to human flourishing and happiness, and the "vices" that tend to undermine human flourishing or lead to "human withering" and "corruption". The vices are "inherently disordered" behaviour. These acts are "unnatural vices". They "contradict the core nature of human sexuality".
- The sentence, "the rejection of true marriage is also in direct opposition to God's Law, and it's our duty to warn you that those who choose to rebel against the God who created them, do so at their eternal peril", has roots in Christian thought. It is "warning" that if you alter

or abandon the healthy human sexuality intended by God, bad things will happen. In Professor Farrow's view, the warning in the flyer is part of the Christian "duty to warn" which requires covenant people to warn their neighbours to pursue good and avoid evil.

- The flyer extends an "invitation into Christianity." The duty to warn and invitation go "hand in hand". The warning is designed to highlight the invitation to restoration, showing what is wrong and how it can be made right.
- The flyer ends with a quotation from Peter, one of Jesus' first apostles. The apostles were told to warn others --- but not attack them when delivering their message.

D. Farrow, Vol. V, pp. 16-24, 26-35, 37-40, 44-46
D. Farrow, Vol. VI, pp. 15-19, 24-27, 29-31

[20] Professor Farrow also identified religious aspects in the respondent's blogposts documenting his activities at the Pride parade:

- The reference to "spiritual forces of wickedness" is from a religious story which warns people to be alert to larger issues or forces that need to be combatted spiritually.
- The reference to "Christian commandos" and the incognito work of the "gay zombies" draws a parallel to the undercover operation of Joshua and his spies. These people launched a "spiritual assault" on a city. Similarly, in Professor Farrow's opinion, the reference to the quotation by the Corinthians shows that the author of the flyer is trying to blend with the audience so that he can get his message across.
- Professor Farrow agreed with the respondent that it is "enormous sacrilege" to put a cross near sex organs.
- The photo of the child at Pride with the quotation about dropping someone in the sea with a stone around their neck is a comment by the respondent about the exposure of children to "deviant sexual behaviour". This is in line with how harshly Jesus treated those who led children astray.
- The respondent's statement, "we had no opposition to our delivery of the much needed 3,000 zombie safe sex packages, which contained accurate truth on the harms of the homosexual lifestyle, and the good news that Jesus died for the redemption of homosexuals!", is a comedic element. In Professor Farrow's view, the respondent is saying that the recipients of the flyer are included in the "happy ending". To Professor Farrow, no real

division is made between those handing out the flyer and those receiving it. This is the larger narrative that informs the flyer.

D. Farrow, Vol. V, pp. 53-64, 66-69

[21] In cross-examination by the Crown, Professor Farrow testified:

- The Christian tradition does not justify the promotion of hatred.
- Neither the Bible nor Catholic tradition holds that being gay is a sin and he does not hold that view.
- "Sexual anarchy" is not used in Christian texts.
- No biblical text states that disease and confusion are the natural state of gay people.
- Lying (as the respondent did on his Pride application) is generally considered a sin.
- The Christian duty to warn is a "message of love". It should not include deceit or trickery. And Christians cannot insult or denigrate others personally.
- The blogpost frequently uses the term "sodomite". This is a reference to the biblical cities of Sodom and Gomorrah which were destroyed by God for their "wickedness". It could be used pejoratively.
- The reference to "strike the dark forces" in the blog is part of Christian tradition that equates darkness with Satan, evil, or wickedness.
- The flyer and blog are different genres. The flyer is directed to "others" whereas the blog is directed to "insiders".

D. Farrow, Vol. VI, pp. 15-16, 21-33, 38-42, 46

(E) <u>Evidence of Professor Nicholas Mulé</u>

[22] Before trial, the Crown applied to admit expert opinion evidence on the issue of whether the respondent's flyer promoted hatred. The Crown proposed Professor Mulé as an expert in anti-gay discrimination. The Defence opposed this evidence. A *voir dire* was held. Professor Mulé testified and his two reports were filed as exhibits.

N. Mulé, Pre-trial applications, June 9, 2021, pp. 55-56
Ex. 2: Report of Dr. Nicholas Mulé, December 15, 2019, Appeal Book, Tab 12
Ex. 3: Supplementary report of Dr. Nicholas Mulé, Appeal Book, Tab 13

[23] Professor Mulé's evidence was on three "tropes" or themes of anti-gay discrimination:

religion, law, and health. He explained these tropes have been the subject of considerable academic commentary and literary review, and there is general consensus about their existence and effect.

N. Mulé, Pre-trial applications, June 9, 2021, pp. 55-57
Ex. 2: Report of Dr. Nicholas Mulé, December 15, 2019, Appeal Book, Tab 12

[24] First, Professor Mulé testified about religion and the "immorality" trope. He explained how religious organizations have opposed and "actively repressed" same-sex relationships, labelled them "immoral" or "sinful", and "vilified" people with same-sex desires. In addition, some religious institutions have "deterred" LGBTQ2-SI individuals from joining their congregations, which is particularly hurtful to religious members of these communities.

