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COURT OF APPEAL FOR ONTARIO

WEILER, LASKIN and GOUDGE JJ.A.

B E T W E E N:

HER MAJESTY THE QUEEN	)	Jennifer Woollcombe, for the respondent
	)	
Respondent	)	
	)	
- and -	)	
	)	
MARK HARDING	)	Peter R. Jervis and Jasmine T. Akbarali,
	)	for the appellant
Appellant	)	
	)	
	)	Heard: October 9, 2001

On appeal from the order of Justice Michael R. Dambrot, (2001), 52 O.R. (3d) 714, sitting as a summary appeal court judge, dated January 31, 2001, dismissing the appeal against the conviction imposed by Chief Justice Sidney B. Linden on June 19, 1998 (1998), 45 O.R. (3d) 207.

WEILER J.A.:

Overview

[1] The appellant Harding, a self-described Christian pastor, was charged with two counts of wilfully promoting hatred against Muslims in relation to two pamphlets written and distributed by him. He was also charged with two counts of wilfully promoting hatred through two telephone messages at a number that he invited members of the general public to call. The appellant was acquitted in relation to one of the telephone messages but convicted in relation to the other telephone message and the two pamphlets. The appellant appealed his conviction to the summary conviction appeal court and Dambrot J. dismissed his appeal on January 31, 2001.

[2] The appellant makes three submissions: (1) Dambrot J. incorrectly and unconstitutionally extended the *mens rea* requirement for wilful promotion of hatred to include wilful blindness; (2) Dambrot J. erred in concluding that the trial judge based his decision on a clear and unambiguous finding that the appellant had a guilty state of mind other than wilful blindness; and (3) Dambrot J. erred in his interpretation of the defence of "good faith" contained in s. 319(3)(b) of the *Criminal Code*.

[3] For ease of reference, ss. 319(2) and (3) are reproduced below:

> 319.
>
> (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; or
> >
> > (b) an offence punishable on summary conviction.
>
> (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, he expressed or attempted to establish by argument an opinion on a religious subject;
> >
> > (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.

[4] At trial, the appellant acknowledged that the pamphlets and recorded telephone message were created by him, were not private conversation, and had the effect of promoting hatred against an identifiable group – Muslims. The only issue was whether

the appellant possessed the *mens rea* for the offence; namely, whether he "wilfully" promoted hatred.

The Pamphlets Written and Distributed by the Appellant

[5] The appellant acknowledged that, prior to writing the two pamphlets that form the subject of the within charges, he had written and distributed two fliers. Despite the reactions he had received in relation to those fliers, it was his evidence that he did not realize that Muslims saw his "evangelizing" as hatred. He suggested that Muslims were "feeling bad about themselves because they couldn't answer the questions" posed in the pamphlets.

[6] Generally, it was the appellant's evidence that he thought the Koran and the Muslim religion were full of hate and violence. Between April 30 and June 24, 1997, the appellant wrote and distributed two pamphlets. It will be helpful to an understanding of the issues to briefly describe the pamphlets and telephone message.

(i) *The Weston High School pamphlet*

[7] In the first pamphlet, entitled "Let's Take a Serious Look at What's Happening to Western [sic] High School" and addressed "Dear local resident", the appellant:

- Describes horrific acts of violence committed by Muslims in other countries and comments that "[t]he Muslims who commit these crimes are no different than the Muslim believers living here in Toronto" and that he has found "no difference between the Muslims living here or anywhere else in the world";

- Describes Muslims as "violent and hateful towards Jews, Christians and anyone else that denies or objects to their false religion" and states that [t]he Muslim religion is full of hate and violence";

- States that Muslims "sound peaceful and try to act peaceful, but underneath their false sheep's clothing, are raging wolves, seeking whom they may devour, and Toronto is definitely on their hit list";

- Suggests that Muslims believe that polygamy "is allowed to any Muslim man in Canada or anywhere else in the world, as a Muslim man you just have to be able to afford them, like land or furniture, the more money you have, the more you can have";

- Suggests that the auditorium at Weston Collegiate has been "turned into a mosque for the children to pray" and comments that "[t]eaching a false religion is always very dangerous, but teaching this particular violent religion in school to children is a very

serious mistake".

