

25166-3	
Quesnel Registry	
In the Supreme Court of British Columbia	
(BEFORE THE HONOURABLE MR. JUSTICE BUTLER AND JURY)	
Quesnel, B.C.	
November 5, 2015	
REGINA	
v.	
ROY ARTHUR TOPHAM	
PROCEEDINGS AT TRIAL	
(DAY 9)	
COPY	
Crown Counsel:	
J. Johnston	
Defence Counsel:	
B. Johnson	

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Quesnel, B.C.

November 5, 2015

THE CLERK: In the Supreme Court of British Columbia this 5th day of November 2015. Continue the matter of R. v. Topham, 25166-3.

MS. JOHNSTON: Thank you, My Lord. If you have -- I do have some materials for Your Lordship but I doubt if Your Lordship will be reading it -- looking at it prior to conclusion --

THE COURT: Why don't we do that at the next time we break.

MR. JOHNSON: Barclay Johnson appearing for the defendant Mr. Topham.

THE COURT: Mr. Johnson.

MS. JOHNSTON: I'm sorry, My Lord. Johnston, first initial J. appearing on behalf of the Provincial Crown.

THE COURT: So we're ready to start, are we?

MS. JOHNSTON: Thank you, yes.

UNIDENTIFIED SPEAKER: Do you want me to speak into the mike here?

THE CLERK: Yes, please.

UNIDENTIFIED SPEAKER: Can you hear me? Testing, one, two, three, testing.

THE CLERK: My Lord, can I just break for two seconds [indiscernible].

THE COURT: Certainly, that's --

(PROCEEDINGS ADJOURNED)

(PROCEEDINGS RECONVENED)

THE COURT: I gather we have the problem solved?

THE CLERK: I believe so.

THE COURT: Just a moment. All right, let's bring in the jury.

(JURY IN)

THE COURT: I apologize again for the late start; we had some more technical difficulties but we've got them solved, I hope. Let's call Mr. Atzmon.

GILAD ATZMON

a witness called for the Accused, recalled, reminded

THE CLERK: I just remind you, you are still under oath. And if you could state your name for the record again.

THE WITNESS: Gilad Atzmon.

CROSS-EXAMINATION BY MS. JOHNSTON, Continuing:

Q Sir, we're going to kick off this morning approximately where we left off yesterday afternoon. And in light of that I ask that the witness please be given Exhibit number 13. Thirteen, it's the most recent exhibit, Mr. Atzmon's report.

Now, Mr. Atzmon, I can see that you're arranging some papers for yourself.

A Yes, sorry?

Q You're arranging some papers for yourself, I can see that.

A Yes.

Q You are most likely entitled to look at your notes. You just have to ask the court's permission before you --

A That's not a problem, I can look at yours. Yes.

THE COURT: Yes.

MS. JOHNSTON:

Q Were you hoping to look at your own copy?

A No, no, no. I wrote it.

Q Thank you very much, sir. If we could please -- if you could please turn, to the Zionism page, which is page 4, of your report.

A Yes.

Q All right. So we discussed the -- we've discussed some of this already, and I'm going to direct you, sir, to the second paragraph down from the top.

A Yes.

Q And I'm going to read it to you [as read in]:

The point is crucial for the court because it confirms that early Zionists were driven by a deep hatred of the Jew, and their language was often virulently anti-Semitic. Here are just a few of the many examples.

A Yes.

Q Now, sir, we had some difficulties with the word anti-Semitic yesterday.

A Mm-hmm.

Q So let me just ask you this. If we take that out altogether: "early Zionists were driven by a deep hatred of the Jew -- deep hatred of the Jew. Here are just a few of the many examples." Even if we take anti-Semitism out altogether, what you've done here, sir, and what you're telling us you're doing here, sir, is you're giving a couple of quotes which you believe show deep hatred of the Jews, correct?

A Mm-hmm, mm-hmm.

Q All right.

A The only question is how do you define hatred, because I don't really think that Dr. Herzl had any inclination to kill Jews or to destroy them. He actually -- at the time he was deeply hating the Jews, according to my interpretation, he actually wanted to save them.

Q All right.

A So you wouldn't charge him, I guess.

Q Well, I think what you're saying, sir, is that to determine whether or not someone has deep hatred towards the Jews you can't just look at one quote; you have to look at the balance of their work and their life work in their entirety; is that fair to say?

A This is not what I'm saying. As you probably know, the notion of self-hatred is very common when it comes to Jews. Now, do we really believe that self-haters are people who want to incite murder? I don't think so.

Q All right.

A I definitely don't think that these altercations [indiscernible].

Q All right. So in spite of the fact that when you read the first paragraph and said "driven by deep hatred of the Jews," you nevertheless don't think that Mr. Herzl in fact was driven by deep hatred of the Jews?

A No. I think that his defence, how you define hatred; do you take it as a metaphorical terminology, as a legal terminology. These questions can be discussed and I can do it until 12.

Q All right. So what you're telling us now is that when you use deep hatred in paragraph 2 at page 4, deep hatred has an ambiguous meaning?

A Obviously.

Q I see. So we're not supposed to read this --

A And I --

Q -- as an example of Mr. Herzl's deep hatred of the Jews?

A I don't think that we should compare Herzl's hatred to Hitler's hatred. It was very different, and what is important for me is to elaborate on the terminology that these Zionists are using, because the terminology is identical.

Q I see. I see. However, the meanings nonetheless are very different?

A I don't know. I'm not Herzl. I can only guess at his -- the Zionist project wasn't the genocide project against the Jews.

Q All right.
A Because they're to save the Jews.
Q All right.
A From themselves.
Q And we've already discussed your source of the quote from Theodor Herzl, which is that that's what he was reported to have said in the *Deutsche Zeitung*, the German Times?
A [Indiscernible]. Ya, I actually --
Q All right. So going onto the next quote on this page --
A Yeah.
Q [As read in]:

A Jew is a caricature of a normal, natural human being, both physically and spiritually. As an individual in society, he revolts and throws off the harness of social obligations, knows no order nor discipline.

A Yes.
Q Now, as we can refer to paragraph 2, you've also given that quote as an example of deep hatred of the Jews, correct?
A Yes.
Q All right. Now, I want to look at the part that's in brackets, sir. The part that is in brackets is you telling us where you got the quote from, correct?
A Yes.
Q All right. So, Hashomer, and a German word which I can't begin to pronounce, Hashomer Hatzair --
A Hashomer Hatzair
Q Thank you -- December 1936 at page 26. However, you didn't get it there, sir. You actually got it from Lenni Brenner, as cited by Lenni Brenner.
A Yeah.
Q What you're telling us is you understand this to be the original source --
A Mm-hmm.
Q -- but you personally got it from a work by Lenni Brenner?
A Yes.
Q All right. Now, I did some research on Lenni Brenner on Wikipedia, and I had never heard Lenni Brenner before --
A Okay.
Q -- but my understanding is, and you can tell me whether or not I'm correct, that he was born in 1937; is that correct?
A I really don't know when Lenni Brenner was born, I'm sorry.
Q Fair enough. Fair enough. I understand that, and tell me if you know this, that he spoke at the inaugural meeting of Jews against Zionism. Is that something you know?
A I assume that this is the case.
Q Okay.
A He's a Jewish -- he's a Jewish anti-Zionist.
Q Okay. He's a Jewish anti-Zionist.
A Yeah. You can save a lot of time, yeah.
Q Fair enough.
A I confirm it.
Q Fair enough.
A And -- and I will also help you, if you really -- because this is where you want to go. This quote is wrong. Lenni Brenner's book, 51 -- I don't remember it's 51 or 53; I'm getting old, 51, I think, *Documents of Zionist Collaboration with the Nazis*, and this is probably the biggest compendium of Zionism, let's say, inverted comma, antisemitism. I'm actually not in favour. I'm far from being an admirer of Lenni Brenner.
Q Mm-hmm.
A Academically we are foes. But I think that, at least in terms of the commentation, he did a good job.
Q All right.
A I would give this to him.
Q The second paragraph which is indented is another quote. It's a [indiscernible] former quote in this case, and that's also as cited by Lenni Brenner; is that correct?
A Yeah.
Q And is it still the 51 -- *51 Documents* - I can actually help you out here, sir, because I have it.
A It's 51 or 53, I don't remember.
Q *51 Documents: Zionist Collaboration with the Nazis*.
A Yeah, yeah.
Q That's also from the same book?
A Yeah.
Q All right. So, a secondary source?
A It's not a secondary source. It's --
Q Well, it's Mr. Brenner quoting another book.
A Yeah, yeah. I could -- I could save you the reference to Brenner. These quotes are genuine. I myself wrote a very serious criticism of Lenni Brenner interpretation of those quotes, which I totally disagree with. However, I'm not aware of anyone -- and, by the way, quite a few people criticize Brenner as an historian. I don't think that he's a great historian. But I've never seen anyone doubting the authenticity of his quotes.
Q I'm simply going through with you, sir, where you got some of the material that appears in your expert report.
A Yeah. But you understand that this is a common, you know, this is a common procedure, is at any time not going to sit in archive and dig quotes. You know, there are people who do that for a living. It's quite a boring job, you know, but my job is to analyze these quotes rather than to collect them.
Q So I believe what you've told us here this morning is that you do not believe that Mr. Herzl had deep hatred of the Jews, whatever this quote may lead you to believe --
A No, this is not --
Q -- is that fair?
A This is not what I said. I said that it is regarded as deep hatred. All those quotes, even Jews see them as -- at the time saw them as deep

self-hatred. However, what you mean by hatred must be defined. When I tell my wife, if she is a bit late, "I hate you," is it a homicidal inclination? I don't think so. Not yet. Sorry.

