

**SUPERIOR COURT OF JUSTICE
Toronto Region**

B E T W E E N:

HIS MAJESTY THE KING

Prosecution

and

WILLIAM WHATCOTT

Defendant

DEFENCE WRITTEN SUBMISSIONS

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PART I: OVERVIEW

1. On July 3, 2016, at the Toronto Pride Parade, William Whatcott marched with a group dressed in green spandex and which held a sign that said, “Gay Zombies Cannabis Consumer Association”. While marching in the parade, Mr. Whatcott distributed approximately 3,000 two-page flyers disguised as red condom packets (“the flyer”). He was subsequently charged, in 2018, with wilful promotion of hatred against gays contrary to s. 319(2) of the *Criminal Code*.

2. The flyer did not promote hatred. It expressed moral, political, and religious views regarding what its author saw as the negative consequences of men having sex with men. It did not call for discrimination or destruction. It carefully distinguished between claims directed at gay men (or homosexuals) generally and allegations concerning specific individuals, politicians, or political parties.¹ It was a colourful, no doubt offensive to some, provocative attempt at persuasion during a colourful, provocative, and at times offensive – again, to some – public event.

3. As noted, to many the flyer was offensive, or even repugnant. But the *Criminal Code* does not criminalize offensive or repugnant speech. Section 319(2) criminalizes the *intentional promotion* of hatred. The flyer, distributed in the unique context of Toronto Pride, by a conservative Christian activist attempting to proselytize, falls short of that demanding standard.

4. The main facts are not in dispute. Mr. Whatcott admits that he publicly distributed the flyer. He testified about how he went about doing so, what he was trying to achieve, and how the experience unfolded, from his point of view, including its aftermath. A professor of social work, Dr. N. Mulé, provided his perspective on the impact the flyer might have had on members of the

¹ In these submissions, the term “homosexual” is meant to refer to gay men or men who have sex with men. Counsel recognizes that some see the term as derogatory mean no disrespect when utilizing the term.

sexually diverse community and their supporters who attended Pride, as well as the history of anti-gay tropes or themes that tread on the belief, largely rooted in religious teachings, that sexual behaviour between consenting men was immoral, unhealthy, and should be proscribed by law.

5. The issues in this trial can be distilled to the following two questions:

- 1) Did the flyer promote hatred against gay men?
- 2) Did Mr. Whatcott wilfully promote hatred against gay men?

PART II: THE LAW

(1) Section 319(2) of the *Criminal Code* & the Seminal Trilogy of Hatred Cases

6. Section 319(2) of the *Criminal Code* reads as follows.

(2) Every one who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of

(a) an indictable offence and is liable to imprisonment for a term not exceeding two years...

7. In 1990, the Supreme Court of Canada released, concurrently, a trilogy of cases related to hatred. Two decisions, *R. v. Keegstra*, [\[1990\] 3 SCR 697](#) (“*Keegstra*”) and *R. v. Andrews*, [\[1990\] 3 SCR 870](#) (“*Andrews*”) addressed the constitutionality of s. 319(2) of the *Criminal Code*.² The third, *Canada (Human Rights Commission) v. Taylor*, [\[1990\] 3 SCR 892](#) (“*Taylor*”) addressed the constitutionality of s. 13(1) of the *Canadian Human Rights Act*, which prohibited telephone

² The majority in *Andrews* upheld the constitutionality of s. 319(2) “for the same reasons” given in *Keegstra*. Accordingly, the reasons in *Keegstra* constitute the leading authority regarding s. 319(2).

communications “likely to expose a person or persons to hatred or contempt” on the basis of a prohibited ground of discrimination.

(a) *Keegstra*: the defining approach to hatred under s. 319(2)

8. The *Keegstra* majority held that s. 319(2) violated s. 2(b) of the *Charter*’s protection of the right to freedom of expression but was “saved” by section 1 based on three significant factors related to statutory construction of the section: (i) the high bar that “wilfully” imports into the offence; (ii) the high bar that “promotes” imports into the offence; and (iii) the high bar for communication to fall within the term “hatred”.

(i) “Wilfully”

9. The mental element of “wilfully” is only satisfied “where an accused subjectively desires the promotion of hatred or foresees such a consequence as certain or substantially certain to result”. This is a “difficult burden for the Crown to meet”.

R. v. Keegstra, supra, at paras. 111-112

(ii) “Promotes”

10. Promotion is not defined by the *Criminal Code*, but was given context by the court. The purpose of the criminal sanction is to criminalize the spreading of hate, which is addressed by the term “**promotes**”. Promote means that the “hate-monger” can foresee, as a consequence of their actions, the **stimulation of hatred against the group** that will directly flow from their actions, which is their goal. This is clearly stated by Dickson C.J.:

I find that the word “**promotes**” indicates active support or instigation. Indeed the French version of the offence uses the verb “fomenter”, which in English means to foment or stir up. In “**promotes**” we thus have a word that **indicates more than simple**

encouragement or advancement. The hate-monger must intend or foresee as substantially certain a direct and active stimulation of hatred against an identifiable group [. . .] The act to be targeted is therefore the intentional fostering of hatred against particular members of our society, as opposed to any individual.

R. v. Keegstra, supra at para 115 [emphasis added]

(iii) “Hatred”

11. “Hatred” is also not defined in the *Criminal Code*. In *Keegstra*, Dickson C.J. stated that hatred is the most extreme form of dislike and expression. On reading or hearing the expression, one must conclude that the group in question should be despised, scorned, denied respect, and **subjected to ill-treatment or discrimination** because of their group affiliation. The expression must connote **detestation, enmity, ill-will, and malevolence**. Dickson C.J. makes this abundantly clear:

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.

[. . .]

I hope, however, that my comments as to the scope of the provision make it obvious that **only the most intentionally extreme forms of expression** will find a place within s. 319(2).

R. v. Keegstra, supra, at paras. 116-117, 127 [Emphasis added]

12. Offensive and distasteful expression does not meet the high bar for hatred. Further, freedom of expression will not be curtailed in borderline cases.

R. v. Keegstra, supra, at paras. 118, 120

(iv) *The four statutory defences under s. 319 and the Defendant's position regarding them*

13. There are four statutory defences available under s. 319(3) to the offence as charged under s. 319(2).

(3) No person shall be convicted of an offence under subsection (2)

- (a)** if he establishes that the statements communicated were true;
- (b)** if, in good faith, the person expressed or attempted to establish by an argument an opinion on a religious subject or an opinion based on a belief in a religious text;
- (c)** if the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true; or
- (d)** if, in good faith, he intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred toward an identifiable group in Canada.

14. The statutory defences only arise *after* the Crown has proven the elements of s. 319(2) beyond a reasonable doubt.

R. v. Keegstra, supra, at para. 139

15. In this case, the defences in (b) and (c) could arise, depending on the factual findings made by this Court. However, the defences may not be salient for two reasons. First, both defences

include elements of good faith and honest belief, elements which already “negate directly the mens rea of the offence” and inform the *mens rea* analysis, as noted by the SCC majority in *Keegstra*.

16. In many cases, these elements of good faith may be present in the accused’s intentions to begin with. As stated by the Court, their presence makes the narrow scope of section 319(2) even more explicit and reflects the Court’s commitment to side with freedom of expression in borderline cases:

These defences are hence intended to aid in making the scope of the wilful promotion of hatred more explicit; individuals engaging in the type of expression described are thus given a strong signal that their activity will not be swept into the ambit of the offence. The result is that what danger exists that s. 319(2) is overbroad or unduly vague, or will be perceived as such, is significantly reduced. **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, supra, at para. 120 [emphasis added]

17. The second reason the defences may not be salient in this case is that in his evidence, Mr. Whatcott was clear that his intention was to foment discussion, invite dialogue, and convert his target audience to his beliefs. His intention was not to foment hatred against the very group he distributed his phone number to. Accordingly, the good faith defences relying on belief in religious text or raising a subject of public interest overlapped with his intent, which was not to spread hatred.