N. Mulé, Pre-trial applications, June 9, 2021, pp. 55-57
Ex. 2: Report of Dr. Nicholas Mulé, December 15, 2019, Appeal Book, Tab 12

[25] Second, Professor Mulé addressed the law and "criminality" trope -- the stereotype that LGBTQ2-SI individuals are criminals. Professor Mulé explained that the law has been used as a tool to discriminate against gay men. Same-sex activity was criminalized in Canada until 1969 and men were targeted more than women. This criminalization was "oppressive" and "demonized" LGB communities. Even when same-sex sexual behaviour was decriminalized, there remained greater limitations on it than for opposite-sex sexual behaviour (e.g. the age of consent was higher, there could only be two parties to the activity, and it had to be done in private). In addition, until the late 1990s and early 2000s, the law prohibited same-sex couples from adopting children or marrying. It was only in the mid-1980s when sexual orientation was identified as a ground of equality that LGBTQ2-SI populations were legally recognized. Finally, this trope includes a long history of conflating pedophilia with LGBTQ2-SI communities. Gay men, in particular, have been targeted by this stereotype. The suggestion is that gay men are sexually attracted to children and are trying to "recruit" children into "the gay lifestyle". As a result of this discriminatory belief,

many gay and lesbian teachers have been fired and LGBTQ2-SI individuals have experienced difficulty obtaining work in positions that involve children.

N. Mulé, Pre-trial applications, June 9, 2021, pp. 52-54, 57, 62-63
Ex. 2: Report of Dr. Nicholas Mulé, December 15, 2019, Appeal Book, Tab 12

[26] Third, Professor Mulé explained the stereotype that LGBTQ2-SI individuals are "sick", with health being used to pathologize and moralize their behaviour. Same-sex behaviour was categorized as a psychiatric illness in the DSM until 1973 and transgenderism is still labelled a mental disorder. These diagnoses legitimized conversion therapy – *i.e.* the attempt to convert an individual's sexual orientation away from same-sex desires. Professor Mulé also underscored how the history of HIV and AIDS impacted the perception of gay men as "sick". Media and religious sectors coined the term, "gay plague". The narrative was that gay men are sick people who engage in immoral sexual behaviours and AIDS was the price they paid for that lifestyle. Many gay and bisexual men died needlessly because the government did not direct public health resources to addressing the issue.

N. Mulé, Pre-trial applications, June 9, 2021, pp. 57-61
Ex. 2: Report of Dr. Nicholas Mulé, December 15, 2019, Appeal Book, Tab 12

[27] Applying his expertise, Professor Mulé opined on how these tropes were connected to statements in the flyer. He identified the religion and health tropes as most prominent:

- The flyer "denigrates" LGBTQ2-SI people by suggesting they are "sinners" or "engaging in sin" and by warning that they will be in "eternal peril" if they do not follow "natural law". This is "particularly insensitive" to religious members of the LGBTQ2-SI communities.
- The terms "sodomy", "sodomites", and "sodomized" are "pejorative" and "salacious". These terms are used to "separate out" people who engage in penetrative, non-procreative sexual activity, and judge them as "selfish" because their sexual activity does not produce children and is not centered on family-making and society building. As such, this behaviour

cannot be supported religiously or culturally. And as a result of this label, "harassment" and "discrimination" against LGB individuals have been legitimized.

- The picture of the two young men without pupils and blood dripping from their mouths suggests that same-sex activity is "devious".
- In the text box on the flyer on the topic of HIV and STIs, there is a "very jarring" picture, statistics, and the statement: "these diseases are almost exclusively homosexual in nature", which sends a negative message about same-sex activities. The use of generalizations and lack of contextualization leaves a "false impression that same-sex behaviours result in deadly viruses".
- The second text box refers to the AIDS epidemic in a way that "harkens back to a time when the illness was terminal", particularly with the mortality statistics. Again, the flyer lacks contextualization. There is no mention of what living with HIV is like today, particularly in Canada where there are advanced medical interventions to manage this chronic illness. This sends a "troublesome message" to the public. The absence of context "appears to be a tool to create fear that is unnecessary when one considers a deeper level of understanding of the issues".
- The respondent uses "extreme and disturbing pictorials designed to shock and be off putting to the reader". In Professor Mulé's expert opinion, "[t]he linking of such images with inaccurate and unsubstantiated content combines to create a message that denigrates trans people and 'homosexuals' as diseased and sick". For example, the picture of the man with oral warts is used to "instill fear" in individuals who have oral sex.

N. Mulé, Pre-trial applications, June 9, 2021, pp. 62-68, 70-71
Ex. 2: Report of Dr. Nicholas Mulé, December 15, 2019, Appeal Book, Tab 12

[28] The criminality trope is also present in the flyer which promotes the stereotype conflating gayness with pedophilia and the discriminatory belief that gay men cannot be trusted around children. Relatedly, the flyer alleges that the Canadian Prime Minister, former member of Cabinet Bill Graham and the Liberal Government support or engage in pedophilia because they support LGBTQ2-SI communities' human rights.[4] The attack on Mr. Graham is done to "demean a once

[4] For example, the respondent writes: the PM is a "chronic attendee of homosexual pride parades"; the liberal

'powerful' member of parliament by making sinister links to the LGBT2-SQI communities". Similarly, the flyer accuses two people in power, former Ontario Premier Kathleen Wynne (labelled a "lesbian") and former Deputy Education Minister Benjamin Levy (labelled a "convicted child pornographer with an incest fetish"), of having a subversive agenda when legislating the province's new sexual education curriculum. One that would harm children and youth and lead to "sexual anarchy".