- States that the Muslim religion, and the fact that it is allowed in schools whereas Christianity is not, poses a "threat to our children".

[8] It was the appellant's evidence that this pamphlet was circulated in a four block radius around Weston Collegiate High School.

[9] The appellant testified in his examination-in-chief that he wrote the pamphlet in response to an article by Ahman Rafi Mian that was published in the Ambition newspaper. He testified that the article concerned him as it made it sound as though Islam was evangelized within the school, during school hours. He said that it was his intention to convey that the Muslim religion is "questionable" and that he wanted area residents to object to what was happening in the school. His assertion that Islam is a "false religion" was based on the fact that the Koran disagrees with the bible. He testified that when he prepared the pamphlet, he felt that the information within it was accurate, that it was not intended to promote hatred against Muslims, and that he did not foresee that this was its probable effect.

[10] There were a number of ways in which the appellant changed or distorted the information presented in the Ambition newspaper when he inserted it into his pamphlet. For instance, he said that the newspaper "gloats and encourages its youth to evangelize in high schools in Metro." Nowhere in the Ambition did an author encourage evangelizing. While Mr. Mian's article spoke of the auditorium being used for Friday afternoon prayers, the appellant asserted that "the auditorium of this school has been turned into a mosque". Whereas the article made clear that prayer in the school was an alternative to many students missing the entire Friday afternoon, the appellant's pamphlet suggested that children could take the "entire Friday afternoon" off from classes with the support of the principal and teachers. Finally, although Mr. Mian testified that pamphlets on Islam were distributed to teachers and students on request, there was no mention of this in his article. However, the appellant's pamphlets stated, "pamphlets are handed out on Islamic topics and issues to non-Muslims…to encourage children to join their religion".

[11] Under cross-examination, the appellant said that he was specifically concerned with the fact that there were prayers in the school from "another religious denomination" when Christian prayer was not allowed. He then clarified that, in this particular case, his concern was that the Muslim religion was evangelized in the school. Asked why, if those were his true concerns, they were preceded in the pamphlet by horrific stories about what was happening to Christians in other parts of the world, the appellant testified that it was his intention to "explain what's happening because of the Koran" and that he wanted "to explain that if you are evangelizing in a school system, you are evangelising to children, who are going to grow up in this country learning that doctrine."

[12] The appellant purported to quote a Toronto Star article of April 25, 1997 in both of his pamphlets. Under cross-examination he was unable to explain why he changed the phrase "Muslim rebels" to "Muslims" and the phrase "Muslim militants" to "Muslim believers" when he left the rest of the text unchanged. He said that this was not intentional, and that he intended to show that Muslim fundamentalists in other countries were hurting Christians. He acknowledged that the Toronto Star article did not refer to average Muslims committing these acts; he also acknowledged that his pamphlet did not make clear that average Muslims were not committing these acts. The appellant also said that to him, Muslim believers means Muslim radicals.

[13] Ultimately, the appellant acknowledged that his comment that the Muslims who commit these crimes are no different than those living in Canada could be "interpreted by some" as misleading, compared to what he wanted to convey.

[14] The appellant acknowledged that the manner in which he wrote the pamphlet could be interpreted to convey fear in people, but he repeatedly asserted that this had not been his intention.

(ii) *The "Terrorist" Pamphlet*

[15] The other pamphlet written by the appellant was entitled "Are all the Muslims living in Canada today TERRORSITS [sic]: This is a warning to all Canadians and their families". The pamphlet is written as a letter to the reader, and pleads with the recipient to take a serious look at the "horrifying events that have taken place around the world regarding Muslim terrorists" because "we have the same Muslims believers living right here in Toronto". He continues, in much the same tone as the other pamphlet, and:

- States that his motive is "to cry out to Canadians to warn them about all Muslims";
- Warns the reader that the "objective of every Muslim living in this city" is to take over and for Canada to become a Muslim country;
- States that all other Muslims living in Toronto who do not acknowledge their desire to take over Canada are "like raging wolves in sheep's clothing, inside they are full of hate, violence and murder";
- Describes atrocities committed by Muslims in other countries and suggests that Muslims living in Canada "are the same as their brothers in other parts of the world";
- States that "Muslims are not peaceful people unless you live as a Muslim lives, and this is impossible for Canada, so in its blind hope for peace, Canada waits patiently for the Muslims, in sheep's clothing, to get strong enough to shed their false clothing and to

reveal the wolve [sic] underneath";

- Suggests that "We as Canadians must try to help those who stand in the way of Muslim believers whose only wish is to control by their religion and to punish anyone they can't control."