Q No, fair enough [indiscernible]. You will agree with me that deep hatred of -- from the Jews towards the Jews remains deep hatred, correctly -- correct?

A It is quite a philosophical question and I don't think that I can answer. Can you define, once and for all, what deep hatred of you have [indiscernible]?

Q If I -- well, take the quote that you yourself --

A Yeah.

Q -- have identified as showing deep hatred of the Jews.

A Yeah.

Q It does not matter whether or not the speaker of that quote is Jewish or non-Jewish.

A For me --

Q If the quote reflects deep hatred, it continues to do so regardless of the speaker.

A For me, I brought this quote into this -- this quote into this court, yah, because I see an identical session of speech between Herzl and *The Protocols of the Elders of Zion*.

Q Fair enough.

A Herzl and Dilling; Herzl and whoever. You know, we want to -- any conspiratorial text on Zionism or Jewish power and so on and so on. This is a text about Jewish power, you know, and I'm saying, if Herzl, if a Jew is entitled to say, a Gentile should be also entitled to say it, unless we decide now, once and for all, confirm that the Jews are chosen.

Q Sir, what I'm saying is, it doesn't matter who mouths the words; there's no entitlement. Merely because a Jewish person said it first does not give some source entitlement for a non-Jewish person to say it. If it's hatred, it's hatred, and it matters not what original mouth the words came from.

A This is a legal question --

Q Okay.

A -- that you have to deal with; it's called [indiscernible] to deal with.

THE COURT: And you're not here to give opinions on legal matters.

A Exactly. Exactly.

MS. JOHNSTON:

Q Is it your -- are you trying to suggest there's some sort of blank cheque when you get behaviour you criticize on the part of the Jews at the same time by people who are not Jews?

A I'm trying to --

Q Surely that's irrelevant, is it not?

A I'm trying to --

THE COURT: I think that's really the same question --

MS. JOHNSTON: Thank you. I'm sorry, My Lord, yes.

THE COURT: -- that you asked before, which Mr. Atzmon is not here to answer.

MS. JOHNSTON:

Q Sir, we are going to look here at *The Protocols of the Learned Elders* --

A Elders of Zion.

Q -- of Zion, which we see at page 10. And I'm going to warn you in advance that we're going to toggle a little bit between *The Learned Elders of Zion* and the *Controversy of Zion*, but we're going to start with *The Protocols of the Elders of Zion*.

A Yes.

Q All right. Now, I believe you told us yesterday, sir, that the protocols were used by Hitler as part of his campaign against the Jews; is that correct?

A Certainly.

Q All right.

A I don't like to say it but it is true.

Q Pardon me?

A I don't remember whether I say it or not but this is true.

Q Thank you. Thank you. And the protocols essentially stand for a Jewish plot to control the -- control the entire world; is that correct?

A This is a good way to -- a possible way to describe it.

Q And it also states about enslaving everyone who is not Jewish; is that also fair, to say that the protocols talk about that as well?

A Manipulating into -- into slavery or whatever. Yeah, you can do that.

Q All right.

A You can get away with it.

Q So given that, it is reasonable for Jewish groups to be concerned about the threat of the protocols. And I just want to put some context in that. In your report you sound rather critical of Jewish people, and I'm just going to read you the first sentence.

A Mm-hmm.

Q [As read in]:

For over a century, Jewish organizations around the world have expended great effort to prove that the protocols are a forgery as well as fiction.

A Yeah.

Q So really my question to you, sir, is, given what the protocols stand for, surely you're not implying any criticism of them for wishing to do that?

A I do.

Q In spite of what the protocols stand for?

A I do, because -- and I will integrate *The Controversy of Zion* into it because I went back to it today. In the eyes of *The Controversy of Zion*, the protocols are a focus. All right? So if tomorrow there was a huge snowstorm we better know about it. We better reschedule our flights. If the protocols are a forecast, and I don't say that they are, but if they are, it's a warning for all of us, including the Jews. And this is exactly why I decided to quote Herzl. He says, "These protocols are actually right. We have a problem." And this is the most beautiful thing about Zionism. I'm not a Zionist, as you probably know by now, because you look at my Wikipedia page [indiscernible]. I'm not a Zionist but I do admit that the early Zionists, early Zionists took --

Q All right. I'm just going to bring you there -- cut you off there because we're talking about *The Protocols of the Learned Elders of Zion*.

A Yes.

Q Are you saying that you think *The Protocols of the Learned Elders of Zion* are a genuine prophecy?

A No.

Q All right.

A They're heavy interpreted as a prophecy, and it's a clear warning to the Jews, and interestingly enough, quite a few Jews interpreted is as such and brought along Zionism that was designed to change the Jews.

Q I'm going to cut you off here because I believe we're outside of your area of expertise.

A No, this is exactly my area, actually.

MR. JOHNSON: My Lord, I wonder if we can have the jury out.

THE COURT: All right. I'll ask the jury to be excused.

(JURY OUT)

THE COURT: Mr. Atzmon, I have to ask you to step outside of the courtroom.

A All right.

(WITNESS STOOD DOWN)

THE COURT: Mr. Johnson.

MR. JOHNSON: My Lord, there seems to be a bit of a pattern in terms of cutting off Mr. Atzmon in the middle of an answer, and I believe he's entitled to answer a question that my friend is asking, especially when it's on point. If a question is asked that you don't know the answer to I think it's probably a bit of a surprise to hear something other than what you're expecting, but I think Mr. Atzmon is certainly entitled to give some breadth and depth to the answer. If that means going to another area of his expertise to answer the question properly, I would respectfully ask that my friend allow him to finish.

THE COURT: Well, I thought on this last one that she should not have cut him off on that too.

MR. JOHNSON: Yes.

THE COURT: The prior ones today I thought it was quite appropriate.

MR. JOHNSON: All right.

THE COURT: So he can conclude his answer on this one.

MR. JOHNSON: Okay. I wonder if we could have that question then read back, if we could, by Madam Registrar, if it's possible.

THE COURT: Well, it can't be read back. We would have to go through the tape and find it and play it, which is a bit difficult.

MR. JOHNSON: I think the problems with this system, I'm not going to request that. Thanks.

MS. JOHNSTON: Your Honour -- Your Lordship's --

THE COURT: Do you recall what question --

MS. JOHNSTON: -- going to ask if I remember what I said.

THE COURT: Yes.

MS. JOHNSTON: I remember that one of the questions was, I read him the first sentence and I asked whether or not, given the nature of the protocols, surely you're not being critical of Jewish organizations who do that.

THE COURT: That was quite a bit earlier.

MS. JOHNSTON: I know.

THE COURT: You started this --

MS. JOHNSTON: That's the best I can do.

THE COURT: -- this discussion by asking if Mr. Atzmon was saying that the protocol is a genuine prophecy, and he said no, but it's a clear warning to the Jews. And then he started off on something else. So I think that's where it started. So is that your recollection, Mr. Johnson?

MR. JOHNSON: Yes, it is. There's no doubt that Mr. Atzmon likes to elaborate on things. He can get off on a different area. I think part of that, My Lord, is the fact that English is his second language, and he's probably trans --

THE COURT: I don't think so. I think he's very good at English. I think it's his -- his natural tendency.

MR. JOHNSON: Well, I think so too.

THE COURT: But in any event, I will myself cut him off, although --

MR. JOHNSON: Sure.

THE COURT: -- I'm reluctant to do that, and so if Ms. Johnston wishes to try to do that, she can do so, and if I disagree with you I'll just simply say --

MR. JOHNSON: I think that's the way to go.

THE COURT: -- you can answer the question.

MR. JOHNSON: Thank you.

THE COURT: All right. Bring in the jury.

(JURY IN)

GILAD ATZMON

a witness called for the Accused, recalled.

THE COURT: Ms. Johnston, I'd like you to start off by asking that last question, which my recollection is, was "Are you saying that the protocol is a genuine prophecy?" And Mr. Atzmon was partway through that, his answer. You can continue your answer.