18. That said, the Defendant does not distance himself from these defences. If the court, as the trier of fact, finds that the flyer (1) promoted hatred, and (2) that Mr. Whatcott intended to promote hatred against gay men, he relies on the s. 319(3)(b) and (c) defences. In cases like this, the

Supreme Court has urged leeway, given what it described as the “rough and tumble of public debate” where “negative and damaging attacks upon [an] identifiable group” can still result in an acquittal under these sections, given the *Charter*-informed approach to these cases and our society’s commitment to freedom of expression.

(b) *Taylor*: seminal case on hatred in the human rights context

19. *Taylor* considered the constitutionality of then s. 13(1) of the *Canadian Human Rights Act*, which prohibited telecommunications that were “likely to expose a person or persons to hatred or contempt” on the basis of a prohibited ground of discrimination. As in *Keegstra*, the majority found that the section was an acceptable infringement on the freedom of expression pursuant to s. 1 of the Charter.

20. The *Taylor* majority looked to the dictionary definition of hatred, and held that it:

[. . .] speaks of “extreme” ill-will and an emotion that **allows for “no redeeming qualities”** in the person at whom it is directed [. . .] [and] thus refers to unusually strong and deep-felt emotions of detestation, calumny, and vilification [.]

Canada (Human Rights Commission) v Taylor, supra, at para. 61 [emphasis added]

21. Dickson C.J., for the majority, further explained that the human rights’ section at issue imposed “a slightly broader limit upon freedom of expression” than s. 319(2), which was acceptable given the human rights context. Such prohibitions on speech focus solely on the effect of communication; intent is irrelevant.

Canada (Human Rights Commission) v Taylor, supra, at paras. 61, 66-70 75

(2) Subsequent “Hatred” Jurisprudence: *Mugesera* and *Whatcott* 2013

(a) *Mugesera* – the role of context

22. In *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005 SCC 40](#) (“*Mugesera*”), the Supreme Court of Canada upheld the deportation of a permanent resident. Mr. Mugesera gave a speech in Rwanda that incited hatred and genocide. There were killings in that country that were a direct outcome of that speech.³ He was also a member of death squads in that country.

23. The decision in *Mugesera* focused on incitement but the court also provided some guidance in relation to “promotion”. The court held that to understand *how* the speech at issue constituted hatred or incitement, it was necessary to understand Rwandan history. Building on *Keegstra*, it explained that to determine if a communication expressed hatred, the court was required to look at “the understanding of the reasonable person in the **context**”. The context included: (i) the speech’s audience, (ii) its social context and (iii) its historical context.

Mugesera v. Canada (Minister of Citizenship and Immigration), *supra*, at paras. [100-105](#)

(b) *Whatcott* 2013 – Building on *Taylor*

24. In *Saskatchewan (Human Rights Commission) v Whatcott*, [2013 SCC 11](#) (“*Whatcott* 2013”), the Supreme Court considered whether four flyers that Mr. Whatcott had distributed to people’s homes in Saskatchewan contravened s. 14(1)(b) the provincial Human Rights Code. Section 14(1)(b) prohibited publication “that exposes or tends to expose to hatred, ridicules,

³ Mr. Mugesera was found at first instance to have been a member of death squads, to have participated in massacres, and it was held that killings occurred as a direct outcome of a speech he gave inciting genocide: see paras [28](#), [41](#) of *Mugesera*.

belittles, or otherwise affronts the dignity” based on a prohibited ground. At first instance, the Tribunal held that all four flyers “could objectively be viewed as exposing homosexuals to hatred and ridicule”.

Whatcott 2013, supra, at paras. [9](#), [10](#), [12](#)

25. The Saskatchewan Court of Appeal held that the flyers did not offend s. 14(1)(b). Their decision was appealed to the Supreme Court.

26. The Supreme Court held that it was reasonable for the Tribunal to find that two of the four flyers, labeled “D” and “E”, “would objectively be seen as exposing homosexuals to detestation and vilification”. The Court further held that “it was not unreasonable for the Tribunal to conclude that this expression was more likely than not to expose homosexuals to hatred”.

Whatcott 2013, supra, at paras. [190](#), [192](#)

(i) *Whatcott 2013 – a “modified” Taylor approach to hatred*

27. In *Whatcott 2013*, the Supreme Court considered whether the *Taylor* definition of hatred – in a human rights context – should be modified or rejected in light of criticisms that the concept was too arbitrary and vague.

28. The Court confirmed a modified approach to the *Taylor* definition of hatred and provided three prescriptions:

- **First**, the approach to hatred is objective. Courts should ask: would a reasonable person, aware of the context and circumstances surrounding the expression, view it as exposing the protected group to hatred?
- **Second**, “hatred” is restricted to extreme manifestations of the motion as described by “detestation” and “vilification”. Repugnant, offensive, expression is not captured.

- **Third**, human rights tribunals must focus their analysis on the effect of the expression, and whether it is *likely to expose* the target to hatred. Intent is irrelevant.

The Court concluded:

In light of these three principles, where the term “hatred” is used **in the context of 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.

Whatcott 2013, supra, at paras. [55-59](#) [emphasis added]

29. The Court further confirmed that speech that “ridicules, belittles or otherwise affronts the dignity [of a particular group]” does **not** rise to the level of hatred, nor does expression that is “derogatory and insensitive”. Similarly, expression that inspires “feelings of disdain or superiority”, expression that “insults”, expression that “may be hurtful and offensive” and expression that is “repugnant and offensive” will not fall within the ambit of hatred. These comments are noteworthy in the present case.

Whatcott 2013, supra, at paras. [57](#), [89-91](#), [109](#)

(ii) A contextual approach focusing on effect

30. *Whatcott 2013* further affirmed that a publication “cannot properly be assessed out of context.” It “must be considered as a whole, to determine the overall impact or effect”. While one phrase might bring a publication into contravention of human rights legislation, the overall context of the expression must be considered.

31. Further, it can make a difference if expression contains a “singular remark that comes close to violating the prohibition” or “repeated, delegitimizing attacks”.

Whatcott 2013, supra, at paras. [53](#), [174](#)

(3) The Concept of “Harm” in Hatred Jurisprudence

32. *Keegstra* explained that s. 319(2) addresses two forms of harm: first, the harm suffered by members of the target group; second, the broader societal harm caused when hate propaganda influences society at large.⁴

33. The second harm lies at the heart of the prohibition. The Court warned that hate propaganda may “attract individuals to its cause” and thereby “create serious discord between various cultural groups in society”, and cause prejudiced messages to gain credibility, resulting in potential discrimination and violence against minority groups.⁵

34. The Court further explained that this societal harm threatens the connection between members of the targeted group and the broader community in which they live.⁶

35. *Whatcott 2013*, building on *Keegstra*, emphasized that the focal harm in hate speech cases is not individual or emotional upset. Rather the focus is on the broader discriminatory impact of the expression on society. As the Court’s majority explained:

“the feelings of the publisher or the victim are not the test [. . .] **Instead, the focus must be on the likely effect of the hate speech on how individuals external to the group might reconsider the social standing of the group.**

[*Whatcott 2013, supra, at paras. 81-82*](#) [emphasis added]

36. The majority explained:

The distinction between the expression of repugnant ideas and expression which exposes groups to hatred is crucial to understanding the proper application of hate speech prohibitions. Hate speech legislation is not aimed at discouraging repugnant or offensive ideas. It does not, for example, prohibit expression which debates the merits of reducing

⁴ *R v Keegstra, supra*, at paras 60-62.

⁵ *R v Keegstra, supra* at paras 62-63.