[16] It was the appellant's evidence that he made about 50 of these pamphlets and handed them out when he evangelized.

[17] Asked why he prepared this pamphlet, the appellant explained that it was intended to let all Christians and Muslims "realize that there is some terrorism going on in other countries", and to wake Christians up on the need to evangelize. He testified that he did not believe that every Muslim living in Canada today is a terrorist, and that he did not believe it when he wrote it. He testified that he did not feel that the document promoted hatred against Muslims, that he had not intended to do so, and that he did not foresee the document having that effect. It was his evidence that his pamphlet was speaking only about Muslim terrorists and radical fundamentalists, rather than Muslims in general, although he acknowledged that this was not clear from the pamphlet itself.

[18] It was the appellant's evidence that when he referred to Muslims in the pamphlet, he was not referring to all Muslims in Canada but, instead, to strictly fundamental Muslims. For instance, when he spoke of the Muslim religion being full of hate and violence, he said that he was referring to radical Muslims. Again, he acknowledged that the pamphlet did not clearly set out this view.

[19] Under cross-examination, the appellant repeated that when he said in the pamphlet that Muslims in Canada were the same as those in other parts of the world, he meant that fundamentalists in Canada are the same as fundamentalists abroad. When it was pointed out that this was nowhere stated in the pamphlet, he suggested that the beginning of the pamphlet said that he was talking about "Muslim believers, Muslim terrorists, living in Canada". The appellant attempted to explain that Muslim "believers" and Muslims terrorists are the same.

[20] The appellant acknowledged that he said in this pamphlet that there were Muslim terrorists living in Canada. He further acknowledged that he knew there were some believers with radical views. He testified that people should be afraid of terrorists. He agreed that his warning about "all Muslims", which followed the discussion about terrorists, was really about fundamentalists, although this was not clear from the comment.

[21] The appellant also agreed that in this pamphlet he had changed a quotation by Sheikh Ahmed Deedat from "But Jihad does not mean with guns or grenades" to "But jihad *does not have to mean* with guns or grenades" [emphasis added]. It was his evidence that the words meant the same thing to him despite the Crown's suggestion that he inserted these words to change the meaning of the quotation.

(iii) *The recorded telephone message*

[22] The text of the first message recorded on the appellant's answering machine forms the basis of the conviction in count three. In his message, the appellant states that Muslims continue to "savagely torture, maim, starve, beat and kill Christians around the globe in the name of their God". He states that Muslims living on Toronto are no different.

[23] It was the appellant's evidence that his phone messages were for the missionary work that he did in the community. He testified that by his comment "the Muslims living in Toronto are no different", immediately following a statement that Muslims continue to savagely torture, maim, and starve, he meant to say that the Koran in their hearts is no different.

[24] As with the pamphlets, the appellant testified that he did not feel that his first message promoted hatred and that he did not intend it to do so.

[25] When asked, under cross-examination, what his purpose had been in using language about Muslims torturing, maiming, and beating Christians, the appellant testified that in his heart, it was Muslim fundamentalists he was talking about, and that he was reaching out to try to involve Christians. Reminded that the phone message spoke of Muslims, and not "Muslim fundamentalists", the appellant repeatedly admitted that he should have been clearer, but that he had been speaking about fundamentalists. Pressed as to why, if that were the case, he said that "Muslims living in Toronto are no different", all that the appellant said was that he had not properly distinguished what he meant.

The Appellant's Statement to the Police

[26] Nowhere in the appellant's 35-page statement to the police did he ever state that, in his pamphlets and phone messages, his comments were primarily about Muslim fundamentalists rather than all Muslims living in Canada.