CROSS-EXAMINATION BY MS. JOHNSTON, Continuing:

A So the protocols, I mention the prophecy in reference to Douglas Reed regarding it as a forecast. Whether they are genuine prophecy, or not, I'm not a prophet and I don't know how to judge whether things are prophetic or not. What I can say that -- and as I did in my documentation, I presented you with some clear evidence that we are dealing with a serious case of over-representation of Jews, within

media, within politics, within lobbying, within the judicial system, and this is an issue that, as I mentioned before, both Jews, especially Zionists, and those who are critical of so-called Jewish power, are -- have written a lot about, and this is an academic topic. Whether it's a genuine prophecy, it's down to you to judge, not me.

MS. JOHNSTON:

Q Sir, we discussed yesterday, and I thought we had agreed, that Jews are individuals, and if they enjoy individual success --

A Absolutely.

Q -- congratulations.

A Yes.

Q All right. Now, you've discussed the protocols of Zion -- or, sorry, the protocols being mentioned in the *Controversy of Zion*.

A Mm-hmm.

Q And they are. So I'm going to ask that Binder 2 be distributed, and we're going to look at the *Controversy of Zion* in there. And if the exhibit copy of Binder 2 could please be put before the witness.

A And where do I look?

Q We're just going to wait, sir, until the jury has had their copies distributed.

A All right. This is the book of it. Yes, thank you.

Q All right, I think we are -- I think we are there. So, just to orient you, sir, if you flip to the very first page under Tab 1.

A Very first. Yes.

Q It says, "*The Controversy of Zion*, by Douglas Reed."

A Yes.

Q All right. So now we're going to actually look to page 152, and you can see the page numbers on the bottom center of every page.

A Yes. It's interesting. Believe it or not I look at this this morning.

Q Well, fortunate.

A I could see it coming.

Q So we're going to be on the same page at the same time.

So given that you looked at it this morning, I probably won't need to orient you much. You agree with me that Mr. Reed is talking about *The Protocols of Learned Elders of Zion* in page 27 -- in chapter 27 of his book, correct?

A Definitely, yes.

Q Okay. The actual part I want to discuss is on the next page, page 153 of his manuscript.

A Yes.

Q All right.

A In what paragraph?

Q Pardon?

A What -- you mean 153?

Q Page 153.

A Yes.

Q And I'm going to start reading to you, sir, and I'm going to go to the third paragraph down, the one that says, "This one chapter". Tell me when you're there and I'll start reading. The third paragraph from the top.

A Yes.

Q All right:

This one chapter was published in England and America as "The Protocols of the Learned Elders of Zion"; I cannot learn whether this was the original chapter heading or whether it was provided during the translation. No proof is given that the document is what it purports to be, a minute of a secret meeting of the Jewish "Elders". In that respect, therefore, it is valueless.

In every other respect it is of inestimable importance, for it is shown by the conclusive test (that of subsequent events) to be an authentic document of the world-conspiracy, first, to disclose by Weishaupt's papers. Many other documents in the same series have followed that first revelation, as I have shown, but this one transcends [them all]. Others were fragmentary and gave glimpses; this one gives the entire picture of the conspiracy, motive, method and objective. It adds nothing new to what had been revealed in part (same for the unproven, attribution to Jewish elders *themselves*), but it puts all the parts in place and exposes the whole. It accurately depicts all that has come about in the fifty years since it was published, and what clearly will follow in the next fifty years unless in that time, the force which the conspiracy has generated produces counter forces.

I read that correctly, sir?

A Yes.

Q All right. So, Mr. Reed is saying that *The Controversy of Zion*, even if it is a forgery, according to what it says here, even if it is a forgery nevertheless accurately sets out a plan for world domination.

A I think that --

Q Is that correct?

A I think that you are wasting time, because the first thing that I told you is that Mr. Reed sees it as a forecast. And I give you one word to describe these two paragraphs. I read it this morning and this is exactly what it means. He sees -- saw it, sorry -- not deal with that anymore -- he saw it as a forecast. There is no doubt about it. Now, where is the problem exactly?

Q You're not remotely concerned about the protocols being promoted as an accurate plan for Jewish domination and the enslavement of all non-Jews?

A I will -- I will tell you where is the problem. If a very good doctor diagnosed me as a potential cancer patient, I really want to know it. What Reed is telling us: Listen, guys, this document is a forecast; Jews and non-Jews. And as I mentioned before, a lot of early Zionists, a lot, thanks to the protocols, have admitted that there is something more big within their identity. Now, is it dangerous? It's very dangerous if you tell me that I'm about to suffer from or with cancer. It is very upsetting, but actually it can save me. It can save me if I take it seriously.

Now, this is a matter of opinion. I actually think -- I actually think, and if you remember, two days ago, or yesterday, I don't -- I think two days ago, we spoke, remember, was it yesterday? Yeah. We spoke about the Talmud, and I said the Talmud, actually there is one theory that the Talmud restrains the Jews, but this theory is problematic now --

MS. JOHNSTON: My Lord, I think we might be getting too far from my question that I'm here to --

A All right, I got that. Yeah.

THE COURT: It strikes me that you're heading off to something --

A All right. I accept it, yeah.

THE COURT: -- very different from the question.

A I accept it. I was about to come with something complicated. Okay, you're right.

THE COURT: Just to remind you, Mr. Atzmon, that this procedure is supposed to be question and answer --

A Sorry.

THE COURT: -- and not an opportunity to lecture a class.

A To sell more books. Sorry.

MS. JOHNSTON:

Q Sir, *The Biological Jew* is by Eustace Mullins, which is actually in Binder 1 of the materials. Perhaps, My Lord, if the binders could be switched.

Now, sir, in *The Biological Jew*, which we find at Binder 1, Tab 4.

A Yes.

Q Now, you have a partial quote at the top, sir. I'm going to read you another quote, which we find at page 15 of 68 in Binder [sic] 4.

THE COURT: Sorry, you say that in --

MS. JOHNSTON: Fifteen of 68, binder -- Tab 4 of Binder 1.

THE COURT: Yes.

MS. JOHNSTON:

Q Now, sir, you already said in examination in chief that the indented paragraph that you have reproduced in your report, at page 14 [as read in]:

One of the specialized modifications of the Jew is its ability to suck the blood of the Gentile host without alarming his victim, weakening it without being discovered.

A Yes.

Q You described that as alarming in examination?

A Mm-hmm.

Q All right. So if you look at the parasite attitude, and a fuller quote on the same topic, I'll read it to you [as read in]:

It follows that the parasite which has established itself on the Gentile host does not care how much it injures the host. Its only goal is to lead a parasitic life at the expense of the host, and its natural objectives are usually the reproductive and excretory organs. Throughout history we find the Jew entwined about the reproductive organs of the Gentile host like a parasitic vine which is slowly strangling a healthy tree. The Jew has also always functioned best as a panderer, a pornographer, a master of prostitution, an apostle of sexual perversion, an enemy of prevailing sexual standards and prohibition of the Gentile community.

I'm assuming you also find that quote disturbing as you find the quote that you have produced in your book?

A As I admitted in my documentation, I find those quotes disturbing, although I'm doing the same thing. However, I provided you with information about Jews who hold exactly the same views. And if you want, you know, I spoke about the [indiscernible] representative, the word parasite is a metaphor. Yeah -- nobody -- you realize that he is not talking about the Jew as a biological parasite. Yeah. We are dealing with a metaphorical language. It's a very strong language, and yet like Zionism, the dominative Jewish world, or at least the Zionist movement for 80 years, and still the second biggest party in Israel.

Q All right. I'm wondering if we're going far afield now.

THE COURT: Let him finish it, Ms. Johnston.

A Yah.

MS. JOHNSTON: Thank you.

A Holding the same views. However, here there's some other views that I did not write in my document. We are talking about some of the metaphors of dealing with almost biological language. I am monitoring Israel press every day. Apparently, Palestinians, who are --

THE COURT: Now I think we're getting into the something --

A Now? All right, okay.

THE COURT: -- that's not contained in your -- news. So, I'm sorry, we'll have to stop you there.

A All right.

MS. JOHNSTON:

Q *The Jewish Religion: Its Influence Today*. You've already said in examination in chief that you found some -- I think the word you used was disturbing elements in *The Jewish Religion: Its Influence Today*.

A Yes.

Q All right. Now, at the bottom, and when I say the bottom I'm talking about paragraphs 3 and 4 of your report at page 12.

A Yeah.

Q You talk about the *King's Torah* --

A Yeah.

Q -- this new book, and you also told us, sir, and I'm going to find it for you exactly so I quote you correctly. In examination in chief you told us that the Israeli police don't like that book and you said words to the effect, that they were looking into it but you don't know what has happened in terms of their investigation?

A I think it is attend the rabbi but I didn't follow there. I don't know if it was a quote, case or charge or what have you.

Q But it's your understanding that the Israeli police are looking into this?

