SCC Court File number:

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

WILLIAM WHATCOTT

APPLICANT
(Respondent)

and

HIS MAJESTY THE KING

RESPONDENT
(Appellant)

APPLICATION FOR LEAVE TO APPEAL
VOLUME II OF III
(Pursuant to section 691(2)(c) of the *Criminal Code* and Rule 25 of the *Rules of the Supreme Court of Canada*, SOR/2002-156)

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PART I – OVERVIEW AND STATEMENT OF THE CASE

A. Overview

1. This case raises the novel issue of whether an appellate court may set aside an acquittal based on a new case theory at odds with the Crown's case theory at trial and with the way Crown counsel conducted the trial.

2. The Applicant was acquitted after being charged with wilfully promoting hatred against "gays" by "communicating statements…consisting of written words and images in a two paged flyer" ("the Flyer"), contrary to s. 319(2) of the *Criminal Code*. At his trial before a judge without a jury, the Trial Crown[1] advanced the theory that *only* the parts of the Flyer pertaining to health and medical issues amounted to criminal hatred, whereas the *other* portions of the Flyer, while offensive, did not.

3. The Court of Appeal for Ontario viewed the case differently from the Trial Crown. In its opinion, the Flyer should have been assessed as a whole, including those parts of the Flyer that the Trial Crown expressly submitted did *not* meet the standard for criminal hatred.

4. Consequently, on the sole issue decided on appeal, namely whether the Trial Judge erred in excluding the evidence of an expert in anti-gay discrimination, the Court of Appeal ordered a new trial. The Court held, in part, that the "expert evidence could have provided assistance to the trial judge in assessing the flyer and its impact as a *whole*, as opposed to the analysis of particular images and claims which appeared to constitute the bulk of the trial judge's analysis" [emphasis

[1] For clarity, Crown counsel at trial are referred to as the Trial Crown.

in the original].[2] The analysis conducted by the Trial Judge, however, was directly responsive to the case presented by the Trial Crown.

5. In *Wexler* and *Barton*,[3] this Court unequivocally held that the *Crown* cannot advance a new theory of its case on appeal because it offends the rule against double jeopardy. This Court, however, has never addressed the issue of an *appellate court* overturning an acquittal based on a new case theory.

6. It is the position of the Applicant that, just as it would offend the rule against double jeopardy for a Crown to advance a new case theory on appeal, so it must be for an appellate court to overturn an acquittal based on a new case theory.

B. Statement of Facts

a. Background Summary

7. The Flyer is a pre-printed single page two-sided document. Its page headlined, "Gay Zombies want you to practice safe sex!" was treated at trial as the front or first page; the flip side was treated as the second or back page.[4]

8. The Applicant arranged to march in the 2016 Toronto Pride Parade with several of his associates. As they marched in the parade, they distributed packages which contained copies of the Flyer. Two years later, police charged the Applicant with wilful promotion of hatred against "gays". The Trial Crown preferred a direct indictment, and the case was scheduled for trial by jury in the Superior Court of Ontario.

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[2] *R v Whatcott*, 2023 ONCA 536 at para 54.
[3] *R v Wexler*, [1939] SCJ No. 22; *R v Barton*, 2019 SCC 33 at para 47.
[4] The Flyer [Applicant's Application Record ("AAR") Vol III, Tab F at pp 54-55].

9. The Trial Crown brought two pre-trial motions. One of the motions concerned the admissibility of expert evidence from an expert in anti-gay discrimination. The trial judge found that the proposed expert evidence did not meet the test of necessity, and further that it failed on a cost-benefit analysis.

10. At the trial proper, the Trial Crown consented to a re-election to trial by judge alone. Only two witnesses testified, both experts: an expert in infectious disease proffered by the Crown, and an expert in theology proffered by the defence. Neither side challenged the admissibility of this expert evidence. In addition to the evidence of these two expert witnesses, the Trial Crown's case consisted, for the most part, of the Flyer, a statement the Applicant made to police following his arrest, and an agreed statement of facts.

b. Pre-Trial Motion to Admit Expert Evidence

11. The Trial Crown proffered an expert in anti-gay discrimination in a pre-trial motion (the "Proposed Expert"). The pivotal question on the issue of admissibility was whether the evidence was necessary.

12. As part of the motion, the Proposed Expert was extensively examined and cross-examined for the purpose of determining the nature and scope of his evidence. Additionally, the trial judge had the benefit of initial and supplementary reports authored by the Proposed Expert.

13. The Proposed Expert's evidence addressed many issues that the Trial Crown did not seek to rely on at trial. For example, the Trial Crown did not seek to lead evidence about microaggressions and minority stress, or to elicit an opinion about whether the Flyer was discriminatory and hateful.