N. Mulé, Pre-trial applications, June 9, 2021, pp. 62-64
Ex. 2: Report of Dr. Nicholas Mulé, December 15, 2019, Appeal Book, Tab 12

[29] Further, the sentence "death, disease, and confusion are the sad and sordid realities of the homosexual lifestyle", found at the bottom of the flyer is discriminatory when viewed in context. First, the death image is "very significant" for LGBTQ2-SI communities whose members are often not well-represented in film and media. They are relegated to small roles and "denigrated characters". If they feature more prominently, the character often dies. There is also a high suicide rate among LGBTQ2-SI people, particularly youth. The AIDS epidemic also led to very high death rates for gay men. The link to death frames gay men as a "hopeless community that has no real direction" and whose end will be death. Second, the mention of disease is problematic because of the HIV/AIDS epidemic and the way the crisis was framed as a "gay issue". Last, the reference to "confusion" is discriminatory because LGBTQ2-SI individuals feel amplified confusion about their identities given that they are a minority population. It can be isolating and difficult to find role models that share your identity. In all, this sentence "paint[s] a very dark picture" and does not recognize how much has happened in society to recognize these populations.

N. Mulé, Pre-trial applications, June 9, 2021, pp. 68-70
Ex. 2: Report of Dr. Nicholas Mulé, December 15, 2019, Appeal Book, Tab 12

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government "has a long and sordid history of homosexual activism and in enabling and actively participating in child sexual abuse"; and "Former Liberal Defense Minister Bill Graham sodomized a 15 year old male prostitute".

[30] Finally, Professor Mulé addressed the respondent's use of the term "homosexual". He explained that this term is not used by members of the communities because it has discriminatory roots. It is a historical, identity-based term that was used to classify individuals with same-sex desires as "mentally disordered".

N. Mulé, Pre-trial applications, June 9, 2021, pp. 58-59, 70

[31] In short, Professor Mulé summarized that the flyer supports opposite-sex sexual behaviour as normative, natural and acceptable, whereas same-sex activity is framed in negative terms. It is tied to "illness" and "disease" and to "sexual behaviours most society abhors" – pedophilia. It also expresses negative views towards individuals who transition their gender. The flyer urges those who have same-sex desires to abstain from them and it attempts to impose one kind of lifestyle over another. The respondent tries to "belittle" or "disenfranchise". Professor Mulé also remarked on the way the flyer was disseminated: using "deception" at a celebratory event put on by and for the very group the respondent was targeting.

N. Mulé, Pre-trial applications, June 9, 2021, p. 71
Ex. 2: Report of Dr. Nicholas Mulé, December 15, 2019, Appeal Book, Tab 12

PART III: APPELLANT'S ISSUES

(A) The trial judge erred by concluding that the statements communicated by the respondent were not "hatred" within the meaning of s. 319(2)

(1) Overview of the appellant's position

[32] In the trial judge's view, the subject material in this case, although "offensive", did not comprise hatred within the meaning of section 319(2) of the *Criminal Code.* That finding was unreasonable. It reflects misapplication of the legal standard for "hatred".

[33] The statements communicated by the respondent were strong expressions of hatred against gay men. They resonated with themes long used to justify the maltreatment and disenfranchisement of members of this vulnerable group. The message conveyed in the flyer is that gay men are unhealthy, unwholesome and repellant; antithetical to natural law, without social value and destructive of mainstream heterosexual matrimony. While purporting to support "safe sex" practices, the pamphlet offers no such advice. Instead, it advocates the outright eradication of sexual practices which are integral to gay sexual orientation and identity.

[34] A reasonable person, aware of the context and circumstances surrounding the expression would, without hesitation, view it as exposing gay men to hatred. The trial judge erred his application of this legal standard to the circumstances of this case.

(2) The meaning of "hatred" in section 319(2)

[35] The *Criminal Code* does not define "hatred". In *Keegstra*, the Supreme Court of Canada considered its meaning in the context of s. 319(2) which proscribes "hate propaganda". Dickson CJC, 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 elucidated the meaning of "hatred" in s. 319(2):

> 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.

And:

> … 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 CanLII 24 (SCC) at paras. 17, 115-116

[36] The SCC has also expounded on the meaning of "hatred" in the context of human rights legislation. In *Whatcott*, Rothstein J for a unanimous Court stated:

> In my view, "detestation" and "vilification" aptly describe the harmful effect that the [Human Rights] Code seeks to eliminate. Representations that expose a target group to detestation tend to inspire enmity and extreme ill-will against them, which goes beyond mere disdain or dislike. Representations vilifying a person or group will seek to abuse, denigrate or delegitimize them, to render them lawless, dangerous, unworthy or unacceptable in the eyes of the audience.

Saskatchewan (Human Rights Commission) v. Whatcott, 2013 SCC 11 at para. 41

[37] 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 the protected group to hatred."

Sask HRC v. Whatcott, ibid at paras. 56, 59

[38] The Crown is not required to prove that actual harm resulted from the communication in question. This element of the offence will be made out where it is proven that the statement amounted to hate-promotion against the targeted group.

R. v. Keegstra, supra at paras. 113-114
R. v. Andrews, [1990] S.C.J. 130 (S.C.C.) at para. 20

[39] In *Whatcott*, the Court provided guidance on the "types of expression and devices used to expose groups to hatred." These "hallmarks of hatred" were summarized in a non-exhaustive list by the Canadian Human Rights Tribunal in *Warman v. Kouba* as follows:

a. The targeted group is portrayed as a powerful menace that is taking control of the major institutions in society and depriving others of their livelihoods, safety, freedom of speech and general well-being.

b. The messages use "true stories", news reports, pictures and references from purportedly reputable sources to make negative generalizations about the targeted group.

c. The targeted group is portrayed as preying upon children, the aged, the vulnerable, etc.

d. The targeted group is blamed for the current problems in society and the world.

e. The targeted group is portrayed as dangerous or violent by nature.

f. The messages convey the idea that members of the targeted group are devoid of any redeeming qualities and are innately evil.

g. The messages communicate the idea that nothing but the banishment, segregation or eradication of this group of people will save others from the harm being done by this group.

h. The targeted group is de-humanized through comparisons to and associations with animals, vermin, excrement and other noxious substances.

i. Highly inflammatory and derogatory language is used in the messages to create a tone of extreme hatred and contempt.

j. The messages trivialize or celebrate past persecution or tragedy involving members of the targeted group.

k. Calls to take violent action against the targeted group.