A I don't have any doubt that it is very embarrassing for the Jewish people and for the Israeli state, and the Jew state, that some rabbi is calling for the murder of goys, of Gentiles, of people who are not Jewish, or calling for the murder of babies, of non-Jewish babies. This is very devastating for Israel.

Q Well, as we discussed yesterday, Jews are individuals.

A Mm-hmm.

Q And individuals can behave badly, correct?

A Yeah.

Q Including Jewish individuals, obviously?

A Yeah.

Q And the mere fact that this behaviour is being done by a Jew makes it no different than if the same behaviour is done by a Gentile?

A Not correct. You're right, Jews are individuals, but the rabbi is a spiritual leader, and this rabbi doesn't operate alone. And this is -- what I'm saying here is very problematic.

Q I'm just going to pause here, My Lord, and the reason, I can --

THE COURT: I don't think you're answering the question. I think the question was different and you should listen to the question.

A Okay, sorry.

THE COURT: Maybe you can ask it again.

A Please ask me again.

MS. JOHNSTON:

Q All right. What I'm saying, sir, is that Jews are individuals.

A Right.

Q And bad behaviour done by Jewish individuals remains bad behaviour exactly the same than if the same behaviour was done by a Gentile?

A I absolutely --

THE COURT: And that's a general question.

A For sure. No, no, I agree. I just mention that Rabbi Shapira is a rabbi. He is not an individual. All right? If the pope is engaged in something slightly embarrassing it is slightly different from a nice Christian person in your community. It has a significant -- it's a significant difference.

MS. JOHNSTON: My Lord, the reason --

THE COURT: Mr. Atzmon, you didn't answer the question, which is quite -- I don't know if you have to repeat it again, but she wasn't asking about a rabbi or the rabbi.

A Okay.

THE COURT: She wasn't asking about the pope.

A All right. I thought she was still referring to the state. Okay, sorry. I said Jewish individuals are the same as Gentile individuals.

MS. JOHNSTON:

Q We evaluate their behaviour on precisely the same standards?

A Ideally, yes.

Q All right. Now, sir, I just wanted to ask you a question about your source of one of your other quotes that I found in your report, and I'm just trying to find the accurate quote. Yes, we're on page 13. That is your page where you discuss *The Controversy of Zion* by Douglas Reed?

A Yes.

Q All right. Now, in the middle of the page, in the third paragraph, the indented quote.

A Yes.

Q That's by Jabotinsky?

A Yes.

Q And he allegedly wrote this in 1914, correct?

A Yes.

Q Now, if you look at -- if you look, sir, at the references at the bottom you can see -- in the indented quote, the first paragraph there's a 6, the second one there's a 7.

A Yes.

Q And you give the source of where you found that quote from, correct?

A Mm-hmm. Yes.

Q In this case it's the zhulhavmed.wordpress.com?

A Yes.

Q I wasn't able to find this exact but I did look up the zhulhavmed.wordpress.com [phonetic] site.

A Yeah.

Q That is a blog site; is it not?

A I don't -- I'm not familiar with this blog site. I was obviously walking -- or I was it here, without my library. I am -- I was raised as a Jabotinskite.

Q I'm just asking you where you got the quote from, sir; that's my question.

A Unless there is a mistake, which I cannot see how --

Q Mm-hmm.

A -- because as far as I can remember I copied and paste; I didn't write it down.

Q Fair enough.

A The quote is from their -- I can provide you with tons of quotes by Jabotinsky. Jabotinsky believed in [indiscernible].

Q Maybe you could, but my question is, what you have on page 13 is you've told us whereabouts -- where you got the quote that you reproduced on page -- I mean that's the purpose, of course, now, to say where you got, correct?

A Yes.

Q All right. So what you're telling us is you got this from zova -- I'm sorry, zovamed [phonetic] word press --

A Sulif Achmed [phonetic]

Q Sulif Achmed.

A It doesn't like a Jewish name to me.

Q All right. Wordpress.com

A Yes.

Q And I looked it up this morning and it appears to me to be a blog site. Do you agree with that?

A With the fact that it's a blog site?

Q Yes.

A I didn't check but you may be right.

Q So you know absolutely nothing about this site whatsoever?

A Definitely know nothing about the site, but I know a lot about Jabotinsky and I know that this quote is expressed Jabotinsky's view on Jews and rape.

Q I see.

A And these -- these facts are established and you can look at Jabotinsky [indiscernible].

Q Maybe. But the site that you did is a blog site about which you know absolutely nothing; is that correct?

A Yes.

Q I see.

A But -- but with my level of expertise I can identify a quote and to see that it is a genuine expression of that man, Jabotinsky, expression of those.

Q All right.

A So I felt confident with it. I could see that it may raise a question because I could see that it's an Arab name, so I get that you may be troubled by it, but I didn't even read the article, I must admit. I just prepared the report. I needed a reference and provided it.

Q I see. I take it then that you're not at all concerned about the quality of the site from which you got the quote, given that it accorded

generally with your knowledge of the sort of comments that Mr. Jabotinsky makes?

A I see, but, geographical references is a secondary element in my research. What I try to understand is what people are saying. If you have a --

Q Sir --

A If you have an issue with this --

Q Sir, are you explaining --

THE COURT: It's a very simple question and you should answer the question.

A So ask me again, please.

MS. JOHNSTON:

Q You didn't check out the site --

A Not at all.

Q -- at all?

A Not at all; because I'm familiar with the work of Jabotinsky.

Q And you decided that was good enough?

A I know that this is good enough.

Q Sir, we discussed the holocaust yesterday and you expressed very clearly your view that the numbers should not be the focus of a holocaust enquiry. In spite of that, nevertheless, in your opinion, sir, the number of Jewish victims in the holocaust, and without quibbling over the exact number, would you say that they numbered in the thousands, the hundred thousands or the millions?

A It is really not my domain. As I mentioned yesterday, I do understand that some people counting names. I'm not a name counter. I'm a philosopher.

Q Now, sir, when you spoke to us in examination in chief, when my friend Mr. Johnson was asking you questions, you discussed the holocaust and you expressed that the fact is undeniable. You used the word "marginal," and you said, "most people, I hope, would tend to agree with this." In other words, agree that the holocaust is in fact something that happened, and we went through a definition yesterday and you agreed with us that the holocaust happened, and you agreed with the definition set forth by Mr. Levas.

A And what was the definition that we agree upon, just to make sure that we --

Q The one that I read you yesterday. Would you like me to read it to you again?

A I don't -- I remember myself not agreeing with your definition. I define the holocaust --

THE COURT: Just a second, Mr. Atzmon.

MR. JOHNSON: Excuse me, sir.

A Yes.

MR. JOHNSON: My Lord, I had trouble following the last question; it was very compound. I was wondering if she could maybe break it up a bit?

THE COURT: Well -- and I think she's about to go to that --

MR. JOHNSON: Okay.

THE COURT: -- that quote, or that statement yesterday.

MR. JOHNSON: Thank you, My Lord.

MS. JOHNSTON: Sir, Mr. Rudner's expert opinion was entered as an exhibit. I'll look up the number, My Lord.

THE COURT: It's Exhibit 8.

MS. JOHNSTON: Thank you very much. Exhibit 8 -- if the original of Exhibit 8 could be placed before Mr. Atzmon, please?

Q Now, about three pages in, sir, the fourth page at --

A Sorry, sorry. What tab?

Q Tab F.

A Tab F.

Q F as in Frank.

A Okay.

Q Now, you can see the first paragraph once you get there, sir.

THE COURT: Three pages in?

MS. JOHNSTON: It's the fourth page.

THE COURT: Fourth page, is it? All right.

MS. JOHNSTON:

Q Are you ready, sir?

A Yes.

Q All right. I'm going to read you the first paragraph of Mr. Rudner's report.

A I am familiar -- you can save time, I'm familiar with -- with Rudner's definition, and I don't follow his definition.

Q Do you recall me reading it to you yesterday?

A Yes.

Q And do you recall agreeing with me that this was an accurate definition of the holocaust?

A Did I? I said -- I -- we may want to look at it again. I definitely had some issues with it and we -- that developed into a discussion on numbers and so on and so on. I define the holocaust differently, as you can see in my document.

Q I'll take you through it then, sir, again.

A Okay.

Q So we have holocaust, and I'm going to read it out loud to you, sir, so tell me when you're at the right page.

A I'm there.

Q All right, Holocaust:

In R. v. Ahenakew, the Holocaust is described as "the systemic murder of Jews, and others, perpetrated by the German Nazi regime of Adolph Hitler prior to and during the Second World War."

A I definitely agree that this is the definition that they give.

Q And do you also agree that that is an accurate definition of the Holocaust?

A It is one, amongst, I wouldn't say many, but a few.

Q You wouldn't say --

THE COURT: Sorry, when you say it is one, you mean it's an accurate one amongst other accurate ones?