14. The Proposed Expert explained that there were three "major" tropes of anti-gay discrimination: religious (morality), law (criminality), and health (sickness). In his opinion, only two of these tropes were prominent in the Flyer: religion and health.[5] *The Trial Crown, however, repeatedly confirmed that their focus was on health*.

15. Notwithstanding the broad range of areas and issues explored with the Proposed Expert, the Trial Crown submitted that they only sought his evidence to the extent necessary for situating the Flyer in relevant historical and social contexts, "*specifically focussing on the theme of health*."[6] The Trial Crown wanted to adduce evidence about the context of the Flyer by supplying the trier of fact with evidence of "the history of denigration and discrimination [against the gay community] based on *health*".[7] The Trial Crown submitted:

> And I understand my friend to object on the basis of necessity because he says that it is well known that gays have experienced discrimination and vilification and if that was the extent of [the Proposed Expert's] opinion evidence, it would not be necessary. That is well known. [. . .] **If permitted, the Crown intends to have [the Proposed Expert] go further and provide specific details of how gays were discriminated throughout history, how this discrimination was perpetuated and the negative stereotypes and belief system that it was premised on, and in my submission this is evidence that the jury needs to know when assessing the statements in the accused's flyer about health, HIV, and STDs**.
>
> And as I said, the Crown is going to ask [the Proposed Expert], generally, about the themes of anti-gay discrimination but when speaking about [the Flyer], **the Crown intends to focus <u>specifically on the trope of health</u> because that is what the Crown says is the overwhelming theme or stereotype present in the flyer. So the Crown will <u>not</u> be asking [the Proposed Expert] to opine on religion or criminality in the flyer. <u>And the Crown is going to argue at trial proper that the accused flyer invokes long held beliefs about gays as diseased and ask him how these stereotypes exposed the gay community to vilification.</u> To understand that argument, the jury needs to know about the concept of the gay plague, how STD and HIV were represented as exclusively gay diseases and the product of unnatural lifestyle and, in my submission, these specific details are not well known**.[8]

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[5] Expert Witness Report of Nick Mulé ("Mulé Report") at p10 [<u>AAR Vol III</u>, Tab E at p 48].
[6] Trial Crown's Oral Submissions Re Admissibility of Expert Evidence ("Crown's Oral Submissions (Expert)"), Transcript - July 14, 2021 at 2/20-30, [<u>AAR Vol III</u>, Tab B at p 5].
[7] Crown's Oral Submissions (Expert), Transcript - July 14, 2021 at 14/15-25 [<u>AAR Vol III</u>, Tab B at p 9].
[8] Crown's Oral Submissions (Expert), Transcript - July 14, 2021 at 14/30-16/5 [<u>AAR Vol III</u>, Tab B at pp 9-11].

16. The Trial Crown further explained that the Proposed Expert's opinion would focus on common themes of anti-gay discrimination and the presence of the "*health stereotype*" in the Flyer.[9] This accorded with the Trial Crown's written submissions which stated:

> The Crown seeks to have [the Proposed Expert] provide an opinion about whether the accused's flyer references themes of anti-gay discrimination or contains stereotypes historically used to discriminate against and denigrate the gay community, with a **focus on the theme of health**.[10]
>
> [. . .]
>
> A trier of fact cannot assess whether language stirs up feelings of vilification and detestation in a vacuum. **Words take their meaning from context. For example, the suggestion in the accused's flyer that gay individuals are likely to contract a sexually transmitted disease because of their sexual orientation may, even divorced from context, be considered hateful. But it is particularly insidious when considered against the backdrop of [the Proposed Expert's] evidence about "the gay plague" and the stereotype that gays are unnatural and diseased. Absent [the Proposed Expert's] evidence, the jury will be left without the context needed to determine whether the accused's statements are hatred**.[11]
>
> [. . .]
>
> **[T]he average juror is unlikely to be aware that the stereotypes employed by the accused – that gays are diseased and unnatural and that being gay is itself a disease – have historically been used to marginalize and degrade gay individuals. Without this context, the jury will be left unable to properly assess the meaning of the accused's statements or his intent**.[12]

17. The Trial Crown maintained that they only sought certain segments of the Proposed Expert's evidence and opinions for admission at trial. For example, *the Trial Crown did not seek an opinion about whether the Flyer conflated homosexuality with pedophilia* – even though the Proposed Expert's report asserted that the Flyer contained "an allusion to a link" between homosexuals and preying on children.[13] The Trial Crown's approach aligned with their theory