⁶ *R v Keegstra, supra* at para 78-79.

the rights of vulnerable groups in society. It only restricts the use of expression exposing them to hatred as part of that debate. It does not target the ideas, but their mode of expression in public and the effect that this mode of expression may have.

An assessment of whether expression exposes a protected group to hatred must therefore include an evaluation of the likely effects of the expression on its audience. Would a reasonable person consider that the expression vilifying a protected group has the potential to lead to discrimination and other harmful effects? **This assessment will depend largely on the context and circumstances of each case.**

Whatcott 2013 at paras 51-52, emphasis added

37. The reference to “likely effects of the expression on its audience” reflects to the societal nature of the harm because it focuses on the prevention of *discriminatory effect*.⁷ In other words, the concern is whether the expression is capable of causing others to view the group as less worthy.

38. Neither the criminal nor the human rights approach to hatred requires proof of actual harm or hatred.⁸

39. Human rights legislation focuses on the discriminatory *effects* of expression and asks whether it is *likely to expose* the target group to hatred.⁹ Criminal liability is narrower and captures only the “*intentional promotion of hatred*”, as explained above in these submissions.

(4) *Whatcott ONCA* and the “Hallmarks of Hatred”

(a) The Crown articulates the wrong test for hatred at para. 12 of their submissions

40. At para. 12 of their written submissions, the Crown writes that the “substantive test” for criminal hate speech is whether expression would be viewed by a reasonable person, aware of the

⁷ *Whatcott 2013* at para 54.

⁸ *Whatcott 2013* at para 129; *R v Keegstra*, *supra* at para 114.

⁹ *Whatcott 2013* at paras 135, 163.

context and circumstances as “*exposing or tending to expose* the target group for hatred”, relying on para. 62 of *Whatcott ONCA*.

41. That formulation was taken from human rights cases. The phrase, “*exposing or tending to expose*” is language used in cases that ask whether the expression is likely to expose a group to hatred for the purposes of human rights legislation. Indeed, the authorities cited by Sossin J.A. at para. 62 are human rights cases.

42. Read in context, *Whatcott ONCA* does not displace the criminal standard articulated in *Keegstra*. At para. 75, Sossin J.A. emphasized that the analysis must be conducted consistently with the governing authorities, **including *Keegstra***, and that the expression must be read as a whole and assessed in light of its **context and circumstances**. This echoes the Supreme Court of Canada’s instruction in *Mugesera* to assess the entirety of the context.

43. It would be wrong to read this as displacing the criminal standard of hatred set out in *Keegstra* or reading out the statutory words used in s. 319(2). The issue in this case remains the criminal one: whether there was *wilful promotion of hatred*.

44. The human rights authorities and the discussion in *Whatcott ONCA* may assist identifying contextual indicators such as whether the expression objectively exposes gays to hatred but does not replace the criminal standard established by *Keegstra* and the *Criminal Code*.

45. This interpretation is consistent with other portions of *Whatcott ONCA*, where Sossin J.A. described the issue as whether the flyer exploited particular grounds of discrimination “so as to promote hate.”¹⁰

(b) *Whatcott ONCA* considered a different evidentiary record

46. *Whatcott ONCA* addressed whether the trial judge erred by failing to admit and consider Dr. Mulé’s expert evidence. It did so on a materially different evidentiary record. The evidence before the court of appeal in *Whatcott ONCA* is not the evidence before this court.

47. As Sossin J.A. recognized in *Whatcott ONCA*, this trial would proceed on its own complete evidentiary record. That record now includes both Dr. Mulé’s contextual evidence and Mr. Whatcott’s evidence about his purpose and beliefs, his understanding of *Whatcott 2013*, and his state of mind.¹¹

(c) The “hallmarks of hate” generating from the human rights context must be cautiously applied

48. At the first trial and on its appeal, the Crown relied on the “hallmarks of hate” derived from the human rights case *Warman v Kouba*, 2006 CHRT 50 (“*Kouba*”). As noted in *Whatcott ONCA*, the trial judge considered those hallmarks in response to the trial Crown’s submissions about them.¹²

49. *Kouba* considered whether white supremacist communications were “likely to expose” members of the target group to hatred or contempt. Reviewing human rights jurisprudence, the

¹⁰ *R v Whatcott*, 2023 ONCA 536 at [para 40](#).

¹¹ *R v Whatcott*, 2023 ONCA 536 at [para 82](#).

¹² *R v Whatcott*, 2023 ONCA 536 at paras [11](#), [68](#).

Tribunal identified a list of “hallmarks of material that is more likely than not to expose members of the targeted group to hatred or contempt”.¹³ Some identified hallmarks were subsequently applied by the Supreme Court in *Whatcott 2013*.¹⁴

50. The Crown in this case submits that four such hallmarks point are present in this case: (i) portraying the target group as a powerful menace; (ii) portraying the target group as preying on children and vulnerable people; (iii) portraying the target group as devoid of redeeming qualities; and (iv) use of reputable sources to support negative and inflammatory generalizations.¹⁵

51. It is important to note that this specific discussion in *Whatcott 2013* was for the purpose of determining whether the flyers were “exposing or likely to expose persons of same-sex orientation to detestation and vilification”, in accordance with human rights legislation.¹⁶

52. In the criminal context, such hallmarks may assist in assessing the nature and effect of expression but cannot substitute for a contextual analysis of the communication as a whole. Their significance depends on the circumstances of the case and its particular facts. The ultimate question remains whether the flyer viewed in its entire context and circumstances, actively fomented or instigated hatred within the meaning of *Keegstra*.

¹³ *Kouba* at [paras 20-23](#).

¹⁴ *Whatcott 2013* at [para 187](#).

¹⁵ Written Submissions of the Crown at paras 33-47.

¹⁶ *Whatcott 2013* at paras [1](#), [48](#), [196](#),

PART III: THE LAW APPLIED TO THE ISSUES

Issue #1: Did the flyer promote hatred against the identifiable group, gays?

53. To determine if this flyer promoted hatred against gays, it must be examined in its entire context. That context includes: the entirety of the flyer; the target and actual audience; the way it was disseminated; and its social and historical context.

54. While the flyer might be called crude, provocative, or offensive, that is not the legal test. The question is whether, when viewed in its full context, it actively fomented or instigated the extreme emotion of hatred against gay men as set out in *Keegstra*. The evidence falls short of establishing this beyond a reasonable doubt.

55. Viewed as a whole, the flyer contains three recurring themes.

56. **First**, it advances medical and political claims, however controversial.

57. **Second**, it espouses traditional Christian views regarding sexuality and morality.

58. **Third**, and importantly, it is framed as a warning motivated by Mr. Whatcott's concern for the reader's spiritual, psychological, and physical well-being. This is coupled with an invitation to contact the author and consider the Christian Gospel. This theme is difficult to reconcile with an intention to instigate detestation or vilification against the very members of the group Mr. Whatcott sought to speak to.

(1) The Toronto Pride Parade Context

59. Context is critical. Unlike the Saskatchewan flyers, which were randomly distributed to private homes in Regina and Saskatoon, the Toronto flyer was distributed at one of Canada's

largest political and cultural demonstrations put on by the sexually diverse LGBTQ2S+ community. The Toronto Pride Parade was an event characterized by robust, colourful, provocative, and intentionally shocking expression.

60. For some, such as the Sisters of Perpetual Indulgence, and no doubt many others, such as nude men or persons whose genitals were exposed while otherwise wearing “BDSM” gear, if you were offended by their costumes or by seeing an image of Jesus Christ on someone’s crotch, you were missing the message.

61. That said, the parade was open to the public. It is not hard to imagine that parade participants were aware of the fact that their costumes could offend some attendees. Pride, one might say, is a day when members of the sexually diverse community were invited to be “offensive” without the fear of being called out for doing so. To be shocking is not unusual.