A If you -- at least it is a definition that is accepted, definitely, by most Jews and Zionist Jews, but some people come with a more abstract definition, which is similar to what I'm saying in my -- in my document, and it refers -- it refers to the systematic oppression of the Jews between 1933 to 1945. When you come, as I mentioned yesterday and I'll say it again, some people do not agree with the [indiscernible] --

MS. JOHNSTON:

Q I'm going to pause you there, sir, because we're getting a little bit far from my question --

A Okay, sorry, sorry.

Q -- was to read you the first sentence --

THE COURT: Again, it was a relatively simple question. See if you can answer it.

A Okay.

MS. JOHNSTON:

Q The sentence I just read, and I'm happy to read it again. Do you agree that that is an accurate definition of the Holocaust; maybe one of many but nevertheless an accurate definition of the Holocaust?

A No. And why, you want to know why?

Q Let me go on to the second part of Mr. Rudner's paragraph.

A Okay.

Q [As read in]:

While the use of the term to include non-Jewish victims in the holocaust is a matter of some discussion (in the same way the term pogroms is respectfully used to describe the Roma genocide) I concur with the elements which identify the murder program as being (1) systemic, (2) directed at Jews, (3) perpetrated the Nazi regime, and (4) the time period of prior to and during the Second World War.

All right. So I've read you four elements.

A Yes.

Q Do you agree that that is an accurate definition of the holocaust?

A I'll answer you precisely now. This is the best definition of the holocaust religion.

Q Let me ask you a few more specific questions, sir. Do you agree that there were Jewish victims of Adolph Hitler's National Socialist Party during World War II?

A No doubt.

Q And do you agree that these victims were murdered by Adolph Hitler and his National Socialist Party during World War II?

A I am absolutely sure some of my family members.

Q All right.

A Yes.

Q So getting back to my question about numbers, sir. Would you number the Jewish victims of the holocaust in the thousands, the hundred thousands, or the millions?

A I think I've answered this question.

MS. JOHNSTON: My Lord, I don't think he did.

THE COURT: Well, he said he couldn't answer it, and that's his answer, I think. Is that --

A I'll make it very easy for you. A lot of people died in the holocaust, and many more people died in World War II. Do you know how many Russians died?

THE COURT: We're not here --

A How many American people died --

THE COURT: Mr. Atzmon. --

A -- in Omaha beach?

THE COURT: -- Mr. Atzmon, you're here to answer questions; that's how the court process works.

A I -- yes. The thing is not my ex -- I'm not an expert on numerical issues when it comes to Jews, only historical chapter. I -- I know that a lot of people died.

MS. JOHNSTON:

Q All right.

A My family -- a part of my family perished in this war. I'm not interested in the numbers. For me, the holocaust is way beyond numbers, and I understand why Mr. Rudner wants to keep it between five to six million, because of reparation money.

MS. JOHNSTON: My Lord, I think we are getting a little bit far afield.

Q Now, sir, you yourself used the word "marginal" when describing people who denied the reality of the holocaust in examination in chief, did you not?

A I -- I do remember exactly what I said, that the people would deny the fact that Hitler hated the Jews or want them out of Germany or was oppressive.

Q Or murdered them?

A [Indiscernible] they are not nothing. I would allow myself to say that they are non-existent. I said -- I was very precise. I said the debate on the holocaust is not whether Hitler liked Jews. Nobody doubts that he didn't.

Q All right.

A The debates are on the measure of the oppression.

Q You've now described the people who doubt the holocaust as non-existent; is that correct?

THE COURT: Well, I don't see how he could answer that question. That seems to be beyond his expertise or knowledge.

A I really address this issue --

THE COURT: No, just -- there hasn't been a question asked, so.

A You're right.

MS. JOHNSTON: I have no further questions for this witness, My Lord. Thank you.

THE COURT: Thank you. Mr. Johnson, any re-examination?

MR. JOHNSON: Nothing arising.

THE COURT: Thank you very much, Mr. Atzmon, you're excused and you can catch your plane.

A Thank you so much.

(WITNESS EXCUSED)

THE COURT: This might be a time to take the morning recess.

MR. JOHNSON: Yes.

(JURY OUT)

MR. JOHNSON: My Lord, I'm going to ask that it be for 20 minutes. I have to make some arrangements with Mr. Atzmon.

THE COURT: Certainly.

MR. JOHNSON: Thank you. It's check-out time.

THE COURT: Before we do that, can you tell where we're going next, because I'm still --

MR. JOHNSON: My Lord, I'll be making an application for a mistrial.

THE COURT: All right. All right.

MR. JOHNSON: Thank you.

(PROCEEDINGS ADJOURNED)

(PROCEEDINGS RECONVENED)

THE COURT: Now, Mr. Johnson, are you wanting to do, the mistrial application, right now?

MR. JOHNSON: Yes.

THE COURT: How long do you think it'll take?

MR. JOHNSON: Not that long. I think probably 20 minutes tops. I don't know; I'm not speaking for my friend.

THE COURT: You're just speaking for yourself.

MR. JOHNSON: Yes.

THE COURT: But I'm just looking at the time and it's likely that the jury should be excused for lunch early, it seems to me.

MR. JOHNSON: I think that would be fair.

THE COURT: Yes, all right. Well, we'll bring them in and do that then.

(JURY IN)

THE COURT: Now, once again I don't want you to get too comfortable. We're going to be standing down for -- until two o'clock. So I'm going to excuse you for an early lunch today and ask you to return at two o'clock.

(JURY OUT)

THE COURT: Mr. Johnson.

SUBMISSIONS ON MISTRIAL APPLICATION FOR ACCUSED BY MR. JOHNSON:

MR. JOHNSON: My Lord, I think it goes without saying that as Mr. Topham's counsel I have a duty to bring matters to the court's attention that would impact on this trial. I also bring this application as an officer of the court for what I believe is a serious problem with regard to Mr. Rudner and his testimony. As you will recall, My Lord, the Crown counsel first intended to produce Bernard Farber -- have I got the name correct?

MS. JOHNSTON: Farber.

MR. JOHNSON: Farber. But the first name is Bernard?

MS. JOHNSTON: Bernie. It might be Bernard; I've only heard Bernie.

MR. JOHNSON: It's Bernie Farber, I believe.

In the course of sending the notice of expert as required under the Rules, I also received an email from my friend, and with it - this goes back to the 28th of September - I received this email with an attachment to it. My friend was trying to provide me with, I think, a courtesy heads-up on what's going to come down in terms of the report and what to expect. I was happy to hear that she was preparing a more formal document, which in fact is what happened. That was done. As you'll recall there was an application made by my friend to have Mr. Farber appear by video. That application was refused, and then I can only gather that Mr. Farber either didn't want to come or wasn't available to come. For whatever reason, Mr. Rudner was put into his place.

I'd like you to have a look at the attachment that is part of my friend's email to me. She just states:

Mr. Johnson:

Please find attached additionally reports for Mr. Farber. Crown intends to rely on the content of these reports at trial. I'll send a hard copy of these reports by mail.

Thank you.

So we end up getting a portion of what appears, I believe it's Exhibit number 8, which is -- yes, Exhibit number 8, which is Mr. Rudner's report.

Now, I've got some issues but I'll get into them in a minute. I think keeping that open will help.

You'll notice that there were some individual segments which are repeated in that document before you, Exhibit 8, but I'm going to draw Your Lordship's attention to the final page of that document that I passed up to you, the one involving the death of -- or the one involving holocaust. Now --

THE COURT: The one you handed up to me?

MR. JOHNSON: Yes. It's the last page. I've printed this off in colour. That's the way it came to me on my -- on my email.

Now, what troubled me, actually, was going back over Mr. Rudner's digital audio recording that I received. I made a request for this from the clerk's office and unfortunately there were some glitches. I ended up with a different case, a provincial court matter. So I finally was able to listen to the DARS last night, and that started me looking back through my emails, started me looking back to see how Mr. Rudner fitted into this whole thing. You'll notice that there is a statement -- this is a micro -- I assume that this is a Microsoft Word document because that's how it came up on my computer. I don't think it's a PDF, but there's a comment and it's from Len Rudner, dated the 26th of September 2015 at 12:17, and it's comment number one. It says [as read in]:

Bernie, let me know what books you want to use to support this position and I will add them as footnotes.

My Lord, we heard during the cross-examination of Mr. Rudner that he collaborated somewhat with Mr. Farber in the preparation of his opinion, but, My Lord --

THE COURT: Well, actually, he said that he wrote it.

MR. JOHNSON: He wrote it.

THE COURT: Not collaborated but he prepared it; that's my recollection.

MR. JOHNSON: He prepared it, that's right. And more importantly, he represented to this court as this being his opinion. And I think it's clear, from this smoking gun, that that's not the case. We have the opinion being prepared at a time when Mr. Farber was supposed to be appearing, not Mr. Rudner.