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[9] Crown's Oral Submissions (Expert), Transcript - July 14, 2021 at 52/25-35 [AAR Vol III, Tab B at p 14].
[10] Crown's Written Submissions Re Admission of Expert Evidence ("Crown's Written Submissions (Expert)") at para 3 [AAR Vol III, Tab G at p 58].
[11] Crown's Written Submissions (Expert) at para 30 [AAR Vol III Tab G at p 69].
[12] Crown's Written Submissions (Expert) at para 34 [AAR Vol III at Tab G, p 71].
[13] Mulé Report at p 6 [AAR Vol III, Tab E at p 44].

that the portions of the Flyer which referenced pedophilia were not hate speech, in part due to their vague nature. As the Trial Crown submitted:

> **"[I] asked [the Proposed Expert] about the stereotype of gays being pedophiles and the conflation between pedophilia and being gay and whether that was present in the flyer, and he gave a very balanced response where he essentially said, I don't think so.** The allegations were unfounded, that's the reason the flyer was quite vague and they're not specified and so I'm not comfortable saying that it is prevalent [. . .]"[14]

18. The same applied to religion. The Proposed Expert opined that the messages in the Flyer tried to impose religious values onto homosexuals, which was a form of oppression and an affront to the gay community.[15] He testified that religion, "can be a very broad area," and that many religions with "negative views of same-sex relationships and desires will label it as immoral behaviour, and sometimes go so far as to say this behaviour is a sin, and sinners engage in this kind of behaviour."[16] Despite the Proposed Expert's opinion that religious discrimination was prominent in the Flyer, *the Trial Crown confirmed they would not ask the Proposed Expert about religion except by way of a "very general" overview*. The Trial Crown submitted:

> [T]he Crown does not intend to ask [the Proposed Expert] to opine or testify at length about various religious doctrines. The reason the Crown intends to ask him about stereotypes broadly is more one of fairness in that we wanted to invite a general history, and the general history doesn't include discrimination based on religion, and the Crown does not want to only ask him about health, so as not to leave the impression that like the gay community is only ever being discriminated based on health and that's present in the flyer. [. . .] And so **[the Proposed Expert's] evidence will not focus at length on religion except to provide the background that this was a facet of anti-gay discrimination and I think your Honour in your ruling can limit that and that he can provide a very general overview and not go into details about different religious doctrines**.[17]

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[14] Crown's Oral Submissions (Expert), Transcript - July 14, 2021 at 11/25-12/10 [AAR Vol III, Tab B at pp 6-7].
[15] Mulé Report at p 10 [AAR Vol III, Tab E at p 48].
[16] Evidence of N. Mulé, Transcript - June 9, 2021 at 56/5-57/5 [AAR Vol III, Tab A at pp 2-3].
[17] Crown's Oral Submissions (Expert), Transcript - July 14, 2021 at 23/10-24/5 [AAR Vol III, Tab B at pp 12-13].

c. The Trial Judge's Ruling Excluding the Proposed Expert

19. In a detailed ruling, the trial judge excluded the Proposed Expert evidence because it did not meet the test for necessity, and it failed on a cost-benefit analysis. As is apparent from his ruling, the trial judge understood and appreciated the overall nature and scope of the Proposed Expert's evidence.

20. After thoroughly reviewing the Proposed Expert's evidence, the trial judge addressed the position of the Trial Crown regarding the proposed the nature and scope of the evidence they intended to lead at trial:

> [30] [The Proposed Expert] will provide valuable information for the jury that links the flyer to historical tropes representing aspects of discrimination, such as the "gay plague" and that this evidence comes from his specialized knowledge. For example, the Crown intends to argue at trial that the long-held tropes about disease expose gay people to hatred.[18]
>
> […]
>
> [37] Crown counsel [a]grees that it is well-known that there has been anti-gay discrimination. The jury, however, needs to understand how anti-gay discrimination has been perpetuated. **The Crown intends to concentrate on the health trope, and the flyer contains many statements about gay people and health. The jury needs to understand what the "gay plague" was, and how it is at the root of a system that equates sickness with immorality.** The jury needs to understand the links between the stereotypes and tropes of anti-gay discrimination. The jury needs to understand the history and context of the accused's 4The Trial Crown] finally argues that [the Proposed Expert's] evidence meets the tests of necessity and relevance. In order to be necessary, the evidence must be more than merely helpful. Here, [the Proposed Expert's] evidence will provide the historical and statements as the speech cannot be considered in a vacuum…[19]

This accurately captured the Trial Crown's submissions regarding the health theory they wished to pursue.

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[18] *R v Whatcott*, 2021 ONSC 5541 at para 30.
[19] *R v Whatcott*, 2021 ONSC 5541 at para 37.