The trial judge's decision

[27] In order to appreciate the arguments advanced in this case by the appellant and the Crown, it is necessary to review and to quote from the trial judge's decision, reported at (1998), 45 O.R. (3d) 207, in some detail.

[28] The trial judge began his judgment by setting out the three counts in the indictment and the relevant sections of the *Criminal Code*. The trial judge then correctly noted that the essential elements of the offence under s. 319(2) were (1) that Mark Harding communicated statements; (2) other than in private conversation; (3) that the statements promoted hatred; (4) that the hatred was against an identifiable group; and (5) that he did so wilfully. After stating that the actus reus was not a difficult issue in this case, the trial judge turned to the *mens rea* for the offence and stated, at p. 211:

> However, to be successful, the Crown must prove not only the promotion of hatred against a identifiable group, but also that the promotion was wilful in that Mr. Harding intended his communications to promote hatred, foresaw that such consequences were substantially certain, **or** was wilfully blind to the fact of this substantial certainty [emphasis added].

[29] The trial judge considered the decision in *R. v. Keegstra*, [1990] 3 S.C.R. 697, which holds that s. 319(2) is not constitutionally invalid. Although the section violates the right to freedom of speech in s. 2(b) of the *Charter*, it is a reasonable limit prescribed by law that is demonstrably justified in a free and democratic society under s. 1 of the *Charter*. In arriving at his conclusion, Dickson C.J.C. considered the mental element of the offence. The trial judge directed himself that a subjective mental state is required for the offence and that the mental element is more than mere negligence, or recklessness as to the result. A stringent standard of *mens rea* is used to limit the incursion of s. 319(2) on freedom of expression. The burden on the Crown is a difficult one but this serves to minimize the impairment of freedom of expression.

[30] The trial judge then considered the meaning of hatred and found that the two pamphlets and first telephone message delivered a message of hatred within the meaning of s. 319(2) because, as he stated at p. 213, they depicted all Muslims as "persons who readily commit heinous atrocities for the sake of their religious beliefs." These materials concluded that Muslims were deserving of ill-treatment on the basis of group affiliation. The trial judge had a reasonable doubt that the second telephone message, although highly offensive, "breached the stringent criminal code standard" having regard to the alterations made to this message by the appellant.

[31] The trial judge commented at p. 214:

> People who promote hatred rarely explicitly admit that such is their intention. Thus the necessary *mens rea* must be inferred from the offending statements themselves.

[32] He then found at p. 214 of his reasons:

> Although Mr. Harding denies having the intent to promote hatred when disseminating his message, he was at best wilfully blind.
>
> It is the Crown's submission that the inference of intention is extremely strong in this case, based on the material itself, as well as other circumstances which speak to the deliberateness of Mr. Harding's actions. As the Crown *convincingly* demonstrates in paragraph 30 of its written submissions, the promotion of hatred by Mr. Harding's messages cannot have been accidental [emphasis added].

[33] The trial judge made three findings. After observing that the appellant distorted statements in the various newspaper articles he purported to quote, the trial judge found firstly that these distortions were deliberate. For example, the appellant omitted the words "rebels", "militants", "insurgents" and substituted the word "believers". The trial judge found at p. 215:

> The manner in which the articles were edited by him reflects a deliberate effort to obscure the distinction between the extremist/radical/militant groups that the articles are referring to, and Muslims in general.

[34] With reference to the appellant's article from the Ambition newspaper in his pamphlet on Western Collegiate the trial judge found at p. 217:

> These misrepresentations are too flagrant to be inadvertent, and they betray a conscious effort to inflame the reader. Mr. Harding's deliberate inaccurate depiction of Muslim practices in the school evinces his *intent to foment feelings of hostility* toward Muslims [emphasis added].

[35] Secondly, the trial judge found the manner in which the appellant changed his recorded telephone message by deleting his generalizations about Muslims living in Toronto being no different from those who "continue to savagely torture, maim, starve, beat, and kill Christians around the globe", demonstrated that he "was well able to appreciate the meaning conveyed by those words."