I did end up with a complete set of documents, which turned out to be Mr. Rudner's index. And I found this to be very disturbing to me, to see this type of collaborative effort on the part of Mr. Rudner and Mr. Farber. Somebody's a puppet here and somebody's the puppeteer. And I've got to believe that it's Mr. Rudner who's the puppeteer. He's coming here, expressing an opinion that was supposed to have been provided by Mr. Farber; in fact representing himself as the owner of that material.

The problem that I have, as well, My Lord, is the manner in which he gave his evidence. There was a reference that I put to him to a search warrant application. There was an affidavit, part of an affidavit, of Corporal Normandie -- I'm going to do it again -- Levas. I put the third page of that document to him and asked him whether on the -- on or around the third of May 2012, that -- pardon me, on or around the 12th of July 2007, whether the Canadian Jewish Congress had made a complaint to the B.C. Hate Crimes team, and he acknowledged that that was what happened in his capacity as a regional director, I believe at that time, of the Canadian Jewish Congress. But he went further than that, My Lord. He said that he was the author of the complaint that was made to the RCMP, and that's the same hate crime section that has been actively bringing an investigation and ultimately a charge against Mr. Topham.

So we have an individual here, My Lord, who is part of an investigation and, I submit, part of an inquisition against Mr. Topham. I'm not here to make a political speech but I can't describe the process in any other way. Mildly, Mr. Rudner had a horse in this race. He had every reason to come here, not as an expert witness, as an unbiased person presenting an honest opinion to help this court. He came here in his capacity as a prosecutor. He's done it before. He's doing it on the stand here. His testimony looked innocuous and what have you, but in fact he has done this before. He's done it in front of your brother Mr. Justice Parrett in *R. v. Noble*. And I'm going to pass up that judgment to you, My Lord.

In *R. v. Noble* -- I've given my friend a copy. I'll just wait, My Lord, so that you can have a look at it. This involved a case against Mr. Noble, who was unrepresented. It was a case in around February -- yes, February the 4th, 2008.

Now, I'm going to read you from paragraph 45 and 46 of that decision. This was another situation where a website was involved. They were bringing a case against this individual under 319, and at page 45 --

THE COURT: At forty -- paragraph?

MR. JOHNSON: 45.

THE COURT: 45.

MR. JOHNSON: I'll read it, My Lord [as read in]:

The accused, in a trial in which he had little to say and chose not to participate, retreated from that position on really only two occasions. His obvious discomfort and anger when Len Rudner, the national director of community relations for the Canadian Jewish Congress, led him to begin a cross-examination which highlighted and emphasized, in my view, the danger of calling as a purported expert witness those who are closely aligned with and committed to their own agenda.

And then paragraph 46:

In a brief cross-examination, Mr. Noble substantially damaged Mr. Rudner's credibility and the overall value of his evidence.

My Lord, I see that this is not just the only occasion when Mr. Rudner comes to this court in this fashion. His methodology for examining Mr. Topham's website in 2007 he says was the same as his preparation for coming here as a witness. I think that says it all. And to the extent that this jury has heard evidence from a man who has gone through a testimony with, again, a horse in the race, in an unbiased fashion, I think gives me great, great difficulty, My Lord, especially when he's making comments about things that Mr. Topham wrote on radicalpress. His general ideas on it, Semitism, what have you, they could have been cut and pasted out of a document, but you'll notice that when he was giving evidence on the definition of anti-Semitism, he said that he was mixing up, he was kind of creating a definition of his own; in other words, stipulating to this court in his opinion how anti-Semitism should be defined. He cited some sources but he said he combined a number of them. That to me suggests that his opinion was disingenuous. He was trying to put forward and elevate the definition of anti-Semitism far beyond what it actually means. And, in my view, that goes to the very heart of this case in terms of what my friend has to prove concerning hatred.

The -- you know, notwithstanding what the --

THE COURT: I don't disagree with you on any of that. I just wonder why this is a matter for a mistrial application. Isn't that properly considered as Justice Parrett did in terms of the evidence that's presented, whether there's bias --

MR. JOHNSON: Right.

THE COURT: -- on the part of an expert witness --

MR. JOHNSON: That's my --

THE COURT: -- and it seems to me that's -- that's how it is normally considered. It's not considered as creating a mistrial.

MR. JOHNSON: Well, I think the only aspect -- I agree with you. I think normally what I would be doing is asking you to give a direction to this jury setting out the reasons why Mr. Rudner's evidence should be disregarded.

THE COURT: That's going to be your argument, I think, a lot of that.

MR. JOHNSON: Yes. Yes.

THE COURT: And I don't, in my charge to the jury, I don't take five. I say here is the evidence --

MR. JOHNSON: Here's what I'm saying.

THE COURT: -- here is the arguments and I try to explain those. And in this case, I'm going to do it very simply, because -- in part, because of the, you know, the vast volume of materials. If I start to get into it in any way, it seems to me that it can be problematic, but I'm not intending to do that. What I'm intending to do is put forward the positions quite clearly and what the parties want.

MR. JOHNSON: Yeah. I just found that the use of that opinion, the cross-examining Mr. Atzmon, for example, for drawing attention to portions -- I'm not suggesting that my friend has done anything improper. I'm suggesting that Mr. Rudner has done something improper, and I hope that I didn't leave you with any impression of impropriety on the part of my friend. I think counsel work pretty hard on these cases and some things get past us. It got past me until I was able to look at this document last night and listen to the actual DARS. But --

THE COURT: Well, I think you really highlighted two issues here, and you've dealt with, primarily, the second one, which is a question of bias.

MR. JOHNSON: Right.

THE COURT: And that's what Justice Parrett was dealing with on Noble.

The first one's a little different and I'm not quite clear how I -- what you've said is you're not -- you don't accept Mr. Rudner's evidence that you cross-examined on, that he was the one that prepared and gave this opinion, although, apparently, he's been -- he's done it before.

MR. JOHNSON: I don't believe it was his opinion. I believe that it was Mr. Farber's opinion and he was calling it his own. And I think that that -- that smoking gun that I gave you shows that he was -- at least working in collaboration with Mr. Farber. Now, for me, logically --

THE COURT: Which he -- he said.

MR. JOHNSON: He did.

THE COURT: And the -- and this was something, I gather, that you had back in September.

MR. JOHNSON: Yes.

THE COURT: And it had that comment on it, obviously.

MR. JOHNSON: Yes. That's -- I'm afraid I have to say that I'm not really that versed in Microsoft Word. I usually work off of PDFs and what have you, primarily because a lot of that metadata doesn't get transmitted when you're sending it back and forth between lawyers and clients and what have you. That -- I don't know if that constitutes metadata or not. I don't know. But I found it very strange when I had it pulled up on my computer screen. That's the first time I saw it.

THE COURT: It looks to me like it's a track changes comment that was used, but --

MR. JOHNSON: Yeah.

THE COURT: -- in any event --

MR. JOHNSON: But -- I just find, My Lord, that this case --

THE COURT: I guess my point there is it seems to me that's a matter that, if you wanted to challenge his statement, you had the information and the ability to do so -- his statement that he prepared it.

MR. JOHNSON: Well --

THE COURT: And --

MR. JOHNSON: -- that's something. I think that's the other point on my application for the mistrial. Where is Mr. Rudner; can I get him back here now and cross-examine him on documents that he prepared, because he's either not telling the truth under oath, or Mr. Farber was prepared to not tell the truth under oath? I can't figure out which. And I think it's that serious, in my view. This document that we've had in front of the jury was a canard. It was meant not as an expert opinion; it was meant as a document to prosecute Mr. Topham, and I don't think I'm going to be moved off of that position, My Lord.

Those are my submissions. I understand that trials are dynamic, that --

THE COURT: And what is the test for a mistrial?

MR. JOHNSON: I think it's entirely discretionary, in my view. I think that, based on the -- I mean I haven't got a brief of law for you. I could probably do that for you, but in my view I think the essence of it is that if there is evidence which is going to the heart of the matters in issue in this trial, and they were misrepresented to this jury in terms of his qualifications to express opinions on those matters, that's pretty serious stuff, and I would think that your discretion should be exercised in favour of keeping that, at least keeping that evidence away from the jury, to disregard his evidence in its entirety.

I believe that you also have the duty to provide instructions to juries. Under these circumstances, I think they exist for you to do that. Those are my submissions, My Lord.

THE COURT: Ms. Johnston.

SUBMISSIONS ON MISTRIAL APPLICATION FOR CROWN BY MS. JOHNSTON:

MS. JOHNSTON: My Lord, what we have from Mr. Rudner is evidence from Mr. Rudner that he wrote the report. He did say that he worked in collaboration with Mr. Farber, that the original plan was that Mr. Farber was going to give the expert evidence, and the intention was that Mr. Farber was going to go over his expert report and obviously make sure that he agreed with everything.