21. The Trial Judge concluded that the Proposed Expert's evidence was unnecessary because "the expert evidence will not provide information that is likely to be outside the experience of the jury".[20] He explained:

> [47] The jury is meant to represent the community, and, acting collectively, is by definition the reasonable person. The Toronto of 2021 is a community that is rich in cultural, ethnic, racial, and sexual diversity, and prides itself on being so. Who better than representatives of this community to understand whether the flyer constitutes hate speech from the point of view of the reasonable person in the contemporary context of our city?
>
> [48] I agree with the Crown that the specific detailed linkages between the tropes of health and religion and anti-gay discrimination as found in the academic literature are unlikely to be within the knowledge and experience of the trier of fact. That said, those detailed linkages do not need to be set out for the jury to understand them.[21]
>
> [. . .]
>
> [50] Members of the jury will generally be aware that there are some religious denominations that have opposed equality and legal rights for LGBT2-SQI people, as seen in the debate over same-sex marriage in this country. Likewise, the reasonable member of this community will be aware of the linkage between discrimination against the gay community and the HIV/AIDS epidemic.[22]

d. The Trial

22. The Trial Crown continued to pursue their health theory at trial.[23] Their theory was that *only* the medical portions of the Flyer amounted to criminal hatred. According to their theory, the medical assertions in the Flyer distorted medical information and threaded lies about diseases with the truth in order to promote hatred against gay men. The Trial Crown submitted that the case against the Applicant came down to whether the Flyer's statements about gays being diseased promoted hate:

> So I'm going to stop there for a moment to just talk about enmity and extreme ill will. Because we all know that gays have suffered that in our society in the past. You know, that's common

[20] *R v Whatcott*, 2021 ONSC 5541 at para 43.
[21] R v Whatcott, 2021 ONSC 5541 at paras 47-48.
[22] R v Whatcott, 2021 ONSC 5541 at para 50.
[23] Crown's Submissions (Trial), Transcript - Oct 22, 2021 at 8/0-20, 9/30-10/30, 13/5-25, 14/5-15, 15/10-20, 17/15-19/35, 20/5-10, 21/5-15, 23/0-15, 26/20-30, 27/5-10, 33/5-15 [AAR Vol III at Tab C].

> knowledge that the AIDS epidemic disproportionately affected gays [. . .] Because they were perceived to be the carriers of this deadly virus, HIV/AIDS. You know, they were perceived by society to be the carriers of this disease. [. . .] it's gay history.[24]
>
> [. . .]
>
> Mr. Whatcott's message is clear that gays are dangerous because they carry this deadly virus that dehumanizes them, and they become unworthy of the very basic human characteristic of love.[25]
>
> [. . .]
>
> Mr. Whatcott's message is similarly clear, gays are dangerous because they have this deadly virus and [are] unworthy of nothing but the deepest feelings of disgust and loathing.[26]
>
> [. . .]
>
> So to sum up why this is hate, he, Mr. Whatcott employed the constellation of devices. He dehumanized gays as being carriers of disease, he used true lies in the veneer of truth to distort medical fact and create outright lies and he preyed upon the tragic history of gays in Canada.[27]
>
> [. . .]
>
> What this comes down to is whether Mr. Whatcott's statements about gays being diseased, and the carriers of disease, is hatred, and it's the Crown's submission that this is not a simple warning as envisioned by the Christian tradition.[28]

23. In support of their health theory, the Trial Crown called an expert in infectious disease who testified about the veracity of medical claims in the Flyer. Her testimony revealed, as the trial judge found, that most medical claims made in the Flyer were not outright falsehoods, but rather were in "the ballpark of plausible or at worst an exaggeration".[29]

24. The Trial Crown submitted that, in assessing the Flyer, the Trial Judge need not focus on the non-health related parts as they did not amount to criminal hatred. For example, the Trial Crown submitted that *only the first two boxes* on the front/first page headlined, "Gay Zombies want you to practice safe sex!" comprised hate speech. These two boxes purported to provide

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[24] Crown's Submissions (Trial), Transcript - Oct 22, 2021 at 8/0-25 [AAR Vol III, Tab C, p 19].
[25] Crown's Submissions (Trial), Transcript - Oct 22, 2021 at 26/25-30 [AAR Vol III Tab C at p 33].
[26] Crown's Submissions (Trial), Transcript - Oct 22, 2021 at 27/5-10 [AAR Vol III, Tab C at p 34].
[27] Crown's Submissions (Trial), Transcript - Oct 22, 2021 at 33/9-14 [AAR Vol III, Tab C at p 35].
[28] Crown's Submissions (Trial), Transcript - Oct 26, 2021 at 82/20-25 [AAR Vol III, Tab D at p 37].
[29] *R v Whatcott*, 2021 ONSC 8077 at para 51.