[36] Thirdly, the trial judge found that when interviewed by the police, the appellant did not provide the innocent explanation he offered at trial about his intended meaning and this detracted from his credibility.

[37] Having regard to these findings, the trial judge stated at pp. 217-18:

> To find that Mr. Harding did not have the requisite intent to commit this offence, the court would have to accept, or reasonably doubt, that the powerful web of inculpatory circumstances in which Mark Harding found himself were all just a horrible coincidence….That the marked change in the tenor of his writings was really without significance.
>
> Now, Mr. Harding offered alternative explanations for these circumstances and placed a different gloss on each in isolation. However, the court agrees with the Crown's submission that their cumulative force, and the sheer improbability of all of this being just part of one big misunderstanding, adds up to an overwhelming case of guilty intent.
>
> ...
>
> [O]n the whole of the evidence presented in this case, there is no doubt that by communicating statements, other than in private conversation, he wilfully promoted hatred against an identifiable group, namely Muslims in Canada.

[38] The trial judge then turned to a consideration of the defences in s. 319(3). He observed at p. 218 that, aside from the defence of truth, "each one contains a mental element that is at odds with the *mens rea* of the offence" and would negate the *mens rea* for the offence as noted by Dickson C.J.C. in *Keegstra*, *supra*, at p. 779. At p. 219 of his reasons, the trial judge stated:

> Despite the fact that this court has found beyond a reasonable doubt that Mr. Harding did promote hatred, and did so

> wilfully, it is necessary that each of the defences be addressed separately.

[39] Dealing with the first defence in s. 319(3) – truth – the trial judge noted that the defence made no effective claim to the defence of truth. The second defence that the accused was only expressing an opinion on a religious subject was also rejected on the basis that, although the pamphlets and recorded message did contain statements of religious belief, they went above and beyond this. The third defence, that the statements were relevant to a subject of public interest if on reasonable grounds the accused believed them to be true also failed. This defence cannot be interpreted on a purely subjective basis. There were no reasonable grounds to believe the statements were true. Furthermore, as the trial judge set out at p. 221:

> Mr. Harding proceeded from the premise that some of them do it, therefore all of them must be like that. In other words, this is simply the typical specious reasoning of a hate-monger, jumping to baseless generalizations. This is not an argument expressed in good faith, or supported by reasonable grounds.
>
> …
>
> Mr. Harding's reasoning evinces a clear absence of good faith, and a blindly directed desire to further his own extremely prejudiced views about Muslims. Not only is this the kind of expression that is clearly without value in the marketplace of ideas, it is, in my view, exactly the kind of expression that s. 319 of the *Criminal Code* seeks to proscribe.

[40] The trial judge also stated that this was not one of those rare cases mentioned by Dickson C.J.C. in *Keegstra* where one who intends to promote hatred is acting in good faith or upon honest belief.

[41] The trial judge then concluded at p. 222:

> [A]fter reading the material as a whole, after listening to the witnesses, and considering the submissions of counsel, this court is convinced beyond a reasonable doubt that Mr. Harding either intended to promote hatred towards Muslims, or was wilfully blind that such was a substantially certain consequence.

The decision of the summary conviction appeal court

[42] Dambrot J. carefully reviewed the reasons of the trial judge. Dambrot J. held that the trial judge found the appellant possessed the necessary *mens rea* for the offence apart from his comments concerning wilful blindness. Notwithstanding this conclusion, Dambrot J. proceeded to consider the issue raised by the appellant; namely, whether wilful blindness falls short of the strict *mens rea* requirements of s. 319(2) of the *Criminal Code*. He concluded that wilful blindness did meet the stringent *mens rea* requirement of the section.

[43] Lastly, Dambrot J. considered whether the trial judge erred by failing to construe the defence of good faith in s. 319(3)(b) in accordance with *Charter* values or considered it in isolation from the whole of the evidence and concluded that the trial judge had not done this. Dambrot J. dismissed the appeal.

Analysis

[44] I prefer to deal with the issue of good faith first as in my opinion it has a bearing on the other two arguments advanced.