62. The reasonable observer contemplated by *Mugesera* would assess the flyer against this specific backdrop.

63. The flyer was distributed openly to parade attendees and spectators, who were themselves predominantly supporters of the LGBTQ2S+ community.¹⁷ Mr. Whatcott and his supporters dressed themselves in bright green spandex, rainbow adornments, and marched with a sign that read “Gay Zombies Cannabis Consumer Association”. They handed 3,000 copies of their flyer to parade attendees, as well as to some other marchers. They were part of an intentionally carnival-like atmosphere.

¹⁷ See Exhibit 1 – First Agreed Statement of Fact at para 8.

64. The flyer itself was packaged to resemble a condom packet.¹⁸ The manner of distribution formed part of a theatrical protest in an environment saturated with expressive activity. There was no report or suggestion that the Green Zombies got into any conflict whatsoever with other parade participants. Some, such as “Mr. Leatherman”, posed for pictures with members of the Green Zombies. The Green Zombies, including Mr. Whatcott, were not aggressive or hostile towards anyone.

65. The Parade was attended by political figures, political advocacy organizations, and individuals who engaged in expression that some or many might regard as provocative or offensive. The record demonstrates the 2016 Parade included the following.

- i. Naked people;
- ii. People, mostly nude, wearing BDSM gear;
- iii. A Parade participant who wore black shorts with a picture of Jesus Christ on the crotch;
- iv. A Parade participant who held a large cutout of then American presidential candidate Donald Trump with a large red X symbol over it, which could be reasonably interpreted as a target or a similarly aggressive motif;
- v. Black Lives Matter, a political activist group, which was an honoured participant that halted the parade for 30 minutes with a list of political demands that they asked to be signed before permitting the parade to continue.

See Exhibit 4 – Sample pictures of TO Pride 2016

See Exhibit 6 – July 4, 2016 Freenorthamerica Post

See expert evidence of Professor N. Mulé

66. A reasonable observer would thus appreciate the wide range of cultural, sexual, and political messages and various forms of expression that they could expect to see and hear at the Pride Parade.

¹⁸ See Exhibit 1 – First Agreed Statement of Fact at para 9.

(a) Medical and Political Claims

67. Much of the flyer consisted of medical and political claims. Page 1, box 1, contained information about various diseases and disease rates. Page 1, box 2, contained information about AIDS and anti-retroviral medication. The record does not establish whether any of these medical claims are true or false.¹⁹ Mr. Whatcott believed them to be reasonably accurate. Whether the information was misguided, offensive, or wrong from an epidemiological perspective, it was not presented as an exhortation to hate gays.

68. Page 2, top text, contains two themes separated by sentences referencing the picture related to them. The first theme was political and related to the picture of Justin Trudeau. The second sentence states he is the leader of a party with a long and sordid history of homosexual activism and that it enabled and actively participated in child sexual abuse. In other words, these sentences were directed at the Liberal Party.

69. The top paragraph also had a picture of a mouth purportedly infected with genital warts. It contained a sentence that could be interpreted in two ways: that some gay men who attend Pride engage in oral sex in public, or that they engage in oral sex at Pride specifically.

70. Dr. Mulé testified that having sex in public spaces such as parks and public washrooms was a form of sexual expression that happens in the gay community and which, in his opinion, should be protected. He did not think that it happened at Pride, but he did agree that sexual expression was a part of Pride.

¹⁹ It is interesting to note that at the first trial of this matter, Goldstein J. found that the evidence of the Crown expert in infectious diseases established that most of the flyer's medical claims were true, or in the ballpark of truth.

71. The flyer's reference to the Liberal party enabling child abuse is accompanied by information below the sentence which (1) describes public information about former Liberal Minister Bill Graham having a sexual relationship with an underage male, (2) public information about the Liberal Party voting to lower the age of consent, (3) public information about former Liberal Deputy Education Minister Benjamin Levin being convicted of child pornography related offences, (4) public information about Levin's involvement with Ontario's sexual education curriculum (5) public information and opinion about what Ontario's sexual education curriculum teaches to children.

72. Reports were filed that confirmed that prior to 2016, conservative media sources had reported on Bill Graham's sexual relationship with the underage male identified in the flyer.²⁰

73. A Toronto Sun news article with the title "Liberals can't deny Levin's role with sex-ed curriculum" was filed. At the time, Levin was expected to plead guilty to child pornography-related offences. The article quoted him as saying that he was "responsible for the operation of the Ministry of Education and everything that they do" and that he was "brought in to implement the new education policy".²¹ Levin was later convicted of three child pornography-related offences.

74. Accordingly, it was reported that Levin had a direct hand in the development of Ontario's sexual education curriculum. At the time, Ontario's modernized approach to sexual health education was controversial, especially amongst conservative Christians. Levin's role in the curriculum became a lightning rod for discontent. Whether the objected-to parts of the curriculum,

²⁰ See Exhibit 13: Blog Article from the Interim and Exhibit 16: Lifesite News Article.

²¹ See Exhibit 14: Toronto Sun Article March 2, 2015.

as summarized in the flyer, taught the subjects as alleged to six-year-olds and thirteen-year-olds is unclear based on the trial record, as there was no witness who gave informed evidence on that subject.

(i) The Crown overstates the contents of the flyer's claims

75. The Crown incorrectly submits, at para. 35 of their written submissions, that the flyer conveys that gay people and their “homosexual agenda” have taken control of the government, education system, and mainstream media.

76. In fact, the flyer makes no reference to any “homosexual agenda”. References to the government plainly read as related to the Liberal party or specific politicians.

77. The Crown submits, at para. 38, that the flyer portrays gays as “dangerous towards children”. Yet, unlike the Saskatchewan flyers which did just that, the Toronto flyer only detailed publicly reported allegations related to specific politicians.²² Unlike the Crown’s submission that the flyer alleges that gays are associated with “incest”, the only reference to incest relates to Benjamin Levin, whose “incest fetish” was linked to his convictions for child pornography related offences.

78. A reasonable observer would recognize page 2 of the flyer as highly charged, provocative, and political criticism of a specific political party, certain members of its federal and provincial wings, as well as a strong, religiously-inspired opinion about Ontario’s sexual education

²² It is interesting to note that at the first trial of this matter, the Crown conceded that reasonable doubt applied to these portions of the flyer for this very reason.

curriculum. Many would find page 2 offensive to their world-view. Others might find it aligns with their beliefs.

79. However misguided or simply wrong one thinks the agenda espoused in the flyer may have been, the sexually diverse audience and its supporters, insofar as they were offended, would not have had hatred fomented and instigated amongst themselves due to this content. They were the “unchurched” audience the flyer sought to engage with.

(b) Christian Views Regarding Sexuality and Morality

80. A second recurring theme throughout the flyer is the expression of traditional Christian beliefs regarding sexuality and morality. The flyer repeatedly references God, God’s law, natural law, Jesus Christ, and the Christian Gospel. It communicates the view that homosexual conduct is morally wrong and inconsistent with Christian teaching.

81. In fact, one could read all of the flyer’s content, including information about health consequences, both physical or psychological, as a reflection of the Christian world-view that equates moral acts with divine judgment and repercussions for non-believers, both in the present world and the afterlife.

82. Page 1, box 3, contains information about a particular person, Walt Heyer. It conveys the opinion that homosexual activist therapists may lie and tell people that they can change genders. While no doubt offensive to many, the opinion is consistent with Christian beliefs, referenced directly below this portion of the flyer, that one’s gender is a gift from God, and that male and female are immutable.

83. The bottom text of page 1 echoes the Christian belief that homosexuality is incompatible with natural law. Directly below, the flyer writes, “In Christ’s service”. On page two, the lower text references God’s plan, God’s law, and the “Lord and Saviour Jesus Christ” and produces a bible quote.