information about various diseases and depicted photographs described as anal warts and an AIDS fatality. The Trial Crown submitted that the *third box* on the front/first page, which claimed to describe a specific person who had undergone a sex change operation, did not comprise hate speech:

[THE TRIAL CROWN]:	And, you know, we've never advanced the proposition that box three is a part of this.
THE COURT:	Right.
[THE TRIAL CROWN]:	You have a reasonable doubt as to whether this would be a communication targeting a group versus an individual.
THE COURT:	Right.
[THE TRIAL CROWN]:	In the same way that on the [back/second] page when you have Mr. Whatcott talking about Mr. Trudeau being a chronic attendee, and actively participating in child sex abuse, you know, it's the same thing. There's obviously the link to this concept of pedophilia.
THE COURT:	Right.
[THE TRIAL CROWN]:	**But it's not against a targeted group, so I think your Honour would have a doubt that would apply.**
[. . .]	
THE COURT:	While you're on that topic and not to throw you off, are you going to discuss the other two boxes?
[. . .]	
[THE TRIAL CROWN]:	**So the hate speech is the first, you know, starts with the first box [on the first/front page], the first image, and then continues down to the AIDS fatality box. And then there is the promotion of hatred as well in the third – oh, sorry, on the [second/back] page, the first full paragraph. Which is the genital warts in the mouth**.
THE COURT:	Right, I see, okay.
[THE TRIAL CROWN]:	**But no, our submission is that it does not include these two [other] boxes [on the second/back page].**
THE COURT:	Okay.

[THE TRIAL CROWN]: Being the one about Mr. Graham and the one about Ms. Wynne.[30]

25. The Flyer's second/back page was headlined "Gay Zombies believe in speaking the truth, even if it is unpopular!". On the Trial Crown's health theory, *only the top portion* of the second/back page, which referenced genital warts, comprised hate speech. The Trial Crown submitted that other portions of the second/back page referencing various politicians, including a politician who had been accused of pedophilia, *did not form part of the hate speech being alleged*.[31] Other Flyer portions on the second/back page which the Trial Crown did not rely on included text which advised gay men that God loved them, and that if they wanted to come to the "Lord and Saviour Jesus Christ", they could contact the Applicant directly.[32]

26. The defence called an expert in theology who opined that the Flyer was broadly consistent with the Christian "duty to warn" and Christianity's missionary nature. The Trial Crown considered the defence expert an "excellent" witness and expressed no concerns about his testimony.[33]

27. Ultimately, the trial judge concluded that the Flyer, while offensive and distasteful, was in the "grey zone" between legitimate speech and criminal hate speech.[34]

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[30] Crown's Submissions (Trial), Transcript - Oct 22, 2021 at 17/15-18/30 [AAR Vol III, Tab C at pp 26-27].
[31] Crown's Submissions (Trial), Transcript - Oct 22, 2021 at 18/5-30 [AAR Vol III, Tab C at p 27].
[32] The Flyer – second/back page at the bottom half [AAR Vol III, Tab F at p 55].
[33] Crown's Submissions (Trial), Transcript - Oct 22, 2021 at 2/25-3/30 [AAR Vol III, Tab C at pp 16-17].
[34] *R v Whatcott*, 2021 ONSC 8077 at paras 27, 38-39, 71, 90, 95.

e. Court of Appeal for Ontario

28. The Crown appealed the Applicant's acquittal to the Court of Appeal for Ontario, which granted the appeal on the basis that the trial judge erred in excluding the evidence of the Proposed Expert.

29. Writing for the Court of Appeal, Justice Sossin criticized the approach taken by the trial judge in his analysis:

> [23] While the trial judge explained his conclusions on the flyer with reference to its specific parts (for example, considering each medical claim with reference to its accuracy), the trial judge offered little by way of an assessment of the whole of the flyer in relation to the question of whether it promotes hatred against gay men."[35]

Based on that criticism, Justice Sossin concluded:

> [40] In my view, the trial judge failed to appreciate the importance of expert evidence on how discriminatory tropes against gay men are conveyed.[36]

30. The criticism levelled at the Trial Judge and the conclusion reached by the Court of Appeal fail to consider the way in which the Trial Crown conducted their case. Not only did the Trial Crown advance a health theory only, but they directed the Trial Judge to consider only those portions of the Flyer that they relied on as being hateful.