(i) *The interpretation of the defence of good faith in s. 319(3)(b)*

[45] As indicated, s. 319(3)(b) provides that a person shall not be convicted of the offence of wilfully promoting hatred if the statements made are expressed in good faith to establish an argument about a religious subject.

[46] The essence of the trial judge's finding that the defence contained in s. 319(3)(b) was not established in this case is found at p. 219 of his reasons in the following passage:

> Now, Mr. Harding is entitled to his opinions on religious subjects, and he is entitled to publicly attempt to convince others of the correctness of his beliefs. His pamphlets and message do contain opinions of religious belief which he appears to sincerely hold.
>
> …
>
> Although expression of religious opinion is strongly protected, this protection cannot be extended to shield this

> type of communication simply because they are contained in the same message and the one is used to bolster the other. If that were the case, religious opinion could be used with impunity as a Trojan Horse to carry the intended message of hate forbidden by s. 319.

[47] Dambrot J. noted that "the trial judge concluded that the appellant's pamphlets and messages do contain opinions of religious belief that he appears to sincerely hold." Despite this, Dambrot J. upheld the trial judge's conclusion that s. 319(3)(b) was not applicable in the circumstances. He stated at para. 42:

> It seems to me that the plain words of s. 319(3)(b) can only rationally provide a defence to a person who, by communicating statements other than in private conversation, wilfully promotes hatred against an identifiable group, in the rare circumstances where, *in the communication of those very statements*, that person, in good faith, was expressing or attempting to establish by an argument an opinion on a religious subject. Of course, the trier of fact must look to the context in order to construe the intention of the maker. But I see no reason to construe the defence in s. 319(3)(b) in a manner that would permit the mere imbedding of a wilful message of hate within protected religious comment to immunize the maker of the message from successful prosecution. As Linden C.J.C. [sic] aptly put it, religious opinion could then be used with impunity as a Trojan Horse to carry the intended message of hate forbidden by s. 319 [emphasis in original].

[48] The trial judge found that, in part of the materials, the appellant did express opinions of religious belief that he appeared to sincerely hold but that the opinions expressed went above and beyond the expression of religious belief and were not made in good faith. Dambrot J. agreed.

[49] I agree that merely because some of the appellant's statements were legitimate expressions of religious belief his other statements are not shielded from scrutiny. Furthermore, the fact that certain of the appellant's statements were isolated in the trial judge's reasons dealing with the issue of good faith, does not mean that the trial judge failed to consider the evidence as a whole or the *Charter* value of freedom of speech. Indeed in the portion of his reasons I have quoted above the trial judge specifically charged himself to consider the statements in context. Dambrot J. did not err in his

interpretation of the defence of "good faith" in upholding the trial judge's finding. I would dismiss this ground of appeal.

(ii) *Whether the trial judge made a clear and unambiguous finding that the appellant had the mens rea for the offence apart from wilful blindness*

[50] The appellant submits that Dambrot J. erred in his conclusion that the trial judge did not convict the appellant on the basis of wilful blindness.

[51] The trial judge stated at p. 214 of his reasons that "[a]lthough Mr. Harding denies having the intent to promote hatred when disseminating his message, he was at best wilfully blind". After finding that none of the statutory defences were available to the appellant, the trial judge stated at p. 222, "[T]his court is convinced beyond a reasonable doubt that Mr. Harding either intended to promote hatred towards Muslims, or was wilfully blind that such was a substantially certain consequence." Between these two references to wilful blindness, the trial judge stated, on a number of occasions, that he found that the appellant intended to commit the offences. At para. 22 Dambrot J. concluded:

> Linden C.J. made a *clear finding of fact that the Appellant had the intent to promote hatred*, but placed that finding between two assertions that Mr. Harding either intended to promote hatred, or was wilfully blind to the fact that the promotion of hatred was a substantially certain consequence of his acts [emphasis added].