84. The inclusion of these Christian references would cause a reasonable observer to recognize that the flyer stems from a fundamentalist or conservative Christian perspective. The Christian message and character of the communication is obvious. A reasonable observer would recognise the flyer as an attempt, however unwelcome, to convey Christian beliefs about sexuality and morality. The fomentation of detestation, vilification, or hatred, would not result from this content.

85. Furthermore, the view expressed in the flyer, that “homosexuality” is contrary to God’s plan for human kind, that it results in suffering both in this life and the afterlife, and that this understanding has implications for contemporary Canadian society such as in the regulation of sexual morality or equal rights for gays and lesbians, has deep roots in Christian religious belief and tradition.

86. Professor Farrow’s evidence supports the opinion voiced by Mr. Whatcott that his religious views, as expressed in the flyer, are rooted in the Christian tradition, for example in what the New Testament says about sexual morality. Professor Farrow explains that the Christian notion of a divine plan includes the marriage of one man and one woman, and that deviation from God’s plan can result in corruption and death.²³

²³ See Exhibit 15: Willsay of Dr. Farrow, especially at paras 8-11, 15-16.

(i) The Crown overstates the “destructive” nature of the religious references

87. The flyer does not state, as the Crown submits at para. 43, that accepting gay men is “destructive”. It states that “sexual anarchy and homosexual inspired oppression” are destructive. Immediately after this sentence, the flyer explains the destruction to which it refers is linked with rejecting God’s plan of life long heterosexual matrimony – in other words, it is linked with all behaviours that contradict this, homosexual sex being one of many.

(c) Concern for the Reader: The Flyer Attributes Redeeming Qualities to its Audience

88. A third and important theme of the flyer is an expressed concern for the well-being of its audience.

89. On page one, the lower flyer text states that “Gay Zombies” are *concerned* about the “spiritual, psychological, and physical welfare” of all parade attendees.

90. On page two, the lower flyer text states:

For those reading this Gospel package we also want to let you know there is a God who loves you, and who is real, and who has made a way for you to come to Him.

91. Love, one might say, is the opposite of hate. The flyer includes contact information for the reader to reach out if they want to “come to your Lord and Saviour Jesus Christ and receive the free gift of eternal life”.

92. Referring to God’s love and offering salvation to the reader is consistent with an attempt to persuade and proselytize and is consistent with what Dr. Farrow describes as a Christian’s duty to warn others. It is inconsistent with the instigation and fomentation of hatred.

(ii) The Crown incorrectly submits that the flyer depicts gay men as devoid of redeeming qualities

93. The Crown submits at paras. 42-43 that gays are portrayed as “devoid of redeeming qualities” and that accepting gay men is depicted as “destructive”. Yet, the flyer tells its audience that God loves them, and they are worthy of salvation.

94. This Court may reject the author’s views or his understanding of morality. However, a communication that repeatedly expresses concern for its audience’s welfare and invites dialogue, even if misguided, is difficult to reconcile with the extreme emotion of hatred described in *Keegstra*.

95. The flyer’s theme of concern for the reader and its offer of salvation is also difficult to reconcile with the approach to hatred described in *Taylor*, where hatred is said to “**allow for no redeeming qualities**” in its target. A message that tells its audience that God loves them and that they are worthy of salvation necessarily reflects the belief they possess redeeming qualities, they are worthy of love. That message is fundamentally inconsistent with the notion that its recipients are beyond redemption or deserving only of detestation and rejection.

(d) Conclusion

96. While the pictures are jarring and the wording is crude, the flyer taken as a whole and situated within the context of the Toronto Pride Parade cannot be said to *promote hatred* amongst its audience beyond a reasonable doubt.

Issue #2: Did Whatcott wilfully promote hatred?

(1) Overview

97. The Crown must prove not merely that Whatcott intended to distribute the flyer, but that he subjectively intended to promote hatred or foresaw that result as substantially certain.

98. Several aspects of Mr. Whatcott's conduct point in the opposite direction. He distributed the flyer directly to the very people the Crown says he hated, and to their supporters. He identified himself. He provided contact information. He invited dialogue. When he subsequently received phone calls in response to the flyer, it was some callers who lobbed epithets at Whatcott, expressing their anger. His response was to attempt to engage them in discussion about his message, and he had "serious" conversations as a result.

99. These are all unusual actions for a person who wanted to foment hatred, but entirely consistent with a person attempting to persuade others of sincerely held religious beliefs.

100. The manner of distribution is also significant. Mr. Whatcott distributed the flyer at the Pride Parade, a public event containing a wide range of colourful, shocking, and to some offensive, views and expression.

101. Mr. Whatcott described the attendees as "unchurched", consistent with his professed Christian belief in a duty to warn others and spread the Gospel. He did not create these views out of whole cloth, as Professor Farrow's evidence demonstrates. His views are a *bona fide* and good faith reflection on what Christianity states about sexual morality and the role of God in our lives.

102. Packaging the flyer as a condom packet was also consistent with an effort to attract the attention of the “unchurched” he hoped to persuade. After all, condom use is typically higher amongst those who are not traditional conservative Christians.

103. If Mr. Whatcott truly wanted to promote hatred, why would he provide his actual contact information and ask the target audience to contact him?

104. If Mr. Whatcott truly wanted to promote hatred, why would he disseminate his flyers to the target of the hatred (gays) and their supporters?

105. It is highly unlikely that a person seeking to convert members of the sexually diverse community would simultaneously attempt to foment hatred among the very people they were trying to persuade. Equally, it is highly unlikely that a person seeking to promote hatred against gays, would do so by attempting to foment that hatred among the gay community themselves and their supporters. Both propositions are contrary to the logic and purpose of the effort.

106. Even apart from what you make of Mr. Whatcott’s testimony, his actions speak loudly to his purpose – persuasion, dialogue, and Christian proselytizing.

107. Mr. Whatcott testified consistently and repeatedly that his purpose was to spread the Christian Gospel and information he believed to be accurate. His testimony was consistent with his actions, consistent with his beliefs, and consistent with Professor Farrow’s evidence concerning Christian beliefs relating to proselytizing and warning others of perceived spiritual danger.

(2) The sole reference to child abuse in the flyer

108. When asked about the sole reference to child abuse in the flyer, which appears at the top of page 2, Mr. Whatcott's answer was consistent with both the contents of the flyer and the balance of his evidence. He testified that the statement referred to the Liberal Party, precisely as the text of the flyer plainly reads.

109. Mr. Whatcott identified four examples that, in his view, demonstrated the Liberal Party's role in enabling child abuse, all of which were referenced on the same page of the flyer: (i) the Liberal Party's support for lowering the age of consent; (ii) the conviction of Benjamin Levin, a chief architect of Ontario's revised sex education curriculum, for child pornography-related offences; (iii) public reports that ex-minister Bill Graham had engaged in a sexual relationship with a minor; and (iv) Mr. Whatcott's belief that exposing children to graphic sexual material through the Ontario sex education curriculum was itself a form of child abuse.

110. He was not talking about gay people as a community. This part of his flyer perhaps most strongly spoke to the overlap between his conservative political views and his Christian moral stance.

(3) The Defendant's understanding of *Whatcott 2013*

111. The admitted evidence regarding the Saskatchewan flyers is also consistent with Mr. Whatcott's intention: to spread the Gospel and distribute accurate information.

112. Mr. Whatcott was a former nurse with no legal training. He testified about the guidance he received from *Whatcott 2013*. He testified that he read the decision a couple of times, and likely

last saw it “some couple years prior” to July 2016.²⁴ As he understood it, the lessons were straightforward: tone down the vitriol, avoid calls for discrimination, avoid calling homosexuals pedophiles, and rely on factual information.²⁵

113. Whether those conclusions are accurately captured by the law is not the point. The point is that they provide compelling evidence of Mr. Whatcott’s state of mind. A person attempting to understand and comply with what he believes the law requires is not acting with the subjective intention to promote hatred.