Sask HRC v. Whatcott, supra at paras. 44-45
Warman v. Kouba, 2006 CHRT 50 at paras. 24-81

[40] In *Whatcott*, the SCC held the Saskatchewan Court of Appeal erred by concluding that two flyers distributed by the respondent did not amount to hatred. The flyers protested the inclusion of information about "homosexuality" in elementary school curricula. Rothstein J, writing for the Court, described the flyers as combining many of the "hallmarks" of hatred identified in the case

law. He stated:

> The expression portrays the targeted group as a menace that could threaten the safety and well-being of others, makes reference to respected sources (in this case the Bible) to lend credibility to the negative generalizations and uses vilifying and derogatory representations to create a tone of hatred. It delegitimizes homosexuals by referring to them as filthy or dirty sex addicts and by comparing them to pedophiles, a traditionally reviled group in society.

Sask HRC v. Whatcott, *supra* at para. 187
See also:
R. v. Andrews, *supra* at paras. 11-12
R. v. Harding (2001), 52 O.R. (3d) 714 (SCO)
R. v. Popescu, 2020 ONCJ 427

(3) The trial judge's errors in this case

[41] The trial judge saw this as the kind of "borderline case" identified by Chief Justice Dickson 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". Second, the flyer was "not sufficiently misleading so as to be inflammatory."[5]

[42] The trial judge failed to recognize clear hallmarks of homophobic hatred in the flyer. Like the flyers considered by the SCC in *Whatcott*, the pamphlet portrays gay men as threatening to the social order and well-being of others. It makes negative generalizations and delegitimizes the gay community. In particular:

(i) Political support for the targeted group is described as "sordid" and leading to great harm.

[43] Justin Trudeau is described as the leader of a party "with a long and sordid history of homosexual activism and both enabling and actively participating in child sexual abuse." The pamphlet further states that "pro-homosexual political correctness" compromises "the welfare of exploited boys."[6]

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[5] *Reasons for Judgment*, Appeal Book, Tab 3, para. 27
[6] Although the Crown at trial did not rely on this evidence, the trial judge, during an exchange with Defence counsel acknowledged that the pamphlet "seems to conflate pedophilia with homosexuality." Defence

(ii) Acceptance of the targeted group is depicted as destructive of social values and institutions.

[44] The advancement of gay rights is portrayed as a "destructive journey towards sexual anarchy and homosexual inspired oppression." It is described as "the rejection of God's plan of life long heterosexual matrimony and replacing the virtues of chastity, fidelity, unconditional love and life long commitment to one's spouse, with promiscuity, polyamory, pornography and homosexuality."

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

[45] The pamphlet states: "Homosexuality is incompatible with human nature. Disease, death and confusion are the sad and sordid realities of the homosexual lifestyle." This is reinforced by a derogatory, photographic representation of two "gay zombies" embracing. There is blood dripping from their mouths. The pamphlet further claims that "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."

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

[46] The pamphlet promotes the idea that gay sexual practices lead to serious disease and death. Medical assertions and photographs are used to support this premise. The trial judge agreed with the Crown that some of the statements are inaccurate and some are misleading.[7] The message conveyed is that gay sex is unhealthy and life-threatening. Photographs purporting to show cases of "genital warts in the mouth", "anal warts", and an "AIDS fatality" would be seen by reasonable people as alarming, frightening and repulsive.

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

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counsel did not dispute this. – *Crown closing argument,* Vol. VII, pp. 17-18; *Defence closing argument,* Vol. VIII, p. 59

[7] *Reasons for Judgment,* para. 27

[47] The only solution proposed by the pamphlet is for gay men to "abstain from the homosexuality".

[48] The pamphlet conveys that the gay community is undeserving of fair and equal treatment because it is a toxic and destructive force that endangers the values and well-being of the rest of society. It portrays gay life as a life of danger, disease and debauchery, without any redeeming value. It further conveys that the only way to avoid the "sordid realities of the homosexual lifestyle" is for gay male sexual practices to stop. Stating that gay male sex should cease to exist advocates the eradication of this group since sexual orientation and practice are central to its identity. Claiming that a group is undeserving of fair and equal treatment in our society demunanizes and delegitimizes its members. Claiming that a group should no longer exist, advocates its extinction. These ideas reflect the most intense vilification and detestation. It is difficult to conceive of more hateful sentiments.

HRC v. Whatcott, supra at paras. 121-124

[49] The pamphlet implicitly asserts that same-sex desire involves choice and that gay men can simply choose not to be gay. As recognized by the Supreme Court of Canada in *Egan*, sexual orientation is an immutable, deeply personal characteristic that is "either unchangeable or changeable only at unacceptable personal costs". To suggest that gay men can and should choose not to be gay because their choice to be gay is destructive and without value is to deny their human dignity and right to equality. It is a powerful expression of hatred.