[52] Dambrot J. conceded that a plain reading or "superficial analysis" of the trial judge's reasons would appear to indicate that the trial judge found the appellant to be wilfully blind. He interpreted the trial judge's comments concerning wilful blindness at para. 22 as follows:

> It seems to me that whenever the mental element of an offence is proved circumstantially, it is always possible that despite even overwhelming evidence of intent, the accused may have closed his or her eyes in the face of a need to make inquiries, declined to make those inquiry [sic] in order to avoid the truth, and remained ignorant. Without being able to see into a person's mind, this alternative must exist. That is all Linden C.J. was saying. He did not find that the appellant was wilfully blind; he simply could not eliminate the remote possibility that he was.

[53] The appellant submits that the middle portions of the trial judge's reasons, in which he found that the appellant had the intent required by s. 319(2), are tainted by the trial judge's other comments concerning wilful blindness. The appellant drew our attention to the beginning of the trial judge's reasons, cited at paragraph 28 , wherein he defined the essential mental element of the offence as including wilful blindness. This passage was not referred to by Dambrot J.

[54] Because the trial judge defined the mental element of the offence as including wilful blindness at the outset of his reasons, the appellant submits that Dambrot J. erred in concluding that the trial judge clearly found the appellant intended to wilfully promote hatred apart from his comments concerning wilful blindness. I agree that various passages in the trial judge's reasons are ambiguous with respect to whether he convicted the appellant on the basis of intending to promote hatred or on the basis of wilful blindness and that the appellant must be given the benefit of any doubt on this point. It is necessary therefore to consider whether wilful blindness fulfils the necessary *mens rea* requirement for the offence.

(iii) *Whether the mens rea requirement for wilful promotion of hatred includes wilful blindness: The trial judge found at p. 222*

[55] The analysis of whether wilful blindness will satisfy the *mens rea* of the offence of "wilfully" promoting hatred must begin with a consideration of the meaning of the word "wilfully".

[56] The word "wilfully" has different meanings and is used inconsistently in statute and case law: Fortin et Viau, *Traité de droit pénal général*, (1982), at 140-42; *Buzzanga*, *supra*, at 717.

[57] One of the meanings sometimes ascribed to "wilfully" is that of recklessness. Recklessness occurs when the accused adverts to the risk that his actions will bring about the result prohibited by law, and in conscious disregard of the risk persists in his actions: *R. v. Sansregret*, [1985] 1 S.C.R. 570 at 582. However, in *R. v. Buzzanga and Durocher* (1979), 25 O.R. (2d) 707, the Ontario Court of Appeal held that in the context of "wilfully" promoting hatred, wilfully does not include recklessness. Wilfully means an accused subjectively communicates "with the intention of promoting hatred".

[58] In *Keegstra*, *supra*, Dickson C.J.C. endorsed the definition of "wilfully" set out by Martin J.A. in *Buzzanga*, *supra*, at pp. 774-75 in the following passage:

> Martin J.A. went on to elaborate on the meaning of "wilfully", concluding that this mental element is satisfied only where an accused subjectively desires the promotion of hatred *or foresees such a consequence as certain or substantially certain to result from an act done in order to achieve some other purpose* [emphasis added].

[59] Dickson C.J.C. indicated that the *mens rea* for the offence will be satisfied when either an intention to promote hatred is found to be present or "hatred is foreseen with substantial certainty."

[60] The trial judge held that the appellant either intended to promote hatred or "was wilfully blind that such [hatred] was a substantially certain consequence." The trial judge appears to have equated "wilful blindness" with "foreseeing the consequences of one's acts with substantial certainty". To resolve this appeal it is therefore necessary to have regard to the definition of wilful blindness and whether it satisfies the *mens rea* for the offence.

[61] Wilful blindness has a meaning that is just short of actual knowledge. In *Sansregret*, *supra*, at p. 585, McIntyre J. quoted with approval the definition of knowledge from Glanville Williams (Criminal Law: The General Part, 2nd ed. (1961) at 157) as follows:

> Knowledge, then, means either personal knowledge or (in the licence cases) imputed knowledge. In either event there is someone with actual knowledge. To the requirement of actual knowledge there is one strictly limited exception. Men readily regard their suspicions as unworthy of them when it is to their advantage to do so. To meet this, the rule is that if a party has his suspicion aroused but then deliberately omits to make further enquiries, because he wishes to remain in ignorance, he is deemed to have knowledge.