As events actually unfolded, Mr. Rudner, who had written reports and said he wrote the report, and I have played the DARS tape to see whether or not he said he wrote every word, actually gave the evidence.

Now, what Your Lordship has, and my best guess is tracking changes too, says is from Mr. Rudner to Mr. Farber, saying what book would you like us to use. That -- the plain wording defence supports what Mr. Rudner says on his evidence, which is, "I was the author." If Mr. Rudner wasn't the author of this document, why is he then asking Mr. Farber what books he would like to use as footnotes.

In terms of the *Noble* decision, that's -- that's a decision of fact. My understanding from the *Noble* case was that it was a judge alone trial, so of course, unlike in this trial, His Lordship -- Mr. Justice Parrett would be the judge of the facts and the judge of the law, and he's entitled to come to whatever conclusions His Lordship thinks are appropriate. I had mentioned the *Noble* decision to my friend, specifically in connection with Mr. Rudner, when I first told him that the Crown was -- was thinking of substituting Mr. Rudner for Mr. Farber. I see absolutely no discrepancy between the track changes and what Mr. Rudner said on the stand.

And in terms of bias of a witness, that is always an open area of cross-examination for any expert, and if the Crown calls an expert with baggage, defence is entitled to go after it, and if they succeed, the trier of fact will discount the expert opinion, and that's every trial.

I don't know if Your Lordship -- those are my submissions to this point. However, if Your Lordship is - this is off the top of my head - if Your Lordship would -- I would prefer the opportunity to give a more full analysis of the test for a mistrial and whether or not this hits that trial prior to an actual verdict by Your Lordship on that decision.

THE COURT: Well, perhaps I can do that over lunch and allow counsel to do the same. I suspect by the end of the lunch I may not hear from you as to exact test that I must apply, but I'll certainly give you an opportunity and I'll give my ruling at two o'clock.

MR. JOHNSON: Do I understand you correctly, My Lord, that you'll be listening to the DARS?

THE COURT: No, I won't be listening to the DARS.

MR. JOHNSON: Okay.

THE COURT: No, no. I'm looking at the test on a mistrial application over lunch. I think I understand the positions but if either of you wishes to make further specific comments on what was said by Mr. Rudner you can do that, and you can also make further submissions on the legal test, if you want to do that.

MR. JOHNSON: I wonder, My Lord, if we can go one step further and have a look at the issue of having an instruction to the jury on this issue?

THE COURT: Well, I think we do that at the end of the trial, along with all the other instructions.

MR. JOHNSON: Yes. Okay.

THE COURT: I'm not going to craft the instruction now, and I don't need to hear from you, for you to craft it, if one needs to be crafted.

MR. JOHNSON: Understood. Thank you, My Lord.

MS. JOHNSTON: Thank you, My Lord. And without prejudging Your Lordship's decision, I think this might be useful anyway. I do have

my draft. I don't know if now would be an appropriate time to hand it up.

THE COURT: Well, I can certainly take them now.

MS. JOHNSTON: Thank you. Now, My Lord, this is a partial draft, as My --

THE COURT: These are your submissions on the charge, essentially?

MS. JOHNSTON: It is. It is my submission but the way Your Lordship worded it, it's been written as a draft -- a draft charge. I hope Your Lordship does not find the form of the submission to be a disrespectful form. I was simply trying to follow the direction that Your Lordship gave, and I can certainly reformat it in its entirety if Your Lordship is concerned.

THE COURT: No, that's fine. However it's been done I'm sure I'll be able to either use it or reject it, as I wish. So two o'clock.

(PROCEEDINGS ADJOURNED FOR NOON RECESS)

(PROCEEDINGS RECONVENED)

THE COURT: Thank you. Are there any further submissions on the application this morning?

MR. JOHNSON: My Lord, I can only pass up a Court of Appeal decision in *R. v. Muller*. I provided my friend with a copy and she's been kind enough to photocopy it.

THE COURT: Well, I can tell you I looked at that before.

MR. JOHNSON: Oh, did you? Okay.

THE COURT: Sure, let's have a look.

MS. JOHNSTON: My Lord, I simply pulled a very short case for the test, the case being, like a stay of proceedings, it's granted in the clearest of cases. I don't think that would be a startling conclusion if that is the case, My Lord. It's from the Ontario Court of Appeal, 2007.

MR. JOHNSON: I'm sorry, My Lord, I don't think I've got the entire case here.

THE COURT: It's just a small portion of it, and it's --

MR. JOHNSON: No, I didn't check that.

THE COURT: No, the relevant parts I think were about paragraphs 59 to 65.

MR. JOHNSON: Right.

THE COURT: And I've had a look at those.

MR. JOHNSON: Maybe I -- I've just given my friend the cite, so maybe I didn't cover which parts. I think I --

THE COURT: In any event --

MR. JOHNSON: -- I was expecting the full case but that's okay.

THE COURT: In any event, I don't think there's any issue between you as to what the test is for a mistrial application, and I'm prepared to give my ruling.

The defence brings this application for a mistrial. The application is based on two matters arising from the evidence of Mr. Rudner, the expert witness for the Crown. The two bases for the mistrial application are as follows.

One, Mr. Rudner indicated to the court that he was the author of the report which was marked as Exhibit 8, but the defence says it should be evident from the circumstances under which he gave evidence as a replacement for Mr. Farber, and from an email sent by Ms. Johnston to Mr. Johnson on February 28, 2015, that Mr. Rudner did not do so. The defence says that Mr. Rudner was really a puppet for Mr. Farber, who was originally going to give opinion evidence on behalf of the Crown.

Second, the defence argues that Mr. Rudner was not impartial. The defence notes that Mr. Rudner was a complainant at the time that a human rights complaint, which was made in 2007 against Mr. Topham. In addition, Mr. Rudner admitted to making or assisting in making a number of human rights complaints and that he had done so in his senior position with the Canadian Jewish Congress.

In these circumstances, the defence says that Mr. Rudner is an investigator and part of the prosecution, and so cannot fairly provide independent opinion evidence to the court.

The test as to whether or not a mistrial should be ordered is not contentious. It is a matter entirely within the discretion of the trial judge. In *R. v. Lawson*, 1991 1 B.C.A.C. 204, Locke J.A. indicated that he had examined all of the cases considering stays of proceedings, abuses of process and mistrials. He indicated that these three remedies are closely associated and all relates to the requirements of fundamental justice as outlined in the Charter. He stated as follows:

There is one common denominator: all these cases say that these powers are to be exercised only in the clearest of cases. It is easy to see why this is so. The remedy contemplates what I will call "a fatal wounding of the trial process", a wounding to the administration of justice which cannot be cured by remedial measures.

Recently, in *R. v. Muller*, 2013 BCCA 528, Stromberg-Stein J.A. agreed with the language in *Lawson* and stated at paragraph 66:

... I conclude a mistrial is a discretionary remedy of last resort that should not be granted unless other, less extreme, corrective measures are incapable of preventing a miscarriage of justice. A mistrial should only be granted "in the clearest of cases", where there is a "fatal wounding of the trial process".

I turn now to my ruling. I am dismissing the defence application for a mistrial.

As set out in the authorities, mistrial applications are granted where there has been a fatal wounding of the trial process. Mistrial applications focus on trial process, not on the substance of the evidence and whether the evidence of a particular witness is credible. Both of the arguments advanced by the defence on this application ask the court to find that the trial process has been wounded because of issues about the truth or credibility of Mr. Rudner. The first basis is an argument that Mr. Rudner was untruthful about whether he prepared the report which was marked as Exhibit 8. The second basis relied upon is an argument that Mr. Rudner was biased and total lacking in credibility. The positions advanced by the defence are not based on problems with the trial process, rather the defence argues that Mr. Rudner's evidence should not be accepted because it is untruthful or biased. Both of these matters are questions of facts. They are entirely within the jurisdiction of the jury, which is the finder of fact in this trial. By asking for a mistrial on the basis that Mr. Rudner's evidence is not credible, the defence is asking me to prejudge questions of fact which must be answered by the jury.

I really need say little more about my reasons for dismissing the mistrial application. As I have already indicated, I cannot conclude that there has been a wounding of the trial process by reason of the matters raised by the defence, let alone that there has been a fatal wounding of that process. There is no basis upon which I could exercise the discretion to declare a mistrial.

However, I will comment briefly on some additional difficulties with the application. With regard to the question whether Mr. Rudner prepared the report and held the opinions expressed in it, the defence relies on what he calls a "smoking gun" which is an email from Mr. Rudner to Mr. Farber, which was passed on by Ms. Johnston to Mr. Johnson, about books he used to support the definition of the Holocaust. The defence was in possession of this email long before Mr. Rudner gave evidence. The defence was also fully apprised of the change of expert witness from Mr. Farber to Mr. Rudner. Mr. Rudner was cross-examined on the question as to his and Mr. Farber's involvement in the preparation of the report. If the defence had wished to challenge Mr. Rudner's assertion that he was the primary author of Exhibit 8, he could have used the email to do so. It is simply too late now to raise that as a question of process or basis for a mistrial.