Egan v. Canada, 1995 CanLII 98 (SCC) at paras. 5, 173
Halpern v. Canada (Attorney General), [2003] O.J. No. 2268 (Ont.C.A.) at paras. 7, 83

[50] The hateful nature of the messaging in this case is intensified by its relevant context: a longstanding history of hatred and discrimination against members of the gay community; and the relatively recent recognition of their equality rights and protection as a vulnerable group. In the

past, religious doctrine has been used to justify hateful, homophobic views. Laws have sanctioned egregious inequality and unfair treatment of members of the gay community. Homophobic myths and stereotypes have permeated and continue to permeate the collective conscience; for example, beliefs that gay men are predatorial, diseased, promiscuous, unnatural, immoral and corrosive of "wholesome" heteronormative societal values.

HRC v. Whatcott, *supra* at para. 169

[51] The trial judge's conclusion that this was a "borderline case" – "in the grey zone between legitimate free expression and hate speech"[8] – was based on error in the application of legal principle. The only reasonable conclusion, applying the objective standard mandated by the jurisprudence, was that the subject material promoted hatred against gay men.

(B) <u>The trial judge erred by excluding expert evidence relevant to establishing the hateful nature of the respondent's flyers.</u>

(1) Overview of the appellant's position

[52] The trial judge wrongly excluded Professor Mulé's expert opinion. The judge erred: (i) in his application of the necessity criterion and (ii) in his assessment of the prejudicial effect of this evidence. Accordingly, deference is not owed to his ruling. Professor Mulé supplied the court with reliable expert opinion evidence that could have assisted the trier of fact. His evidence was highly probative of the core trial issues and had limited prejudicial effect. It should have been admitted.[9]

R. v. RD, 2014 ONCA 302 at para. 52
R. v. Shafia, 2016 ONCA 812 at para. 248

(2) The trial judge's ruling respecting Professor Mulé's expert evidence

[53] The trial judge found Professor Mulé "has knowledge and experience beyond that of an

[8] *Reasons for Judgment,* paras. 27, 39
[9] Professor Mulé's opinion evidence is summarized above in the *Part II: Appellant's Summary of the Facts* at *(E) Evidence of Professor Nicholas Mulé.*

ordinary person in the area, broadly, of discrimination against LGBT2-SQI people", disagreeing with the defence on this point. He was also satisfied that Professor Mulé would make a "good-faith effort to give unbiased evidence", contrary to the defence position. The trial judge appears to have accepted the proposed evidence was relevant. However, the trial judge ruled that Professor Mulé's evidence was inadmissible because he determined it was unnecessary and its prejudicial effect overwhelmed its probative value.

Ruling on Expert Evidence, Appeal Book, Tab 5, paras. 3, 36, 38, 57, 66, 80-81, 84-85

[54] On the necessity criterion, the trial judge held that Professor Mulé'would not provide information likely to be outside the jury's experience. The trial judge agreed with the Crown that "the specific detailed linkages between the tropes of health and religion and anti-gay discrimination as found in the academic literature are unlikely to be within the knowledge and experience of the trier of fact". But, he decided that "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". In the end, the trial judge was satisfied that the contents of the flyer and the circumstances surrounding its distribution would furnish the jury with enough "factual foundation" to make its decision.

Ruling on Expert Evidence, Appeal Book, Tab 5, paras. 38, 43, 46-50, 57

[55] The trial judge also held the evidence was inadmissible when he conducted the final balancing required by *R. v. Mohan* (SCC). Finding the evidence was not necessary, he concluded it had "no benefit". He then went on to evaluate "the significant costs" of admission, reasoning that the evidence would 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". As with his ruling on prior discreditable conduct, the trial judge was

"concerned that this will become a case about Mr. Whatcott's religious and political beliefs". The "danger" was the jury would "debat[e] the merits of his beliefs". Similarly, the trial judge was concerned "[t]he jury may also find itself debating Mr. Whatcott's right to freedom of expression – a worthy subject of debate but not in the jury room in this case". Or debating "'left-wing progressive values' versus right wing fundamentalist religious values'".

Ruling on Expert Evidence, Appeal Book, Tab 5, paras. 82-89

(3) The trial judge's errors

(i) The trial judge wrongly decided that Professor Mulé's evidence was not necessary

[56] The trial judge was wrong to conclude that Professor Mulé's evidence was not necessary in the circumstances of this case.

White Burgess Langille Inman v. Abbott and Haliburton Co., 2015 SCC 23 at paras. 19, 22-24
R. c. J.J., 2000 SCC 51 at para. 56
R. v. Mohan, [1994] 2 S.C.R. 9 (S.C.C.) at paras. 25-27
R. v. A.K., 1999 CanLII 3793 (ON CA) at paras. 90-94

[57] First, 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. This perspective situated the respondent's communication in its social and historical context. Importantly, this information is tied to one of the rationales for prohibiting hate speech: "it causes emotional distress to the members of a vulnerable group".

Saskatchewan (Human Rights Commission) v. Whatcott, 2013 SCC 11 at paras. 35, 52-53, 56, 59, 169, 174, 178, 191
Ward v. Quebec, 2021 SCC 43 at paras. 62, 75, 83-84
Mugesera v. Canada, 2003 FCA 325

[58] The identifiable group is uniquely positioned to report on the impact of the speech (i.e. whether it causes feelings of "abhorrence, delegitimization and rejection"), drawing from its collective experiencet. This perspective may strengthen or diffuse the hatefulness of the respondent's

communication. It is not information that would presumptively be obvious to a trier of fact. Professor Mulé's specialized knowledge on this point would have assisted the trier of fact to "draw reliable inferences from the facts".