[62] At p. 586 of his judgment, McIntyre J. also quoted the *caveat* found at p. 159 of Williams, *supra*:

> *The rule that wilful blindness is equivalent to knowledge is essential, and is found throughout the criminal law.* It is, at the same time, an unstable rule, because judges are apt to forget its very limited scope. A court can properly find wilful blindness only where it can almost be said that the defendant actually knew. He suspected the fact; he realized its

> probability; but he refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge. This, and this alone, is wilful blindness. It requires in effect a finding that the defendant intended to cheat the administration of justice. Any wider definition would make the doctrine of wilful blindness indistinguishable from the civil doctrine of negligence in not obtaining knowledge [emphasis added].

[63] Thus, to satisfy the *mens rea* requirement for wilful blindness as defined by McIntyre J. above, the actor must first have 1) a subjective realization 2) of the likely result of his actions and 3) deliberately avoid actual knowledge while engaging in or pursuing the activity.

[64] In *Keegstra, supra,* Dickson C.J.C. upheld the constitutionality of the offence of wilfully promoting hatred under s. 1 of the *Charter* because in his view the provision possesses a stringent *mens rea* requirement. The appellant submits that wilful blindness cannot satisfy the stringent *mens rea* requirement of an offence that limits freedom of expression. That is not so. The offence of knowingly selling obscene material without lawful justification under s. 163(2) of the *Criminal Code* limits freedom of expression, but, like *Keegstra, supra,* it is saved by s. 1. See *R. v. Butler*, [1992] 1 S.C.R. 452. Although s. 163(2) limits freedom of expression, the Supreme Court held in *R. v. Jorgensen*, [1995] 4 S.C.R. 55, that wilful blindness satisfies the *mens rea* requirement for this offence. Sopinka J. held at pp. 97-98 that in including the word "knowingly" in the offence, Parliament chose to set an onerous standard of proof that was beyond the minimum constitutional requirement for the offence. He further held at p. 110 under the heading "Wilful Blindness":

> Deliberately choosing not to know something when given reason to believe further inquiry is necessary can satisfy the mental element of the offence. As Glanville Williams wrote in *Criminal Law: The General Part* (2nd ed. 1961), at pp. 157-58:
>
> > [T]he rule is that if a party has his suspicion aroused but then deliberately omits to make further enquiries, because he wishes to remain in ignorance, he is deemed to have knowledge. …
> >
> > … In other words, there is a suspicion which the defendant deliberately omits to turn into certain knowledge. This is frequently expressed by saying that he "shut his eyes" to the fact, or that he was "wilfully blind".

And, at pp. 158-59, the learned author states:

> Before the doctrine of wilful blindness applies, there must be realisation that the fact in question is probable, or, at least, "possible above the average".

[65] After quoting the same passage from Glanville Williams that McIntyre J. cited in S*ansregret*, *supra,* and that I have reproduced, Sopinka J. held at p. 111:

> A finding of wilful blindness involves an affirmative answer to the question: Did the accused shut his eyes because he knew or strongly suspected that looking would fix him with knowledge?

[66] Wilful blindness is more than mere recklessness. Criminal law treats wilful blindness as equivalent to actual knowledge because the accused "knew or strongly suspected" that inquiry on his part respecting the consequences of his acts would fix him with the actual knowledge he wished to avoid. The appellant's submission that wilful blindness is insufficient to support the stringent *mens rea* requirement contained in s. 319(2) because it limits freedom of expression is not supported by the jurisprudence. Wilful blindness satisfies the stringent *mens rea* requirement for the offence of wilfully promoting hatred and does no violence to Dickson C.J.C.'s definition of the mental element for the offence in *Keegstra, supra.* The trial judge did not convict the appellant based on an insufficient *mens rea* requirement and Dambrot J. did not err in upholding his conviction.

Conclusion

[67] For these reasons, I would agree with Dambrot J. that the *mens rea* requirement for the offence of wilfully promoting hatred in s. 319 is met and dismiss the appeal.

Released: DEC 17 2001
KMW

Signed: "Karen M. Weiler J.A."
"I agree John Laskin J.A."
"I agree S.T. Goudge J.A."