114. The Toronto flyer reflects the lessons Mr. Whatcott said he took from the Saskatchewan litigation. It does not call for discrimination. It does not call homosexuals pedophiles. It contains language that is less vitriolic than that of the Saskatchewan flyers.

115. Mr. Whatcott repeatedly explained this during cross-examination:

“Yeah, I mean certainly I’ve tried to turn down the vitriol of my language.”²⁶

“I certainly didn’t want to get myself in needless trouble, so I toned it down some.”²⁷

“I certainly toned down my flyer from the previous ones, so I, I didn’t even think I was going to attract a human rights complaint, never mind a criminal complaint. This is one of the problems I have with this law, it’s really hard to know what the line is and I thought I was well under it.”²⁸

116. Mr. Whatcott further testified that he researched the information contained in the flyer. He sourced medical information from public health, university, and medical websites, as well as two

²⁴ Transcript May 27, 2026 at p 14 (pdf 16).

²⁵ See, for example, Transcript, May 27, 2026, pp. 14-21 (pdf 16-23).

²⁶ Transcript May 28, 2026 at p 23-24 (pdf 25-26).

²⁷ Transcript May 28, 2026 at p 7 (pdf 9).

²⁸ Transcript May 28, 2026 at p 22 (pdf 24).

books, one of which was written by a doctor. He sourced the information about Walt Heyer from Walt Heyer's published testimony. He sourced information about politicians from various news sources. He sourced information about the Ontario sex education curriculum from media including the National Post and CBC, as well as from Christian lobbyist groups such as Campaign Life Coalition.

117. Mr. Whatcott shared the flyer before it was distributed with members of his circle, which included a couple of lawyers.

118. Rightly or wrongly, he believed he was "sticking to facts". He also believed that relying on facts was consistent with what *Whatcott 2013* said to do:

"Well, I'm sticking to the facts, which the Supreme Court of Canada certainly said you can."²⁹

"I believe I was being careful and sticking to the facts and to the best of my understanding of law, that is legal."³⁰

"I'm sticking to facts and no, I don't believe this flyer contains hallmarks of hatred."³¹

119. The Crown asks this court to draw a direct line from *Whatcott 2013* to the Toronto flyer, as though that decision and the "hallmarks of hatred" it identified in Flyers D and E can simply be mapped onto the Toronto flyer. The Crown further treats *Whatcott 2013* as though it provided clear and predictable guidance regarding the boundary between lawful expression and criminal hatred. The Defendant disagrees with both submissions.

²⁹ Transcript May 28, 2026 at p 42 (pdf 44).

³⁰ Transcript May 28, 2026, at p 43 (pdf 45).

³¹ Transcript May 28, 2026, at p48 (pdf 50).

120. The Saskatchewan and Toronto flyers might be described as similar in theme, but very different in content. Flyers F and G from *Whatcott 2013*, found not to violate human rights legislation, were also similar in theme, but different in content.

121. In addition, the history of these proceedings demonstrates why the issue is far more nuanced, requiring careful contextual legal analysis.

122. First, Dickson C.J. in *Keegstra* cautioned that in the rough and tumble of good faith political or religious discourse, the courts are explicitly urged to side with freedom of expression.³²

123. Secondly, the Crown's position assumes a degree of legal sophistication that the evidence does not support. Mr. Whatcott is not a lawyer. The law does not impose a burden of seeking out a legal brief before one engages in good faith religious or political expression. Even if it did, the law on expressions of hatred has generated extensive judicial analysis at every level of court, including disagreement regarding where the line should be drawn.

124. It would be artificial to suggest that a layperson who distributed political and religious literature necessarily understood if and when his conduct crossed the boundary into criminal hatred, a concept that remains the subject of complex legal interpretation. While ignorance of the law is not a defence, there is no legal obligation to possess detailed knowledge of the law or to obtain legal advice before engaging in religious or political expression, as the Crown suggested to Mr. Whatcott in cross-examination. The meaning of expression is notoriously difficult to pin down.

³² *R v Keegstra*, *supra* at para 120.

125. The notion that one should obtain expert advice before expressing oneself contradicts the jurisprudence on section 1 of the *Charter* in the context of s. 319(2). That jurisprudence strives to ensure restrictions on freedom of expression are as minimal as possible. The notion that one must obtain advice prior to expressing oneself risks creating the very self-censorship and chilling effect on freedom of expression that courts have sought to avoid in developing and applying hatred legislation.

126. Again, the history of these very proceedings, with a trial then an appeal and now a second trial, demonstrates why this is unrealistic and impractical.

(4) What *Whatcott 2013* said about the flyer that did *not* express hatred

127. The guidance from *Whatcott 2013* must be considered with what the decision said about the flyer³³ that **did not** contravene the Saskatchewan Human Rights Code. For example, the Court explained that the “offensive” **implication** that gay classified ads revealed men seeking underaged boys fell “short of expressing detestation or vilification,” because it presented as Whatcott’s interpretation of what the ads meant.

[*Whatcott 2013* at paras 195-196](#)

128. The Supreme Court also confirmed that it is lawful to contribute to the “public debate on the morality of homosexuality”, even in an “offensive” manner.

[*Whatcott 2013* at para 200](#)

³³ Flyers “F” and “G” which the Supreme Court of Canada held did *not* contravene the Saskatchewan Human Rights Code were the same flyer.

(5) The tenor of the Defendant's testimony

129. Mr. Whatcott's evidence rang true and should be accepted. He was not an evasive witness – far from it. He accepted suggestions in cross-examination that were reasonably true, even when asked in an obviously pointed, and occasionally confrontational manner.

130. Whatcott gave one-word answers when the question asked for such. He did not stall for time. He was frank and candid. He agreed, he lied to Pride Toronto. He viewed that as permissible, given the context. He swore on the Bible to tell the truth. It is not often that we have evidence in our courts that such an oath might actually mean something to a witness. Here, we have that, from a witness who has dedicated the latter part of his life to his faith. There was a style and content to his evidence that supports the conclusion that this was a witness who spoke plainly and honestly, whether to his detriment or not. The Defendant strongly disagrees with the Crown's characterization of his evidence as anything but that.

131. Ultimately, Mr. Whatcott's evidence was that he believed he was communicating facts, warning people about what he regarded as unhealthy and immoral behaviour, and fulfilling a Christian duty to spread the Gospel. His evidence was consistent with the contents of the flyer and with his conduct.

132. While Mr. Whatcott does have a nursing background, he is a layperson in terms of his understanding of the law and textual interpretation. When asked, in cross-examination, about the “trope of immorality”, he explained:

“I believe the homosexual lifestyle is immoral and I certainly would argue that in my flyer, yeah [. . .] Yeah, if you want to call it a trope, I call it a Biblical theme, I guess whatever you see it as.”³⁴

133. When asked, in cross-examination, about the “trope or device of criminality” in the paragraph about Prime Minister Trudeau, he responded that he believed that these were facts that concerned him from his perspective as “pro-life” and “pro-family”:

Q. And there's this trope or device of criminality and we just looked at that, it's the blue part underneath Justin Trudeau's picture. You agree with me, right?

A. These are facts that were in the mainstream news, so I don't know that I want to call that a trope. He's making the argument that's a trope, I'm not going to help him out on that. I believe that these are facts that should concern Canadians. It certainly concerns me and other pro-life, pro-family individuals.³⁵

134. When asked about his box of information cautioning about the risk of contracting AIDS, he linked it to his Christian duty to warn others.