Saskatchewan (Human Rights Commission) v. Whatcott, 2013 SCC 11 at para. 57
R. v. Oppong, 2021 ONCA 352 at para. 50
R. v. D.D., 2000 SCC 43 at para. 28
R. v. Mills, 2019 ONCA 940 at para. 38

[59] Second, this evidence was responsive to Professor Farrow's evidence, which the trial judge admitted. Without it, 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.

[60] Professor Farrow provided exculpatory evidence relevant to the meaning of statements in the flyer and to intent. He opined that some parts of the flyer are in line with Christian scripture and values. He also testified that the respondent may have been fulfilling his Christian mission and duty to warn when he wrote and distributed the flyer. His evidence supported inferences that the respondent did not promote hatred and did not intend to promote hatred. He acknowledged that much of the flyer is not rooted in Christian thought or scripture.[10]

[61] Professor Mulé's opinion assisted in exposing the limits of Professor Farrow's evidence. Professor Mulé demonstrated that the respondent played on classic homophobic tropes: specifically, the view that gay men are disgusting, morally inferior, corrosive to Christian morals, and dangerous to children/pedophilic. In this way, Professor Mulé's evidence assisted with interpreting the meaning and emotion the flyer conveys.

Lund v. Boissoin, 2012 ABCA 300 at para. 72
See also: *Ward v. Quebec,* 2021 SCC 43 at para. 85
Warman v. Kouba, 2006 CHRT 50 at para. 30
Saskatchewan (Human Rights Commission) v. Whatcott, 2013 SCC 11 at para. 140

[10] E.g. the idea of "sexual anarchy" is not found in the Christian tradition; the belief that gay men should die or that disease and confusion are the "natural state" of gay individuals is not a biblical reference; and Christians cannot rely on the duty to warn to justify actions that insult or denigrate others.

R. v. Popescu, 2020 ONCJ 427at paras. 31-42.
R. v. Harding, 2001 CanLII 21272 at paras. 45-49 (Ont.C.A.), leave denied [2002] S.C.C.A. No. 95 (S.C.C.)
Mugesera v. Canada, 2003 FCA 325 at para. 103

[62] Third, excluding the expert opinion of Professor Mulé risked reliance on unconscious biases about gay men when the trier applied "common sense". Professor Mulé exposed deeply embedded, false narratives and stereotypes about gender and sexually diverse populations. His evidence could assist the trier with consciously acknowledging them and purging them from their assessment. The expert assistance of Professor Mulé allowed the trier to approach its task from the perspective of a truly "reasonable person" – objective and unclouded by unconscious bias. Importantly, Canadian courts have acknowledged the need to correct "common sense" assumptions founded on stereotypes in other contexts to ensure the reliability of verdicts.[11]

[63] Fourth, the admissibility of this kind of evidence is supported by precedent. Although the admissibility of expert evidence is a case-specific analysis, other courts have recognized the utility of expert evidence of this nature to contextualize an accused's communications, when determining if they are hate speech.[12] Similarly, this kind of evidence has been admitted in related contexts.[13]

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[11] For instance, when assessing: the behaviour of sexual assault survivors (*R. v. Ewanchuk*, 1999 CanLII 711 (S.C.C.).; *R. v. Seaboyer*, [1991] 2 S.C.R. 577 (S.C.C.); *R. v. Osolin*, 1993 CanLII 54 (S.C.C.); *R. v. A.R.J.D.*, 2018 SCC 6); the interaction between racialized individuals and police (psychological detention) (*R. v. Le,* 2019 SCC 34); and cross-cultural interpretations of human behaviour (*R. v. B.G.,* 2022 ONCA 92).

[12] For example: *R. v. Sears and St. Germaine*, 2019 ONCJ 104 (experts in anti-Semitism and misogyny); *Whatcott v. Saskatchewan Human Rights Tribunal*, 2010 SKCA 26 (expert in discrimination against gay and lesbian individuals; and expert in Lutheranism); *Hellequist v. Owens,* 2006 SKCA 41 (expert in human sexuality and experts in Christianity, Judaism, Catholicism, and Lutheranism); *Mugesera v. Canada*, 2003 FCA 325 (experts in the modern history of Rwanda and genocidal speeches); *R. v. Harding*, 1998 CarswellOnt 2521 (Ont. Ct. J.), leave denied (expert in the tenents of the Quran); *R. v. Keegstra*, 1994 CarswellAlta 210 (ABCA) (expert in Judaism); *Saskatchewan (Human Rights Commission) v. Bell*, 1994 CarswellSask196 (Sask.C.A.) (expert in "ethnic and race relations and, in particular, the Chinese immigrants to Canada", expert in the Sikh religion, and expert in multiculturalism)

[13] For example: *R. c. Namough,* 2010 QCCQ 943 (expert in al-Queda and jihadism called on sentencing); *R. v. Vrdoljak*, [2002] O.J. No. 1331 (Ont. Prov. Ct.), appeal allowed on other grounds, 2003 CarswellOnt 2731 (Ont.C.A.) (expert in racism and hate crimes called to give evidence about motive); *R. v. Nash*, [2002] O.J. No. 3843 (On. Gen. Div.) (expert in white supremacy called on sentencing).

R. v. Shafia, 2016 ONCA 812 at para. 258
R. v. Oppong, 2021 ONCA 352 at para. 49

(ii) The trial judge overemphasized the potential danger of this evidence.