31. In particular, the Court of Appeal concluded that the trial judge's error was *material* enough to warrant overturning the acquittal on the basis that the Trial Judge ought to have considered:

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[35] *R v Whatcott*, 2023 ONCA 536 at para 23.
[36] *R v Whatcott*, 2023 ONCA 536 at para 40.

1) the Flyer as a whole and whether all the texts and images in the Flyer relied on stereotypes and tropes about gay men that expose them to hatred, notwithstanding the manner in which the Trial Crown presented their case;[37]

2) the "classic homophobic tropes" identified by the Proposed Expert but not pursued by the Trial Crown, that gay men are morally inferior, corrosive to Christian morals, dangerous to children, and therefore deserving of disease and suffering;[38]

3) the Proposed Expert evidence as being necessary to prevent "an unfair imbalance and one-sided perspective on the historic and cultural background of the messages conveyed by the flyer, namely the implications of the references to pedophilia, and 'gay zombies'…among other references," despite this being an argument raised by the Crown for the first time on appeal;[39] and

4) the "emotional distress" the Flyer caused because it might have strengthened or diminished its hatefulness[40] – even though this theory was never advanced at trial.

PART II – QUESTION IN ISSUE

32. The question in issue is as follows:

(1) Does the decision of the Court of Appeal for Ontario ordering a new trial violate the Applicant's rights under s. 11(h) of the Charter by subjecting him to double jeopardy?

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[37] *R v Whatcott*, 2023 ONCA 536 at para 40.
[38] *R v Whatcott*, 2023 ONCA 536 at para 47.
[39] *R v Whatcott*, 2023 ONCA 536 at paras 46 and 53.
[40] *R v Whatcott*, 2023 ONCA 536 at paras 43-44.

PART III – ARGUMENT

A. Double Jeopardy Principles

33. The cardinal principle that nobody should be placed in jeopardy twice for the same matter is foundational to Canadian criminal law.[41] This principle against double jeopardy is enshrined in s. 11(*h*) of the *Canadian Charter of Rights and Freedoms* which states:

> 11. Any person charged with an offence has the right:
>
> (*h*) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again;

34. The purpose of s. 11(*h*) is to protect accused persons against double jeopardy[42], which includes protection from "the harassment of multiple trials". [43] Its language mirrors the language and purpose of art. 14.7 of the *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171, to which Canada is a party. The article reads:

> 7. No one shall be liable to be tried or punished again for an offence for what he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

35. Though Canadian protection from double jeopardy is not absolute, the Crown right of appeal from acquittals is strictly limited to questions of law alone.[44] It is firmly entrenched in Canadian law that the protection from double jeopardy prohibits the Crown from advancing a new theory of liability for the first time on appeal.[45] This prohibition remains intact even if the Crown

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[41] *Cullen v The King*, [1949] SCR 658.
[42] *Canada (Attorney General) v Whaling*, 2014 SCC 20 at para 33.
[43] *Canada (Attorney General) v Whaling*, 2014 SCC 20 at para 37.
[44] R v Evans [1993] 2 SCR 629 at 645 f-h, see also *R v Barton*, 2019 SCC 33 at para 46.
[45] *R v Wexler*, [1939] SCJ No. 22; *R v Varga*, 1994 CanLII 8727, 1994 OJ No 1111 (ON CA) at p 14; *R v Suarez-Noa*, 2017 ONCA 627 at paras 32-38; *R v Barton*, 2019 SCC 33 at para 47

is alleging an error in law germane to an acquittal.[46] In *Barton*, this Court affirmed the following passage from *Varga*, a decision of the Court of Appeal for Ontario:

> A Crown appeal cannot be the means whereby the Crown puts forward a different case than the one it chose to advance at trial. It offends double jeopardy principles, even as modified by the Crown's right of appeal, to subject an accused, who has been acquitted, to a second trial based on arguments raised by the Crown for the first time on appeal. **Double jeopardy principles suffer even greater harm where the arguments advanced on appeal contradict positions taken by the Crown at trial**.[47] [Emphasis added]

36. Canadian appellate courts have emphasized the importance of protecting against double jeopardy by preventing appeals from being the means for the Crown to secure retrials based on new theories of a case. For example, in *Elms*[48], the Court of Appeal for Ontario dismissed a Crown appeal from an acquittal of wilfully promoting hatred because the Crown tried to pursue a new theory on appeal. The accused had been acquitted at trial of promoting hatred in relation to the sale of white supremacist CDs. The trial Crown theory was that the CD *lyric sheets*, located inside the CD covers, comprised the hatred being promoted. On appeal, the Crown theory was that the CD *covers* promoted hatred. The Court of Appeal, citing *Varga*, held that the Crown could not pursue this new theory of the case on appeal because it would offend the rule against double jeopardy.[49]