Q. You have a death box, which is clearly all about disease, right?

A. That person died of Aids, yeah.

Q. And you know the term gay plague.

A. Yes.

Q. You're not studying that from a book, you were there.

A. I was a nurse during the Aids pandemic, which overwhelmingly affected gay males.

Q. Yeah.

A. Yeah.

Q. Not just disease and death as a result of Aids, but devastating, delegitimization of gays, right?

A. Well, certainly my take on this is avoid these risky sexual behaviours and, and I believe that's a charitable warning. There is a Christian duty to warn people away from sinful, unhealthy behaviour.³⁶

³⁴ Transcript May 28, 2026 at p 44 (pdf 46).

³⁵ Transcript May 28, 2026 at p 44 (pdf 46).

³⁶ Transcript May 28, 2026 at pp. 45-46 (pdf pp. 47-48).

This was consistent with Professor Farrow's evidence that the duty to warn others is prevalent in the Christian tradition³⁷.

135. The Crown submits that Mr. Whatcott's evidence about the word "sodomite" was "combative and did not answer the question". The Defendant disagrees. Mr. Whatcott was consistent on this subject, both in chief and cross-examination.

136. In chief, Mr. Whatcott testified that the word, which has a "biblical definition," was "potentially" pejorative and "not necessarily meant to be a compliment".³⁸

137. In cross-examination, he *again* testified that the term is "somewhat pejorative", and that, "It's not exclusively pejorative, it's more accurate and biblical".³⁹ In other words, just as he testified in chief, it is a biblical word that is potentially pejorative.

138. When cross-examined *again* about the term, Mr. Whatcott testified that "It's a Biblical word and I believe it's accurate". He explained that "It definitely lends a negative connotation to behaviour, it's a behaviour-based word that is describing a sinful and harmful behaviour". In other words, just as he testified in chief, it is a biblical word that is potentially pejorative.

139. When the Crown *continued* to ask Mr. Whatcott about "sodomy," he testified, "It has pejorative connotations, but it's a biblical behaviour-based word and that part cannot be lost".⁴⁰

Once again, the same answer in substance that he gave in chief.

³⁷ Exhibit 15 – Willsay of Dr. Farrow at para 18.

³⁸ Transcript May 27, 2026 at p 37 (pdf 39).

³⁹ Transcript May 27, 2026 at p 50 (pdf 52).

⁴⁰ Transcript May 27, 2026 at p 50 (pdf 52).

140. The main point of the Crown's submissions appears to be that Mr. Whatcott's religious views are not genuinely held. He does not take his worldview from his religion. Instead, he uses his religion to back up and substantiate a hateful world view.

141. This was never explicitly put to Mr. Whatcott. It should have been. To the degree that one sees this as implicit in the Crown's cross-examination, implicit may not be sufficient to put Mr. Whatcott on notice that his belief in his religious world-view would be questioned.

142. Dr. Mulé's evidence may be helpful on this issue. He was a forceful advocate for his perspective on what he described as the three main tropes of anti-gay discrimination, which he tied to morality, health, and our legal system. He rooted this approach in a belief that speech can reflect the power of dominant groups or hegemonic forces in our society. Knowingly or unknowingly, we might echo these beliefs, such as what he called heterosexist beliefs about sexual norms. He personally found such beliefs to be offensive and discriminatory.

143. Yet, Dr. Mulé acknowledged that such beliefs can also reflect a moral view of the universe that is rooted in Christianity, or equally in a conservative belief that there are eternal laws that govern human nature, and that certain sexual practices are immoral. He also agreed that, contrary to the dogma espoused by "critical discourse analysis" or CDA, beliefs such as these may develop prior to their adoption by dominant groups in society. He acknowledged that religion was one of the strongest forces that holds people back from embracing sexual diversity.

144. Many people simply have moral objections to certain sexual practices. Like Mr. Whatcott, they do not necessarily hate those with whom they disagree. They simply disagree – and sometimes very strongly.

(6) The Defendant's Purpose – In His Own Words

145. It is important to consider Mr. Whatcott's stated purpose behind distributing the flyer, in his own words. He was given repeated opportunities during his evidence to say why he distributed the flyers, what his goal was, and what he meant by specific sentences in the flyer.

146. He continually linked his purpose to his faith, the flyer to his political and religious beliefs, and certain sentences to his experience as a nurse in the 1990's.

147. First, Mr. Whatcott went to Pride because he wanted to join the conversation about sexual morality. That was what Pride was about. It was moreover, a tax-payer funded parade. He believed he had the right to reach out to the "unchurched" and provide them with "gospel flyers".

Q.Bill, if, if you believe that the Toronto Pride Parade is so shameful, why did you go?

A. Namely, because it is political and I believe that Christians would ignore it to their peril. Also it's taxpayer funded, so I should be able to participate like anyone else and I was not allowed to participate.⁴¹

148. Mr. Whatcott was asked why he used the words "natural law" when discussing gender transition and an individual named Walt Heyer. He referred to his religious belief that gender was a part of God's creation and that to deviate from one's birth gender opened one up to physical, spiritual and psychological harm.

Q. Okay. Below this Walt Heyer area of the flyer, you wrote, "natural law is clear, homosexuality is incompatible with human nature." What did you mean by that?

A. I believe we're created by God and I believe our sexual nature should be in accordance with God's plan for our lives and I think when we deviate from that, which means we're deviating from natural law, we are opening ourselves up to harm, physical, spiritual,

⁴¹ Transcript May 27, 2026 at p 25 (pdf 27).

psychological and I think it's best to, you know, acknowledge natural law and that God has created us.

Q. The next sentence reads, "disease, death and confusion are the sad and sorted realities of the homosexual lifestyle." Why did you write that?

A. Certainly in the 90's when I was a nurse, I saw a lot of disease, death and confusion, even within my own patient caseload. And I do believe homosexual sexual practices are, are harmful.⁴²

149. When asked why he talked about the “sordid realities” of the homosexual lifestyle, he referred to his experience as a nurse in the 1990’s.⁴³ He used the word homosexual because it was an accurate term that described a person who had sex with someone of the same sex, not because it was pejorative.

150. He used the word sodomy because it was an accurate Biblical term.⁴⁴ He used the words “paw prints” in relation to Benjamin Levin because he believed that the Liberal party was trying to distance themselves from Levin’s involvement in Ontario’s sex ed curriculum. He believed that the curriculum was “perverted” because it taught inappropriate content to elementary, school-age children.⁴⁵

151. Mr. Whatcott provided his contact information on the flyer so his target audience could reach out to him.

Q. And then there's contact information. Again, Bill, was that your correct contact information at the time?

A. Yes, it was.

Q. Okay. And then below that there is a quote, where's this quote from, Bill?

A. 1 Peter chapter 2 in the Holy Bible.

⁴² Transcript May 27, 2026 at p 31 (pdf 33).

⁴³ Transcript May 27, 2026 at p 31 (pdf 33).

⁴⁴ Transcript May 27, 2026 at p 37 (pdf 39).

⁴⁵ Transcript May 27, 2026 at p 38 (pdf 40).

Q. And what are you trying to get across by including that Bible quote in your flyer?

A. I want to let people know that Christ died for us and suffered for us and He is an example and I want people to know Him as their Lord and savior. He was a perfect sacrifice for our sins.

Q. Did anyone contact you after you distributed this flyer?

A. Yes.

Q. How many people contacted you?

A. Probably dozens to hundreds, especially for the first couple of days.

Q. And what kinds of conversations did you have?

A. Everything from sending me pictures of their junk and saying they wanted to beat the heck out of me to serious conversations and one or two thank yous.⁴⁶

152. None of this was hateful in Mr. Whatcott's mind. That was not his intent.

153. Similarly, in cross-examination, he emphasized that his intent was to persuade. He talked about these goals when it was suggested that his language went too far.