With regard to the argument that Mr. Rudner's bias results in a fatal wounding of the trial process, it is noteworthy that the defence did not object to the introduction of Mr. Rudner's report. The defence has made it very clear throughout these proceedings that it challenges Mr. Rudner's opinions on the basis of his bias. This includes the proposition that it is improper for him to act as investigator, complainant and expert witness. These issues underlay a substantial part of the cross-examination of Mr. Rudner. Undoubtedly, at the end of the trial, counsel will forcefully advance this argument to the jury. However, to argue that a mistrial should be declared because of bias in Mr. Rudner's report at this stage of the proceedings, when the admission of the report in evidence was not objected to, has little merit.

So the mistrial application is dismissed.

Now, that leads us to what we were discussing yesterday and what happens next.

MR. JOHNSON: My Lord, before doing so, I had a question about Exhibit number 10, I believe it is. I wish to -- I think you mentioned something in passing, you were wondering what the relevancy of the document, which was the response to the Canadian Human Rights Commission by Radical Press. This was a document that, by consent of both counsel, was to be put in as evidence. I wish to -- I wish to refer to it in my closing. Obviously, there's nobody to have introduced the document.

THE COURT: What I thought yesterday was that -- you said there's another document which is very, very similar, almost identical.

MR. JOHNSON: It ties in. It ties in. *The Hundred Monkeys* article, that's actually in Binder number 3?

MS. JOHNSTON: Four.

MR. JOHNSON: Four, binder number 4, but I think the two need to be read together, and that's why I wanted it marked, because I think they play off. One is -- it sets out, by Mr. Topham, his response to the Human Rights Commission complaint, setting out who he is and what his purpose was in terms of writing about the matter that was subject to complaint by the Canadian Jewish Congress. So I think that that's certainly a question of the probative value. It goes to the weight, I would expect, but I would ask that it be something that I could refer to the jury on.

We've got an awful lot of information here.

THE COURT: There's a huge amount.

MR. JOHNSON: Yeah. And I don't know what Your Lordship's view on that's going to be. If I can start cherry picking facts out of this document -- you know, the exhibit as well, in support of my closing. All I can tell you is that I plan on limiting that very much. I think there's basically two articles that are contained in the -- well, one article for sure that's contained in the documentation, but I think what troubles me about this is that my friend earlier on, when asked about that from the bench, had indicated that because Mr. Wilson had prepared, if I heard it correctly, had prepared a summary of a book or an article, that the whole book or the article should be looked at by the jury, and I think that's going to be a pretty big mountain of information. It took me a long time just to go through Binder 1.

THE COURT: It is a mountain of information.

MR. JOHNSON: Yeah.

THE COURT: And I, of course, questioned you both about that at the start, but that's where we're at. And you can clearly refer to anything you want in it --

MR. JOHNSON: Yeah.

THE COURT: -- during the course of closing submissions.

MR. JOHNSON: That was the purpose in having this marked as an exhibit, so that I could refer to it as well.

THE COURT: Well, as I said, I have a real problem with that exhibit just because of it not being part of the statements which were communicated, and it related to a separate complaint that pre-dated the other one, and pre-dated the criminal complaint by four or five years, and we don't know what the substance of that human rights complaint was, and I just don't see how I can tell the jury what use they can make of it other than to say, in my view it's irrelevant, or I'll tell them it's irrelevant and they should not regard it. And -- but I can also say that it's very similar to or -- the one that's at pages whatever.

MR. JOHNSON: Right.

THE COURT: And you should look at that one. And I think that's the way that it should be done.

MR. JOHNSON: I think, on that note, the case for the defence is closed, and I'd like to get busy on my closing, if we're doing that tomorrow morning.

THE COURT: All right. So Mr. Topham is not going to be called as a witness?

MR. JOHNSON: No.

THE COURT: And that's what I will do with the Exhibit 10, but I need to know where to find the other one, *The Hundred Monkeys*.

MS. JOHNSTON: It's *Killing the Hundredth Monkey*, and it's at Tab -- it's at Binder 4, Tab 2L, if I'm correct, and I believe I am.

MR. JOHNSON: And that's not to be construed as hatred against an animal, My Lord.

THE COURT: Sorry, what's the page number?

MS. JOHNSTON: I don't know the page number but I can find it for Your Lordship.

MR. JOHNSON: This is Exhibit 10. Can that be distributed to the jury then?

THE COURT: I think, as it was admitted by consent, we have to do that.

MR. JOHNSON: Yes, thank you.

THE COURT: So is there anything else we need to discuss before we bring jury back. I guess we need to discuss timing.

MR. JOHNSON: Yes.

THE COURT: What time do you want to start tomorrow?

MR. JOHNSON: I'm going to suggest we start at two o'clock. I've got probably about an hour, a little bit more for the closing. I don't know about my friend -- might be a bit more than that. But --

THE COURT: Could we start at one o'clock, if --

MR. JOHNSON: I know that you wanted to --

THE COURT: Well, I'd like to be done by 3:30, so I could catch the flight, but -- so I really think we should probably do an hour in the morning.

MR. JOHNSON: Okay.

THE COURT: Start at 11:00 or 11:30.

MR. JOHNSON: I think 11:30 I would prefer, My Lord.

THE COURT: All right. And do you think, and I'm looking at both of you now, do you think that your addresses can be completed in that period of time?

MR. JOHNSON: I think so.

MS. JOHNSTON: Yes. Yes, I do, My Lord.

THE COURT: All right. And the other thing I need from you; I'll need it from both of you, and I'd like it in electronic form, is a one-page outline, or one and a half page outline, of your position, because as part of my closing, of course, I tell the jury what your positions are, and I prefer to get the substance of that from you. I'm not saying I'm going to give it to them exactly in the same form that you give it to me. I'll try to make it into my language, but I would like to receive that from you by the end of the day tomorrow, or electronically --

MR. JOHNSON: Over the weekend.

THE COURT: -- over the weekend.

MR. JOHNSON: Yeah. I'll get the -- maybe an email address for the registry or something to that extent, but, My Lord, I was also wondering when we would have a meeting to discuss your charge, after we receive it. Would that be sometime Monday?

THE COURT: Well, it looks like that's going to be the only chance to do that.

MR. JOHNSON: Okay.

THE COURT: So -- and, again, I guess we should probably consider that right now. Well, we can talk about it before we start tomorrow, I guess.

MR. JOHNSON: I realize the difficulty in Your Lordship's corner on preparing this document without having a lot of CRIMJI material to go back on. I think that's a pretty big -- tall order to draft a charge.

THE COURT: Well, let me ask one question of both of you, which I would like to have the answer to. You may not be able to give it today, and that is -- and it's something we discussed before, which defences does the defence say should be put to the jury, and what is the Crown's position on that. So I'd like to hear that, I guess before we start tomorrow.

MR. JOHNSON: I'll try my best.

THE COURT: All right.

All right, we'll bring the jury in and tell them that we are going to start at 11:30 tomorrow morning. I guess first of all we'll have to say that the defence case is closed.

MR. JOHNSON: Yes.

(JURY IN)

THE COURT: Mr. Johnson.

MR. JOHNSON: My Lord, that is the case for the defence.

THE COURT: All right. That being the case, the next in the proceedings is for counsel to address you with their positions on what you should do in this case. Now, we're not going to do that today. We're going to start that tomorrow morning, and we're going to start a little late. So I'd like you to -- we're going to start court at 11:30 tomorrow morning. So you are now excused to that point. Tomorrow we will get addresses of counsel, and then on Monday, I will be giving you my charge. My charge is an instruction on the law, and you'll get that on Monday. So that's the schedule, and what will happen after my charge is completed, is you'll then be sequestered, as I told you, until you arrive at a verdict. So that gives you an idea of the rest of this process. And you're now excused until 11:30 tomorrow morning.

(JURY OUT)

MR. JOHNSON: My Lord, I was just wondering about Exhibit 10, if that was to be --

THE COURT: Oh, I apologize for that.

MR. JOHNSON: I don't know if they need to be present. I'm content if they are given a copy.

MS. JOHNSTON: I'm sorry, My Lord. Exhibit 10 is not the same as 2L. So --

THE COURT: Well, we're giving it to them because the Crown admitted that or consented to it going in as an exhibit. At the end of the day I'm going to say to them it's irrelevant to the issues they have to consider in this case, but they'll have it in their binders.

MR. JOHNSON: Thank you, My Lord.

THE COURT: We will adjourn until 11:30 tomorrow morning.

(PROCEEDINGS ADJOURNED TO NOVEMBER 6, 2015, AT 11:30 A.M., FOR CLOSING SUBMISSIONS)

Transcriber: J. Graham