37. In *Nguyen*[50], the majority of the Saskatchewan Court of Appeal dismissed a Crown appeal from acquittals on charges of marijuana possession because the appeal Crown tried to present the case in a new manner. The three accused were acquitted because the trial judge excluded the

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[46] *R v Varga*, 1994 CanLII 8727, 1994 OJ No 1111 (ON CA) at p 14.
[47] *R v Varga*, 1994 CanLII 8727, 1994 OJ No 1111 (ON CA) at p 14, cited with approval in *R v Barton*, 2019 SCC 33 at para 47.
[48] *R v Elms*, 2006 OJ No 3635 (ON CA).
[49] *R v Elms*, 2006 OJ No 3635 (ON CA) at paras 28-30.
[50] *R v Nguyen*, 2008 SKCA 160.

marijuana evidence, pursuant to s. 24(2) of the *Charter*, after concluding that police did not have the requisite grounds to detain and question the three accused. On appeal, the Crown argued that a statement made by Reith, one of the accused, provided police with requisite grounds. However, the trial Crown had not made this argument. The Court of Appeal majority held that presenting the case in this new way on appeal violated double jeopardy. The majority stated:

> **What is the error of law? The error of law can only be that the trial judge failed to act on his own initiative and consider the Reith statement when determining whether Corporal Wilson had reasonable grounds to arrest Duy Nguyen. In my respectful view, this cannot be an error of law justifying a new trial when the case was not presented to the trial judge in this way, and if it had been, the statement may very well have been excluded in any event.**
>
> **If the treatment of the Reith statement was the product of the Crown's considered choice, this case can be analyzed in terms of whether the Crown is pursuing a different theory of liability than that which was considered at trial.** This brings us to that line of authority, beginning with *Wexler v. The King*, which restrains the presentation of new arguments on appeal. That line of authority includes *R. v. Merson*; *R v. Vidulich*; *R. v. Varga*; *R v Trabulsey*; *R v. J.G.S.*; *R v. I.W.M.* and *R v Elms*. All of these decisions are demonstrations of the Wexler principle and, for the most part, are Crown appeals seeking to set aside an acquittal or to sustain a conviction obtained by the Crown before a summary conviction appeal court following an acquittal at first instance.
>
> [. . .]
>
> **On a Crown appeal from an acquittal, a trial judge should not be found to have committed an error of law for having failed to consider a means of convicting the accused, which was effectively taken off the trial judge's plate by Crown counsel. There is to obligation on a trial judge to make a better case for the Crown than which was presented**.[51] [Emphasis added]

38. Although the Crown sought leave to appeal *Nguyen* to this Court, they abandoned their application. Accordingly, this Court never addressed the issue of whether a trial judge commits an error in law for failing to consider "a means of convicting the accused, which was effectively taken off the trial judge's plate by Crown counsel."[52]

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[51] *R v Nguyen*, 2008 SKCA 160 at paras 37-39.

[52] *R v Nguyen*, [2009] SCCA No 5; Supreme Court of Canada File 32965; Supreme Court of Canada Bulletin of Proceedings, May 15, 2009, at p 689: Notice of Discontinuance filed by the Crown in relation to its application for leave to appeal *R v Nguyen*, 2008 SKCA 160 to the Supreme Court of Canada.

B. The Decision of the Court of Appeal for Ontario is based on a New Theory of the Case

39. Just as the rule against double jeopardy prohibits the Crown from arguing new theories on appeal, so it should prohibit the Court of Appeal for Ontario from overturning an acquittal based on a new theory. In this case, the Court of Appeal granted a retrial on the basis that expert evidence was necessary to assess the Flyer in a manner that *directly contradicted the Trial Crown's theory*. Not only has the Court of Appeal granted a retrial based on a new theory, but it has gone further – urging the prospective new trier of fact to conduct a "fuller analysis of the record" and to specifically consider portions of the Flyer which the Trial Crown had submitted did not meet the standard of criminal hate speech.[53]

40. The Court of Appeal claimed that the trial judge "failed to appreciate the importance" of the Proposed Expert's evidence,[54] when in fact, the trial judge appreciated the purpose of the Proposed Expert's evidence as articulated by its proponent, the Trial Crown. Nevertheless, the Court of Appeal held that the trial judge erred in law by misapplying the legal standard of necessity.[55] It provided three main reasons for finding the error *material* enough to warrant setting aside the Applicant's acquittal. All three reasons reveal that the acquittal was overturned based on a new theory of the case which contradicted both the Trial Crown's theory and the trial record.