[64] The trial judge found that the evidence was overly prejudicial. He worried that the proposed evidence risked leading the jury into debates about peripheral topics, like the merits of the respondent's religious and political beliefs. The trial judge erred in relying on this consideration to exclude Professor Mulé's expert evidence.

Expert Evidence Submissions, Pre-trial applications, July 14, 2021, pp. 22-24

[65] Professor Farrow, like Professor Mulé, gave "soft" expert evidence. 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 (as the trial judge observed). He 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. His evidence was also focused. He commented on the contents of the flyer and whether the messages expressed in the flyer contained the tropes of discrimination experienced by gay men. Professor Mulé never invited the trier to debate whether Christianity or right-wing conservatism, generally speaking, promote hatred.

Ruling on Expert Evidence, Appeal Book, Tab 5, paras. 58-66

[66] Moreover, and contrary to the trial judge's finding, the core function of the trier in this case *was* to debate the degree to which Mr. Whatcott's personal beliefs are hateful. This was not a distraction. The trier of fact had to consider whether the respondent's beliefs, as expressed in the flyer, met the definition of hate speech. Any risk of impermissible reasoning would have been more than adequately curtailed by instructions focusing the jury on the substantial legitimate relevance of this evidence and cautioning against its misuse.

Ruling on Expert Evidence, Appeal Book, Tab 5, para. 87

(C) The trial judge erred by excluding evidence of the respondent's prior discreditable conduct.

(1) Overview of the appellant's position

[67] The Crown tendered some of the respondent's other publications including social media blogs from 2018-19 and printed flyers distributed by him in Saskatchewan in 2001. 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. The respondent's intensely negative attitude toward gay men was evidence of motive, furthering the inference that he intended to promote hatred against them. The Saskatchewan flyers - found by the Supreme Court of Canada in *Saskatchewan (Human Rights Commission) v. Whatcott* to promote hatred – furnished particularly strong evidence relevant to proving intent.

[68] The Defence opposed the admission of this evidence and the trial judge agreed, holding that its prejudicial effect outweighed its probative value. The trial judge erred in his assessment of the probative value of this evidence. Correctly valuated, its probative value well exceeded any risk of prejudice. The evidence should have been admitted.

(2) The respondent's social media posts

[69] The Crown tendered ten social media posts made by the respondent in 2018 and 2019. These posts were itemized as appendices G to P in the Crown's application record.[14] In these posts, the respondent:

- Characterizes same-sex relationships as "unhealthy" and "deviant";
- Repeatedly uses the word "sodomites" to describe gay men;
- Repeatedly refers to "homofascism" to describe a political movement that advocates for

[14] *Pre-trial Ex.9: Crown application record re prior discreditable conduct*, Appeal Book, Tab 9, pp.418-480

gay equality and is destructive in nature;

- Similarly, refers to "the homosexual political agenda" and "homosexual activists" intent on "taking over government positions";
- Refers to "the harms of the homosexual lifestyle";
- Accuses "LGBT activism" as being responsible for this hate crime charge;
- Describes a participant marching in a Pride parade as a "freak";
- Describes "the Canadian LGBT lobby" as hating God and the truth.

(3) The "Saskatchewan" flyers

[70] The Crown also tendered flyers distributed by the respondent in Saskatchewan in 2000 and 2001. These flyers were the subject of a complaint to the Saskatchewan Human Rights Commission. The case made its way to the Supreme Court of Canada where the Court unanimously held that statements in two of the flyers exposed gay people to hatred.[15] In these flyers, the appellant protests the inclusion of same-sex relationships in the sexual education curriculum. Although his objection is ostensibly based on Christian religious doctrine, the respondent vilifies gay men as "filthy", diseased, destructive of wholesome values, corruptive of children, dangerous, perverse, pedophilic and predatorial.

(4) The trial judge's errors

[71] As submitted by Crown counsel at trial, this evidence was relevant to establishing motive. It supported the inference that the respondent had an intense and persistent animus toward gay men, making it more likely that his promotion of hatred against this group was intentional.[16] This

[15] *Sask. HRC v. Whatcott*, 2013 SCC 11 – flyers appended to judgment; *Appeal Book*, Tab 8, pp.244-5

[16] *Pretrial applications*, January 14, 2020, pp.8-9; pp.23-30; p.35
In its factum, the Crown also relied on the respondent's awareness of the SCC's declaration that the Saskatchewan flyers communicated "hatred" as fixing him with knowledge that similar material in the 2016 flyer also communicated hatred. This supported a finding of willful blindness to or subjective foresight of that consequence. *Applicant's factum*, Appeal Book, Tab 9, p. 406, paras. 38-39. In oral argument, the Crown did not advance this line of relevance. – *Pretrial applications, January 14, 2020,* p.77; p.80; pp.85-86

evidence bolstered the common sense inference of intent in the circumstances of this case. It was also relevant to rebutting the Defence position that the respondent's intention was to help gay men.[17]

> *R. v. Salah*, 2015 ONCA 23 at paras. 64-66
> *R. v. Jackson*, 1980 CanLII 2945 (ON CA) at para. 37

[72] With respect to the 2018-19 media posts, the trial judge ruled that this evidence was "not material" and "irrelevant to the issues the jury will have to decide." He found it was "not capable of demonstrating that Mr. Whatcott has an animus towards gay people."[18] The trial judge reached this conclusion because he incorrectly conflated the meaning of "animus" with "hatred" in section 319(2). The trial judge's reasons clearly evince this error:

> In this case, the proposed motive evidence must be capable of demonstrating the proposition that Mr. Whatcott hates gay people.[19]
>
> Thus, the proposed motive evidence must be evidence showing that Mr. Whatcott vilifies and detests gay people – in other words, an animus.[20]
>
> There is no question that the proposed motive evidence would be relevant and material (although still not necessarily admissible) if it did demonstrate that Mr. Whatcott hates gay people. If the evidence could demonstrate that Mr. Whatcott hates gay people, that could certainly show that he had a motive. In my view, however, the proposed motive evidence simply does not go that far.[21]

[73] "Animus" includes but is not limited to feelings of "hatred." Animus refers more broadly to evidence showing that the accused "possessed a specific tendency or intention to act against the victim." Such evidence is "highly relevant to the issues of motive and intent." The trial judge erred

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[17] The Crown submitted that the appellant's police statement could be relied on by the Defence to support a finding of innocent intention. – *Pretrial applications*, January 14, 2020, pp.19-22; p.34; pp.75-76. In his closing argument, Defence counsel did, as anticipated by the Crown, rely on the respondent's police statement as showing that he was motivated by concern for the well-being of gay men. – *Defence closing argument*, Vol. VIII, p.25, pp.29-31; p.45; pp.61-63

[18] *Ruling (#1), prior discreditable conduct*, Appeal Book, Tab 4A, paras. 7, 24

[19] *Ruling (#1)*, *ibid*, para. 26

[20] *Ruling (#1), supra*, para. 30

[21] *Ruling (#1), supra,* para. 33

by equating the two. In so doing, he failed to acknowledge the high probative value of this evidence.

> *R. v. Griffin*, 2009 SCC 28 at para. 63
> *R. v. Pasqualino*, 2008 ONCA 55 at paras. 29-31

[74] This error infected the trial judge's analysis of the prejudicial potential of the evidence. The high degree of cogency of such evidence on the issue of motive minimizes the risk of its prejudicial misuse by a jury - so much so that a limiting instruction is unnecessary. As explained by Doherty J.A. in *Merz*:

> The limiting instruction normally given when evidence of prior bad acts by the accused is placed before the jury would make no sense in the context of evidence of motive. An instruction like that called for by the appellant could only serve to confuse the jury.

> *R. v. Merz* (1999), 140 C.C.C. (3d) 259 (Ont.C.A.) at para. 59
> *R. v. Pasqualino, supra* at paras. 65-67
> *R. v. Krugel* (2000), 143 C.C.C. (3d) 367 (Ont.C.A.) at paras. 84-92

[75] The trial judge ruled separately on the Saskatchewan flyers.[22] Given the Supreme Court of Canada's judgment, holding that two of the flyers expressed hatred, the trial judge accepted that they were capable of showing the respondent had an animus toward gay people. Still, he reasoned that the prejudicial effect of this evidence outweighed its probative value. The trial judge erred in his assessment. This highly probative evidence, relevant to the issue of intent, should have been admitted. The risk of prejudice was negligible.

(D) Materiality of the trial judge's errors

[76] To obtain a new trial, the Crown 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 Crown 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

[22] *Ruling (#2), prior discreditable conduct*, Appeal Book, Tab 4B

reasonably, in the concrete reality of the case, have had a material bearing on the acquittal.

R. v. Graveline, 2006 SCC 16 at paras. 14, 16
R. v. George, 2017 SCC 38 at para. 27

[77] The trial judge's error in finding that statements contained in the flyer were not "hatred" was material to the acquittal. On the basis of this error alone, a new trial is warranted.

[78] The trial judge's exclusion of the evidence of Professor Mulé compiled the error. The evidence would have assisted the trial judge by providing deeper understanding of the context for the hatred promoted by the flyer.

[79] Although the trial judge also had reasonable doubt about whether the respondent intended to promote hatred, he acknowledged this might not hold, had he found that the material promoted hatred. He stated: "The most powerful evidence of Mr. Whatcott's intent would be the flyer if I were not left with reasonable doubt that the flyer promotes hatred."[23] The trial judge was correct. A finding that the material promotes hatred furnishes a strong common sense inference that an accused intended to promote hatred, or foresaw its promotion as a likely consequence of his conduct.

Keegstra, supra at para. 117

[80] Additionally, the evidence of prior discreditable conduct, excluded by the trial judge was highly probative of the respondent's state of mind and relevant to the issue of intent. It strengthened the inference of intention to promote hatred, either as a desired or foreseen consequence of distributing the flyer.

[23] *Reason for Judgment,* para. 76

PART IV: ADDITIONAL ISSUES

[81] The appellant raises no additional issues.

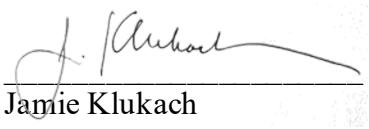
PART V: ORDER REQUESTED

[82] The appellant asks that the appeal be allowed and a new trial ordered.

PART VI: SEALING ORDERS, PUBLICATION BANS OR OTHER RESTRICTION ON PUBLIC ACCESS

[83] There are none.

All of which is respectfully submitted this 5th day of October, 2022 by:



Jamie Klukach
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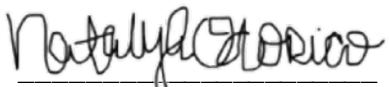

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Schedule B: Relevant Legislative Provisions

None outside the *Criminal Code*.

C70189

COURT OF APPEAL FOR ONTARIO

BETWEEN:

HIS MAJESTY THE KING
Appellant

– and –

WILLIAM WHATCOTT
Respondent

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