Q. And so what you're saying on page 3, this is the first page of your flyer of Exhibit 5, page 3 of the little compendium I've put together, the filthy, dirty, reality of the gay lifestyle is disease, death and confusion. That's what you're communicating in the flyer.

A. Yes, I definitely want to dissuade people from adopting this lifestyle.

Q. And you spell out disease, death and confusion in your carefully crafted and well thought out flyer, right?

A. Yes, those are Christian themes relating to sexual sin against God.⁴⁷

154. His goal was to warn people that there were still real risks inherent in certain sexual practices.⁴⁸ He did not hate gay people. He also did not subscribe to phobias about gay people or to people who suffered from AIDS.

⁴⁶ Transcript May 27, 2026 at pp 40-41 (pdf pp 42-43).

⁴⁷ Transcript May 28, 2026 at p 21 (pdf p 23).

⁴⁸ Transcript May 28, 2026 at p 35 (pdf p 37).

Q. But there was an effect beyond just their illness and their death, which is they were stigmatized in society as a result, right?

A. Some people chose to stigmatize. There was also Christian hospices set up to care for the sick.

Q. Sure.

A. Yeah.

Q. So there was people that did care for them, but what...

A. Yeah.

Q. ...I'm talking about is they were stigmatized in society, right? Don't sit on a toilet seat if a gay person has sat on the toilet seat, right?

A. No nurse believes that, not me.

Q. Not a nurse, we're talking in society, sir, stigmatization that was occurring...

A. Okay. I can't...

Q. ...that you knew about.

A. ...speculate to that 'cause my flyer certainly doesn't tell you to avoid gay toilet seats.

Q. Don't hug a gay person because you might catch Aids, right? That was something you were familiar with during the Aids epidemic, right?

A. I hug people, it's just I'm warning you against anal sex.⁴⁹

155. When the Crown directly suggested that Mr. Whatcott was not wilfully blind, but rather that he actually knew that his flyer amounted to hate-speech, Mr. Whatcott vehemently denied both that (1) he believed his flyer to be hateful, and (2) that he personally hated or loathed gay people.

Q. Well, what – I'm going to suggest to you, you weren't actually willfully blind about this, you actually knew that this was hate-speech.

A. I am absolutely positive it was not hate-speech.

Q. And the reason why you designed the flyer to be hateful, is because you have this animus towards gay people, isn't that right?

A. Clearly, clearly if a homosexual comes to Christ, that's the best thing that could ever happen to them and this flyer is the gospel...

Q. Again....

⁴⁹ Transcript May 28, 2026 at pp 46-47 (pdf pp 48-49).

A. ...it's not, it's not a life-long animus.

Q. Again, that's not my question. My question is you have this animus, this dislike, this loathing of gay people.

A. I...

Q. That's why....

A. ...completely disagree with you, sir.

Q. You knew that this was hate and you designed it on purpose, right?

A. No, I, I disagree.⁵⁰

156. Mr. Whatcott was never shaken at all from this perspective.

(7) Conclusion on intent

157. Under *Keegstra*, the demanding standard of “wilfully” is only met where an accused subjectively desires the promotion of hatred or foresees it as substantially certain to result. The Crown has not met that burden.

R. v. Keegstra, supra, at paras. 111-112

158. Applying the burden of proof, if his evidence is believed, the court must acquit. Even if it is not believed but, in the context of the rest of the evidence, it raises a reasonable doubt, the same applies.

159. In sum, Mr. Whatcott should be believed. If, however, the court disagrees, there are numerous bases, described in these submissions, which at a minimum raise a reasonable doubt.

⁵⁰ Transcript May 28, 2026 at pp 46-47 (pdf pp 48-49).

Final Conclusion: At a Minimum, the Evidence Raises a Reasonable Doubt

160. This case is not about whether the flyer was offensive. The court might conclude that it plainly was.

161. The question is whether the Crown has proven beyond a reasonable doubt that the flyer promoted hatred, as that term is narrowly defined in Canadian criminal law, and that Mr. Whatcott subjectively intended that result. The evidence fell well short of establishing either element. At a minimum, it raises reasonable doubt for the following reasons:

- The flyer was distributed directly to the alleged target group (gays) and their supporters. Even accepting the Crown's theory at its highest, it is difficult to see how the flyer could instigate or foment hatred among that audience.
- The flyer contains explicit Christian proselytizing, repeatedly expresses concern for the reader's welfare, and tells the reader that God loves them.
- The flyer invites dialogue with its audience and provides contact information for that purpose.
- The flyer contains no call for discrimination, exclusion, segregation, or mistreatment.
- The flyer does not accuse homosexuals generally of being pedophiles or child abusers.
- The language of the flyer is less vitriolic than that of the Saskatchewan flyers found to contravene human rights law. Those flyers directly called for discrimination against gays, alleged that homosexuals wished to "share their filth and propaganda" with children, and stated that gays are more likely to sexually abuse children.
- Unlike the Saskatchewan flyers, the Toronto flyer does not use terms such as "filthy" and "dirty". The first of two references to "sordid" appears in what a reasonable observer would recognize as religiously-influenced commentary about "natural law". The second reference describes the history of the Liberal Party.
- Unlike the Saskatchewan flyers, distributed indiscriminately to people's homes and which spoke *about* homosexuals, the Toronto flyer was distributed directly *to* its target audience. It repeatedly addressed its audience directly: "Gay Zombies want **you** to practice safe sex!", "we want to give **you** this accurate information and encourage **you** to abstain from the homosexuality", "God loves **you** . . . and has made a way for **you** to come to Him". This is consistent with the intent to proselytize *to* the audience, rather than instigate hatred *amongst* the audience.

- *Whatcott 2013* addressed whether expression was more likely than not to *expose* gays to hatred for the purpose of human rights legislation. That inquiry is not directly equivalent to the criminal question under s. 319(2), which as per *Keegstra*, is whether the accused *wilfully promoted hatred*.
- Mr. Whatcott believed he complied with *Whatcott 2013* guidance regarding a human rights standard. Regardless of the correctness of his belief, a person attempting to stay on the lawful side of the line is not readily inferred to be acting with a subjective intent to promote hatred.
- This case is not about whether Whatcott should have known better based on *Whatcott 2013*. The correctness of his interpretation of that decision is not at issue. At issue is whether he subjectively intended to promote hatred or saw the promotion of hatred as substantially certain. Both determinations must be assessed in the entirety of the context.
- The expert evidence regarding tropes provided social and historical context. However, it did not displace the *other* contextual factors that point away from the flyer promoting hate, and away from Mr. Whatcott intending to promote hate. A trope is context, not an element of the offence, otherwise any religious criticism of homosexuality would become hatred, which is not the case.
- The expert evidence also supports the proposition that moral views such as those expressed by Mr. Whatcott reflect perspectives on sexual morality that may reasonably be expected from a person of orthodox Christian faith.

162. In the alternative, if the Court concludes that the offence has been proven, the applicability of the defences in s. 319(3)(b) and (c) will depend on the Court's findings of fact. As those findings cannot be known in advance, the Defendant leaves that analysis to the Court to consider following its determination of the facts.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

Mindy Caterina & Dan Stein
Counsel for the Defendant

DATED AT TORONTO THIS 2nd DAY OF JUNE, 2026.

SCHEDULE A: TABLE OF AUTHORITIES

1. *R. v. Keegstra*, [\[1990\] 3 SCR 697](#)
2. *R. v. Andrews*, [\[1990\] 3 SCR 870](#)
3. *Canada (Human Rights Commission) v. Taylor*, [\[1990\] 3 SCR 892](#)
4. *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005 SCC 40](#)
5. *Saskatchewan (Human Rights Commission) v Whatcott*, [2013 SCC 11](#)
6. *R v Whatcott*, [2023 ONCA 536](#)