41. ***First***, the Court of Appeal held that the Proposed Expert was necessary for evaluating portions of the Flyer that the Trial Crown had expressly submitted *were not hate speech*. For example, the Court of Appeal found that the Proposed Expert had evidence necessary for assessing portions of the Flyer's second page which "connected claims of sexual abuse and pedophilia to

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[53] *R v Whatcott*, 2023 ONCA 536 at paras 75, 80.
[54] *R v Whatcott*, 2023 ONCA 536 at para 40.
[55] *R v Whatcott*, 2023 ONCA 536 at para 51.

well-known political figures"[56]. This directly opposed the Trial Crown's submission that *only* the portions of the Flyer related to its "health" theory comprised hate speech because reasonable doubt applied to the *other* portions. In finding that the Proposed Expert's evidence was necessary, the Court of Appeal relied on portions of the Flyer that the Trial Crown had expressly disavowed as being capable of proving criminal hatred. The Court of Appeal also held that the Proposed Expert had evidence necessary for assessing the Flyer "as a whole".[57] This directly opposed the Trial Crown theory that *only* the "health" portions of the Flyer comprised hate speech.

42. ***Second***, the Court of Appeal found that the Proposed Expert was necessary to "balance" the "asymmetry" of the theology expert's testimony which had been admitted on consent.[58] Not only is this a new theory of the case, but it contradicts the trial record. The Proposed Expert could not present any evidence to "balance" the theology expert's testimony because the Proposed Expert was not a religious expert. This was why the Trial Crown submitted that the Proposed Expert would *not* provide evidence about religion beyond a "very general" overview of religion as "a facet of anti-gay discrimination".[59]

43. Moreover, the Trial Crown considered the theology expert an "excellent" witness and never expressed any concern about asymmetry.[60] If the Trial Crown *had* been concerned about asymmetry, there was an available remedy: they could have re-applied to admit the Proposed Expert's evidence on the basis that it had become necessary to respond to the theology expert's evidence.[61] Tellingly, the Trial Crown did not do so and never expressed any concern about

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[56] *R v Whatcott*, 2023 ONCA 536 at para 52.
[57] *R v Whatcott*, 2023 ONCA 536 at para 45.
[58] *R v Whatcott*, 2023 ONCA 536 at para 49.
[59] Crown's Oral Submissions (Expert), Transcript - July 14, 2021, at 23/25-24/5 [AAR Vol III, Tab B at pp 12-13].
[60] Crown's Submissions (Trial), Transcript - Oct 22, 2021 at 2/25-3/30 [AAR Vol III, Tab C at pp 16-17].
[61] The Trial Crown received the theology expert's report prior to the commencement of trial, such that this application could have been made before trial had the Trial Crown been concerned about imbalance.

"asymmetry". As the Trial Crown submitted at the pre-trial motion, they only sought a "very general" overview of religion from the Proposed Expert because it was not his area of expertise, and their focus was on health. It follows that the Proposed Expert could not counter any alleged "asymmetry" posed by the theology expert's evidence.

44. Not only should this Court be concerned that the issue of "asymmetry" was only raised at the appeal stage, but this Court should also be concerned about how this aspect of the appeal decision encourages an approach to expert evidence that risks degenerating trials into "a contest of experts".[62] This Court has strongly and repeatedly cautioned against such an approach because it risks encouraging triers of fact to dilute the high threshold for the admission of expert evidence.[63]

45. ***Third***, the Court of Appeal found that the Proposed Expert had necessary evidence about the "emotional distress" that the Flyer could have caused to the gay male community whose perspective may have strengthened or diminished its hatefulness. [64] This was not the theory of the Trial Crown. Furthermore, harm is not an element of the criminal promotion of hate speech. Accordingly, its proof cannot be so necessary and material that it warrants overturning an acquittal.

PART IV – COSTS SUBMISSIONS

46. The Applicant makes no submissions concerning costs.

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[62] *R v D.D.*, 2000 SCC 43 at para 56.
[63] *R v D.D.*, 2000 SCC 43 at paras 47, 56; *R v Mohan*, [1994] 2 SCR 9 at 24 g-i; *White Burgess* 2015 SCC 23 at para 18;
[64] *R v Whatcott*, 2023 ONCA 536 at paras 43-44.

PART V – ORDER REQUESTED

47. The Applicant seeks an order allowing the application for leave to appeal and granting the right to issue a Notice of Appeal from the judgment of the Court of Appeal for Ontario.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at TORONTO, Ontario, this 6th day of October, 2023.

John Rosen
Counsel for the Applicant

Mindy Caterina
Counsel for the Applicant

PART VI – TABLE OF AUTHORITIES

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